

SOUTH AFRICA / JUDGMENT

Mosselbaai Boeredienste (Pty) Ltd v OKB Motors CC (1216/21) [2023] ZASCA 91 (9 June 2023) [2023] ZASCA 91

COURT

Supreme Court of Appeal

BEFORE

Mocumie, Schippers, Carelse, Meyer, Goosen

CASE / FILE NUMBER

1216/21

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1216/21

In the matter between:

MOSELBAAI BOEREDIENSTE (PTY) LTD

t/a MOSELBAAI TOYOTA

APPLICANT

and

OKB MOTORS CC

t/a BULTFONTEIN TOYOTA

RESPONDENT

Neutral citation: Mosselbaai Boeredienste (Pty) Ltd v OKB Motors CC (Case no 1216/21) [2023] ZASCA 91 (09 June 2023)

Coram: MOCUMIE, SCHIPPERS, CARELSE, MEYER and GOOSEN JJA

Heard: 04 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be at 11h00 on 09 June 2023.

Summary: Civil procedure – failure to comply with the rules of court – appeal lapsing – application for condonation and reinstatement of appeal – factors to be considered – strong prospects of success on appeal may trump unsatisfactory explanation – special leave granted – matter referred to the full court to determine the merits of the appeal.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Naidoo J and De Kock AJ, sitting as a court of appeal):

1 Special leave to appeal is granted.

2 The appeal (in respect of the condonation application) is upheld, with costs.

3 The order of the high court, dismissing the application for condonation with costs, is set aside and replaced with the following order:

‘(a) Mosselbaai Boeredienste (Pty) Ltd is granted condonation for its failure to comply with the provisions of uniform rules 50(4)(a), 50(7)(a) and 7(2).

(b) The appeal is reinstated.’

4 The matter is referred to the full court of the Free State Division of the High Court, Bloemfontein to determine the merits of the appeal.

Carelse JA (Mocumie, Schippers, Meyer and Goosen JJA concurring)

[1] This is an application for special leave to appeal against the order of the full bench of the Free State Division of the High Court, Bloemfontein (Naidoo J and De Kock AJ), delivered on 18 November 2021 (the high court). That court dismissed the application for condonation of the late prosecution of the appeal. On further application to this Court for special leave to appeal, the application was referred for oral hearing in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. The parties were directed to be prepared, if called upon to do so, to address this Court on the merits.

[2] The following facts are common cause. On 7 February 2018, the applicant, Mosselbaai Boeredienste (Pty) Ltd t/a Mosselbaai Toyota (plaintiff) and the respondent, OKB Motors CC t/a Bultfontein Toyota (defendant), both motor dealers, concluded an interdealership agreement in terms of which the respondent bought a Toyota Etios motor vehicle (the vehicle) from the plaintiff for resale.

- [3] On the same day, Mrs Steyn, an employee of the defendant, received an invoice from Mr Maritz, the plaintiff's sales manager's email address, namely sales2[...]. On 8 February 2018, the vehicle was delivered to the defendant but the plaintiff did not receive payment of the purchase price of R159 353.76. The defendant paid the purchase price into an incorrect bank account because the invoice which was emailed to it was intercepted by an unknown third party who fraudulently changed the defendant's bank details on the plaintiff's invoice, and obtained receipt of the money.
- [4] On 8 February 2018, Mrs Steyn emailed proof of payment for the vehicle which reflected the incorrect bank details, which was once again intercepted by an unknown third party who changed the incorrect bank details to the correct bank details that caused the plaintiff to believe that the defendant had correctly made payment for the vehicle. It is not disputed that the standard practice in the motor dealership industry is that a vehicle is only released upon proof of payment.
- [5] The plaintiff instituted an action in the magistrates' court for payment of the amount of R159 353.76, the purchase price of the vehicle. The defendant raised a special plea of estoppel by representation. The court a quo upheld the special plea and dismissed the plaintiff's case. Dissatisfied with the outcome, the plaintiff appealed to the
- high court. On 19 April 2021, the plaintiff noted its appeal timeously in terms of rule 51(3) of the Magistrates' Court's Rules of Court.[1]
- [6] A party who wishes to pursue an appeal to the high court must file a notice contemplated in rule 50(4)(a)[2] for the assignment of a date for the hearing of the appeal, within 40 days of the noting of the appeal. It is common cause that the plaintiff failed to do so. In the result, the appeal lapsed. The plaintiff had to lodge with the registrar two copies of the record of appeal timeously in terms of rule 50(7)(a).[3] This was not done. The plaintiff also sought condonation to file a power of attorney in terms of rule 7(2),[4] authorising the plaintiff's attorney to lodge an appeal.
- [7] It is not disputed that the plaintiff failed to prosecute its appeal within 60 days of the noting thereof. The appeal lapsed on 14 July
2021. The plaintiff filed the record of appeal on 20 July 2021. A further complaint of the defendant was that the plaintiff did not file a power of attorney. On 2 August 2021, the appeal was enrolled for hearing on 15 November 2021. On 17 August 2021, the plaintiff launched an application for condonation of its non-compliance with the above-mentioned Rules of Court, and if successful, the reinstatement of the appeal. The defendant opposed the application on the basis of the tardiness of the plaintiff's attorney and the lack of prospects of success.
- [8] The high court directed that the application for condonation be heard first and the appeal itself at a later stage, depending on the outcome of the condonation application. On 18 November 2021, the high court dismissed the application for condonation with costs.

- [9] The reasons for the delay and non-compliance with the rules have been dealt with extensively in the judgment of the high court and need not be repeated. It was not seriously contested that the delay in finalising the preparation of the record should be laid at the door of the transcribers. The record shows that there are two reasons why the high court refused the application for condonation and reinstatement of the appeal. The first is that there were no prospects of success on appeal; and the second, that the plaintiff failed to file a power of attorney in terms of rule 7(2).
- [10] As to the first reason, the high court indicated it would have granted the application for condonation, but for the lack of prospects of success. Regarding the second, it appears that a power of attorney is not required in order to reinstate an appeal. Thus, the main issue for determination is whether the plaintiff established reasonable prospects of success on appeal.
- [11] Where special leave is sought, as in this case, the existence of reasonable prospects of success is insufficient, '[s]omething more, by way of special circumstances is needed'.^[5] The principles underlying an application for condonation, in the context of a reinstatement of an appeal is that the court has a discretion which must be exercised judicially. The Constitutional Court has held that:

'... the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.'^[6]

It is trite that strong prospects of success can often overcome a poor explanation for any delays. Differently stated, strong prospects of success may trump an unsatisfactory explanation for the delay.^[7]

- [12] There are four issues to consider in the present matter in determining whether there are prospects of success in the appeal. At the outset, it must be emphasised that this Court is not making any findings on these issues: it is only necessary to determine whether they demonstrate reasonable prospects of success. First, the defendant raised the defence of estoppel which was upheld by the court a quo. The defendant's case is that the plaintiff had negligently misrepresented to the defendant that the banking details on its

invoice were the correct banking details. It is common cause between the IT experts that the interception was on the side of the

plaintiff, in other words, the plaintiff's email system was 'spoofed'.^[8] The plaintiff was aware of cybercrime in the motor industry, and failed to take measures to guard against this. As a result, the court a quo held that the plaintiff was estopped from denying that the altered bank details were not those of the plaintiff. Mr Oliver (for the defendant) testified that before

he had authorised the electronic transfer of funds to the plaintiff, he had specifically asked Mrs Steyn, the sales assistant (for the defendant) whether she had verified the correctness of the plaintiff's bank details, which she confirmed. However, when she testified, she denied this. This material contradiction was not considered by the court a quo.

[13] Second, the court a quo failed to consider whether the alleged negligence was the proximate cause of the payment having been electronically transferred by the defendant into the incorrect banking account. Third, the court a quo failed to consider whether the damage or loss that was caused by the third party (the interceptor), was foreseeable.

[14] Fourth, the facts in this case may be akin to the interception of cheques. It is well known that banking systems are targeted by criminals. Cheques, which were once the preferred method of payment, have become obsolete. In *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another*,^[9] the principles to be applied in cases where cheques have been intercepted in the post and misappropriated by a thief have been

reaffirmed thus: when a debtor tenders payment by cheque, and the creditor accepts it, the payment remains conditional and is only

finalised once the cheque is honoured. Any risk of fraudulent misappropriation should be borne by the debtor since it is the debtor's duty to seek out its creditor. But where the creditor stipulates the mode of payment and the debtor complies with it, any inherent risk in the stipulated method is for the creditor's account.

[15] In *Galactic Auto Pty Ltd v Andre Venter*,^[10] the creditor sent the debtor an invoice via email and thereafter sent the debtor its bank details. Unfortunately, the email was intercepted and the debtor received the email with incorrect banking details into which it made an electronic transfer of the amount as per the invoice. The court relied on the decision of *Mannesmann Demag (Pty) Ltd v Romatex Ltd and Another*,^[11] and found in favour of the creditor.

[16] The question that arises in this case is whether the same legal principles should find application, namely where the debtor remains liable until payment has been credited to the creditor's bank account. The question concerning the interception of a creditor's banking details sent by electronic means has yet not been decided by this Court.

[17] A further reason for granting special leave to appeal, is that there are conflicting high court judgments on the question as to who should bear the loss where a payment is electronically made to a creditor, which is fraudulently intercepted by a third party. This Court was referred to some of those conflicting judgments. In *Andre Kock en Seun Vrystaat (Pty) Ltd v Snyman N.O.*,^[12] the high court held that the debtor is responsible for verifying the creditor's banking details. In *Hawarden v Edward Nathan Sonnenbergs Inc*,^[13] the high court held that the defendant had a general duty of care to the plaintiff, the purchaser of immovable property, and concluded

that the purchaser could not be held liable for the electronic transfer of funds into a banking account where the bank details had been fraudulently changed. In *Gerber v PSG Wealth Financial Planning (Pty) Ltd*,^[14] the high court held that '[t]he proximate cause of the loss was not the hacking, it was the failure to employ the necessary and contractually prescribed vigilance when monies held in trust were paid into a different account'.^[15] In *Hartog v Daly*,^[16] the high court held that the electronic transfer of funds into the incorrect account did not absolve the debtor from payment.

[18] The applicant thus established reasonable prospects of success on appeal. It is appropriate that the matter be referred to a full court of the Free State Division of the High Court, Bloemfontein to determine the merits of the appeal.

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

2 The appeal (in respect of the condonation application) is upheld, with costs.

'(a) Mosselbaai Boeredienste (Pty) Ltd is granted condonation for its failure to comply with the provisions of uniform rules 50(4)(a), 50(7)(a) and 7(2).

4 The matter is referred to the full court of the Free State Division of the High Court, Bloemfontein to determine the merits of the appeal.

Z CARELSE JA

JUDGE OF APPEAL

Appearances

For appellant: C D Pienaar Instructed by: Oosthuizen Marais & Pretorius Inc, Mosselbaai Phatshoane Henney, Bloemfontein For respondent: A P Berry Pieter Badenhorst Attorneys, Bloemfontein.

[1] Rule 51(3) of the Magistrates' Court's Rules provides that '[a]n appeal may be noted 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, which ever period shall be the longer.'

[2] Rule 50(4)(a) of the Uniform Rules of Court provides that '[t]he 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.'

[3] Rule 50(7)(a) of the Uniform Rules of Court provides that '[t]he 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.'

[4] Rule 7(2) of the Uniform Rules of Court provides that 'the registrar shall not set down any appeal at the instance of an

attorney unless such attorney has filed with the registrar a power of attorney authorising him to appeal and such power of attorney

shall be filed together with the application for a date of hearing.'

[5] Including: '... that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public.' *Cook v Morrison and Another* [2019] ZASCA 8; [2019] 3 All SA 673; 2019 (5) SA 51 (SCA) para 8.

[6] *Van Wyk v Unitas Hospital and Another*

[2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 20; *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others*

[2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) para 3; *PAF v SCF* [2022] ZASCA 101 2022 (6) SA 162 (SCA).

[7] *Valor IT v Premier, North West Province and Others*

[2020] ZASCA 62; [2020] 3 All SA 397; 2021 (1) SA 42 (SCA) 42 (SCA) para 38.

[8] In the Oxford Learners Dictionary, 'spoofed' is defined as the practice of sending emails that appear to come from somebody's email address. <https://www.oxfordlearnersdictionaries.com/definition/english/spoof?q=spoofed>. Accessed on 30 May 2023.

[9] *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and another* [1973] 4 ALL SA 116 (A). See a more recent judgment, *Stabilpave (Pty) Ltd v South African Revenue Services*

[2013] ZASCA 128; 2014 (1) SA 350 (SCA) para 9.

[10] *Galactic Auto v Pty Ltd v Andre Venter*

[2019] ZALMPPHC 27.

[11] *Mannesmann Demag (Pty) Ltd v Romatex Ltd and Another*

[1988] 2 ALL SA 353 (D).

- [12] Andre Kock en Seun Vrystaat (Pty) Ltd v Willem Stephanus Snyman N.O and Another [2022] ZAFSHC 161 para 9.
- [13] Hawarden v Edward Nathan Sonnenbergs Inc [2023] ZAGPJHC 14; [2023] 1 All SA 675 (GJ) para 122.
- [14] Gerber v PSG Wealth Financial Planning (Pty) Ltd [2023] ZAGPJHC 270.
- [15] Ibid para 90.
- [16] Hartog v Daly [2023] ZAGPJHC 40; [2023] 2 All SA 156 (GJ).
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