

Reportable:	NO
Circulate to Judges:	NO
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IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NO.: **CIV APP MG28/2023**

COURT A QUO CASE NO.: **350/2021**

In the matter between:

MOLEFI PHANUEL MABYANE

APPELLANT

And

DAVID DEDE MOERANE

FIRST RESPONDENT

**DEPARTMENT OF RURAL
DEVELOPMENT**

SECOND RESPONDENT

CIVIL APPEAL - FULL BENCH

CORAM: REDDY J & MASIKE AJ

ORDER

- (i) The matter is removed from the roll subject to it being reconstructed.
- (ii) The appellant's legal representative is directed to immediately take steps to properly reconstruct the missing and illegible portions of the record of the proceedings in the court *a quo* in consultation with all relevant role players including Magistrate M P Hlabyago, according to the guidelines in:
 - (a) *Muravha v Minister of Police* 2024 (4) SA 84 (SCA);
 - (b) *S v Leslie* 2000 (1) SACR 347 (W);
 - (c) *S v Schoombie and Another* 2017 (2) SACR 1 (CC).
- (iii) The appellant is ordered to pay the wasted costs occasioned by the removal of the appeal from the roll. Such costs should be on the scale between party – and – party.

JUDGMENT

MASIKE AJ

INTRODUCTION

[1] This matter served before this Court as an appeal of the whole judgment of the learned Magistrate M.P Hlabyago from the Mogwase Magistrates' Court, (the court *a quo*) purportedly dated 18 November 2022.

[2] The appellant in the court *a quo*, instituted motion proceedings against the first and second respondent wherein he sought relief in the following terms:

1. "That the 1st Respondent is ordered to remove all of his livestock (including, inter alia, all his cattle, sheep, goats, horses, donkeys or any other livestock) presently in his possession or under his control from farm UNIT 1 OF THE REMAINDER OF THE FARM BLINKKIPPEN NO. 2[...], JP, PROVINCE NORTH WEST and PORTION 3 OF THE FARM BLINKKLIPPEN NO. 2[...], JP, PROVINCE NORTH WEST within 7 (SEVEN) days from date of Court Order.
2. The 1st Respondent is interdicted and restrained from returning any of his livestock as contemplated in paragraph 1 above, or any other livestock on to the farm for the duration of the term of the lease of the aforementioned farm between Applicant and 3rd Respondent.

3. In the event of the 1st Respondent failing to comply with this order contemplated in paragraph 1 or 2 above, then in that event an order is hereby issued that the Sheriff with the assistance of the South African Police Service, alternatively any other registered private security company that the Sheriff is granted leave to appoint, shall remove all such livestock contemplated in prayer 1 above, which the 1st Respondent has failed to remove from the farm, and to take such livestock to the nearest able to accommodate the livestock, for the pound master to deal with in terms of the applicable legislation dealing with pounds.
 4. Costs against the 1st Respondent.
 5. Costs against the 3rd Respondent only in the event of their opposition to this Application and such opposition being unsuccessful.”
- [3] The court *a quo* dismissed the application, and it is this order that the appellant assails.
- [4] The appellant also applies for condonation for the late prosecution of the appeal in terms of Rule 50(1) of the Uniform Rules of Court (the Rules) and non-compliance with Rule 50(4) (a).
- [5] Prior to hearing the matter, we were informed that the parties had agreed that the appeal may be decided on the paper’s filed in terms of Section 19(a) of the Superior Courts Act, 10 of 2013.

THE LAW

- [6] 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.”

[7] 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.”

[8] 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.”

[9] 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.** (our emphasis)

[10] Rule 51(4) of the Magistrates' Court Rules 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."

[11] Rule 51(8) (a) and (b) of the Magistrates' Court Rules 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.”

THE GROUNDS OF APPEAL

[12] The grounds of appeal as set out in the Notice of Appeal read as follows:

- a. “That the learned Magistrate erred in finding that the Court had no jurisdiction to adjudicate upon the Applicant’s case;
- b. The learned Magistrate erred in finding that the matter before the Court for consideration was an ejectment application in circumstances where the Applicant’s case was for interdictory relief;
- c. The learned Magistrate erred in finding that Section 29(1) (b) of the Magistrate’s Court Act 32 of 1944 found application to the Applicant’s application;
- d. The learned Magistrate erred in finding that the Applicant ought to have instituted proceedings by way of action instead of application proceedings;

- e. The learned Magistrate erred in finding that Section 46(2)(c) of the Magistrate's Court Act 32 of 1944 found application to the Applicant's application;
- f. The learned Magistrate erred in finding that the relief sought by the Applicant and in particular the relief sought in prayer 3 of the Notice of Motion amounted to a claim for specific performance;
- g. The learned Magistrate erred in finding that the relief sought in prayer 3 of the Notice of Motion falls outside of the jurisdiction of the Court by virtue of the provisions of Section 46(2)(c) of the Magistrate's Court Act 32 of 1944;
- h. The learned Magistrate erred in dismissing the Applicant's application in circumstances where the Applicant had satisfied the requirement of the relief sought;
- i. The learned Magistrate erred in not granting the relief sought by the Applicant as sought in the Notice of Motion."

THE RECORD BEFORE THIS COURT

[13] The record before us consists of the following:

13.1 The transcribed record of the application for postponement;

13.2 The transcribed record of the ruling on the application for postponement;

13.3 The transcribed record of the argument by the legal representative of the applicant;

- 13.4 The transcribed record of the argument by the legal representative of the first and second respondent on the main application in the court *a quo*;
- 13.5 The notice of motion of the applicant in the court *a quo*;
- 13.6 The founding affidavit of Molefi Phanel Mabyane and annexures of the founding affidavit;
- 13.7 Notice to oppose by the first respondent in the court *a quo*;
- 13.8 The answering affidavit of the second respondent in the court *a quo* and the annexures to the answering affidavit;
- 13.9 The notice of intention to oppose by the second respondent;
- 13.10 The answering affidavit of the first respondent to the founding affidavit of the applicant in the court *a quo* and the annexures to the affidavit;
- 13.11 The replying affidavit of the applicant in the court *a quo* to the answering affidavit of the second respondent;
- 13.12 The replying affidavit to the answering affidavit of the first respondent;

13.13 Heads of argument of the applicant, first and second respondent and the supplementary heads of argument of the first respondent.

ANALYSIS

- [14] Rule 50(7)(b), read with Rule 62(2) of the Rules sets out the condition in which the record that is filed should be in. Rule 50(7)(b) reads amongst others that “Such copies shall be clearly typed...”
- [15] Rule 62(2) of the Rules reads as follows “All documents filed with the court, other than exhibits or facsimiles thereof, shall be clearly and legibly printed or typewritten in permanent black or blueblack ink on one side only of paper of good quality and of A 4 standard size. A document shall be deemed to be typewritten if it is reproduced clearly and legibly on suitable paper by a duplicating, lithographic, photographic or any other method of reproduction.” (our emphasis).
- [16] On consideration of the appeal record, we noted pages 66 to 114 as contained in Part B: Court *a quo* documents, are illegible. The documents at pages 66 to 114 are the answering affidavit of the second respondent and the annexures in the court *a quo*.
- [17] We have further noted that Magistrate’s reasons for his findings on fact and law required by Rule 51(8)(b), do not form part of the record. In *Regent Insurance Co Ltd v Maseko 2000 (3) SA 983 (W)* at 990A – C and 990E, it was held that the written explanation forms an integral part of the appeal record and serves to assist the court of appeal in

dealing with the appeal in a speedy, efficient and cost-effective manner.

- [18] The appellant has not taken this Court into his confidence and stated what steps if any were taken to obtain the Magistrate's reasons for his findings on fact and law, what steps if any were taken to file legible copies of the appeal record from pages 66 to 114 as contained in Part B: Court *a quo* documents. It is noted that in the heads of argument filed by the appellant, reference is made to a "written judgment". This judgment referred to in the heads of argument by the appellant does not form part of the record.
- [19] It is further noted that the appellant has not complied with Rule 51(4) of the Magistrate's Court Rules, in that the appellant has failed to give security for the respondent's costs to the amount of R 1000 as it applied at the time of the filing of this appeal.
- [20] The appellant 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).
- [21] Notably the appeal is opposed by the second respondent, who has elected not to waive the requirement of the appellant not to provide security.

- [22] Appeals emanating from the Magistrates' Court do not require the simultaneous filing of security for costs with the noting of an appeal. The caveat however is that the noting of the appeal is incomplete until security for costs has been provided.
(See: *O'Sullivan v Mantel* 1981 (1) SA 664 (W)).
- [23] Having considered Rule 51(3) of the Rules of the Magistrates' Court, we hold the view that the security for costs should have been given within the period prescribed for the noting of the appeal in the court *a quo*.
- [24] From the reading of Rule 50(5)(a), the registrar erred in assigning a date of hearing when there was non-compliance by the appellant with the provisions of Rule 50(7)(b) and (c) of the Rules. The appeal record was and is incomplete.
- [25] In *Muravha v Minister of Police* (179/2022) [2024] ZASCA 11 (30 January 2024), the Supreme Court of Appeal (SCA) was faced with an appeal in which the civil trial record was lost. Because it was not clear to the SCA what steps the appellant took to reconstruct the record, the SCA at paragraph 13 of the judgment held it was not satisfied that there had been compliance with the guidelines set out by the Constitutional Court in *Schoombie and Another v S* [2016] ZACC 50; 2017 (5) BCLR 572 (CC); 2017 (2) SACR 1 (CC) at paragraphs 19 – 21.

- [26] The SCA granted an order postponing the matter *sine die* with no order as to costs. The parties were further directed to attend to the reconstruction of the record of the civil trial proceedings to the extent that it is necessary and capable of reconstruction in line with the guidelines in *Schoombie*.
- [27] The SCA further directed that the counsel for the parties to immediately take steps to have the record of the matter reconstructed and submit the report to the SCA within 90 (ninety) days from the date of the order. The SCA further directed that if the record is not capable of reconstruction notwithstanding the efforts set out in paragraph 3 and 4 of the order of the SCA, the parties were to file a joint report to that effect.
- [28] The non – compliance by the appellant with Rule 51(4) and Rule 51(8)(a) of the Magistrates’ Court Rules, Rule 50(7)(b) and Rule 62(2) of the Rules has not been explained by the appellant in these proceedings. The application for condonation by the appellant addresses only the failure by the appellant to comply with Uniform Rule 50(1) and 50(4)(a).
- [29] Flagrant or gross non – observance of the Rules of the Court may result in an appeal being struck from the roll. (See: *MEC for Health Eastern Cape v As obo SS (842/2023) [2025] ZASCA 02 (15 January 2025)* at paragraph 23). In the absence of the Magistrates’ reasons for his findings on fact and law and legible answering affidavit of the

second respondent in the court a *quo*, this Court is not in a position to hear the appeal with the record in its current form.

[30] For the reasons stated above, the appeal is not properly before this Court.

COSTS

[31] This is a matter that should not have been assigned a date for hearing by the registrar owing to the appeal record that is incomplete, some of the pages of the record being illegible and no security for the second respondents' costs being tendered by the appellant.

[32] The legal team of the appellant and the second respondent appear to have been oblivious to the provisions of Rule 51(4) and Rule 51(8)(b) of the Magistrates' Court Rules and Rule 50(7)(b) read with Rule 62(2) of the Rules.

[33] It was incumbent for the appellant to ensure that the appeal record is in order before enrolling the appeal.

[34] Resultantly, the following order is made: -

ORDER:

- (i) The matter is removed from the roll subject to it being reconstructed.

- (ii) The appellant's legal representative is directed to immediately take steps to properly reconstruct the missing and illegible portions of the record of the proceedings in the court *a quo* in consultation with all relevant role players including Magistrate M P Hlabyago, according to the guidelines in:
- (a) *Muravha v Minister of Police* 2024 (4) SA 84 (SCA);
- (b) *S v Leslie* 2000 (1) SACR 347 (W);
- (c) *S v Schoombie and Another* 2017 (2) SACR 1 (CC)
- (iii) The appellant is ordered to pay the wasted costs occasioned by the removal of the appeal from the roll. Such costs to be on the scale between party – and – party.

T MASIKE

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

I agree

A REDDY

JUDGE OF THE HIGH COURT SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE FOR HEARING : 16 AUGUST 2024,

DATE OF JUDGMENT: 31 MARCH 2025

FOR APPELLANT : MR C B CLEMENTE

INSTRUCTED BY : DU PLESSIS VAN DER WESTHUIZEN
INC.

C/O SMIT NEETHLING ATTORNEYS
INC.

Email Address : nicolener@dupwest.co.za

litigation1@smitstanton.co.za

FOR SECOND RESPONDENT: ADV MJ GUMBI SC

INSTRUCTED BY : THE OFFICE OF THE STATE
ATTORNEY

EAST GALLERY, FIRST FLOOR

MEGA CITY COMPLEX

CNR SEKAME ROAD & DR JAMES

MOROKA DRIVE

Email Address : Raletjena@justice.gov.za