A. 359/2000

ELLEN LOUW v CHAIRPERSON. DISTRICT LABOUR COURT. WINDHOEK & 2 OTHER

Hannah. J *et* Mtambanengwe, J *et* Manyarara, AJ

2001/03/29

APPEAL

Security for costs of. Rule 49(13) of the Rules of the High Court gives no discretion to the Court to interfere with amount fixed by Registrar or to exempt appellant from furnishing security. This bars access to Court of Appeal where deserving appellant is unable to furnish security. Such result is unfair and in conflict with provisions of Article 12(l)(a) of the Constitution.

Case No.: A. 359/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ELLEN LOUW **APPLICANT**

and

THE CHAIRPERSON, DISTRICT LABOUR COURT,

WINDHOEK **FIRST RESPONDENT**

J P **SNYMAN & PARTNERS (NAMIBIA) (PTY) LTD** **SECOND RESPONDENT**

THE REGISTRAR OF THE HIGH COURT **THIRD RESPONDENT**

CORAM: HANNAH, Jet MTAMBANENGWE, J et MANYARARA, A J

Heard on: 2001-03-23

Delivered on: 2001-03-29

JUDGMENT

HANNAH, J: In the application, brought on notice of motion, the applicant seeks the following relief:

> "1. Declaring Rule 49(13) of the Rules of the High Court of Namibia as contrary to the provisions of the Namibian Constitution and therefore invalid:

2. Exempting the Applicant from having to furnish security for the costs of appeal;

3. Directing that any Respondent who opposes this application be jointly and severally liable for the costs of this application;

4. Granting the Applicant such further and/or alternative relief as this Honourable Court may deem fit."

The background to the application is briefly as follows.

On 9th August, 1996 the applicant lodged a complaint against the second respondent in the District Labour Court. Thereafter, the hearing of the complaint was postponed on several occasions. On 16th October, 1998 the Chairman of the District Labour Court took the view that the applicant had come to court unprepared despite a previous warning to both parties that they should be fully prepared for trial. He postponed the hearing and ordered the applicant to pay the wasted costs on an attorney and client scale such costs to be paid before the resumption of further proceedings.

On 23rd November, 1998 the applicant lodged an application for the review of the costs order asking that it be set aside. This application was dismissed by the Labour Court and thereafter the applicant sought leave to appeal. This application also met with no success but, undeterred, the applicant petitioned the Chief Justice for leave to appeal. This application was successful and on 9th August, 2000 the applicant was granted leave to appeal to the Full Bench of the High Court. However, there remained a further hurdle in her way, namely Rule 49(13) of the High Court Rules. This Rule provides:

> "(13) Unless the respondent waives his or her 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, and in the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and his or her decision shall be final."

Having lodged a notice of appeal, the applicant's legal practitioners then wrote to those acting for the second respondent asking that the second respondent waives its rights to security. They explained that the applicant could not afford to pay the amount of security which was likely to be fixed. They also asked the second respondent's legal practitioners to indicate the amount which they considered sufficient security for their costs of the appeal. On 1st September, 2000 the second respondent's legal practitioners replied stating that their client was not prepared to waive its rights to security and proposed an amount of N$12 000,00 as sufficient security.

In her founding affidavit the applicant states that she was unemployed from 17* February, 1997 when she was dismissed from her employment with the second respondent until 15th May, 2000 when she commenced employment with a firm called Riteware. She states that her basic salary is NS1 000,00 (presumably per month) and there is scope for commission to be earned. However, commission depends on first building up a clientele and she anticipated that commission would not be paid until 2001. She further avers that her basic salary is barely sufficient to cover her living expenses and her daily travel from Windhoek. As for assets, she states that these have been attached pursuant to a warrant issued in respect of the costs order made by the District Labour Court and the warrant still has not been fully satisfied. She avers that she is not able to furnish security in the amount of N$12 000,00, which she admits is a reasonable amount for the second respondent's costs of appeal, or, for that matter, any such security and by virtue of the peremptory terms of Rule 49(13) is accordingly barred from

proceeding with her appeal.

One other matter raised by the applicant in her founding affidavit concerns the position of the second respondent should her appeal be unsuccessful. She says that in this eventuality the second respondent could make application for an emoluments attachment order to recoup its costs.

In its answering affidavit the second respondent seizes upon what is stated by the applicant with regard to an emolument attachment order. It states that this is in contradiction of the applicant's averment that she is unable to furnish any security at all. However, that is not how I read the applicant's affidavit. What she is saying is that at the time of making the affidavit she had no means of providing sufficient security but at some future time if, as she anticipates, she earns commission, she will be in a position to pay something towards the second respondent's costs by instalments. In my view, there is no real merit in the second respondent's contention that the applicant has not shown that she is unable to furnish security for the second respondent's costs of appeal.

A further point raised by the second respondent in its answering affidavit and pursued by Mr Dicks, who appeared for the second respondent, in his heads of argument as a point *in limine* is that the applicant failed to apply to the Registrar to fix the amount of security. It is suggested that in the circumstances of the present case that was a necessary prerequisite to seeking the relief sought in the notice of motion. I do not agree. What emerges from the affidavit evidence is that the parties were *ad idem* as to what a sufficient amount of security should be. There was no reason for aDolication to be made to the Registrar. It is highly unlikely that he would have fixed

an amount of security less than that regarded by both parties as reasonable. Any such application would have been a waste of time and costs.

In my view, the applicant has established an interest to apply for the relief sought in the first prayer of the notice of motion and the question to be addressed is whether that relief should be granted. All three respondents join with the applicant in saying that it should. They rely in the main on *Shepherd v O* We/7/ *and Others* 2000 (2) SA 1066 (N).

That case concerned the constitutionality of Rule 49(13) of the South African Uniform Rules of Court which, until it was amended as a consequence of the Court's judgment, was couched in identical terms to our Rule 49(13). The applicant sought an order declaring the provisions of Rule 49(13) to be unconstitutional, invalid and of no force and effect. He claimed that he was not in a financial position to furnish the amount of security fixed by the Registrar, a claim accepted by Combrinck, J. who heard the application. The basis of the application was then described by the learned judge in the following words at 1068 B-D:

> "The applicant alleges in the application that it is inequitable and a gross injustice that a person in his position should have to find and establish security (which he cannot) in order to pursue his rights of access to a Court of law (particularly following upon an order given by the Supreme Court of Appeal). He submits that he is effectively being barred access to a Court of law, which is in direct contravention and conflicts in its entirety with the provisions of the Constitution of the Republic of South Africa Act 108 of 1996. The provision he relies upon is s 34, which reads as follows:
> '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.'

The case for the applicant in the application before us is much the same except that she relies on

Article 10 of the Constitution as well as Article 12(l)(a). Article 10 reads:

> ""10(1) All persons shall be equal before the law.
>
> (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status."

And the material part of Article 12(l)(a) reads:

> " 12(1)(a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law. . . . . ."

As already indicated, all parties in the present application are agreed that the provisions of Rule 49(13) are inconsistent at least with Article 12(l)(a) and, as a result, we have been presented with a one-sided argument. This is seldom a satisfactory situation. However, in the *Shepherd* case *[supra)* the Court was presented with full argument by counsel for the respondents on the constitutionality of the Rule and that argument was, if I may respectfully say so, comprehensively considered and dealt with by Combrinck, J. in his judgment.

The main point argued by counsel for the respondents in *Shepherd's* case *(supra)* was that Rule 49(13) is saved from constitutional invalidity by the fact that under Rule 27(3) (identical to our Rule 27(3)) the Court has a wide and unfettered discretion whether or not, in an appropriate case, to absolve the would-be appellant from its consequences. Having referred to a number of cases cited by counsel, Combrinck, J. said at 1072 J - 1073 B:

> "In my view, Rule 27(3) was not designed for the purpose ascribed to it by Mr Hunt. It was designed to assist the litigant who at all times had intended to comply with the Rule but for some or other reason had failed to do so. It was not intended to allow the Courts in advance to in effect exempt a litigant from complying with a requirement of substance such as I am dealing with in the present case. In any event, the question to be answered is whether the provisions of Rule 49(13) are in conflict with s 34 read with s 8 of the Constitution. If it is found to be so, then it seems to me to be illogical to retain it in its present form and console would-be appellants with the remedy of possible exemption from its provisions by virtue of Rule 27(3)."

1 respectfully agree with the opinions expressed by the learned judge in this passage. It could never have been intended that Rule 27(3) could be used to relax the requirements of another Rule in the case of a particular class of litigant. If an appellant cannot properly enter through the front door of Rule 49(13) he should not, in my view, be allowed to enter through the back door of Rule 27(3).

In his judgment, Combrinck, J. referred to the position in England regarding security of costs on appeal as governed by the Rules of the Supreme Court and the position in South Africa regarding security required from a*peregrinus* applicant and from a bankrupt company,. The learned judge concluded his judgment by saying at 1073 C-E:

> "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. 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 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."

I respectfully adopt that conclusion and can add nothing useful to it. In my judgment, Rule 49(13), as it presently stands, is inconsistent with the provisions of Article 12(l)(a) of the Constitution to the extent that it does not vest in the Court a discretion to exempt wholly or in part an appellant from compliance therewith. It is unnecessary to consider the effect of Article 10.

Article 25 of the Constitution deals with the enforcement of fundamental rights and freedoms. Sub-Article (1) provides, *inter alia,* that any subordinate legislative authority shall not make any law which abolishes or abridges fundamental rights and freedoms

> ".....and any law.....in contravention thereof shall to the extent of the contravention be invalid: provided that:
>
> (a) a competent Court, instead of declaring such law .... to be invalid, shall have the power and the discretion in an appropriate case to allow.....any subordinate legislative authority .... to correct any defect in the impugned law.....within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law .... shall be deemed to be valid."

In my opinion, the discretion conferred on this Court by Article 25(l)(a) should be exercised so as to allow the Judge-President who, in terms of section 39 of the High Court Act, No. 16 of 1990 is the Rule-making authority, to correct Rule 49(13) by making the necessary amendment.

This will avoid any hiatus in a procedure which is only to a limited extent unfair.

Following the decision in *Shepherd's* case *(supra)* the South African Rules Board amended their Rule 49(13) and for the assistance of the Judge-President I set out the amended South African Rule:

> "(13)(a) Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, the appellant shall, before lodging copies of the record on appeal with the registrar, enter into good and sufficient security for the respondent's costs of appeal.
>
> (b) In the event of failure by the parties to agree on the amount of security, the registrar shall fix the amount and the appellant shall enter into security in the amount so fixed or such percentage thereof as the court has determined, as the case may be."

The parties are agreed that in the circumstances of this case there should be no order as to costs. Ms Conradie, who appeared for the applicant, did, however, ask that the relief sought in prayer 2 of the notice of motion be kept open so that the applicant can, if so advised, pursue that head of relief in the light of any amendment which may be made to Rule 49(13). That part of the notice of motion will, therefore be postponed *sine die* but it may be that the applicant will best be advised to launch a fresh application if the Rule is amended.

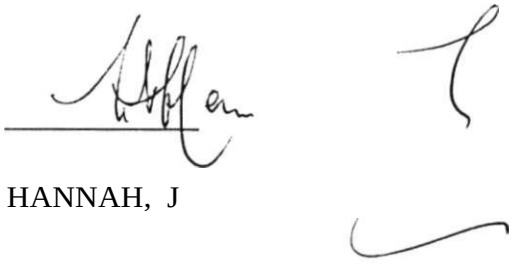
For the foregoing reasons the following order is made:

1) In terms of Article 25(l)(a) of the Constitution, the Judge-President of the High Court

is allowed to correct Rule 49(13) of the High Court Rules within a period of three months from the date of this judgment so as to vest in the Court a discretion to exempt wholly or in part an appellant from compliance therewith;

2) The relief sought by the applicant in prayer 2 of the notice of motion is postponed *sine die;*

3) No order is made as to the costs of the application insofar as the relief sought in prayer 1 of the notice of motion is concerned.

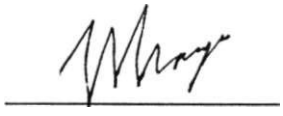


HANNAH, J

I agree,

MTAMBANENGWE, J

I agree.



MANYARARA, AJ

For the Applicant:	Ms L. Conradie
Instructed by:	Legal Assistance Centre
For the 1st and 3rd Respondents:	Mr N. Marcus
Instructed by:	The Government Attorney
For the 2nd Respondent:	Mr G. Dicks
Instructed by:	Messrs Lorentz & Bone