

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(1)(a) of the Constitution.

**CaseNo.: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:

3.

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

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

4. ting the Applicant such further and/or may m fit." Gran alternative relief as this Honourable Court de

applicant lodged a complaint against the Cour with no success but, undeterred, the applicant The second respondent in the District Labour and petitioned the Chief Justice for leave to back Court. Thereafter, the hearing of the there appeal. This application was successful and grou complaint was postponed on several after on 9<sup>th</sup> August, 2000 the applicant was nd to occasions. On 16<sup>th</sup> October, 1998 the the granted leave to appeal to the Full Bench of the Chairman of the District Labour Court took appli the High Court. However, there remained a appli the view that the applicant had come to court cant further hurdle in her way, namely Rule 49(13) catio unprepared despite a previous warning to soug of the High Court Rules. This Rule provides:

n is both parties that they should be fully prepared ht brief for trial. He postponed the hearing and leave ly as ordered the applicant to pay the wasted costs to follo on an attorney and client scale such costs to appe ws. be paid before the resumption of further al.

On proceedings. This

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Aug On 23<sup>rd</sup> November, 1998 the applicant catio

ust, lodged an application for the review of then

1996 costs order asking that it be set aside. This also

the application was dismissed by the Labour met

"(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."

The second respondent asking that the second respondent be paid until 2001. She further avers that her first respondent waives its rights to security. The first respondent's basic salary is barely sufficient to cover her living expenses and her daily travel from Windhoek. As for assets, she states that these are likely to be fixed. They also asked the second respondent's legal practitioners to indicate the amount which they considered sufficient for their costs of the appeal. On 1<sup>st</sup> 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<sup>th</sup> February 1997 when she was dismissed from her employment with the second respondent until 15<sup>th</sup> 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, the applicant 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 emolument

attac upon what is stated by the applicant with securte to seeking the relief sought in the notice of hme regard to an emolument attachment order. Itity. Itmotion. I do not agree. What emerges from nt states that this is in contradiction of theis the affidavit evidence is that the parties were orderapplicant's averment that she is unable to sugg *ad idem* as to what a sufficient amount of to furnish any security at all. However, that isested security should be. There was no reason for reco not how I read the applicant's affidavit. Whatthat aDolication to be made to the Registrar. It is up she is saying is that at the time of making thein highly unlikely that he would have fixed an its affidavit she had no means of providingthe amount of security less than that regarded by costs sufficient security but at some future time if, circuboth parties as reasonable. Any such . as she anticipates, she earns commission, shemsta application would have been a waste of time In its will be in a position to pay somethingnces and costs.

answ towards the second respondent's costs byof In my view, the applicant has established an ering instalments. In my view, there is no real meritthe interest to apply for the relief sought in the affid in the second respondent's contention that theprese first prayer of the notice of motion and the avit applicant has not shown that she is unable tont question to be addressed is whether that relief the furnish security for the second respondent'scase should be granted. All three respondents join seco costs of appeal. that with the applicant in saying that it should.

nd A further point raised by the second<sup>was</sup> They rely in the main on *Shepherd v O We/7/* resp respondent in its answering affidavit and<sup>a</sup> *and Others* 2000 (2) SA 1066 (N).

onde pursued by Mr Dicks, who appeared for the<sup>nece</sup> nt second respondent, in his heads of argument<sup>ssary</sup> That case concerned the constitutionality of seize as a point *in limine* is that the applicant failed<sup>prere</sup> Rule 49(13) of the South African Uniform s to apply to the Registrar to fix the amount of<sup>quisi</sup> Rules of Court which, until it was amended

as 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 the security fixed by the Registrar, a claim accepted by Combrinck, J. who heard the applicant's application. The basis of the application was then described by the learned judge in the following words at 1068 B-D:

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"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 Article 12(1)(a) 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.'

""10(1) All persons shall be equal before the law.

And the material part of Article 12(1)(a) reads:

No grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status."

" 12( 1 )(a) In the

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 hear resp by Combrinck, J. in his judgment.  
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 inde nts The main point argued by counsel for the  
 pend on respondents in *Shepherd's* case (*supra*) was  
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 imp the that Rule 49(13) is saved from constitutional  
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 and constinvalidity by the fact that under Rule 27(3)  
 com itutio(identical to our Rule 27(3)) the Court has a  
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 Cou nality wide and unfettered discretion whether or  
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 Trib y ofnot, in an appropriate case, to absolve the  
 unal the would-be appellant from its consequences.  
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 blish Rule Having referred to a number of cases cited by  
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 by and counsel, Combrinck, J. said at 1072 J - 1073  
 law  
 .....that B:  
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argu  
 As already indicated, all parties in the presentment  
 application are agreed that the provisions ofwas,  
 Rule 49(13) are inconsistent at least withif I  
 Article 12(1)(a) and, as a result, we have beenmay  
 presented with a one-sided argument. This is, respe  
 seldom a satisfactory situation. However, inctfull  
 the *Shepherd* case [*supra*] the Court wasy say  
 presented with full argument by counsel forso,

"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. If in any event, the question never to have been intended that Rule 49(13) could be used to relax the requirements provisions of Rule 49(13) in the case of a particular conflict with s 34 reads with significant force. If an appellant cannot Constitution. If it is found to be so, though the front door of Rule 49(13) should not, in my view, be allowed retain it in its to enter through the back door of Rule 49(13) applicants with the remedy of possible exemption from its provisions by virtue 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:

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"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 its application or to interfere with the application by the Registrar. Rule 49(13), as it presently stands, is said for protecting an applicant within the provisions of Article 10 of the Constitution to the extent that appellant who drags him from one court to the other. On the other hand in part an appellant from 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 fundamental rights and conflicting rights of litigants. Sub-Article (1) provides, *inter alia*, that any subordinate legislative authority shall not make any law which abolishes or abridges fundamental rights and freedoms 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."

that conclusion and can be used to it. In my judgment, it presently stands, is said for protecting an applicant within the provisions of Article 10 of the Constitution to the extent that appellant who drags him from one court to the other. On the other hand in part an appellant from 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 fundamental rights and conflicting rights of litigants. Sub-Article (1) provides, *inter alia*, that any subordinate legislative authority shall not make any law which abolishes or abridges fundamental rights and freedoms in the exercise of its discretion, whether a particular appellant should be compelled to put up

".....and any law  
.....in



contravention  
~~power conferred on this Court by Article 25(1)~~  
~~thereof shall be the~~  
 extent of the  
 (a) should be exercised so as to allow the  
 contravention be  
 invalid: provided  
 Judge-President who, in terms of section 39  
 that

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 valid, shall~~ any hiatus in a procedure  
 which is only to a limited extent unfair.

Following the decision in *Shepherd's* case  
 allow  
 (supra) the African Rules Board  
 authority .... to correct any  
 defect in the impugned law (13) and for the  
 within a specified period,  
 subject to the Judge-President I set out the  
 to such conditions as may  
 be specified by the Rules:  
 event and until such  
 correction, or until the  
 expiry of the time limit set  
 by the Court, whichever be (13)(a) Unless the  
 the shorter, such impugned  
 law .... shall be deemed to  
 be valid."

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The parties are agreed that in the light of the amendments made to Rule 49(13). That part of 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 event that the Rule is amended.

For the foregoing reasons the following order is made:

- 1) In terms of Article 25(1)(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.

I agree,

**MTAMBANENGWE, J**

I agree.

For the Applicant:

Ms L. Conradie

Instructed by:

Legal Assistance Centre

11.

For the 1<sup>st</sup> and 3<sup>rd</sup> Respondents:

Mr N. Marcus

Instructed by:

The Government Attorney

For the 2<sup>nd</sup> Respondent:

Mr G. Dicks

Instructed by:

Messrs Lorentz & Bone