

SOUTH AFRICA / JUDGMENT

Spamer v Olivier (CIV APP MAG 34/2023) [2024] ZANWHC 236 (11 September 2024)

[2024] ZANWHC 236**COURT**

North West High Court, Mafikeng

BEFORE

Reid, Mfenyana

CASE / FILE NUMBER

CIV APP MAG 34/2023

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****NORTH WEST DIVISION,****MAHIKENG****CASE NUMBER: CIV APP****MAG 34/2023****Reportable: NO****Circulate to Judges: NO****Circulate to Magistrates:**

NO

Circulate to Regional

Magistrates: NO

In the matter between: -

JACQUES

SPAMER

Appellant

and

OCKERT

OLIVIER

Respondent

This judgment is

handed down by means of electronic communication to the parties' representatives. The date of hand down is

deemed to be 11

September 2024.

CORAM:

REID J et MFENYANA J

ORDER

The following order is

made:

(i)

The application for condonation is dismissed.

(ii)

The appellant shall pay the costs of the appeal including the costs of the application for leave to appeal, the reserved costs of the urgent application on 23 November 2023, 1 December 2023, and 8 December 2023 on a party and party scale B, to be taxed.

JUDGMENT

MFENYANA J

Introduction

- [1] This appeal lies against the whole judgment and cost order of the Matlosana Magistrates' Court, Klerksdorp, in which the court per Magistrate M Pillay (the court a quo) on 1 August 2023, granted summary judgment in favour of the respondent. The written reasons for the judgment were provided by the presiding magistrate on 30 August 2023.
- [2] The appeal is opposed by the respondent.
- [3] There are three issues for determination before this Court, namely: (a) whether the appeal has lapsed, (b) if so, whether condonation should be granted and the appeal reinstated; and lastly (c) the merits of the appeal (in the event that condonation is granted).

Factual

background

- [4] On 20 September 2022 the respondent issued a summons in the Klerksdorp Magistrate's Court against the appellant for payment of an amount of R181,152.00 for monies lent and advanced by the respondent to the appellant.
- [5] On 1 August 2023 the court a quo granted summary judgment in favour of the respondent. In its order the court a quo stated that the court would "provide written reasons on 30/08/2023."
- [6] On 17 August 2023 the appellant delivered a notice in terms of Rule 51(1) of the Magistrates' Court Rules requesting reasons for the granting of the summary judgment.
- [7] On 24 August 2023, before the reasons for the summary judgment were provided by the court a quo, the respondent commenced with execution against the appellant. According to the respondent, this was done in accordance with the summary judgment granted in his favour.

- [8] On 28 August 2023 the appellant served on the respondent, a notice titled “Preliminary Notice of Appeal”. The said notice was filed on 31 August 2023. In correspondence addressed to the respondent, the appellant stated that it intended to amplify its grounds of appeal after receipt of the reasons for the judgment. As already indicated, the reasons were provided by the court a quo on 30 August 2023. The execution of the order was stayed by agreement between the parties.
- [9] In the “preliminary notice of appeal”, the appellant states that security is given in the amount of R1 000.00 “which will be furnished simultaneously with the filing of the Amplified Notice...”. There is a dispute between the parties regarding the provision of security by the appellant, as required in terms of Rule 51(4) of the Magistrates’ Court Rules as the respondent avers that it did not receive any confirmation of compliance with this provision despite the appellant’s assertion that it was complied with.
- [10] On 27 September 2023 the appellant filed a further notice titled “Amplified Notice of Appeal.” The four grounds of appeal in the “amplified” notice of appeal are a replica of the grounds in the “preliminary” notice of appeal. With regard to the issue of security, in the “amplified notice of appeal”, the appellant states that security in the amount of R1 000.00 “was furnished simultaneously with the filing of the Preliminary Notice of Appeal...”. This is not the case, as in the preliminary notice the appellant deferred the furnishing of security to the filing of the amplified notice of appeal.
- [11] On 28 September 2023 the respondent addressed further correspondence to the appellant stating that the amplified notice of appeal is not a proper notice of appeal, and that security should have been provided simultaneously with the preliminary notice of appeal.
- [12] On 31 October 2023 the respondent addressed a letter to the appellant informing him that the appeal had lapsed as the appellant failed to prosecute the appeal within the 40 day period stipulated in rule 50(4)(a) of the Uniform Rules. According to the respondent this 40-day period is the time stipulated in the Uniform Rules for prosecuting the appeal. In this regard, it must be stated that Rule 50(4)(a) must be read with Rule 50(1). Rule 50(1) deems an appeal to have lapsed if it is not prosecuted within 60 days following the noting of the appeal.
- [13] Further correspondence ensued between the parties as the appellant contended that the appeal had not lapsed, placing reliance on the date the amplified notice of appeal was filed. It is worth stating that there is no dispute between the parties regarding the calculation of the dies. If reliance is placed on the “preliminary” notice of appeal which was served on 28 August 2023, the 40 days would have expired on 24 October 2023. It is further worth stating that the failure of a party to prosecute an appeal within 40 days does not render the appeal to have lapsed. Neither does it trigger the deeming provision in Rule 50(1). The deeming provision is only triggered if the appeal is not prosecuted within 60 days after it has been noted. What this translates to is that the appellant has 40 days to prosecute the appeal. If the

appellant fails to do so, the respondent may do so, but before the expiry of the 60- day period, in accordance with Rule 50(4)(b). It is clear from the reading of these provisions that despite not being prosecuted within 40 days, the appeal is only deemed to have lapsed once 60 days expires.

- [14] What appears to be the contention between the parties is whether the appeal was noted on 28 August 2023 when the “preliminary” notice of appeal was served or on 27 September 2023 by the service of the “amplified” notice of appeal, in which case the 40 days would have expired on 22 November 2023.

Noting of the appeal

- [15] The respondent’s stance is that the appeal was noted on 28 August 2023 when the “preliminary” notice of appeal was served. The appellant on the other hand flips between the two notices of appeal. In a letter dated 2 November 2024, the appellant records as follows with regard to the noting of the appeal:

“6. ... We had no other choice but to note a Preliminary Appeal and make payment of the security amount as provided in Rule 50 of the Magistrate Court Rules in this regard to safeguard our client’s legal positions. Your instructions came after your offices was notified of our client’s intention to apply for Appeal, but then proceeded with execution with immediate removal of our client’s assets. (Clearly mala fide). (sic).

7. ...,

8....

9. We confirm that after written judgment was received on 30 August 2023, we have noted our amplified Notice of Appeal on 27 September 2023 as allowed and provided for in terms of the Court rules within the stated time.”

- [16] From a reading of the above extract, it is clear that the appellant is of the view that it had noted the appeal on both occasions, but that on the first occasion, it was compelled to do so, in order to avert execution by the respondent, as its initial intention was to note the appeal once the reasons for the order had been received.

- [17] It is apposite to state at the outset that the Rules of Court do not provide for the filing of two notices of appeal. Once the appellant

made an election to note the appeal after receipt of judgment, as envisaged in Rule 51(3) of the Magistrates’ Court Rules, it was bound by that election. It is not obligatory for an appellant to have written reasons in order to file a valid notice of appeal. In this regard, the respondent avers, correctly in my view, that although Rule 51(3) makes provision for two different scenarios on which an appeal may be noted, it does not provide for the noting of an appeal in both scenarios in the same matter. The respondent relies on the decision in *Pilato v Fakude*[1] where the court noted that where an appellant has not made a request for judgment in writing, an appeal may be noted within 20 days after the date of the judgment. I understand the respondent to be saying that

the Rule does not permit the noting of an appeal twice in the same matter.

- [18] In this matter while the appellant had made a request for reasons, it proceeded as if it had not done so and noted the appeal. In so doing, it conflated the processes. It does not matter, in my view, that the respondent had prematurely proceeded with execution. The appellant was not without remedy in the circumstances. Nothing, in my view, prevented the appellant from approaching the court for a stay of the execution. In any event, the appellant exercised its options and successfully launched such application on 23 November 2023. There is no reason why the appellant could not have done so prior to issuing the “preliminary” notice of appeal.
- [19] The fact that the notices of appeal are identical in every material respect exacerbates the issue even further. The second (amplified) notice of appeal is superfluous and serves no purpose. In my view, this disposes of the issue. Consequently the appeal was timeously noted on 28 August 2023 when the first notice of appeal was delivered.
- [20] A further issue raised by the respondent in relation to the noting of the appeal is that in terms of Rule 51(4) the appellant is, in addition to filing a notice of appeal, required to provide security in the amount of R1 000.00. Placing reliance on the decision in *M.N v F. N[FR1]* where the Mpumalanga Division cited with approval *O’Sullivan v Mantel*[2] that ‘the noting of an appeal is not complete until payment of security is made’, the respondent avers that the appellant’s notice of appeal does not comply with Rule 51(4). I agree. As previously stated, the (preliminary) notice of appeal indicates that security would be provided when the amplified notice of appeal is filed. However, a document dated 29 August 2023 shows that an amount of R1 000.00 was paid into court. The authenticity of the document is not known as the document does not bear the registrar’s stamp. There is also no indication that the document was filed at court. It is trite that security as required in terms of Rule 51(4) must be provided to the registrar. Any process filed with the registrar must bear the registrar’s stamp as proof of the filing thereof. It can thus not be said that the document relied on by the appellant complies with the provisions of Rule 51(4).
- [21] The respondent avers that this non- compliance by the appellant, is fatally defective to the appeal. Failure to note an appeal does not per se render an appeal to have lapsed. It is only if the appeal has not been prosecuted sixty days after noting the appeal that it is deemed to have lapsed. In my view, such non-compliance can be cured by an application for condonation. I therefore do not agree

with the respondent that such non- compliance is fatal to the appeal.

- [22] It appears to me that this averment by the respondent is borne by the conflation of the provision in Rule 51(4) which relates to the noting of an appeal, and Rule 51(9) which relates to the prosecution of an appeal.

Prosecuting the appeal

- [23] Upon realising that the appellant had not prosecuted the appeal on 24 October 2023 as it ought to, the respondent on 2 November 2023 transmitted a letter to the appellant inviting him to launch an application for condonation for its failure to prosecute the appeal timeously, within 10 days from the date of the letter, failing which the respondent would proceed with execution.
- [24] Having not received such application for condonation, on 22 November 2023, the respondent proceeded with execution. On 23 November 2023, the appellant successfully launched an urgent ex parte application in this Court under case number UM227/2023 in terms of which the writ of execution was stayed and a rule nisi issued, pending the final determination of this appeal. The costs of the ex parte application were reserved for the return date of 14 December 2023.
- [25] The appellant anticipated the return date, and the application was heard on 1 December 2023. The parties reached settlement, and the agreement was made an order of court on 8 December 2023 to the effect that the application was withdrawn, and the appellant would deliver “an application for condonation for any non-compliance relating to his appeal, within ten (10) court days from date of this order (excluding the period of dies non as determined by the Rules)”.
- [26] It was further agreed that the respondent would not execute the order of the Magistrates’ Court, unless the appellant did not launch a condonation application as agreed.
- [27] The costs of the application, including the application for reconsideration, and all reserved costs occasioned by the applications would form part of the costs in the appeal.
- [28] On 31 October 2023 the appellant applied for a date of hearing of the appeal.

Has the appeal lapsed?

[29] Rule 51(9) of the Magistrates’ Court Rules provides:

“(9) A party noting an appeal or a cross-appeal shall prosecute the same within such time as may be prescribed by rule of the court of appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make an order to the contrary.”

(own emphasis)

- [30] In addition, Rule 50(1) of the Uniform Rules of Court stipulates that an appeal to the High Court against the decision of a Magistrate in a civil matter shall be prosecuted within 60 days after the notice of such appeal, and unless so prosecuted, shall be deemed to have lapsed.
- [31] Rule 50(4)(a) of the Uniform Rules stipulates that within 40 days of noting the appeal, the applicant shall 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 (prosecute the appeal). In the present case the 40 days after 28 August 2023 lapsed on 24 October

2023. The appellant applied for a date of the hearing of the appeal on 31 October 2023 and was thus, out of time. That being the case, the appellant did not prosecute the appeal on time, and should have sought condonation for the late prosecution of the appeal as prescribed in Rule 50(4)(a).

[32] That being the case, the deeming provision in Rule 50(1) was not triggered as the period of 60 days had not lapsed when the appellant prosecuted the appeal. The appeal has not lapsed.

[33] In my view, the saving grace for the appellant lies in the period between the time required to prosecute the appeal, and the deeming provision in Rule 50(1).

The condonation application

[34] On 9 January 2024 the appellant filed an application for condonation for the late noting and prosecution of the appeal. The condonation application is opposed by the respondent.

[35] In the founding affidavit, the appellant sets out the purpose of the application as follows:

“PURPOSE OF THIS APPLICATION

2.1 The application for condonation is brought in so far as the appellant might have not complied with the requirements set out in the applicable legislation and Rules of the above Honourable Court regarding the noting and prosecuting of the Appeal under the abovementioned case number.

2.2 In terms of the aforesaid Rules and legislation, specifically Rule 51 and 50 of the Magistrate’s Courts Act 32 of 1944, as amended, the judicial officer shall within 15 (fifteen) days after an order is granted, hand to the Clerk of the Court a judgment in writing which shall become part of the record setting out the facts he or she found to be proved; and his or her reasons for the judgment. (sic)

2.3 An appeal may be noted within 20 (twenty) court days (sic) after the date of a judgment appealed against or within 20 (twenty) days after the Clerk of the Court has supplied a copy of the judgment in writing to the party applying therefore, whichever period shall be longer.”

[36] The appellant then proceeds to set out the chronological sequence of events. The appellant states that after receiving the reasons for the judgment from the presiding magistrate on 30 August 2024, an amplified notice of appeal was filed on 27 September 2023 which falls within the prescribed 20 (twenty) court days.

[37] The appellant also states that the “notice of appeal was prosecuted within the prescribed 40 (forty) court days” as the application for allocation of an appeal date and Index of the Record of Proceedings in the Magistrates’ Court had been served on the respondent on 30 October 2023. This reference by the appellant to the ‘prosecution of a notice of appeal’ is apparently in respect of the 40 day period stipulated in Rule 50(4)(a) of the Uniform Rules for the application for a date of the hearing, for the prosecution of the appeal itself.

[38] The appellant then goes further to state that:

“3.13 This application as indicated above has been brought ex abundante to save guard any non-compliance of the applicable legislation regulating the noting and prosecution of the appeal.

3.14 I further confirm that the appeal had been duly noted and duly prosecuted in terms of the applicable legislation.

3.15 In the event the Honourable Court finds that there exists certain non-compliance with the requirements as set out in Rule 50 and Rule 51 of the Magistrate’s Court Rules, I hereby request that the Honourable Court condone same.”

[39] The appellant states that he has complied with all the Rules, that the appeal has been duly noted and duly prosecuted in terms of the applicable legislation, but requests condonation if this Court finds that there “exists certain non-compliance with the requirements” of noting and prosecuting an appeal. In the application it is repeatedly stated that the Rules relating to the noting and prosecution of the appeal have been duly complied with.

[40] The application for condonation is thus brought as a ‘safety-net’ to cure any and all defects that this Court may find to exist. This is inappropriate. First, because it is expected of every legal representative to be familiar with the provisions of the Rules applicable to the application, they intend to bring on behalf of their client, and not make a blanket application. It is not for the court to spell out the applicable regulatory regime on behalf of the appellant.

[41] In *Uitenhage Transitional Local Council v South African Revenue Service* the Supreme Court of Appeal (SCA) noted that condonation will not be granted for the mere asking.[3] In that matter the SCA further cautioned that:

“... condonation is not a right but a concession granted at the Court’s discretion. An application for condonation must provide a full, detailed and accurate account of the causes of the delay and their effects to enable the court to understand clearly the reasons and to assess the responsibility. If the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be set out.”

[42] Thus, the appellant must provide a full and comprehensive explanation for the shortcomings in noting the appeal, including the discrepancies

relating to the provision of security, as well as the delay in prosecuting the appeal.[4] These requirements for condonation are well established. Importantly, the appellant must demonstrate good cause for the failure to comply with the Rules.

[43] The SCA noted in *Offbeat Holiday Club and Another v Sanbonani Holiday Spa Shareblock Limited and Others*[5] that an applicant for condonation must explain in detail the cause of the delay for the entire period of delay. In this regard, the appellant makes generic statements without demonstrating their applicability on the facts of the present case. He submits that the appellant enjoys “excellent prospects of success” without demonstrating

these prospects of success. It goes without saying that the appellant has not shown good cause for the delay in prosecuting the appeal.

- [44] It may be that this failing by the appellant was occasioned by his belief that all the requirements of the Rules and 'applicable legislation had been complied with'. That belief is misplaced.
- [45] It is concerning that even though in the notice of motion, the appellant states that condonation is sought, the supporting affidavit is in direct contrast to the relief sought, in that it makes no averments for condonation but simply reiterates the process followed in noting and prosecuting the appeal. What is even more confusing, is that the appellant then proceeds to address the circumstances leading up to the delay in prosecuting the appeal, prejudice and prospects of success, albeit flippantly. A closer reading of the founding affidavit to the condonation application shows that these are no more than a regurgitation of the process followed by the appellant. The appellant is mum about the reasons for the delay, or the issue of

security or any of the shortcomings both in noting and prosecuting the appeal.

- [46] As to prospects of success, the appellant simply refers this Court to the Appeal Record, also on the same basis that all applicable prescripts have been complied with. The court is thus left perform guesswork as to the specific circumstances relied on by the appellant in surmising that the appeal enjoys great prospects of success. While it is so that in deciding whether good cause exists, the court should consider the trite principles set out in *Melane v Santam*[6], which include the degree of lateness and the explanation therefor, the prospects of success and the importance of the case. In exercising

its discretion whether or not to grant the application, the court should seek to achieve fairness to both sides. It is a trite

principle that "a slight delay and a good explanation may help compensate for prospects of success which are not strong. ... And the respondent's in finality must not be overlooked." [7]

It bears iterating that in the present case, while the delay in prosecuting the appeal cannot be said to be inordinate, the appellant

gave no explanation whatsoever. Neither did he provide any explanation for the shortcomings in respect of the issue of security.

While, no doubt, all cases are important to the litigants who institute them, there is no particular importance to be attached to the present case, as to warrant that this court should overlook the myriad of errors committed by the appellant in the noting and prosecuting the appeal. It could not have been possible in those circumstances for the appellant to make out a case for condonation,

when its belief has up to this point, been that he had complied with all the relevant prescripts. In this regard, I align myself with the dictum in *Ntaba v Premier Eastern Cape Province and Others*[8], which was also relied on by the respondent. In that case as in the present case, the condonation application made no reference to the amount of the delay and no attempt was made to explain the extent of the delay with reference to the period required in the applicable rules. The Full Court of the Eastern Cape Division noted that the court was ‘left to its own devices to figure out the extent of the delay’.

[47] On a conspectus of all the facts of this case, there is no doubt that the application falls short of making out a case for the relief sought, and conversely is in direct conflict with the relief sought. It falls short of the principles set out in *Melane v Santam*. The nonchalant posture adopted by the appellant is not only inappropriate, but fatal to the appellant’s case. The application falls to be dismissed.

[48] Having found that no proper case has been made out for condonation, it is not necessary to deal with the merits of the appeal.

Costs

[49] The general principle when it comes to costs is that the successful party is entitled to its costs. There exists no reason, in my view why this principle should not apply in this matter. Something needs to be said about the reserved costs.

[50] On 23 November 2023, the appellant successfully sought an ex parte order for the stay of a warrant of execution. The costs were reserved for determination on the return day. On the return day, by agreement between the parties the appellant withdrew its application and undertook to file an application for condonation for its non-compliance with the rules of court relating to noting and prosecuting the appeal. Costs were further reserved for determination on hearing of the appeal.

[51] There was no justification in my view for the respondent to proceed with execution, as the 20 day period stipulated in Rule 51(3) for the noting of the appeal had not lapsed, the judgment having been given on 1 August

2023. That notwithstanding, the respondent is substantially successful, and is thus, entitled to its costs.

Order

[52] In the result, I make the following order:

S MFENYANA

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION MAHIKENG

I agree.

FMM REID

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DATE OF JUDGMENT: 11 SEPTEMBER 2024

[1] (A08/2021)

[2021] ZAMPMBHC 57 (26 October 2021).

[2] 1981

(1) SA 664 (W).

[3] 2004(1) SA 292 (SCA).

[4] Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited 2017(6) SA 90 (SCA).

[4] Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited 2017(6) SA 90
(SCA).

[5] (20231/2014)

[2016] ZASCA 62; [2016] 2 All SA 704 (SCA); 2016 (6) SA 181 (SCA) (25 April 2016).

[5] (20231/2014)

[2016] ZASCA 62; [2016] 2 All SA 704 (SCA); 2016 (6) SA 181 (SCA)
(25 April 2016).

[6] Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 AD.

[7] Ibid, at 532D – E.

[8] (524/2011)

[2023] ZAECMHC 52 (26 September 2023).

[FR1]Citation?

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Prepared on 10 October 2026 · Esheria