

SOUTH AFRICA / JUDGMENT

Agenbag Motor Group v Nkitseng (Appeal) (CIV APP MG 13/2024) [2025] ZANWHC 110 (1 July 2025)

[2025] ZANWHC 110

COURT

North West High Court, Mafikeng

BEFORE

Oosthuizen-Senekal, C Mokhare

CASE / FILE NUMBER

CIV APP MG 13/2024

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

IN THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION -
MAHIKENG
CASE
NUMBER: CIV APP MG 13/2024
COURT
A QUO CASE NO: 7576/2016
Reportable: NO
Circulate to Judges: NO

Circulate to Magistrates: NO
Circulate to Regional
Magistrates: NO
In

the matter between:

AGENBAG
MOTOR
GROUP
APPELLANT
(Plaintiff
in Court a quo)
and
MOLAPO
ELIAH
NKITSENG
RESPONDENT
(Defendant
in the Court a quo)

CORAM:

OOSTHUIZEN-SENEKAL AJ et MOKHARE AJ
Date
judgment reserved: 30
May 2025
The judgment was handed
down electronically by circulation to the parties'
representatives via email. The date and time
for hand-down is
deemed to be 1 July 2025 at 10H00am.

ORDER

1.

The appeal is dismissed.

The

order of the court a quo

upholding the special pleas of prescription, lack of locus

standi, non-joinder, and no cause

of action is confirmed.

The

appellant is directed to pay the costs of the appeal on party and

party scale. Such costs shall include those incurred

in the

rescission application and in opposing the main action.

JUDGMENT

OOSTHUIZEN-SENEKAL AJ et C MOKHARE AJ:

Introduction

- [1] This is an appeal against the judgment delivered by the Learned Magistrate Strauss on 15 January 2024 in the Klerksdorp Magistrate's Court. The court a quo upheld various special pleas raised by the respondent, which led to the dismissal of the appellant's action. The appellant challenges the ruling on the basis that the court a quo erred in law and misdirected herself in fact.

- [2] The matter concerns a dispute regarding storage fees allegedly due from the respondent, stemming from a 2009 vehicle sale. Following the discovery of alleged defects, the vehicle was returned and remained with the appellant until 2016 when storage fees were first demanded.
- [3] Summons was issued in 2020, resulting in default judgment, which was subsequently rescinded. The respondent raised five special
- pleas, of which four are central to this appeal: prescription, locus standi, non-joinder, and no cause of action.

Background

- [4] During March 2009, Ipolokeng Funeral Parlour, duly represented by Maria Nkitseng, entered into a sale agreement with the appellant for the purchase of a motor vehicle at the price of R157,000.00. Shortly after delivery of the vehicle, it began exhibiting mechanical problems which rendered it unsuitable for the purpose for which it was acquired. Consequently, the vehicle was returned to the appellant for repairs. However, the mechanical issues persisted, and the vehicle was returned a second time to the appellant due to the ongoing problems.
- [5] It was alleged that the motor vehicle was affected by a latent defect that was not apparent at the time of sale and only manifested after the vehicle was put to use. As a result of the continued failure of the vehicle to perform satisfactorily, Ipolokeng Funeral Parlour initiated legal proceedings against the appellant in the High Court in 2010, seeking a full refund of the purchase price. These proceedings, however, remained unresolved and were not finalized.
- [6] Subsequently, in 2012, both Ipolokeng Funeral Parlour and the respondent, Molapo Eliah Nkitseng, jointly issued a summons against the appellant. The appellant responded by challenging their locus standi, raising objections regarding the legal standing of the parties to bring the claim. Due to the unresolved nature of this
- procedural dispute, the matter did not proceed to finality.
- [7] On 12 July 2016, the respondent, acting in his personal capacity, was served with a formal letter of demand from the appellant, wherein he was called upon to pay outstanding storage fees allegedly incurred in respect of the vehicle. The demand stipulated that payment was to be made within five (5) days, failing which storage fees would continue to accrue at a daily rate of R350.00.

Legal Frame Work

Prescription

- [8] Under section 11(d) of the Prescription Act 68 of 1969 (“the Act”), the general period of prescription for a debt is three years, unless interrupted or delayed in terms of the Act. A “debt” under South African law includes any obligation to pay money or deliver goods or services, including storage fees.
- [9] Section 12(1) of the Act provides as follows:
- "Prescription shall commence to run as soon as the debt is due."
- [10] Thus, the prescription period begins when the creditor has the right to demand payment and the debtor refuses or fails to pay.
- [11] The appellant contended that the debt for storage fees was a continuing obligation and prescription had not begun to run until the vehicle was removed or the demand made in 2016. The court a quo found that the debt became due earlier, rejecting the continuing wrong argument.
- [12] The test for when prescription begins to run is settled in *Truter and Another v Deysel* [2006] ZASCA 16; 2006
- (4) SA 168 (SCA) at paragraphs [16]-[17][1], where the court held that a debt becomes due when the creditor has knowledge of the facts from which the debt arises, not necessarily when the creditor subjectively chooses to enforce the right.
- [13] This means the appellant’s claim for storage fees would prescribe three years after the date the appellant became aware (or ought reasonably to have been aware) that the respondent failed to pay or refused to remove the vehicle.
- [14] Furthermore, in *Electricity Supply Commission v Stewarts & Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) at 344H-345A, the court held that a continuing wrong does not prevent prescription unless the cause of action itself is inherently continuous. Here, the storage fees, if due, arose once the vehicle remained unclaimed, not indefinitely at the will of the appellant.
- [15] In the present matter the following facts are clear:
- a) The vehicle was purchased in March 2009;
 - b) It was returned shortly thereafter, likely in 2009 or early 2010;
 - c) The appellant only issued the letter of demand on 12 July 2016, demanding storage fees and threatening further daily charges.
- [16] Even on the most generous assumption that the vehicle was returned late in 2010, the cause of action for storage would have arisen shortly after the appellant stored the vehicle without retrieval or payment, thus, by 2011 at the latest. Three years from 2011 would be 2014.
- [17] Since the demand was issued only in July 2016, the claim would have prescribed unless:

- a) Prescription was interrupted in terms of section 14 (e.g., by an acknowledgment of liability), or
- b) There were exceptional circumstances delaying the running of prescription.

[18] The Constitutional Court in *Mohlomi v Minister of Defence*

[1996] ZACC 20; 1997

- (1) SA 124 (CC) emphasised the rationale behind the doctrine of prescription. At paragraph [11], it stated:

“Rules of prescription serve the purpose of legal certainty. They ensure that legal disputes are resolved within a reasonable period. The longer the lapse of time, the more difficult it becomes to adjudicate fairly.”

- [19] The court a quo correctly applied the law in finding that the debt had prescribed before summons was issued in 2020.

Locus Standi

- [20] The legal principle of locus standi requires that a litigant must have a direct and substantial interest in the outcome of the litigation to be entitled to bring an action or application. This principle was clearly articulated in *Jacobs en 'n Ander v Waks en Andere*

[1991] ZASCA 152; 1992

- (1) SA 521 (A), where the Appellate Division held at page 533B-C that:

“The interest that must be shown is an interest in the right which is the subject matter of the litigation and not merely a financial interest which is indirectly affected.”

- [21] The appellant’s claim for storage fees is directed against the respondent, Mr Molapo Eliah Nkitseng, in his personal capacity.

However, the respondent contends that he is not the party liable for the alleged debt, as the vehicle which is the subject of the dispute was purchased by Ipolokeng Funeral Parlour, represented by Maria Nkitseng, during March 2009.

- [22] It is undisputed that the purchase agreement was concluded between the appellant and Ipolokeng Funeral Parlour, and that the vehicle was bought for business purposes under the name of that entity. The appellant’s claim is therefore premised on the assertion that the respondent is personally liable for the storage fees incurred after the vehicle was returned. The respondent denies any personal liability and challenges the appellant’s right to claim against him individually, raising a special plea of lack of locus standi.

- [23] The general principle governing locus standi is that legal proceedings must be instituted against the correct party, being one who has a direct and substantial legal interest in the subject matter of the litigation. In *Jacobs en 'n Ander v Waks en Andere*

[1991] ZASCA 152; 1992

(1) SA 521 (A), the Appellate Division held at 533B–C:

“The interest which a party must have in the subject matter of the litigation must be a direct and substantial interest, and not merely an indirect financial or commercial interest.”

[24] In the matter, there is no evidence that the respondent, in his personal capacity, was the purchaser of the vehicle, nor that he ever assumed personal responsibility for the storage costs claimed by the appellant. On the contrary, the pleadings and supporting

documents show that the transaction was concluded by and in the name of Ipolokeng Funeral Parlour, which is a separate legal entity, or at least a distinct trading concern.

[25] In *Ganes and Another v Telecom Namibia Ltd* 2004

(3) SA 615 (SCA), the Supreme Court of Appeal confirmed that liability arising from a contract entered into by a juristic person cannot, in the absence of special circumstances, be attributed to an individual associated with that entity. At paragraph [19], the Supreme Court of Appeal explained:

“A party seeking to establish locus standi must demonstrate a sufficient and direct interest in the relief sought. Where a company or juristic entity is involved, such an interest must reside in that entity and not in a natural person associated with it, unless duly authorised to act or unless the legal personality is being pierced.”

[26] The appellant has not provided any evidence that the respondent was acting in his personal capacity when the vehicle was delivered, stored, or allegedly abandoned. Nor has the appellant established that the respondent expressly or impliedly undertook to pay storage fees personally.

[27] Furthermore, the appellant failed to establish that the respondent cited was authorised to act or was the proper party to the transaction. Two different legal entities (BPK and CC) appear in the record.

[28] The respondent disputed that he had the legal standing in the matter because he was not the original contracting party and the appellant had not shown a valid resolution to cite the respondent.

[29] The requirements for locus standi were clearly outlined in *Mars Incorporated v Candy World (Pty) Ltd* 2011 (1) SA 135 (C) at paragraph [9], which held that a plaintiff must establish both a direct and substantial interest in the subject matter and the legal capacity to sue.

[30] The appellant failed to show that the respondent was the rightful contracting party or that it was duly authorized to be cited in the matter. The court a quo’s finding on locus standi was thus legally sound.

Non-Joinder

[31] The legal principles governing non-joinder are well established. In *Amalgamated Engineering Union v Minister of Labour* 1949

(3) SA 637 (A), the Appellate Division held that:

“In order for a party to be a necessary party, that party must have a direct and substantial interest in the subject matter of the

litigation.”

[32] The modern articulation of the test appears in *Gordon v Department of Health, KwaZulu-Natal* [2008] ZASCA 99; 2008

(6) SA 522 (SCA). At paragraph [9], the Supreme Court of Appeal stated:

“The test whether there has been a non-joinder is whether a party has a direct and substantial interest in the order the court might make. Such an interest is more than a mere financial interest. It is a legal interest in the subject matter of the litigation which may be affected prejudicially by the judgment of the court.”

[33] The respondent contended that Ipolokeng Funeral Parlour, as the purchaser of the vehicle and potential debtor in respect of the storage claim, had a material interest in the matter but was not joined.

[34] In the present case, Ipolokeng Funeral Parlour was the purchaser of the vehicle and, as such, the entity that allegedly abandoned it, resulting in the accrual of storage fees. Any judicial finding as to liability for those fees would undoubtedly affect the rights and interests of the funeral parlour. A finding against Mr Nkitseng, the respondent, personally, without affording the funeral parlour an opportunity to be heard, would be procedurally unfair and legally untenable.

[35] The omission to join the funeral parlour is particularly significant given the respondent’s defence that he was not the contracting party and bore no personal liability for the debt. If this is accepted, and no evidence to the contrary was presented by the appellant, then the proper party to be cited was the funeral parlour. Failing to do so amounts to a fatal procedural irregularity.

[36] In *Abdulrahman v United Democratic Movement and Others* 2008

(3) SA 263 (TPD), the Court stated at paragraph [18]:

“The importance of joining all necessary parties is fundamental to the integrity of legal proceedings. No order should be made that prejudicially affects a person’s rights without affording them the opportunity to be heard.”

[37] The appellant's cause of action was intrinsically tied to the 2009 sale. Yet, Ipolokeng Funeral Parlour was not joined, despite being a party to the transaction and the physical return of the vehicle. The court a quo's conclusion that this amounted to a material non-joinder cannot be faulted.

No Cause of Action

[38] The court a quo also upheld the special plea that the appellant's particulars of claim disclosed no cause of action for storage fees. Furthermore,

that no agreement, express, tacit, or implied, was pleaded, and there was no averment of consensus or contractual obligation.

[39] It is common cause that the vehicle was purchased from the appellant by Ipolokeng Funeral Parlour, represented by Maria Nkitseng, and not by the respondent in his personal capacity. Following mechanical defects, the vehicle was

returned to the appellant, and the appellant later sought to recover storage fees from the respondent personally, without establishing any contractual basis, express or implied, for such liability.

[40] In *McKenzie v Farmers' Co-operative Meat Industries Ltd* 1922 AD 16 at paragraph [23], Innes CJ described a contract as:

"An agreement between two or more persons which creates an obligation to do or not to do a particular thing."

[41] A cause of action based on contract must, therefore, allege and prove the existence of an agreement giving rise to the obligation sought to be enforced.

[42] Where a tacit contract is relied upon, it must be shown that the parties conducted themselves in such a manner that it can be inferred that they intended to and did indeed conclude a binding agreement. The leading authority in this regard is *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* 1983

(1) SA 978 (A), where the Appellate Division stated at 981B–C:

"The inference of a tacit contract is not easily made. It must be a necessary inference from the conduct of the parties and the surrounding circumstances."

[43] Furthermore, in *ABSA Bank Ltd v Boksburg Transitional Local Council* 1997

(2) SA 415 (W) at 418G–H it was held that a party cannot recover on the basis of contract where no terms or basis for consensus are pleaded. The mere retention of a vehicle on premises is insufficient to infer a legal obligation to pay storage fees, particularly after a lapse of years and with no supporting terms.

[44] In the present matter, no such inference is possible. The appellant failed to establish any facts from which it can be concluded that the respondent undertook, even tacitly, to pay storage charges. On the contrary, the respondent was not the party who concluded the sale, did not receive or use the vehicle, and did not agree to its storage. The appellant unilaterally stored the vehicle and then later attempted to recover fees from the respondent in his personal capacity, without demonstrating any basis in law for doing so.

[45] The court a quo was therefore correct in finding that the appellant's particulars of claim disclosed no cause of action against the respondent. As the Appellate Division held in *Trope v South African Reserve Bank and Another*

[1993] ZASCA 54; 1993

(3) SA 264 (A) at 273A–C, a pleading is excipiable as disclosing no cause of action if:

“... it does not make the necessary allegations to sustain a cause of action.”

[46] The absence of allegations showing any agreement, express or implied, rendered the appellant's claim defective. A party cannot be held liable in contract in the absence of consensus, or conduct justifying the inference of consensus.

[47] In these circumstances, I find no fault with the conclusion reached by the court a quo in this regard. The special plea of no cause of action was correctly upheld.

Costs

[48] The final issue for determination is whether a punitive costs order should be granted against the appellant. The general rule regarding costs is that they follow the result, in other words., the successful party is entitled to their costs. However, courts retain a discretion, which must be exercised judicially, upon a consideration of all relevant facts.

[49] In *Affordable Medicines Trust and Others v Minister of Health and Another*

[2005] ZACC 3; 2006

(3) SA 247 (CC), the Constitutional Court stated at paragraph [138]:

“The award of costs is a matter that lies within the discretion of the court. In exercising that discretion, a court must do so judicially

and having regard to all relevant considerations.”

[50] A punitive costs order, such as costs on an attorney-and-client scale, is an exceptional measure and will not be granted lightly. Such an order is usually warranted where the conduct of a litigant is found to be vexatious, frivolous, abusive of court process, or in bad faith.

[51] In *Public Protector v South African Reserve Bank* 2019

(6) SA 253 (CC), the Constitutional Court reaffirmed this principle at paragraph [229]:

“A personal and punitive costs order should be granted only where the litigant’s conduct is clearly mala fide, vexatious, or

constitutes an abuse of process. Courts must exercise caution not to discourage litigants from approaching the courts.”

[52] In *President of the Republic of South Africa and Others v Gauteng Lions Rugby Union and Another* 2002

(2) SA 64 (CC) at paragraph [11], the Constitutional Court cautioned that:

“While courts have a discretion to award costs on an attorney-and-client scale, such orders are reserved for exceptional cases where there is a clear justification for departing from the ordinary rule.”

[53] In the present matter, although the appellant’s appeal lacks merit and the court a quo’s findings were correctly upheld, there is no evidence before this Court that the appellant acted in bad faith, with malice, or in a manner that would justify a punitive costs order. The appellant raised legitimate legal issues.

[54] While the appellant’s position was ultimately incorrect in law, its conduct throughout the litigation process does not warrant a departure from the ordinary rule. The appeal was not brought frivolously or vexatiously, and there is no indication that it constituted an abuse of the court process.

[55] Accordingly, there is no basis to grant a punitive costs order. The ordinary rule should apply, and the appellant should be ordered to pay the costs of the appeal on a party-and-party scale.

Order

[56] In the result, the following order is made:

1. The appeal is dismissed.
2. The order of the court a quo upholding the special pleas of prescription, lack of locus standi, non-joinder, and no cause of action is confirmed.
3. The appellant is directed to pay the costs of the appeal on party and party scale. Such costs shall include those incurred in the rescission application and in opposing the main action.

CSP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree

TC MOKHARE

APPEARANCES

For the Appellant: Advocate HJ Scholtz

Email: henko@adv-scholtz.co.za

Instructed by:

THERON JORDAAN & SMIT INC ATTORNEYS

C/O CJP OELOFSE ATTORNEYS

No 9 Aerodrome Crescent

Mahikeng

Email: nicolene@cjpo.co.za

For the Respondent: Advocate: Hlapolosa

Email: tt@tthinc.co.za

Instructed by: T.T Hlapolosa Attorneys

148 Corlet Drive

Bramley, Johannesburg

C/O Lerato Moeketsi Inc Attorneys

Office No. 14

14 Tillard Street

Kelgo House

Mafikeng

moeketsilaw@gmail.com

[1] Para [16]: “A debt is due when the creditor acquires knowledge of the facts from which the debt arises (or could have acquired it with reasonable diligence), not necessarily when they acquire knowledge of the legal conclusions.”

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZANWHC/2025/110.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/agenbag-motor-group-v-nkitseng-unknown-topic-anwhc-2025--6a3ea50e3b1caa912980747d>

Prepared on 12 October 2026 · Esheria