

SOUTH AFRICA / JUDGMENT

Miambo v Commissioner for South African Revenue Service (A27/2022) [2023] ZAMPMBHC 72 (29 November 2023) [2023] ZAMPMBHC 72

COURT

Mbombela High Court, Mpumalanga

BEFORE

Ratshibvumo, Greyling-Coetzer, Roelofse

CASE / FILE NUMBER

A27/2022

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IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)

APPEAL CASE NUMBER: A27/2022

COURT A QUO CASE NUMBER: 1396/2018

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

11 December 2023

In the matter between:-

LUCIANO ALBERTO RICARDO MIAMBO

Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE

Respondent

JUDGMENT

Coram: Ratshibvumo J, Greyling-Coetzer AJ, Roelofse AJ

GREYLING-COETZER AJ

Introduction

- [1] This appeal concerns a dismissal by Mali J (the court a quo) of the appellant's claim (the plaintiff in the main action) pursuant to a finding by Mali J (the court a quo) that the appellant failed to furnish security for costs as contemplated in Rule 47, having been previously ordered by the court

to do so.

Background

- [2] The appellant, a peregrine, who hails from Mozambique, instituted an action against the respondent (defendant in the main action) claiming damages pursuant

to the seizure and detention of a motor vehicle owned by the appellant.. The action was defended by the respondent.

- [3] During 2019, the respondent demanded security for costs from the appellant in the amount of R800 000.00 (Eight Hundred Thousand Rand). Pursuant to the appellant's failing to act upon said notice, the respondent successfully applied in terms of Rule 47(3) for security for costs.

- [4] Jansen van Rensburg AJ on 7 May 2020, made an order for security for costs, it reads: -

"1. The respondent is ordered to furnish security in the amount of R250 000.00 (two hundred and fifty thousand rand) on or before 25th May 2022 to the registrar of this honourable court.

2. Should the respondent fail to furnish security as ordered (sic) 1 above, all proceedings between the parties will be stayed.
 3. The applicant is granted leave to approach this honourable court on the same papers, supplemented if necessary, to proceed with an application for the dismissal of the respondent's action against the applicant.
 4. The respondent to pay (sic) cost of this application."
- [5] On 11 May 2020 the appellant served and filed a document titled 'SECURITY IN TERMS OF RULE 47' (herein after referred to as "Certificate of security") Ex facie this document the appellant and one Kaiser Kapito Miambo, a South African citizen residing in Gauteng and employed as director at Exlite 415 CC (registration no: 2011/084564/23), bound himself jointly and severally for the payment to the respondent or whom else it may concern, for all costs and charges which the respondent may sustain by reason of a taxed bill of cost against the appellant, to a limit of R250 000.00.

- [6] Not satisfied that the certificate of security is adequate, the respondent's attorneys of record called upon the appellant to either pay R250 000.00 or to provide a bank guarantee for said amount. The inadequacy of the form of security was also raised through correspondence directed to the registrar of this court.
- [7] On 4 June 2020 the respondent, via its correspondent attorneys, received an e-mail from one of the court's personnel, Ms. Lekhuleni, containing an "order" dated 7 May 2020, but issued on 4 June 2020, which "order" reads:-
- "1. Application granted.*
2. Respondent to pay R250 000.00."
- [8] On 20 July 2020 the respondent applied in terms of Rule 47(4) for the dismissal of the appellant's action. The application was founded upon the appellant's failure to furnish security for costs as ordered, the respondent alleging that the appellant had been ordered to make payment of an amount of R250 000.00, but had not done so. The appellant opposed this application
- [9] On 17 November 2020, the court a quo found in favor of the respondent and ordered that the appellant's action be dismissed, together with costs of the application and the action. This appeal lies against this judgment.

Findings of the court a quo

- [10] The court a quo found that Jansen van Rensburg AJ ordered the appellant to pay security in the amount of R250 000.00. The court quo's reasoning was that, although the order by Jansen van Rensburg AJ ordered that the appellant had to 'furnish' security the word 'furnish' read with the word 'amount' later in the same sentence, means that the amount of R250 000.00 had to be paid, as the word 'amount' relates to something quantifiable and or currency and that currency is measured in rand and cent. The court a quo proceeded find that the amount of security had to be paid and proceeded to dismiss the action with costs.

Grounds of appeal

- [11] The appellant raises 4 grounds of appeal, conveniently summarized as follows: -
- (a) the court a quo erred in finding that the appellant had not furnished security in the amount of R250 000.00 as ordered by Jansen van Rensburg AJ;
 - (b) the court a quo incorrectly found that the word 'amount' as referenced in Rule 47 means to making payment after concluding that the only way or form to furnish the amount is to make payment.
 - (c) the court a quo erred by failing to find that the respondent, dissatisfied with the form of security, ought to have approached the registrar; and

(d) the court a quo erred by dismissing the appellant's claim without considering any other order.

[12] In this appeal the appellant seeks the order of the court a quo's to be set aside, and substituted with an order that the respondent's application for the dismissal of the appellant's action be dismissed with costs.

The parties' contentions in the court a quo

[13] The case relied on by the respondent in the court a quo, and through placing reliance on both the judgment of Jansen van Rensburg AJ and the subsequent order, was that the appellant was ordered to furnish security, which meant that the appellant was ordered to pay an amount of R250 000.00 as security.

[14] The appellant contended that the judgment of Jansen van Rensburg AJ did not order payment, but the furnishing of security in the amount of R250 000.00. Therefore, the security provided, by means of the Certificate of security, was sufficient security for the purpose of compliance with the order by Jansen van Rensburg AJ. Furthermore, that the origin of the further order dated 4 June 2020, wherein it is ordered that the appellant ought to pay the amount of R250 000.00, was unknown and rather questionable. The appellant also contended that the respondent ought to have approached the registrar for a determination of the form of security in circumstances where it was not satisfied with the Certificate of security.

[15] In reply the respondent contended that the form of security was wholly inadequate, considering that the Certificate of security was signed by one Kaiser Kapito Miambo, whereas Exlite 415 CC, the entity of which it was alleged that Kaiser Kapito Miambo was a director of, had three members, being Tshegofatso Lucia Miambo, Kaiser Kapito Mlambo and Michael Kaizer Mlambo. Further ex facie the Certificate of security, it was unknown whether Kaiser Kapito Miambo was duly authorized to provide such security on behalf of the appellant. Thus, that said Certificate of security did not meet the threshold in terms of Rule 47.

Analysis

[16] Rule 47 provides as follows:

"47. Security for costs

- (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.

- (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 10 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.

[17] Rule 47(4) empowers a court to dismiss a claim (such as the appellant's claim in this instance) if security is found not to have been provided. This power emanates from the court's inherent jurisdiction to grant such an order.[1]

[18] The dismissal of a proceeding on the basis of a plaintiff failing to provide security is a manifestly extreme remedy which a court should reluctantly grant in the presence of less drastic remedies or when other remedies are equally available to satisfy the objective of security for costs.

[19] In *Wallace NO v Commercial Union Insurance Co of SA Ltd*[2] dealing with security for costs and an application for a dismissal of the main action in terms of Rule 47(4), the court held that:-

"... The use of the word 'may' in the text of the rule at least empowered the court to dismiss an action or to take other steps. A decision to dismiss an action was not a matter of the ordinary housekeeping or procedural running of the court and it was trite that a court would be slow to adopt the extreme measure of dismissal of an action when other remedy was available.

[20] In *Wallace NO* supra the quoted with approval from the matter of *Western Assurance Co v Caldwell's Trustees* 1918 AD 262 at 273 where Solomon JA said:-

'Now it is needless to say that strong grounds must be shown to justify a court of justice in staying the hearing of an action. The courts of law are open to all, and it is only in very exceptional circumstances that the doors will be closed upon another who desires to prosecute an action.' That approach has been steadily adopted ever since."

- [21] The court in Wallace NO (supra) gave consideration to the effect that a dismissal would have, and found that it would not only oblige the plaintiff to institute a fresh action, but the matter would have gone beyond the period of prescription. Therefore, the dismissal amounted in effect to a situation where the plaintiff could no longer pursue any remedy.
- [22] In the Wallace NO (supra) the court found that the court a quo erred in not giving due consideration to the effect of the prescription, existence of alternative remedies to either directing the appellants in that matter to file security by a specific date alternatively to allow the appellants an opportunity to file an affidavit giving details of the transactions and arrangements in order to obtain the necessary funds to set security. The court found that the court a quo in that matter had to consider the alternatives, as the alternatives were more achievable than what the court a quo considered them to be.
- [23] Dealing with Rule 58(2), being the equivalent rule of security in the Magistrate's Court, Trollip J in SA Scottish Finance Corporation Ltd v Smit 1966 (3) SA 629 (T), [3] and dealing with the dismissal of an action upon failure to provide security, said:
- "Generally, I do not think that the action ought to be dismissed unless 'the plaintiff has recklessly disregarded his obligation; or ... the case appears to be hopeless, or the court is convinced that the plaintiff does not seriously intend to proceed'. That was the test applied by Greenberg J (as he then was) in Ford v South African Mine Workers Union 1925 TPD 405 at 406 in determining whether to grant absolution from the instance under the Supreme Court rules against a plaintiff for not filing a declaration timeously, and I think that it is also a useful guide for Rule 58(2)."*
- [24] I now turn to deal with the grounds of appeal in turn. It is convenient to deal with the first and second ground of appeal simultaneously.
- [25] In Magida v Minister of Police 1987 (1) SA 1 (A) [4] the court analyzed Roman-Dutch authorities. It concluded that various forms of security have been recognised. They were suretyship (fideiussor), pledge (actio pignoratitia) and security on oath (actio giratoria), some of which have become obsolete because of disuse.
- [26] In Majunja Food Processors SARL v South African Dried Fruit Cooperative Ltd 2000 (2) SA 94 (C) [5] it was stated that security for costs is part of practice and not part of the substantive law. Normal practice, in terms of the common law, was that security takes the form of a suitable bank-, institutional- or personal guarantee, or other acceptable guarantee. The court proceeded to state that to comply with the objective of giving security, in its view, it ought to be tangible and durable. It ought to possess value and be negotiable. These attributes are not necessarily exhaustive. The court proceeded to hold that for that reason moveable property is not excluded as a form of security, provided it complies with the criteria mentioned above.
- [27] Similarly, when regard is had to Rule 47(5), there is no limitation set by the rule itself on the form or manner of security the registrar or the court may direct to be furnished.

- [28] I therefore have to respectfully disagree with the court a quo's finding that although the order of Jansen van Rensburg AJ ordered the furnishing of security, when the word 'furnish' is contained in the same sentence and read together with the word 'amount', it means that payment had to be made. I differ on the basis that it is generally accepted that security can be furnished, or differently put, set by means of either payment or delivery of a suitable guarantee or even moveable property. As long as the form of security serves the objective of the rule. In order for a form of security to serve the objective one has to consider the characteristic of the form of security. Therefore, is it for example tangible, durable and does it possess value. Further to this does it provide assurance that the defendant will be able to recover its costs on the action failing.
- [29] Therefore, it does not mean when the court orders that security must be furnished and fixes the amount that said amount must be paid. The word 'amount' can similarly be equated to the term 'to the value of'.
- [30] That leads to the next question. Does the appellant's certificate of security amount to security that serves the objective of the rule and comply with the criteria and characteristic as discussed above?
- [31] I am of the view that it does not constitute proper security. The certificate of security relied on by the appellant does not demonstrate that it has any value, nor can it be said to be tangible. It provides no assurance that the amount has been secured or is available. More so, when regard is had to that pointed out by the respondent in the court a quo, in that the person purportedly furnishing security is not the same person listed as a director, nor is there any resolution provided by the appellant confirming the authority of such person to bind the close corporation as far it is suggested that its proper security as the person is employed as director of Exlite 415. It is further unclear whether Kaiser Kapito Miambo has any beneficial interest in Exlite 415. The mere referencing of his employment and directorship do not confirm that there is any value in the Certificate of security.
- [32] I agree with the court a quo that these issues, more particularly, the adequacy of the form of security utilised by the appellant, was an issue for the appellant to satisfy the respondent of. Differently put, the onus was on the appellant to demonstrate firstly to the respondent, and if the respondent is still unsatisfied, to the court or to the registrar (if that was to be the case), that the form of security serves the objectives of the rule.
- [33] Before dealing with the third ground of appeal, it is necessary and logical to deal with the fourth ground of appeal.
- [34] In light of that set out above, there can be no question whether the court was empowered, in the absence of suitable and acceptable security being furnished, to dismiss the appellant's claim. However, the enquiry cannot stop there. It appears from the court a quo's judgment and record of appeal that the court did not consider any alternatives but to dismiss the action, nor did the court attempt to strike a balance between the parties' respective interests, or have regard to the effect of the dismissal of the action generally or in so far as

prescription is concerned.

- [35] A court having found that security has not been furnished has to give due consideration to suitable alternatives to serve the objective of the rule. MEC, Department of Public Works v Ikamva Architects[6] dealing with striking of a defence or dismissal of a claim pursuant to non-compliance with Rule 35(3) and in an application to stay the writs brought by the defendants on said basis, the full court observed that:

“The dismissal of a claim or the striking of a defence is a drastic remedy, and the power to grant such a remedy is discretionary, a discretion that must be exercised judicially.....The interpretation and application of a court rule often requires a consideration of the provisions of the Constitution. Section 34 is relevant in this respect, providing that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or tribunal in a fair public hearing. The striking-out of a plaintiff’s claim or a defendant’s defence has a far-reaching impact on this right. It has the potential to deprive a litigant of a fair trial, bringing an end to a claim or defence. In the case of a defendant, the usual effect of a striking-out is to prevent the presentation of a defence so that judgment will be entered for the plaintiff, subject to any further order of court.” (own emphasis)

- [36] I find above equally applicable to Rule 47(4) and where the court is called upon to dismiss an action on the basis of failure to furnish security. Considering the issues highlighted in Wallace NO supra prescription is a relevant consideration as the appellant’s cause of action arose in 2016. There appears not to have been any deliberate disregard by the appellant of his obligation. A dispute existed as to whether the court ordered payment or furnishing

security to the value or ‘in amount’ of R 250 000.00. The appellant furnishing the Certificate of security albeit as found above not to have been proper security.

- [37] There were suitable alternatives, to dismissal, that ought to have been considered by the court a quo. It was open to the court a quo to resolve the dispute by ordering that the appellant furnish the set security by means of payment into the trust account of the

respondent’s attorneys of record or to provide an institutional or bank guarantee to the value of the amount. Both alternatives would serve the objective of security for costs.

- [38] That leaves the third ground of appeal to consider. The appellant’s argument in this respect does not find favor. Having regard to Rule 47(5), a party (as the respondent herein) has more than one remedy to pursue if it is dissatisfied with the form of security that was provided. The respondent, in the circumstances of this case, could have approached the registrar or the court to determine the form of security and/or the manner in which security must be given for the determination of these issues fall within the power of the registrar. It was also entitled to seek the relief it did in terms of Rule 47(5).

[39] The court a quo misdirected itself when it failed to consider alternative options to dismissal, and by doing so failed to strike a balance between the parties' interests. In particular, the court a quo did not consider the effect of the dismissal of the appellant's action for the appellant neither did the court a quo attempt to balance the parties' respective interests as was required.

[40] The appeal for these reasons ought to succeed.

Costs

[41] First dealing with the issue of costs as raised by the respondent, and pertaining to the preparation of the record. The inclusion of unnecessary pages in a civil appeal record caused the Supreme Court of Appeal in *Minister of Police v Mzingeli and Others*[7] to recently to repeat its warning to practitioners to apply their minds when assembling civil appeal records. This court upheld the appeal but made no order of cost.

[42] In *Premier, Free State, and Others v Firechem Free State (Pty) Ltd*[8] the court dealt with the chaos reflected in the appeal record and in upholding the appeal ordered the respondent to pay the cost excluding the cost resulting from identified portions of the appeal record.

[43] The inclusion of unnecessary pages cause wasted expenditure, prejudices judges' time management, and increases costs. It further

distracts from the true issues and can lead to avoidable confusion.

[44] All documents not essential for the determination of the appeal ought to be removed from the appeal record. Only the document on which the appeal is based should be included. What should be included pursuant to aforesaid removal is a list of excluded documents as referred to in Rule 49(7)(a) and a written agreement between the parties to exclude part of the record which have no bearing on the points in the appeal.[9]

[45] In *Kham and Others v Electoral Commission and Another*[10] the Constitutional court warned that unnecessary pages aggravate the burden of reading, while the incorrect exclusion of documents could contribute to courts finding on a set of facts different to that proven in the court a quo.

[46] In this appeal, the appeal record consisted of three volumes totaling 866 pages. Volumes one and two is irrelevant for the purpose of the appeal. The only relevant portions were found in Volume 3 and amounted to a mere 100 pages.

[47] In respect of the cost of the appeal, and save for that set out herein above, there appears to be no reason why cost should not follow the event.

[48] This matter was heard and dealt with in terms of Section 19(a) of the Superior Courts Act, Act 10 of 2013. The appeal panel was constituted and a directive to the latter respect was issued. A re-constitution to the appeal panel was necessary and communicated to the parties, calling for any objection. By 5 December 2023 both parties' responded confirmed that they have no objection to the re-constituted appeal panel presiding in and determining the matter.

Order

[49] Consequentially, the following order is proposed:-

1. The appeal is upheld.
2. The respondent is ordered (subject to paragraph 5 of this order) to pay the appellant's costs.
3. The action is stayed pending paragraph 4 of this order.
4. The appellant is directed to furnish security to the respondent by means payment of R 250,000.00 into the trust account of Respondent's

correspondent attorneys being Van Zyl Le Roux Attorneys by 29 January 2024.

5. The appellant is ordered to pay 50% (fifty percent) of the respondent's costs.

D GREYLING-COETZER

Acting Judge of the High Court

I agree and it is ordered

TV RATSHIBVUMO

Judge of the High Court

I agree

JH ROELOFSE

DATE OF HEARING: 25 August 2023

DATE CONFIRMING NO OBJECTION: 5 December 2023

DATE OF JUDGMENT: 11 December 2023

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[1] Excelsior Meubels Bpk v Trans Unie Ontwikkelings 1957

(1) SA 74 (2). See further Selero (Pty) Ltd v Chauver 1982 (3) SA 518 (T) at 522B

[2] 1999

(3) SA 804 (C)

[3] At 634D-F

[4] At 10A-J

[5] At par 8

[6] 2002

(6) SA 275 (ECB)

[7]

(115/2021) [2022] ZASCA 42 (5 April 2022)

[8] 2000

(4) SA 413 (SCA)

[9] See Rule 49(9)

[10] 2016

(2) SA 338 (CC)

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