



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No: A4/2018
4409/2018

In the matter between:

MATLHAKU CASSIUS LAZARUS MOROLONG

Applicant/

Appellant

And

**THE HILLANDALE HOMEOWNERS
ASSOCIATION t/a WOODLANDS HILLS
WILDLIFE ESTATE**

First Respondent

STRATOS KAMBANIS

Second Respondent

THE STANDARD BANK LTD

Third Respondent

THE SHERIFF, BLOEMFONTEIN WEST

Fourth Respondent

**THE REGISTRAR OF DEEDS,
BLOEMFONTEIN**

Fifth Respondent

JUDGMENT

CORAM: JORDAAN J *et* NAIDOO J

JUDGMENT BY: NAIDOO J

HEARD ON: 28 JANUARY 2019

DELIVERED ON: 22 MARCH 2019

INTRODUCTION

- [1] This matter encompasses an application for reinstatement of an appeal against a judgment emanating from the Magistrates Court, dismissing an application by the applicant/appellant (whom I shall refer to as the appellant), for rescission of a default judgment granted against him by that court, the appeal itself in respect of that matter, an appeal against an order by the Magistrates Court, declaring the appellant's immovable property executable, applications for condonation for the late filing of the Notices of Appeal in respect of both the orders mentioned and an application for leave to lead further evidence in the appeal. Mr JJ Buys appeared for the appellant while Mr JG Gilliland appeared for the first respondent. The appellant cited the 2nd to 5th respondents as parties because they may have an interest in the matter, and seeks no order against them. For convenience I shall refer to the first respondent as the respondent.

BACKGROUND and FACTS

- [2] The appellant purchased a piece of ground (the property) within the Woodland Hills Wildlife Estate, in Bloemfontein (the Estate) in

2008, with the intention of building a home thereon. By virtue of his ownership of the property, he became a member of the respondent. The building operations commenced in September 2008. The building is still incomplete. The respondent administers the Estate, and, in terms of its Memorandum of Incorporation (MOI) is responsible for the formulation of rules to facilitate the proper maintenance and functioning of the Estate. These rules are binding upon the members of the respondent. The respondent did formulate such rules, which will be referred to in this judgment, where necessary, as the House Rules. These rules deal with, *inter alia*, disciplinary matters, collecting the agreed levies from each owner, and the imposition of sanctions and penalties for buildings not completed within the times stipulated in such Rules. The appellant fell into arrears due to non-payment of the levies and penalties in respect of his property. The respondent issued summons against the appellant, in which it claimed payment of an amount of R80 070.16, together with interest and costs.

- [3] In terms of the House Rules, the property would be regarded as an owner's domicilium citandi et executandi for the service of documents, notices etc, unless he advises the respondent, in writing, of another address at which he will receive service of such documents. The summons was issued on 1 February 2017 and served on the appellant on 23 February 2017 by affixing it to his property. The appellant alleges that he was not aware of the summons until 19 March 2017, when he visited the property. He instructed his legal representative to defend the action, but by the time the Notice of Intention to Defend was served on the

respondent's legal representative on 22 March 2017, default judgment had already been granted against the appellant on 20 March 2017. The respondent's legal representative advised the appellant's legal representative by way of a letter dated 4 April 2017 that default judgment had been granted on 20 March 2017. The appellant thereafter made application to the Magistrates Court for the rescission of the default judgment. The application was served and filed on 4 May 2017. The matter was heard by Magistrate Ms N Majokweni, and the application was dismissed by way of a judgment dated 18 August 2017 and delivered on 24 August 2017.

Application for Rescission - Defences

[4] On the basis of what is set out above, the appellant alleged that he was not in wilful default in defending the matter late, but had shown good cause for the delay, and had acted immediately upon becoming aware of the summons. As defences to the respondent's claim, the appellant raised the following in support of his application for rescission:

4.1 Rule 16.12 was ambiguous and does not state in certain terms that the property was deemed to be his *domicilium citandi et executandi*. The Rule states that documents "may" be served on the physical address of the erf, while later on indicates that the erf "shall" be regarded as his *domicilium citandi et executandi*. The respondent knew where appellant resided and that the respondent could easily have contacted him by telephone or email, instead of executing against movable property at premises

which were vacant. The appellant had sufficient movable property at his current place of residence to satisfy the judgment

4.2 The respondent amended (House) Rule 31.25.2.2 to 31.25.2.4, which relates to penalties for failing to complete a building within the specified time, on 28 September 2016 and such amendment became effective on 1 November 2016. The appellant alleges that the amendments had the effect of increasing the penalties for incomplete buildings from R2000 to R20 000 per month. He purchased his property in 2008 and commenced building in September 2008, hence the amendments relating to penalties do not apply to him. The respondent applied such amendment retroactively (It seems the appellant means “retrospectively”), which is irregular and which has caused him to fall into arrears in respect of payment of penalties, as he was being charged more than he should have been.

4.3 The appellant also alleges that the amendments to the Rule referred to have been passed irregularly, in that House Rule 30.4 stipulates that approval of an amendment requires the sanction of at least 51% of the total number of votes (of members of the respondent) at an Annual General Meeting. The appellant expressed the belief that the amendment of the Rules did not take place as stipulated and was therefore irregularly approved. He furnished no reasons or substantiation for this belief.

Proceedings Leading to the Present Application

- [5] The appellant attached a copy of the rescission application, the judgment dismissing the application, as well as the notice of appeal to his founding papers in this application, in order that this court may consider the application for reinstatement of the appeal against the background of such information. The appellant indicates that at the time of the hearing of the application for rescission, he was in the process of negotiating the sale of the property to a third party, and when the application was dismissed, his attorney advised him not to appeal against the judgment, in order to avoid incurring unnecessary legal costs in respect of a property that was being sold. Some two months later, in November 2017, the sale of the property fell through, by which time an order declaring the property specially executable was obtained by the respondent on 19 October 2017. The order was granted by Magistrate PJR Barnard. The respondent proceeded to arrange a sale in execution of the property, which was set down for 6 December 2017.
- [6] The appellant brought an urgent application to this court to prevent the respondent from proceeding with the sale in execution. By agreement between the parties, an interim order, returnable on 15 February 2018, was granted preventing the respondent from selling the property and enforcing the Warrant of Execution relevant thereto, pending the final determination of the appeal accompanied by an application for condonation. This order was confirmed, by agreement between the parties, on 15 February 2018. It seems a Notice of Appeal was filed in this court instead of the Magistrates' Court on 10 January 2018, and the application for condonation for the late filing of the Notice of Appeal was filed on

15 January 2018. Thereafter, a second Notice of Appeal was filed on 30 January 2018 in the Magistrates' Court, although the grounds of appeal remained the same as in the Notice of Appeal dated 10 January 2018.

- [7] Nothing further was done to prosecute the appeal, despite several requests and telephone exchanges between the appellant's then attorney Mr Rampai and the respondent's attorney. The appellant's attorney informed the respondent's attorney that he was unable to obtain instructions or payment of his fees from the appellant. Mr Rampai thereafter withdrew as the appellant's attorney of record in July 2018, and the respondent proceeded with the sale in execution on 1 August 2018, at which the property was sold to the second respondent. A few days later, on 8 August 2018, the current attorney for the appellant initiated contact with the respondent's attorney, who informed him of the history of the litigation between the parties and that the property was sold in execution on 1 August 2018.
- [8] The appellant's attorney requested the respondent's attorney not to proceed with the transfer of the property into the second respondent's name, and when latter was unwilling to do so, the appellant brought an urgent application to this court to stop the respondent from proceeding with the transfer of the property. That order too was granted by agreement between the parties, and the court ordered, *inter alia*, that pending the finalisation of appellant's application to reinstate the appeal, the first, second and fifth respondents were not to proceed with the transfer of the property. The appellant was required to file his application for reinstatement

of the appeal by 21 September 2018. That led to the launch of the current application, together with the applications for condonation for failure to properly note an appeal, and for the late filing of the Notice of Appeal, as well as the application to lead further evidence. The appellant now filed a Notice of Appeal that was completely different to the one filed on 30 January 2018, and purports to note an appeal against the judgments of both Magistrate Majokweni, who dismissed the rescission application, as well as that of Magistrate Barnard, who declared the property executable.

- [9] For the sake of completeness, I set out the relevant part of the contents of the Notice of Appeal dated 30 January 2018, and served on the respondent's attorneys the same day:

"BE PLEASED TO TAKE NOTICE that the Applicant herein appeals to the FULL BENCH of the FREE STATE DIVISION against the whole of the judgment and order of the Learned Magistrate, Ms N Majokweni, granted on 18 August 2017.

The grounds of appeal are as follows:

1. The Learned Magistrate erred in declaring the Applicant's property situated at no. 8 Steenbok Street, Woodlands, specifically executable without conducting an enquiry into the Applicant's financial affairs.
2. The Learned Magistrate misdirected herself in granting an order which the court was not competent to grant.
3. The Learned Magistrate erred in granting a declaratory order which the Honourable Court did not have jurisdiction to grant.

The Honourable Court ought to have found that the value of the property in dispute far exceeds the jurisdiction of the Court, thus leaving it with no power to grant such an order.

4. The Learned Magistrate misdirected herself in dismissing the application without taking into consideration that in doing so she will be giving injustice precedence over justice.
5. The Learned Magistrate erred in granting a cost order against the Applicant”.

Evaluation

[10] It is clear that the Notice of Appeal referred to the order declaring the property executable and not the order dismissing the rescission application. When the appellant approached the court with the urgent application to stop the transfer of the property on 3 September 2018, it was clear that when the court referred to “the applicant’s application to reinstate the appeal”, it referred to the appeal as envisaged in the Notice of Appeal dated 30 January 2018, which had by that stage lapsed. The lapsing of the appeal does not render the Notice of Appeal *pro non scripto*. That Notice of Appeal will have to be considered in an application for re-instatement of the lapsed appeal. The court order of 3 September 2018 directed the appellant to file his application for reinstatement by 21 September 2018. There was no order or authority to file a new and different notice of appeal, nor was the Notice of Appeal dated 30 January 2018 withdrawn. The current firm of attorneys acting for the appellant, who came on board around 8 August 2018, clearly realised that the Notice of Appeal dated 30 January 2018 was defective and a nullity, and attempted to remedy the situation, without following the correct procedure. The Notice of Appeal filed on 21 September 2018 is not valid, in view of the non-withdrawal of the previous notice dated 30 January 2018, which remains in force.

[11] I should point that there are other procedural and technical difficulties. It is not in dispute that the two security certificates that were filed related to the order declaring the property executable and not to the dismissal of the rescission application, given that both Notices of Appeal (dated 10th and 30th January 2018) related to the order of executability and not the dismissal of the rescission application. The appellant filed, rather belatedly on 24 January 2019, a security certificate in respect of the September Notice of Appeal, which purports to be in respect of the judgments of Magistrates Majokweni and Barnard. In effect, this court does not have a proper or valid Notice of Appeal to enable it to consider the application for reinstatement of the appeal. The Notice dated 30th January is clearly invalid but has not been withdrawn, and the Notice dated September 2018 was filed improperly and cannot be regarded as valid in view of the earlier notice remaining in force. It must also be borne in mind that the court order of 3 September 2018 makes no mention of and does not authorise the filing of the Notice of Appeal that was filed. It appears that the appellant is attempting to have the application for reinstatement heard by getting in via the proverbial back door.

[12] Mr Buys correctly pointed out that an appeal which has lapsed may be reinstated on the application of either party, and **on good cause shown** (my emphasis). In my view, and based on what I have said above, the appellant has not shown good cause to justify granting the relief he seeks and has not made out a case for the reinstatement of the appeal. It is, therefore, not necessary for the court to consider the application for condonation for the late

filing of the appeal. However, given the history of this matter, I deem it necessary to traverse some of the issues in this matter that would have been relevant to the court's consideration of whether or not to grant condonation, and reinstatement of the appeal. I do this in the hope that it will give guidance to the parties, but particularly the appellant, in order that he may reconsider his position and avoid embarking on further unnecessary and inordinately expensive litigation against the respondent. A great part of the papers was taken up in setting out the history of the matter in substantiation of the reasons, firstly, for the appellant's failure to timeously file the Notice of Appeal, and, secondly, of defences proffered by the appellant, and the opposition thereto by the respondent.

- [13] Prospects of success on appeal, in a matter such as this, is one of the important considerations, amongst numerous others in determining whether condonation should be granted. In the matter of **United Plant Hire (Pty) Ltd v Hills 1990 (1) SA 717 (A) at 720 E-G**, the court stated the position succinctly:

"It is well settled that, in considering applications for condonation, the Court has a discretion to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the relevant Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive.

These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong".

- [14] In considering the explanation given by the appellant for his failure to note an appeal against the judgment dismissing his application for rescission, it is clear that the only reason he did not do so is that he was in the process of negotiating the sale of the property and did not want to incur any further legal costs. It can be inferred from this that at the time, he accepted the judgment. He then decided to pursue the matter when the sale did not go through. His explanation was that the sale of the house was subject to an agreement of sale being signed. As correctly pointed out by the respondent, it is no wonder that the banks refused to finance such a transaction. The version of how the sale fell through is not very convincing. He places the blame for his failure to note an appeal on the advice given to him by his legal representative. The blame for the delays thereafter are again placed at the door of his attorney. The impression from the appellant's conduct is that he used every avenue to protect his property, and did not have the *bona fide* intention to defend the merits of the matter. His conduct has caused inordinate delays in the finalisation of this matter, much to the prejudice of the respondent.
- [15] The issue of prospects of success is relevant both to the reinstatement of the appeal and the condonation. What emerges from the defences raised by the appellant is that he quotes the various House Rules only partially and places interpretations on them which are misplaced and incorrect. The text of the various rules forms part of the papers, and from an ordinary reading of such rules, the impression is gained that the appellant bends the interpretation to create a dispute and hence a defence.

15.1 The appellant attacks Rule 16.12, which was inserted in the Rules on 28 April 2010, on that basis that it is ambiguous and cannot be regarded as his *domicilium citandi et executandi*. The rule reads thus:

“Any notice, legal document or other document that must be send,(sic) delivered or served by the **Association** in terms of this Manual may be served on the physical address of the erf in the Estate and such erf shall be regarded as the *domicilium citandi et executandi* of the owner, unless the owner notified the Association per registered mail of another physical address that should be used as *domicilium citandi et executandi*”.

It is clear that the respondent could choose to (‘may’) serve documents, notices and legal process at the physical address of the property, which then shall (peremptory) be regarded as the appellant’s *domicilium* address. If the appellant had furnished an address at which he would accept service of such documents, notices etc, then it could be argued that the physical address of the property could or should not be regarded as his *domicilium*. The appellant does not dispute that he did not furnish to the respondent an alternative address, in writing, at which he would accept service. His argument that the respondent knew where he lived does not avail him, in the face of the stipulations of this Rule.

15.2 I have indicated above the basis on which the appellant relies on Rule 30.4. The relevant portions of Rule 30 headed “AMENDMENT OF THESE RULES” reads as follows:

“30.1 The **Developer** and **Trustees** may add to and amend the rules when and if it deems necessary to ensure a happy and orderly coexistence for **Owners** and/or residents. This can be obtained without giving notice to the **Owners**. The decision(s) of the **Developer** and **Trustees** regarding the interpretation of the rules is binding and final.

30.4 Subject to the provisions of (30.1) above, and after the development period, any such addition, amendment, substitution or repeal shall require the approval of at least 51% of the total number of votes of members of the **Association** given during the Annual General Meeting. The notice of such a meeting shall, in addition to complying with other requirements of these rules, set out in specific terms the proposed addition, amendment, substitution or matter to be repealed”.

15.2.1 It is not in dispute that the appellant is a member of the respondent and as such is bound by its MOI, the provisions and definitions of which were extensively dealt with in the respondent’s Answering Affidavit. The definition which is relevant to the defence raised by the appellant is that of the term “Development Period” which is defined in the MOI as:

“the period from the date of establishment of the Association until all the erven have been transferred from developer to the first buyer of such erf; or until the Developer notifies the Association in writing that the development period has ceased; whichever shall first occur. During the Development period, the Developer shall in addition to votes for untransferred stands, have an additional 600 votes”.

The appellant seems to have made no attempt to verify the position with regard to the development period. The respondent indicated in its Answering affidavit that up to the time that the Answering Affidavit was deposed to, the development period had not come to an end, as all the erven had not been transferred to the buyers of such erven. This was substantiated by a Deeds Search report, confirming the respondent’s assertion. A simple reading of these provisions indicates that the any amendments, substitutions or repeal of rules will require 51% of the total number votes of members of the Association, **after the**

development period (my emphasis). The appellant's attempt to raise the interpretation of this Rule to show that the amendment of Rule 31.25.2.1 to 31.25.2.4 is irregular, will not avail him as a defence, as the respondent has shown that the development period had not come to an end.

15.3 The appellant indicated that the amendment of Rule 31.32.2.1 to 31.25.2.4 was irregular, and that the penalties were increased from R2000 to R20 000 per month. The complete text of the relevant portions of the amended Rule 31.25.2 reads as follows:

"31.25.2 The construction of any **new residence** on the **Estate** must be completed within nine (9) months from the date on which construction commenced. Due to the extent of residential construction that commences but are not completed within a reasonable time, as well as the impact of partially completed buildings on the property value of other property in the vicinity and the discomfort caused to other owners by extended building in the area, it became necessary to implement arrangements to ensure that residential construction is completed within a reasonable time after commencement thereof.

31.25.2.1 If construction is not completed within this 9-month period, the Owner will be responsible for the payment of a monthly fine of **R2000 (TWO THOUSAND RAND)** excluding VAT to the **Association over and above** any fine that might be payable in terms of Rule 31.25.1 above if that period is exceeded. This fine will be payable from the day immediately following the date on which the 9-month period expired until the date on which the residence is completed and will form part of the Levy.

31.25.2.2 If the construction of any residence after 1 December 2013 therefore is not completed within fifteen (15) months from the

date of commencement, the penalty levy levied in terms of 31.25.2.1 will be increased to **R10 000.00 (ten thousand rand)** plus VAT per month.

31.25.2.3 If the construction of a residence for a period of 48 months from the date of commencement, regardless of the date on which construction commenced, is not completed the penalty levy levied in terms of 31.25.2.2 will increase to **R20 000.00 (twenty thousand rand)** plus VAT per month.

31.25.2.4 If the construction of a residence for a period of 102 months from the date of commencement, regardless of the date on which construction commenced, is not completed the penalty levy levied in terms of 31.25.2.3 will be increased to **R40 000.00 (forty thousand rand) per month.**

The appellant also made the bald allegation that these amendments

were not properly approved by members at an annual general meeting and were irregularly imposed on him. He offers no explanation for this belief or any substantiation therefor. Read in context, it is clear that the penalties were not charged retrospectively

but were incremental, depending on the period that construction of a residence remained incomplete from the date of commencement

of the construction. It is also clear that the penalties did not simply increase from R2000 to R20 000 for no reason at all. The copies of the invoices attached to the summons as well as those furnished by the respondent in answer to the Founding Affidavit, clarify this aspect beyond dispute.

[16] On the appellant's own version, the building is still incomplete, even at the time of the launch of the various applications in September 2018, which are now before this court. The building therefore remained incomplete for a decade at the time. Save to say, in his Replying Affidavit, that he was suspended from his employment and had to expend large amounts of money to be reinstated, and consequently did not have the funds to meet his financial obligations at the time the increased amount of penalties were levied, he has given no explanation or reasons for continuing to remain in arrears. If he was reinstated, it can be inferred that he was in employment thereafter. Even at the time that the various opposing affidavits were filed, he was not paying the monthly levies, which he was obliged to do and which is a separate debit from the penalties levied against his account in respect of the incomplete building. He has not mentioned this at all, and did not reply to this allegation raised in the respondent's Answering Affidavits. The amounts that he owes to the respondent therefore continue to increase on a monthly basis. The appellant did not deny this obligation or attack the correctness of the amounts debited to his account in respect of monthly levies. In my view the appellant has not shown that he has a *bona fide* defence or defences to the respondent's claim.

[17] It is perhaps also noteworthy of mention that the respondent was obliged to institute six actions, prior to issuing summons in this matter, for the recovery of arrears due to it by the appellant. In several of those actions, default judgment was granted while in others the appellant defended those actions, but in each of the six

matters, the appellant ultimately paid the amounts due to the respondent, either after judgment was granted or, in two instances, shortly before the property was sold in execution of the judgment obtained therein. This is therefore the seventh action that the respondent was obliged to institute against the appellant for the recovery of monies due to it. The appellant's conduct is indicative of the fact that in each instance he did not have any defence to the respondent's claims. In some instances , he drew out the matter and paid at the proverbial eleventh hour, just before the property was sold. That pattern of behaviour appears to be repeating itself in this matter, and the irresistible inference is that he is dragging out this matter to buy himself some time, either to pay what is due or frustrate the first and fifth defendants in transferring the property to the second defendant. The prejudice to the second defendant is clearly apparent.

- [18] The appellant has repeatedly blamed his then legal representative for poor advice, inaction in prosecuting his matters and failing to follow his instructions. When one views these allegations against the detailed version of the respondent regarding the interactions of its attorneys with the appellant's previous and current legal representatives, which are substantiated by correspondence and contemporaneous notes made by the respondent's attorney at the time, it becomes clear that the appellant is glossing over his role in and attempting to extricate himself from the awkward situation he was responsible for creating. The sentiments of the court in the matter of **Saloojee and Another NNO v Minister of Community Development 1965(2) SA 135 (A) at 141 C**, are apposite:

“There is a limit beyond which a litigant cannot escape the result of his attorney’s lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect on the observance of the rules of this court. Considerations *ad miseracordiam* should not be allowed to become an invitation to laxity....The attorney, after all, is a representative whom the litigant has chosen for himself.”

If indeed the appellant’s legal representative was negligent or remiss in carrying out his instructions and duties to his client, then the appellant would, of course, have a right of recourse against him. In my view, it is unacceptable to hold the respondent to ransom and burden this court with spurious applications as well as complaints he ought to direct against the attorney in another forum.

- [19] When all these factors are considered together, the appellant’s prospects of success on appeal in my view, are little to none, due largely to the fact that the appellant has not shown that he has any defence/s against the claims of the respondent. The protracted litigation embarked upon by the appellant is causing prejudice to himself as well as the respondent. The appellant will ultimately have to pay the amounts due to the respondent. In the meantime the respondent is being dragged through the courts, having to expend large amounts of money to defend the proceedings initiated by the appellant. As stated by the court in the **United Plant Hire** case *supra*, the court has a discretion to grant applications for condonation, which discretion must be exercised judicially after considering all the relevant factors so that the decision arrived at must in essence be fair to both parties. In my view, if it the court had to determine the applications for condonation and reinstatement of the appeal, the discretion of this

court, judicially exercised, would have only one result which would be fair to both parties – that is a refusal to grant condonation for the late filing of the Notice of Appeal and a refusal to reinstate the appeal.

Appeal against Order Declaring Property Executable

[20] The appellant alleges that he instructed his attorney to oppose respondent's application to declare the appellant's property specially executable. The respondent set out the history of the extensive efforts it made to serve the notice of application to declare the appellant's property executable, the several calls thereafter to remind the attorney that the application for rescission of the judgment had been dismissed and to enquire what the appellant's intentions are with regard to the executability application. The respondent confirms that a notice to oppose the application was indeed served upon its attorneys by the appellant's attorneys on 12 September 2017. The matter which was at that stage placed on the unopposed roll did not proceed due to the application being opposed.

[21] The appellant failed to file his opposing affidavit, and the respondent's attorney proceeded to set the application down for hearing on 19 October 2017, after first having informed the appellant's attorney that he was proceeding to set the matter down for hearing. It seems that after a second notice to oppose the application was erroneously served on the respondent's attorneys, the appellant's attorney informed the respondent's attorney that the applicant intended to bring an application to

declare the imposition of fines of the respondent's members unlawful, and requested the respondent not to proceed with the application to declare the appellant's property executable. The respondent's attorney refused. The application was heard on 19 October 2017, and an attorney from the firm of Rampai Attorneys, who represented the appellant, advised the court that Mr Rampai had informed her that order declaring the applicant's property specially executable may be granted. It was on this basis that Magistrate Barnard granted the order.

[22] No appeal against Magistrate Barnard's order was filed, in terms of the Rules of Court, after the granting of the order. This was done only on 21 September 2018, in the same Notice of Appeal against the judgment dismissing the appellant's application for rescission of the default judgment. In any event, it appears that the Notice of Appeal was served on the respondent's attorneys, together with the application for condonation for the late filing thereof before the Notice of Appeal was filed at the Bloemfontein Magistrates Court. The respondent correctly pointed out that an application for condonation if the notice of appeal in respect of which the condonation is sought, had not first been filed. The appellant did not deal with this aspect in his Replying Affidavit, and merely submitted that the condonation application is not fatally defective, without giving any explanation or substantiating his allegation.

[23] Throughout the papers and even in the appellant's Heads of Argument it was submitted that Magistrate Barnard failed to comply with the provisions of Magistrate Court Rule 43A prior to

declaring the appellant's property specially executable. During argument in court, Mr Buys conceded that Rule 43A came into operation only after the executability order was granted and that the appellant no longer places reliance thereon. In any event, the amount owing to the respondent at the time the order was granted was approximately R300 000, far in excess of the approximately R80 000 claimed in the summons. In view of the circumstances outlined above, the appellant has no prospect of success on appeal in respect of the order declaring his property specially executable.

Application to Receive Further Evidence

- [24] In view of what I have found in respect of the applications for condonation for late filing of the notices of appeal, the application for reinstatement of the appeal against the dismissal of the rescission application and the appeal against the order declaring the appellant's property specially executable, it is unnecessary to deal with the application to receive further evidence.

With regard to costs, I see no reason why costs should not follow the result. The respondent pointed out that in respect of costs, the appellant had undertaken, in the written agreement between the parties, that the appellant would pay costs on an attorney own client scale. This was not disputed by the appellant

- [25] In the circumstances, the following order is made:

- 25.1 The application for the reinstatement of the appeal under case number A4/2018 is dismissed;
- 25.2 The application for condonation of the late filing of the Notice of Appeal is dismissed;
- 25.3 The application for condonation of the Appellant's failure to properly note an appeal is dismissed;
- 25.4 The application to condone the late filing of the Notice of Appeal against the Magistrates Court order declaring the Appellant's property specially executable is dismissed;
- 25.5 The application to receive further evidence in the appeal is dismissed;
- 25.6 The Appellant is directed to pay the Respondent's costs on a scale as between attorney and own client.

S NAIDOO J

I CONCUR

AF JORDAAN J

On behalf of Applicant:

Instructed by:

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On behalf of 1st & 2nd Respondent:
Instructed by:

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