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 109/96

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.

   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 27th 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 1992 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 oauoris 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 (Ptv) 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.

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

MTAMBANENGWE, JUDGE

ON BEHALF OF FIRST APPLICANT:	ADV C J MOUTON
Instructed by:	Theunissen, Van Wyk Sc Partners
ON BEHALF OF SECOND APPLICANT:	ADV C J MOUTON
Instructed by:	Theunissen, Van Wyk & Partners
ON BEHALF OF THE RESPONDENT:	0 S MWELLIE
Instructed by:	In person