

IN THE COURT OF APPEAL OF LESOT

HELD IN MASERU

C of A (CIV) No 24/2019

In the matter between:

NTHABELENG MOCHOTOANE

APPELLANT

and

OFFICER COMMANDING VITD/CROU

1ST RESPONDENT

OFFICER MAKHUBE

2ND RESPONDENT

OFFICER COMMANDING MABOTE POLICE

3RD RESPONDENT

COMMISIONER OF POLICE

4TH RESPONDENT

ATTORNEY GENERAL

5TH RESPONDENT

NEDBANK LIMITED t/a MFC

6TH RESPONDENT

CORAM:

MOSITO P

DAMASEB AJA

VAN DER WESTHUIZEN AJA

HEARD:

16 OCTOBER 2020

DELIVERED:

30 OCTOBER 2020

Summary

The appellant wishes to appeal against an order of the High Court releasing a vehicle, confiscated by the Lesotho Police, to the sixth respondent. The vehicle is no longer in Lesotho. Condonation is required for several aspects of appellant's conduct. In view of, inter alia, the prospects of success of this appeal, especially the fact that its outcome would have no practical effect or benefit for the appellant, condonation is not granted. The matter is struck off the roll of this Court, with costs.

JUDGMENT

VAN DER WESTHUIZEN AJA

Introduction

[1] This is an appeal against an order, issued without written reasons by Monapathi J in the High Court, on 17 April 2019. Based on a South African judgment in favour of the sixth respondent (Nedbank Limited t/a MFC), the High Court ordered the release of a vehicle (a 2014 Audi A3 1.4 TFS Stronic Cabriolet), at that stage held by the police in the Kingdom of Lesotho. The appellant (Ms Nthabeleng Mochotoane) submits that the Lesotho police had no business interfering in the contractual relationship between her and the sixth respondent, when they took possession of the car; and that the High Court wrongly enforced a foreign court order.

Factual background

[2] In December 2014 the appellant entered into a hire-purchase agreement, in the Republic of South Africa, with the sixth respondent regarding the vehicle in issue. Ownership of the car was not to pass from the sixth respondent to the appellant before she made the last payment in terms of the contract. She started to pay her agreed monthly instalments.

[3] At some stage there was confusion about the ownership of the car, as it (or its registration plate) seemed to have been illegally “cloned” in favour of someone in Soweto, South Africa. The vehicle was seized by the South African Police Service when the appellant drove to Lesotho during the Easter weekend of 2015. According to the appellant, this was due to the negligence of the sixth respondent. She stopped paying her instalments and informed the sixth respondent that she would resume doing so only when the problem was addressed. This apparently happened and the sixth respondent informed her as such. Yet, the appellant allegedly failed to resume the payments. She fell behind with her payments to a considerable amount.

[4] In May 2017 the sixth respondent obtained an order for the repossession of the Audi from the High Court of South Africa. In June 2017 a warrant for delivery was issued. The Sheriff of the High Court failed to locate the appellant at her last known place of residence. On 12 April 2018 the Lesotho police confiscated the vehicle from the appellant at her home in Khubetsuana in Lesotho.

[5] The appellant approached the High Court of Lesotho. The sixth respondent came to know about the proceedings and applied to

join. On 21 May 2018 the High Court allowed the sixth respondent into the proceedings and postponed the matter to 30 May 2018 joined the proceedings.

[6] On 17 April 2019 the High Court ordered the release of the vehicle. It was repatriated to South Africa on 24 April 2019, apparently into the possession of the sixth respondent. On the same day the appellant noted her appeal against the High Court order.

Appellant's case

[7] According to the appellant, the High Court “erred and or misdirected himself in giving effect to an order of court a from a foreign jurisdiction contrary to the law (*sic*)”. He furthermore “erred and or misdirected himself in holding that that the officers of the 1st Respondent had no authority to withhold appellants car at the request of the 6th Respondent and yet released the vehicle to the 6th Respondent (*sic*)”. In his written heads of argument counsel for the appellant gives extensive attention to the law about the enforcement of foreign judgments in Lesotho.

Respondent's case

[8] Counsel for the sixth respondent submitted that the appellant had “displayed disdain for the rules of this Court”. The Record of the High Court proceedings should have been filed in July 2019, yet it was filed on 19 March 2020, “without even (being) foreshadowed by an application for condonation”. The appellant's

heads of argument were filed before the Record. A condonation application was filed very shortly before the appeal hearing – yet the application for condonation itself was late and the appellant had to ask for that lateness to be condoned, which was not done.

[9] On behalf of the sixth respondent it was also pointed out that the Record did not contain the High Court order appealed against, despite it being available in the file of that court. According to him, this rendered the appeal impossible to be heard.

[10] Furthermore, the matter was moot, since the Audi was no longer in Lesotho. The matter should be struck off this Court's roll, with costs, so contended the sixth respondent's counsel.

Condonation? Remedy?

[11] Several aspects of the appellants conduct would have to be condoned, for this appeal to proceed. Apart from the reasons for the lateness and for the fact that the High Court order was not placed before this Court, the prospects of success of this appeal have to be considered in deciding whether to grant condonation.

[12] Given the above facts, particularly that the vehicle at the centre of this matter is no longer in the Kingdom of Lesotho, the central question - repeatedly put to counsel for the appellant – is: What can this Court do for the appellant? Stated differently, what practical effect would a decision of this Court to uphold the appeal have? The answer appears to be: Nothing.

[13] Should the appellant still believe that the vehicle is unlawfully in the possession of the sixth respondent, it would seem that the appropriate path to follow would be to approach a South African

court with a contractual claim based on her agreement with Nedbank, with the *rei vindicatio*, or with whatever other remedy might be available.

[14] During oral argument counsel for the appellant eventually conceded that “as far as the vehicle is concerned” the matter was indeed moot. However, he insisted that this Court must give a reasoned judgment on the enforcement of foreign court orders by courts in Lesotho, even though it would have no effect on the appellant’s three year long struggle to get her vehicle back.

[15] It would be a waste of judicial resources for three judges on the bench in this matter to research a potentially complicated topic, involving inter alia international relations, for mainly theoretical and academic purposes. Whatever conclusion it might reach, is likely to be *obiter* and thus not binding. This Court has a full roll and each judge has to hear and decide almost 20 appeals in three weeks. As stated above, the appellant would be no better off than she is now, even if the point is decided in her favour.

[16] After some debate, counsel for the appellant conceded that the matter should be struck off the roll. However, he persisted to argue against a cost order. As one of the factors that hampered the appellant in properly preparing argument, the failure of the High Court to furnish reasons for the order it gave was mentioned. This failure is indeed lamentable; but it cannot provide an excuse for the way in which these proceedings have been conducted by the appellant.

Conclusion

[17] The conclusion is inevitable: There are no prospects of success. The appeal was misconceived. Condonation cannot be granted. The matter has to be struck off the role.

Costs

[18] There is no reason to deviate from the general rule that costs follow the result. The appellant must pay the costs of the sixth respondent. A punitive cost order is warranted, because of the appellant's disrespect for the time of the sixth respondent, its legal representatives and this Court.

[19] The question of a *de bonis propriis* cost order against counsel for the appellant was considered. If his advice is indeed behind this misconceived appeal, it would be highly unfortunate that the appellant has to bear her own costs, as well as those of a commercial bank. However, it is not clear whether this matter was brought because of her insistence, or because of the advice of her attorney of record or her counsel. Should she wish to complain about unprofessional conduct by her legal representatives, she could presumably consider approaching the relevant professional oversight bodies.

Order

[20] The following is ordered:

The matter is struck off the role, with costs, on the scale of attorney-and-client.



J VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

I agree



DR K E MOSITO
PRESIDENT OF THE COURT OF APPEAL

I agree



P T DAMASEB
ACTING JUSTICE OF APPEAL

FOR APPELLANT: ADV LEHLOKA MAPHAT'SOE

FOR 6TH RESPONDENT: ADV T MPAKANYANE

