IN THE HIGH OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

Date: **15 September 2022** Signature:

Case No: **A292/2021**
49110/2021

In the matter between:

MALOMINI STRATEGISTS (PTY) LTD First Applicant

MOHLAMONYANE KLAAS TALA Second Applicant

and

NXUMALO BHEKIWE AMANDA Respondent

In re the appeal of:

NXUMALO BHEKIWE AMANDA Appellant

and

COMPANIES AND INTELLECTUAL PROPERTY First Respondent

COMMISSION (CIPC)

THE COMPANIES TRIBUNAL OF SOUTH AFRICA	Second Respondent
SIKHITHA LINDELANI N.O	Third Respondent
MALOMINI STRATEGISTS (PTY) LTD	Fourth Respondent
MOHLAMONYANE KLAAS TALA	Fifth Respondent

JUDGMENT

NEUKIRCHER J:

[1] This is an application brought in terms of Rule 47 in which the applicant seeks an order that the respondent[1] be ordered to pay security for costs of an appeal that the latter noted against a decision of the Companies Tribunal dated 28 September 2021. The appeal was noted on 30 September 2021.

RULE 47

[2] Rule 47 provides:

> *"(1) A party entitled and desiring to demand security for costs from another shall, as soon as practicable after the commencement of proceedings, deliver a notice setting forth the grounds upon which such security is claimed, and the amount demanded.*
>
> *(2) If the amount of security only is contested the registrar shall determine the amount to be given and his decision shall be final.*

[1] The parties will henceforth be referred to as they are cited in the appeal: ie the applicants as 4th and 5th respondents (or the respondents) and the present respondent as "the appellant".

(3) If the party from whom security is demanded contests his liability to give security or if he fails or refuses to furnish security in the amount demanded or the amount fixed by the registrar within ten days of the demand or the registrar's decision, the other party may apply to court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.

(4) The court may, if security be not given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.

(5) Any security for costs shall, unless the court otherwise directs, or the parties otherwise agree, be given in the form, amount and manner directed by the registrar.

(6) The registrar may, upon the application of the party in whose favour security is to be provided and on notice to interested parties, increase the amount thereof if he is satisfied that the amount originally furnished is no longer sufficient; and his decision shall be final."

SECTION 195 OF THE COMPANIES ACT 71 OF 2008

[3] Section 195(7) of the Companies Act 71 of 2008 (the Act) makes provision for an appeal of this nature:

"(7) A decision by the Companies Tribunal with respect to a decision of, or a notice or order issued by, the Commission is binding on the Commission, subject to any review by, or appeal to, a court."

[4] The status of an order of the Companies Tribunal is set out in Section 195 (8) of the Act which states:

"(8) An order of the Companies Tribunal may be filed in the High Court as an order of the court, in accordance with its rules."

Thus, an order of the Tribunal has the same status as an order of the High Court.

BACKGROUND

[5] On 28 September 2021, the Tribunal handed down its decision on an application lodged by 4th respondent in which it ordered that the CIPC was to remove the appellant as a director of 4th respondent and that one KT Mahlomanyane[2] was to be registered as a director of 4th respondent.

[6] As stated, the appellant noted her appeal in terms of Section 195(7) two days later.

[7] On 20 October 2021, the 4th and 5th respondents served a Rule 47 notice on the appellant. In that they demand security for the costs of the appeal in the amount of R2 million on the grounds that:

"… *the notice appeal is vexatious and/or amounts to an abuse of the process of the court, more particularly in that:*

1. The notice of appeal which formed the subject matter and merits of the judgment sought to be appealed against was itself vexatious, reckless and/or an abuse of the court process.

[2] The 5th respondent

2. *The appellant was ordered to pay costs of the main application which costs shall be on the scale as between party and party.*
3. *The notice of appeal is an extension of the reckless conduct identified in the judgment.*
4. *In spite of the above the appellant has continued to use the funds of the 4th and 5th Respondents held at the FNB account even after she became aware of the ruling of the Tribunal under case number CT00701ADJ2021.*
5. *In addition to the above, subsequent developments have rendered the notice of appeal even more vexatious, reckless and/or abuse namely, inter alia*

   In that:

   5.1 *FNB has released records of the transaction from the 5th respondents account indicating that an amount of R532,000.00 was transferred from the fifth respondents account a day after the ruling of the Tribunal attached herein is the fourth respondents bank statement annexed marked "**TK01"**.*

   5.2 *FNB further released a summary of payments of the total amount of R1,247,651,51 as their beneficiaries which was a reckless conduct of the appellant for using funds intended for the 4th respondents and for work done by the 4th respondents annexed marked **"TK02"***

   5.3 *The appellant attorneys on record were notified through email regarding a warning not to use such funds pending the outcome of the matter and that such funds were intended the 4th*

*respondents for work done by the 4th respondents, however on the 29 September 2021 immediately after the appellant became aware of the ruling she transferred the funds from the fifth respondents account annexed herein is annexure "**TK03**" to the appellant attorneys and annexure "**TK04**" a response from appellant attorneys.*

5.4 On the 30th September 2021 and in defiance of the above the appellant file the notice of appeal but did so without fixing any time frames.

5.5 The fourth respondent funds held at FNB account to which the appellant have access have been exhausted and it will severely and adversely affect appellant ability to pay her costs liabilities in the likely event of the notice of appeal itself being unsuccessful."

[8] On 25 October 2021 the appellant filed a "reply" to the Rule 47 notice and opposed the 4th and 5th respondent's entitlement to security as well as the amount sought.

[9] On 3 March 2022, the present application was launched. In the Notice of Motion, the respondents seek an order that:

9.1 the taxing master be ordered to tax the estimated security for their costs *"and such costs be made an order of court and final";*

9.2 that the taxed security for costs be payable within 10 days of order; and

9.3 costs of the Rule 47 application.

[10] Attached to the Notice of Motion is an affidavit styled “Confirmatory Affidavit”, deposed to by the 5th respondent who states that he is the director of the 4th respondent. He confirms that he gave the instructions for the delivery of the Rule 47 notice, that the averments made in the Rule 47 notice are true and correct, confirms the grounds on which security was sought and also states that the appellant has been dilatory in her prosecution of the appeal as she has failed to obtain a date of hearing from the registrar.

[11] The latter statement however does not appear to be correct as the appellant has set out correspondence between her attorney and the registrar between 15 December 2021 and 2 February 2022 in which the prosecution of her appeal is evidenced.

[12] In the meantime, it appears that the respondents set the Rule 47 down for taxation, despite appellant’s opposition to the liability, and obtained a date of taxation for 22 February 2022. Ultimately the Taxing Master declined to tax as he was of the view that the respondents had to first launch this application, which they then did on 3 March 2022 ie 4½ months after appellant’s opposition (see paragraph 8 supra).

[13] Before I deal with the merits of the Rule 47 itself, there is a preliminary issue that must be dealt with.

THE CONFIRMATORY AFFIDAVIT

[14] The appellant complains, in essence, that no Founding Affidavit is attached to the Notice of Motion. She complains that instead, there is an affidavit attached which is called a "Confirmatory Affidavit" that she has no idea where or how this affidavit fits into the application. She argues that the respondents have therefore failed to launch a proper Rule 47 application and that she is prejudiced.

[15] The argument is, in my view, opportunistic: a) it is very clear from the Notice of Motion that *"the confirmatory affidavit of Mohlamonyane Klaas Tala and Rule 47 notice with its annexures will be used in support of [the] application*", and b) the confirmatory affidavit is indeed deposed to by the 5th respondent who sets out the necessary evidential facts to found the application.

[16] Whether it is called a "confirmatory affidavit" or anything else, it sets out the necessary evidence to enable appellant to respond - which she did, fully, on 12 April 2022 and there is thus absolutely no prejudice to her whatsoever. In any event a rose by any other name is still as sweet.

[17] This point therefore holds no water and is dismissed.

THE SECURITY FOR COSTS

[18] As stated *supra*, once the order of the Tribunal is filed with the high court, it has the status of a high court order. Thus, any appeal noted, must be done

in accordance with Rule 49 as this regulates appeals from the high court and it in fact appears that the Registrar of this court and the parties have followed the procedure set out in Rule 49 as regards the prosecution of the appeal – there is no evidence on these papers to the contrary. There is only one exception to this procedure – unlike orders of the high court which require that the court *a quo* grant leave to appeal, Section 195(7) of the Act requires no such application – an appeal is a direct appeal which is afforded to an aggrieved party by its mere noting.

[19] This is important as Rule 49(13) regulates the provision of security for the costs of an appeal. It states:

"(13)(a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or 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, enter into 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 shall fix the amount and the appellant shall enter into security in the amount fixed or such percentage thereof as the court has determined, as the case may be."

[20] There being no application for leave to appeal, the Tribunal could not have released the appellant from her obligations under Rule 49(13).

[21] In **Shepherd v O'Neil and Others**[3], the court found that, to the extent that Rule 49(13) does not vest a court with a discretion to exempt an appellant from compliance (either wholly or in part), it is unconstitutional and invalid. As a result, Rule 49(13) was amended in GN R1299 of 29 October 1999 to its present form.

[22] In **Dr Maureen Allem Inc v Baard**[4] (Allem) Engelbrecht AJ considered the provisions of Rule 49(13), their applicability and their constitutionality in regard to a pending appeal. There, whilst finding the "*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",* the court resolved the dispute without deciding the issue of the Constitutionality of Rule 49(13) on the following basis: in **Allem** a) the Supreme Court of Appeal had granted the petition for leave to appeal without stipulating that the appellant was to provide security for costs[5] and at no stage either at the time of the petition or subsequently, had that applicant raised the issue of security nor had it launched an application to compel security when the record was filed. It did so very shortly before the appeal was to be heard. It did so by launching a Rule 30A application, which was met with a denial of the obligation to provide security on the basis that (i) Rule 49(13) is inconsistent with the provisions of the Superior Courts Act 10 of 2013 and is therefore of no force and effect, (ii) Rule 49(13) is *ultra vires* the provisions, of section 6(1)(m) of

[3] 2000 (2) SA 1066 (W) at 1073 H – I – decided on 30 August 1999
[4] 2022 (3) SA 207 (GJ)
[5] Supreme Court of Appeal Rule 9 states:
"(1) When required – if the court which grants leave to appeal orders the appellant to provide security for the respondent's costs of appeal, the appellant shall, before lodging the record with the registrar, enter into sufficient security for the respondent's costs of appeal and shall inform the registrar accordingly.
(2) Form or amount of security - if the form or amount of security is contested, the registrar of the court a quo shall determine the issue and this decision shall be final."

the Rules Board for Courts of Law Act 107 of 1985, (iii) Rule 49(13) is invalid in accordance with the principle of legality and (iv) this court has no jurisdiction to grant the relief sought; b) the appeal would be heard within a few days of the application for security for costs, and the court found that to grant security at that late stage would be prejudicial.

[23] But the above case is distinguishable on the facts as there the SCA had granted leave to appeal. *In casu*, the appeal is noted in terms of Section 195(7) of the Act. Thus the question is: does this court have a discretion to exempt an appellant from providing security for the costs of the appeal?

[24] In my view, the answer lies in the wording of Rule 49(13): the present appeal is *sui generis* in that no leave to appeal is required and therefore there is no court *a quo* that can exempt that appellant from furnishing security. However, Rule 49(13) does not confine the exemption from security to the court granting Leave to Appeal as it provides that a court *"subsequently an application to it*" is entitled to release the appellant either wholly or in part, from that obligation. Whilst it is tempting to read these words restrictively, in my view the phrase is broad enough to encompass that it is not just the court hearing the leave to appeal that may release the appellant from this obligation, but any court on application to it. I am also of the view that it is unnecessary to decide whether or not Rule 49(13) is unconstitutional given the facts of this matter and that this matter can be resolved without delving into that issue.

[25] In essence, there are several procedures available to the respondents to enforce Rule 49(13): by way of a Rule 30A notice, or by way of Rule 47.

Here they chose Rule 47, and the notice demanding security was filed 14 days after the appeal was noted. Thus it was brought *"as soon as practicable after the commencement of proceedings."*[6] Importantly, Rule 47(3) does not state a time period within which the respondents must apply for an order and, in my view, the application must be brought within a reasonable time. The respondents launched these proceedings on 3 March 2022 ie 4½ months after the appellant contested liability.

[26] Bearing in mind that respondents complain that the appellant has been dilatory in prosecuting her appeal[7] it is noteworthy that the Rule 47 provides that proceedings are stayed until any order is complied with. Thus, given the delay in launching the present proceedings, it appears that the respondents are also responsible for delays that have occurred, especially as their original demand for security was in October 2021.

[27] The respondents base their demand on the grounds set out in paragraph 7 supra:

27.1 <u>The transfer of funds</u>

a) The respondents state that, subsequent to the Tribunal decision and on 29 September 2021[8], the appellant transferred funds from the 5th respondent's account to her attorneys.

b) According to Annexure "TK01" the appellant transferred the following amounts for legal fees:

1) 13 September 2021 R517 843-53
13 September 2021 R77 306-45

[6] Rule 47(1)
[7] Which she denies
[8] The day after the ruling and a day before her appeal was noted

20 September 2021	R100 000-00
29 September 2021	R532 000-00

c) The appellant has denied this and states "*the Appellant avers that she does not have access to 5th respondents FNB account, as such she never uses funds of the 5th respondent*" and that *"the funds in the 4th respondent's bank account belong to the 4th respondent, not the 5th respondent ….."*.

d) It appears from the FNB statement that the bank account from which the transfer was made was that of the 4th respondent and that, where the respondents refer to the bank records of 5th respondent[9] they are clearly the bank records of 4th respondent.

e) The appellant's prevarication on this issue cannot be sustained – the fact is that R532 000 was transferred a day after the Tribunal hearing.

27.2 <u>The appeal is vexatious, reckless and/or an abuse</u>

a) The thrust of this argument has to do with the R532 000-00 transferred by appellant from the account of the 4th respondent after the Tribunal's ruling. The respondents state that it is clear that she has no source of funds other than those and that, even though given an opportunity to do so, she has failed to explain her conduct.

b) The appellant has denied this but given no other information to this court

[9] In paragraphs 4 and 5.1 of the Rule 47 notice

[28] However, whilst it is certainly within a court's discretion to order a party to provide security for costs where the action is either vexatious or reckless or amounts to an abuse of the court's process[10], this discretion is exercised sparingly and only in exceptional circumstances[11].

[29] In fact, the mere fact that the appellant may not be able to satisfy a potential costs order against her, is insufficient in itself to justify an order for security for costs against her – something more is required[12]. In the present case, the respondents allege that the noting of the appeal is not genuine – it is motivated by the ulterior motive of transferring money from 4th respondents bank account and by delaying the inevitability of the Tribunal's order. Thus they say that the appellant's conduct is vexatious and is an abuse of process.

[30] "*Abuse of process*" has been described thus by our courts:

30.1 in **Hudson v Hudson**[13] it was said: *"when therefore the court finds an attempt made to use for ulterior purposes machinery devised for the better administration of justice, it is the duty of a Court to prevent such abuse. But it is a power which has to be exercised with great caution and only in a clear case.";*

[10] Ecker v Dean 1937 AD 254 at 259

[11] Western Assurance Co v Caldwell's Trustee 1918 AD 262 at 274; Crest Enterprises (Pty) Ltd v Barnett and Scholsberg 1986 (4) SA 19 (C) at 22B – D; Ramsamy No and Others v Maarman No and Another 2002 (6) SA 159 (C) at 172 – 173

[12] Ramsamy No and Others (supra) 1927 AD 259 at 268

[13] 1927 AD 259 at 268. Also Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere 1999 (3) SA 389 (SCA) at 414I – J where the court stated *"Die blote aanwending van 'n bepaalde hofprosedure vir 'n doel anders as waarvoor dit primêr bestem is, is tiperend, maar nog nie voldonge bewys, van mala fides nie; daarvoor is die verdere afleiding nodig dat die resultaat wat beoog is, … onbehoorlik was. 'n Sodanige aanwending (vir 'n doel anders as waarvoor dit primêr bestem is) is dus 'n kenmerk, eerder as die definisie, van mala fides."*

30.2 what constitutes an abuse of process is determined by the circumstances of each case and there is no hard-and-fast rule as to what would constitute an abuse of process;[14]

30.3 in general, where it appears that the procedures provided for in the Rules are utilised for an ulterior motive or are to coerce a party into doing something outside of the claim, that is considered to be an abuse[15]

[31] In this matter the appellant is exercising her right to appeal the decision of the Tribunal, as she is entitled to do, in terms of Section 195 (7) of the Act. There is nothing either vexatious or abusive in her doing so and if her appeal is unmeritorious, it will be dismissed. This, on its own, does not entitle the respondents to security for costs.

[32] The fact that appellant transferred money from the company to her attorneys subsequently to the Tribunal's order may well be frowned on but is not of itself indicative of appellant's inability to pay legal costs and a Rule 47 is not the appropriate procedure to enforce a "repayment" of these funds which is, in a measure, the effect of the order sought by the respondents.

[33] Thus, in my view, the application cannot succeed on these facts.

ORDER

[34] The order I make is therefore the following:

The application for security for costs is dismissed with costs.

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[14] Beinash v Wixley 1997 (3) SA 721 (SCA) at 734 F – G

[15] See Hudson (supra) and Beinash supra; Phillips v Betha 1999 (2) SA 555 (SCA) at 565 E – F; Erasmus; Superior Court Practice Vol 2 (2nd edition) at D1 – 637

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NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically 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 hand-down is deemed to be 15 September 2022.

For the 4th and 5th respondents (Rule 47 applicants)	: Adv MM Snyman
Instructed by	: WS Nkosi Attorneys Inc
For the appellant (Rule 47 respondent)	: Adv Mnyatheli
Instructed by	: L Mbangi Inc

Date of hearing: 11 August 2022 and 24 August 2022