Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Not Reportable

CASE NO: A15/2007

In the matter between:

HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	First Applicant
PROFESSIONAL BOARD OF EMERGENCY CARE	Second Applicant
and	
EMERGENCY MEDICAL SUPPLIES AND TRAINING CC (t/a EMS)	Respondent
In re	
EMERGENCY MEDICAL SUPPLIES AND TRAINING CC (t/a EMS)	Appellant
HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	First Respondent
PROFESSIONAL BOARD OF EMERGENCY CARE	Second Respondent

Court: NYMAN AJ

Heard: 5 December 2012

Delivered: 25 February 2013

JUDGMENT

R. M. NYMAN AJ

R. M. NYMAN AJ

[1] This is an application for security for costs in terms of Uniform Rule 47(3). The applicants request the respondent to furnish security for their costs in respect of the respondent's pending appeal to the Supreme Court of Appeal (SCA).

Background

[2] In January 2007, the respondent launched an appeal in this Court, in terms of section 20 of the Health Professions Act, 1974 (the Act), against a decision taken on 11 December 2006 by the combined Education and Executive Committees of the second applicant.

[3] In the section 20 appeal, the respondent sought to have impugned a withdrawal of its accreditation to offer training in emergency care, granted to it by the Board in terms of section 16 of the Act.

[4] On 28 October 2011, this Court dismissed with costs, the section 20 appeal. Leave to appeal against the judgment and order was granted to the SCA on 2 February 2012. On 28 February 2012 the respondent lodged its notice of appeal with the SCA.

The application for security

[5] On 7 May 2012, the applicants served a notice in terms of Uniform Rule 47(1) on the respondent's attorneys, requesting security for the applicants' costs in respect of the SCA appeal in the sum of R282 919.50. The respondent did not furnish the requested security.

[6] In the founding affidavit the applicants base their ground for the relief so

sought on the allegations contained in the respondent's founding affidavit in the section 20 appeal, that the respondent will not be able to pay their costs of the appeal in the SCA, should the appeal be dismissed with costs. In its founding affidavit, the respondent alleged that it had difficulty in generating sufficient income to meet its obligations and that the only assets that the respondent owns are its training equipment. The applicants allege that their estimated liability in respect of the costs of the section 20 appeal is R1 400 262.16.

[7] In his submissions, Mr Berger, on behalf of the applicants, relied on the allegations made in the answering affidavit deposed to by Mr Craig Northmore, one of the two members of the respondent, that the respondent does not have any disposable assets or resources to furnish security for costs and furthermore, that the respondent is unable to fund the costs of its own appeal.

[8] The respondent has raised three grounds of opposition to the application: firstly, that this Court is *functus officio*; secondly, that it lacks jurisdiction; and thirdly, that this Court should exercise its discretion and dismiss the application.

Functus officio and jurisdiction

[9] The respondent contends that this Court, as the Court of first instance, has already granted leave to appeal against its judgment, which appeal is pending before the SCA. Accordingly, this Court is *functus officio* and does not have jurisdiction to order the respondent to furnish security for the costs of the appeal.

[10] In answer to this point *in limine*, Mr Berger submitted that subsections 20(5)(a) and (b) of the Supreme Court Act 59 of 1959 apply to the pending appeal to the SCA because this appeal is an appeal which was against a judgment or order of a court given on appeal to it (*See*: *MV Navigator (No 2): MV Navigator and Another v Wellness International Network Ltd* 2004 (5) SA 29 (C) at 33 C-D).

[11] Subsections 20(4) and (5) read as follow:

> *"(4) No appeal shall lie against a judgment or order of the court of a provincial or local division in any civil proceedings or against any judgment or order of that court given on appeal to it except-*
>
> *(a) In the case of a judgment or order given in any civil proceedings by the full court of such a division on appeal to it in terms of subsection (3), with the special leave of the appellate division;*
>
> *(b) in any other case, with the leave of the court against whose judgment or order the appeal is to be made or, where such leave has been refused, with the leave of the appellate division.*
>
> *(5) (a) Any leave required in terms of subsection (4) for an appeal against a judgment or order of a court given on appeal to it, may be granted subject to such conditions as the court concerned or the appellate division, according to whether leave is granted by that court or the appellate division, may determine, and such conditions may include a condition that the applicant*

shall pay the costs of the appeal.

(b) If such leave to appeal is granted in any civil proceedings, the court granting the leave may order the applicant to find the security for the costs of the appeal in such an amount as the registrar may determine, and may fix the time within which the security is to be found.

(c) If the leave to appeal required in terms of subsection (4) (b) has been refused by the court of a provincial or local division but is granted by the appellate division, the appellate division may vary any order as to costs made by the court concerned in refusing leave."

[12] It is the applicants' contention that subsection 24(5)(b) regulates an application for security and it empowers the Court which grants leave to appeal, to order an applicant in an application for leave to appeal, to find the security for the costs of the appeal.

[13] The applicants contend that SCA Rule 9 stipulates the time when an application for security should be launched. Rule 9 provides that:

"*When required*

(1) 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.

Form or amount of security

(2) - If the form or amount of security is contested, the registrar of the court a quo shall determine the issue and this decision shall be final."

[14] It is the applicants' contention that accordingly, the wording of SCA Rule 9(1) and in particular, the provision that security must be provided *"before lodging the record'*, indicate that the application for security must be brought at the time when the application for leave to appeal is made or soon thereafter, but before the record is lodged and that security must be provided before the record is lodged. It is not in dispute that, when the application for security was instituted on 1 June 2012, the record had not yet been lodged with the Registrar of the SCA. In these circumstances, this Court is not *functus officio* and is properly empowered to hear the application for security.

[15] In my view, from the reading of SCA subrule 9(1), an application for security has to be launched at the time when the application for leave to appeal is brought. The formulation of the words, "*[i]f the court which grants leave to appeal orders the appellant to provide security for the respondent's costs of appeal*", presuppose a situation where the court, at the time when it is granting the application for leave to appeal, also orders the appellant to provide security for the respondent's costs of appeal, and not at a later time. To my thinking, it is for this reason that SCA subrule 9(1) stipulates that security should be furnished before the record has been lodged.

[16] Therefore, subrule 9(1) envisages two stages to an application for security; firstly, the time when the application for security is made and granted, which would be the same time when the application for leave to appeal is made and granted.

Secondly, the time when security has to be lodged, which is before the time of the delivery of the record. However, this is not the end of the issue. Do my conclusions mean that an applicant would be prevented from bringing an application for security after the application for leave to appeal has been granted? In my view, such a strict interpretation of subrule 9(1) would deprive this Court of its inherent jurisdiction to condone non-compliance with its rules, in appropriate circumstances.

[17] In *Magida v Minister of Police* 1987 (1) SA 1 (A), Joubert JA 13J-14A confirmed the practice that normally, an application for the furnishing of security for costs should be brought against a *peregrinus* before *litis contestatio* but it may be brought at any stage of the proceedings, should the plaintiff have changed his status to become a *peregrinus*.

[18] In *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV and Another v Honig 2012* (1) SA 247 (SCA) at 252I – 253A, Leach JA dismissed the appellants' allegation that a respondent is not entitled to seek security for costs at a late stage of the proceedings in the following passage:

> "*While as a general rule a party is expected to apply expeditiously for security under rule 47 (which the respondent did in his first security notice), a party is entitled to seek additional security at any stage, although an unreasonable delay in doing so may be decisive in the exercise of the court's discretion.*"

[19] In my view, although the facts of the *Magida* and *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV* decisions are different from the facts of

the present case because they concern appeals in respect of orders regarding applications for security against a *peregrinus* in respect of the court sitting as a court of first instance, to my thinking, the decisions bear relevance because they illustrate the general approach that our courts adopt to applications for security for costs. It seems to me that the general rule is that a party is expected to apply expeditiously for security under Uniform Rule 47. However, an application for security can be brought at a later stage, provided that a reasonable explanation is proffered for such a delay. (I consider below whether the applicants have provided a reasonable explanation.) For these reasons, I should dismiss the preliminary points that this Court is *functus officio* and lacks jurisdiction to consider the application.

Just and equitable

[20] The respondent contends that I should exercise my discretion and not grant security for costs on the ground that it would not be in the interest of justice to do so, given that such an order would have the effect of preventing the appeal from proceeding. The respondent furthermore contends that it has good prospects of success on appeal.

[21] After taking into consideration a number of factors, I am not inclined to grant the application for security for costs.

Delay in proceedings

[22] While I have taken note of Mr Berger's submission that the application for

security was brought as soon as practicable and that the applicants were entitled to bring the application as and when they did, in my view, the application was not launched expeditiously. The papers do not reveal on which date the application for leave to appeal was brought. What is known is that leave to appeal was granted on 2 February 2012 and the notice of appeal to the SCA was lodged on 28 February 2012. The notice in terms of Uniform Rule 47 was delivered on 4 May 2012 followed by the delivery of the application for security on 1 June 2012, four months after the granting of leave to appeal.

[23] In my view, I do not find the reasons advanced by the applicants in their replying affidavit for the delay in launching the application for security, as reasonable. The applicants state that it took their counsel two months to draft an opinion regarding the prospects of pursuing this application and further, that it took one month for a bill of costs to be drafted. In my view, in the light of the established practice that an application for security for costs should be brought expeditiously, I do not find the applicants' conduct reasonable.

[24] On the applicants' own version, they had full knowledge that by the time the application for security was launched on 1 June 2012 that the respondent was in the process of compiling the record of the appeal to the SCA, given that on 31 May 2012, the applicants granted to the respondent an extension of two months to deliver the record. The record was delivered on 5 October 2012, therefore the respondent had already incurred further costs in prosecuting the appeal by the time that the matter was heard. For the reasons of equity and fairness, in my view, the applicants should have taken the necessary steps to ensure that the application was

finalised before the record was delivered.'

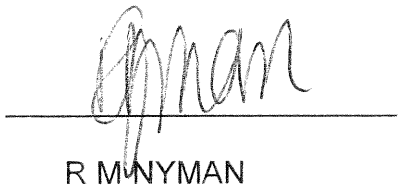
Financial means

[25] In his answering affidavit, Mr Northmore makes an undertaking to pay the costs of the appeal in his personal capacity, should the respondent be unsuccessful. In support of this undertaking, Mr Northmore states that he and his spouse own the immovable property where they live. In their replying affidavit, the applicants not only fail to provide a response to this undertaking, but also fail to place in dispute the premise of the undertaking. To my mind, this undertaking constitutes a good enough defence to the primary ground of the application.

Prospects of success

[26] In the *Exploitatie- en Beleggingsmaatschappij Argonauten 11 BV* decision at 255E, the Court held that the legal authorities to the effect that a court will not enquire into the merits of the main dispute in the exercise of its discretion as to security for costs, should not be seen to be a wholly inflexible rule of practice. In my view, given that the respondent was granted leave to appeal, another court has already formed the view that there are reasonable prospects on appeal. I therefore find no reason to deviate from the rule that I should not enquire into the merits of the main dispute. For all the aforementioned reasons, I should therefore dismiss the application with costs.

[27] The application is accordingly DISMISSED with costs.



R M NYMAN

Acting Judge of the High Court