

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



CASE NO: 2021/19942

In the matter between:

RAKOKWANE MALOKA

Applicant

and

LIBERTY HOLDINGS

Respondent

J U D G M E N T

(APPLICATION FOR LEAVE TO APPEAL)

MAIER-FRAWLEY J

1. Mr Maloka (the applicant) seeks leave to appeal against the orders granted in the judgment delivered on 24 June 2022 in terms of which, *inter alia*, a rule 30 application brought by Mr Moloka against the respondent ('Liberty') was

dismissed with costs and a rule 47 application brought by Liberty was granted with costs. The application for leave to appeal is opposed by Liberty.

2. By way of background, the judgment recorded that Mr Maloka had instituted 9 different claims in different fora against Liberty over a period of fifteen months, all stemming from his dismissal in December 2019 from Liberty's employ on grounds of misconduct.¹ Pursuant to the delivery by Liberty of a notice in terms of rule 47, the respondent instituted various interlocutory proceedings, including, amongst others: (i) the filing of a notice of objection under rule 30 pertaining to his complaint that Liberty had taken an irregular step in the pending proceedings by demanding security for costs in terms of rule 47 after, *inter alia*, filing an answering application in the pending main application, which Mr Moloka argued, amounted to Liberty having taken 'a further step in the cause' as envisaged in rule 30; and (ii) the launch of an application in terms of rule 30(2)(c) 'to set aside notice of demand that [he] must provide security for [Liberty's] legal costs.'
3. As regards the rule 30 application, the judgment found, *inter alia*, that the application was ill founded, amongst others, because Mr Maloka's argument that Liberty had taken a further step in the cause, as envisaged in rule 30, was unsustainable by reason of the fact that rule 30 only imposed a limitation on the party alleging that an irregular step had been taken (i.e., Mr Maloka, as

¹ These included, amongst others, two claims instituted in the Equality Court relating to unfair discrimination, both of which were unsuccessful; and three claims instituted in the Labour Court, *inter alia*, relating to automatically unfair dismissal, which claims were still pending at the time the rule 30 and rule 47 applications were heard. Subsequent to the hearing of the said applications on 9 May 2022, the Labour court delivered judgment against Mr Moloka and in favour of Liberty in one of the 9 matters. See: *Liberty Holdings v Maloka* (2021/19942) [2022] ZAGPJHC 423 (24 June 2022).

applicant) by prescribing that such party could not invoke the rule if he or she had taken a further step in the cause. Since Mr Maloka had invoked the rule, he was the party to which the prohibition in terms of rule 30 applied and not Liberty. The judgment further found, based on the authority cited in fn 6 therein, that a notice to furnish security does not constitute an irregular or improper step or proceeding for purposes of rule 30(1).

4. As regards the rule 47 application, the judgment found, on an application of the relevant legal principles (referred to in paragraphs 17 and 18 of the judgment) to the relevant facts,² that: (i) Liberty had established its entitlement to security for costs on the basis that the main application was ‘unsustainable in its present form’ and further based on Mr Maloka’s vexatious conduct in instituting various claims, including the unsustainable rule 30 application, all of which had served to put Liberty to unnecessary trouble and expense, which it ought otherwise not to bear; and (ii) apropos Mr Maloka’s assertion that he would be compelled to sell his immovable property, given his current employment status and lack of liquidity, that given that there was no suggestion by Mr Maloka that he was incapable of raising a loan against the security of his property or of obtaining gainful employment in the foreseeable future, it could not be found that an order directing him to furnish security would necessarily deal a death blow to his main application.

5. In terms of section 17 of the Superior Courts Act, 10 of 2013:

“(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that -

² The facts were recorded in paras 6, 8, 19 & 20 of the judgment *a quo*.

- (a) (i) the appeal would have a reasonable prospect of success;
or
- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) ...”

6. The use of the word ‘would’ in section 17 (1)(a)(i) of the Superior Courts has been held to denote ‘*a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.*’³ Such approach was endorsed in this division in *Acting National Director of Public Prosecutions and Others v Democratic Alliance*⁴ To this may be added, further cautionary notes sounded by the Supreme Court of Appeal in dealing with appeals: In *S v Smith*,⁵ it was stated that in deciding whether there is a reasonable prospect of success on appeal, there must be ‘*a sound, rational basis for the conclusion that there are prospects of success on appeal.*’ In *Dexgroup*,⁶ the SCA cautioned that the ‘*need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit.*’ More recently, in *Kruger v S*,⁷ the Supreme Court of Appeal reiterated the need for a lower court to act as a filter in ensuring that the appeal court’s time is spent only on hearing

³ *The Mont Chevaux Trust and Tina Goosen & 18 Others* (Case No. LCC 14R/2004, dated 3 November 2014), at para [6], followed by the Land Claims Court in *Daantjie Community and Others v Crocodile Valley Citrus Company (Pty) Ltd and Another* (75/2008) [2015] ZALLC 7 (28 July 2015) at par 3.

⁴ *Acting National Director of Public Prosecutions and Others v Democratic Alliance, In Re: Democratic Alliance v Acting National Director of Public Prosecutions and Others* (19577/09) [2016] ZAGPPHC 489 (24 June 2016) para [25], a decision of the Full Court which is binding upon me.

⁵ *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

⁶ *Dexgroup (Pty) Ltd v Trustco Group International (Pty) Ltd and Others* 2012 (6) SA 520 (SCA) at par 24.

appeals that are truly deserving of its attention and that the test for the grant of leave to appeal should thus be scrupulously followed. In order to meet the test for the grant of leave to appeal, '*more is required than the mere 'possibility' that another court might arrive at a different conclusion.'*' Quoting *S v Smith*, the court went on to state that it is not enough that the case is arguable on appeal or not hopeless, instead the appeal must have '*a realistic chance of succeeding.*'

7. In his notice of application for leave to appeal, Mr Maloka relied on three grounds for his submission that the court *a quo* erred in dismissing his rule 30 application and in granting the rule 47 application, including the costs orders made against him pursuant thereto. These included: (i) lack of jurisdiction; (ii) gross irregularity; and (iii) misdirection. I deal with each in turn below.

Jurisdictional challenge and alleged gross irregularity

8. As there is a measure of overlap between these grounds, I will consider them together.
9. Mr Moloka alleges that the court did not have jurisdiction to entertain Liberty's opposition to the rule 30 application and to entertain Liberty's notice in terms of rule 47 because Liberty had filed its answering affidavit in the rule 30 proceedings out of time and had thereafter failed to apply for condonation for the late filing thereof, and also because Liberty had failed to apply for condonation for the late delivery of its rule 47 application. No new or novel arguments were raised in support of these contentions, which were concisely dealt with in paragraph 9(ii) (read with footnote 3 thereto) and paragraph 19 of

⁷ *Kruger v S* 2014 (1) SACR 647 (SCA) at paras 2 and 3

the judgment. Mr Moloka did not take issue with the authorities cited and applied by me in evaluating the facts and in reaching the conclusion that the rule 30 application lacked merit and that the rule 47 application held merit.

10. Mr Moloka submits that I failed to determine preliminary issues raised by him relating to the alleged late delivery of Liberty's answering affidavit in the rule 30 application, including Liberty's failure to apply for condonation for the late delivery of its Rule 47(3) application. On a proper reading of the judgment, it will be noted that I dealt therewith in footnote 3 of paragraph 9(ii) of the judgment. In so far as he accuses Liberty of having misled the court in the main application ostensibly to support his averment that the main application enjoys reasonable prospects of success, such complaint does not detract from the conclusion I arrived at in paragraph 21 of the judgment, namely, that the main application was unsustainable in its present form.

11. Mr Moloka persists in these proceedings with his objection that Liberty filed its answering affidavit in the rule 30 application out of time. He thus submits that I erred in not upholding his objection. Suffice it to say that despite the fact that the rule 30 application appeared not to have properly set down for hearing on the date of hearing of the rule 47 application (on 9 May 2022), since both parties were ready to argue both applications, and since no prejudice was contended for by either party in dealing with the matters together, it having been accepted that the application in terms of rule 30 could have a direct impact upon the rule 47 application and thus ought to be considered together with the rule 47 application,⁸ I adopted a pragmatic approach, as advocated in

⁸ In the event that the rule 30 application succeeded, resulting in Liberty's rule 47(1) being set aside, this would naturally have affected the outcome of the rule 47 application.

Pangbourne,⁹ by allowing both applications to be argued and the issues arising therein to be canvassed substantively.

12. In *Pangbourne*, Wepener J considered a vast array of authorities in support of an approach which does not encourage formalism in the application of the rules, based on the trite principle that the rules are there for the Court, not the court for the rules. Mr Maloka had filed heads of argument in both applications, was well equipped to argue the merits of both applications, and did so vociferously at the hearing of the matter. Mr Maloka's objection, namely that Liberty's answering affidavit in the rule 30 application was filed out of time, was a non-starter. Firstly, his notice of motion provided no time periods for the filing of a notice of intention to defend or the delivery of an answering affidavit thereafter. Liberty thereafter applied the time periods provided for in Rule 6 (5) (d)(ii) in filing its answering affidavit. Liberty had given notice that it would do so in its notice of intention to defend. Mr Moloka was therefore under no misapprehension about the time periods applied by and adhered to by Liberty. In any event, Mr Moloka did not apply for either the notice of intention to defend or the answering affidavit to be set aside as an irregular proceeding on grounds that rule 6(5)(d)(ii) applied only to applications by which proceedings are instituted and not to interlocutory proceedings.

13. Even had the rule 30 application been determined on an unopposed basis, as Mr Maloka contends ought to have happened, the application would in my view have suffered the same fate on the basis that his invocation of rule 30 was inappropriate for reasons given in paragraph 14 of the judgment. Significantly,

⁹ *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ).

Mr Moloka did not take issue with the authority relied on for the conclusion reached by me in that paragraph.

14. I am accordingly not persuaded that another court would find merit in the arguments advanced by Mr Moloka on these grounds.

The alleged misdirection

15. Mr Maloka submits that the court erred in determining that Liberty was justified in delivering its Rule 47(1) notice more than 10 days after it had knowledge of Mr Maloka's impecuniosity. Under this heading, Mr Maloka also asserts that I erred in not finding that Liberty was precluded from seeking security for costs because it had taken a further step in the cause by filing an answering affidavit as well as a condonation application for the late filing of its answering affidavit.¹⁰ No authority was cited by Mr Moloka in support of either proposition, nor could I find any authority in support thereof.
16. The timing of the delivery of the rule 47(1) notice and the ultimate launch of the rule 47(3) application was dealt with in paragraph 12 of the judgment, which is to be read together with footnote 6 thereto, where the relevant timeline was set out. Mr Maloka's argument that Liberty took a further step in the cause was dealt with in paragraph 13 of the judgment.

¹⁰ In its answering affidavit, Liberty pointed to various disputes of fact which ought to have been foreseen, thereby highlighting the inappropriate approach adopted by Mr Maloka in proceeding on motion. This, it submitted, underscored its need for security for costs, and militated against the grant of an order that no security need be provided by Mr Maloka on the basis that he was entitled to litigate in any court of law, without any consequence, on grounds of impecuniosity, as sought by Mr Maloka.

17. I remain unpersuaded that the submissions made under this rubric, which were largely a repeat of Mr Maloka's submissions made at the hearing of the rule 47 application, carry reasonable prospects of success. I am fortified in such view, having considered the judgment of Tlhotlhemaje J in *Liberty Holdings v Maloka* (2021/19942) [2022] ZAGPJHC 423 (24 June 2022)¹¹, which judgment, counsel for the respondent submitted, illustrates that the wrong approach adopted by Mr Maloka in the Labour court (as to the form of the proceedings utilised) was characteristic of the approach he again adopted in this court in seeking relief on motion in the pending main application. It should be remembered that Liberty's case in the Rule 47 application was that the frequency and proliferation of unsustainable claims brought by Mr Moloka against Liberty since his dismissal from its employ on 31 December 2019, was indicative of a pattern of vexatious litigation arising in different fora, underscoring the need for the provision of security for Liberty's costs in the pending main application. In the case of *Liberty Holdings v Maloka*, Mr Maloka had sought condonation for filing his claim in respect of his referral of an alleged automatically unfair dismissal to the Labour court 240 days late. The Labour court found that the explanation provided by him for the delay was not easily discernible¹² but that such explanation as the court was able to fathom was in any event not satisfactory¹³. In par 17 of the judgment, the court held that '*The averments made by the applicant...do not come close to disclosing any cause of action. In fact it is difficult to comprehend what the applicant's claim is all about.*'¹⁴ In par 20 of the judgment, the court held that '*It can only be reiterated*

¹¹ The judgment in the Labour Court was delivered after the hearing of the rule 30 and rule 47 applications in this court. The Labour Court case was one of 9 cases instituted by Mr Maloka against Liberty since his dismissal from its employ on 31 December 2019.

¹² Par 14 of the judgment of the Labour Court.

¹³ Par 15 of the judgment of the Labour Court. See too para 21 where the following was said: "*the excessive delay in approaching the Court with the alleged automatically unfair dismissal has not been explained, and to the extent that there is any explanation, it is neither satisfactory nor reasonable.*"

¹⁴ Ironically, I arrived at a similar conclusion in my judgment.

that disputes surrounding any alleged automatically unfair dismissals ought ordinarily be brought by way of action proceedings. This is so in that motion proceedings are unsuited for such claims for obvious reasons, which are mainly the disputes of fact that may arise and that ought to be anticipated. Thus, even if the applicant was to be granted condonation, he would still need to explain the reason that his claim was brought before the Court in the manner he did, and why it ought to be determined.¹⁵ The same issue regarding the manner in which Mr Moloka has brought his various claims for damages (i.e., on motion) will similarly arise for consideration in the main application. The merits of the main application were not finally decided by me but were merely considered for purposes of determining whether the application for the provision of security for Liberty's costs was justified. Mr Maloka's submission at the hearing of the application for leave to appeal, namely, that I erred in determining the merits of the main application, is thus without merit.

18. Mr Maloka further submitted that the Equality court had previously determined that he had a valid claim on the merits when directing that the main application be instituted in the High court. Consequent thereupon, he submitted that I erred in finding that the main application did not carry prospects of success for purposes of deciding whether or not to order security for costs. In *riposte*, counsel for the respondent referred me to exact wording of the Equality court's ruling,¹⁶ which was that the '*Matter does not belong in the Equality Court. Complainant is directed to approach the appropriate court for relief.*' Mr Moloka was ordered to pay Liberty's costs,¹⁷ which costs remain outstanding to

¹⁵ Again, a similar conclusion was arrived at by me in my judgment apropos the claim for damages that was instituted by Mr Moloka on motion in the main application.

¹⁶ The ruling can be found at R-014-110 (Annexure AA25) of the papers.

¹⁷ The costs order made by the Equality Court can be found at R-014-134.

date. Far from endorsing the validity of Mr Maloka's claims in the main application, the Equality court merely directed that Mr Maloka should pursue his claims in a different forum, without proposing any form of proceeding or any pronouncement on the merits.

19. At the hearing of the appeal, Mr Maloka argued that the order for security for costs will put an end to litigation instituted by him which is designed to protect his fundamental rights enshrined in the Bill of rights. This this is not so, appears from what is stated in paragraph 21 of my judgment. In so far as Mr Maloka submits that he is an impecunious litigant, this is a factor that underscored the need for security for costs, rather than a motivating factor for his resisting the grant of security. He argues that he has a guaranteed right in terms of the Constitution to have any dispute adjudicated upon by a court of law and that because his constitutional rights were infringed by Liberty, propelling the main application, he should not have to pay costs in the event that his claims do not succeed. It is apparent from such argument that Mr Maloka ultimately asserts a right to litigate in the High Court without any financial consequence to him, irrespective of whether his case does not succeed. All litigants have the right to have their disputes determined by a court of law, however, there is a concomitant obligation upon litigants to litigate responsibly. Every litigant, whether legally represented or not, bears the risk of losing and the concomitant risk of an adverse costs order in such event. Mr Maloka is no exception.
20. Mr Moloka also sought to advance a constitutional challenge to rule 47 at the hearing of the application for leave to appeal, ostensibly to support his submission that the court erred in making costs orders against him. The rule 30

and rule 47 applications were determined on common law principles. No constitutional challenge was brought to rule 47 in Mr Maloka's papers and the application was not either opposed by him on the basis that he was vindicating any constitutional rights. As no constitutional rights were implicated in the rule 47 application, the *Biowatch* principle¹⁸ on costs did not apply. It is in any event impermissible for Mr Maloka to advance a constitutional challenge for the first time during oral argument presented at the hearing of the application for leave to appeal, where such challenge was not pleaded or canvassed on the papers.¹⁹

21. For these reasons, I remain unpersuaded that this ground carries reasonable prospects of success

¹⁸ See: *Biowatch Trust v Registrar, Genetic Resources, and Others* 2009 (6) SA 232 (CC). The judgement by Sachs J deals with cost orders against public bodies or persons when they initiate litigation in defence of constitutional rights against the state. In examining the approach to be applied in matters between private parties and the State, Sachs J confirmed the general rule propounded in *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) (2005 (6) BCLR 529, namely, that an unsuccessful litigant in proceedings against the State ought not to be ordered to pay costs, the rationale therefore being that an award of costs 'might have a chilling effect on the litigants who may wish to vindicate their constitutional rights.' A further principle was established, namely, that if the government loses the matter then it should pay the costs of the other side, while if the government wins, each party should bear its own costs. (It is however important to note that the principle in *Affordable Medicines* does not extend to constitutional litigation between private parties.)

The Constitutional Court warned, in paras 24 and 25 of the judgment, that the above principles are not unqualified. If an application is frivolous, vexatious or inappropriate the worthiness of its cause will not immunise it against an adverse cost order. The court went further and stated that merely labelling the litigation as constitutional would not be enough to invoke the general rule. The issues in the matter must genuinely and substantively be of a constitutional nature. [emphasis added]

¹⁹ See: *Minister of Cooperative Governance and Traditional Affairs v De Beer and Another* (538/2020) [2021] ZASCA 95 (1 July 2021), para 87, where the following was said: "Likewise, in *Fischer v Ramahlele*, it was stated:

"Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for it is impermissible for a party to rely on a constitutional complaint that was not pleaded'...." [emphasis added]

Lack of impartiality

22. As I understand the argument, Mr Maloka submitted that no prior court has pronounced on the merits of any case thus far pursued by him and no court has either found, in relation to the various claims instituted by him in other fora, that he is a vexatious litigant, therefore, there was no basis for this court to have concluded that he has embarked on vexatious litigation, particularly in circumstances where the Equality Court had previously determined the validity of the claims now pursued by him in the main application. The argument is not sustainable. Firstly, the submission that no court has pronounced on the merits of any of Mr Maloka's cases is incorrect in the light of the Labour Court's judgment referred to in paragraph 17 above. Secondly, as illustrated above, the Equality Court made no determination on the merits of his claims that are now pursued in the main application. Thirdly, there was nothing in the papers to indicate that Liberty had brought an application for security for costs in the various proceedings that were instituted in other fora, hence the issue of vexatious litigation would not have arisen in those proceedings.
23. Mr Moloka further submitted that the court failed to demonstrate fairness and impartiality because it paid more attention, when arriving at its findings, to the evidence presented by Liberty concerning its prejudice in the event that Mr Moloka were to fail to satisfy any costs order granted against him in the main application and in finding that the main application in its present form is unsustainable.

24. As rightly pointed out by the respondent's counsel at the hearing of the application for leave to appeal, the lack of impartiality complaint was not raised as a ground for impugning the judgment in the notice of application for leave to appeal. The said complaint was also not identified or addressed in Mr Maloka's written submissions that were filed in support of his application for leave to appeal, and as such falls outside the scope of what can be considered in this matter. That notwithstanding, it bears mention that Mr Maloka appears to overlook the fact that the court made findings based on its application of legal principles to what was largely common cause facts. The authorities cited in the judgment were not challenged, nor has Mr Moloka sought to demonstrate that the relevant principles were incorrectly applied by the court. Instead, his appeal is based largely on complaints that this court failed to uphold technical objections pursued by him at the hearing of the applications without, however, contending or demonstrating that the court had failed to exercise its discretion judiciously in so doing or because it applied the relevant legal principles it relied on incorrectly. The mere fact that a court may make incorrect findings does not mean that it was consequently partial in erring. In any event, Mr Maloka's oral submissions did not come close to meeting the threshold for rebutting the presumption of judicial impartiality,²⁰ or for what the Constitutional Court in *Sarfu*²¹ pronounced in relation to the test to be applied for the recusal of a judicial officer on grounds of reasonable apprehension of bias.

²⁰ See: *South African Commercial Catering and Allied Workers Union and Others v Irwin & Johnson Limited Seafoods Division Fish Processing* (CCT2/00) [2000] ZACC 10; 2000 (3) SA 705; 2000 (8) BCLR 886 (9 June 2000) at par 13 ('*Irwin & Johnson*')

²¹ See: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147; 1999 (7) BCLR 725 (CC) at par 48 ('*Sarfu*'). See too: *Irwin & Johnson, supra*, at paras 15 – 17.

25. Having dispassionately considered my judgment and having given due consideration to the submissions of the parties, I am not persuaded that a different court would find in accordance with Mr Maloka's submissions.
26. Counsel for Liberty submitted that costs should follow the result. Mr Maloka, on the other hand, sought an order granting him leave to appeal with costs, alternatively, an order that the costs of the application for leave to appeal stand over for determination by the appeal court. Mr Maloka has not succeeded in his application for leave to appeal, once again putting the opposing litigant to the expense of having to deal not only with written argument that contained surplusage but also a further ground raised by Mr Maloka from the bar for the first time at the hearing of the application for leave to appeal. In the circumstances of the matter, I cannot find any reason to depart from the general rule that costs ought to follow the result.
27. I accordingly make the following order:
- 27.1. The application for leave to appeal by the applicant is dismissed with costs.

A. MAIER-FRAWLEY

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 29 July 2022
Judgment delivered 2 August 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 2 August 2022.

APPEARANCES:

For the Applicant:	Mr R. Maloka in person
Counsel for the Respondent	Adv R Itzkin
Attorneys for Respondent:	SGV Attorneys