Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	YES
Circulate to Regional Magistrates	YES

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA
NORTHWEST DIVISION, MAHIKENG

CASE NUMBER: CIV/APP/MG17/2022

In the matter between:-

L[…] S[…] Appellant
(Plaintiff in the court *a quo*)

and

W[…] S[…] Respondent
(Defendant in the court *a quo)*

CORAM: REID J *et* MFENYANA J

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 14h00 on **22 March 2024.**

ORDER

The appeal is dismissed with costs.

JUDGMENT

MFENYANA J

INTRODUCTION

[1] The appellant in these proceedings seeks to appeal the whole of the judgment and order of the honourable Magistrate Baba (court *a quo*), handed down on 14 July 2022. The judgment that forms the subject of this appeal, deals with a claim instituted by the appellant against the respondent for an amount of R150,000.00 for monies due and owing by the respondent to the appellant. This R150,000.00 is the estimated total amount of debts owed by the appellant to various creditors, as determined in a

separate Rule 58 application[1] between the appellant and Mr J[…] S[…], who is the appellant's husband, and the respondent's son.

[2] The source of indebtedness as argued in the court *a quo,* is an affidavit deposed to by the respondent on 6 February 2014, offering to pay an amount of up to R150 000.00 to the appellant's creditors on behalf of his son. The respondent was to make payment arrangements with the appellant's creditors directly. When the respondent failed to pay, the appellant instituted proceedings in the court *a quo*.

THE APPEAL

[3] This appeal pertains to two special pleas raised by the respondent in the court *a quo*. The special pleas concern the timeframe afforded to the appellant, and whether the payment sought by the appellant had already been catered for by the Regional Court in the Rule 58 order.

[4] The court *a quo* dismissed the first special plea and upheld

[1]Rule 58 of the Magistrates' Court Rules (interim maintenance claims pending divorce).

the second special plea with costs on a party – and – party scale.

[5] Before this Court, the appellant acknowledges that the court *a quo* correctly dismissed the first special plea. She however appeals against the costs related to the dismissal of the first special plea, as no costs were awarded by the court *a quo* in this regard.

[6] She further appeals against the order upholding the second special plea. In this regard, it is worth noting that the court *a quo*, despite upholding the second special plea, ordered costs against the respondent. In this regard the order reads:

> "**[49] ORDER**
>
> [49.1] First special plea is dismissed.
>
> [49.2] Second special plea is upheld with cost on a party – party scale". (*sic*)

[7] The appellant appeals against this order on the basis that:

7.1. Costs should have been included in the dismissal of the first special plea;

7.2. The court *a quo* erred in upholding the second plea with costs. The second plea was one of *res iudicata* and the absence of a *lis* between the appellant and respondent, in that the respondent was not a party to the Rule 58 proceedings.

RULE 58 PROCEEDINGS

[8] In the Rule 58 proceedings the offer made by the respondent was made as a means of minimising the amount of maintenance paid by his son to the appellant with an amount of R7,715.00 per month. The offer made by the respondent was incorporated into the Rule 58 order, to the extent that the court ordered the appellant to provide a list of her debts to her husband's attorneys "to enable the respondent and his father to pay off all those debts in full".

[9] It is on that basis that when the respondent and his son failed to pay the amount, the appellant instituted proceedings in the court *a quo* against the respondent for payment of the said amount.

[10] Having defended the action, the respondent raised two special pleas. Before dealing with the special pleas in detail, it is necessary to consider the judgment and order of the Regional Court, which gave rise to the proceedings between the parties.

[11] In the Rule 58 judgment, the Regional Court ordered the appellant to provide a list of her debts as specified, stipulating the details of her creditors, account numbers and the amount owing in respect of each creditor, to her husband's attorney within five days from the date of the order, to enable the respondent and his son to pay off all the debts. The respondent's son was further ordered to provide proof of payment to the applicant' attorney within fifteen days.

[12] The judgment further stipulated that in the event of the respondent failing to pay the appellant's debts, the respondent's son '… is ordered to pay the amount of R7,715.00 to the applicant (appellant *in casu*) in addition to the maintenance … until those debts are paid in full'. The Rule 58 order thus specifically determined that, should the

total amount of debt not be paid in full, an additional monthly amount of R7,715.00 was to be paid by the respondent’s son “in addition to” the amount of R16,500.00 maintenance per month, towards the maintenance of the appellant and the two minor children.

SPECIAL PLEAS

[13] The first special plea related to the interpretation of ‘five days’ as stipulated in the judgment. The respondent’s contention in this regard was that if the definition envisaged by the court is calendar days instead of court days, his obligation towards the appellant lapsed as a result of the appellant’s failure to comply. The appellant is therefore obliged to recover the outstanding amount from her husband, the respondent further contended.

[14] The second special plea raised was ‘*res judicata*’. In this regard the defendant argued that the Regional Court had already determined how the matter was to be dealt with in the event that the respondent failed to pay.

[15] In the reasons for judgment, the court a quo states *inter alia*:

> "[4.1] Although the Plaintiff did succeed in the first special plea, the second special plea was upheld, therefore as a result of the plaintiff not succeeding with the second special plea, a globular cost award was granted on the merits in favour of the Defendant. However, I concede in erring in not excluding the costs."

SUBMISSIONS

[16] At the commencement of the matter, we considered an application by the appellant, for condonation for the late filing of the heads of argument. Having considered the length of the delay (three days) and the reasons therefor, we were satisfied that no prejudice could be caused to the respondent, moreso in consideration of the fact that heads of argument are for the benefit of this Court. We thus, condoned the late filing of the appellant's heads of argument and proceeded with the hearing of the matter.

[17] The appellant submits that she was substantially successful in the application in having the special plea dismissed and

thus, entitled to costs on that issue. The appellant relies on the decision of the Appellate Division (now the Supreme Court of Appeal) in *Estate Wege v Strauss*[2], which held that if issues are distinct and severable, the successful party on each issue is, as a rule, entitled to its costs on that issue.

[18] Although this decision goes further and states that this is not a hard and fast rule, the Appellate Division noted that considerable discretion must be left to the trial judge.

[19] In this regard, Mr Jacobs argued on behalf of the respondent, that the issue of costs is within the discretion of the trial court, and a court of appeal will not easily interfere with that discretion.

[20] In this matter, the court *a quo* conceded to have erred in not awarding costs to the appellant. The court's failure to properly consider and apply its mind to the issue of costs seems to be a misdirection. In light of the concession by the Magistrate in her reasons for the judgment, which concession, in my view, was well taken, such interference

[2] 1932 AD 76.

would ordinarily be no more than a correction. What this means in effect is that the first special plea ought to have been dismissed with costs.

[21] As regards the upholding of the second special plea, the appellant contends that the intention of the parties in concluding the agreement was to incorporate it into the Rule 58 judgment. This, as well as the intention of the Regional Court that dealt with the Rule 58 application, are key to the determination of this issue, he asserts.

[22] According to the appellant, interpretation does not stop at the literal meaning of words. Thus, she contends that the meaning to be ascribed to the order should be ascertained from the language of the judgment, including the reasons therefor, as well as the intention of the parties. Importantly, the appellant avers that the judgment was not intended to cater for what would happen in the event of breach.

[23] In paragraph 25(g) the judgment states unambiguously that 'should the respondent's father (the respondent in this appeal) fail to pay the debts mentioned in paragraph (f), the

respondent (appellant's husband) is ordered to pay the amount of R7,715.00 to the applicant (appellant herein) in addition to the maintenance mentioned in paragraph (e) until those debts are paid in full."

[24] This part of the judgment admits of no ambiguity. It clearly catered for what should transpire in the event of a breach of the payment arrangement by either the respondent or his son as either of them were to pay the appellant's debts according to the order.

[25] The question is whether the Regional Court, being seized with a Rule 58 application, was in a position to issue an order against the respondent, who was not a litigant in the Rule 58 proceedings, and in so doing venture into issues not postulated in the Rule.

[26] I understand the appellant to be saying that it was not open to the Regional Court to state, nor could it be interpreted that the appellant would have no contractual claim against the respondent, or limit or waive the appellant's right of recourse against the respondent in the event of breach. The Regional

Court could also not prescribe to the appellant which right of recourse she had. I disagree. The affidavit giving rise to the respondent's undertaking to pay on behalf of his son was not an agreement open to interpretation or enforcement by the Regional Court. The respondent was not a party in the Rule 58 proceedings. He was not before the court or subject to the court's jurisdiction.

[27] Indeed, the starting point of any interpretative exercise is to look at the literal meaning of words in light of the contextual setting of the matter. The context is that the respondent undertook to settle the appellant's debts in respect of the Rule 58 application, on behalf of his son who was the respondent against whom maintenance was sought in those proceedings. That to me, is as far as the Regional Court could take the matter. This is what it did. The language employed admits of no ambiguity. The Regional Court trod with caution.

[28] I understand the appellant's contention to be that despite the fact that the appellant's former husband (the respondent's son) was ordered to take over the responsibility for payment

in the event of a default by his father, the appellant was still at liberty to proceed against the respondent. That may be so. However, at the risk of repetition, that was not a matter the court needed to concern itself with, as the contractual relationship or otherwise of the appellant and the respondent was not a matter before the court.

[29] In light of the above, the appellant further contends that the court *a quo* erred in holding that the parties intended to have the agreement made an order of court in the rule 58 proceedings. She argues that all that the parties intended was to record the offer in the order made, for the purpose of bringing to the attention of the court that the appellant's maintenance needs would be reduced.

[30] Mr Jacobs submitted on behalf of the respondent that the court *a quo* subjectively conceded having erred instead of looking at the matter objectively. Objectively viewed, the agreement between the appellant and the respondent was recorded in the court order of the Regional Court, he asserted, and paragraphs 25(f) and (g) were accepted as part of the agreement and formed part of the order, he

concluded.

[31] This assertion overlooks the fact that the matter before the Regional Court did not pertain to the agreement, nor was the court asked to make any agreement part of the proceedings. It could not have done so, for reasons already alluded to above.

[32] The effect of the appellant's case is that the 'agreement' between the appellant and the respondent should be viewed independently of the order for the Rule 58 application. To the extent that the 'agreement' cannot be regulated by that order, I agree. The Regional Court did no more than acknowledge the agreement between the appellant and the respondent, short of issuing an order against the respondent. From the language employed in the judgment, the Regional Court was constrained, and appears to have acted with an understanding of such restraint, correctly in my view, as the respondent was not a party before it in the Rule 58 proceedings.

[33] I agree with Mr Keeny appearing on behalf of the appellant

that there was no *lis* between the appellant and the respondent in the Rule 58 proceedings. That on its own cannot lead to a finding that the appellant can, in terms of that same order, proceed against the respondent, while the order clearly stipulates that the maintenance obligation lies against the appellant's husband in the event the respondent and his son fail to pay to the appellant's creditors.

[34] Regarding the judgment of the Regional Court, Mr Keeny argued that the court *a quo* misconstrued the nature of the judgment, which he argues is not binding on the court *a quo,* being a judgment *in rem* and not *in persona*. In view of my findings above, nothing turns on this assertion.

[35] Relying on the decision of the SCA in *Ndabeni v Municipal Manager OR Tambo District Municipality (Ndabeni)*[3], Mr Keeny submitted that a decision issued by a court binds all persons <u>to whom it applies</u> (my emphasis). This is of course in line with section 165(5) of the Constitution. Incidentally, this principle in *Ndabeni* was reaffirmed by the Constitutional Court in 2022. The key issue is that the judgment did not

[3](Case no 1066/19) [2021] ZASCA 08 (21 January 2021).

apply to the respondent.

[36] Ultimately, the appellant contends that the matter did not relate to the same parties, was not in respect of the same subject matter, and not founded on the same cause of action. That being the case, the requirements of *res judicata* were not met by the respondent, and the court *a quo* erred in upholding the second special plea. I disagree. What is dispositive of this contention is that coining the circumstances as *res judicata*, is not apparent from the record of the proceedings. It is purely an interpretation ascribed by the appellant.

[37] The affidavit that forms the subject matter of the claim against the respondent, was an affidavit to undertake on behalf of his son to pay the appellant's debt in order to minimise his son's maintenance obligations. An affidavit is not a contract between the parties. It does not establish rights and obligations between parties. This affidavit records the respondent's intention to pay the appellant's debts and can never be an acknowledgement of liability.

[38] The recourse established in the failure of the respondent and his son to pay the appellant’s debt, is clearly stipulated in the Rule 58 order and the appellant is to claim the amount from the person who is liable for payment thereof, being the respondent’s son.

[39] As such, the second special plea was correctly upheld by the court *a quo*.

ORDER

[40] In the result I make the following order:

The appeal is dismissed with costs.

____

S MFENYANA
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

I agree. It is so ordered.

____

FMM REID
JUDGE OF THE HIGH COURT
NORTHWEST DIVISION, MAHIKENG

APPEARANCES

For the appellant:	WM Keeny
Instructed by:	Van Velden - Duffey wesleyk@vvd.co.za patsyt@vvd.co.za
C/o:	Van Rooyen Tlhapi Wessels Inc. litigattion@vtwinc.co.za
For the respondent:	G Jacobs
Instructed by:	Moloto-Weiss Inc. conradweiss@mweb.co.za
Date reserved:	21 July 2023
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