

REPUBLIC OF SOUTH AFRICA



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

**Case no: A2023-080029
& 2017/2774**

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

DATE

SIGNATURE

In the matter between:

RAND WATER BOARD

First Applicant

CHIEF EXECUTIVE OFFICER: RAND WATER BOARD

Second Applicant

and

KARIKI PIPELINE AND WATER PROJECT (PTY) LTD

Respondent

JUDGMENT

Wijnbeek, AJ

1. The respondent filed its appeal record and heads of argument in an appeal before the full bench of this court without entering good and sufficient security for applicants' costs in the appeal.
2. The applicant accordingly applies for an order setting aside the aforesaid as irregular steps. In argument the respondent also asks that the court declare that the appeal lapsed, yet such relief does not form part of the Notice of Motion.
3. The applicants, represented by Advocates Tsatsawane SC and Loabile-Rantao argues that the respondent failed to comply with Uniform Rule 49(13) and that the steps taken in prosecuting the appeal are irregular. The respondent, represented by Mr Marumoagae argues that the Respondent is not bound to enter security for the applicants' costs in the appeal because the Supreme Court of Appeal granted leave to appeal.
4. To avoid confusion in reference to the parties in this application vis-à-vis their description in the appeal, the applicants will jointly be referred to as "Rand Water" and the respondent as "Kariki".

Brief History on the Facts

5. In June 2020, Kariki filed a notice of intention to amend the main application it instituted against Rand Water. The main application deals with allegations of tender irregularity.
6. Rand Water objected to the notice of intention to amend, and the court subsequently dismissed Kariki's application for leave to amend its notice of motion. Kariki thereafter applied for leave to appeal to this court, and upon its dismissal, petitioned for leave to appeal to the Supreme Court of Appeal. The SCA granted leave to appeal to the Full Bench of this Court.

7. In granting leave to appeal, the Supreme Court of Appeal did not speak about security for costs of the appeal.
8. Kariki proceeded to lodge copies of the appeal record and filed heads of argument without providing security for the pending appeal.
9. Rand Water says that Kariki had to provide security for its costs: Rand Water argues that the Supreme Court of Appeal did not release Kariki from the obligation to provide security for costs as required by Rule 48(13)(a), Kariki did not ask for such an exemption from the Supreme Court of Appeal, and Rand Water has not waived its right to security for costs.
10. Kariki, on the other hand, argues that section 17(2)(b) of the Superior Courts Act read with Supreme Court Rule 9 finds application and that it was accordingly not obliged to render security for costs in an instance where the SCA granted leave to appeal to the full bench of this court.

Consideration

11. Uniform Rule of Court 49(13) reads as follows:

(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 so fixed or such percentage thereof as the court has determined, as the case may be.

12. Section 17(2)(b) of the Superior Courts Act, 10 of 2013 provides for the application for leave to appeal to the Supreme Court of appeal if the High Court refused leave and reads as follows:

If leave to appeal in terms of paragraph (a¹) is refused, it may be granted by the Supreme Court of Appeal on application filed with the registrar of that court within one month after such refusal, or such longer period as may on good cause be allowed, and the Supreme Court of Appeal may vary any order as to costs made by the judge or judges concerned in refusing leave.

13. Supreme Court Rule 9 deals with security, stating the following:

When required

(1) 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.

Form or amount of security

(2) 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.

14. Kariki argues that the decision in **Allem**² is dispositive of the argument and that the Court ought not to follow the decision in **Strouthos**³.

¹ Subsection 2(a) reads: *Leave to appeal may be granted by the judge or judges against whose decision an appeal is to be made or, if not readily available, by any other judge or judges of the same court or Division.*

² Dr Maureen Allem Inc v Baard 2022 (3) SA 207 (GJ) (“Allem”)

³ Strouthos v Shear 2003 (4) SA 137 (T) (“Strouthos”) at 140G

14.1. The Court in *Allem* per paragraph 60 held that “*in this instance, we are concerned with a matter where the SCA, under its powers in terms of section 17(2)(b), was approached for and granted leave to appeal. As indicated, section 17(5) empowers the court in such circumstances to set conditions to attach to a leave to appeal. Logically, it would seem to me 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 process in that court*”.

14.2. In dealing with Rule 9, the court in *Allem* held in paragraph 61 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. I am of the view that Rule 49(13) does not find application, because the order is one made by the SCA. And under that order there is no entitlement that must be waived and the order granting leave to appeal by implication absolved the respondent from any duty to furnish costs.*”

15. In ***Strouthos***⁴ Daniels J held that the Court in granting leave to appeal as opposed to the court in which the appeal is made or the court hearing the appeal, is the court designated to order the release of the appellant from his or her obligation to lodge security. (my emphasis)

16. Rand Water argues that *Strouthos* was correctly decided. Rand Water also places reliance on the judgments of ***Boland Konstruksie***⁵, ***Eagle Creek Investments***⁶ and ***Panayiotou***⁷. *Strouthos*, *Boland Konstruksie*, *Eagle Creek*, and *Panayiotou* deal with applications where the SCA granted leave to appeal to the full bench of the High Court.

⁴ *Strouthos* supra also with reference to 140H-I

⁵ *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk* 1974 (4) SA 291 (C) (“*Boland Konstruksie*”)

⁶ *Eagle Creek Investments 472 (Pty) Ltd v Focus Connection (Pty) Ltd and Another* [2018] JOL 40609 (GJ) (“*Eagle Creek*”)

⁷ *Panayiotou v Shoprite Checkers* 2016 (3) SA 110 (GJ) (“*Panayiotou*”)

- 16.1. It was held in *Boland Konstruksie* that where security is not provided as stipulated in Rule 49(13) an appeal may be struck off the roll. The Court has a discretion to condone such non-compliance.⁸
- 16.2. The relief sought in *Eagle Creek* was that certain steps taken by the respondents, such as filing of the record, applying for an appeal date, and filing of heads of argument be set aside as irregular steps plus a declaratory order that the appeal lapsed.⁹
- 16.3. The court in *Eagle Creek*¹⁰ referred to ***Jyoti Structures Africa***¹¹ concluding that the lodging of the record with the Registrar prior to the provision of security constitutes an irregularity as envisaged in Uniform Rule of Court 30A.
- 16.4. In *Panayiotou* the court held that the failure to serve an application for leave to appeal within the prescribed time resulted in the lapsing of the right to apply for leave to appeal, and only on the granting of condonation would it be revived.¹²
17. Two recent judgments, namely that of ***Jeanru***¹³ and ***Gruskin***¹⁴ are informative of the decision that this court is bound to make.
18. In both *Jeanru* and *Gruskin*, the SCA granted the parties leave to appeal whereafter the appellants did not enter security for costs. Issues arose on

⁸Boland Konstruksie supra at 293D-H

⁹ Eagle Creek supra paragraph 1

¹⁰ Eagle Creek supra paragraph 12

¹¹ *Jyoti Structures Africa v KRB/Masana* 2011 (3) SA 231 (GSJ)

¹² *Panayiotou* paragraphs 11 and 13-15

¹³ *Jeanru Konstruksie (Pty) Ltd v Botes* [2023] JOL 59475 (GP) (“Jeanru”)

¹⁴ *Gruskin v Gruskin* [2023] JOL 58986 (GJ) (“Gruskin”)

whether the appellants were obliged to enter into security for the respondents' costs in terms of Uniform Rule 49(13).

19. In *Jeanru*, the appellant 'accepted the legal position' to be that it was obliged to enter security, unless it was released from such obligation by court or by the respondent waiving its right.¹⁵ The court said that the consequence of a finding of irregularity would be that the appeal would have to be removed from the roll or that the appeal run the risk of being struck off.¹⁶

20. The appellant in *Jeanru's* argument was that Rule 47(13) was promulgated outside the powers of the Rules Board. This argument was dismissed.¹⁷ Consequently the application for a date for hearing of the appeal, was set aside as constituting an irregular step.

21. In *Gruskin*, the appellant argued that because the SCA granted leave to appeal and not the High Court, it was only the SCA that could order the respondent to provide security. Accordingly, in the absence of an order pursuant to SCA rule 9(1), the respondent was under no legal duty to furnish security for costs in the pending appeal. The court dismissed the argument and ordered the appellant (as respondent in the application before that court) to provide security.¹⁸ The facts in *Gruskin* are on all fours with the application that this court must decide.

22. Windel J holds the view in *Gruskin* that Rule 49(13) and SCA Rule 9 deal with the same subject matter and that the respective rules are to be construed together and harmoniously. Accordingly, she concludes that –

¹⁵ *Jeanru* supra paragraph 15

¹⁶ *Jeanru* supra paragraph 10

¹⁷ *Jeanru* supra paragraph 29

¹⁸ *Gruskin* supra paragraph 30

22.1. SCA Rule 9 only finds application in cases where leave to appeal was granted by the High Court to the SCA, and not to cases where leave to appeal was granted by the SCA to the Full Court.¹⁹

22.2. SCA Rule 9(1) must, to make sense, be read to apply to instances where the High Court did not release the appellant from providing security for costs. When not released from the obligation, an appellant cannot lodge its record with the Registrar at the SCA before security for costs has been provided. This interpretation explains the logic of SCA Rule 9(2) that provides for the Registrar of the court of first instance that shall determine the form or amount of security if the form of security is contested.²⁰

22.3. Rule 49 governs all Full Court appeals in the High Court and Rule 49(13) must therefore be given effect to when the SCA grants leave to appeal to the Full Court.²¹

23. Although Rand Water presented a compelling argument that the appeal lapsed, inviting the court to make such finding, the court is not willing to make such finding where the notice of motion does not expressly seek such relief.

Findings

24. This Court forms the view that it cannot follow the *dicta* in *Allem*; *Gruskin* is correct.

25. I accordingly find that Kariki is bound to comply with Rule 49(13) where the SCA granted leave to appeal. The steps taken by Kariki to file the appeal record and heads of argument are irregular. There is no reason why costs ought not to

¹⁹ Gruskin supra paragraph 15

²⁰ Gruskin supra paragraph 18

²¹ Gruskin supra paragraph 20

follow the result, albeit that the Court cannot sustain the claim that costs be on the attorney and client scale. Rand Water accordingly succeeds with the relief sought in prayer 1 of its Notice of Motion dated 5 October 2023, with costs on the ordinary scale.

26. In the result, the following order is made:

- 26.1. The filing of the respondent's appeal record and the filing of the respondent's heads of argument in the appeal under case number A2023/080029 are declared irregular steps.
- 26.2. The respondent is to pay the applicant's costs on a party and party scale.

WIJNBEEK AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 22 April 2024.

Appearances

For the applicants: Adv Tsatsawane SC with Adv Loabile Rantao

Raborifi R Inc Attorneys

For the respondent: Mr CMarumoagae

Instructed by: Marumoagae Attorneys Inc.

Date of hearing: 15 April 2024

Date of judgment: 22 April 2024