

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



(1) Reportable: No
(2) Of interest to other Judges: No
(3) Revised: No

Date: 24/06/2022


A Maier-Frawley

CASE NO: 2021/19942

In the matter between:

LIBERTY HOLDINGS

Applicant/
(Respondent in main application)

and

RAKOKWANE MALOKA,

Respondent/
(Applicant in main application)

J U D G M E N T

MAIER-FRAWLEY J:

Introductory background

1. The applicant, Liberty Holdings (*Liberty*), applies in terms of Rule 47 of the Uniform Rules of Court for an order that the respondent furnish security for its costs in the main application currently pending in this court. The respondent, Mr Maloka, who opposes the application for security for costs, in turn applies in terms of Rule 30 for the applicant's notice in terms of Rule 47(1) to be set aside as an irregular proceeding.

2. Mr Maloka is an unrepresented litigant who appears in these proceedings in person. He is the applicant in the main application as well as in the Rule 30 application. He is the respondent in the Rule 47 application whilst Liberty Holdings is the applicant therein. The parties will for convenience be described as 'Liberty' and 'Mr Maloka' in the judgment.

3. In the notice of motion filed in the main application, Mr Maloka (as applicant) seeks an order in the following terms:

- " 1. The defamation of character;
- 2. The malicious prosecution and abuse of process;
- 3. The breach of legal duty of care;
- 4. The misuse of personal information;

WHEREFORE the applicant prays for relief in the following terms:

- 1. Declaration order that the conduct of the respondent was unlawful;
- 2. Order for payment of the fair and equitable compensation as per discretionary powers of the Court for the non-patrimonial losses that I have suffered;
- 3. Order for payment of the patrimonial losses that I have incurred.
- 4. Order for interest payment at the official interest rate payable 14 days from date of judgment to date of payment.
- 5. Order for costs of the previous and current civil lawsuits as per discretionary powers of the Court.
- 6. Order for alternative relief as the Court deems it fit to do so. "

4. A perusal of the founding affidavit¹ filed in support of the notice of motion reveals that Mr Maloka is pursuing, amongst others, a claim for damages consisting of:

- (i) Patrimonial damages in the amount of R587,375.50;
 - (ii) Loss of earnings in the amount of R521,093.00;
 - (iii) Medical expenses in the amount of R50,264.00;
 - (iv) 'Income mitigating expenses' in the amount of R5321.00;
 - (v) 'Professional development expenses' in the amount of R10,697.50;
- and

¹ See founding affidavit at 001-26 to 001-27.

- (vi) 'Fair and equitable compensation as determined by the court for legal injuries' suffered by him.
5. It is common cause that Mr Maloka was dismissed from Liberty's employ for gross misconduct pursuant to a disciplinary enquiry that was held during December 2019.
 6. Mr Maloka has since instituted 9 different claims in different fora against Liberty over a period of fifteen months, all stemming from his dismissal. These include:
 - (i) Three claims instituted in the CCMA relating to unfair discrimination, unfair dismissal and unfair labour practice, all of which were unsuccessful;
 - (ii) Two claims instituted in the Equality Court relating to unfair discrimination, both of which were likewise unsuccessful;
 - (iii) Three claims instituted in the Labour Court relating to automatically unfair dismissal, unfair discrimination and harassment as well as a review of the CCMA arbitration awards, which claims are still pending; and
 - (iv) The main application relating to various damages claims arising from his dismissal, including defamation of character, which is pending.
 7. On 6 July 2021, Liberty delivered a notice in terms of rule 47 calling on Mr Maleka to furnish security for its costs in the main application.
 8. Pursuant to service of the rule 47 notice, the respondent instituted various interlocutory proceedings, including:
 - (i) The filing of a '*notice of objection under rule 30 pertaining to (sic) irregular step taken by respondent [Liberty] to rule 47*';

- (ii) An application in terms of rule 30(2)(c) '*to set aside notice of demand that I must provide security for legal costs*', which is being opposed;
- (iii) The filing of an application for leave to amend the notice of motion in the main application in terms of rule 28(4) together with a '*supplementary founding affidavit to an application for leave to amend the notice of motion*', which is being opposed.

Rule 30 application

9. The respondent delivered a notice of objection in terms of Rule 30² pursuant to receipt of the rule 47 notice calling for security. The notice of objection is lengthy and for the most part, contains surplus verbiage including unintelligible argument. In the notice of objection, Mr Moloka complains, amongst others, that the rule 47 notice delivered by Liberty constitutes an irregular step in that:

- (i) Liberty '*did not within 10 days of sending the notice of intention to oppose [the main application] served (sic) the notice of demand that I must provide security for legal costs...as provided by the rules of court*';
- (ii) Liberty '*has been expected in terms of Rule 30(2)(b) to serve the notice of demand that I must provide security for legal costs if [Liberty] had within (10) days of becoming aware of the irregular step afforded [Mr Moloka] an opportunity of removing the cause of complaint within 10 days.*'³ (The complaint, as formulated, is not understood)

² The notice of objection is to be found at 002-45 to 002-53 of the papers.

³ These were the only two complaints that were pursued by Mr Moloka at the hearing on the merits of the rule 30 application. Other complaints that were raised from the bar were procedural in nature, relating to the fact that Liberty had not filed a practice note or written heads in the rule 30 application and that its answering affidavit was filed out of time, albeit in accordance with the period provided for in rule 6(5)(d)(i) of the Rules. I adopted a pragmatic approach and allowed both interlocutory applications to be argued notwithstanding that it was unclear whether the rule 30 application had in fact been enrolled for hearing. See in this regard: *Pangbourne Properties Ltd v Pulse Moving CC and Another* 2013 (3) SA 140 (GSJ)

10. During the presentation of oral argument at the hearing of the matter, the respondent clarified that his complaint relates to the fact that Liberty took a further step in the cause by delivering an answering affidavit as well as an application for condonation for filing its answering affidavit one day late, before delivering its rule 47 notice, and therefore it has no right to demand security for costs.
11. In terms of Rule 30:
- (1) A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.
 - (2) An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if—
 - (a) **the applicant has not himself taken a further step in the cause with knowledge of the irregularity;**
 - (b) **the applicant** has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;
 - (c) the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).
 - (3) If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.
 - (4) Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.
 - (5) ...” (emphasis added)
12. As regards the first complaint, Mr Maloka relies on a time period of ten days after delivery of a notice of intention to defend within which a party demanding security is to file its notice in terms of rule 47. However, the rule does not prescribe a period of ten days within which to demand security, whether from date of notice of intention to defend or at all, as Mr Maloka erroneously believes. In terms of rule 47(1), ‘a party entitled and desiring to demand security for costs from another shall, *as soon as practicable after the commencement of proceedings*, deliver a notice setting forth the grounds on

which security is claimed, and the amount demanded.’ (emphasis added). As pointed out in Erasmus,⁴ even prior to the introduction of rule 47 it was accepted that delay in applying for security is not necessarily a fatal bar to an application for security for costs,⁵ and there is nothing in the present rule which suggests delay in demanding or applying for security is to be regarded as fatal. In any event, there does not appear to have been any unreasonable delay in applying for security for costs when regard is had to the timeline that elapsed from the date on which the main application was launched until demand was made for security and the subsequent rule 47 application was launched.⁶

13. Mr Maloka’s second complaint, namely, that Liberty took a further step in the cause, is based on an erroneous reading or understanding of what the rule entails. It is Mr Maloka who complains that the rule 47 notice is irregular and it is thus he who is applying in terms of rule 30 for such notice to be set aside. In terms of rule 30(2), Mr Maloka (as applicant) is, amongst others precluded from bringing an application in terms of rule 30 if he has taken a further step in the cause (rule 30(2)(a) or if he fails, within 10 (ten) days of becoming aware of the irregular step, to deliver a written notice in which his opponent is afforded the opportunity of removing the cause of complaint within ten days.
14. It is trite that a notice to furnish security does not constitute an irregular or improper step or proceeding for purposes of rule 30(1). In the case of *Market*

⁴ Superior court practice, Erasmus, authored by Bertelsmann & Van Loggerenberg in their commentary on rule 47(1) at D1-637 (revision service 5,2017)

⁵ See authorities cited in fn 91 of Erasmus in the relevant commentary.

⁶ The main application was launched on 2 April 2021. The rule 47 notice was delivered on 6 July 2021 shortly after the answering affidavit in the main application was delivered on 2 July 2021. Mr Maloka delivered his notice of objection in terms of rule 30 on 13 July 2021. The application in terms of rule 30 was brought on 3 August 2021. The rule 47 application was brought on 2 September 2021. In between, affidavits were filed in an opposed application for condonation for the late filing (by one day) of the answering affidavit in the main application, and in the opposed rule 30 application.

Dynamics,⁷ the court considered that a notice filed in respect of furnishing security is not in fact a further step in the proceedings or some act which advances the proceedings one state nearer completion. Rather, the notice can be considered to relate to a peripheral matter and as falling outside the provisions of Rule 30.⁸

15. For these reasons, the rule 30 application lacks merit and falls to be dismissed.

Rule 47 application

16. Liberty seeks, *inter alia*, an order compelling Mr Maloka to provide security for costs and that the main proceedings be stayed until the order is complied with, alternatively, in the event that Mr Maloka does not provide security within a reasonable time, that the applicant be given leave to re-enrol this application, duly supplemented, for an order dismissing the main application with costs.
17. In *Boost Sports*,⁹ The Supreme Court of Appeal held that mere inability by an *incola*¹⁰ to satisfy a potential costs order is insufficient in terms of the common law to justify an order for security. Something more is required – the court must be satisfied that the contemplated main action (or application) is vexatious or reckless or amounts to an abuse of its process. As pointed out in paragraph 18 of that judgment, an application for security for costs requires a less stringent test than one for the stay of vexatious proceedings. The latter ends unsustainable litigation whereas the former contemplates the continuance of proceedings with the safeguard of security for costs.

⁷ *Market Dynamics (Pty) Ltd t/a Brian Ferris v Grogor* 1984(1) SA 152 (W).

⁸ See authorities cited in fn 92 of Erasmus in the relevant commentary.

⁹ *Boost Sports Africa (Pty) Ltd v South African Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA), paras 15 - 16

¹⁰ An *incola* within the present context refers to a person who is a resident of the Republic of South Africa.

18. An action (or application) is vexatious and an abuse of the process of court if it is obviously unsustainable.¹¹ Unsustainability of the action/application on the merits need not appear as a certainty but on a preponderance of probability in any application for security for costs.¹² It is not necessary for a court to embark on a thorough investigation of the merits of the pending case. Nor is it contemplated that there should be a close investigation of the facts in issue in the case. As Streicher JA stated in *Zietsman*,¹³ *'I am not suggesting that a court should in an application for security attempt to resolve the dispute between the parties. Such a requirement would frustrate the purpose for which security is sought. The extent to which it is practicable to make an assessment of a party's prospects of success would depend on the nature of the dispute in each case'*.
19. Liberty relies on the fact that Mr Maloka is unemployed, alleging that he is a 'man of straw' who is litigating in a nominal capacity. Given Mr Maloka's admission that he is financially distressed and that there is currently still an unpaid costs order in favour of Liberty against Mr Maloka arising from proceedings pursued by him against Liberty in the Equality court, he would in all likelihood be unable to comply with any adverse costs order in due course. The main application has engendered several interlocutory

¹¹ See *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565 D-E

¹² *Id Boost Sports*, para 18, where the court endorsed what was said in earlier authorities, namely, that a detailed investigation of the merits need not be undertaken in an application for security for costs, nor does the court need to be convinced with certainty of the unsustainability of the action or application. See too: *Fitchet v Fitchet* 1987 (1) SA 450 (ECD) at 454E-G, where the following was said: "...in applications for security for costs the test should be somewhat different. Where, in an application for dismissal of an action, the Court without hearing evidence on the merits will require moral certainty alone that the action is unsustainable, in an application for security for costs the merits test should be somewhat less stringent and other factors which are irrelevant in a dismissal application, should be taken into account." (emphasis added)

In *Ravden v Beeten* 1935 CPD 269 at 276, Sutton J endorsed the less stringent approach, indicating that the test is satisfied where on the face of the pleadings it is shown that the action cannot be maintained and is frivolous and vexatious.

¹³ *Zietsman v Electronic Media Network Ltd* 2008 (4) SA 1 (SCA), para 21.

applications including further applications to amend by Mr Maloka, which have caused costs to increase incrementally in the matter.

20. Liberty submits that the main application is meritless and vexatious in the sense conveyed in the authorities referred to above. Not only has the claim for defamation and damages impermissibly been brought by way of motion proceedings, dooming it to failure,¹⁴ a perusal of the papers in the main application reveals that the application is beset with numerous material disputes of fact. Such issue was pertinently raised in the answering affidavit, notwithstanding which, Mr Maloka has elected to persist with the matter on motion. Furthermore, no supporting documentary evidence is attached to the founding affidavit.¹⁵ It appears that Mr Maloka merely separately uploaded an evidence pack (similar to a trial bundle) which is impermissible in motion proceedings and contrary to established principles pertaining to the pleading and proving of a case in motion proceedings.¹⁶ Whilst

¹⁴ See: *Malema v Rawula* [2021] ZASCA 88, paras 27 & 29

¹⁵ For example, the claim for medical expenses is not supported by invoices or proof of payment thereof.

¹⁶ See: *Genesis Medical Aid Scheme v Registrar, Medical Schemes and Another* 2017 (6) SA 1 (CC) para 171 where the Constitutional Court dealt with a litigant's obligation to make out a case in the affidavit itself, stating as follows (underlining added):

The fact that the second judgment got the point about the auditor's assurance report from an annexure to one of the affidavits and not from the respondents' answering affidavit raises the question whether it is permissible in our law to decide a matter on the basis of a point contained in, or based on, an annexure to an affidavit but which is not covered in the relevant affidavit. The answer is No. In Minister of Land Affairs and Agriculture v D & F Wevill Trust¹⁶ the Supreme Court of Appeal said:

'(T)he case argued before this court was not properly made out in answering affidavits deposed to by Andreas. The case that was made out, was conclusively refuted in the replying affidavits as I pointed out in paras [18] to [20] above. It is not proper for a party in motion proceedings to base an argument on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest — the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. The position is worse where the arguments are advanced for the first time on appeal. In motion proceedings, the affidavits constitute both the pleadings and the evidence: Transnet Ltd v Rubenstein [2006 (1) SA 591 (SCA)] in para 28], and the issues and averments in support of the parties' cases should appear clearly therefrom. A party cannot be expected to trawl through lengthy annexures to the

procedural irregularities may be overlooked by a court in the exercise of its discretion, having regard to the peculiar facts, it should also be remembered that unrepresented litigants are not entitled as of right to better treatment than represented litigants.¹⁷ Given the history of the litigation pursued by Mr Maloka against Liberty in other fora, the question of whether he should have foreseen that disputes of fact would arise in the matter will likely feature prominently at the hearing of the main application.

21. On the facts of this matter, I am persuaded that Liberty has established its entitlement to security for costs on the basis that the main application is unsustainable in its present form and further based on his vexatious conduct in instituting various interlocutory applications (including the present rule 30 application and including his insistence that a substantive application for condonation be brought by Liberty in the main application for filing its answering affidavit one day late, which Mr Maloka has seen fit to oppose without reasonable cause) all of which have served to put Liberty to unnecessary trouble and expense which it ought otherwise not to bear.¹⁸ This is aside from various other unmeritorious claims instituted by him in other fora, as alluded to above. On his own version, Mr Maloka is the owner of immovable property. He submits that he will be compelled to sell his home if ordered to pay security. He has, however, not stated that he is incapable of raising a loan against the security of his property or of obtaining gainful employment in the foreseeable future. He has in my view failed to demonstrate that an order directing him to furnish security will necessarily

*opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.*¹⁶ [Own emphasis.]

If a litigant is not permitted to engage in a trial by ambush, it follows that a court may also not do so." See too the summary by the Supreme Court of Appeal in *MEC for Health, Gauteng v 3P Consulting (Pty) Ltd* 2012 (2) SA 542 (SCA) para 28 on the trite principles that govern pleading and proving a case.

¹⁷ See *Malema v Rawula* [2021] ZASCA 88, para 63.

¹⁸ See *Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another* 1997 (1) SA 157 (A) at 177 D-E, where the court expressed the view that proceedings may be regarded as vexatious when a litigant puts the other side to unnecessary trouble and expense which it ought not to bear.

deal a death blow to his main application. In any event, that an order for security might or will put an end to the litigation is not in itself an overriding consideration or even a sufficient reason to refuse an application for security.¹⁹

22. The rule 30 application was unsustainable and the rule 47 application was opposed on unsustainable grounds. In these circumstances, I see no reason not to apply the ordinary rule that costs follow the result.
23. Accordingly, the following order is granted:

ORDER:

- 1 The rule 30 application is dismissed with costs.
- 2 The rule 47 application succeeds with costs.
- 3 The applicant in the main application (Mr Rakokwane Maloka) is ordered to furnish security for the legal costs of the respondent (Liberty Holdings) in the main application.
4. The form, amount and manner of security to be provided by the applicant in the main application shall be determined by the Registrar of this court on application by the Respondent in the main application.
5. The main application is hereby stayed forthwith until such time as security shall have been furnished as directed above.
6. In the event that the applicant fails to provide security as determined by the Registrar within 20 days of such determination, the respondent is granted leave to apply, on the same papers, amplified as necessary, for the dismissal of the main application.



¹⁹ See: *Fusion Properties 233 cc v Stellenbosch Municipality* (932/2019) [2021] ZASCA 10 (29 January 2021)

**AVRILLE MAIER-FRAWLEY
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION, JOHANNESBURG**

Date of hearing: 9 May 2022
Judgment delivered 24 June 2022

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on Caselines and release to SAFLII. The date and time for hand-down is deemed to be have been at 10h00 on 24 June 2022.

APPEARANCES:

Counsel for Applicant (rule 47 application)/ (Respondent in Rule 30 application)	Adv R Itzkin
Attorneys for Applicant:	SGV Attorneys
For Respondent (in rule 47) (Applicant in rule 30)	Mr Maloka in person