

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022-023339

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

20 Aug 2026

DATE

SIGNATURE

In the matter between:

BUZME KHALID SHAH CHISTY SABRI INT. NPC

Applicant

and

**BAZME KHALID SHAH CHISTY SABREE
INTERNATIONAL NPO**

First Respondent

CASSIM, AHMED

Second Respondent

RANDAREE, MOHAMED SALIM ISMAIL

Third Respondent

KHAN, YAKOOB

Fourth Respondent

KHAN-ANWARY, KANEEZ FATIMA

Fifth Respondent

REGISTRAR OF DEEDS, JOHANNESBURG N.O.

Sixth Respondent

REGISTRAR OF DEEDS, PRETORIA N.O.

Seventh Respondent

In re:

**BAZME KHALID SHAH CHISTY SABREE
INTERNATIONAL NPO**

First Applicant

CASSIM, AHMED

Second Applicant

RANDAREE, MOHAMED SALIM ISMAIL	Third Applicant
KHAN, YAKOOB	Fourth Applicant
and	
BUZME KHALID SHAH CHISTY SABRI INT. NPC	First Respondent
OMAR, NASHIR	Second Respondent
KHAN-ANWARY, KANEEZ FATIMA	Third Respondent
REGISTRAR OF DEEDS, JOHANNESBURG N.O.	Fourth Respondent
REGISTRAR OF DEEDS, PRETORIA N.O.	Fifth Respondent

JUDGMENT

CARELSE, AJ

Introduction

- [1] The applicant, Buzme Khalid Shah Chisty Sabri Int. NPC, seeks an order in terms of rule 47(3) of the Uniform Rules of Court¹ directing the first to fourth respondents to furnish security for its costs in the application pending under this case number in which the first to fourth respondents are the applicants, and staying that application until the security is given (the security application).
- [2] Two subsidiary applications were enrolled with the security application:
- a. one by the first respondent, Bazme Khalid Shah Chisty Sabree International NPO, in terms of rule 6(5)(e) for leave to deliver two further affidavits (the further affidavit applications), and
 - b. one by the applicant in terms of rule 6(15) to strike out the first to the fourth respondents' answering affidavit in the security application, alternatively identified portions thereof (the strike-out application).

¹ GN R48 in GG 999 of 12 January 1965. All rules referred to in this judgment refer to the Uniform Rules of Court.

- [3] At the hearing, I directed the parties to argue the security application and neither side pressed the other two. Because their outcome determines the record on which the security application falls to be decided, and because the joint practice note asks that all three be determined, I will briefly deal with them first.
- [4] The applicant is a non-profit company registered in 2012, which I shall refer to as the NPC. The first respondent is a non-profit organisation registered in 2018, which I shall call the NPO. The second to fourth respondents are office-bearers of the NPO, each also cited as a trustee of it. No relief is sought against the fifth to seventh respondents and they took no part in these proceedings. The roles are reversed in the application in which security for costs is sought, which I shall call the main application. I refer to the parties as they are cited in the security application, and to the first to fourth respondents collectively as the respondents.

Background

- [5] The brief background that follows is common cause or not seriously disputed, save where otherwise indicated. The similarity between the applicant and the first respondent's names is not coincidental. Each party claims to be the true successor to a voluntary association which regulated itself by a constitution adopted on 20 May 1984, shortly after the death of the revered spiritual leader (the association). Both sides of this dispute claim to be followers of the said spiritual leader. Whether the association came into being then, or in 1976 at the leader's own instance, is disputed. I express no view on it.
- [6] Two immovable properties lie at the centre of the dispute between the parties. On one hand stands the leader's tomb, at which commemoration services and mass prayers are held (the Mazaar property). Whereas on the other, a mosque (the Masjid property). From those premises, meals, blankets and clothing are distributed to the surrounding communities. Both sides treat the properties as devoted to religious and charitable purposes, and each party claims to be the body entitled to possess, control and administer them.

- [7] The NPC was registered in 2012 by members who say that the association had by then become defunct and that the NPC carried its work forward. The NPO was registered in 2018 and a trust bearing a similar name in 2019. The respondents say that the NPO simply is the association in converted form. The NPC, on the other hand, claims that both are recent vehicles by which the second to fourth respondents seek to appropriate the association's name, standing and properties.
- [8] In 2018, a dispute about possession of the Mazaar property was referred to arbitration. On 21 April 2018, the NPC represented by Nashir Omar, the association represented by the second respondent and the arbitrator signed a document styled "ARBITRATION AWARD BY CONSENT OF THE PARTIES". It records that the NPC is the 'controlling/administrative association' of both the Mazaar and the Masjid properties 'to the exclusion of any other body or association' and that the NPC will manage the said properties. It further *inter alia* identified the directors of the NPC, its interim chairman, set a date by which the NPC had to hold an AGM and provided that the said award 'is final and binding on the parties and it is not appealable'. The respondents say the document misrepresented what had been agreed orally, that the second respondent signed one of five copies before appreciating this, and that the arbitration remains unresolved. It is common cause that no application has been brought to set aside the arbitration award under s 33 of the Arbitration Act².
- [9] On 18 April 2019, this court granted the NPC an urgent interdict restraining the NPO and the second respondent from interfering with the NPC's operations at the properties. On 8 February 2022, a further order was granted by Twala J against the first to fourth respondents, who were all represented by attorneys and counsel. It records on its face that it was made '[b]y agreement between the parties'. This order continued the interdicts and awarded the NPC its costs. Those costs were taxed on 7 June 2022 at R 127 429,45 and warrants of execution were issued against all four respondents. On 3 August 2022, the Sheriff executed the warrants against the NPO and the second respondent. The

² 42 of 1965.

returns record against the NPO: “NO ATTACHABLE ASSETS” and against the second respondent, a return of *nulla bona*.

- [10] The respondents launched the main application in September 2022, after the execution of the warrants. Its founding affidavit states that the primary purpose of the application is to set aside the conversions in terms of s 3(1)(v) of the Deeds Registries Act³ by which ownership of the properties came to be registered in the name of the NPC and to convert ownership thereover to the NPO (the conversions). Following such relief, the respondents intend to ask that all previous orders by this court attached to the Notice of Motion be set aside or varied to release the respondents and, in particular, members of the NPO from any prior interlocutory relief which was sought based on fraud.
- [11] The respondents contend that the conversions were procured by fraud, *inter alia* relying on a letter of the Acting Registrar of Deeds recording that a complaint should be lodged with both Registrars of Deeds ‘to formally investigate the internal process and escalate to SIU’ and that ‘[t]he affected conveyancer must be referred to LPC’. The NPC denies any fraud. That dispute belongs to the court that hears the main application and nothing in this judgment concerns its merits.
- [12] The applicant opposed the main application, which then lay dormant for years. Neither side is blameless for that delay. During April and May 2024 the Sheriff executed the warrants against the third and fourth respondents. The return against the third respondent was one of *nulla bona*, and the attachment against the fourth respondent was met by an affidavit from a third party claiming ownership of the attached goods. In the end, nothing has been recovered to settle the applicant’s taxed bill of costs.
- [13] On 11 May 2025, the NPC delivered a notice under rule 47(1) demanding security of R 350 000 by bank guarantee within ten days. The notice alleged that the respondents had failed to satisfy two previous costs orders, lacked locus standi in respect of the properties, and had prosecuted an application that is vexatious and without prospects of success. No security was furnished, and

³ 47 of 1937.

when the rule 47(3) application was instituted, no response to the demand had been received.

The application to file further affidavits

- [14] The first respondent seeks, under two different notices of motion, to introduce two further affidavits to these proceedings. The first affidavit is styled the “RESPONDENTS FURTHER AFFIDAVIT” and was deposed to by the respondents’ attorney on 20 August 2025, and it answers the applicant’s replying affidavit. The second affidavit, styled “SUPPLEMENTARY AFFIDAVIT (RULE 47)”, was deposed to by the second respondent on 24 March 2026 and *inter alia* discloses that R 180 000 has been placed in the trust account of the respondents’ attorneys to demonstrate that the NPO is not insolvent, and that the NPC has instituted insolvency proceedings against the NPO in another Division which were removed from the roll.
- [15] A party tendering an affidavit both late and out of its ordinary sequence seeks not a right but an indulgence and must satisfy the court that it should nevertheless be received. However, the rule as to the number and sequence of affidavits is not inflexible, and a court retains a discretion to be exercised where the interests of justice require it.⁴ They require it here. The replying affidavit did not confine itself to answering the respondents’ case. It annexed affidavits by Mr Moola, said to be the last known president of the association, and by Mr Mia, said to reside at the address given in the constitution as the association’s head office, both deployed to disprove the continuity on which the respondents’ standing depends. The replying affidavit also went further and prays for an order that Mr Singh, the respondents’ attorney, pay costs *de bonis propriis* in his personal capacity, relief which was not claimed in the notice of motion. A litigant who introduces fresh evidence in reply and who asks for the first time in reply that his opponent’s attorney be mulcted in costs personally, cannot complain when an answer to that material is tendered out of sequence.

⁴ *James Brown & Hamer (Pty) Ltd (previously named Gilbert Hamer & Co Ltd) v Simmons NO 1963 (4) SA 656 (A)* at 660E-F.

[16] The affidavit deposed to by the attorney, however, goes well beyond such an answer. It runs to some thirty pages and traverses the replying affidavit from its opening paragraph onwards, much of it directed at matters that were themselves no more than the applicant's answer to the answering affidavit. It is, however, a matter of the weight that should be attached to such matter rather than the reception thereof. I have had regard to the affidavit insofar as it answers the evidence of Mr Moola and Mr Mia and the claim for costs *de bonis propriis*, and to the balance, I attach no weight.

[17] The second affidavit stands on a different footing. The events it records occurred after the applicant's replying affidavit was delivered and could not have been placed before the court earlier and they bear directly on the central question of the respondents' means. The applicant, who did not oppose the further affidavit applications and who enrolled them itself, did not point to any prejudice it would suffer should the affidavits be admitted, which cannot be cured by time and/or costs. In my view, a court that is asked to find that a litigant cannot meet a costs order should generally not decline to look at that litigant's evidence that it can. Leave is therefore granted to admit both affidavits as part of the record of this application.

The application to strike out

[18] The answering affidavit was not deposed to by any of the respondents but by their attorney of record and confirmed by the second to fourth respondents only in so far as it relates to each of them. The applicant asks that the answering affidavit be struck out in its entirety for want of authority and personal knowledge, alternatively that certain categories of material be struck out, being averments about a rule 30 notice, a letter marked without prejudice said to contain an admission of fraud, material about the applicant's attorneys in their personal capacities, references to another practitioner's application for admission, and averments about a concluded urgent application and about two judges of this Division. The respondents opposed the application and delivered an answering affidavit. No replying affidavit was filed.

[19] Two requirements must be satisfied for a court to strike out material from affidavits. One, the matter must be scandalous, vexatious or irrelevant, and two, the court must be satisfied that the party seeking the relief will be prejudiced if it is not struck out. Even where the material is objectionable, the relief will be refused if prejudice is not established, and where the application is heard by a judge who is able to disabuse his or her mind of such matter, prejudice will ordinarily be absent.⁵ Much of the impugned material is irrelevant, and some of it is intemperate and should not have been placed on a court file. But no prejudice has been demonstrated by the applicant. I have read the material and put it out of account and none of my conclusions in this judgment depends on it.

[20] The prayer that the entire affidavit be struck out must in any event fail. A bare assertion of personal knowledge is of little value without some indication of how the knowledge was acquired.⁶ Authority to conduct litigation is a different question from competence to give evidence and a resolution authorising a deponent confers no knowledge that he does not have.⁷ But that goes to weight, not to the reception of the affidavit as a whole. To strike it out entirely would leave the security application unopposed, which is out of all proportion to the complaint, the more so because the applicant's own case rests to some degree on admissions in that affidavit. The strike-out application is therefore dismissed.

Preliminary objections to the security application

[21] The first objection is that the deponent to the founding affidavit was not authorised. The founding papers annex a resolution of the applicant's directors, signed by its secretary, Mohamed Saleem Mohamed, authorising Mr Nashir Omar and its attorneys to institute proceedings in defence of legal proceedings brought against the company in this Division. The respondents say that three names appear as directors at the foot of the letterhead and that none of them signed, and that the resolution says nothing of security for costs. But those three are on the face of the resolution the applicant's chairman, secretary and

⁵ *Beinash v Wixley* 1997 (3) SA 721 (SCA) at 733A-B and 733I/J-734B.

⁶ *President of the Republic of South Africa v M & G Media Ltd* 2011 (2) SA 1 (SCA) at para 38.

⁷ *Sibani Group (Pty) Ltd v Doves Group (Pty) Ltd* [2022] ZAGPJHC 770.

treasurer, and the secretary did in fact sign the resolution. In any event, it is the institution and prosecution of proceedings that must be authorised, not the deposing of an affidavit. In addition, where proceedings are instituted by a firm of attorneys purporting to act for a party, that must be accepted, the more so where the other party has not availed itself of rule 7.⁸ No rule 7 notice was delivered in this matter and the resolution does authorise the defence of the application brought against the applicant, which is what this is. The objection therefore fails.

[22] The second objection is that the applicant cannot demand security because it is itself in default in the main application, having entered opposition thereto some 853 days late without seeking condonation. The factual premise for this objection is, however, not established. The record contains contemporaneous correspondence asserting that a notice of intention to oppose was served on the respondents' erstwhile attorneys on 27 September 2022. I need not decide whether service in fact occurred then. It is enough that the premise on which the objection rests has not been made out. The objection therefore fails.

[23] The third objection is that the security application was premature. The respondents complain that the NPC sent a notice in terms of rule 47(1) on 11 May 2025, which afforded the NPO 10 (ten) days to respond, but the NPC set the matter down on the unopposed roll-on 13 May 2025, in contravention of their own notice in terms of rule 47(1) and rule 6. It appears that two days after delivering the notice, the applicant also obtained a date on the unopposed roll. The obtaining of an unopposed hearing date before the period afforded by the notice had expired was premature and unnecessary, and I record my disapproval of the practice. Rule 47(3) is engaged where the party from whom security is demanded contests liability or fails to furnish it, and the respondents' papers contest liability in detail. Whether an application instituted before the period has expired is competent because liability is contested afterwards is a question on which I heard no argument and was referred to no authority. In view of the conclusion I reach on the merits, it is unnecessary to decide it, and I

⁸ *Ganes v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) at para 19.

assume in the applicant's favour, without deciding, that the application was properly before me.

The applicable principles relating to Rule 47

- [24] Rule 47 deals only with procedure. It does not create the grounds on which security may be demanded, and recourse must be had to the common law.⁹ The respondents are all *incolae*. At common law an *incola* cannot, as a general rule, be required to give security. Since the repeal of s 13 of the Companies Act¹⁰ there is no basis for distinguishing between an *incola* company and an *incola* natural person, but because this court has a residual discretion arising from its inherent power to regulate its own process, an *incola* may be compelled to furnish security. The onus is on the party seeking it. Inability to satisfy a costs order is not enough. Something more is required, and the court must be satisfied that the main proceeding is vexatious or reckless or otherwise an abuse of process. The power is exercised sparingly and in exceptional circumstances.¹¹
- [25] Proceedings are vexatious and an abuse if they are obviously unsustainable, and where their setting aside is sought that must appear as a certainty. A security application is less drastic, since it does not end the litigation but permits it to continue with a safeguard, and the ordinary yardstick of a preponderance of probability applies. A detailed investigation of the merits is not envisaged, and a court should not attempt to resolve the dispute, as that would frustrate the very purpose for which security is sought.¹²
- [26] Where the threshold is crossed, a discretion remains. On the one side of the scale is the potential injustice to a claimant prevented from pursuing a legitimate claim, which incorporates the importance of the right of access to courts protected by s 34 of the Constitution. On the other side is the potential injustice to a defendant who succeeds but cannot recover its costs. Relevant

⁹ *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at [5].

¹⁰ 61 of 1973.

¹¹ *Boost Sports supra* at paras [14] to [16].

¹² *Id* at paras [17] to [19], adopting *Golden International Navigation SA v Zeba Maritime Co Ltd* 2008 (3) SA 10 (C) at para 26 and quoting *Zietsman v Electronic Media Network Ltd* 2008 (4) SA 1 (SCA) at para 21.

considerations in exercising that discretion include the likelihood that an order will terminate the claimant's proceedings, the attempts it has made to obtain assistance from those who stand behind it, whether its financial difficulties were caused by the party seeking security, and the nature of its action. The party seeking security must show a probability that its opponent cannot pay and the party resisting must establish that an order might well leave it unable to pursue the litigation and should indicate the nature and importance of that litigation so as to rebut the suggestion that it is vexatious or without prospects.¹³

Inability to satisfy a costs order

[27] The evidence on the first enquiry, whether the respondents can satisfy an adverse costs order, strongly favours the applicant. A taxed costs order of this court has stood unsatisfied for years. Writs of execution were issued against all four respondents and produced nothing. The return against the NPO records that there were no attachable assets; those against the second and third respondents are returns of *nulla bona*, and the attachment against the fourth respondent was met by a third party's claim to the goods. Returns of that kind cast doubt on a litigant's ability to meet an adverse costs order, and the doubt is reinforced where the litigant does not say that it will be able to meet one and makes no disclosure of its financial affairs.¹⁴ The answering affidavit observes only that a *nulla bona* return does not prove that the NPO is defunct, which is true but beside the point. The respondents' position appears from their own admission in the answering affidavit, that:

"The NPO admits that, should an order for security costs be granted against it, it would financially cripple and/or make the NPO insolvent and would effectively stop its main application. This is not in the interests of justice because the NPO's case has merits and should be heard. Further, it would effectively halt the humanitarian work of the NPO."

[28] The financial disclosure by the respondents is thin. The only record placed before me is a transaction history of the respondents' attorneys' trust account,

¹³ *Giddey NO v J C Barnard and Partners* 2007 (5) SA 525 (CC) at paras 8 and 30.

¹⁴ *Zietsman supra* at para 14.

showing three deposits over three days in February 2026 totalling R 180 000. There is no statement of the NPO's own accounts, no record of its income or of the donations on which it says it depends, and no schedule of its assets and liabilities, although the notice squarely challenged its means. The evidence is not identical in respect of each respondent, and the NPO's admission cannot simply be attributed to the three individuals. However, taking the execution history together with the absence of any disclosure of means, I am satisfied that there is a substantial risk that the applicant will not recover its costs if the main application fails.

- [29] That conclusion does not, however, finally determine the security application. The impecuniosity of an *incola* is not by itself a ground on which security may be ordered.

Whether the main application is vexatious or an abuse

- [30] The second enquiry, whether the main application is vexatious or an abuse, must be approached with restraint. The merits belong to the court that hears the main application. The respondents' core grievance, that the community was deprived of its properties by fraudulent conveyancing, is serious and, if established, can ground substantive relief. The letter of the Acting Registrar of Deeds makes no finding of fraud, but it lends some objective support to the existence of a dispute about the registration process and cautions against treating the underlying grievance as obviously unsustainable.
- [31] I must, however, first identify what the main application presently is. It appears from the documents on CaseLines that the respondents, on or about 6 March 2026, delivered a notice of intention to amend their notice of motion in the main application. The proposed amendment entailed the joinder of a further respondent, a judge, and the deletion of the existing prayers in the notice of motion and the replacement thereof in their entirety. The applicant objected to the proposed amendment and the respondents thereafter launched an application under rule 28 seeking leave from the court for the proposed amendments. The application was not opposed, and it appears that the respondents intended to set this application down for argument with the current

application. Whether that was done on a procedurally correct basis is unclear, but neither the joint practice note nor the parties at the hearing requested me to determine the application to amend. The same can be said of what appears to be an application under rule 10 to join Twala J as a respondent to the main application. Similarly, there was no opposition and there was seemingly also an attempt to set down the rule 10 application with this application, but it was never argued nor raised in the joint practice note.

[32] A party becomes entitled to amend either because no objection was raised to the proposed amendment, or by an order of court authorising it, and the amendment itself takes place only when it is effected in the manner the rule prescribes. Here an objection was raised, so that the entitlement could arise only from an order, and no such order has been made. On the papers before me, the amendment was therefore never effected, and I consequently decide this application by reference to the notice of motion in the main application as issued in September 2022. The application under rule 28 for leave to amend, and the application under rule 10, remain pending and undetermined. Whether the respondents may hereafter effect, or seek leave to effect, the proposed amendment is not before me, and nothing in this judgment decides it.

[33] Next, I need to determine what the main application claims. The founding affidavit in the current application describes it as an application 'seeking to set aside the arbitration award, as well as both the 2019 and 2022 court orders', and as 'a fourth attempt to litigate the same dispute on the same set of facts'. That is not an accurate description of the original notice of motion in the main application. Its principal prayers seek the setting aside of the two Deeds Registry conversions and the restoration of ownership. It contains no prayer setting aside the arbitration award, and none setting aside the order of 18 April 2019. The only court order it attacks is that of 8 February 2022, by Twala J.

[34] That distinction matters, because the applicant's case on abuse rests substantially upon repetition. But the earlier proceedings and the main application are not directed at the same thing. The arbitration award determined who was to control and administer the properties. The two court orders granted interdictory relief directed at that control and at access to the premises. Neither

determined who owned them. The main application seeks the setting aside of the registered conversions of ownership and the restoration of ownership to the NPO, on the ground that the conversions were procured by fraud.

[35] The chronology also points the same way. The conversions are alleged to have been effected at the Deeds Registries in May 2019, about a month after the order of 18 April 2019 and nearly three years before that of 8 February 2022. A complaint about conduct alleged to have occurred after an order is not, without more, a re-litigation of what that order decided. The order of 8 February 2022 was of course made after the conversions, but it was taken by agreement and continued interdictory relief, and what it determined, and with what consequence for the ownership dispute, is a question for the court that hears the main application. So too is whether the arbitration award, the court orders or the parties' agreements ultimately defeat or constrain the claim to ownership. What has not been established on these papers is that the cause now advanced has already been finally determined against the respondents and is merely being advanced again under another name.

[36] That is not to say that the main application is in good order. It is not.

[37] The first difficulty is the identity of the litigant acting as applicant in the main application. The notice of motion cites the first applicant as Bazme Khalid Shah Chisty Sabree International NPO and asks that ownership be restored to it. The founding affidavit that supports that notice of motion says something different. It states that the first applicant is Bazme Khalid Shah Chisty Sabree International Trust, initially operating as a voluntary association, and now registered as a trust under IT373/2019 and also registered as a non-profit organisation. The second to fourth applicants are cited as office-bearers and co-trustees of that body. On the respondents' own founding papers, the litigant is therefore at once an organisation and a trust, and the deponent nowhere says which of them is before the court.

[38] Nor do the papers present a consistent account of which of the three bodies holds the rights asserted over the properties. Having named the trust, the deponent records that he will refer to the first applicant as 'the NPO', and that

label then carries the narrative. On it, the NPO had its inception in 1976 and acquired both properties during the 1990s. On the same affidavit's account, the NPO was registered only in 2018 and the trust was created only in 2019. That a voluntary association which registers as a non-profit organisation may continue as the same body is one thing. That rights acquired in the 1990s vest in a trust created in 2019 is another, and the affidavit does not address it. The resolution authorising the opposition to this application is taken on the letterhead of "Bazme Khalid Shah Chisty Sabree International Trust – NPO" by persons described as 'Trustees/Executive Members'. The answering affidavit, and the answer I have admitted, put the position as one of institutional continuity through changing legal forms, with the trust holding the assets. That may be right as a matter of practice, but it does not yet tell the court which entity actually claims.

[39] If the litigant is the trust, as its own founding affidavit says, a further difficulty follows. A trust established by trust deed is not a legal person but a legal relationship of a special kind. Because the control and administration of the trust property vests in each trustee individually, and because the trustees have individual interests, all of them must join in litigation concerning the affairs of the trust unless the trust instrument provides otherwise; proceedings brought at the instance of fewer trustees than are required have been held to be a nullity.¹⁵ One trustee may be authorised to sue in the name of another, but the authorisation does not substitute the one for the other. The difficulty here is not one of authority. The resolution on which the main application rests bears the signatures of all seven persons named in it, above the legend 'To be signed by each and every trustee'. The difficulty is that only three of the seven are cited as applicants, and that the resolution is, on its terms, one of the NPO, authorising its chairman 'to sign any documentation necessary' for the application, rather than a resolution of trustees to litigate in their own names.

[40] The second difficulty is that the legal basis of the attack on the court order of 8 February 2022 has never been settled. The answering affidavit describes the main application as a review when it states that 'the NPO launched a review

¹⁵ *Lupacchini NO v Minister of Safety and Security* 2010 (6) SA 457 (SCA) at para 2.

application in terms of rule 53 to set aside the 2019 and 2022 court orders'. So far as a review under rule 53 is intended, it is misconceived. Rule 53¹⁶ governs the review of the decision or proceedings of a lower court, or of a tribunal, board or officer performing judicial, quasi-judicial or administrative functions, and the proceedings of the High Court are not subject to review.¹⁷ An order of this court may be set aside under rule 42, under rule 31(2)(b), on appeal, or on common-law grounds. Rule 42(1)(a) is not available, for it requires the absence of the party affected, and the respondents were not absent.¹⁸ What remains open is the common law, under which a judgment may be set aside for fraud, or where there is no valid agreement between the parties to support it — the latter ground made for an order taken by consent whose underlying agreement is impugned.¹⁹ The founding affidavit in the main application does allege that the false claim of ownership was repeated on oath before the court, which, if established, could found such an attack, though the requirements are exacting.²⁰ But nowhere is that ground formulated as one of common-law rescission in the main application.

- [41] The third difficulty is the respondents' posture towards the legal instruments that stand in their path. It is trite that an order of a court of law stands until set aside by a court of competent jurisdiction, and until then must be obeyed even

¹⁶ Rule 53(1) reads:

"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any lower court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and served by the party seeking to review such decision or proceedings on the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and on all other parties affected —

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to send, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so."

¹⁷ Van Loggerenberg: *Erasmus Superior Court Practice*, at D1 Rule 53-2.

¹⁸ *Id* at D1 Rule 42-16.

¹⁹ *Id* at D1 Rule 42-9.

²⁰ The successful litigant must have been party to the fraud, the evidence must have been incorrect and given with intent to mislead, and it must have diverged from the truth to such an extent that the court would have decided otherwise had it known: Van Loggerenberg: *Erasmus Superior Court Practice*, at D1 Rule 42-10.

if it is wrong.²¹ The arbitration award itself records that it is final and binding on the parties and not appealable. Section 28 of the Arbitration Act²² provides that, unless the arbitration agreement provides otherwise, an award is final and not subject to appeal and that each party must abide by and comply with the award in accordance with its terms.²³ The Arbitration Act provides grounds on which an award may be set aside on application, which include the very complaints the respondents make, that the tribunal exceeded its powers and that the award was improperly obtained.²⁴ A *transactio* may likewise be set aside for fraud or for an error vitiating true consent.²⁵ No order setting aside the arbitration award has, however, been obtained.

[42] Nor is the attack upon these legal instruments coherent. The respondents, for example, do not say that no agreement was reached during the arbitration. They in fact say the parties arrived at a settlement agreement, with terms favourable to the NPO, which was not reduced to writing, but nowhere do they say what those terms were. In contradiction to the alleged settlement agreement, the respondents in the same answering affidavit also allege that the parties 'were not *ad idem*, and hence the agreement did not come into being', and the arbitration was 'a sham' and that the arbitration award was *ultra vires* and void *ab initio* so that 'there was no need to waste resources to set it aside'.

[43] These are formidable difficulties and some of them may prove fatal. But the question under rule 47 is not whether the main application will fail. Because an order for security is less drastic than an order finally staying or striking out proceedings as vexatious, the assessment is made on a preponderance of probability rather than to a certainty. There may be cases in which security is ordered although it can be said only that the prospects of success are doubtful, without it being possible to say that there are none.²⁶ That is the applicant's

²¹ *Id* at D1 Rule 42-5 and the authorities cited there.

²² 42 of 1965.

²³ Section 28 of the Arbitration Act 42 of 1965.

²⁴ Section 33(1)(b) and (c) of the Arbitration Act 42 of 1965. Such an application must be made within six weeks after publication of the award: section 33(2).

²⁵ *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) at 922C-D.

²⁶ *Boost Sports supra* at para 18, quoting *Fitchet v Fitchet* 1987 (1) SA 450 (E) at 454E-G and *Davidson's Bakery (Pty) Ltd v Burger* 1961 (1) SA 589 (O) at 593E.

best answer to what follows and I have weighed it. But a less exacting merits enquiry is not the same as dispensing with the threshold. Even where the prospects of recovering costs are poor, security may be ordered against an *incola* only if the court is satisfied that the main proceeding is vexatious or reckless or otherwise amounts to an abuse.²⁷ Doubtful prospects are a factor in that assessment but they are not themselves the answer to it.

[44] The question, then, is whether the applicant has shown, on a preponderance of probability and without my attempting to resolve the underlying dispute, that the main application is vexatious or reckless or otherwise amounts to an abuse. An action is vexatious and an abuse of the process of court, '*inter alia* if it is obviously unsustainable'.²⁸

[45] I am not satisfied that the threshold is met. The identity and standing difficulties are substantial, but they concern the juridical formulation of the claimant and its cause of action, and do not, without more, establish that the underlying claim directed at the Deeds Registry conversions is objectively unsustainable. The arbitration award and the two court orders present serious obstacles. Still, they do not, on these papers, determine the validity of those conversions, which are the primary subject of the main application and what it seeks to set aside. The legal basis of the attack on the court order of 8 February 2022 is not clearly formulated, but the founding affidavit alleges the facts of a fraud upon the court, which is a recognised common-law ground on which an order may be set aside. I express no view on whether any of those contentions will succeed. The point is narrower. Although this is a badly formulated and vulnerable case, it is not an objectively unsustainable one.

[46] The respondents' conduct of the litigation also does not supply what is otherwise missing in the main application. The answering affidavit in this application is prolix, in places intemperate and contains allegations that ought never to have been made. After the main application had lain unprosecuted for years, the respondents obtained an unopposed hearing date for it. Those

²⁷ *Boost Sports supra* at para 16.

²⁸ *Boost Sports supra* at para 17, quoting *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D-E.

matters bear on costs and on the weight to be given to particular allegations. Taken alone, or together with the defects identified above, they do not establish on a preponderance of probability that the continued prosecution of the main application is vexatious, reckless or otherwise an abuse of process.

[47] I therefore find that the applicant has established a substantial risk that it will not recover its costs but has not established the further element which the common law requires before an *incola* may be compelled to furnish security. That is dispositive of the matter, and the application must therefore be dismissed. I am conscious of what that means for the applicant. It holds a taxed order of this court which has gone unsatisfied for years; it has executed four times without recovering anything, and it must now defend an application launched in 2022 while facing a substantial risk of not recovering the costs of doing so. That is a real hardship, but it is the hardship which the common law accepts when it declines to compel an *incola* to give security merely because it cannot pay and it does not entitle the applicant to an order which the further requirement has not been shown to justify.

[48] Because the threshold has not been crossed, no discretion arises. Should I be wrong about that, I record how I would have exercised it. On the applicant's side stands a taxed costs order of this court unsatisfied for years and four executions that produced nothing. The respondents' disclosure of their means is very thin. They produced no statement of the NPO's accounts, no record of its income and no schedule of its assets and liabilities. They do not identify the source of the R 180 000, say whether further assistance is available from those who stand behind them, or describe any unsuccessful attempt to obtain it. A litigant resisting security on the ground of impecuniosity must be candid and place the relevant information before the court.²⁹ I would not have accepted, on that material, the unqualified assertion that an order for security would bring the main application to an end.

[49] Against that stand the importance of the dispute to both sides and to the community they serve, and the impairment of the right of access to courts which

²⁹ *Giddey NO supra* at para 31.

an order for security may work upon a litigant of limited means. Weighing those considerations and had I been satisfied that the main application was vexatious or reckless or otherwise an abuse, I would have ordered security and left its amount, form and manner to be determined by the registrar under rule 47(5).

- [50] This judgment, however, is only concerned with the main application as presently constituted and the facts placed before me. Nothing said in it determines the legal consequences of any amendment which may hereafter be effected, if at all.

Costs

- [51] The applicant has failed and should pay the respondents' costs of the security application. I am not persuaded that any punitive order is called for on either side. Having regard to the size of the record, the procedural and historical complexity of the dispute and the importance of the relief to both sides, fees will be recoverable on scale B.
- [52] The applicant pressed for costs *de bonis propriis* against the respondents' attorney, who deposed to the answering affidavit. It complains that he swore to matters of which he can have no personal knowledge, treated privileged correspondence as an admission of fraud when on its terms it was conditional, used another practitioner's admission application to impugn him, and made unfounded allegations against judges of this Division. In considering costs the court may have regard to the conduct of a legal representative and to whether that representative should pay costs personally, but such an order is made only where there has been negligence in a serious degree, warranting the order as a mark of the court's displeasure.³⁰ Some of the criticism is justified, as my remarks above reflect. The affidavit ought to have been drawn with restraint and confined to the issues. But that falls short of the threshold and an order for costs *de bonis propriis* is refused. The same considerations dispose of the respondents' mirror-image request against the applicant's attorney, and of the invitations that I refer the other's practitioners to the Legal Practice Council.

³⁰ *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board* 2009 (1) SA 565 (CC) at para 54.

Those requests are refused. It is enough to say that the way portions of the answering affidavit were drawn, and the manner in which the applicant obtained the May 2025 unopposed hearing date for the security application, each fell short of what this court is entitled to expect of its officers.

- [53] Neither subsidiary application was argued. The respondents obtained the admission of both further affidavits, although the first went well beyond what was justified and much of it has been given no weight. The applicant failed in the strike-out application, although the complaint underlying it was not without foundation and part of the material ought never to have been filed. In those circumstances, and because each side's conduct contributed to the interlocutory proliferation, there will be no order as to the costs of either application.

ORDER

- (1) Leave is granted to the first respondent in terms of rule 6(5)(e) of the Uniform Rules of Court to deliver the further affidavit of the respondents' attorney of record dated 20 August 2025 and the supplementary affidavit of the second respondent dated 24 March 2026, both of which are admitted as part of the papers in the application in terms of rule 47(3).
- (2) The application in terms of rule 6(15) of the Uniform Rules of Court is dismissed.
- (3) The application in terms of rule 47(3) of the Uniform Rules of Court is dismissed.
- (4) The applicant is ordered to pay the first to fourth respondents' costs of the application in terms of rule 47(3) on the party and party scale, on scale B.
- (5) There is no order as to the costs of the applications in terms of rule 6(5)(e) and rule 6(15).


C CARELSE
Acting Judge of The High Court
Gauteng Division
JOHANNESBURG

Delivered: This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically and by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 20 August 2026.

APPEARANCES

For the applicant: ZE Mahomed
Instructed by: Samnakay Attorneys Inc

For the 1st to 4th
respondents: A Singh
Instructed by Avon Singh Attorneys Inc.

For the 5th to 7th
respondents: Unrepresented

Heard on: 27 May 2026

Decided on: 20 August 2026