

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, JOHANNESBURG**

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|-----|----------------------------------------|
| (1) | <b>NOT</b> REPORTABLE                  |
| (2) | <b>NOT</b> OF INTEREST TO OTHER JUDGES |

CASE NOS: 2023/117389  
2023-114380  
2023-114293  
2023-114287  
2023-114375  
2023-117392  
2023-114021  
2023-114376

In the matter between:

**CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY**

Applicant

and

**MOJELO HLAZO ATTORNEYS INCORPORATED**

First Respondent

**TAXING MASTER, JOHANNESBURG**

Second Respondent

This judgment was handed down electronically by circulation to the parties legal representatives by email, and uploading on Caselines. The date and time for hand-down is deemed to be 10h00 on 22 July 2024

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## JUDGMENT ON LEAVE TO APPEAL

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### Marcus AJ

- [1] On 18 June 2024 I delivered judgment dismissing, with costs, the eight matters that had been consolidated. The City now applies for leave to appeal to a Full Bench.
- [2] The appeal is directed purely against the factual findings that I made upholding the two defences raised by Mojelo Hlazo concerning the interruption of prescription, namely, acknowledgement of liability and partial payment. Counsel for the City does not dispute that, as a matter of law, prescription may be interrupted either by partial payment of the debt or by an acknowledgement of liability. This is important in the context of the present application for leave to appeal. It means, as was accepted by counsel, that the City must establish that there is a reasonable prospect of successfully overturning my factual findings in relation to both defences. A reasonable prospect of success in overturning my findings on only one of the two defences raised would be of no avail.
- [3] As to the test that the City must satisfy, there has been some debate as to whether s 17 of the Superior Courts Act 10 of 2013 postulates a higher test than was previously the case. Section 17(1)(a) of the Superior Courts Act provides, in relevant part:
- “17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
- (a)(i) the appeal would have a reasonable prospect of success, or*

(ii) *there is some other compelling reason why the appeal should be heard including conflicting judgments on the matter under consideration.*"

[4] In *Ramakatsa v African National African Congress*<sup>1</sup> the court stated the following:

*"I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted ... The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court."*<sup>2</sup>

[5] In the context of reasonable prospects of success, the Supreme Court of Appeal had previously said in *S v Smith*:<sup>3</sup>

*"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound rational basis for the conclusion that there are prospects of success on appeal."*<sup>4</sup>

[6] Counsel for the City relied only on the existence of a reasonable prospect of success. He did not suggest that there was any other compelling reason for leave to be granted.

[7] I deal first with the argument concerning the acknowledgement of liability. The evidence in this regard, as it appeared in both the answering affidavit and the replying affidavit, is set out in full in the main judgment at paragraphs 17 – 21. At paragraph 26 of the main judgment I recorded the facts emanating from this

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<sup>1</sup> [2021] ZASCA 31 (31 March 2021).

<sup>2</sup> At para 10.

<sup>3</sup> 2012 (1) SACR 567 (SCA).

<sup>4</sup> At para 7.

evidence, having previously set out the principles relating to the resolution of factual disputes in motion proceedings:

*“[26] In light of the long-established principles for resolving factual disputes in motion proceedings, there is no proper basis on which I can reject the evidence regarding interruption put up by Mr Hlazo:*

- a. *The affidavit is deposed to by Mr Hlazo, the sole director of Mojelo Hlazo.*
- b. *He deposes to facts of which he has personal knowledge. Indeed, he states that he attended the meeting in question.*
- c. *He records the outcome of the meeting.*
- d. *He recorded the name of the person who represented the City, Ms Nicole Dasneves who was present at the meeting and to whom his email was addressed. Ms Govender was also a recipient of the email.*
- e. *He attaches proof of part payment of the outstanding invoices.”*

[8] I went on to point out that the City had not done anything substantively to rebut this evidence in its replying affidavit. I made specific reference to the fact that there was silence on the attempts, if any, to contact Ms Dasneves or Ms Govender to ascertain from them what transpired and, self evidently, there was no rebutting evidence from either Ms Dasneves or Ms Govender.

[9] Counsel for the City contends that I erred in reaching this conclusion for two reasons, both of which essentially repeat the same argument advanced (and rejected) on the merits. First, it is contended that the acknowledgement of debt must be made by the debtor. Second, it is contended that this particular defence had been expressly denied by the City and a version had been put up.

[10] Regarding the need for the acknowledgement of debt to emanate from the debtor, I dealt with this argument in the main judgment where I stated the following:

*“[33] The evidence of the meeting of 6 June 2022 between Mr Hlazo and Ms Dasneves is predicated upon an acknowledgement of liability. Indeed, in the extracts from the affidavit referred to above, it is stated that Ms Dasneves ‘acknowledged the debt and advised me that the claim will be paid from the budget of the Legal*

*Department of the City of Johannesburg Metropolitan Municipality'. In support of this contention, the emails of 18 July 2022 (annexures 'AA6' and 'AA7') have been put up. There is nothing to contradict this evidence.*

*[34] Counsel argued that the recordal of the City's resolution to pay the outstanding invoices was not good enough. He contended that the acknowledgement of liability had to emanate from the debtor. This argument confuses the source of acknowledgement with the proof necessary to establish it. Here, the City did acknowledge liability (through its representative, Ms Dasneves). The emails recording that acknowledgement are undisputed.."*

[11] Counsel has not advanced any substantive argument as to why my reasoning in this regard is incorrect. Indeed, the argument advanced loses sight of the role played by affidavits in motion proceedings as well as how factual disputes are resolved. In motion proceedings, the affidavits constitute both the pleadings and the evidence.<sup>5</sup> In the present case, Mr Hlazo gave first-hand evidence of what transpired at the meeting of 6 June 2022. He was present at the meeting and he gave direct evidence of what occurred under oath. The evidence established that Ms Dasneves *"acknowledged the debt and advised me that the claim will be paid from the budget of the legal department of the Johannesburg Metropolitan Municipality"*. On counsel's argument, nothing short of an affidavit or letter from Ms Dasneves herself would have sufficed. But that contention simply ignores how facts are established. Parties frequently testify about a particular event. They do so based on their personal knowledge of the event in question. That is what occurred here.

[12] One can test the matter practically. Here, Mr Hlazo gave direct evidence of what Ms Dasneves said (much in the same way as a party might testify about what transpired on any particular occasion). That evidence was to the effect that Ms Dasneves admitted liability on behalf of the City. This was said in his presence. If the City wished to dispute that evidence it could have obtained an affidavit from Ms Dasneves. It did not do so. The question that arises, therefore, is on what basis can Mr Hlazo's evidence be rejected? Counsel accepted that a bare denial would be insufficient. Accordingly, countervailing evidence of what occurred at

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<sup>5</sup> *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at para 28.

the meeting in question was required, yet none was proffered by the City. Counsel contended argument that I should reject Mr Hlazo's evidence as far-fetched and untenable. This is plainly unsustainable. Not only is there nothing inherently far-fetched or untenable about such evidence, but it is corroborated by the correspondence between Mr Hlazo and Ms Dasneves. That correspondence records what transpired at the meeting in question. That it emanated from Mr Hlazo is of no moment. It is a matter of everyday experience that parties to a dispute record what transpired in a letter or email. Indeed, this is frequently a matter of prudence.

[13] The matter goes further, however, Mr Hlazo recorded in his two emails of 18 July (reproduced in the main judgment at paragraphs 18 and 19), the terms of a resolution in which it was apparently resolved that payment of the outstanding debts would be made. Once again, the City put up no countervailing evidence.

[14] In such circumstances, "*ordinary commercial practice and human expectation*" would have demanded a response if the contents of the emails were not accepted as correct. Here there was no explanation of why there was no response, let alone a satisfactory explanation.<sup>6</sup>

[15] As appears from the evidence put up by Mr Hlazo (reproduced in paragraph 17 of the main judgment), he stated the following:

*"This express acknowledgement of the debt led me to withdraw the notice in terms of section 3 of the Institution of Legal Proceedings Against Certain Organs Of State Act 40 of 2002 which had been served. In evidence of the said withdrawal I attach hereto an email dated 18 July marked as annexure 'AA7'."*

[16] In the main judgment at paragraph 18, I reproduced part of annexure "AA7". The annexure had a further sentence which reads as follows:

*"One point which writer hereof forgot to include on previous email was to state that in view of the resolution arrived at the said meeting we have withdrawn our section 3 notice for COJ GRAS Department invoices"* and corroborates Mr Hlazo's evidence.

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<sup>6</sup> See *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10 E-H.

[17] The circumstances of the withdrawal of the notice in terms of Act 40 of 2002, was explained in light of the resolution adopted at the meeting. This is not rebutted at all and further seems to corroborate Mr Hlazo's evidence.

[18] In my view, therefore, there are simply no reasonable prospects of success that a court of appeal would overturn these factual findings. This makes it strictly unnecessary for me to deal with the second basis advanced for interruption of prescription, namely, partial payment. I deal with this briefly for the sake of completeness.

[19] In relation to the defence of partial payment, I indicated in my judgment at paragraph 29 that the evidence put up by Mojelo Hlazo was not substantively disputed by the City. The evidence put up by Mr Hlazo appears in paragraphs C.19.1 – C.19.1.3 (reproduced in paragraph 17 of my judgment). Annexure "AA3", referred to by Mr Hlazo, is a tax invoice headed "*INTERIM INVOICE : CITY OF JOHANNESBURG METROPOLITAN MUNICIPALITY // NTOMBIZODWA GEORGINA KHOZA*". It reflects the City's reference as being a "*Mr Larry Mallela*". The total amount payable is R2 875,00. Annexure "AA4" (also referred to in the extract) is a remittance advice emanating from the City. It has a range of entries, including the one mentioned in annexure "AA3". It reflects the name of a "*contact person*" from the City, as being Ellen Ndzimande.

[20] The evidence of partial payment is dealt with in the replying affidavit as follows:

*"ALLEGED PART PAYMENT CONSTRUED AS ACKNOWLEDGEMENT OF LIABILITY*

*13. The first respondent alleges that the conduct of the applicant in making part payments of invoices establishes an acknowledgement of debt. This is expressly denied.*

*14. I vehemently deny having any knowledge of payments being made by the applicant to the first respondent on or about the 13<sup>th</sup> of April 2021 or any other date for that matter.*

*15. The applicant does admit that certain payments were made to the first respondent, but the primary question to determine insofar as this is concerned is whether those paid invoices relate to the items which are before the court."*

- [21] Taken on its own, this reply is evasive. It is common cause that Mojelo Hlazo was indeed retained by the City and provided professional services. It is equally common cause that payments were made to Mojelo Hlazo. The present issue concerns whether certain of the amounts allegedly due and owing had prescribed. Accordingly, one would have expected the City to candidly confront the tax invoice and the remittance advice which were put up in evidence. It did not do so. Nor is there any indication of the attempts, if any, to contact the persons referenced in the tax invoice or remittance advice.
- [22] In argument before me in the main application, counsel advanced an argument not foreshadowed on the papers. It went like this: if one has regard to annexure “AA3”, it reflects an amount of R2 875,00 as owing. If one has regard to annexure “AA4”, it reflects an amount of R2 875,00 as having been paid. But if one has regard to the bill of costs, there is no amount of R2 875,00 said to be owing. Hence, the argument that was advanced was that the amounts said to be in part payment, namely, R2 875,00 was not the subject of the present dispute. None of this, however, was foreshadowed in the papers and accordingly Mojelo Hlazo did not have the opportunity to deal with it.
- [23] As indicated in the main judgment, Mr Hlazo put up evidence to establish part payment. The City simply argues that the question is whether *“those paid invoices relate to the items which are before the court”*. Pursuant to a general duty to engage *“seriously and unambiguously”* with the facts said to be in dispute, I would have expected the City to identify what the part payments were actually for. But it contented itself with posing a rhetorical question instead. If the City wished to demonstrate that the admitted payment was for something unrelated to the present dispute, it ought to have put up appropriate evidence. It did not do so. On this ground also, I find that there are no reasonable prospects of success on appeal.

## ORDER

- [24] I make the following orders:



- (1) The applications for leave to appeal in case numbers 2023/117389, 2023-114380, 2023-114293, 2023-114287, 2023-114375, 2023-117392, 2023-114021 and 2023-114376 are dismissed.
- (2) The applicant is to pay the costs of the applications for leave to appeal in case numbers 2023/117389, 2023-114380, 2023-114293, 2023-114287, 2023-114375, 2023-117392, 2023-114021 and 2023-114376.

**GJ MARCUS AJ**  
Acting Judge of the High Court  
Gauteng Division, Johannesburg

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|---------------------------|---------------------------|
| HEARD ON:                 | 19 July 2024              |
| JUDGMENT DATE:            | 22 July 2024              |
| FOR THE APPLICANT:        | Adv K Pule                |
| INSTRUCTED BY:            | J Fitzhenry Attorneys Inc |
| FOR THE FIRST RESPONDENT: | Adv N Ncube               |
| INSTRUCTED BY:            | Mojelo Hlazo Practice     |