

REPUBLIC OF SOUTH AFRICA



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

CASE NUMBER: A3104/2021

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED.

.....
SIGNATURE

.....
DATE

In the matter between:

BOMBELA OPERATING COMPANY (PTY) LTD

Appellant

and

SADIPHIRI TRANSPORT SERVICES CC

Respondent

Neutral Citation: *Bombela Operating Company (Pty) Ltd v Sadiphiri Transport Services*

CC (Case No. A3104/2021) [2023] ZAGPJHC 463 (12 MAY 2023)

JUDGMENT

LEECH, AJ:

INTRODUCTION

- 1 This is an appeal by Bombela Operating Company (Pty) Ltd (*Bombela*), against the whole of the judgment and order of the Magistrates' Court for the District of Johannesburg North, Randburg.
- 2 The judgment of the Magistrates' Court lay in respect of an action brought by Sadiphiri Transport Services CC (*Sadiphiri*), as plaintiff, against Bombela as defendant. Sadiphiri is the respondent in this appeal.
- 3 Sadiphiri's claim was for contractual damages flowing from the alleged repudiation by Bombela of a written agreement concluded between them. In the Particulars of Claim attached to its summons it sought payment of the sum of R4 614 174 alternatively reinstatement of the agreement between the Parties as well as interest and costs on the attorney and own client scale.
- 4 The action proceeded to trial, the leading of evidencing commenced and concluded on 16 September 2019, and then it was postponed for argument.
- 5 On 22 January 2020, the Presiding Magistrate, Mr Sewnarain, handed down judgment in favour of Sadiphiri for payment by Bombela of the sum of

R4 355 000, interest at the rate of 10% per annum calculated from 8 May 2021 to date of final payment, and costs on the Magistrates' Court tariff party and party scale. The judgment was read out to the Parties in open court and recorded.

- 6 Bombela has noted an appeal against this judgment and order, but there is an issue about whether or not it timeously noted the appeal in accordance with the Rules of the Magistrates' Court and thereafter prosecuted that appeal timeously as required by the Uniform Rules of this Court. It has applied for condonation. Sadiphiri's opposition includes a counter-application for an order declaring the appeal to have lapsed. Those applications must be dealt with before considering the merits of the appeal.¹

THE CONDONATION AND COUNTER-APPLICATIONS

- 7 In terms of section 84 of the Magistrates' Court Act, 32 of 1944, an appeal from the Magistrates' Court to the High Court must be prosecuted within the time period and in the manner prescribed by the rules, save that the court of appeal may extend such period.
- 8 Rule 51(3) of the Magistrates' Court Rules provides, in effect, that an appeal must be noted within 20 days, being court days, of the date of a judgment appealed against or after the Court has supplied a copy of the judgment in writing to the party applying therefor, whichever period is the longer. The appeal is noted, in terms of Rule 51(4), by the delivery of a notice of appeal, and, unless

¹ At the hearing of the appeal, we asked counsel for the Parties to address both merits and condonation at the same time.

the court of appeal shall otherwise order, by giving security for the respondent's costs of appeal to the amount of R1 000. Rule 51(9) provides that, after the appeal has been noted, it must be prosecuted within such time as may be prescribed by rule of the court of appeal, failing which it is deemed to have lapsed, unless the court of appeal orders otherwise.

- 9 The prosecution of an appeal before the High Court is governed by Rule 50 of the Uniform Rules of this Court. Rule 50(1) requires the appeal to be prosecuted within 60 days after the noting thereof failing which it is deemed to have lapsed. The appeal is duly prosecuted, in terms of Rule 50(4)(c), by the making of application to the Registrar of the High Court, with notice to the other party, for the assignment of a date for the hearing of the appeal. That application must be made by the appellant within 40 days of noting the appeal (Rule 50(4)(a)) failing which the respondent is afforded a further 20 days (Rule 50(4)(b)) the expiry of which coincides with the expiry of the 60-day period stipulated in Rule 50(1).
- 10 In accordance with the provisions of Sub-Rules 27(1) and (3) of the Uniform Rules of Court, the Court may upon application on notice and on good cause shown, make an order extending any time prescribed by the Rules in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet and may condone any non-compliance with any Rule.
- 11 Bombela has, to the extent necessary, applied for condonation for the late prosecution of its appeal.² It tendered the costs of the application in the event of it

² It launched this application on 20 May 2022. It asks for condonation and the reinstatement of the appeal.

being unopposed, failing which it asks that Sadiphiri pay the costs. If it succeeds in this application, then condonation will be granted and the appeal be reinstated. If the application is refused, then the appeal will have lapsed and we will not proceed to make a finding on the merits.

- 12 Sadiphiri opposes the application for condonation. It also asks, in its counter-application, filed with its answering affidavit and dated July 2022, for a declaration to the effect that Bombela failed in various respects to comply with the Rules and that the appeal has lapsed. It seeks costs.
- 13 I am not entirely sure why Sadiphiri saw fit to bring the counter-application or what purpose it usefully serves, except to increase costs. That is because if we are to grant the condonation application then the counter-application must be dismissed; if we refuse the condonation application, then the result will be that the appeal has lapsed and asking for a declaration to that effect is, at best for Sadiphiri, a *plus petitio*.
- 14 Either way, I approach the matter on the basis that the question of whether or not condonation should be granted is determinative of both application and counter-application.
- 15 As I have indicated above, the judgment was initially read out in open court. On 3 February 2020, Bombela's then attorneys timeously gave notice in terms of Rule 51(1) of the Magistrates' Court Rules, seeking *inter alia* a written copy of the

judgment. In terms of that Rule, the written judgment should have been provided within 15 days, being on or before 24 February 2020.

- 16 On 5 May 2020 Bombela's then attorneys noted an appeal, despite their not having yet received a copy of the written judgment. In terms of the Magistrates' Court Rules, this was a premature misstep, because Bombela was yet to receive a copy of the written judgment. Either way, Rules 51(4) and (9) could not have been triggered.
- 17 On 31 July 2020 a second notice in terms of Rule 51(1) was given, which if the fifteen days were to have been complied with should have seen a written judgment being produced on or before 24 August 2020. Still nothing was forthcoming from the Magistrates' Court.
- 18 In the interim, attempts were made by the representatives of both Parties to secure a copy of the written judgment. These included attendances by a representative of Bombela's attorneys at the offices of the Presiding Magistrate as well as further letters and requests. Correspondence was exchanged between the attorneys for the Parties complaining about nothing being done and threatening writs and answers that much had been attempted, but to little avail.
- 19 On 21 July 2021, a Deputy-Sheriff attempted to execute on the judgment against the property of Bombela. This sparked a request for an undertaking from Sadiphiri that it would desist from attaching property which, when declined, saw the Parties engage in what must have been needlessly costly interdict

proceedings aimed at staving off the attachment and execution. This culminated in an interim order being granted by the High Court, with the result that—save in one respect—this excursus need not detract further from the issues at hand.

20 Within the interim order was a directive obliging Bombela to take steps on an urgent and expedited basis to have the record of the oral judgment transcribed, to forward it to the Magistrate within stipulated time periods (together with a copy of the High Court's Order), and to lodge its appeal in the High Court within three days of receiving the written reasons from the Magistrates' Court. A failure to do so would entitle Sadiphiri to proceed to execute on the writ.

21 On 6 September 2021 and still in the absence of the Magistrates' Court providing the written judgment, Bombela served a Notice of Appeal. This Notice suffers from the same deficiency as the earlier Notices: it was filed before a copy of the written Judgment had been provided.

22 On 16 November 2021 Bombela's erstwhile attorneys attended at the Magistrates' Court, where they obtained a copy of the written judgment, backdated to 6 September 2021.

23 Up until 16 November 2021, Bombela was not in default. The delays up until then are not attributable to Bombela.

24 Even if we were to conclude that Bombela could be found to carry responsibility at all for the delays on the part of the Presiding Magistrate, it can hardly be said that its conduct was of such a nature that we should conclude thereby that it had

waived its right to pursue an appeal or that the appeal had been preempted or otherwise lapsed. On the contrary, it consistently made clear that it continued to pursue the appeal and resisted Sadiphiri's attempts to bypass the appeal or execute on a writ.

25 Moreover, Sadiphiri could equally have taken steps to expedite the appeal in circumstances where it was plain that the fault lay with the Magistrates' Court.

26 I am therefore of the view that the date when, for the first time, it can be said that the clock started to run again against Bombela was on 16 November 2021, when it received the written judgment. On the basis of the Magistrates' Court Rules read with the Uniform Rules of Court, the appeal should have been prosecuted sixty days from then, which would have been on or before 28 January 2022.

27 In terms of the Magistrates' Court Rules, this would have required of Bombela that it apply for the assignment of a date for the hearing of the appeal.

28 Bombela's current attorneys of record were appointed on 24 December 2021 and proceeded to take instructions. Various exchanges apparently took place as between the current and erstwhile attorneys and consultations and correspondence with Bombela. According to the affidavit filed in support of condonation, this was during the period 11 January to 1 March 2022.

29 On 2 March 2022 Bombela served and filed heads of argument, a practice note, and security for costs on Sadiphiri and CaseLines.

29.1 In terms of the Practice Directives of this Court—which are treated, no doubt wrongly in law, as having the authority to override the Rules—a date for the appeal could not be applied for before these documents and the corresponding documents from the respondent, had been filed.

29.2 The security provided was apparently not in keeping with the requirements of this Court and further attempts were made to satisfy that requirement. In the interim an application for condonation was prepared, which was eventually issued on 20 May 2022. These shortcomings are said to have given rise, practically speaking, to further delays.

29.3 All of that said, these were issues that were thereafter cured and the result was that the appeal shuffled on its way forward until it arrived before us, with all requirements having finally been satisfied and the interrelated issues of delay, the lapsing of the appeal, and condonation the first call of business. In substance, Bombela had complied—or attempted to comply—with the Rules read with the Practice Directives when it filed its heads of argument, practice note, and security for costs on 2 March 2022.

30 Hence, it seems to me that 2 March 2022 marks the date when Bombela had effectively taken those steps it was required to take for purposes of prosecuting the appeal and the delay in respect of which Bombela must therefore seek condonation is for the period between 28 January and 2 March 2022. This is a period of twenty-three Court Days.

- 31 Whether or not condonation should be granted is to be determined having regard to the interests of justice taking into account the facts and circumstances of the case.³
- 32 The explanation for the delays, contained in the founding affidavit in the application for condonation, are focussed largely on the period from 24 December 2021 to May 2022, although the crucial time period is up until 2 March 2022.
- 33 The gravamen of this explanation is that, in December 2021, the erstwhile attorneys of record for Bombela were replaced with their current attorneys of record. The latter took over the file and with it the mandate on 24 December 2021. They thereafter proceeded to familiarise themselves with the matter, within the constraints of the annual festive season shutdown, meeting with Bombela on 11 January 2022.
- 34 The steps that followed are set out in some detail and included, amongst others, obtaining further documents from the erstwhile attorneys to complete the file and the appeal record, the appointment of and consultation with counsel, the preparation and filing of the appeal record, inquiries with the Registrar's office regarding the protocol and revised practice directives to accommodate the Covid-19 Pandemic, the preparation of heads of argument and practice note, and more.

³ *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at [20]:
This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.

35 Counsel for Sadiphiri, when arguing the condonation application and counter-application, referred us to the principle that the explanation for the delay must be full and cover the entire period of the delay.⁴ She criticised the explanation given as being insufficiently detailed and for not covering the entire period.

36 In the main, this criticism was directed at the period prior to 24 December 2021, which is not a time when Bombela was in culpable delay. The absence of a fuller explanation for this period is therefore not, in my view, relevant because it is not a period for which Bombela is required to seek condonation.

37 I am satisfied that the explanation for the period from 24 December 2021 to 2 March 2022 is sufficiently detailed as to fall within the ambit of what is required of Bombela as per the requirements in *Van Wyk v Unitas*.

38 I appreciate that Sadiphiri was no doubt frustrated by the additional twenty-three days that they were made to wait. It made much of the total delay of three years between judgment *a quo* and the hearing of the appeal. Even more so, the nearly five years between when summons was first issued forth out of the Magistrates' Court and now. In the face of these lengthy periods, it was argued strenuously that it would not be in the interests of justice to grant condonation. It was argued that the effects on Sadiphiri had been pernicious, because it had been without an income and had therefore suffered financial hardship all the while.

⁴ *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* 2008 (2) SA 472 (CC) at [22].

39 But, I sense that this frustration is not so much as a result of the five-week delay from 28 January to 2 March 2022, but the prior delays of twenty-two months attributable to the failure of the Presiding Magistrate timeously to provide the written judgment and even before that as the wheels of justice slowly turned. As understandable as this frustration is, it should not be allowed to cloud the much narrower question of whether or not the delays from 28 January 2022 onwards are so egregious that they should not be condoned.

40 Having regard to the explanations given, there is no basis for concluding that Bombela's default was wilful or that it was unreasonable in delaying to the extent that it did, having regard to the steps that were undertaken on its behalf. Nor do I find that the delay is unduly extensive or that the reasons for the delay are not without merit. This is particularly so in relation to Bombela's attempts to compile a proper appeal record and to ensure compliance with the often Gormenghast like practice directives.

41 In relation to other factors that should be taken into account for purposes of the interests of justice, both Parties are agreed that the issues with which the appeal deals and the case itself are important. Furthermore, the quantum is not insignificant: we are told that, for Sadiphiri, it is a lot of money; for Bombela, there is an element of public funding.

42 Lastly, the prospects of success should be considered and, as the balance of this judgment reflects, those lie overwhelmingly in favour of Bombela.

43 In all of these circumstances, I am of the view that the interests of justice dictate that condonation should be granted and the appeal should be dealt with on its merits. It follows, in my view, that condonation should be granted and the counter-application for declaratory relief should be dismissed.

44 As far as concerns costs, Bombela seeks an indulgence. The opposition—founded as it is on the extensive delays from February 2020, which was admirably argued and for which I have great sympathy—was not unreasonable. I can see no reason why Bombela should not be made to bear the costs of the condonation application.

45 But the counter-application was not well-advised. It has not succeeded and there would ordinarily be no reason why costs should not follow that result.

46 In my view, a fair and just outcome would be that there should be no order as to costs on the counter-application and this is reflected in the order below.

47 On that basis, I turn now to consider the merits of the appeal, starting with the background facts.

THE RELEVANT BACKGROUND TO THE APPEAL

48 It is common cause that on 12 May 2017 Bombela and Sadiphiri concluded a written Service Agreement in terms of which Sadiphiri was contracted to provide transport services for and on behalf of Bombela (*the Contract*).

- 49 In terms of the Contract Sadiphiri agreed, over a period of five years (*the Contract Period*), to transport the employees of Bombela, Mega Bus Express (Pty) Ltd, and Bombela Maintenance Company (Pty) Ltd, daily, between the Midrand Train Depot and Midrand Station (*the Contractual Services*). In consideration for rendering the Contractual Services, Sadiphiri would be paid the sum of R85 000 per month (subject to CPI increases) for the duration of the Contract Period (*the Monthly Consideration*). Sadiphiri would also be reimbursed fuel costs, up to a stipulated amount, at the prevailing price per litre.
- 50 In terms of the Contract, Sadiphiri would provide two vehicles, as specified, to render the Contractual Services, being Toyota Quantum GL 14-seater 2.7 litre petrol motor vehicles, or their equivalent. The motor vehicles were required to carry the signage or branding specified by Bombela.
- 51 The Contract provided that should either Party breach the Contract then the other would be entitled to afford the Party in breach a period of fourteen days within which to cure or remedy the breach, failing which the notifying Party could cancel the Contract forthwith, with or without claiming damages; obtain an order for specific performance, with or without claiming damages; and recover any costs incurred by it on the attorney and client scale.
- 52 On 28 November 2017, Bombela notified Sadiphiri that it was in breach of the Contract between them and called upon it to remedy its breaches, failing which Bombela would cancel. Its principal complaint was that Sadiphiri had failed to

provide new vehicles for the discharge of the Contractual Services and had not had the vehicles appropriately branded. Dissatisfied with Sadiphiri's response to its notice, on 29 December 2017 Bombela cancelled the Contract.

53 As at the date of cancellation, the Monthly Consideration, adjusted with reference to the annual CPI, was R90 474 and there were fifty-one months remaining on the Contract.

54 In response to Bombela's purported cancellation, on 16 January 2018 Sadiphiri's then attorneys wrote to Bombela advising it that it was in breach of the Contract and demanding that Bombela either reinstate the Contract or pay damages in the sum of R4 335 000, being the amount that Sadiphiri was entitled to receive for the balance of the Contract Period of fifty-one months, calculated using the initial Monthly Consideration.

55 A reading of this letter of 16 January 2018 reveals that, whilst Sadiphiri considered the termination of the Contract to be unlawful, it did not accept the repudiation implicit in this termination and itself cancel the Contract. On the contrary, not only does the letter not say as much, but it maintains that Bombela should reinstate the Contract, which I understand to mean that it was still seeking enforcement of the Contract. This is reflected in the following passage from the letter:

Should you fail to pay the above amount, alternatively, to re-instate the Contract within the specified period [of fifteen days from the date of the letter], Our Client's instructions are for us to commence legal proceedings and seek suitable relief against yourselves.

56 Neither the desired payment of R4 335 000 or the alternative reinstatement of the Contract was forthcoming within the fifteen day period or at all. Making good on its threat, Sadiphiri caused a summons to be issued forth out of the Magistrates' Court.⁵

57 The claim advanced in the Particulars of Claim maintained that Bombela's termination of the Contract was unlawful.⁶ The basis on which Sadiphiri alleged that the termination was unlawful were twofold:

57.1 First, in a so-called "Special Plea" Sadiphiri contended that the Contract did not permit of termination by Bombela in the circumstances under or the manner in which it cancelled the Contract.

57.2 Secondly, it alleged that Bombela had breached the Contract by making demands on Sadiphiri that were impermissible under the Contract or exceeded the bounds of what Sadiphiri was contractually obliged to deliver as part of its Contractual Services.

58 It also persisted in seeking damages alternatively reinstatement of the Contract. The damages were calculated with reference to the Monthly Consideration adjusted with reference to CPI. The amount claimed was for the remaining fifty-one months at R90 474 in the sum of R4 614 174. Sadiphiri also claimed interest and costs on the scale as between attorney and client.

⁵ There was, in terms of the Contract, a consent to the jurisdiction of the Magistrates Court for all disputes arising from the Contract.

⁶ The Particulars of Claim as originally pleaded were later amended. The references are to the amended Particulars of Claim and the consequentially amended Plea.

59 The cause of action on which Sadiphiri alleged it was entitled to this amount was pleaded as follows:

12 The Plaintiff suffered damages being a loss of income in the amount of R4 614 174.00 . . . which the Plaintiff was entitled to receive from the Defendant over the remaining term of the Contract being an amount of R90 474.00 (Eighty Five Thousand Rand) per month subject to CPI rate increment calculated over a period of 51 . . . months from the date of termination of the Contract to date. . .

13.1 Therefore, the Defendant is indebted to the Plaintiff in the amount of R4 614 174.00 . . . for substantial financial damages as a result of the unlawful termination and breach of the Contract.

13.2 The Plaintiff therefore claims to be placed in the position it would have been had the contract been properly performed and/or had the breach or unlawful termination not occurred, by the Defendant.

14 As a result of the unlawfully termination by the Defendant, the Plaintiff suffered financial loss and/or damages in the sum of R4 614 174.00 . . .

60 In response to the Particulars of Claim, Bombela denied that it had breached the Contract. It pleaded that it was Sadiphiri that had breached the Contract in its provision of the Contractual Services, entitling it to call upon Sadiphiri—as it had done—to remedy its breaches within the stipulated period failing which it would cancel. Sadiphiri, it pleaded, had not remedied its breaches within the stipulated time, with the result that it had lawfully cancelled the Contract.

61 In addition to more general denials and a claim for rectification of the Contract to include a stipulation for the use of new vehicles, Bombela specifically denied Sadiphiri's claim to damages. Its Plea in this regard reads as follows:

AD PARAGRAPH 12

32 The Defendant specifically denies that the Plaintiff has suffered damages in the amount of R4,614,174.00 . . .

33 In amplification of the abovementioned denial the Defendant pleads that taking into account the fact that the contractual period has only been in operation for a period of approximately one year and the Plaintiff has a common law duty to mitigate his damages, the Plaintiff cannot allege that they have suffered damages in the abovementioned amount, even in the event that the above Honourable Court determines that the Defendant unlawfully terminated the Agreement, which is specifically denied.

AD PARAGRAPH 13 & 14

34 The Defendant specifically denies that it is indebted to the Plaintiff in the amount of R4,614,174.00 . . . or any amount whatsoever. The Defendant specifically denies that the Plaintiff has suffered 'substantial financial damages' and / or their termination of the contract was 'unlawful' and accordingly puts the Plaintiff in the proof thereof.

62 The trial action proceeded on 16 September 2019. The evidence was led over the course of a single day. It consisted of a single witness each on behalf of Sadiphiri and Bombela:

62.1 For Sadiphiri, the sole witness was Mr Sethoga, the managing member of the close corporation, Sadiphiri.

62.1.1 Mr Sethoga gave evidence as to the context under which the Contract was concluded, including the prior relationship between Bombela and Sadiphiri under an earlier contract. He testified about the terms of the Contract, including the requirement for branding and discussions between the Parties regarding branding and the purchase of new vehicles.

62.1.2 He proceeded to deal with the notices of breach and his understanding of whether or not Sadiphiri had breached the

Contract, whether in the respects complained of by Bombela or at all. He explained that, after terminating the Contract between them, Bombela instructed Sadiphiri to remove their vehicles and to cease providing the Contractual Services.

62.1.3 As I understand his evidence, Sadiphiri later lost possession of the vehicles it was using to provide the Contractual Services and retrenched the drivers it employed.

62.1.4 With reference to invoices, he told the Court that Sadiphiri had billed Bombela a monthly fee of R85 000 as well as reimbursement of petrol costs as per the Contract. The total invoice was around R125 000. He then explained the increase in the Monthly Consideration from R85 000 per month to the CPI increased amount of R90 474.

62.1.5 The amount that Sadiphiri was claiming, he testified, was made up as the sum of the Monthly Consideration, adjusted for CPI, multiplied by the remaining 51 months of the Contract Period. He sought these damages or restoration of the Contract between the Parties.

62.2 Bombela's witness, Mr Bruwer, was employed as the Company's Traffic Manager and, in that capacity, was involved in the day-to-day administration of the Contract. Mr Bruwer's evidence dealt principally with

the background to the conclusion of the Contract, the claim for rectification, and the alleged breaches of the Contract by Sadiphiri, giving rise to Bombela's cancellation of the Contract. He did not—and no doubt could not—give any evidence in relation to the damages contended for on behalf of Sadiphiri.

63 At the conclusion of the evidence of their respective witnesses, Sadiphiri and Bombela closed their respective cases. The action was then postponed to allow for the preparation of heads of argument and for oral argument to be presented to the Court.

64 As indicated above, the Presiding Magistrate read out his judgment in open court, but later provided a signed version of the judgment. My references are to the latter.

65 The Presiding Magistrate upheld Sadiphiri's claim in a reduced amount of R4 355 000, ordering payment of this amount together with interest, from date of service of the summons on 8 May 2018 to date of final payment, and costs on the party and party scale.

65.1 Central to the Presiding Magistrate's findings was his conclusion that Bombela's cancellation of the Contract was unlawful. This finding was based on an interpretation of the Contract, that there was no requirement that Sadiphiri utilise new vehicles. Bombela's cancellation on the basis

that Sadiphiri breached by failing to provide new vehicles therefore fell outside of the Contract.

65.2 Bombela's conduct, in thereafter dismissing Sadiphiri from the depot, was found to be a repudiation of the Contract. The Presiding Magistrate found that Sadiphiri had accepted this repudiation. His findings in that regard are as follows:

It is found that the defendant's conduct in dismissing the plaintiff from its depot at Midrand by asking Mr. Sethoga to remove his vehicle . . . constitutes a repudiation of the service agreement. The conduct of the plaintiff by so complying and, by causing a letter of demand dated 16 January 2018 to be sent to the defendant indicates that the plaintiff accepted such repudiation after the lapse of time when the defendant failed to re-instate the service agreement in favour of the plaintiff. It is not in dispute that the plaintiff was willing and able to carry on with his contractual obligations.

65.3 There was no finding made on rectification. Indeed, it doesn't appear to have been considered at all, notwithstanding the conclusion reached in the judgment that the Contract, properly interpreted, excluded a requirement for the use of new vehicles. It is not clear how the conclusion could have been arrived at—that there was no requirement for the use of new vehicles—without at least deciding the rectification claim.

65.4 As far as concerns damages, in the amended Particulars of Claim Sadiphiri had sought payment of the sum of R4 614 174, based on the Monthly Consideration escalated with CPI. The Presiding Magistrate reduced this to the original Monthly Consideration, but awarded the full

sum of the Monthly Consideration of R85 000 payable for the remaining fifty-one months of the contractual period.

65.5 The reason given for reducing the amount was because the Presiding Magistrate concluded that the plaintiff had failed to properly prove, at the trial, that the CPI adjusted Monthly Consideration was the full R90 474 per month, but that the plaintiff had otherwise satisfactorily proved its damages as being the R85 000.

66 Bombela appealed against the whole of the judgment and order, including as to costs. The grounds of appeal were directed *inter alia* at the findings made on repudiation and the extent of the damages awarded.⁷ As far as concerns repudiation, Bombela pointed to the fact that this was neither pleaded nor was evidence led on it.

67 It is to a consideration of the merits of the appeal that I turn next and I do so with specific reference to these two grounds regarding repudiation and damages.

THE MERITS OF THE APPEAL

68 Sadiphiri's claim against Bombela was founded on contract. The amount claimed was for damages ostensibly flowing from the Contract between the Parties and represented the balance of the Contract price in the form of payment in full of the

⁷ There were four broad grounds identified in the Notice of Appeal. In addition to the two I have referred to, Bombela took issue with the failure to deal with rectification and vehicle branding, the findings on the lawfulness of the cancellation, and mitigation.

remaining Monthly Consideration for what would have been the balance of the Contract term.

69 The basis of Sadiphiri's claim lay in the contention that Bombela's cancellation of the Contract was unlawful and was therefore ineffective. Bombela acted upon that cancellation, required of Sadiphiri that it remove its vehicles from Bombela's premises, and thereafter refused to honour any aspect of the Contract.

70 Our law of contract is well settled. Where a party to an agreement behaves in a manner that is incompatible with an intention to continue with that agreement, they are said to have repudiated it. Put differently, they renounce their obligations under the agreement, making it clear—through words or conduct—that they no longer consider themselves to be bound to that agreement.

71 If that party's renunciation of their contractual obligations is countenanced by and permitted under the agreement—for example, where there is a clause entitling them to behave in the manner in which they do or they are excused by the agreement from performing further—then nothing further can come of it. Where, however, their conduct is in breach of the agreement and evinces an unequivocal intention no longer to be bound by it, then they repudiate.

72 An all too frequently occurring instance of this, as in this case, is where one party relies on a clause in the agreement to cancel the agreement in circumstances where the other party (often referred to as *the innocent party*) disputes the lawfulness of the cancellation, contending that the cancellation is in breach of the

terms of the agreement. In these circumstances, the innocent party is left with an election as to one of two mutually exclusive paths.

72.1 The first of these allows the innocent party the right to refuse to recognise the cancellation. Instead, the innocent party tries to enforce the agreement as against the cancelling party, by claiming specific performance of the agreement.

72.2 Alternatively, the innocent party can accept the other side's repudiation of the agreement and can itself cancel the agreement for the very reason of the other party's repudiation (or its fundamental breach, evincing an intention no longer to be bound by the agreement). In those circumstances, the innocent party no longer tries to enforce the agreement through an order of specific performance, but instead confines the remedy it seeks to a claim for damages.

72.3 The innocent party might also claim limited damages where it elects to enforce the agreement, but the measure of those damages differs from the damages that can be claimed where the innocent party elects to accept the repudiation, itself cancel the agreement, and pursue damages alone.

73 Save in very limited respects not relevant to this dispute, the innocent party is afforded a largely untrammelled discretion as to which of these two paths it chooses to take. It exercises that discretion by communicating its election to the

other party, whether by words or by conduct. It must do so within a reasonable period of time and it must do so unequivocally. The other party should be left in no doubt as to what the innocent party has elected to do. The time when it communicates its election may impact the quantification of damages.

74 These principles are illustrated by the judgment of the Appellate Division, as it then was, in *Culverwell v Brown* and the cases it refers to.⁸ I have referred to that decision, amongst the many others that deal with these trite principles, because it also illustrates the relationship between the acceptance of the repudiation and the quantification of damages. It also illustrates, more generally, the principles applicable to the assessment of damages.

75 In this instance, as noted by Mr Tshikila who appeared on behalf of Bombela in the appeal, Sadiphiri never seems to have made an election whether to accept the repudiation, cancel the Contract and claim damages or to reject the repudiation and claim specific performance.

76 Indeed, far from it making an election (let alone doing so within a reasonable period of time), Sadiphiri seems to have persisted in both of these courses of action, including in the letter from its attorneys of 16 January 2016, in its Particulars of Claim and the prayers contained therein, and even in the evidence of Mr Sethoga.

77 The Presiding Magistrate's reasons, quoted at paragraph 65.2 above, don't suffice. Especially given that in the Particulars of Claim—which postdate the

⁸ *Culverwell v Brown* 1990 (1) SA 7 (A) at 25A – 31H.

letter of January 2018 and Sadiphiri's departure from the depot—Sadiphiri still equivocated and appeared to want reinstatement of the Contract. This was also the evidence, as I understand it.

78 Either way, contrary to what the Presiding Magistrate found, there was no evidence presented of unequivocal conduct or a communication from Sadiphiri by which it accepted the repudiation and cancelled the Contract. Nor was such an acceptance and cancellation pleaded on its behalf.

79 As a result of its ambivalence, Sadiphiri has never perfected either cause of action against Bombela and, as a result, it should not have succeeded at all. In my view, Bombela is correct that the Magistrates' Court action should have been dismissed and, it follows, is also correct that the appeal should succeed and the order of the Presiding Magistrate be overturned and replaced with one dismissing Sadiphiri's claims with costs.

80 But, even if I am wrong in this regard, there is yet another reason why the appeal should succeed, which is that Sadiphiri failed properly to prove its damages.

81 As I have indicated above, the question of damages was put squarely in issue on the pleadings. Sadiphiri, as the plaintiff, at all times bore the onus to prove its damages. Bombela also pleaded the duty to mitigate.

82 The amount claimed by Sadiphiri represented the Monthly Consideration, adjusted by CPI, for the remainder of the Contract Period. It thus claimed in full the balance of the Contract Price. The only real evidence that was led in respect

of the proof of this amount pertained to the CPI adjustment of the Monthly Consideration from the original R85 000 per month to the R90 474 per month that formed the basis of the pleaded case.

83 Whilst the Presiding Magistrate found that Sadiphiri had failed to prove its entitlement to the CPI adjusted Monthly Consideration, he does not seem to have had regard to the evidence that was led—or, more accurately, that was not led—in relation to proof of damages more generally.

84 It is trite that a party who claims damages arising from the breach (or repudiation) of a contract is entitled to be placed in the position s/he would have been in had the breach not occurred. That is, the measure of damages is the difference between the position the contracting party is in after the breach and that which it would have been in had there been no breach or had the contract been performed in full. It is the nett difference that represents the measure of the innocent party's contractual damages.

85 Extremely rarely, in modern commercial transactions, will the gross contract price equate to the contractual damages suffered by the innocent party. This is because, if the agreement were to have been executed, then the innocent party would invariably have incurred costs and expended money in the execution of its obligations. These costs and amounts need to be taken into reckoning for purposes of determining what the innocent party's contractual damages would have been. It is for the plaintiff, as the party claiming, to put that evidence before the court in the discharge of his/her onus of proof.

86 This case is no different. In the course of his evidence, albeit in a different context, Mr Sethoga testified about Sadiphiri's business more generally. He explained that it employed drivers and incurred insurance costs. It made repayments on vehicle purchases. While it was reimbursed its petrol costs, it was not contended that Sadiphiri was reimbursed for the other running costs that it would inevitably have been incurred over the Contract Period. All of these costs and expenses would have been incurred in circumstances where, according to Mr Sethoga, Sadiphiri's sole source of income was the Monthly Consideration.

87 The difficulty that Sadiphiri faces is that while evidence was placed before the Court indicating that these types of expenses would have been incurred, they were never quantified. The result is that Sadiphiri's damages were never properly quantified. There was no evidence of the nett entitlement that Sadiphiri might have been entitled to.

88 In this instance, the Presiding Magistrate awarded Sadiphiri the full measure of the gross Monthly Consideration that it would have received for the remainder of the Contract Period. I can, with respect, see no justification in the judgment of the presiding Magistrate for this finding.

89 In my view therefore, Sadiphiri failed to prove its damages flowing from Bombela's alleged repudiation of the Contract and, for this reason too, its claim in the Magistrates' Court should have been dismissed.

CONCLUSION

90 It follows, that I am of the view that Sadiphiri failed to discharge the onus resting on it to prove its cause of action based on Bombela's alleged repudiation of the Contract or its entitlement to damages flowing from that alleged repudiation.

91 The appeal must accordingly succeed. There is no reason why costs should not follow the result, although I hesitate in the particular circumstances of this case to award those costs on the attorney and client scale.

92 I accordingly make the following order:

- 1 To the extent necessary, the appellant is granted condonation for its failure timeously to note its appeal.
 - 2 The costs of the application for condonation are to be paid by the appellant on the party and party scale.
 - 3 The counter-application to the condonation application is dismissed, on the basis that each party is to bear their own costs.
 - 4 The appeal is upheld with costs on the party and party scale.
 - 5 The order of the Presiding Magistrate *a quo* is replaced with the following:
"The plaintiff's claim is dismissed, with costs, payable on the party and party scale."
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**B.E. LEECH
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

I agree,

**R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG**

For the appellant:

Mr. S. Tshikila

Instructed by:

LNP Attorneys Inc.

For the respondent:

Ms. K.A. Slabbert

Instructed by:

Mpoyana Ledwaba Inc

Date of hearing:

9 February 2023

Date of judgment:

12 May 2023