CASE NO. A 265/96

THE R6SSING PENSION FUND

versus

B.H. LYNERS
N. VAN VUUREN P.
ROOI

In the matter between

B.HH. LYNERS
N VAN VUUREN
P. ROOI

versus

THE R6SSING PENSION FUND
R5SSING URANIUM LTD

HANNAH. J.

1996/11/20

PENSIONS:

All assets of a pension fund vest in that fund. The ownership of, or a right to a surplus usually only becomes an issue when the fund is wound up. IN that eventuality it is extremely doubtful whether the member and beneficiaries have any legal right to any surplus. On the amalgamation in the instant cause the assets and surplus transferred to the amalgamated fund and the member have no claim on the surplus.

CASE NO. A 265/95

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE RoSSING PENSION FUND

versus

B H LYNERS

N VAN VUUREN

P ROOI

In the matter between **B H**

LYNERS N VAN VUUREN P ROOI

versus

THE RoSSING PENSION FUND

FIRST APPLICANT

in Counter Application

RoSSING URANIUM LTD

SECOND APPLICANT in Counter Application **THIRD APPLICANT**

in Counter Application

CORAM: HANNAH, J.

APPLICANT

FIRST RESPONDENT SECOND RESPONDENT THIRD RESPONDENT

FIRST RESPONDENT

in Counter Application

SECOND RESPONDENT

in Counter Application

Heard on: Delivered **1996/10/28 on.1996/11/20**

JUDGMENT

HANNAH. J.; The applicant is a pension fund registered in terms of the provisions of the Pension Funds Act, 24 of 1956. On 1st September, 1994 another pension fund, namely the Rossing External Pension Fund ("REPF") which was registered under the same Act in South Africa, amalgamated with the applicant. In this application the applicant seeks an order declaring that neither the respondents nor any erstwhile member of REPF:

(1) had any claim to any portion of the assets of or actuarial surplus in REPF prior to its amalgamation with the applicant; or

(2) has any claim against the applicant after the amalgamation and arising from the transfer of the assets and liabilities of REPF to the applicant. The respondents not only oppose the grant of such an order but they make a counter-application in which they seek the following relief:

(3) An order declaring a certain amendment to rule 42 of the rules of REPF and/or the amalgamation of REPF with the applicant to be an unfair labour practice.

(4) An order setting aside

(i) the amendment of rule 42 of the rules of REPF;

(ii) the amalgamation of REPF with the applicant.

(5) An order declaring that a certain dispute within the ambit of the rules of REPF existed at the time of the amalgamation of the two pension funds and that the existence of such dispute precluded the amalgamation until such time as the dispute had been resolved within the framework of REPF's rules and

(6) An order directing the applicant and Rossing Uranium Ltd, which company was joined as a respondent to the counter-application,

(i) to restore the status quo ante in respect of REPF as it was before the amalgamation; and to deal with the

dispute in question within the framework of REPF's rules.

The background to the application and counter-application is as follows. The applicant was established with effect from 1st August, 1975 to provide pension and other benefits to permanent employees of Rossing Uranium Ltd (Rossing), a public liability company incorporated in Namibia. The applicant is a defined benefit pension fund. With effect from 1st September, 1984 a second pension fund known as Rossing South African Pension Fund was established in terms of an agreement concluded on 20th August, 1984 between Carveth Geach, Solon Trust (Pty) Ltd and Rossing. Its name was changed to Rossing External Pension Fund on 28th August,

1989. REPF was formed to provide pension and other benefits to employees of Rossing at a time when considerable uncertainty existed as to the political future of Namibia and when fears were expressed that after the independence of Namibia difficulties might be experienced in obtaining payment of pension benefits to members who had left Namibia to reside elsewhere. In order to ensure the continued employment of the many South African citizens employed by Rossing it was decided to register a pension fund controlled in the Republic of South Africa in which country benefits would be payable. REPF was registered in South Africa under the provisions of the Pension Funds Act, 24 of 1956, and had its registered office in Johannesburg. REPF was also a defined benefit pension fund and pension benefits accruing to members were in all respects identical to those accruing to members of the applicant.

Subsequent to the independence of Namibia on 21st March, 1990 the Registrar of Pension Funds for Namibia assumed responsibility for the applicant as a Namibian pension fund whilst the Registrar of Pension Funds for the Republic of South Africa retained responsibility for REPF as a South African fund.

As it happened, the fears which had given rise to the creation of REPF were not realised and it became obvious to Rossing that there was no need to maintain two separate pension funds for its employees. Also the Registrar of Pension Funds for Namibia as well as the income tax authorities had indicated that various taxation benefits available to employers and employees would not be extended to contributors to, or persons receiving benefits from, a South African pension fund. Rossing accordingly suggested to the committee of management of both the applicant and REPF that consideration be given to the amalgamation of the two pension funds and to transfer the business of REPF to the applicant.

At this point it is convenient to set out those parts of the rules of REPF which are material to this application. Rule **6** provided:

> "The Fund shall be administered by the Trustees, in accordance with these Rules."

Rule 7(a) provided:

> "There shall be appointed a Committee of Management whose function shall be:
>
> (i) to carry out such duties on behalf of the Trustees as the Trustees authorise the Committee to do.

(ii) to make recommendations to the Trustees on any matter concerning the Fund: Provided however that the Trustees shall not be bound to act upon any such recommendation."

The remainder of rule 7 dealt with the constitution of the committee of management. It consisted of six members of whom three were appointed by Rossing and three were elected by the members of the fund. The trustees in fact delegated its powers of administration of the fund to the committee of management.

Turning now to rule 42(c) this provided:

"Notwithstanding any provision to the contrary contained in these Rules and subject to the provisions of Section 14 of the Act, the Trustees shall, if the Company decides to replace this Fund by another pension scheme for its Employees, terminate the Fund and calculate the proportionate share of each Member in the Fund as set out in Rule 42(a) and then apply each Member's share to acquire benefits in such scheme; or, if this is not possible, to purchase from a registered insurance Company fully paid-up annuities on the lives of the Members concerned, which annuities shall become payable as from the dates the Members would have reached Retirement Age had the Fund not been terminated."

The rules, as is customary, provided for amendments to be made. Rule 45 provided:

" (a) The Trustees may, on the recommendation of the Committee or for any other reason, and subject to Rule 45(b) hereunder, make such new Rules or alter or rescind any existing Rules as they may decide.

(b) Notwithstanding anything to the contrary contained in these Rules any addition to or amendment of these Rules shall be submitted to the Registrar for approval in accordance with the Act. Copies of all amendments or additions to these Rules shall be sent to the Inland Revenue Authorities of the Republic of South Africa and of Namibia."

It is unnecessary to set out the remainder of Rule 45 but Rule 46 is of some relevance. This provided:

> "Any dispute which may arise in regard to the interpretation or application of these Rules shall be decided by the Trustees after consultation with the Actuary and the Trustees' decision shall be final: Provided that if any party to such dispute is dissatisfied with the decision, the Trustees may by agreement with such party refer the dispute to arbitration by an independent Actuary."

The respondents contend that Rossing had an ulterior motive for suggesting the amalgamation of the two pension funds. There was an actuarial surplus in REPF of N$72 420 000.00 and the respondents contend that Rossing made the suggestion in order to get access to this surplus. There can, in fact, be no real substance in this contention because the surplus belonged to REPF itself and with an amalgamation would belong to the applicant. All Rossing could do was to continue a contribution holiday which had commenced for both Rossing and the members of the two funds on 1st January, 1993 but nothing much turns on that in this case.

Following the suggestion that the two funds be amalgamated various discussions took place and on 20th June, 1994 the committee of management of REPF met to consider the matter. Present at the meeting was a quorum of members and the settlor of Solon Trust (Pty) Ltd, Carveth Geach, in his capacity as trustee and representative of the trust. The committee resolved that the rules of REPF be amended subject to the approval of the Actuary, the Registrar of Pension Funds and the trustees so as to provide for the amalgamation of REPF with the applicant, the transfer to the applicant of certain interests in REPF and certain ancillary matters. The payment of the balance of the assets of REPF was then to be transferred to the

applicant. The amalgamation was to take place on 1st September, 1994 and from the date of amalgamation REPF would cease to exist and the interests of all members, pensioners and beneficiaries of REPF would, on that date, be transferred to the applicant. Thereafter, all such persons would be entitled to benefits from the applicant. The amendment was to be effected by adding a new subrule (f) to rule 42.

On 21st June, 1994 the committee of management of the applicant also met and it was resolved that the rules of the applicant be likewise amended subject to the approval of the Actuary and the Registrar of Pension Funds with effect from 1st September, 1994 so as to permit the amalgamation of REPF with the applicant and to accept all members, pensioners and beneficiaries of REPF as members of the applicant.

All consents and approvals required to give effect to the resolutions were granted and the amendments to the respective rules were effected and registered with the Registrars of Pension Funds in South Africa and in Namibia. The amalgamation duly took place on 1st September, 1994 and the relevant certificate in terms of section 14 (1) (e) of the Pension Funds Act, 1956 was issued by the Registrar of Pension Funds for Namibia on 7th September, 1994 and by the Registrar of Pension Funds for South Africa on 31st January, 1995. The actuarial surplus transferred to the applicant as at 1st September, 1994 in pursuance of the amalgamation was in the region of N$100 000 000.

Prior to the amendments to the rules being effected Rossing arranged for seminars to be held to enable members of REPF to be advised as to their rights and options arising from the amalgamation of the two funds and during one of these seminars certain members of REPF formed a committee of their own which became known as, and to which I shall refer as, the ad hoc committee. The three members of this committee are the three respondents to this application. This committee organised a petition and by letter dated 27th July, 1994 addressed to the chairman of the committee of management of REPF raised certain objections to the proposed amalgamation. Various discussions then took place and then by letter dated 1st August, 1994 the ad hoc committee informed the chairman of the committee of management for REPF that in general everyone seen was happy with the options but required answers to a number of questions. Other correspondence emanated from the ad hoc committee and by letter dated 9th August, 1994 the secretary to REPF wrote a reply to the letter dated 1st August. Earlier in 1994 all members of REPF had been given an option form which they were requested to complete specifying how their actuarial interest in REPF should be dealt with on amalgamation. In the letter dated 9th August, 1994 the secretary to REPF stated, inter alia, that the date by which options were to be exercised had been extended by one week to 19th August, 1994 and the letter continued:

> "As was stated by the Chairman to you at the meeting, it is not the company's intention to ride rough shod over the rights of members, and we bona fide believed that the Committee's decision to amalgamate the REPF with the RPF met with the approval of the majority of the members of the REPF. If we were wrong in our assessment of the position we are quite prepared

> to revoke the decision, annul the rule change, and restore the status quo.
>
> Accordingly if the number of option forms not returned or returned with no option expressed as at 19 August exceeds 50% of the total active and disability membership, then the issue will be referred back to the Committee of Management with a view to determining whether or not to proceed with the amalgamation of the two funds."

Further correspondence ensued and on 24th August the ad hoc committee wrote as follows to the secretary to REPF:

> "During a communication meeting held with the petitioners and other members of the REPF on 23 August 1994 in the Swakopmund Town Hall the following resolution was unanimously adopted.
>
> The said members are not in agreement with your interpretation of Rule 42 with regard to surplus and herewith register a dispute under Rule 46 of the REPF rules."

The interpretation of Rule 42 to which reference is made is set out in the letter dated 9th August, 1994, namely that the Fund has a duty to protect the rights and reasonable benefit expectations of its members and that this duty is satisfied provided that the Fund offers alternative benefits at least equal to the previous benefits under the Fund's rules.

The secretary to REPF wrote to the ad hoc committee on the same day as the dispute was registered asking for their written submission to the trustees so that the dispute could be referred to the trustees in terms of rule 46. Then on 13th October, 1994, some six weeks after the amalgamation had taken place, the erstwhile chairman of REPF received a letter from attorneys acting for members of REPF stating that the dispute submission was being prepared by counsel and reserving the members' rights flowing from the dissolution of the previous fund. Following this letter there were requests by the

ad hoc committee for certain financial statements and then by letter dated 10th April, 1995 the ad hoc committee again declared a dispute in terms of the rules of REPF and made the following submissions:

> "1. That the proportioning of assets of the REPF should take place according to the provisions of Rule 42(a) as referred to in Rule 42(c).
>
> (7) We dispute the basis on which the Registrar of Pensions granted his approval.
>
> (8) We dispute the company's ability to use the contribution holiday approach.
>
> (9) We dispute the adherence to the Rules by the Committee of Management.
>
> (10) That we make a case for reimbursement of costs and expenses incurred, related to or directly flowing from efforts to resolve this dispute."

Various meetings of the committee of management of the applicant took place after receipt of the letter dated 10th April, 1995 with a view to determining how the dispute should be resolved and the committee began preparing a submission to arbitration under rule 46 of the rules of the REPF. However, the chairman of the committee expressed reservations as to whether or not the matter could proceed as REPF had been amalgamated with the applicant and the trustees appeared to be functus officio. And in any event any arbitral award would be unenforceable as REPF was no longer possessed of any assets following their transfer to the applicant. Legal opinion was sought and on 17th July, 1995 the committee of management of the applicant resolved that the present application be brought.

Before considering the merits of the application and counter-application I will deal briefly with three points in limine raised on behalf of the respondents. It was

6 June 1996

TELECOM NAMIBIA & 1 O -vs- 0 S MWELLIE

MTAMBANENGWE, J.

SUMMARY

Application to declare appeal lapsed or strike same from roll.

Appeal - Security for cost of appeal.

Appellants claim dismissed by Trial Court - High Court - on special plea of prescription. Respondents demand security for costs of appeal. Appellant refusing to pay costs determined and fixed by Registrar in terms of the Rules contesting liability for such costs on various grounds. Appellant represented by two Counsel at hearing of matter against which appeal noted but conducting appeal and application in person. Application for Legal Aid having been refused as no prospects of success on appeal.

Held: Prospects of success relevant consideration in this type of application.

Held: Appellant liable for costs of appeal as demanded and as originally determined and fixed by Registrar. Appeal stayed till costs paid.

Held: Appellant to pay costs of application before he can proceed with appeal.

CASE NO. A 10 9/9

IN THE HIGH COURT OF NAMIBIA

TELECOM NAMIBIA **FIRST APPLICANT**

A W G RUCK **SECOND APPLICANT**

versus

OSMOND SANDILE MWELLIE **RESPONDENT**

CORAM: MTAMBANENGWE, J.

Heard on:

1996.05.24

Delivered on: 1996.06.06

JUDGMENT

MTAMBANENGWE, J.: The respondent in this matter has noted an appeal against a judgment of this Court delivered on 9th March, 1995 in which his claim was dismissed with costs. The applicant seeks an order in the following terms:

> "1. That the appeal lodged by the respondent has lapsed;
>
> Alternatively
>
> that the appeal lodged by the respondent and set down for hearing on 12 June 1996 be struck off the roll;
>
> In the further alternative
>
> that the respondent be ordered to furnish security to the Registrar of this Honourable Court in the sum of N$4 000,00 within 10 days from date of service upon him hereof, failing compliance thereof;
>
> that the applicant be granted leave to approach this Honourable Court on the same papers for the dismissal of the respondent's appeal.

2. That the respondent be ordered to pay the costs of this application.

3. Further and/or alternative relief."

The basis of this application is that respondent has failed or refuses to furnish security for applicants' costs of appeal as determined and fixed by the Registrar on 2 7th March, 1996. The respondent was requested to furnish the security required in terms of Rule 49(13) of the High Court Rules which provides as follows:

> "(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 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."

Mr Mouton who appeared for the applicants abandoned the last alternative prayer in the notice of motion, because, as he submitted, the respondent was not asking for an extension of time within which to furnish security or the amount determined by the Registrar; should the Court consider to extend the time as the last alternative prayer envisages respondent would come back with the same argument, so there was no use in granting that relief, since respondent's refusal is based on the argument that the matter heard by the High Court (i.e. the matter in respect of which the appeal was noted) relates to a labour dispute, not a civil matter - See Excelsior Meubels Beperk v Trans Unit Ontwikkelinas Koroorasie Beperk, 1957(1) SA 74 (TPD) where a party ordered to furnish security for costs failed to and could not do so, and on application for the dismissal of the action, instituted by that party, the question arose whether a rule nisi should issue ordering that party to

furnish security or show cause on the return day why the action should not be dismissed, and the Court held at p. 77 H:

> "The respondent does not offer to furnish the security nor does it ask for an extension of the stipulated period. A defence is raised which would not be successful on a return day if it had to show cause the action should not be dismissed. A rule nisi is unnecessary in the circumstances."

The abandonment of the said prayer in this matter is quite justified.

This leads me to respondent's submissions in this matter. In reply to applicants' affidavits respondent filed an unsworn statement entitled "FILING PLEA BY RESPONDENT". Rule 6(5) (d) (ii) of the High Court Rule requires that:

> "Any person opposing the grant of an order sought in the notice of motion shall:
>
> (i) .....
>
> (ii) within 14 days of notifying the applicant of his or her intention to oppose the application, deliver his or her answering affidavit, if any, together with any relevant documents;"

In reply to the replying affidavit filed by applicant, referring to the Rule and replying "thereto in so far as the Respondent has placed certain incorrect facts before this Honourable Court" respondent who appeared in person, countered by referring to Rule 30(1) :

> " (1) A party to a cause in which an irregular step or proceeding has been taken by any other party
>
> may, within 15 days after becoming aware of the irregularity, apply to Court to set aside the irregular

step or proceeding: Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such an application."

No such application was made by applicant in this case. However, as applicant states, the document "has no and/or little evidential value. This is so of course because in proceedings by way of notice of motion or petition the only way evidence is placed before the Court is in the form of affidavits .

Briefly stated, applicants rely for the relief sought, on the fact that respondent has refused to furnish security for its costs of appeal and that respondent has not complied with the Uniform Rules of Court.

Respondent has, however, put in issue his liability to furnish security. He bases his opposition to the application on two contradictory grounds. In one stance he says since, according to him, the matter heard by the High Court relates to labour disputes there is no obligation for him to furnish security. When it was pointed out that it was specifically agreed in the pretrial conference pertaining to the matter that "The Labour Code is not applicable to this matter," (Annexure "B" to applicant's replying affidavit) respondent seemed to argue that he was not bound by that agreement. That agreement was made when respondent was represented by two counsel and, as Mr Mouton rightly points out, respondent did not throughout those proceedings, that is before or during the hearing, raise

such a question although he had ample opportunity to do so since the Labour Act no. 6 of 19 92 came into operation during 1992 and before the matter was heard on 14th, 15th and 16th December, 1994. This in my view is a complete answer to any complaint that respondent had on this score. Those proceedings were conducted on the basis of a civil matter and at this late stage respondent is estoppel from relying on this ground whatever its merits. I therefore hold that the High Court Rules pertaining to Civil appeals must apply and are applicable in this matter.

The other ground for respondent's argument that he is not liable to furnish security^ is squarely based on the Rules. He says that he falls within the ambit of Rule 47(7) which provides:

> "(7) Notwithstanding anything contained in these rules a person to whom legal aid is rendered by or under any law is not compelled to give security for the costs of the opposing party, unless the Court directs otherwise."

Respondent claims that he is a person in that category. The facts pertaining to this claim are the following:

(1) Apparently respondent applied for legal aid to enable him to conduct the appeal to the Full Bench of the High Court. This was refused. The following letter was addressed to the Registrar of the High Court from the Ministry of Justice, in this connection:

> "RE: FULL BENCH APPEAL 0 S MWELLIE VS TELECOM NAMIBIA AND OTHER
>
> I acknowledge receipt of your letter dated **14** June 1995, regarding the above matter.

In this regard I wish to confirm that Mr Mwellie did apply for legal aid for his appeal on March 13, 1995. After perusing the judgment appealed against I found that Mr Mwellie had no reasonable grounds for lodging the appeal and accordingly refused his application.

The reason for refusing his application were explained to him in a letter addressed to him dated 17 March 1995.

Yours faithfully

MR I V NDJOZE CHIEF:
LEGAL AID"

(Annexure A to applicant's replying affidavit.)

(2) According to some documents handed in by him during his submissions in this matter respondent was advised by Central Bureau Services (Pty) Ltd that the cost of transcribing the record would be in the region of N$2 365.97 and a deposit of 50% would be required before start of transcribing.

(3) Respondent, as a result of the above, apparently approached the Permanent Secretary for Justice, who then wrote to the Registrar who in turn wrote to respondent as follows:

"RE: FULL BENCH APPEAL: 0 S MWELLIE V TELECOM NAMIBIA (PTY) LTD AND ANOTHER

Enclosed please find a copy of the record for your attention.

I have received instructions from the Permanent Secretary for Justice to provide you with a copy of the record after you have had a discussion with him.

Yours faithfully

REGISTRAR"

Though his application for legal aid was thus refused by the Legal Assistance Board and, although he is thus conducting the

appeal in person, and also appeared in person in this matter, respondent contends that, because the Permanent Secretary for Justice assisted in securing the record for him free, he is "so far partially (financially) assisted by Legal Aid or some other law in this action in accordance to provision or Rule 51(6) and Rule 47(7) ." There is no substance in this claim. First of all Rule 51(6) pertains to criminal appeals; and, even if it were said to apply, the fact is that the Registrar apparently refused to furnish the respondent with a copy of the record and did so only when the Permanent Secretary for Justice instructed him to do so. His application for legal assistance to prosecute the appeal was clearly turned down as Annexure A (quoted above) shows. That letter emanates from the Ministry of Justice.

It should also be noted that respondent has not applied for or been given assistance to prosecute the appeal in forma paupris as he could have done in terms of the Rules. The Rules pertaining to in forma pauoris applications require, in order to determine whether legal assistance should be afforded an indigent litigant, that a certificate probabilis causa be lodged with the Registrar (Rule 41(2)(b)). Apparently the Legal Assistance Board' also requires that applicants' claim carries some prospects of success before the application could be favourably entertained. Mere indigence is alone not a qualification for such assistance.

I do not think that one needs any authority for the self evident proposition that the requirement for security for costs under any circumstance is meant to protect the opposing party against being saddled with that the party from whom security is demanded might not be able to pay and/or to prevent unnecessary

litigation where prospects of success are doubtful. However, I think, what Curlewis J.A. said in Chermont v Lorton, 1929 AD 84, though said in the context of construing a particular statute, applies to the requirement of security for costs in any case. His Lordship stated the two-fold purpose of requiring security under that statute at p. 90 as -

> "....firstly, so as to restrain the unsuccessful party from lightly indulging in what has been called the luxury of an appeal, and secondly to afford the successful party some safeguard in case he wins the appeal and finds that the appellant is a man of no means, from whom he will be unable to recover the costs of appeal."

That should apply a fortiori where, as in this case, it is almost a certainty that the appeal will not succeed and that the unsuccessful appellant will be unable to pay the costs of appeal.

Another prong of respondent's ground of resistance based on the Rules was couched as follows in paragraph 9 of his document:

> "9. Originally Telecom Namibia was the Government of Namibia at the start of this dispute and accordingly is exempted from giving or accepting securities on appeal as provided in Rule"49(14)."

That subrule provides:

> "(14) The provisions of subrules (12) and (13) shall not be applicable to the Government of Namibia."

As applicant states in its replying affidavit:

> "Telecom Namibia has ceased being a Government Ministry or Department since 31st July, 1992 when the Posts and Telecommunications Companies Establishment Act 17 of 1992 was promulgated and published under Government Gazette no. 447 dated 31st July, 1992 and was further not disputed and/or ever placed in issue that first applicant was transformed into a company, subsequent to summons having been issued but prior to the hearing of this matter and that it no longer retained the character of a Government Ministry and/or Department prior to and during the course of the hearing of this matter on 14th, 15th and 16th December, 1993."

And again, as applicant rightly says:

> "In any event Rule 49(14) only applies to instances where security is demanded from Government and not vice versa."

There is no merit in this ground as well.

With reference to annexures "A", "B" and "C" to the founding affidavit of applicant, Mr Malan's affidavit and respondent's "FILING PLEA BY RESPONDENT" it would appear that the Registrar fixed, in terms of Rule 47(2), the amount of the security demanded by applicant, whereas respondent appears to have all along been contesting his liability to give security. Whether that was the case, or otherwise, the criticism by respondent of the Registrar in the said Annexure C and "FILING PLEA BY RESPONDENT" as biased, partial, off-hand and highly irregular, is unjustified without stating specifically what was discussed in the meeting between respondent and Mr Malan of applicants' attorneys in the Registrar's office on 27th March, 1996. It was not enough to say, as respondent says, in the said Annexure C:

> "The Respondents are aware of my stand on their claim of security since the 22 June 1995. The onus is upon them to take the dispute before the above Honourable Court for determination thereof. The Registrar has no jurisdiction in giving a ruling in this dispute."

In light of these contentions by the applicant and the unclearness of the papers before me as to what transpired before the Registrar on 27th March, 1996, I shall determine this application on the basis that respondent is contesting only his liability to give security and in terms of Rule 47(3) and (5) which provide:

> (3) Of the party from whom security is demanded contests his or her liability to give security .... within 10 days of demand ..., the other party may apply to Court on notice for an order that such security be given and that the proceedings be stayed until such order is complied with.
>
> (4).....
>
> (5) Any security for costs shall, unless the Court otherwise directs, or the parties agree, be given in the form, amount and manner directed by the registrar."

In Selero (Pty) Ltd and Another v Chauvier and Another, 1982(3) SA 519 (T) Nestadt J. at pp. 523 F - 524 A referred to conflicting views as to whether the Court, in exercising its discretion whether to order the furnishing of security, consideration of the prospects of success, was or was not a relevant consideration. Two quotes from Herbstein and Van Winsen apparently supporting conflicting views were discussed; the first being that the Court will not "enquire into the merits of the dispute or the bona fides of the parties." The other was that:

> "The Court is not, however, bound to order security in every case where it is plain that if the action fails the company would be unable to pay the defendant's costs, but is entitled to consider the nature of the particular case, although it need not enquire fully into the merits and form an opinion of the plaintiffs prospects of success. "

(from p. 259 of the 3rd edition of the Civil Practice of the Superior Courts in South Africa).

The learned judge concluded as follows:

> "I would have thought that where in a patent matter, security for costs is sought against a defendant, the prospects of success is a relevant factor in determining how the court's discretion should be exercised."

I think that approach, in a matter like the present, accords with the first purpose of requiring security as stated by Curtlewis J.A. in Chermont's case, supra. I adopt it with respect.

Now in the matter against which the appeal is noted, applicants succeeded on a special plea of prescription and I can see no real prospects of success against that ruling.

In the result I make the following order:

1. That in the matter 0 S MWELLIE v TELECOM NAMIBIA AND A W G RUCK security of costs of appeal be given by the appellant.

2. That the appeal is stayed until the security in the amount already determined by the Registrar is paid.

MTAMBANENGWE, JUDGE

3. That respondent pays the costs of this application before he can proceed with the appeal.

ON BEHALF OF FIRST APPLICANT:	ADV C J MOUTON
Instructed by:	Theunissen, Van Wyk & Partners
ON BEHALF OF SECOND APPLICANT:	ADV C J MOUTON
Instructed by:	Theunissen, Van Wyk & Partners
ON BEHALF OF THE RESPONDENT:	O S MWELLIE
Instructed by:	In person