

SOUTH AFRICA / JUDGMENT

Mokoena v Dinkebogile Transport Services (Reasons) (CIV APP RC 09/2020) [2025] ZANWHC 88 (27 May 2025) [2025] ZANWHC 88

COURT

North West High Court, Mafikeng

BEFORE

Hendricks, Masike

CASE / FILE NUMBER

CIV APP RC 09/2020

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO.: CIV/APP/RC-09/2020

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

MANTOKI EMMAH MOKOENA APPLICANT And DINKEBOGILE TRANSPORT SERVICES
RESPONDENT In re DINKEBOGILE TRANSPORT SERVICES APPELLANT And MANTOKI EMMAH
MOKOENA RESPONDENT

CORAM: HENDRICKS JP & MASIKE AJ

REASONS

FOR ORDER

MASIKE AJ

INTRODUCTION

[1] On 14 February 2025, this Court made an order which reads as follows:

“1. The matter is struck from the roll.

2. The respondent in the application to strike (Dinkebogile Transport Services) is ordered to pay the costs occasioned by the striking of the matter from the roll on a party and party basis on Scale B”

- [2] The respondent in the application to strike, Dinkebogile Transport Services filed a notice in terms of rule 49(1)(c) on 26 February

2025. This notice was brought to our attention on 17 March 2025.

- [3] Rule 49(1)(c) reads as follows:

“When giving an order the court declares that the reasons for the order will be furnished to any of the parties on application, such application shall be delivered within ten days after the date of the order.”

BACKGROUND FACTS

- [4] I shall for the sake of brevity refer to the parties as cited in the application to strike the appeal that served before this Court.

- [5] The main matter under case number CIV/APP/RC-09/2020, came to the North West Division of the High Court, as an appeal against the whole judgment and orders, handed down by Regional Magistrate HJ Boonzaaier (the Regional Magistrate), of the Regional Court for the Regional Division of North West held at Klerksdorp, on 20 March 2020, dismissing the application for rescission of judgment launched by the respondent, and granting costs in favor of the applicant on an attorney and client scale.

- [6] The respondent filed a notice of appeal on 10 June 2020. The applicant filed a notice to oppose on 30 June 2020. On 27 July 2020, the respondent filed a request for allocation of a date of hearing of the appeal. The date of 6 May 2021 was allocated for the hearing of the appeal. The respondent failed to take any steps to prosecute the appeal to bring it to finality.

- [7] On 30 April 2024, the applicant filed an application in which the following relief was sought:

“1. That the appeal under the abovementioned case number be dismissed alternatively struck, with costs;

2. That the Respondent pay the costs of this application on a punitive scale;
3. Further and/or alternative relief.”

- [8] The application was not opposed by the respondent. The applicant applied for a date for the hearing of the application and the application was surprisingly set down by the attorney of the respondent.

- [9] The applicant filed her heads of argument and practice note on 10 January 2025 and 15 January 2025 respectively. When the application was heard, the respondent had not filed heads of argument, and a practice note.

- [10] At the hearing of the application, Mr Dlanjwa who appeared for the respondent informed this Court that the application to strike the appeal from the roll is irregular. There is no cross – appeal. The application was not opposed due to non – compliance with the rules of the court. The application that served before this Court is not necessary as there is an application for condonation.
- [11] Mr. Scholtz who appeared for the applicant informed this Court that the application to strike the appeal from the roll remains unopposed. Mr. Scholtz urged this Court to strike the appeal from the roll and order the respondent to pay the costs on an attorney client scale.

THE LAW

- [12] Rule 50(1) reads as follows:

“An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.”

- [13] Rule 50(4)(a) reads as follows:

“The appellant shall, within 40 days of noting the appeal, apply to the registrar in writing and with notice to all other parties for the assignment of a date for the hearing of the appeal and shall at the same time make available to the registrar in writing his full residential and postal addresses and the address of his attorney if he is represented.”

- [14] Rule 50(5)(a) reads as follows:

“Upon receipt of such application, the registrar shall forthwith assign a date of hearing, which date shall be at least 40 days after the receipt of the said application, unless all parties consent in writing to an earlier date: Provided that the registrar shall not assign a date for hearing until the provisions of subrule (7)(a), (b) and (c) have been duly complied with.”

- [15] Rule 50(7)(a), (b) and (c) reads as follows:

“(a)

The applicant shall simultaneously with the lodging of the application for a date for the hearing of the appeal referred to in subrule (4) lodge with the registrar two copies of the record: Provided that where such an appeal is to be heard by more than two judges, the applicant shall, upon the request of the registrar, lodge a further copy of the record for each additional judge.

- (b) Such copies shall be clearly typed on foolscap paper in double spacing, and the pages thereof shall be consecutively numbered and as from second January 1968, such copies shall be so typed on A4 standard paper referred to in rule 62(2) or on foolscap paper and after expiration of a period of 12 months from the aforesaid date on such A4 standard paper only. In addition every tenth line on each page shall be numbered.

(c)

The record shall contain a correct and complete copy of the pleadings, evidence and all documents necessary for the hearing of the appeal, together with an index thereof, and the copies lodged with the registrar shall be certified as correct by the attorney or party lodging the same or the person who prepared the record.” (my emphasis)

[16] Rules 51(3) of the Magistrates’ Court Rules (MCR) reads as follows:

“An appeal may be noted by the delivery of notice within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor.”

[17] Rule 51(4) of the MCR reads as follows:

“An appeal shall be noted by delivery of notice, and unless the court of appeal shall otherwise order, by giving security to the respondent’s costs of appeal to the amount of R 1000: Provided that no security shall be required from the State or, unless the court of appeal otherwise orders, from a person to whom legal aid is rendered by a statutorily established legal aid board.”

[18] Rule 51(8) (a) and (b) of the MCR reads as follows:

“(8) (a) Upon the delivery of a notice of appeal the relevant judicial officer shall within 15 days thereafter hand to the registrar or clerk of the court a statement in writing showing (so far as may be necessary having regard to any judgment in writing already handed in by him or her)—

- (i) the facts he or she found to be proved;
 - (ii) the grounds upon which he or she arrived at any finding of fact specified in the notice of appeal as appealed against; and
 - (iii) his or her reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against.
- (b)

A statement referred to in paragraph (a) shall become part of the record.”

ANALYSIS

[19] The applicant has taken issue with the respondent having filed its notice of appeal 38 days late and not within 20 days in accordance with rule 51(3) of the MCR. I have noted that the respondent did file an affidavit in support of an application for condonation for the late filing of the appeal, only.

- [20] The applicant has taken issue with the respondent having failed to provide security for costs of the appeal in the amount of R 1000.00, as prescribed in rule 51(4) of the MCR, as it was then applicable when the appeal was noted. The applicant has further taken issue with the respondent having failed to comply with rule 50(7)(c). The record submitted to court by the respondent is incomplete. The application in the court a quo was not included in the record, nor were the answering and replying affidavits.
- [21] Despite this, submission by Mr Dlanjwa that the application of the applicant is irregular. The respondent did not file a notice in terms of rule 30(2)(b) within 10 days of becoming aware of the alleged irregular step taken, affording the applicant an opportunity to remove the cause of complaint. The respondent did not file a notice in terms of rule 30(1), advising the applicant that it intends to bring an application to this Court for an order setting aside the application to strike the appeal from the roll.
- [22] A party's proper course where any proceeding in a cause is irregular is not to proceed as if there had been no such proceeding at all, but to apply to court under rule 30(1) for an order setting it aside. (See: M and M Quantity Surveyors CC v Orvall Corporate Designs (Pty) Ltd (unreported, GP case no 84202/19 dated 27 May 2021) at para 17 to 19.)
- [23] An examination of the record that served before this Court revealed that the respondent did not comply with rule 51(4) of the MCR as it was applicable when the appeal was noted. The respondent also did not comply with rule 50(7)(c).
- [24] The respondent has not brought an application for the appeal court to consider dispensing with the giving of security for the costs of appeal. The requirement of security is designed for the protection of the opposite party and may be waived. (See: Drakensbergpers Bpk v Sharpe 1963 (4) SA 615 (N) at 619). Notably, the appeal is opposed by the applicant, who has elected not to waive the requirement of the respondent to provide security.
- [25] No application has been made for condonation for the failure by the respondent to file the complete record of the proceedings in the court a quo or for an order extending the period for the respondent to file the complete record. The complete record was to have been filed on 27 July 2020 when the respondent filed a request for allocation of a date of hearing of the appeal. The conduct of the respondent amounts to a flagrant disregard of the rules of the court.
- [26] The application for the striking of the appeal was not complex. It was of importance to the applicant because the appeal had been noted in the High Court in the year 2020, and the respondent had failed to take steps to move the appeal to finality.
- [27] For these reasons, the appeal was struck from the roll and the respondent ordered to pay the costs on a party and party basis on Scale "B".

T MASIKE

ACTING JUDGE OF THE HIGH COURT SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG

I agree

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT SOUTH AFRICA

APPEARANCES

DATE FOR HEARING: 14 FEBRUARY 2025 DATE REQUESTED FOR REASONS: 26 FEBRUARY 2025
DATE REASONS GIVEN: 27 MAY 2025 FOR APPLICANT: ADV H.J SCHOLTZ INSTRUCTED BY:
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