IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No: 1997/2018

In the matter between:

RHODES UNIVERSITY	**First Applicant**
RHODES UNIVERSITY APPEALS REVIEW COMMITTEE	**Second Applicant**
DR STEPHEN FOURIE N.O.	**Third Applicant**
TOM MARTIN	**Fourth Applicant**
DR ADELE MOODLY	**Fifth Applicant**

And

YOLANDA ZULU	**Respondent**

JUDGMENT

BESHE J:

[1] This is an interlocutory application wherein an order in the following terms is sought:

"1. The review proceedings instituted by the Respondent under this case number be stayed pending payment of the Applicants unpaid costs;

2. Further and/or alternative relief;

3. Costs of this application."

[2] In the notice issued by the applicants in terms of *Rule 47 (3) of the Uniform Rules* of this court, and served on the attorneys of the respondent, a security in the amount of R250 000.00 or such sum as is determined by the Registrar was demanded. The respondent did not comply with the notice hence this application.

[3] It is common cause that the respondent is the applicant in the main application where she seeks the following relief:

(i) Reviewal and setting aside of second applicant's decision to overturn the fourth applicant's decision.

(ii) Review of the decision to academically exclude her from Rhodes University.

(iii) The review of the decision to institute disciplinary charges against her.

(iv) An order that she be allowed to register at Rhodes University.

(v) Costs.

[4] It is also common cause that respondent is currently a student and is not possessed of financial means to meet two costs orders that were made against her previously in connection with this matter.

[5] Applicants assert that in the circumstances the respondent is highly unlikely, should the applicants be successful in their opposition to the main application, to be able to pay applicants' taxed bill of costs. It is submitted in this regard that respondent's prospects of success in the main application are extremely doubtful. In this regard, the applicant points out certain hurdles respondent will face in respect of the main application. *Inter alia*, that the review application was brought out of time. The untenability of her having this court usurp the contractually agreed role of the first applicant by deciding the outcome of the disciplinary hearing without hearing evidence.

[6] I was taken through a time line of events or the manner in which the respondent has conducted the litigation thus far. I do not propose to regurgitate the time line which appears to be common cause between the parties.

[7] Based on such time line, applicants assert that the respondent has paid scant regard to the rules and time limits of this court. And that she is litigating at no risk to

herself whilst causing substantial risk to the applicants in terms of costs. That she has no regard for the financial consequences of this litigation.

[8] Respondent denies that the applicants are suffering any prejudice. She submitted that she is the one being prejudiced, that the applicants are intent at denying her the opportunity to fight for her education which she terms a gateway right which will enable her to escape poverty. That as an incola she is not required to pay security for costs. And that if she were to be required to pay security for costs, which she is unable to do, she will be denied her right of access to a court in regard to her review application. It is further argued on behalf of the respondent that if she were to be unsuccessful in the main application it does not follow that she will face an adverse costs order. Reliance for this submission is placed on ***Biowatch Trust v Registrar, Genetic Resources***[1] where it was stated:

"[24] At the same time, however, the general approach of this court to costs in litigation between private parties and the State, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the State, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the State in favour of a private litigant who achieves substantial success in proceedings brought against it."

[9] Whilst I have my doubts about the applicability of this dictum in this matter, it is neither the appropriate stage nor for this court (in the present proceedings) to determine which party's to bear the costs.

[10] *Rule 47 (3)* provides that:

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[1] 2009 (6) SA 232 CC at [24].

"(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."

[11] Even though under the common law an incola of the Republic cannot as a general rule, be called upon to give security for costs, *Rule 47* does not seem to differentiate between incola and peregrinus.

[12] Respondent's strongest argument in my view, is that if she were to be required to furnish a security for costs, which she is unable to at this stage, she will be denied her day in court. That this is turn would infringe on her right to access to court as provided for in *Section 34 of the Constitution*. This section provides that:

"**Access to courts**

34. Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[13] Commenting of *Section 13 of the Companies Act*[2] which confers a discretion upon courts to order payment of security for costs by a plaintiff company if there is reason to believe that it will be unable to pay the costs of its opponents. *O'Regan J* had this to say:[3]

"[8] The Courts have accordingly recognised that in applying s 13, 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

[2] Act 61 of 1973.
[3] Giddy NO v JC Barnard and Partners 2007 (5) SA 525 at 530 [8].

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."

[14] I have already, albeit, briefly outlined facts relevant to this application.

[15] It is clear that should I acced to the application and order the respondent to furnish a security for costs, that will deny the respondent her right of access to court in this regard. A right enshrined in the Constitution. Granted that the applicants are suffering a prejudice by not being able to recoup their costs against the respondent, upon balancing the interests of the parties, I am of the view that it will not be appropriate or just to deny the respondent the right to have the dispute between her and the applicants resolved by application of the law in a public hearing before a court of law.

[16] For this reason, the application should fail.

[17] I however do not propose to order the applicants to pay the costs of this application. In my view in the circumstances, they were justified in approaching the court for the order sought. Given that it is common cause that the respondent is unable to meet the costs orders given against her up to this point.

[18] The application is dismissed. Each party to pay its own costs.

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NG BESHE
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicants	:	Adv: I J Smuts SC
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For the Respondent	:	Adv: S Sephton
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