

SOUTH AFRICA / JUDGMENT

# Raseroka v Maloka (CIV APP RC 04/2020) [2023] ZANWHC 52 (15 May 2023)

**[2023] ZANWHC 52****COURT**

North West High Court, Mafikeng

**BEFORE**

Sakelo Gura, AH Petersfn

**CASE / FILE NUMBER**

CIV APP RC 04/2020

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**Policy****IN****THE HIGH COURT OF SOUTH AFRICA****(NORTH****WEST DIVISION, MAHIKENG)****CASE****NO.: CIV APP RC 04/2020****REGIONALCOURT****CASE****NUMBER:**

291/2017

**Reportable:**

YES/NO

Circulate

to Judges: YES/NO

Circulate

to Magistrates: YES/NO

Circulate

to Regional Magistrates: YES/NO

In

the matter between:           MANGWENG  
                                          MIGHTY RASEROKA  
                                          Applicant/Plaintiff  
                                          and  
                                          ALPHEUS  
                                          JABULANI MALOKA  
                                          Respondent/Defendant

## JUDGMENT

### Introduction

[1] This is an appeal against the judgment of the Regional Court, Ga-Rankuwa in terms of which judgment for the respondent (as plaintiff) in the sum of R325 000-00 (three hundred and twenty five thousand rand) with costs was granted against the applicant (as defendant). The said judgment was handed down on the 30 th of August 2019.

#### Factual background

[2] The respondent's particulars of claim in the court a quo reads:

"

3. The above Honourable Court has jurisdiction to adjudicate this matter in that

(3.1) The Defendant is ordinarily resident within the area of jurisdiction of the above Honourable Court; and

(3.2) The whole cause of action as set out hereunder arose within the area of jurisdiction of the above Honourable Court.

4. On/or about the 14th of November 2015 the parties entered into a written acknowledgement of debt, formulated under the name and style of a "payment agreement". Such agreement is annexed hereto as Annexure "MAL1", the relevant material terms of which agreement were as follows:

(4.1) The Defendant acknowledged his unconditional indebtedness towards the Plaintiff in the amount of R325,000-00 (three hundred and twenty five thousand rand);

(4.2) Of the total amount of indebtedness as at paragraph 4.1 supra, half (50%) of such amount (being R 162,500.00 [one hundred and sixty two thousand five hundred rand]) would become due and payable by the Defendant on the 28th of February 2016;

(4.3) The remainder of the claim amount being R 162,500.00 (lone hundred and sixty two thousand five hundred rand]) would become due and payable by the Defendant on the 30th of April 2016;

5. In terms of the aforementioned written agreement, the Plaintiff did not incur any liabilities, save to allow the Defendant to make payment to the Plaintiff as contractually agreed, which only obligation was honoured by the Plaintiff.

6. The Defendant fell into material breach of the abovementioned agreement (which breach goes to the root of the agreement) in that:

(6.1) The initial payment due to the Plaintiff by the Defendant on the 28th February 2016 in the amount of R162 500.00, was not paid by the Defendant on the contractually agreed date or any subsequent date thereafter; and

(6.2) The further payment due to the Plaintiff by the Defendant on 30 April 2016 in the amount of R162 500-00 was not paid by the Defendant on the contractually agreed date or any subsequent date thereafter. "

[3] In his plea, the appellant denied that he is ordinarily resident at the chosen domicillium citandi et excutandi address (2[...] Zone 2 Ga -Rankuwa). He stated that he is in fact residing at 2[...] N[...] street, Amandasig, Pretoria. The appellant denied that he had signed the "payment agreement" an per annexure "MALI" to the particulars of claim. He therefore denied, in the plea, that he ever entered into a "loan agreement" with the respondent . He denied that respondent ever paid him R325 000-00 or any amount whatsoever. Finally, he further denied that the whole cause of action arose within the area of jurisdiction of the Ga-Rankuwa Regional Court.

#### Evidence

[4] The respondent was the first to testify and he called Colonel Gerhardus Cloete as a witness. What follows is the respondent's

account of the events leading to the current litigation. On the 14th of November 2015, the appellant as well as one Vusimuzi Raymond Mzimba entered into a payment agreement with the respondent. It reads:

#### "PAYMENT AGREEMENT

We, the undersigned,

Vusimuzi Raymond Mzimba, identity number: 6[...], Adress 1[...] V[...] Street, Rietvlei Ridge Estate, Irene and Mangweng Mighty Raseroka, identity number: 6[...] Adress: 2[...] Zone 2, Ga-Rankuwa, City of Tshwane Metropolitan Municipality. We hereby do acknowledge indemnifying / reimbursing Eliphaz Jabulane Maloka, identity: 7[...], Address: 1[...] P[...], Cnr G[...] Street and P[...] Dr, Esther Park, Kempton Park the sum of R750 000-00 (Seven Hundred and Fifty Thousand Rands) at the meeting held at Wonderpark Mall on the 29th October 2015.

The sum of of R750 000-00 (Seven Hundred and Fifty Thousand Rands) is in respect of property Portion 10 and 11 of ERF 79-5 Mabopane M, City of Tswane Metropolitan Municipality. The Payment will be made as follows:

(1) The Sum of R650 000-00 (Six Hundred and Fifty Thousand Rands) will be paid by Vusimuzi Raymond Mzimba and Mangweng Migthy Raseroka, 50% will be paid on the 23 April 2016 and the balance paid on the 30 April 2016 to the nominated Bank Account below.

(2) The Sum of R100 000-00 ( Hundred Thousand Rands) will be paid by Vusimuzi Raymond Mzimba on the 31 May 2016 to the nominated Bank Account below. (ALONE)

The nominated Bank Account of Elphas Jabulane Maloka: Standard Bank, Account No:2[...], Branch No:0[...].

We, Vusimuzi Raymond Mzimba and Mangweng Migthy Raseroka further consent that should the payments not be made on time as promised, Elphas Jabulane Maloka may instruct his attorneys to institute legal proceedings against us and the legal cost will be incurred by us.

For all purposes hereunder including the services of all or in process we hereby choose as our domicilium citandi et executandi at the address hereinbefore contained.'

[5] What gave rise to the payment agreement aforesaid is that the respondent bought two vacant plots (erf or stand) from Mighty Obriane Homes for R300 000-00. The respondent bought these properties in order to build some structures on them and thereafter to sell them (the stands) at a profit. The appellant is the sole member of the Close Corporation called Mighty Obriane Homes and he is the one who had signed the purchase agreement on behalf of Mighty Obriane Homes.

[6] After the respondent had put structures on these two plots, the appellant and Vusimuzi Raymond Mzimba (Mzimba) sold one of these properties but they did not give the respondent the proceeds of this sale. When the respondent questioned them about that transaction, the two of them (appellant and Mzimba) offered to settle the respondent for the two properties. By the word "settle" the two men wanted to pay the respondent for the two stands. In other words, the appellant and Mzimba wanted these stands to be theirs.

[7] The evidence of the respondent is that initially after the appellant had sold to him the two stands for R150 000-00 per stand he did pay Mighty Obriane Homes the said purchase price. Exhibit "C" before the court a quo was a tax invoice No. 75 dated 15 January

2010. This is written proof of payment issued by Mighty Obriane Homes to the payer (the current respondent) to the effect that R100 000-00 had been received from respondent in respect of the purchase of a stand. The evidence of respondent is that he had paid the R 100 000-00 with a crossed cheque (not negotiable). This cheque was made out to Mighty Obriane Homes. It is dated 14 January 2010. According to exhibit "D1" and '02", this cheque was honoured by Standard Bank on 14 January 2010. From Exhibit "D2" (the backside of the cheque) the identity number of the person who presented this cheque to the bank to negotiate it is 7[...] and his cell phone number is 0[...].

[8] The respondent testified that later he made the second cheque payment of R200 000-00 to Mighty Obriane Homes on 3 February 2010. This cheque was also marked "not negotiable". Exhibit "E1" is the face side of that cheque whilst Exhibit "E2" is the reverse side thereof. From these two documentary exhibits the cheque was negotiated at Standard Bank on 3 February 2010 by a person with identity number 7[...], cell number 0[...].

[9] It was in sequel to these events that on 29 October 2015, the three men (appellant, Vusimuzi and respondent), converged at Wonderpark Mall where the two men offered to settle the respondent

for his two properties for R 750 000-00. Initially, on that day at Wonderpark Mall the two men jointly offered to pay the respondent R 650 000-00 for his two improved properties. When he indicated that R650 000-00 was not enough, Vusimuzi then offered to top up the offer of R 650 000-00 with R 100 000-00. The respondent is suing the appellant for half of the amount of R650 000-00, being R325 000-00.

[10] The respondent's second witness, Colonel Cloete, testified and confirmed that on a balance of probabilities, the signature on the payment agreement (Exhibit "A") was that of the appellant.

[11] The appellant also testified. In his evidence the appellant continued as follows: He is not staying within the jurisdiction area of the Ga-Rankuwa Court. Wonderpark does not fall within the area of jurisdiction of Ga-Rankuwa but Pretoria North. The Regional Court of Ga-Rankuwa has no jurisdiction to hear the case. He never attended a meeting at Wonderpark Mall, in Theresa Park as alleged by the respondent. He stated however, that on about four occasions he attended a meeting with respondent and Raymond Mzimba, at Groenkloof Café 41. Mzimba was the respondent's cousin. Most of the times it was the respondent who initiated these meetings. The purpose of the said meetings was to resolve the amount which Mzimba owed the respondent. At one of these meetings the respondent told the two men to "divide the money into two and pay" the respondent, a suggestion which appellant rejected.

[12] The appellant admitted that the amount of R 100 000-00 referred to in Exhibit "D" was paid into the bank account of Mighty Obriane Homes CC, and that he is the sole member of this Close Corporation. The appellant testified that as per Exhibit "E", another amount of R200 000-00 was received from respondent and it was deposited by Mighty Obriane Homes into its bank account. For each of these two amounts which the CC received from the respondent, a tax invoice was issued by the CC to respondent as proof that this money was received.

[13] The appellant then testified about the reason why the respondent had paid R300 000-00 to Mighty Obriane Homes. The CC had a development and it was a big project so the appellant engaged Mzimba to help him with the development of the project. In the process Mzimba asked him (appellant) to allocate five stands for his (Mzimba's) personal use. Mzimba then told him that two of these five stands were going to be "signed for" by the respondent who is his cousin. To clarify this, Mzimba said to appellant that two of the five stands would be allocated to his cousin (respondent). The said two stands were portion 10 and 11 and

Mzimba explained that the respondent was going to transfer money to Mighty Obriane Homes account. Later the

respondent made two payments in the amounts of R100 000-00 and R200 000-00 to Mighty Obriane Homes for the two stands. Above that the respondent signed two offers to purchase for the two portions (no. 10 and 11). The price for each of the two stands was R 150 000-00. Exhibit "B" is a purchase agreement in respect of these two stands. Indeed the houses were built on the two properties by Mzimba, although they are still registered in the name of Mighty Obriane Homes. They were never transferred to the purchaser (respondent).

[14] The appellant denied that he had signed the acknowledgement of debt (Exhibit "A") or that he was in any way indebted to the respondent.

### Grounds of appeal

[15] In support of his appeal the appellant relies on the following grounds:

1. The presiding Magistrate erred in law, in one or more of the following respects, in finding that the Court had jurisdiction to

adjudicate the matter:

1.1 The presiding Magistrate erred in finding that Section 110 of the Magistrates Court Act states that "Where a party proceeds to plead on the merits of the case he ipso facto submits himself to the jurisdiction of the Court", and relying on same for a basis for jurisdiction, whilst Section 110 of the Magistrates Court Act does not provide for same.

1.2 The presiding Magistrate erred in finding that the fact that a Defendant pleads to the Plaintiff's particulars of claim results in such Defendant subjecting himself to the jurisdiction of the court and absolves the Plaintiff of the onus of proving jurisdiction in circumstances where the Defendant, in such plea, denies that the court has jurisdiction to adjudicate the matter as alleged in the particulars of claim.

1.3 The presiding Magistrate erred in finding that failure by a litigant to raise an objection to the jurisdiction of the Court at a pre-trial hearing, precludes such litigant from raising an objection to the jurisdiction of the Court at trial, in accordance with the contents of the litigant's plea.

1.4 The presiding Magistrate erred in finding that the Plaintiff was entitled to amend its particulars of claim in relation to the

citation of the Defendant after evidence has been led in order to found the jurisdiction of the Court on a basis other than what has been pleaded by the Plaintiff prior to commencement of the trial.

2. The presiding Magistrate erred as a finding of fact in accepting the Plaintiff's evidence by erroneously relying on findings irrelevant to the Plaintiff's cause of action, such as:

2.1 By accepting the Plaintiff's evidence on the basis of her finding that "the plaintiff's knowledge or identification of the defendant can thus not be questioned" when the plaintiff's knowledge or identification was never in issue between the parties"

2.2 By accepting the Plaintiff's evidence on the basis of her finding that "the evidence of the plaintiff is further supported by the two cheques or two cheque payments that were drawn from his account held at Standard Bank in favour of Mighty Homes CC, which is the defendant of which the defendant is the sole member" while also rejecting the relevance of the payment of the cheques by the plaintiff in her judgement and also finding that a "proper construction of plaintiff's particulars of claim and his evidence it is abundantly clear or evidence of the plaintiff that his claim rest or arose out of a payment agreement document which the plaintiff testified that it was signed by himself and the defendant and one Mr Mzimba"

3. That the presiding Magistrate erred as a finding of fact in rejecting the Defendant's evidence on the following basis:

3.1 By finding that the "defendant as a witness appeared not be a truthful witness'

3.2 By rejecting the Defendant's evidence on the basis of her finding that the Defendant "tried by all instances to distance himself from the payment document" as a basis for finding that the Defendant was untruthful, whilst the Defendant's dispute of the payment document was in fact the basis of the dispute between the parties;

3.3 By rejecting the Defendant's evidence on the basis of her finding that from Defendant's refusal to provide bank statements of the close corporation "Mighty O'Brian Homes", an entity which was not party to proceedings and which the presiding Magistrate found was not relevant to the dispute between the parties, that the "only

## conclusion

that can be drawn herein is that the defendant was, the conduct of the defendant goes to show that he was avoiding to present evidence before this Court which will prove that he is indeed the party that is indebted to the plaintiff as claimed."

## Condonation

[16] This appeal is accompanied by an application for condonation of the appellant's lateness in noting the appeal. The application for condonation is also opposed by the respondent who has filed an opposing affidavit urging this Court to refuse to condone the lateness of the appeal. The appellant has in turn filed a replying affidavit to the respondent's answering affidavit. This has made the application for condonation unusually bulky. Here then is the version of the appellant. Judgment was granted on 30 August 2019. After the appellant had instructed his attorney to note an appeal against the judgment, a consultation was held between the attorney

and Counsel on 6 September 2019 where the latter indicated that he needed a transcribed record of the case. On 9 September 2019 the attorney wrote a letter to Lepele Scribes, the transcribers of the case requiring a quotation for the transcription of the record. On 10 and 13 September 2019 the appellant's attorney called Lepele Scribes to enquire if they had received his letter but the phone remained unanswered. On 13 September 2019 the attorney again sent another letter to Lepele Scribes still requesting a quotation for the record transcription. Again on 18 September 2019 the appellant's attorney called Lepele Scribes and he was told by one Mansidi that their contract was not renewed by the Department of Justice with effect from 1 September 2019. Lepele Scribes could therefore not supply the required quotation. The attorney contacted the Clerk of the Court at Ga-Rankuwa and was eventually given the particulars of Elt Pro transcription, the new transcriber.

- [17] The appellant's attorney then called the said transcriber who promised to send him a form to complete before he could be supplied with a quotation. On 27 September 2019 the attorney sent a letter to the transcriber requesting a quotation. On 3 October 2019 the transcriber informed the appellant's attorney that they were still awaiting the CD of the recordings from the Clerk of the Court. On 4 October 2019 the attorney received the quotation from the transcriber.
- [18] The attorney then forwarded the quotation to the appellant with a request for further instructions. The appellant promised to pay the transcription fee (R9 398-70) by month end, i.e. end of October
2019. On 10 October 2019 the attorney drew the appellant's attention to the time period which had already lapsed since judgment encouraging him to pay before the end of October 2019. Appellant then informed him that he would try his level best to pay before 20 October 2019. He was struggling to raise the money for the record because his business was not doing well. A promise from his relative to borrow him money did not materialise.
- [19] Eventually on 17 January 2020 he paid R9 000-00 into his attorney's trust account. He undertook to pay the balance on the subsequent day. On 21 January 2019 the appellant's attorney instructed Elt Pro Transcription to proceed with the transcription. On 23 and 24 January 2020 the transcriber supplied the transcribed case record to the attorney. The attorney immediately availed the record to appellant's Counsel and a consultation was held on 27 January 2020. On 29 January 2020 the attorney received the draft notice of appeal from Counsel. This notice of appeal was filed with the Registrar of the High Court on the same day. On 31 January 2020 Kgomo attorneys in Mahikeng were appointed as appellant's correspondent.
- [20] Subsequent to this, the appellant's attorney requested reasons for judgment from the Magistrate in terms of Rule 51(8) of the Magistrates Court rules. This was done on 31 January 2020. The application for condonation was finalized on 12 February 2020. The appellant submitted that there are prospects of success in the matter based on the grounds as set out in the notice of appeal.

[21] I now set out a summary of the respondent's opposing affidavit to the application for condonation. Judgment was handed down on 30 August 2019 and the appellant was supposed to note the appeal within twenty days from the date of judgment. The appellant only noted the appeal on or about 29 January 2020, that is about 103 Court days after 30 August 2020. The appellant's attorney received a quotation for the transcribed record on 4 October 2019 but the appellant only received the transcribed record more than three months later, on 23 January 2020. He makes no full and frank disclosure of his financial position. Despite his financial constraints the appellant is the owner of various immovable properties with an initial purchase price of R1 647 900-00. A deed search (annexure JM5.1) reveals that he owns the following properties:

Property 1 of 12 Property Type ERF NO.8640 Township GA-RANKUWA UNIT 1 Title Deed TGI2/1978BP Registration Date 1978/02/20 Purchase Price R150 000.00 Purchase Date 2007/01/16  
Property 2 of 12 Property Type ERF NO.2951 Township GA-RANKUWA UNIT 2 Title Deed TGI 27/1977BP Registration Date 1977/05/18 Purchase Price R15 000.00 Purchase Date 2004/01/15  
Property 3 of 12 Property Type ERF NO.1860 Township MABOPANE-X Title Deed TG4167/1996BP Registration Date 1996/09/06 Purchase Price R60 000.00 Purchase Date 2003/04/24 Property 4 of 12 Property Type ERF NO.2371 Township GA-RANKUWA UNIT 2 Title Deed TG4087/1988BP Registration Date 1988/09/19 Purchase Price R125 000.00 Purchase Date 2007/12/15 Property 5 of 12 Property Type ERF NO.1639 Township GA-RANKUWA UNIT 1 Title Deed TG49/1968BP Registration Date 1968/06/05 Purchase Price R230 000-00 Purchase Date 2018/02/12 Property 6 of 12 Property Type ERF NO.2591 Township GA-RANKUWA UNIT 2 Title Deed TG562/1971BP Registration Date 1971/12/20 Purchase Price NIL Purchase Date - Property 7 of 12 Property Type ERF NO.8646 Township GA-RANKUWA UNIT 4 Title Deed TG604/1979BP Registration Date 1979/05/03 Purchase Price R150 000.00 Purchase Date 2007/04/05 Property 8 of 12 Property Type ERF NO.1729 Township GA-RANKUWA UNIT 7 Title Deed TG65380/2011 Registration Date 2011/09/19 Purchase Price R80 000.00 Purchase Date 2010/07/19 Property 9 of 12 Property Type ERF NO.2508 Township GA-RANKUWA UNIT 2 Title Deed TG916/1984BP Registration Date 1984/03/20 Purchase Price R35 000.00 Purchase Date 2001/03/14 Property 10 of 12 Property Type ERF NO.369 Township THE ORCHARDS EXT 6 Title Deed T111158/2015 Registration Date 2015/12/17 Purchase Price R642 000.00 Purchase Date 2015/07/17 Property 11 of 12 Property Type ERF NO. 554 Township GA-RANKUWA UNIT 7 Title Deed T141492/2003 Registration Date 2003/10/27 Purchase Price R62 000.00 Purchase Date 2003/07/10 Property 12 of 12 Property Type ERF NO.1090 Township AMANDASIG EXT 24 Title Deed T37974/2002 Registration Date 2002/04/09 Purchase Price R98 900.00 Purchase Date 2001/11/22

[22] In terms of a Windeed person vehicle ownership report (Annexure JM 5.2) the appellant has five motor vehicles registered in his name:

An Audi A3, registration No W[...].

A Colt 1.200, registration No M[...].

A Caterpillar Backhoe Loader, registration No H[...].

A Land Rover 1.320, registration No T[...].

A BMW registration No X[...].

[23] The timing of the notice of appeal by the appellant is accompanied by bad "faith and ill motive". According to the respondent, the following incidents constitute clear evidence of the appellant's bad faith:

23.1 "A warrant of execution was issued by the Court a quo following pronouncement of judgment on the 30th of August 2019, and such warrant of execution was issued on the 18th of October 2019, which issued warrant of execution is appended, hereto and marked "JM6"

23.2 The Sheriff of the Court made various attempts at executing such writ of execution, commencing on the 11th of November 2019, followed by the 22nd of November 2019, the 11th of December 2019 and ultimately on the 30th of January 2020. I append hereto a copy of the Sheriff's return of service confirming such various attempts at execution by the Sheriff, and mark same herewith as "JM7".

23.3 Upon every attempt at execution where the Appellant's spouse was at home, the latter, through his spouse, informed the domestic worker to inform the Sheriff that they will obstruct access by the Sheriff to the property, as instructed specifically by the Appellant. This has been conveyed by the Deputy Sheriff to the aforesaid Monica Van Den Heever on numerous occasions, and this is confirmed through the confirmatory affidavit of Monica Van Den Heever, alluded to herein above as Annexure "JM4"

23.4 It is rather telling that upon the day that the Sheriff was to conclude its execution, with the necessary assistance of a locksmith and a qualified dog handler (seeing as there were aggressive Rottweiler dogs present on the premises) on the 30th of January 2020, the Sheriff was suddenly served with a notice of appeal even before such notice was served upon my legal representatives.  
"

[24] In his replying affidavit to the application for condonation, the appellant gave the following account about the assets which are alleged by the respondent to be his (appellant's) property. The motor vehicle with registration No. D[...] is not a BMW as alleged by the respondent but it is a BMW It belongs to the appellant's wife and she is owing the bank (which financed the purchase of that car) R208 000-00. Annexure MR30 to the replying affidavit is an affidavit dated 24 March 2020 by Theodora Thabang Raseko who is the appellant's wife. She confirms therein that the said vehicle (BMW belongs to her and that it was financed by ABSA The current balance is R250 000-00. She confirms that from time to time her husband does drive this vehicle.

- [25] The appellant confirms that he owns a Land Rover but says it is broken and is stationary at a garage in Montana since September 2019. He denies that Nico who is the Deputy Sheriff ever stated to Monica that he had "seen the Landrover belonging to Mr Raseroka some nights ago in the area." According to the appellant the first time when he met Nico was in the beginning of the year 2020, and the said Nico has no knowledge about appellant's properties.
- [26] In relation to fixed assets which are tabulated in respondent's annexure "JM5.1" the appellant avers that properties number 3,5 and 11 on the Windeed list (JM5.1) do not belong to him any longer because he has sold them long ago. In support of this he attached annexures MR31, MR32 and MR33 being tittle deeds of these properties in other people's name. Property No.3 is registered in the name of Motjelele Mapule Rebecca, she purchased it for R 108 000-00 on 26 April 2003. Property number 5 on annexure JM5.1 belongs to Aphane Jesica Puseletso since 19 August 2019. She purchased it for R535 000-00. Finally, property number 11 on annexure JM5.1 is registered in the name of Makola Jeremiah Desmond. He purchased it on 17 July 2003 for R90 000-00. The appellant does not know why these properties still reflect that he owns them as per Windeed search of 8 October 2019.
- [27] According to appellant, property number 10 and 12 on annexure JM5.1 are still bonded and cannot be sold as the market value thereof is far less than the outstanding bond amount. Property number 1 has been on the market for more than a year but no one has come forward to buy it due to the current economic market on immovable properties. In respect of the rest of the assets enumerated in annexure JM5.1 most of them have been on the market for more than a year but no one has offered to purchase them.
- [28] The appellant then dealt with the remaining immovable assets as follows: Indeed the Audi A3 motor vehicle belongs to him. He has tried unsuccessfully to sell it but cannot get a buyer. The Colt 1.200 is a 1999 model with no substantive value. This is the appellant's only means of transport. If he were to sell it he would surely fetch a meagre price because it is an old vehicle. The Caterpillar loader is registrered in the appellant's name but it belongs to his wife. She is the one who bought it on auction. The appellant attached a confirmatory affidavit (annexure MR34) by his wife. She confirms that she is the one who purchased the Caterpillar T LB. The reason why it is registered in her husband's name, she says "is because he uses it on my behalf to source jobs as I am working full time." The BMW has been sold by the appellant to a Mr Dakgada. The vehicle is still registered in the appellant's name because he is struggling to get the Natis documents from ABSA. In a confirmatory affidavit Mr Lufuno Dagada confirms that he purchased this vehicle in 2015 from the appellant but he is still waiting for its original Natis certificate from the appellant.
- [29] The appellant denies that he or his wife ever instructed their domestic worker not to allow the Deputy Sheriff access to their premises. On the issue of borrowing money in order to pay for the transcribed case record, the appellant says it is his cousin Mr Pieter Mashishi who borrowed him money ultimately. For that reason the appellant attached to his replying affidavit three annexures being the confirmatory affidavit from the said Mashishi, an electronic account payment deposit slip from Mashishi in terms of which he deposited R 15

000-00 on 7 February 2020 into M.M Raseroka's bank account and a copy of M.M Raseroka's Standard Bank account statement which reflects that the said payment of R15 000-00 by PH Mashishi was made into the appellant's bank account.

### Legal Principles

[30] In an application for condonation for failure to observe timeframes such as in the current case:

"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. "[1]

[31] The application for condonation is not a mere formality for the applicant has to make out a case justifying the abridgment of times frames. In *Shabalala v Goudini Chrome (Pty) Ltd and Another*[2] the Court held that:

"Condonation is not for the mere asking. It is incumbent upon an applicant for condonation to prove that (s)he/it did not wilfully disregard the time frames provided for in the Rules of Court. Furthermore, that there are reasonable prospects of success on appeal. "

### Analysis

[32] The judgment of the Regional Court was delivered on 30 August

2019. On 9 September 2019 the appellant's attorney requested a quotation of the record from Lepele Scribes. On 10 and 13 September 2019 a call on each of these two days by the attorney to Lepele Scribes was not answered. A written reminder was sent to the transcribers on 13 September 2019. Only on 18 September 2019 was the appellant's attorney told that Lepele Scribes' contract had expired. Again this information was conveyed only after the attorney had called Lepele Scribes. Despite the appellant's attorney's best attempts to get a quotation of the transcription of the record speedily, he finally received it from Elt Pro transcribers on 4 October 2019. Up to that stage the sole cause of the delay in noting an appeal was the unavailability of the quotation of the transcribed case record. In my view, this delay cannot be held against the appellant, in other words, he cannot be blamed for it.

[33] The second period of the delay started on 4 October 2019 when the appellant's attorney demanded payment for the transcription of the case record from him. It was only on the 17 January 2020 when the appellant finally paid R9 000-00 for the transcription of the case record. The appellant attributes his delay to pay on his inability to raise R9 000-00 due to lack

of funds. In the same breath the appellant in his replying affidavit states that property number 5 on annexure JM5.1 (Erf No. 1639, Unit 1, Ga-Rankuwa) was sold by him to Aphane Jesica Puseletso on 19 August 2019 for R535 000-00. This means that nine days before the Ga-Rankuwa Regional Court gave judgment in this case he earned R535 00000 from this property yet on 30 August 2019 he was unable to raise money for the case record. The appellant did not explain to the Court why he could not afford the case record when he had just received R535 000-00 for the sale of his property. He had a duty to explain to the Court what happened to this money in order to justify his alleged lack of financial means.

- [34] The appellant throughout the application for condonation, seems to be reluctant to honestly disclose to this Court what his income or his family's income is. He has not disclosed the salary he earns from his business. He has failed to disclose the salary of his wife with whom he is married in community of property. He has not disclosed whether his fixed properties are just vacant stands or whether there are structures or houses built on the properties. He has not disclosed whether he receives any rental income from his several fixed properties. Looking at the appellant's previous and current movable and immovable properties, an inference can safely be drawn that he is a good business person. It is surprising then to see a person of his social status choosing to borrow money from a relative, with a risk of waiting more than three months for the money, instead of making a call to his bank manager and getting a loan within twenty four hours. In this regard, the appellant has failed to explain to the Court why he did not follow the shortest route by borrowing money from the bank.
- [35] In relation to his financial means I am satisfied that the appellant is playing his cards close to the chest. Accordingly, the Court finds that he has not made a full and frank disclosure. The application for condonation must be dismissed.
- [36] The second reason why condonation stands to be dismissed is that the appellant has no prospects of success. In his particulars of claim, the respondent averred that the Ga-Rankuwa Court had jurisdiction in this case because
- (a) "the defendant is ordinarily resident in the area of jurisdiction of the Court and (b) the whole cause of action arose" within the area of jurisdiction of the Court. The respondent failed to prove any of the two grounds upon which he relied to justify his view that the Ga-Rankuwa Court had jurisdiction. However, during cross-examination, the appellant admitted that his business, a CC, of which he was a sole member was situated within the Court's area of jurisdiction. Accordingly, the appellant is working in his business within the area of the Court.

Through this evidence, the appellant salvaged respondent's case because he (appellant) then proved that the Court had jurisdiction over him. For the appellant to plead that the Court had no jurisdiction over him knowing that he was running a business in Ga-Rankuwa, is simply disingenuous.

[37] Paragraph 8 of the pre-trial minutes of 8 and 9 November 2018 is entitled "common cause facts and facts in dispute". Paragraph 8 reads:

"The Plaintiff is of the opinion that the common cause facts and facts in dispute are sufficiently set out in the pleadings.

Defendant's Answer:

Agreed. The Defendant contends that:

1. The Defendant, by signature the payment agreement, consented to the jurisdiction of the above Honourable Court;
2. Concomitant to the above, should it be found that it is the signature of Defendant on said payment agreement, the aspect of jurisdiction becomes irrelevant.
3. On the other hand, should it be found that it is not the signature of the Defendant on the payment agreement, the aspect of jurisdiction will come into dispute.
4. The aspects of signature on the agreement together with jurisdiction, are to be considered as whole and cannot be separated.
5. The Plaintiff take note of this view. '

The concession by the appellant amounts to agreeing that the court a quo had jurisdiction over this matter only if it found that appellant is a signatory to the payment agreement (Exhibit "A").

Indeed the court a quo found that the appellant did sign the payment agreement. That finding puts to rest the issue of jurisdiction.

[38] In view of the findings which this Court has already made that the court a quo had jurisdiction in this case it becomes unnecessary to decide whether the amendment to the respondent's particulars of claim after the appellant had closed his case was properly or improperly made.

[39] The Regional Court Magistrate made credibility findings which are favourable to the respondent's case. Conversely, an adverse finding was made against the appellant when the court a quo found that he was an untruthful witness. It found respondent and his expert witness to be honest and reliable. There is no reasonable prospect that another Court may differ with the court a quo on its credibility findings. In fact the appellant's explanation of the reasons why respondent deposited money into Mighty Obriane Homes bank account defies logic and common sense. Beside, the evidence of the handwritting expert remains unchallenged by credible evidence.

## Conclusion

[40] Consequently, the application for condonation stands to be dismissed with costs, first, because no good cause has been shown by the applicant for the granting of condonation and second, there are no prospects of success on appeal.

Order

[41] The result, it is ordered that:

The application for condonation for the late prosecution of the appeal be and is hereby dismissed with costs.

SAKELO GURA

JUDGE OF THE HIGH COURT

HIGH COURT, MAHIKENG

I agree

AH PETERSFN

APPEARANCES

For the Applicant: Adv. M. Snyman SC Instructed by: Chris Greyvenstein Attorneys c/o Kgomo Attorneys INC. For the Respondents: Adv. R van Schalkwyk Instructed by: Van Greunen & Associates INC c/o Maree & Maree Attorneys Heard on: 10 June 2022 Judgment handed down on : 15 May 2023

[1] Per Homes JA in *Melane V Santam Insurance Co.Ltd* 531(A) at 532C-E

[2] (M342/2016) [2017] ZANWHC 77 (2 November 2017)

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