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

CASE NO: A5005/2021 & 2016/44725

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

12/08/2021
DATE

SIGNATURE

In the matter between:

DR MAUREEN ALLEM INC Applicant

and

DR ELSA SUSANNA CECILIA BAARD Respondent

In re:

DR ELSA SUSANNA CECILIA BAARD Appellant

and

DR MAUREEN ALLEM INC Respondent

JUDGMENT

ENGELBRECHT, AJ:

Introduction

1. This application in terms of Rule 30A(2) of the Uniform Rules concerns the duty of an appellant to furnish security for costs. In its notice of motion, the

applicant seeks an order to compel the respondent to furnish security for costs as contemplated in Uniform Rule 49(13) within 5 days, failing which the applicant be authorised to apply for the respondent's appeal to be struck or dismissed with costs. In a draft order uploaded to CaseLines shortly before commencement of the hearing, the proposed period for compliance has been reduced to 3 days before the applicant's entitlement to apply for the appeal to be struck or dismissed is activated. In argument Mr Novitz, who appeared for the applicant, explained that the exigencies of the case (which appear from the discussion of the facts hereinbelow) call for an order of compliance within such a short space of time.

2. The application arises in the following circumstances.

2.1. The respondent sought and, on 3 September 2020, obtained leave from the Supreme Court of Appeal (SCA) to appeal an order of my brother Mtati AJ to a Full Bench of this Court. That order essentially concerned the production of patient details and other documents sought by the applicant in the context of a restraint of trade dispute. The details are immaterial to the present application.

2.2. The appeal is set down for hearing on 18 August 2021 by way of a notice from the registrar dated 28 May 2021, the respondent having filed the record of appeal on 28 December 2020 and heads of argument on 21 April 2021.

2.3. Well before the record of appeal was filed, on 1 October 2020, the respondent requested the applicant to waive security for costs as contemplated in Uniform Rule 49(13). This, apparently on the basis that the respondent at that stage considered herself bound under Rule 49(13) to furnish security unless she obtained a waiver or a court order

releasing her from the obligation to put up security. Consent to waive security was not forthcoming. Towards the end of October 2020 the respondent then adopted the position that it was unconstitutional to demand security under Rule 49(13), and her attorneys communicated this view to the applicant by way of a letter of 22 October 2020. Unsurprisingly, the applicant expressed disagreement with this position in early November 2020, but the issue of putting up security was not taken substantially further until the applicant, on 31 March 2021, issued a notice in terms of Rule 30A (the Notice). The respondent did not comply with the Notice; indeed, on 6 April 2021 the respondent expressly informed the applicant that she would not comply with the Notice. Then, on 21 April 2021, the applicant launched the present application.

3. The applicant relies on the purported obligation expressed in Rule 49(13) that an appellant furnish security for costs unless the circumstances contemplated in that rule prevail, which they do not in the present instance, in the sense that no waiver nor court order releasing the respondent from a duty to put up security is in place. The applicant insists on a right to demand security for costs, which it submits has its source in Rule 49(13). The applicant elected to give effect to its asserted right by invoking the procedure in Rule 30A to compel compliance with Rule 49(13).

4. This being an application in terms of Rule 30A(2), this Court is empowered to make such order thereon as it deems fit. Rule 30A(2) confers a discretion on the court, which must be exercised judicially and upon a proper consideration of all the relevant circumstances, which may include (i) the reasons for non-compliance, (ii) whether the defaulting party's case appears to be hopeless;

(iii) that the defaulting party does not seriously intend to proceed; and (iv) prejudice to either party. This list is not exhaustive, but it is indicative of the matters properly to be taken into account in the judicial exercise of discretion.

5. The respondent opposes the application. She primarily bases such opposition on the reason for non-compliance, which is that the respondent denies an obligation to furnish security. The respondent asserts that (i) Rule 49(13) provides for an inflexible right to demand security; (ii) Rule 49(13) is inconsistent with the provisions of the Superior Courts Act 10 of 2013 (Superior Courts Act) and is therefore of no force and effect; (iii) Rule 49(13) is *ultra vires* the provisions of section 6(1)(m) of the Rules Board for Courts of Law Act 107 of 1985 (the Rules Board Act); (iv) Rule 49(13) is invalid in accordance with the principle of legality; and (v) this Court has no jurisdiction to grant the relief sought. She also says that her case is not hopeless, since the SCA granted her leave to appeal, and that she has every intention to proceed with the appeal, as is evident the steps taken to ensure that the appeal has been set down for hearing on 18 August 2021. The respondent further submits that the applicant cannot assert prejudice in the circumstances.

6. The registrar allocated the week of 10 August 2021 for the hearing of the application. In a "*Joint Practice Note"* uploaded to CaseLines on 2 August 2021, but not signed by Mr Guldenpfennig SC for the respondent, it was pointed out that "*The Appeal to which this Interlocutory Application relates, has been set down for hearing on 18 August 2021. Accordingly, Judgment herein is required before such date"*. In the circumstances, I directed that the application be the first to be entertained on my roll for the week, at 10h00 on 10 August 2021. On the morning of the hearing, the respondent uploaded to

CaseLines an amended "*Joint Practice Note"* signed by Mr Guldenpfennig SC, which added a gloss to the assertion in the initial "*Joint Practice Note"* that judgment was required before 18 August 2021, as follows: "*The Respondent submits that it is improper for the Applicant to pressurize the Court for a judgment in a complex matter as the present to deliver judgment expeditiously especially under the circumstances where the Applicant dragged their feet in launching this Application. The Applicant should have brought this application prior to the filing of the record of Appeal by the respondent on 28 December 2020 as contemplated in Rule 49(13) of the Uniform Rules of Court"*.

7. It is certainly undesirable for this court to be placed under severe time pressure to give a judgment that has the capacity to affect not only the interests of the parties to this dispute, but parties and practitioners more generally, and which raises multifaceted and complicated arguments for consideration. However, the pressure is partly brought to bear in consequence of the enrolment system. Notably, at the time the present application was launched, the date for the hearing of the appeal had not been allocated. This court has no choice but to grasp the nettle, and to render the judgment expeditiously. I am grateful for the assistance received from the useful heads of argument and oral submissions of Messrs Novitz and Guldenpfennig SC.

8. At this juncture, I consider it appropriate to apologise for the length of the judgment. I am reminded of a letter penned by William Cowper in 1704 in which wrote "*if in this I have been tedious, it may be some excuse, I had no time to make it shorter"*.[1] In any event, the issues raised demand a proper exegesis and contextual evaluation: the parties are entitled to a

[1] https://quoteinvestigator.com/2012/04/28/shorter-letter/.

comprehensive understanding of the court's reasoning that leads to the order made, and other interested parties might find value in a comprehensive consideration of the issues raised.

Rule 49(13)

9. Given the basis for the application and the reasons advanced for non-compliance in the present instance, the necessary starting point must be Rule 49(13).

10. It provides:

"*(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 of or partially from that obligation, the appellant shall before lodging copies of the record on appeal, with the registrar, enter into good sufficient security for the respondent's costs on 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."

11. Rule 49(13)(a) appears to be peremptory in its terms. On its plain language, it envisages that security for costs must be given by an appellant unless one of two circumstances prevails, namely (i) either that the counterparty has waived his or her right to security; or (ii) the court granting leave to appeal has released the appellant from the obligation. The premise upon which Rule 49(13)(a) is based is that a respondent in an appeal has a "*right to security*".

This is certainly the assumption from which the Full Bench in *TR Eagle Air (Pty) Ltd v RW Thompson,*[2] a judgment that I discuss hereinbelow, proceeded.

12. Rule 49(13) did not always read as it does now. Prior to its amendment on 29 October 1999, it provided that –

"*Unless the respondent waives his right to security, 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. In the event of failure by the parties to agree on the amount of security, the Registrar shall fix the amount and his decision shall be final."*

13. However, In *Shepherd v O'Neill*[3] the court reviewed a number of authorities and concluded that the Rule in its then form was in conflict with the Constitution and invalid. It stated that:

"It is clear from what is set out earlier in this judgment, that in virtually every case where security is demanded of a litigant, the Court has a discretion whether to order that such security be put up. As matters stand at present in terms of Rule 49(13) the Court has no power to either exempt an appellant from putting up security or to interfere with the amount fixed by the Registrar. There is much to be said for protecting a respondent in an appeal from an impecunious appellant who drags him from one court to the other. On the other hand to in effect bar access to a Court of Appeal because a deserving litigant is unable to put up security appears to me to be unfair and in conflict with the provisions of the Constitution. <u>The conflicting rights of the litigants can, in my view, be adequately safe-guarded were the Court to be vested with the power to determine, in the exercise of its discretion, whether a particular appellant</u>

[2] 2021 JDR 0699 (GP).
[3] 2000 (2) SA 1066 (N).

should be compelled to put up security and in what amount. To the extent that Rule 49(13) does not embody that power I consider it to be in conflict with the Constitution and to that extent invalid."[4]

14. The court suspended the declaration of invalidity in terms of section 172(1)(b)(ii) of the Constitution for a period of three months to enable the Rules Board to correct the defect. The judgment appears to have led to the amendment of October 1999.

15. The applicant accordingly submits that, post-amendment, Rule 49(13)(a) is not inflexible, because it provides the Court with the power to release an appellant from the obligation to provide security and affords an appellant the opportunity to approach the court that granted leave (here, the SCA) for an order dispensing with the requirement to provide security.

Judicial interpretation and application of Rule 49(13) post-1999

16. In light of the arguments raised before me, it is prudent to rehearse the judicial treatment of Rule 49(13) in the available case law and to consider the development of Rule 49(13) over the years. I cannot assert that the summary that follows is complete, but it is an attempt to collate the history of treatment of section 49(13), largely in unreported judgments.

17. Following the judgment in *Shepherd*, which concerned the constitutionality of Rule 49(13) in its pre-1999 form, little attention appears to have been given to the constitutionality of Rule 49(13) in its amended form. The only notable exception to this is the oldest case among those that I propose to discuss in this section.

[4] Emphasis supplied.

18. In *FirstRand v Van der Merwe*[5] (*FirstRand*), an unreported judgment of Froneman J, then sitting as a judge of the Eastern Cape Division of the High Court, the learned judge considered an application to set aside as irregular an earlier application aimed at exempting an appellant from providing security called for by the respondent in the appeal. The appeal was, as is the case in the present matter, with leave of the SCA. However, in that case, the appellant had made application to be released from the obligation to put up security; it was not an application to compel.

18.1. At the outset, Froneman J expressed the view that "*after hearing argument and upon further reflection it appears to me that rule 49(13) may well be ultra vires and thus unconstitutional*".

18.2. The learned judge explained that *"there is a … fundamental problem relating to rule 49(13), one that ultimately favours the respondents, namely that they are not obliged at all to provide security in an appeal of this nature".*

18.3. The reasoning was premised in the first instance on the provisions of the Supreme Court Act 59 of 1959 (Supreme Court Act): "*Section 20(5)(b) of the Act explicitly vests the court granting leave to appeal from civil appeals in the High Court with the discretionary power to order the furnishing of security, but the Act contains no such a provision in respect of a court granting leave to appeal from the High Court as a court of first instance in civil appeals."*

18.4. It is worth recording his reasoning in full:

[5] [2002] ZAECHC 23, accessible at http://www.saflii.org/za/cases/ZAECHC/2002/23.html.

"The rules of court are delegated legislation and if a rule does not fall within the scope of its enabling legislation it is ultra vires (Harms, ***Civil Procedure in the Superior Courts****,* ***A 2.2****, 2002 ed.). The enabling statutory provisions for the old Appellate Division rules and the Uniform Rules for the High Courts were the now repealed ss. 43(1) and 43(2)(a) of the Act. These provisions allowed for the making of rules 'for regulating the conduct of the proceedings' in those courts in broad, permissive terms. Security for costs was seen as a matter of practice and not of substantive law, with the result that an ultra vires challenge to the old AD rule 6(2) and the old High Court rule 49(13) (which dealt with security for costs on appeal) was unlikely to have met with any success.*

Matters have changed on two fronts.

The enabling legislation is now to be found in the Rules Board for Courts of Law Act 107 of 1985. Section 6(1)(m) of Act 107 of 1985 provides that the Rules Board may make rules that regulate

'the manner of determining the amount of security in any case where it is required that security shall be given, and the form and manner in which security may be given.' (my emphasis).

The rules may thus not stipulate where security is required – the legal obligation to provide security, or its obverse side, the right to require security from an opposing party, must be found elsewhere.

The second change is the new constitutional context. An inflexible right to demand security effectively infringes everyone's right of access to justice under s.34 of the Constitution, as held in ***Shepherd v O'Niell****, above, at* ***1073C-D****.*

Section 20 of the Act deals comprehensively with parties' rights in the appeal process from the High Courts. It provides for a discretionary power to order security in one case (appeals from appeals), but not in another (appeals from the High Court of first instance). The common law cannot help either. The inherent power of the superior courts to regulate their own process as far as ordering security is concerned is limited to controlling vexatious litigation – the kind of litigation which is almost by definition excluded where an order granting leave to appeal is made.

The Supreme Court of Appeal rules no longer contain a provision similar to the old AD rule 6(2) which provided for an inflexible right to demand security. The present rule 9 dealing with security refers only to the situation where the court granting leave to appeal has ordered the appellant to provide security. It thus falls within the enabling provision of s.6(1)(m) of Act 107 of 1985.

In my judgment the provisions of rule 49(13) do not fall with the limits set by s. 6(1)(m).

In so far as the provisions of the rule seeks to be the source of a right to security it goes beyond the powers of regulation set out in s.6(1)(m) of Act 107 of 1985. If its claim is more modest, namely that it merely

assumes the existence of such a right, it still overreaches itself because there is no other source of such a right.

*If this reasoning is correct rule 49(13), even in its amended form, is invalid. The cure, if needed, lies in amending the Act, not the rules. Although the invalidity stems from reasoning thus far couched in terms of the common law ultra vires doctrine, it in effect amounts to a finding that the rule is invalid under the Constitution according to the doctrine of legality (**Pharmaceutical Manufacturers Association of SA and another: In re ex parte President of the Republic of South Africa and others 2000(2) SA 675 (CC)**, **para [50]**, **698D-F**).”*

19. In *Strouthos v Shear*[6] Daniels J dealt with an application for an order directing the respondent to lodge good and sufficient security for the applicant’s costs of appeal noted by the respondent. He noted that, in granting leave to appeal, the Chief Justice (who gave the leave) “*did not release the respondent wholly or partially from his obligation to furnish security for the applicant’s costs of appeal as contemplated in Rule 49(13)(a) of the Uniform Rules of Court*”.[7] The learned judge explained that:[8]

“Here it is provided that the Court in granting leave to appeal 'or subsequently on application to it. . . .' (as opposed to the Court to which the appeal is 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.

[6] 2003 (4) SA 137 (T).
[7] At 138B.
[8] At 140F/G.

Since leave to appeal was granted by the Supreme Court of Appeal, or properly put, the President of that Court, it is only that Court that can conceivably release the respondent from his obligation to provide security, and the Court hearing the appeal accordingly does not have jurisdiction to do so. This much follows from a proper reading of the subrule. Should the appellant be so inclined he could apply to that Court for such relief. In considering such an application the Court has a wide discretion which will be judicially exercised. (See Chasen v Ritter 1992 (4) SA 323 (SE); Chopra v Sparks Cinemas (Pty) Ltd and Another 1973 (2) SA 352 (D) and Mynhardt v Mynhardt 1986 (1) SA 456 (T).) However, until such time as such an order is obtained, the respondent is obliged to provide security, and this must be done before lodging copies of the record on appeal with the Registrar in terms of subrule 13(a). The copies of the record were lodged on 1 February 2002. Since security was then not lodged, the lodging of the copies of the record on appeal constitutes an irregular step within the meaning of Rule 30, and may accordingly be set aside upon application. Should it be set aside the provisions of subrule 7(d), which provides that

> *'(i)f the party who applied for a date for the hearing of the appeal neglects or fails to file or deliver the said copies of the record within 40 days after the acceptance by the Registrar of the application for a date of hearing in terms of subrule (7)(a) the other party may approach the Court for an order that the application has lapsed.'*

apply. Should security not be furnished, the record cannot be lodged, and subrule (7)(c) cannot be given effect to.

Obviously where no application is brought in terms of Rule 30 or where such an application is refused for whatever reason, the appeal will be proceeded with, and a respondent will then have to move for the appeal to be struck from the roll for want of compliance with the Rule as was done in Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk 1974 (4) SA 291 (C). This does not mean that an appellant is automatically released from his or her obligation to furnish security.

As explained earlier it is the respondent's case that he is entitled to proceed, and that he may or may not apply for condonation for his failure to lodge security, and if he does so apply and that application is refused, the applicant will then be entitled to move for the appeal to be struck from the roll. It is argued that notwithstanding the fact that he has not been released from that obligation, the applicant is not entitled to demand security nor is he obliged to lodge security. This approach renders the rule a nullity, and as said earlier, the respondent is clearly wrong. It is for the respondent to apply for and obtain the release from his obligation to provide security.

The applicant applies for an order directing the respondent to furnish security. Strictly speaking such an order is not required, since the respondent is obliged in terms of the Rule to provide security. The Rule does not provide for an order in the terms prayed."

20. The judgment of the Full Bench in South Eastern Cape Local Division in *Nondwendwe Kama and Others v Nombulelo Anoria Kama and Another,*[9] dealing with an appeal where no security was put up, noted *"Mr Cole did not seek to argue that the respondents were not obliged to furnish security nor*

[9] Case No 1357/2005 (Judgment of 6 September 2007).

could he have done so in view of the fact that Rule 49(13)(a) is couched in peremptory terms. Where security has not been furnished in terms of this rule such a failure may have fatal consequences as the appeal may be struck off the roll and this is what will invariably happen in the absence of condonation being granted".[10] These observations must be treated as *obiter*, since the parties in the appeal came to an agreement that no security would be put up, in the interests of proceeding with the merits of the appeal itself. However, it is clear that the Court considered Rule 49(13) to be peremptory.

21. In *Jyoti Structures Africa (Pty) Ltd v KRB Electrical Engineers / Masana Mavuthani Electrical and Plumbing Services (Pty) Ltd t/a KRB Masana*[11] the respondent in an appeal applied to set aside as irregular certain steps in terms of Rule 30(1), the filing of copies of the record on appeal and the making of an application for the hearing of the appeal, and for an order declaring that the appeal had lapsed. The judgment records that "*In following the steps required for the proper prosecution of the appeal, the appellant omitted to furnish security for the appeal in terms of rule 49(13)".*[12] It is explained that "*The appellant lodged copies of the appeal record with the Registrar, and made application for the hearing of the appeal, without entering into 'good and sufficient security for the respondent's costs of appeal'. It is common cause that the right to security was not waived by the respondent and the appellant was not released from that obligation by the court".* Within three days of service upon the respondent of the appeal record, the respondent served a notice in terms of Rule 30(2)(b), asserting that the failure to enter security

[10] Emphasis supplied.

[11] 2011 (3) SA 231 (GSJ).

[12] At para 3.

resulted in the filing of the record being an irregular step. A nominal amount was then provided. The learned judge was critical of this approach, and expressed the view that, in the case of Rule 49(13), "*security must be furnished as a matter of course, without proof that it is required, unless there is a waiver or a release from such obligation*".[13] Again, the judgment proceeded from the premise that Rule 49(13) was peremptory in its terms.

22. All of these judgments were handed down prior to the promulgation of the Superior Courts Act. Accordingly, they did not, and could not have, dealt with the position on provision of security in the context of the provisions of the Superior Courts Act.

23. On 14 December 2016 Tuchten J in the Gauteng Division, Pretoria, some three years after the Superior Courts Act came into force, rendered judgment in *Carpe Diem Explorations (Pty) Ltd v Kasimira Trading 82 (Pty) Ltd.*[14] Amongst many other procedural problems plaguing the appeal was listed failure to provide security under Rule 49(13).[15] The appellant sought condonation for some of its failures and asked the court to (i) release it from the obligation to furnish security ; or (ii) order it to find such security in an amount to be determined by the Court.[16] The learned judge commented that: "*The failure to find security and to obtain a ruling on the failure to find security before the appeal was due to be heard is of a character different to the other procedural non-compliances which I have mentioned. It is the right of a respondent on appeal to go into an appeal secured, at least to the extent*

[13] At para 7. Emphasis supplied.
[14] Case No A601/14, accessible at http://www1.saflii.org/za/cases/ZAGPPHC/2016/1099.pdf.
[15] At para 7.
[16] At para 8.

provided by the Rules, against the inability of the appellant to pay costs if the appeal is unsuccessful."[17]

and

"*The failure to provide an explanation as to why security should be dispensed with and the failure to have the issue of security resolved by application to court before Kasimira incurred expense in opposing the appeal are in my view sufficient by themselves to justify the dismissal of the application to dispense with security."*[18]

24. Notably, the judgment did not engage with the lawfulness of Rule 49(13), or the implications of the promulgation of the Superior Courts Act upon the right to demand security.

25. In December 2017, a Full Bench of the Gauteng Division, Pretoria issued judgment in the matter of *Erasmus v Absa Bank Ltd,*[19] concerned *inter alia* with the question whether condonation for non-compliance with Rule 49(13)(a) was to be granted.[20] The Court was apparently not called upon, and did not engage with the meaning and constitutional validity of Rule 49(13). The Court simply quoted Rule 49(13)(a), noted that no security had been provided and stated that "*Erasmus must apply for condonation for the late filing of security"*.[21] The Full Bench in *Erasmus* declined to entertain the applicant's argument that the court ought to dispense with the requirement for security, on the basis of Rule 49(13) providing that only the court granting leave to appeal can release the appellant from the obligation to furnish security.[22]

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[17] At para 12. Emphasis supplied.
[18] At para 14.
[19] (A982/13) [2017] ZAGPPHC 890 (8 December 2017).
[20] At para 2.
[21] At para 5.
[22] At para 6.

26. In October 2018, Mashile J in this Court gave judgment in *Eagle Creek Investments 472 (Pty) Ltd v Focus Connection (Pty) Ltd and Another.*[23] Just like in the present case, the respondent in an appeal invoked Rule 30A to seek an order to set aside as irregular the filing of an appeal record and consequential steps.[24] The facts in that case also have in common with the present case that the leave to appeal in question had been granted by the SCA. What distinguishes that case from the present one, is that following the grant of leave to appeal by the SCA, the respondent in the appeal applied for security for costs "*in terms of Rule 49(13)"*. The Registrar then fixed security for costs, but the appellant did not provide security.[25] In its discussion, the court referred to the pre-constitutional judgment in *Boland Konstruksie Maatskappy (Edms) Bpk v Petlen Properties (Edms) Bpk*[26] to the effect that "*if security is not provided as stipulated in this Rule an appeal must be struck off the roll"*.[27] The court then invoked the judgment in *Jyoti Structures Africa (Pty) Ltd*[28] to support its assertion 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"*.[29] In the circumstances of the case – where provision of security had been mandated and fixed by the registrar – the court found that the failure to provide security timeously precluded the appellant from furnishing the registrar with the appeal record. The furnishing of the appeal record to the registrar was thus held to be irregular, and set aside.[30]

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[23](A5007/2018) [2018] ZAGPJHC 576 (19 October 2018), accessible at http://www.saflii.org.za/za/cases/ZAGPJHC/2018/576.html.
[24] At para 1.
[25] At para 3.
[26] 1974 (4) SA 291 (C).
[27] At para 10.
[28] *Supra*.
[29] At para 12.
[30] At paras 16 and 19.1.

Since the judgment concerns a case where security had been fixed, it is distinguishable from the present case.

27. On 22 November 2018, a Full Bench of the Limpopo Division, Polokwane, gave judgment in the matter of *Mokhutamane Kenneth Maake and Others v Chemfit Finechemical (Pty) Ltd.*[31] The judgment records that the respondent raised a point *in limine* and argued that the appeal be struck on the ground that the appellants refused to put up security. The request for security was said to be based on Rule 49(13)(a). The court refused the application.[32] The reasoning of the Court makes for interesting reading, and it is worth quoting it in full for purposes of this judgment:

"*[15] The reliance of [sic] Rule 49(13)(a) by the Respondent to demand security for costs of this appeal is misplaced. As a general rule an Appellant in the High Court, unlike in the magistrate Court [sic], is not required to furnish security for costs of an appeal. The furnishing of security for costs of an appeal is provided for an exceptional requirement provided for in Rule 49(12), 49(13) and 49(14). The latter Rules are a sequel to the repealed Rule 49(11) which dealt with the suspension of the operation and execution of an order pending the decision of an application for leave to appeal or appeal. The operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, and the suspension of such a decision are now provided for in section 18 of the Superior Courts Act 10 of 2013. Upon the repeal of Rule 49(11) sub-rules (12), (13) and (14) were left extant.*

[31] [2018] ZALMPPHC 71.
[32] At para 18.

[16] The subrules left extant when subrule (11) was repealed provide as follows:

[The court quoted Tule 49(12), 49(13) and 49(14)]

[17] It is clear from the reading of Rules 49(12), 49(13) and 49(14) that all these Rules are subject to the repealed Rule 49(11) which is now repealed by section 18 of the Superior Courts Act 10 of 2013. This simply means that an Appellant is required to furnish security for an appeal only where there is an execution of a Court judgment or order pending an appeal. The circumstances in the present appeal do not require the Appellants to furnish security for costs of the appeal.

[18] Even if there was an obligation on the Appellants to furnish security for costs of appeal (we still maintain that there is no such obligation) this Court cannot uphold the Respondent's point in limine at this stage. If security for costs is not lodged, the lodging of the copies of the record on appeal with the Registrar constitutes an irregular step within the meaning of Rule 30. In the appeal before us the Respondent failed to make or lodge an application in terms of Rule 30 calling upon the Appellants to remove the cause of complaint. The application to struck [sic] the appeal from the roll is accordingly refused."

28. I am not convinced that Rule 49(13) must be taken to have fallen away in the manner described, but this matters not for purposes of the present judgment.

29. In May 2019, a Full Bench of the Western Cape Division considered an application for an appellant's appeal to be struck,[33] *inter alia* on the basis that the appellant had failed to put up security before filing the record.[34] The facts

[33] At para 3.
[34] At para 4.

of the case were peculiar, because the taxing master had not yet fixed the amount of security, despite a request. Be that as it may, the Court explained that "*Rule 49 does not provide that should the appellant fail to furnish security within the time period stipulated by the rule the appeal shall lapse. And any implication to such effect would in any event probably be unconstitutional"*.[35] After commenting on the misdirection of the taxing master, the Court held that "*The appropriate course for the applicant to have taken in the described circumstances was to have approached the taxing master or the registrar and pressed for an early determination of the amount of security to be provided. In the unlikely event of the registrar, notwithstanding such an approach, unreasonably failing to discharge her duty in terms of rule 49(13)(b), the applicant would have been entitled to approach the court for an order directing the registrar to discharge the function provided in terms of the subrule. Having not taken the indicated steps, it was not appropriate in the given circumstances for the applicant to apply instead for the appeal to be struck out*". The application was dismissed.

30. The most recent judgment I have considered is that of *TR Eagle Air (Pty) Ltd v RW Thompson,*[36] an unreported judgment of a Full Bench of the Gauteng Division, Pretoria. It concerns a case where a respondent raised non-compliance by the appellants with Rule 49(13)(a) in heads of argument in the appeal, contending that the appeal should be struck off the roll with costs. Faced with a submission by the appellant that the respondent ought to have engaged the Rule 30 procedure if it considered that the failure to put up security was an irregular step, the Full Court said:

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[35] At para 33.

[36] 2021 JDR 0699 (GP).

"Rule 49(13) is peremptory. The rule does not place any responsibility on the Respondent. The rule obliges the appellant to give security. The rule does not give a court granting leave to appeal the discretion to absolve an appellant from giving security when the record is filed with the Registrar. The Rule envisages that the respondent shall be satisfied that sufficient security is given that his costs will be paid in the event of the appeal not succeeding. The rule entitles the respondent to waive his right to such security. The rule envisages an instance where the court granting leave to appeal may release the appellant wholly or partly from giving security on application to it. The latter may occur where the respondent has not waived his right and, this will oblige the appellant to place facts to the satisfaction of the court why he or she should be released wholly or partially from giving security when filing the record of appeal."[37]

31. The court placed reliance on the judgments in *Strouhos*[38] and *Boland Konstruksie Maatskappy*[39], and concluded that:

"*In this matter the second appellant is a practicing attorney who is expected to have known better of the importance to provide security for costs in the appeal and, the possibility of prejudice to the respondent should no security be given. When the heads of argument were served there was knowledge on his part that he had not complied and he was forewarned. This in my view should have triggered prompt attention to either negotiate security and apply for condonation, or alternatively to have the matter removed, to tender wasted*

[37] At para 18.
[38] *Supra.*
[39] *Supra*.

costs in order to attend to compliance and condonation. I am of the view that it is proper to strike the appeal off the roll".

The duty and approach of this court

32. This brief excursus on the judicial treatment of Rule 49(13) shows that no court since the *Shepherd* judgment and the amendment to Rule 49(13) in 1999 has been directly called upon to adjudicate upon the constitutional validity of Rule 49(13). Froneman J in *FirstRand* raised the issue *mero motu*, provided reasoning for his conclusion that Rule 49(13) in its current form may well be unconstitutional, and indicated an intention to refer the matter to a Full Bench to allow for various interested parties, including the Rules Board and the Minister of Justice to make submissions. However, it appears that the anticipated hearing before the Full Bench never eventuated. I could certainly find no judgment, reported or unreported, of such a Full Bench. In oral argument before me Mr Guldenpfennig SC advised that attempts had been made to find out from the attorneys involved in the *FirstRand* matter as to the outcome. The understanding that the respondent's legal team gleaned from this engagement was that the matter became settled between the parties, thereby obviating the need for the referral.

33. This appears to be the first case in which (i) the respondent in an appeal invoked Rule 30A as a means to compel provision of security where no order to put up security was in existence; and (ii) the appellant directly challenged the constitutional validity of Rule 49(13).

34. Where there is a challenge to a law on the basis that it constitutes an unjustifiable limitation of section 34, and it is found that the law (or Rule, in the

present case) limits the constitutional right, consideration of section 36 of the Constitution arises. The question then to be asked whether, as a law of general application, Rule 49(13) constitutes a reasonable and justifiable limitation. This court must engage upon that exercise in the absence of an earlier judgment in a matter where the alleged limitation of the section 34 right by Rule 49(13) in its current form was raised.

35. In the present case, there is also a challenge to Rule 49(13) on the basis of want of legality, based in the provisions of section 51 of the Superior Courts Act and section 6(1)(m) of the Rules Board Act. As I have indicated, apart from the judgment in *FirstRand*, no court has grappled with the legality of Rule 49(13) and this fact also enjoins this court to treat with caution statements made in earlier judgments, which assume such legality.

36. The essence of the respondent's position in the present instance is that this court must reach the conclusion that Rule 49(13) is constitutionally invalid. If I were to take up the invitation to hold that Rule 49(13) is so invalid, this would have significant implications, not only for the parties to this application, but for appeal litigants more generally and also for the Rules Board and the Minister of Justice.

37. Part of the problem in this respect is that the respondent did not file a Rule 16A notice when raising the constitutional points it relies on. Rule 16A(1)(a) provides that "*Any person raising a constitutional issue in an application … shall give notice thereof to the registrar at the time of filing the relevant affidavit …"*, and Rule 16A(b) requires of such a notice to "*contain a clear and succinct description of the constitutional issue concerned"*. The purpose of Rule 16A is to "*bring cases involving constitutional issues to the attention of persons who may be affected by or have a legitimate interest in such cases, so that*

they may take steps to protect their interests by seeking to be admitted as amici curiae with a view to drawing the attention of the court to relevant matters of fact and law to which attention would not otherwise be drawn".[40] Generally, the failure to file a rule 16A notice prior to the hearing results in a postponement of the hearing,[41] so that interested and affected persons may be granted the opportunity to make a contribution to the debate. Given the time constraints in this matter, postponement was not an option open to this court. The consequence of the respondent's omission is that it "*deprived other interested parties … of the opportunity to intervene as parties to the dispute or seek admission as amicus curiae"*.[42]

38. In *De Lange* the Constitutional Court did not consider the omission as a sufficient reason to deny leave to appeal.[43] It is also not a sufficient reason in the present instance for this court to engage upon the constitutional arguments raised by the respondent. This is because the pleadings and submissions before this court compel me to interpret and apply Rule 49(13). This requires consideration of the provisions of the Constitution as section 39(2) of the Constitution instructs. As O'Regan J explained in *Giddey NO v JC Barnard and Partners:*[44] "*A court that fails to consider the relevant constitutional provisions will not have properly applied the rules at all"*. Put differently, this court is enjoined to consider the constitutional issues in any event, even in the

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[40] *Phillips v South African Reserve Bank and others* 2013 (6) SA 450 (SCA) at para 31 and the authorities there cited.
[41] See for example *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others (Mont Blanc Projects and Properties (Pty) Ltd and Another as amici curiae)* 2008 (4) SA 572 (W) at para 2.
[42] *De Lange v Presiding Bishop of the Methodist Church of Southern Africa for the Time Being and another* 2016 (2) BCLR 1 (CC) (*De Lange*) *at* para 30.
[43] *Id*.
[44] 2007 (5) SA 525 (CC).

absence of a constitutional challenge squarely being raised or where a Rule 16A notice has not been filed.

39. This, of course, does not mean that the court must rise to the occasion and accept the invitation to make an order of constitutional invalidity. The issue is one of ripeness: according to Ackerman J, ripeness is a justiciability doctrine stemming from the principle of avoidance of constitutional issues:

"*While the concept of ripeness is not precisely defined, it embraces the general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed*".[45]

40. In other words, even if the court accepts the correctness of the respondent's submissions on constitutional validity, it must enquire whether the dispute between the parties can be resolved without reaching the constitutional issue. In the circumstances presented by the present case, I consider it appropriate to engage upon the constitutional enquiries first, before embarking on the examination of whether the case may be decided without reaching the constitutional issues for purposes of the determination to be made under Rule 30A(2).

Rule 49(13) and the access to court right

41. Section 34 of the Constitution provides that everyone has the right to have a dispute that can be resolved by the application of law decided by a court or

[45] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at para 21. Emphasis supplied.

tribunal in a fair public hearing. It is an important right, "*foundational to the stability of an orderly society"*, as Mokgoro J explained in *Chief Lesapo v North West Agricultural Bank and Another.*[46] Being of such importance, there is no basis to suggest that the right to access to court must be considered simply as access to a court of first instance. The Court in *Shepherd*,[47] in declaring Rule 49(13) in its previous form constitutionally invalid, implicitly accepted this.

42. In accordance with section 36 of the Constitution, that right may be limited only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom, taking into account relevant factors: (i) the nature of the right; (ii) the importance of the purpose of the limitation; (iii) the nature and extent of the limitation; (iv) the relation between the limitation and its purpose; and (v) less restrictive means to achieve the purpose.

43. Section 34 must also be read with section 171 of the Constitution, which provides that "*All courts function in terms of national legislation, and their rules and procedures must be provided for in terms of national legislation*". Implicit in section 171 is constitutional sanction for rules and procedures. The national legislation envisaged in section 171, for present purposes, must be taken to be the Superior Courts Act and the Rules Board Act, the provisions of which I discuss more fully below. There is no question that the Uniform Rules, of which Rule 49(13) form part, are those contemplated in section 171.

44. As the Constitutional Court pointed out in *Giddey*[48] *"for courts to function fairly, they must have rules that regulate their proceedings. Those rules will often*

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[46] 1999 (12) BCLR 1420 (CC) at para 22.

[47] *Supra.*

[48] At para 16

require parties to take certain steps on pain of being prevented from proceeding with a claim or defence. A common example is the rule regulating the notice of bar in terms of which defendants may be called upon to lodge their plea within a certain time failing which they will lose the right to raise their defence. Many of the rules of court require compliance with fixed time limits, and a failure to observe those time limits may result, in the absence of good cause shown, in a plaintiff or defendant being prevented from pursuing their claim or defence. Of course, all these rules must be compliant with the Constitution. To the extent that they do constitute a limitation on a right of access to court, that limitation must be justifiable in terms of section 36 of the Constitution. If the limitation caused by the rule is justifiable, then as long as the rules are properly applied, there can be no cause for constitutional complaint". In the same vein, the Constitutional Court held in *Dormehl v Minister Of Justice And Others*[49] that not every procedural requirement constitutes an infringement on the right to access to Court.

45. Insofar as Rule 49(13) presents a bar to access to court at the appeal level, it does appear to infringe upon the access to court right. In *Shepherd v O'Neill*[50] the Court recognised that "*to in effect bar access to a court of appeal because a deserving litigant is unable to put up security appears to me to be unfair and in conflict with the provisions of the Constitution"*.

46. However, a limitation analysis suggests that it may be considered a justifiable limitation, as follows:

46.1. The Rule exists in accordance with the provisions of national legislation (specifically section 51 of the Superior Courts Act which

[49] 2000 (2) SA 987 (CC).
[50] *Supra* at 1073C.

provides for the retention of Rules in place before that statute was promulgated and section 6(1) of the Rules Board Act, which confers upon the Rules Board the power to make and amend rules). On the principle of subsidiarity, it is the provisions of these statutes that must be applied to assert the access to court right, and not section 34 directly.[51]

46.2. The Rules themselves constitute law of general application within the meaning of section 36 of the Constitution.

46.3. The bar is not absolute: the appellant is able to escape the requirement of providing security either by agreement with the respondent or by making an approach to court. Accordingly, the limitation on the access right is not inflexible. The Constitution demands a reading of provisions such as these with proportionality in mind, and provision for security to protect the interests of one's counterpart in litigation is not a disproportionate limitation on the access to court right.

47. In these circumstances, it is not open to this Court to conclude that Rule 49(13) infringes upon the access to court right in a manner that is not justifiable in an open and democratic society. However, that conclusion is subject to a consideration whether Rule 49(13) may be constitutionally invalid for want of compliance with the doctrine of legality. For a law of general application justifiably to limit the access to court right, it must of course be one that is consistent with the rule of law. It is to that consideration that I now turn.

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[51] *S v Mhlungu* 1995 7 BCLR 793 (CC); 1995 3 SA 867 (CC) para 59.

Rule 49 and the legality requirement

48. The reasons for non-compliance in the present instance proceed from the submission that Rule 49(13) is unconstitutional for want of compliance with the doctrine of legality. The argument finds its basis in, and follows the logic of the *FirstRand* judgment in which Froneman J expressed the view that Rule 49(13) "*may well be ultra vires and thus unconstitutional".* This, essentially because the Rules Board Act does not confer power on the Rules Board to stipulate the circumstances in which security is required, so that the Rule is invalid and unconstitutional under the doctrine of legality.

49. As indicated above, the referral anticipated by Froneman J came to nothing. The judgment is not reported and it has not been followed in any other judgment that this court could find. In any event, the judgment in *FirstRand* reflected upon the position at a time before the Superior Courts Act was promulgated. The Court in *FirstRand* specifically considered the absence from section 20(5)(b) of the Supreme Court Act of a discretionary power to order the furnishing of security where leave to appeal is granted from the High Court as a court of first instance in civil appeals. It seems to me that the matter of the legality of Rule 49(13) must be considered afresh in view of the changed legislative position.

50. As foreshadowed in the previous section, the two main statutes relevant to the consideration in this context are the Superior Courts Act and the Rules Board Act.

51. Section 16 of the Superior Courts Act regulates appeals. It provides in section 16(1)(a)(i) that an appeal against any decision of a Division as a court of first instance lies, upon leave having been granted, if the court consisted of a single

judge, either to the SCA or to a full court of that Division, depending on a direction issued in terms of section 17(6).

52. In accordance with section 17(2)b) of the Superior Courts Act, leave to appeal may be granted by the SCA upon application to that court. Section 17(2)(c) provides that such an application must be considered by two judges of the court who may, in accordance with section 17(2)(d) dispose of the application without oral argument. The decision to grant or refuse leave to appeal is final.[52] Under section 17(5), any leave to appeal may be granted subject to such conditions as the court may determine. Whether such conditions may be taken to include that an appellant furnish security for costs, is uncertain: notably, the Superior Courts Act does not provide that the SCA has power to order an appellant to provide security for the respondent's costs of appeal in any of the circumstances under the statute where the SCA is empowered to grant leave to appeal.

53. This brings us to the Rules. Section 51 of the Superior Courts Act provides that the rules applicable to the SCA and the High Court immediately before the commencement of the Superior Courts Act "*remain in force to the extent that they are not inconsistent with this Act, until repealed or amended"*. The rules are of course the Rules promulgated by the Rules Board under the Rules Board Act, which include Rule 49(13) that is the subject-matter of the current debate. Those rules, which regulate the practice and procedures in litigation, may in accordance with section 6(1)(m) of the Rules Board Act include regulation on "*the manner of determining the amount of security in any case where it is required that security shall be given, and the form and manner in which such security may be given"*.

[52] Superior Courts Act s 17(2)(f).

54. The Rules Board Act does not confer upon the Rules Board the power to regulate the circumstances in which security may be demanded; rather it confines the power to regulation of procedure in cases where security may be demanded. If the Rules Board does not enjoy the power under the Rules Board Act to limit access to court in the form of security for costs, then any rule issued by the Rules Board that purports to set out when security for costs is required is unlawful, unless the obligation in the Rules finds its basis in another law.

55. The authors of *Herbstein and Van Winsen: Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*[53] make the point that *"The subrule seems to presuppose that in the event of any appeal an appellant has an obligation to provide security for the respondent's costs of appeal and the respondent has a right to receive such security. However, at present, there does not seem to be any such statutory obligation or right".* In other words, the obligation in Rule 49(13) to furnish security for costs before the record is filed does not have its origin in any other law.

56. Indeed, insofar as it purports to impose a requirement that security be furnished in cases where the SCA has granted leave to appeal, it is inconsistent with section 17(5) that envisages it for the court considering the application for leave to appeal to set conditions for the prosecution for the appeal and not for any Rules to impose such conditions. If there is such an inconsistency, section 51 of the Superior Courts Act results in Rule 49(13) not

[53] 5 ed Juta 2009 at p 1167.

remaining in force. Harms *Civil Procedure in the Superior Courts*,[54] commenting on security for costs under Rule 49(13) explains that:

"In any event, it is arguable that the requirement of security by the rule may be ultra vires. The only security that could have been demanded was that provided for under section 20(5)(b) of the Supreme Court Act. All that Act 10 of 2013 stipulates in this regard is: s 25: If a plaintiff in civil proceedings in a Division resides within the Republic, but outside the area of jurisdiction of that Division, he or she shall not by reason only of that fact be required to give security for costs in those proceedings. However, section 51 of Act 10 of 2013 stipulates that: Rules in existence immediately before commencement of Act.—The rules applicable to the Constitutional Court, Supreme Court of Appeal and the various High Courts immediately before the commencement of this section remain in force to the extent that they are not inconsistent with this Act, until repealed or amended."

57. Even if Rule 49(13)(a) were considered not to be inconsistent with section 17(5) of the Superior Courts Act, the imposition of a duty on an appellant to furnish security would still be *ultra vires* the powers of the Rules Board under section 6(1) of the Rules Board Act.

58. In these circumstances, Rule 49(13) ought not to be read as imposing an obligation to furnish costs. It must be read restrictively as operating only where the respondent is able to assert a right to security derived from another source, such as a court order. If not read restrictively in this manner, it is not capable of being upheld as a law of general application that legitimately limits

[54] At B49.29.

the access to justice right. It would have to be set aside for want of compliance with the doctrine of legality.

59. However, as foreshadowed in the introductory part of this judgment, the conclusion of constitutional non-compliance ought not to be reached for if the determination in the case before me can be made without recourse to the constitutional question. It is to that analysis that I now turn.

Consideration of the Rule 30A application

60. In the present 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 processes in that court.

61. The SCA Rules regulate applications for leave to appeal in Rule 6. The rule provides that it applies to all applications for leave to appeal. Rule 9(1) of the SCA Rules provides that, "*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*". Rule 9(1) suggests 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.

62. In *Strouthos v Shear*[55] Daniels J recognised the Rule 49(13) provides that "*the Court in granting leave to appeal 'or subsequently on application to it …' (as opposed to the Court to 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*".[56] In that case, the Court considered that, since the SCA had granted leave to appeal, "*it is only that Court that can conceivably release the respondent from his obligation to provide security, and the Court hearing the appeal accordingly does not have the jurisdiction to do so"*.[57] The nub of the finding is that it is the Court that granted leave that has jurisdiction over the question whether security may be demanded or not. The source of the respondent's entitlement to demand security, as contemplated in Rule 49(13) would be an order of the SCA. If there is no such order, there is no entitlement that sets in motion the procedure in Rule 49(13).

63. That being so, I find myself in respectful disagreement with the conclusion of the Court in *Strouthos* that it is appropriate, in a case where the SCA has granted leave to appeal without requiring costs, and where the respondent has not made application to the SCA for an order that security by lodged, for a respondent to invoke Rule 30 (or Rule 30A, as is the case in the present instance) to set the filing of the record aside as an irregular step. Why should it be deemed irregular for an applicant to file a record without furnishing security of the Court granting leave to appeal did not impose an obligation to

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[55] *Supra*.
[56] At 140G.
[57] At 140H.

give security? Why should it be irregular to proceed with the filing of the record in the absence of security if the respondent made no application to the Court granting leave to appeal (here the SCA), to issue an order for security to be furnished?

64. The problem that I have with an analysis that allows the High Court effectively make an order compelling an appellant to supply security, whether in consequence of the Rule 30 procedure adopted in *Strouthos*, or pursuant to the Rule 30A procedure adopted in the present instance, is that it splits the jurisdiction to determine whether security for costs ought to be granted between the SCA and the Court to which leave to appeal is granted on the simple basis of the identity of the applicant. How can it be that the SCA retains the exclusive jurisdiction and authority to release an appellant from the obligation to furnish costs, but that the High Court can be said to be empowered to order that security be given. The orders contemplated are two sides of the same coin.

65. It seems to me that, once it is accepted that this Court is not empowered to release an appellant from an obligation to furnish costs, then it can equally not be empowered to compel the furnishing of costs, or, as it were, set conditions for the prosecution of the appeal in addition to the conditions set by the SCA under section 17(5) of the Superior Courts Act. Since the SCA enjoys the statutory power to set the conditions, the High Court would be usurping the powers of the SCA as contemplated in section 17(5) if it were to compel the furnishing of security. I am of the view that, if this court allows the applicant to rely on the provisions of Rule 30A to grant an order that Rule 49(13) be complied with and security for costs be given, the effect would for this court to arrogate for itself a power that it does not otherwise have.

66. I am not convinced that the Rule 30A procedure is appropriately invoked. The effect of *Strouthos* is that this Court cannot release the respondent from the obligation to furnish security. That means, once the application in terms of Rule 30A(2) is brought, the Court's discretion is fettered, so that it has no choice to grant the compelling order, for to do otherwise would be to release the appellant/respondent from the obligation to put up security, which the court does not enjoy jurisdiction to do. And that cannot be right. As Hefer J explained in *Shepstone & Wylie and Others v Geyser NO,*[58] *"Because a Court should not fetter its own discretion in any manner and particularly not by adopting an approach which brooks of no departure except in special circumstances, it must decide each case upon a consideration of the relevant features, without adopting a predisposition either in favour of or against granting security*."[59] The same consideration must apply in a case where provision of security is sought to be compelled.

67. I am of the opinion that, where the SCA, in granting leave to appeal, did not set a requirement that the appellant provide security and the respondent considers that it would be appropriate for security to be provided, it would be for the respondent to approach the SCA for an order to such an effect. Put differently, it would only be once the respondent in an appeal brought an application and obtained an order that it could then invoke Rule 30A for want of compliance with the obligation created under that provision. These views are inconsistent with the views expressed by the Full Bench in *TR Eagle Air (Pty) Ltd v RW Thompson,*[60] which considered that "*Rule 49(13) is peremptory. The rule does not place any responsibility on the Respondent.*

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58 1998 (3) SA 1036 (SCA)
59 At 1045I – 1046A.
60 *Supra*.

The rule obliges the appellant to give security".[61] However, the Full Bench in *TR Eagle Air* made this statement without engaging with the meaning of Rule 49(13) in the context. The Court certainly did not engage upon the implications of the promulgation of the Superior Courts Act.

68. Be that as it may. Whether or not I am right on the analysis of the provisions of the Superior Courts Act and the Uniform Rules, the central question for me to consider is simply whether I should exercise the discretion that I enjoy under Rule 30A(2) in favour of the applicant if, as the applicant asserts that I do have jurisdiction to make an order in consequence of the Rule 30A application. That discretion is wide, and this Court must take all relevant considerations into account.

69. As regards the reason for non-compliance in the present instance, it was on the basis of an attack on Rule 49(13). The view that I have expressed is that there is merit to the attack. However, even if this Court were to disagree with the submissions made, it is apparent that the respondent in this application did not recklessly fail to comply with a Rule of Court: it had a reason for doing so and it expressed that reason to the applicant from at least 22 October 2020.

70. More importantly, in accordance with section 173 of the Constitution, the High Court "*has the inherent power to protect and regulate their own process … in the interests of justice"*. The Constitutional Court confirmed in *S v S*[62] that "*where strict adherence to the rules is at variance with in the interests of justice, a court may exercise its inherent power in terms of s 173 of the Constitution to regulate its own process in the interests of justice"*. I must accordingly exercise judicial discretion in the circumstances of the case to

[61] At para 18.
[62] 2019 (6) SA 1 (CC) at para 58.

determine whether strict adherence to Rule 49(13) ought to be compelled, or whether I can, in the interests of justice, decline so to compel.

71. In the present case the respondent raised the alleged unconstitutionality of Rule 49(13) on 22 October 2020. Then, on 6 November 2020, the applicant made the demand that security for costs be given. The applicant took no further steps to compel the respondent to furnish security and only raised the respondent's failure to provide security again on 11 February 2021, more than a month (i) *after* the appeal record had been lodged with the registrar of this court in accordance with the prescribed time period for lodging of the appeal record; and (ii) the respondent had applied to the registrar, in terms of Rule 49(6), for a date for hearing of the appeal, both of which happened on 28 December 2020.

72. On 12 February 2021, the very next day, the respondent brought to the attention of the applicant the fact that the registrar had allocated an appeal case number and once more recorded denial of the obligation to furnish security. The applicant's response was to re-assert its stance that security was to be given. Yet, it did nothing for more than a month. It was only on 31 March 2021 that it served the Notice upon the respondent. And then, when the respondent made it abundantly clear on 6 April 2021 that no security for costs would be forthcoming, the applicant waited until 23 April 2021 to bring the present application. This, despite the fact that the time period for compliance of the Notice had already run out on 16 April 2021.

73. The result of the applicant's delay in bringing an application that would conclude in the respondent being compelled to furnish security for costs for months after the applicant knew from correspondence that the respondent denied an obligation to furnish security had the undesirable consequence that

this matter, which raised constitutional issues (as anticipated) came before me on 10 August 2021, a mere 6 court days before the day on which the appeal is to be heard. The order sought of me (as now expressed in the draft order), if granted, would allow the respondent to file security within 3 days and, if not, for the applicant to supplement its papers and apply for the applicant's appeal to be struck or dismissed. All of this cannot be achieved in time for the issues to be disposed of before the date allocated for the appeal, even though this Court has acceded to the request that judgment be given expeditiously, and absorbed the pressure of rendering a judgment on these complicated debates without delay.

74. in *MV Navigator (No 2): MV Navigator and Another v Wellness International Network Ltd*[63] Louw J, there dealing with SCA Rule 9(1) and referring to the words "*before lodging the record"* commented that the language indicates that "*the application must be brought at the time of the application for leave to appeal or soon thereafter, but before the record is lodged and that security must be provided before the record is lodged"*.[64] That position seems to be correct when regard is also had to Rule 47(1), which permits a party "*entitled and desiring to demand security for costs"* to give notice of such a demand "*as soon as practicable after the commencement of proceedings".*

75. The SCA in *Buttner v Buttner,*[65] confronted with an application for security for costs under SCA Rule 11(1)(b), considered that "*the application for security for costs at this very late stage of proceedings, when the bulk of the costs of*

[63] 2004 (5) SA 29 (C).
[64] At 34F.
[65] 2006 (3) SA 23 (SCA).

appeal have already been incurred, was misconceived and futile". Accordingly, the SCA dismissed the application with costs.[66]

76. When read together, Rule 47(1) and the judgments in *MV Navigator* and *Buttner* lend support to the conclusion that applications for security for costs must be launched at an early stage. Here, it was open to the applicant, in opposing the application for leave to appeal to the SCA, to ask for an order that security be given in the event leave were granted. The papers in the application for leave to appeal to the SCA are not before this Court, but the submission before me is that the applicant did not ask for security in opposing the application for leave to appeal, apparently because the respondent had not included in its application for leave a request that it be released from a security obligation. The applicant could equally have raised the demand for security for costs when the respondent filed the notice of appeal on 2 October 2020. It did not. The next opportunity came when the respondent, on 22 October 2020, insisted that it would be unconstitutional for the applicant to demand security. On none of these occasions did the applicant commence proceedings to compel security for costs.

77. I appreciate that parties should not approach court unnecessarily if interlocutory matters are capable of resolution between the parties, as Mr Novitz submitted in oral argument. However, to restate one's position "*ad nauseam"* in correspondence, as the applicant's attorney put it in a letter of 12 February 2021, in a case where the counterparty has unequivocally challenged the duty to comply with a rule on a constitutional basis constitutes a futile attempt to avoid an approach to court. I do not consider it to be in the

[66] At paras 40 and 43(a).

interests of justice to order compliance with the procedural prescripts of Rule 49(13) at this late stage.

78. To grant the order at this point, days before the appeal is due to be heard, would result in prejudice to the respondent. Any prejudice that the applicant might suffer now as a consequence of the respondent's failure to furnish security is all of its own making, because it did not approach this Court with due expedition. It elected to incur further costs in pursuit of compelling the respondent to furnish security, without due expedition.

79. I am fortified in my decision to exercise my discretion in favour of the respondent by virtue of my agreement with the respondent's submission that this cannot be a case where the merits of its appeal can be considered as so hopeless that it would warrant precluding it from pursuing the appeal if security were not furnished. After all, the SCA deemed this an appropriate case for leave to appeal be granted.

80. I therefore propose to exercise my discretion in favour of the respondent, and decline to compel compliance with any requirement that security be put up as may exist.

81. However, I do not consider it appropriate to issue a punitive costs order, which the respondent sought in pleading. It is true that the applicant delayed in bringing the application, but that alone does not warrant a punitive costs order. The applicant was entitled to rely on Rule 49(13) and not to simply accept the respondent's assertions on constitutionality. The matters raised in this application were novel and worthy of debate. It would be improper to visit a punitive costs order upon the applicant in such circumstances. Mr Guldenpfennig SC accepted this in oral argument.

Conclusion

82. I am of the view that there is a legitimate basis for the challenge to Rule 49(13) on the basis of the doctrine of legality. In the circumstances of this case, it was unnecessary for this Court to make an order to that effect. Put differently, as the reasoning hereinabove shows, this Court was able to resolve the dispute between the parties without reaching the constitutional issue. However, 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. Arrangements will be made for this judgment to be brought to the attention of these interested parties.

83. In the present instance, the application falls to be dismissed on one of two grounds:

83.1. either that this Court does not enjoy the jurisdiction to entertain a Rule 30A(2) application to compel security where the SCA has granted leave to appeal without making provision for security, because in such an application this Court would have to engage upon the question of whether an appellant ought to be released from an obligation to furnish security, in respect of which this Court does not enjoy jurisdiction;

83.2. or, if the Court does enjoy jurisdiction, a judicial consideration of the relevant factors does not lead to the conclusion that security ought to be compelled in the circumstances of the case.

84. In the circumstances, I make the following order:

"*The application is dismissed with costs, such costs to include the costs occasioned by the employment of senior counsel*".

M ENGELBRECHT
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Electronically submitted therefore unsigned

Delivered: This judgement 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 12 AUGUST 2021.

Date of hearing:	10 August 2021
Date of judgment:	12 August 2021

Appearances

For the applicant:	Adv M Novitz
Instructed by:	Schindlers Attorneys
For the respondents:	Adv S Guldenpfennig SC
Instructed by:	Corne Guldenpfennig Attorneys