IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5005/2021 & 2016/44725

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

18 Aug 2021
DATE

SIGNATURE

In the matter between:

DR MAUREEN ALLEM INC Applicant

and

DR ELSA SUSANNA CECILIA BAARD Respondent

In re:

DR ELSA SUSANNA CECILIA BAARD Appellant

and

DR MAUREEN ALLEM INC Respondent

LEGAL SUMMARY

This application in terms of Rule 30A(2) of the Uniform Rules concerns the duty of an appellant to furnish security for costs. In its notice of motion, the applicant seeks an order to compel the respondent to furnish security for costs as contemplated in

Uniform Rule 49(13), failing which the applicant be authorised to apply for the respondent's appeal to be struck or dismissed with costs.

The respondent sought and, obtained leave from the Supreme Court of Appeal (SCA) to appeal an order to a Full Bench of this Court. Before the record of appeal was filed, the respondent requested the applicant to waive security for costs as contemplated in Uniform Rule 49(13), on the basis that the respondent at that stage considered herself bound under Rule 49(13) to furnish security unless she obtained a waiver or a court order releasing her from the obligation to put up security as required under the Rule. Consent to waive security was not forthcoming. Later, the respondent adopted the position that it was unconstitutional to demand security under Rule 49(13). After an impasse of some months, the applicant issued a notice in terms of Rule 30A (the Notice). The respondent did not comply with the Notice; the respondent expressly informed the applicant that she would not comply with the Notice. Then, the applicant launched the present application.

The respondent opposes the application, on the reason for non-compliance, which is that the respondent denies an obligation to furnish security. The respondent asserts that Rule 49(13) (i) provides for an inflexible right to demand security; (ii) is inconsistent with the provisions of the Superior Courts Act 10 of 2013 (Superior Courts Act) and is therefore of no force and effect; (iii) is *ultra vires* the provisions of section 6(1)(m) of the Rules Board for Courts of Law Act 107 of 1985 (the Rules Board Act); (iv) is invalid in accordance with the principle of legality; and (v) that this Court has no jurisdiction to grant the relief sought. The respondent further submits that the applicant cannot assert prejudice in the circumstances.

Rule 49(13) did not always read as it does now, it was amended on 29 October 1999, following *Shepherd v O'Neill ("Shepherd")* to address concerns of unconstitutionality arising from the absence of an opportunity to be released from the security obligation. The applicant submits that, post-amendment, Rule 49(13)(a) is not inflexible, because it provides the Court with the power to release an appellant from the obligation to provide security and affords an appellant the opportunity to approach the court that granted leave to dispense with the requirement to provide security.

However, in *FirstRand v Van der Merwe ("FirstRand")*, an unreported judgement from 2002, Froneman J, dealing with the amended Rule 49(13) expressed the view that *"after hearing argument and upon further reflection it appears to me that rule 49(13) may well be ultra vires and thus unconstitutional".* These judgements were handed down prior to the promulgation of the Superior Courts Act and accordingly did not, and could not have, dealt with the position on provision of security in the context of the provisions of the Superior Courts Act. No court since the *Shepherd* judgment and the amendment to Rule 49(13) in 1999 has been directly called upon to adjudicate upon the constitutional validity of Rule 49(13). Froneman J in *FirstRand* raised the issue *mero motu*.

Where there is a challenge to a law on the basis that it constitutes an unjustifiable limitation of section 34, and it is found that the law (or Rule, in the present case) limits the constitutional right, consideration of section 36 of the Constitution arises. The question then to be asked is whether, as a law of general application, Rule 49(13) constitutes a reasonable and justifiable limitation. In the present case, there is also a challenge to Rule 49(13) on the basis of want of legality, based in the provisions of section 51 of the Superior Courts Act and section 6(1)(m) of the Rules Board Act.

If the Court were to hold that Rule 49(13) is constitutionally invalid this would have significant implications, not only for the parties to this application, but for appeal litigants more generally and also for the Rules Board and the Minister of Justice. In the present matter the respondent did not file a Rule 16A (which would cause affected or interested parties to be notified) notice when raising the constitutional points, it relies on. The Court held that given the time constraints in this matter, postponement was not an option open to this court, as would generally result from filing a rule 16A notice. The Court does not consider the omission a sufficient reason to engage upon the constitutional arguments raised by the respondent. This is because the pleadings and submissions before this court compel it to interpret and apply Rule 49(13). This, of course, does not mean that the court must rise to the occasion and accept the invitation to make an order of constitutional invalidity. The issue is one of ripeness.

The Court finds that insofar as Rule 49(13) presents a bar to access to court at the appeal level, it does appear to infringe upon the access to court right, however, a

limitation analysis suggests that it may be considered a justifiable limitation, as follows: The Rule exists in accordance with the provisions of national legislation. On the principle of subsidiarity, it is the provisions of these statutes that must be applied to assert the access to court right, and not section 34 of the Constitution directly. The Rules themselves constitute law of general application within the meaning of section 36 of the Constitution. The bar is not absolute: the appellant is able to escape the requirement of providing security either by agreement with the respondent or by making an approach to court. Accordingly, the limitation on the access right is not inflexible. The Court concludes that the provision for security to protect the interests of one's counterpart in litigation is not a disproportionate limitation on the access to court right. However, that conclusion is subject to a consideration whether Rule 49(13) may be constitutionally invalid for want of compliance with the doctrine of legality. For a law of general application justifiably to limit the access to court right, it must be one that is consistent with the rule of law.

Here the submission is that Rule 49(13) is unconstitutional for want of compliance with the doctrine of legality. In accordance with section 17(2)b) of the Superior Courts Act, leave to appeal may be granted by the SCA upon application to that court. Under section 17(5), any leave to appeal may be granted subject to such conditions as the court may determine. Whether such conditions may be taken to include that an appellant furnish security for costs, is uncertain.

The Rules Board Act does not confer upon the Rules Board the power to regulate the circumstances in which security may be demanded; rather it confines the power to regulation of procedure in cases where security may be demanded. If the Rules Board does not enjoy the power under the Rules Board Act to limit access to court in the form of security for costs, then any rule issued by the Rules Board that purports to set out when security for costs is required is unlawful, unless the obligation in the Rules finds its basis in another law, which it does not. Indeed, insofar as it purports to impose a requirement that security be furnished in cases where the SCA has granted leave to appeal, it is inconsistent with section 17(5) that envisages it for the court considering the application for leave to appeal to set conditions for the prosecution for the appeal and not for any Rules to impose such conditions. If there is such an inconsistency, section 51 of the Superior Courts Act results in Rule 49(13) not remaining in force.

Even if Rule 49(13)(a) were considered not to be inconsistent with section 17(5) of the Superior Courts Act, the imposition of a duty on an appellant to furnish security would still be *ultra vires* the powers of the Rules Board under section 6(1) of the Rules Board Act. The Court holds that Rule 49(13) ought not to be read as imposing an obligation to furnish costs. It must be read restrictively as operating only where the respondent is able to assert a right to security derived from another source, such as a court order. If not read restrictively in this manner, it is not capable of being upheld as a law of general application that legitimately limits the access to justice right. It would have to be set aside for want of compliance with the doctrine of legality. However, the Court considered that the matter fell to be decided without reaching the constitutional point.

The Court holds that since the SCA was the court that considered the application for leave to appeal, its adjudication of the application would have to be regulated by the rules applicable to processes in that court. Rule 9(1) of the SCA Rules suggests that, in cases where leave to appeal is granted by the SCA under its rules, the precondition for a demand that security be given must be an order by the SCA that it be done. The Court finds that Rule 49(13) does not find application, because the order is one made by the SCA. The Court holds that it is the court that granted leave that has jurisdiction over the question whether security may be demanded or not, to do otherwise would be to split the jurisdiction to determine leave to appeal and whether security for costs ought to be granted, such orders contemplate two sides of the same coin. Consequently, once it is accepted that this Court does not enjoy jurisdiction to release an appellant from an obligation to furnish costs, then it can equally not be empowered to compel the furnishing of costs.

If the Court is taken to have jurisdiction, then it must exercise its powers in accordance with section 173 of the Constitution. The High Court “has the inherent power to protect and regulate their own process … in the interests of justice”. This Court must accordingly exercise judicial discretion in the circumstances of the case to determine whether strict adherence to Rule 49(13) ought to be compelled, or whether, in the interests of justice, decline so to compel. The Court does not consider it to be in the interests of justice to order compliance with the procedural prescripts of Rule 49(13) at this late stage. To grant the order at this point, days before the appeal is due to be heard, would result in prejudice to the respondent. Any prejudice that the applicant

might suffer now as a consequence of the respondent's failure to furnish security is all of its own making, because it did not approach this Court with due expedition.

Therefore, the Court declines to compel compliance with any requirement that security be put up as may exist. However, does not consider it appropriate to issue a punitive costs order, which the respondent sought in pleading, as the matters raised in this application were novel and worthy of debate.

As the reasoning hereinabove shows, this Court was able to resolve the dispute between the parties without reaching the constitutional issue. However, the concerns about the legality of Rule 49(13) are ripe for consideration by the Rules Board and the Minister of Justice and Constitutional Development. Arrangements will be made for this judgment to be brought to the attention of these interested parties.

The application falls to be dismissed on one of two grounds: (a) either that this Court does not enjoy the jurisdiction to entertain a Rule 30A(2) application to compel security where the SCA has granted leave to appeal without making provision for security, because in such an application this Court would have to engage upon the question of whether an appellant ought to be released from an obligation to furnish security, in respect of which this Court does not enjoy jurisdiction; and (b) or, if the Court does enjoy jurisdiction, a judicial consideration of the relevant factors does not lead to the conclusion that security ought to be compelled in the circumstances of the case. The application is dismissed with costs, such costs to include the costs occasioned by the employment of senior counsel.