



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 11187/2016

In the matter between:

ANTHONY BRINK

APPELLANT

And

**THE INFORMATION OFFICER,
LEGAL AID SOUTH AFRICA**

RESPONDENT

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 11H00 on 10 August 2022.

ORDER

The application to be released from filing of security is dismissed with costs.

JUDGMENTDelivered on 8 August 2022

Poyo Dlwati ADJP:

[1] The appellant, Mr Brink, launched an application in terms of rule 49(13)¹ of the Uniform Rules. He sought an order releasing him from his obligation to file security for the Legal Aid South Africa's (the Legal Aid) costs of the appeal to the Full Court of this Division.

[2] As alluded to in my main judgment, and evident in this application, there is a long history of litigation between the appellant and the Legal Aid emanating from the Legal Aid not appointing the appellant in a post where he had been recommended as a senior litigator. The appellant was aggrieved by that decision and litigation ensued. Before me was an application to review and set aside the Legal Aid's decision refusing the appellant's request for access to Legal Aid's public records specified in the appellant's requests made in terms of the promotion of Access to Information Act 2 of 2000 (PAIA). On 6 March 2020, I dismissed the appellant's application with costs.

[3] On 11 June 2020, I granted the appellant leave to appeal my judgment to the Full Court of this Division. It is evident in that judgment that I granted leave to appeal as I held the view that another court could interpret the provisions of PAIA differently than I did. I also held that it was in the interests of justice to

¹ Rule 49(13)(a) of the Uniform Rules reads:

'Unless the respondent waives his or her right to security or the court in granting leave to appeal or subsequently on application to it, has released the appellant wholly or partially from that obligation, 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.'

grant leave to appeal due to various personal accusations made by the appellant towards me in his application for leave to appeal, despite the fact that at no stage did he apply for my recusal in the matter.

[4] The gist of the appellant's grounds for applying to be released from filing security are mainly the following: 'The Legal Aid was involved in depriving him income which could have enabled him means to provide security'. This it did, according to him, by having his contracts as acting magistrate in Eshowe summarily terminated after the Legal Aid reported him to the Magistrate's Commission for what it alleged to be impeachable conduct and that he was unfit to practise as an advocate and to serve as a magistrate. He, as a result was subsisting by assisting a friend run his guesthouse as that friend was frequently abroad. He, in return resided rent-free, I imagine, at the guesthouse and on a light pension. He, therefore, does not have any meaningful income. Furthermore, he contended that it was a matter of exceptionally compelling public interest that the appeal be heard.

[5] The appellant, in his application further details how the documents he was seeking would be used in the further litigation against the Legal Aid. He stated that some of the information would be provided to the Auditor General of South Africa in order to uncover irregularities committed by the Legal Aid, contrary to the provisions of the Public Finance Management Act 1 of 1999. Some information would be furnished to the National Prosecuting Authority as possible evidence in a criminal prosecution against the Legal Aid whilst some would be used in the Judicial Conduct Committee of the Judicial Services Commission against an investigation involving the Judge President of the Gauteng Provincial Division and the Judge President of the Labour Court.

[6] According to the appellant, it was in the public interests that his appeal proceed to hearing so that my basic legal errors, including on costs, are corrected for

‘the legal annals, lest future records requesters illegally and unconstitutionally denied access to public records by corrupt public officers intent on obstructing privately conducted corruption investigators be daunted from vindicating their fundamental right to public body information entrenched by section 32(1)(a) of the Constitution by seeking relief in the courts in the exercise of their fundamental right to do so entrenched by section 34, both rights given effect by sections 11 and 78 of [PAIA] respectively’.

[7] The Legal Aid opposed the appellant’s application on the basis, firstly, that it was filed late and there was no application for condonation of the late filing of the application. They did not expand any further on this ground and I was unable to deal with it further. Secondly, the Legal Aid had about two costs orders against the appellant which remained unpaid. In some instances, a *nulla bona* return of service was obtained from the sheriff after the Legal Aid instructed the sheriff to execute its writs for the costs against the appellant. In light of the above, the Legal Aid was of the view that if security was not furnished by the appellant it would be placed in an unenviable position of being unable to recover its costs if the appeal was unsuccessful.

[8] It was the Legal Aid’s contention that even though the appellant was impecunious, that had not stopped him from what it called proliferating litigation against the Legal Aid despite also being unsuccessful. Furthermore, the Legal Aid, as a result of the appellant’s litigation, has had to commit its scarce resources and deal with the appellant’s litigation. This impeded the Legal Aid from performing its core public functions which undermined the public interest that the functioning of the courts and the administration of justice should proceed unimpeded by groundless proceedings. According to the Legal Aid, the appellant does not feel a pinch on costs as he represented himself in all the litigation and

also did not pay his outstanding cost orders whilst the Legal Aid had to incur enormous costs to defend the appellant's baseless litigation.

[9] According to the Legal Aid, as the appellant was unemployed and had no income, he was unable to service his current debt to the Legal Aid and potential future debts. It was therefore unfair to expect the Legal Aid to source out scarce public funds to defend the appeal whilst it was not guaranteed of its costs if the appellant became unsuccessful. Therefore, the appellant's application ought to be dismissed as there were no justifiable reasons that were fair and equitable as to why the appellant ought not to provide security.

[10] In *Shepherd v O'Niell*² the court held that 'in every case where security is demanded of a litigant, the court has a discretion whether to order that such security be put up'. The court³ further held that 'There is much to be said for protecting a respondent in an appeal from an impecunious appellant who drags him from one court to the other. On the other hand 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.'

However, this position has evolved with time.

[11] In *Carpe Diem, Explorations (Pty) Ltd v Kasimira Trading 82 (Pty) Ltd*⁴ the court held that it is the right of a respondent on appeal to go into an appeal secured, at least to the extent provided by the rules, against the inability of the appellant to pay costs of the appeal, where the appellant is unsuccessful. In *TR Eagle Air v Thompson*⁵ the court held that the onus was on the appellant 'to place facts to the satisfaction of the court why he or she should be released wholly or

² *Shepherd v O'Niell & others* 2000 (2) SA 1066 (N) at 1073B.

³ *Shepherd v O'Niell* at 1073C-D.

⁴ *Carpe Diem Explorations (Pty) Limited v Kasimira Trading 82 (Pty) Limited & others* [2016] ZAGPPHC 1099.

⁵ *TR Eagle Air (Pty) Ltd & another v Thompson* [2020] ZAGPPHC 801.

partially from giving security'. In *Dr Maureen Allem Inc. v Baard*,⁶ the court held that 'provision for security to protect the interests of one's counterpart in litigation is not a disproportionate limitation on the access to court right'.

[12] On the appellant's version, he will be unable to pay the Legal Aid's costs if his appeal is not successful. Furthermore, there are already two cost orders against him in favour of the Legal Aid. In the circumstances, it will not be in the interest of justice to release him from his obligation to file security. My discretion therefore is exercised against releasing him from filing security.

[13] In the result, the application for filing of security is dismissed with costs.



POYO DLWATI ADJP

⁶ *Dr Maureen Allem Inc. vs Baard* 2022 (3) SA 207 (GJ) para 47.3.