

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION- PRETORIA**

CASE NO: 2556/2021

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED: YES

In the matter between:

THE LEGAL PRACTICE COUNCIL

Applicant

and

DARREN SAMPSON

First Respondent

**DEPARTMENT OF JUSTICE
& CONSTITUTIONAL DEVELOPMENT**

Second Respondent

ROCHELLE MAISTRY

Third Respondent

JUDGMENT

Introduction

[1] This is an application for security of costs in terms of Rule 47 (4) by the first respondent in which the first respondent seeks the following order:

“(i) The First Respondent having duly served a Rule 47(1) request for security for costs (27 May 2021) application including a request for written reasons in terms of Rule 41A of the Uniform Rules of Court (02 June 2022);

(ii) Applicant duly opposed the application for security for costs (31 May 2021) and failed to provide written reasons in terms of Rule 41A;

(iii) The Applicant’s dies having expired for either providing written reasons including filing of an answering affidavit to oppose the application for security for costs;

(iv) The First Respondent hereby applies to the above Honorable Court for security to be provided within five (5) days in terms of Rule 47 (4) of the Uniform Rules of Court (application for security of costs) failing which the First Respondent shall seek an order striking out the application filed by the Applicant;

(v) Costs on an attorney and own client scale and/ or in the alternative costs *de boni propis*;

(k)Further and/ or alternative relief.”

Background

[2] The applicant brought an urgent application to suspend the first respondent as a Legal Practitioner. The first respondent opposed the matter and the urgent was heard on 16 February 2021.

[3] Judge Ranchod was of the view that the applicant did not require a court order suspending the first respondent in order to discipline the first respondent and that it should continue with its disciplinary enquiry. Further that after the outcome of

the disciplinary enquiry the first respondent could approach the court and therefore postponed the matter *sine die*.

[4] Between January 2021 and 12 March 2021 there were several applications brought by the first respondent including joinder applications of the second and third respondent as well as an application to compel in terms of Rule 35(7). The first respondent has brought the current application which is an application for security for costs.

[5] On 27 May 2021, the first respondent's served a notice in terms of Rule 47 (1) on the applicant for security of costs. The applicant opposed the application on 31 May 2021. The first respondent now seeks an order in terms of Rule 47(4) for this Court to order the applicant to provide costs within 5 (five) days of the order being granted.

The first respondent's submissions

[6] The first respondent's submissions are that the applicant failed to file an answering affidavit or respond to a request for written reasons for the objection to mediation in terms of Rule 41A. He submitted that his request for written reasons was furnished on 2 June 2021 to obtain the information which he states stems from his application and which will be exchanged in the ordinary course of the court processes. It is his submission that litigation in this matter can be avoided. He has further stated that he has brought a Rule 23 application to dismiss the applicant's case as it is vague and embarrassing and the urgent application lacks material facts.

[7] The first respondent avers that had the applicant acted prudently regarding the complaints against the second and third respondent that litigation could have been avoided. Further that he has presented bills of costs for payment to the taxing master and the second respondent refuses to attend the taxations. The applicant and the second respondent opposed the matter in September and October 2021 respectively but only filed their answering affidavit on 15 March 2022 three days before the hearing was set down for 18 March 2022. He was therefore advised by the Registrar that the matter was technically unopposed. However, on 18 March

2022 Judge Basson directed that the matter be removed from the unopposed roll and reserved costs. Again on advice from the Registrar he brought an application to compel on 30 March 2022 for the filing of heads of argument. He avers that the *dies* have expired again and the matter should be enrolled as unopposed. It is due to the applicant's conduct in this matter that he requests that all his costs be covered on an attorney and own client scale to either an attorney of his choice or to the registrar of the Court as guarantee and that condonation of the applicant should not be entertained. Lastly he submits that the applicant refuses to permit him to enrol on the roll of practising attorneys in order to generate an income and therefore he has difficulty in applying for vacancies.

Security for costs

[8] Rule 47(4) relied upon states the following:

“The Court may, if security not be given within a reasonable time, dismiss any proceedings instituted or strike out any pleadings filed by the party in default, or make such other order as to it may seem meet.”

[9] In terms of Rule 47 of the Uniform Rules, a *peregrinus* plaintiff (or applicant) who does not own unburdened immovable property in the country, may be ordered to give security for the costs of his action. The objective of the rule is to ensure that if the *peregrine* plaintiff is unsuccessful, payment of the *incola* defendant's costs is secured. The court also has a discretion to grant an order for security for costs where both parties are *peregrini*. The court must be satisfied that the main application is vexatious or reckless or amounted to an abuse of the process of the court¹. A *peregrinus* who is plaintiff (or applicant) and who does not own unburdened immovable property in the Republic may be ordered to give security for the costs of his action² or as in this instance an opposition to the pending application.

¹ *Ramsamy NO v Maarman* 2002 (6) SA 159 (C) at 172I; *Boost Sports Africa (Pty) Ltd v South Africa Breweries (Pty) Ltd* 2015 (5) SA 38 (SCA) at 50C–I.).

² *Brearley v Faure, Van Eyk and Moore* (1905) 22 SC 2; *Lowndes v Rothschild* 1908 TH 49; *Kachelnik v Afrimeric Distributors (Pty) Ltd* 1948 (4) SA 279 (C).

[10] An *incola* is not generally compelled to furnish security for costs except where there is an abuse of the process of court, namely where the claim is vexatious³. An action is vexatious if it is obviously unsustainable, frivolous, improper, instituted without sufficient ground, to serve solely as an annoyance to the defendant⁴.

[11] In an application for security for costs a court does not have to be convinced as a matter of certainty that the matter is incapable of succeeding but rather as a probability. The test whether an action is vexatious on the grounds that it is unsustainable can therefore be summarised as follows: the applicant does not have to establish this as a certainty; a court should not undertake a detailed investigation of the case nor attempt to resolve the dispute between the parties. This would be tantamount to pre-empting the trial court, in this case the court seized with the urgent application. Rather, the court in a security for costs application brought upon these grounds, should merely decide on a preponderance of probabilities whether there are any prospects of success⁵. In *Zietsman Supra* the Court held that:

“The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff’s claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim.”

[12] This approach was subsequently endorsed by the Constitutional Court in *Giddey NO v JC Barnard and Partners*⁶, which concerned the correct constitutional approach to a court’s discretion as whether to require a litigant to furnish security for costs. There the Constitutional Court stated as follows in relation to the balancing exercise:

³. *Ecker v Dean* [1938 AD 102](#); *Zietsman v Electronic Media Network Ltd* [2008 \(4\) SA 1](#) (SCA), para 4

⁴ See *Fisheries Development Corporation of SA Ltd v Jorgenson and Another* [1979 \(3\) SA 1331](#) (W); *Golden International Navigation SA v Zeba Maritime Co Ltd*; *Zeba Maritime v MV Visvliet* [2008 \(3\) SA 10](#) (C) para 9).

⁵ *Zietsman* (supra) at para 21.

⁶ [2007 \(5\) SA 525](#) (CC) at para 8.

‘To do this balancing exercise correctly, a court needs to be apprised of all the relevant information. An application for security will therefore need to show that there is a probability that the plaintiff company will be unable to pay costs. The respondent company, on the other hand, must establish that the order for costs might well result in it being unable to pursue the litigation and should indicate the nature and importance of the litigation to rebut a suggestion that it may be vexatious or without prospect of success. Equipped with this information, a court will need to balance the interest of the plaintiff in pursuing the litigation against the risks to the defendant of an unrealisable costs order.’

[13] I turn now to the facts of the present matter. The fact that the applicant in this matter has not attended taxations of numerous taxed bills upon presentation to the taxation master is not a relevant consideration as there is no Court order for costs. The test from as seen from the above precedent is that in order to succeed in an application for security for costs that the applicant must show that there is a probability that the plaintiff company will not be able to pay the costs. Further that the objective of Rule 47 is to ensure that a *peregrinus* plaintiff (or applicant) who does not have unburdened immovable assets to provide security for his action. The applicant is not a *peregrinus* as it is domiciled in South Africa and therefore is actually an *incola*. As indicated earlier it is a general rule that an *incola* will not be compelled to provide security for costs unless there is proof that the litigation is vexatious and is an abuse of the Court process.

[14] It is trite that the court has an inherent jurisdiction to stop or prevent a vexatious action as being an abuse of the process of the court, and one of the ways of doing so is by ordering the vexatious litigant to furnish security for the costs of the opposing side⁷. An action is vexatious if it is clearly unsustainable. The first respondent has in my view failed to demonstrate that the claim by the applicant is vexatious. However, this Court is of the view that to prevent the plaintiff from pursuing a proper claim will prejudice the applicant.

⁷ Zietman, *supra* at 4E.

[15] The first respondent has not provided any proof that the applicant will not be able to pay its costs should this Court order it to do so. The first respondent other than the fact that he is unable to secure work as a result of being suspended from practicing as a legal practitioner pending the disciplinary action by the applicant against it, he has not provided any further evidence of any other injustices that he has or may suffer for an order for security of costs to be granted.

[16] Accordingly and in light of the consideration of the interests of justice as borne out by the totality of the facts it does not favour the granting of the security of costs.

[17] In my view, the first respondent's application stands to fail.

Order

[18] **I accordingly make the following order:**

18.1 The application is dismissed.

C SARDIWALLA
Judge of the High Court of South Africa

Representation:

For the applicant:

Adv. N Mteto

Instructed by:

RENQE FY INC

For the first respondent:

D Sampson

Date of the hearing:

18 March 2022

Date of reasons:

6 October 2022