

SOUTH AFRICA / JUDGMENT

## M.P v M.P (610/1996) [2017] ZANWHC 69 (27 October 2017) [2017] ZANWHC 69

COURT

North West High Court, Mafikeng

BEFORE

Kgoele

CASE / FILE NUMBER

610/1996

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION,

MAHIKENG

CASE

NO. 610/1996

In

the Rule 47(3) application of:-

M

P (BORN

) Applicant

(ID

No. [...])

and

M

P Respondent

In

re: In  
the application for Leave to Appeal of  
M  
P Applicant  
(ID  
No. 610807 5764 089)  
M  
P (BORN  
P) Respondent  
CIVIL  
MATTER  
DATE  
OF HEARING: 13 OCTOBER 2017  
DATE  
OF JUDGMENT: 27 OCTOBER 2017  
COUNSEL  
FOR THE APPLICANT: Adv. C Zwiegelaar  
COUNSEL  
FOR THE RESPONDENTS: Mr Magengenene

## JUDGMENT

KGOELE J.

[1] There are two applications before me. The first one is an application for leave to appeal my order dated 1 December 2016.

The second application is an application to stay the said application for leave to appeal pending payment of security of costs. The application to order security of costs was argued first and this judgment relates to this application. I will refer to the citation of parties as they are in this application.

[2] A brief background to the two applications is to the effect that on the 1st of December 2016 I granted an order in terms of which the application which was instituted by the respondent under Case No. 610/1996 for the variation of the decree of divorce (the variation application) granted on the 11th December 1997 was dismissed with costs. The respondent then filed a notice of his intention to apply for leave to Appeal against this order and it was served on the 9 March 2017. The applicant in this application (Security of Cost application) then filed its notice of intention to oppose the application of the respondent for leave to Appeal on the 24 March 2017.

[3] The applicant thereafter on the 5th May 2017 delivered to the respondent notices in terms of Rule 30A and Rule 47(1) of the Uniform Rules of Court (The Rules). The Rule 30A was dealing with the failure by the respondent to file together with his application (leave to appeal), an application for condonation for his failure to timeously comply with the provision of Rule 49(1)(b) of the Rules. On the 19th May, the respondent served the condonation application for the late filing of the respondent's application for leave to Appeal

together with a notice in terms of Rule 47(3).

[4] The applicant's Rule 47(3) application for security for costs was delivered on the 1st June 2017. The respondent's intention to oppose the Rule 47(3) application of the applicant was delivered on the 4 July 2017.

[5] The two applications were eventually given the same date for trial. The Rule 47(3) application was argued first and judgment was reserved. This Court then made an order that the application for leave to appeal and the condonation thereof is stayed pending judgment in the Rule 47(3) application.

[6]. The order sought by the applicant in the notice of motion in her Rule 47(3) application is for an order in terms whereof:

*"1. The Respondent has to give security in the amount of R30,000.00 to the Applicant for the costs in respect of his application for leave to appeal and for condonation for the late-noting thereof; and*

2. The Respondent's application for leave to appeal and for condonation for the late-noting thereof be stayed until the Respondent has complied with the order in paragraph 1.

3. The Respondent has to pay the costs of the Rule 47(3)-application for security.

4. Further and/or alternative relief."

[7] The respondent has indicated in his notice of his opposition of Rule 47(3) delivered on his behalf on 19 May 2017 that he is contesting

his liability to give security for costs on the following grounds:

*"(a) It is the First Respondent who has caused the property of the Applicant to be sold in execution for recovering the money that the Applicant owed to the First Respondent pursuant to the division of the joint estate in terms of the Deed of Settlement which was incorporated in the Final Decree of Divorce.*

(b) The demand for security for costs will effectively block the Applicant's access to the Court for determination of its dispute through the due process of law for the simple reason that he is unemployed and a poor person.

(c) The Applicant has been assisted by the Legal Aid Board during the divorce proceedings and therefore, he is not required to furnish security for costs as provided for in terms of Rule 47A of the Honourable Court.

- (d) There are reasonable prospects of success in the Applicant's application for leave to appeal as can be discerned from the grounds for leave to appeal which are stated in the Applicant's notice in terms of Rule 49(1)(b) seeking for leave to appeal.
- (e) There are some other compelling reasons for the Applicant's request for leave to appeal, to be heard in that:
  - (i) there has to be clarification on whether or not it can be said that the division of the joint estate which entails the pension interest(s), has taken place whilst the pension interest(s) itself that are available in the Pension Fund to be claimed and divided, are in fact not yet shared by the parties who are married in community of property.
  - (ii) the possibility of division of the pension interest(s) at a later stage if they are not claimed during the divorce proceedings is a matter of public interest which requires that the Applicant's leave to appeal be heard and determined by the Honourable Court."

[8] The applicant's case is basically that the application for leave to appeal of the respondent is vexatious because it has no reasonable prospect of success and furthermore, there is no other compelling reason why the Appeal should be heard, including

conflicting judgments on the matter under consideration as the matter was settled by the Supreme Court of Appeal (SCA) in the matter of *Ndaba v Ndaba* [2016] ZASCA 162 (SCA); 2017 (1) 342 (SCA) which this Court thoroughly analyzed and applied it in the Variation application which the Court dismissed.

[9] The applicant further submitted that it is common cause that the respondent is unemployed and that there is a strong possibility that the applicant will not be able to recover her costs in case the Appeal fails. According to the applicant's Counsel, this is a typical case where the Court must exercise its discretion in favour of the applicant because the respondent does not even have any movable or immovable assets. It is furthermore the submission of the applicant's Counsel that the prejudice the applicant will stand to suffer outweighs that of the respondent.

[10] It has been stated by the then Appellate Division of South Africa in *Ecker v Dean* 1937 AD 254 at 259 that:

*"In Western Assurance Co v Caldwell's Trustee 1918 AD 262 this court laid down that a court of law had inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process of the court; one of the ways of doing so is by ordering the vexatious litigant to give security for the costs of the other side, and I know of no reason why the court below should not have [exercised] such an inherent jurisdiction."*

[11] The SCA stated as follows in the matter of *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* [2015] ZASCA 93; 2015(5) SA 38 (SCA) at 51:-

*“[17] According to Nicholas J in Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others 1979 (3) SA 1331 (W) at 1339 E-F:*

‘In its legal sense “vexatious” means “frivolous, improper: instituted without sufficient ground, to serve solely as an annoyance to the defendant” (Shorter Oxford English Dictionary). Vexatious proceedings would also not doubt include proceedings which, although properly instituted, are continued with the sole purpose of causing annoyance to the defendant’; “abuse” connotes a mis-use, an improper use, a use mala fide, a use for an ulterior motive’

In *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555(A) at 565 D-E Holmes JA observed:

‘An action is vexatious and an abuse of the process of court inter alia if it is obviously unsustainable. This must appear as a certainty, and not merely on a preponderance of probability. *Raven v Beeten* 1935 CPD 269 at p 276; *Burnham v Fakheer* 1938 NPD 63.’

[12] It is trite that the onus is on the party seeking security for costs to persuade the Court that security should be ordered.

See: *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) in paragraph 14 at 49 E to F.

[13] As a general rule, the mere inability of a plaintiff or applicant as the case may be, who is an incola such as the respondent, to satisfy a potential costs order against him is insufficient in itself to justify an order that he furnish security for his opponent’s costs. Something more is required. The Court must be satisfied that the main action or application (a) is vexatious or (b) is reckless or (c) amounts to an abuse of the process of the Court.

See:- *Crest Enterprises (Pty) Ltd and Another v Barnett and Schlosberg* NNO 1986 (4) SA 19 (C) at 22 A to E;

*Ramsamy NO and Another v Maarman* 2002 (6) SA 159 (C) at 172 I and 173 E; and

*Boost Sports Africa v South African Breweries* (supra) in paragraph 15 at 50C to I.

[14] It is not in dispute that the respondent is unemployed, does not have any movable or immovable assets and that he will not be able to satisfy a costs order to be granted against him in the event of the dismissal of his application for leave to Appeal including his application for condonation for the late-noting of his application for leave to Appeal.

[15] It has been stated in *Paradigm Capital Holdings Ltd v Pap Computer Services CC* 2000 (4) SA 1070C to D:

*“Ascertainable prospects of the respective parties in the main case, more specifically the difficulty or otherwise of establishing what is required to be successful, are not irrelevant in the decision about security for costs .... That is not an issue for its own sake but, apart from influencing the equities in other ways in an appropriate case, because it can reflect upon the prospects of the plaintiff (viz the Respondent in the application for security for costs) (insertion added) becoming liable for costs at all.”*

- [16] The first ground the respondent is relying on to dispute liability to pay the security for costs is that the applicant is responsible for the unfortunate situation he found himself in in that the applicant instituted the execution process to recover her last R5000-00 that was owed to her in terms of the Deed of Settlement. He claims that he was forced to sell the house for much less than it was worth. The applicant's reply to this averments is to the effect that the warrant of execution was against the movable property not the house and she did so to enforce the Deed of Settlement. This ground of opposition by the respondent does not have merit. As to how the recovery of the applicant of the money owed to her led the respondent to find himself in a situation he is in, that of being unemployed and with no money is questionable because the respondent agreed to the said payment. I do not find any cogent reason why the applicant should be blamed for the alleged financial difficulties of the respondent.
- [17] The second ground relied upon by the respondent is that the granting of the application for security for costs will effectively deny the respondent his Constitutional right to have his legal dispute resolved by a Court of Law. The legal representative of the respondent submitted that the respondent was assisted by Legal Aid during the Divorce proceedings. Before approaching this Court again for Variation of Order he did apply again for Legal Aid but it was denied. He prosecuted the Variation of the Order and application for leave to appeal through the help of family members and friends.
- [18] It is so that Rule 47A provides that notwithstanding anything contained in the Rules of this Court a person to whom Legal Aid is rendered by a statutory established Legal Aid Board is not compelled to give security for the costs of the opposing party, unless the Court directs otherwise.
- [19] It is, however, also true that the respondent is not represented in the application for leave to Appeal and for condonation for the late-noting thereof by the Legal Aid Board and that he has also not been so represented in the application for the Variation of the Decree of divorce.
- [20] I am of the view that the granting of the applicant's Rule 47(3)-application for security for her costs would not necessarily

lead to the termination of the respondent's application for leave to Appeal and for condonation for the late noting thereof as it may well be that the family members and friends of the respondent whom he alleged are assisting him to raise funds for the purpose of paying the legal costs of his legal representation, can be approached by him to furnish the necessary security to assist the respondent in pursuing his proposed Appeal.

- [21] It further appears from the notice of application for leave to Appeal of the respondent that one of the grounds he is relying on against the costs order being granted against him is couched as follows:-

*“(vi) The APPLICANT in terms of the papers before Court is unemployed. Therefore, it could not be anticipated that he is in a position to pay the legal costs of the First Respondent”;*

- [22] It thus seems that the respondent's attitude is that he is entitled to litigate against the applicant to his heart's

content and do so without even ensuring that he complies with the Rules of this Court such as Rule 49(1)(b) whilst the applicant have to bear the cost and it can thus not be expected from him to pay for it.

- [23] On the question of ability or inability to pay costs the Court has long time ago even before the Constitutional era, had this to say in the case of *Crest Enterprises v Barnett and Schlosberg* 1986 (4) SA 19 (C) at 22 A-B:-

*“That applicants in this case may never be able to recover any part of their costs if they succeed in the action brought against them by or on behalf of the trust cannot in my view outweigh in the balance the inalienable rights of an incola to call in aid the due process of the law in pursuing his (or its) claim and neither he (nor it) should be effectively deprived of the right to access to this Court (or have any impediment placed in the way of the exercise of the right) upon the basis solely of an inability to pay the costs of the opposing party should he or it subsequently fail in the prospective proceedings”*

- [24] As is evident from paragraph 2 of the applicant's Rule 47(1)-notice the applicant's Rule 47(3)-application for security for costs is based thereon that the respondent's application for leave to Appeal is vexatious as it is obviously unsustainable in that the respondent's proposed Appeal would not have a reasonable prospect of success as contemplated in section 17(1)(a) (i) of the Superior Courts Act 10 of 2013 or some other compelling reason why it should be heard as contemplated in section 17(1)(a)(ii) of that Act.

- [25] The respondent on the other hand maintains that his application for leave to Appeal has prospect of success and furthermore, that there are other compelling reasons for it to be adjudicated.

[26] In expanding on this proposition his legal representative submitted that to start with, the fact that the Court Order sought to be appealed against is in conflict with the SCA (Ndaba) Judgment, is sufficient to meet the requirement of “other compelling reasons” as provided for in terms of Section 17(1) (a)(ii) of the Superior Courts Act. The conflict lies in the fact that the Court Order sought to be appealed against is leading to confusion in that, it only dismissed

the respondent’s claim without stating whether or not he has thereby forfeited his entitlement to share in the applicant’s

pension interest.

[27] According to him another compelling reason is that the interests of justice requires that there should be legal certainty on the question of whether or not, it can be said that the joint estate is divided when in fact, the pension interest are not shared and are available in the Pension Fund. The third compelling reason according to him is that of public interest which needs clarification on the question of whether or not persons who did not claim pension interest during the Divorce action thereby, loses their right to claim same after a certain period (say 19 years as the Court Order sought to be appealed against suggest).

[28] I do not intend dwelling much on the issue of prospects of success and other compelling reasons for the mere fact that the issue raised in these grounds have been thoroughly dealt with by this Court during the Variation Application. The other reason is that the Court cannot be seen to be putting the card before the horses as the application for leave to Appeal is still pending. It suffices to say that I had clearly indicated in my judgment that the applicant and the respondent had in their settlement agreement not only agreed that there should be a division of the joint estate, but also went to an extent as to mention as to what their joint estate entails and who gets what. It also appears that both were aware of the issue of the pension interest being part of their estate but elected not to deal with it although they gave different versions of why it was not dealt with.

[29] In *Golden International Navigation SA v Zeba Maritime Co Ltd; Zeba Maritime Co Ltd v M V Visvliet* 2008 (3) SA 10 (C) paragraph 26, Griesel J posited that:-

*“the ordinary yardstick – a preponderance of probability – should find application in an enquiry such as the present. It is not envisaged, it seems to us, that a detailed investigation of the merits of the case should be undertaken. Nor is it contemplated that there should be a close investigation of the facts in issue in the action. As it was put by Streicher JA in Zietman v Electronic Media Network Ltd and Others 2008 (4) SA 1 (SCA) paragraph 21:-*

*“I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party’s prospects of success would depend on the nature of the dispute in each case”*

[30] In my view, there are no prospect of success in the proposed leave to Appeal. There is furthermore no other reason why this matter should be heard by the Appeal Court because of the fact that the Ndaba matter clarified all the issues that surround the contentious issue of the Pension Interest, and this Court's judgment in the Variation Order applied the principles laid therein and is not in conflict with it.

[31] It has been held in *Silvercraft Helicopters (Switzerland) Ltd and Another v Zonnekus Mansions (Pty) Ltd and Two Other Cases* 2009 (5) SA 602 CPD in paragraph [26] at 607 I to J:

*"[26] It is trite law that the courts have a discretion to grant or refuse an application for security and, in coming to a decision, will consider the relevant facts of each case. Hardship to the peregrinus and financial ability to provide security are taken into account, but are not necessarily decisive. The court should have due regard to the particular circumstances of the case and considerations of equity and fairness to both the incola and the non-domiciled foreigner. See Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa 4 ed at 321-2 and the authorities cited therein."*

[32] In the case of *Giddey NO v JC Barnard and Partners* [2006] ZACC 13; 2007

(5) SA 525 (C) the Constitutional Court held in paragraph [4] at 529 C:

*"Accordingly, in determining whether an order for security should be made, a court needs to take into consideration the provisions of the Constitution in particular, S 34 (which provides that everyone has the right to have a dispute which can be resolved by the application of law by a court of law or tribunal in a fair public hearing) (insertion added).";*

And in paragraph [8] at 530 D to G:

*"[8] The Courts have accordingly recognised that in applying section 13 (of the Companies Act, Number 61 of 1973) (insertion added), they need to balance the potential injustice to a plaintiff if it is prevented from pursuing a legitimate claim as a result of an order requiring it to pay security for costs, on the one hand, against the potential injustice to a defendant who successfully defends the claim, and yet may well have to pay all its own costs in the litigation. To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An applicant for security will therefore need to show that there is a probability that the plaintiff company will be unable to pay costs. The respondent company, on the other hand, must establish that the order for costs might well result in its being unable to pursue the litigation and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospects of success. Equipped with this information, a court will need to balance the interests of the plaintiff in pursuing the litigation against the risks to the defendant of an unrealisable costs order."*

And in paragraph [22] at 535 H:

*"[22] ..... The court at first instance must consider all the relevant facts placed before it and then perform the balancing exercise described at paragraph [8] above.";*

And in paragraph [30] at 538 C to E:

*“[30] In my view there can be no doubt that in exercising its discretion in terms of section 13, a court must bear in mind the provisions of section 34 and weigh them in the light of other factors laid before it. The balancing exercise proposed by the Supreme Court of appeal in Shepstone & Wylie’s (Shepstone & Wylie and Others v Geyser NO 1998*

- (3) SA 1036 (SCA)) (insertion added) case (adopted from the English case *Keary Developments Ltd v Tarmac Construction Ltd and Another*) acknowledges this (albeit without express reference to the Constitution). On one side of the scale must be weighted the potential injustice to the plaintiff or applicant if it is prevented from pursuing a legitimate claim. This incorporates a recognition of the importance of the right of access to courts. On the other side of the scale must be placed the potential injustice to the defendant if it succeeds in its defence but cannot recover its costs. Relevant considerations in performing this balancing exercise will include the likelihood that the effect of an order to furnish security will be to terminate the plaintiff’s action; the attempts the plaintiff has made to find financial assistance from its shareholders or creditors; the question whether it is the conduct of the defendant that has caused the financial difficulties of the plaintiff; as well as the nature of the plaintiff’s action.”

[33] I am of the view that taking all of the above considerations that I made above in balancing the interest of both parties, it is quite clear that the prejudice which the applicant will suffer in the case where the leave to Appeal and the condonation thereof is applied for does not succeed far outweighs that of which will be suffered by the respondent.

[34] The following order is thus made:-

34.1 The respondent is ordered to furnish the applicant with a security for her costs of the application for leave to Appeal including the application for the late filing thereof in the amount and form that will be determined by the Registrar;

34.2 The respondent’s application for leave to Appeal and for condonation for the late noting thereof are stayed until the respondent has complied with the Order in paragraph 34.1;

34.3 Costs to be costs in the cause.

A.M. KGOELE

JUDGE OF THE HIGH COURT

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