



**THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
<u>13 APRIL 2026</u>	
DATE	SIGNATURE

Appeal no: A77/2024

MRCD-657/2022

In the matter between:

SILINDILE PRISCILLA SIBIYA

APPELLANT

And

BONGANI MAFFOT MAVIMBELA

RESPONDENT

REASONS FOR THE JUDGMENT

CORAM: Ratshibvumo DJP and Ngwenya AJ

Ngwenya AJ

- [1] These are our reasons for having struck off on the 6th of June 2025, the Appellant's application to be released wholly from paying security for costs in an appeal against the Magistrates' Court decision dated 01 August 2024, dismissing the Appellant's claim for divorce.
- [2] The Appellant's notice of motion consisted of Part A and Part B. Part A is the application to be released from paying security. We shall refer to this application as the 'security application'. Part B is an application for condonation for the late noting of the appeal. The Appellant did not move the latter application. Therefore, our reasons are confined to the security application.
- [3] The notice of motion in Part A reads as follows:

"PART A

Security for costs

1. *That the Appellant be released wholly from paying security for costs for the appeal.*
2. *That the Respondent be ordered to pay the costs of this application in the event of opposition."*

- [4] In paragraph 10 of her founding affidavit, the Appellant relies on Rule 51(4) of the Magistrates' Court Rules for the relief she seeks in the notice of motion. Paragraph 10 reads as follows:

"10. I request the Honourable Court to absolve me from paying security for costs in terms of rule 51(4) of the Magistrate's Court Rules for the following reasons..."

- [5] The Respondent did not oppose the application nor the appeal but delivered a notice to abide dated the 24th of January 2025 via email on the same day.

[6] Having prepared and read the contents of the file, we held a *prima facie* view that we lacked jurisdiction to hear the security application. Accordingly, at the hearing, Counsel for the Applicant was invited to address us on the question of jurisdiction.

[7] Counsel submitted that we had the necessary jurisdiction to adjudicate the matter and referred us to Rule 51(4). However, he referred us to the provisions of the old Rule 51(4), which provided as follows:

"(4) An appeal shall be noted by the delivery of notice, and, unless the Court of appeal shall otherwise order, by giving security for the Respondent's costs of appeal to the amount of R1 000.00: provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established Legal aid board."

[8] We need to mention that Counsel had not prepared heads of argument in relation to the security and condonation applications. He had prepared heads only for the appeal.

[9] He seemed taken aback when confronted with the question of jurisdiction. Nevertheless, he tried his best to persuade us that we had jurisdiction.

[10] In his quest to persuade us, it became apparent that he was unaware that Rule 51(4) had been amended by Government Gazette R4476 of 08 March 2024, with effect from 12 April 2024. The amended 51(4) reads as follows:

"(4)(a) Unless the respondent waives his or her right to security or the court subsequently on application to it has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar or clerk of the court, enter good and sufficient security for the respondent's costs of appeal.

(b) In the event of failure by the parties to agree on the amount of security, the registrar or clerk of the court shall fix the amount and the appellant shall enter security in the amount so fixed or such percentage thereof as the court has determined, as the case may be: Provided that no security shall be required from the State or, unless the court of

appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board.

[11] Once the amended Rule was read to him and told that 'Court' in the subrule is in reference to the Magistrates' Court or the Magistrate whose order was being appealed, he insisted that 'Court' means the Court of Appeal. It was then put to him by my brother Ratshibvumo DJP that the legislature would have clearly stated that 'Court' meant the Court of Appeal, as it had done in the previous Rule. In that regard, my brother referred Counsel to Rule 51(9), which governs the prosecution of an appeal arising from the Magistrates' Court. In subrule 9, the Legislature clearly states that the prosecution of the appeal shall be dealt with in terms of the Rules of the 'Court of Appeal'. Rule 51(9) reads as follows:

"(9) A party noting an appeal or a cross-appeal shall prosecute the same within such time as may be prescribed by rule of the court of appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary."

[12] Whereas 'Court' is not defined in the Magistrates' Court Rules, the empowering statute, being the Magistrates' Court Act, no 32 of 1944, defines '**Court**' as "a magistrate's court for any district or for any regional division." (See section 1).

[13] In *Kader v Chix* 1958 (4) SA 207 (N), at page 208, the Court, dealing with a similar application, observed that such applications were rare and that there was uncertainty and thus decided to lay down general principles for future guidance. We quote exactly what the Court said:

"Applications such as this one are rare, and the practice in the division has been uncertain; we think it is desirable to lay down the following general rules for future guidance. The Judge President has indicated his general agreement with them."

[14] At the time the above matter was decided, Rule 47(4) of the Magistrates' Court Rules was applicable to the question of security for costs for appeal, and it provided that 'an appeal shall be noted by the delivery of notice and, unless the court of appeal

shall otherwise direct, by giving security for the Respondent's costs of appeal in the amount of forty pounds'. Rule 47(4) is substantially similar to Rule 51(4) before its amendment on the 12th of April 2024, except that it referred to an amount of forty pounds instead of R1000.00.

[15] For certainty, we also deem it necessary to provide written reasons and to formulate some guidance for future matters, especially given that the amended Rule 51(4) differs entirely from Rule 47(4) and Rule 51(4) in their unamended forms.

[16] In the *Kader*, the Court held that the full bench has jurisdiction (meaning the Court of Appeal) to hear security applications.

[17] The amended Rule 51(4) has brought about material changes, and these can be summarised as follows:

- 17.1 Firstly, the right of the Respondent to waive the need for security payment is re-established.
- 17.2 Secondly, it has done away with a predetermined amount of security and affords parties an opportunity to agree on an amount which is considered good and sufficient;
- 17.3 Thirdly, it has given the Clerk of the District Magistrates' Court and Registrar of the Regional Magistrates' Court (the court *a quo*), the power to determine security in the event that the parties do not agree on the amount; and
- 17.4 Lastly, it has given the District Magistrate's Court and the Regional Magistrates' Court (the court *a quo*), the power to hear security applications to release an appellant wholly or in part from paying security.

[18] In light of the clear provisions of the amended Rule 51(4), Counsel's submission that the meaning of 'Court' is in reference to the Court of Appeal cannot be sustained.

The Commentary by *Jones & Buckle* on what is contemplated in the amended Rule 51(4), states the following:

"Sub-rule 4(a): the court, subsequently on application to it has released the appellant wholly or in part. In terms of this sub-rule, it is the Magistrates' Court where the appeal has been noted that can release the appellant, either wholly or in part, from putting up security. The court has a discretion to dispense with the giving of security for costs of appeal and will usually do so where the appellant appears in forma pauperis. It is submitted that the word application in this sub-rule means apply on motion as defined in rule 2(1)."

[19] We trust the following general guidelines will be helpful in relation to appeals emanating from the Magistrates' Court regarding the question of security for costs:

- 19.1 Firstly, parties ought to engage on the possible waiver of the payment of security for costs by the Respondent.
- 19.2 Secondly, parties ought to engage on the amount of security and seek to reach a consensus.
- 19.3 Should the engagement referred to above yield no results, they ought to approach the Clerk or Registrar of the Magistrates' Court which delivered the judgment or ruling sought to be appealed, to determine the appropriate amount of security.
- 19.4 Lastly, and importantly, should a party wish to be released to pay security, wholly or in part, or when one of them is dissatisfied with the amount determined by the Clerk of the Court or the Registrar, as the case may be, they must approach the Magistrate whose order is being appealed, to make a determination on being partially or fully released, or the appropriate amount of security for costs.

[20] Accordingly, the application was struck from the roll for lack of jurisdiction and no order as to costs was made.

[21]

DATED AT MBOMBELA ON 10 APRIL 2026


TS Ngwenya
Acting Judge of the High Court
Mbombela (Main Seat)

I agree.


TV Ratshibvumo DJP
Deputy Judge President of the High Court
Mbombela (Main Seat)

Appearances

For the Appellant:

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For Respondent:

No appearance

Date of hearing: 06 June 2025

Date of Judgment: 06 June 2025

Reasons for the Judgment given on: 13 April 2026