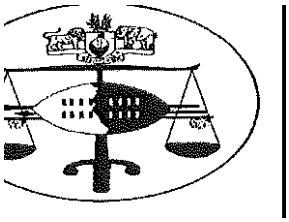

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

· **Held in Mbabane** **Case No. 86/2021**

In the matter between:

MACHAWE SITHOLE **Appellant**

And

PHINDILE MANTIMAKHULU N.O. **Respondent**

Neutral citation: Machawe Sithole vs Phindile Mantimakhulu N.O. (86/2021)[2022] SZSC ... 17(02 June 2022)

Coram: **MJ Dlamini JA, SB Maphalala JA, SM Masuku AJA**

Heard: **9 May 2022**

Delivered: **02 June 2022**

Civil Practice: ***Late filing of heads by Applicant who is Respondent in appeal - Condonation in terms of Rule 17 of the Court of Appeal Rules - Explanation for late filing -Applicant wrongly diarized date of filing- Respondent abandoning opposition if Respomlent pays wasted costs - Condonation granted in interests of justice.***

Civil Appeal: ***Contract of sale - Immovable property - Transfer of free possession - Property occupied - Purchaser insists on free possession - Novation doubtful - Appeal dismissed.***

JUDGMENT

MJ Dlamini JA

Introduction and background

[1] This is an appeal against the judgment of Mamba J in a summary judgment application. The summary judgment application arose from an agreement between the parties' in terms of which the Appellant, pursuant to a power of attorney, offered for sale certain property, being Lot No. 30 situate at eZulwini, Mountain View Township, Hhohho District and the Respondent agreed to buy the said property. The agreement was duly settled in a Deed of Sale in which the Seller was represented by the Appellant and the Purchaser represented by the Respondent, in trust.

[2] After the purchase price was duly paid, the Seller and Purchaser represented as hereinabove stated, signed the Deed of Transfer of the property into the name of the Purchaser. Notwithstanding the purported transfer things did not go as smoothly as might be expected between the parties. The Respondent would not assume possession of the property allegedly because the possession was not free of any encumbrances. As it turned out, there was a certain Lungile Dlamini, who was said to be in (illegal) occupation of the

property. In terms of the agreement the Respondent the property was to be vacant on possession.

[3] When Respondent would not take up possession of the property unless cleared of any occupant, the parties entered into a Memorandum of Agreement with Robinson Bertram Attorneys regarding the property in question. The reasons for this Agreement were, *inter alia*, that the property "had been attached on behalf of certain creditors", and "contrary to what was stated in the Agreement of Sale between the Seller and Purchas·er there [was] an occupier of the property". Consequently a process was set in motion whereby debts of the property would be cleared by the Appellant or his agents, including the removal of any occupant from the property. However, the parties were not in agreement on the Appellant being responsible for removing the occupant from the property. The Respondent relied *inter alia* on Clause 10.3 of the Agreement for the contention that Appellant was responsible for ejecting the occupier. The Clause reads:

> "10.3. The cost, at attorney and client scale, that the purchaser may incur in instituting or defending any action that may be necessary for the purchaser to obtain free and undisturbed occupation of the house on the property".

[4] Following the disputed occupation/vacation of the said Lungile Dlamini, the Respondent applied to the High Court for an order directing the [Appellant] "to take all legal steps to hand over to the [Respondent] the possession and /or occupation of the vacant Lot 30 ... in line with the Deed of Sale between the parties", and costs by Appellant at Attorney and our client scale. The High Court granted the prayer thereby giving rise to this appeal.

The·condonation application

[5] The Applicant for condonation is the Respondent in the appeal. The application for condonation arises from Applicant's late filing of heads and bundle of authorities. The

deponent in support of the condonation is Mr. Jele, counsel for the Respondent in appeal. In paragraph 8 of the founding affidavit, the deponent recounts that the heads and bundle in terms of the rules of court should be filed not later than 18 days before the date of hearing. That date *in casu* was 9 May 2022. What deponent misses, by design or inadvertence, is the degree of non-compliance, that is, by how much time Applicant was out of time. The applicant should be candid enough to lay this information before court. It should not be for the Court to then take time working out the degree of non-compliance which is normally one of the factors to be taken into account in deciding whether or not to grant condonation. In this regard, the smaller the degree of non-compliance the better is the chance for securing condonation. But is not guaranteed.

[6] Mr. Jele further says that he had "four matters on the Roll for the session of this Court". In paragraph 11 of the condonation application, the Applicant says that he had "drafted the heads on the 5th April, 2022", but somehow did not file those heads due to a misdiarisation of the court files. Why the misdiarisation, is not fully explained. He says that he had erroneously diarized this appeal for 8 June instead of 9 May, and only got to realise this error on 28 April, 2022. In short Mr. Jele pleads being very busy - affecting his attention to detail. But the Court is not told the time-spread of these four matters during the session. A session of the Court is usually about four months. Four cases in four months: that cannot be very busy. Misdiarising the matter is also unforgivable in this case. No proper explanation for the error other than that 'to err is human'. That will not do. Rule 17 calls for "sufficient cause" to be shown for condonation to be granted. The deponent avers that the non-filing of the heads of argument in time was not intentional *"but was due to me diarizing the files wrongly. This was a human error which can happen to anyone.* " Needless to say that none of us defaults intentionally.

[7] The Applicant is the respondent in the appeal and generally is at an advantage. Even if the condonation were not granted the Appellant would still have to satisfy the Court that the court *a quo* was wrong. Reasonable prospects of success have been canvassed on behalf

of the Applicant by Counsel who was responsible for the non-compliance. In this appeal, the missing filings by the Applicant were due on or about 6 or 7 April 2022 instead of 29 April 2022. The Applicant was therefore about 12 days out of time. Even this period is not necessarily uncondonable; if need be, the merits of the case on appeal may be considered. See **De Villiers v. De Villiers** 1947 AD 635; **Federated Employers Insurance Co. v McKenzie** 1969 (3) SA 360 (AD); **Standard General Insurance Co. Ltd v. Eversafe (Pty) Ltd and Others** 2000 (3) SA 87 (WLD) paras [12] and [13].

[8] The application for condonation was opposed by the Respondent who filed his heads and bundle on 28 March 2022, about three days out of time. He has not applied for condonation. Whilst it may be correct to say that "forgetting, because it is human" is not a good defence for non-compliance, it, by no means, without more, reflects evidence of "flagrant" disregard of the Rules of Court. There must be something in the 'forgetting' that qualifies the forgetting as flagrant or egregious. The Respondent has only alleged but has not stated in what way the alleged forgetfulness is to be considered as flagrant and deserving visitation with punitive costs. It also does not assist to refer to a "long line of precedents" without citing even one or two of that line of cases. Litigants should always endeavor to avoid misleading the Court by exaggerating their cause or defence.

[9] It has been said that the superior courts have an inherent right to grant condonation in cases of time limitation in terms of the rules of court when principles of justice and fair play demand it to avoid undue hardship. Whilst the rules of court must be obeyed for the smooth administration of justice, those rules are by no means inscribed on stone and unchanging like the Law of the Medes and Persians[1] There is no definitive definition of sufficient cause. The explanation for the non-compliance must be considered and assessed in light of reasonable prospects of success on appeal. At the hearing, however, the Respondent agreed to withdraw his opposition to the application for condonation if

[1] See NKJV Holy Bible, Daniel 6:8

Applicant tendered the wasted costs. That was agreed by the parties. The explanation for the default in compliance based on the misdiarisation of the filing *dies* does not satisfy the required standard. But that the default was due to lapse on the part of the attorney cannot entirely be dismissed from consideration. Quite some effort was however put on the prospects of success. All said and done, there being no substantial prejudice suffered by the Respondent, the Court accepted the consent agreement reached between the parties at the hearing.

The merits on appeal

[10] In her founding affidavit, in the court below, the Respondent, as applicant, averred *inter alia:*

> "9. In total breach of the Deed of Sale, after the transfer of the property, the [Appellant] failed to give possession of the property to the [Respondent]. I then discovered that, for the first time, there was an illegal occupier of the house by the name of Lungile Dlamini which was not disclosed to me when the Deed of Sale was concluded. The Deed of Sale in the face of it disclosed to me that the Seller or his legal representative were in occupation of the house or the house was vacant".

[11] Respondent further explained that as a result of the property being illegally occupied Appellant signed the Memorandum of Agreement, dated 17 March 2021, in terms of which:

> "14.1. The [Appellant] acknowledged that contrary to what was stated in the Deed of Sale between the Seller and the Purchaser there was an occupier of the house or property;
>
> "14.2. The [Appellant] shall ensure that the Purchaser shall obtain free and undisturbed possession of the property within two months from date of signature.

"14.3. Should the Purchaser institute legal proceedings necessary for it to obtain the free and undisturbed possession frotn the [Appellant] it will be entitled to claim costs at Attorney and own client scale".

[12] The Appellant had opposed the application on a number of grounds, mainly that Respondent knew at time of transfer that the property was occupied, and that in any case the sale and transfer agreements had been novated after the date of transfer by the latter regard Appellant stated in his answering affidavit at paragraph 2.8 that the setting aside of El20,000.00 'to pay for legal fees to eject the occupants' was initiated by Respondent through Mr. Knox Nxumalo who had assisted in the transfer of the property, and the money was kept in an account with Messrs. Robinson Bertram Attorneys. Appellant continued: ".

. . It was then left to them to instruct attorneys to evict the occupants whom (sic) were to be paid from that amount."

[13] In terms of the Memorandum of Agreement, the sum ofE 120,000.00 was to cater for things such as services of a security company to provide day and night security over the house; compensation loss of rental on the house being illegally occupied; the cost, at attorney and client scale, that the purchaser may incur to obtain free occupation of the property; the cost of storage and disposal of items found in the house - all of which were to be completed within two months.

[14 The Appellant was also assigned other duties in connection with the clearance of the property for free occupation by Respondent. Against the Respondent's averment that the Appellant was in "total breach of the Agreement" the Appellant denied that he was in breach as alleged and stated that" ... the amount paid into Robinson Bertram trust account was to be partly used to engage services of an attorney to evict the occupier". Although the Appellant also insisted that the Respondent "was fully aware of the existence of an illegal occupier in the house" through the agents who assisted Respondent in acquiring the property, it is significant that in the preamble to the Memorandum of Agreement it was

stated: "And Whereas contrary to the Agreement of Sale between the seller and the purchaser there is an occupier of the property". To that extent the Respondent accused the Appellant of dishonesty in not having disclosed the occupation till after the transfer.

[15] In the result, the Respondent applied to court for the order set out above (para [4]). The High Court granted the order which is challenged by the Appellant in these proceedings on the following grounds:

> "I. That the Court *a quo* erred in law and in fact in directing that the Appellant takes legal steps to handover possession of the immovable property (Lot 30 ...) notwithstanding that possession and legal control over the immovable property had already been given to the Respondent by virtue of the transfer of the immovable property into the Respondent's name;
>
> 2. That the Court a quo erred in law and in fact by directing that the Appellant takes legal steps to handover occupation of the immovable property (Lot 30
> ...) notwithstanding that the legal onus and duty to secure occupation was on the Respondent and her legal representatives Robinson Bertram Attorneys who in terms of Clause 10.3 of the Memorandum of Agreement duly received the sum ofE 120,000.00 for the very purpose ofinstituting legal proceedings to secure occupation."

[16] In terms of the 3rd ground of appeal, Appellant stated that *"the Court a quo misdirected itself by issuing out an order which* is *not capable of performance by the Appellant"* since he is not the owner of the property in question and *"does not have the necessary* locus standi *to give effect to such order".* And lastly, that the "Court a quo erred in law in awarding punitive casts against the Appellant where there were no special circumstances warranting award" of such costs.

[17) After considering the evidence pleaded by the respective parties, the Court a quo in para [1OJ observed that the Agreement signed on 17 March 2020 referred to the Appellant "in his personal capacity", accordingly: *"The obligation rested on him personally. Specific performance is possible. He has to evict Lungile from the property.* "The learned Judge *a quo* then proceeded to consider the issue of costs and in para [11] stated as follows:

> "On the issue of costs, there is no doubt in my judgment that the [Respondent] has been gravely and unnecessarily prejudiced by the acts ofboth [Appellants] in failing to adhere to the terms of the Agreement. The pt [Appellant] is an attorney and should have known better. As things stand, the [Respondent] has faithfully honoured her obligations. For over a year, she has been denied vacant occupation of the property that is the subject-matter of this dispute... she has been put out of pocket by having to file this application. As a ... fundamental principle ... agreements must be kept. .. For these reasons, a punitive order for costs is merited and is hereby ordered."

[18] In principle, I agree with the learned Judge a quo in the above statement. What I am not sure about though is, whether indeed Respondent was "put out of pocket" as a result of the application. I say this because there was the sum ofE 120,000.00 set aside for the very purpose. Or, was this amount already exhausted in the other purposes for which it was established? However the scale of the costs in my view does not change because Clause
10.3 did not put conditions on its application. And, in my view, Clause 10.3 applied only as between the Applicant and the Respondent, not to a third party.

[19) The grounds of appeal turn upon whether Appellant, having passed ownership to Respondent, still had the necessary *locus stand/* to evict the enigmatic Lungile from the property sold. During the hearing, none of counsel was willing to explain why it has been difficult to remove Lungile when her alleged partner was removed by court action at the instance of the Appellant. Respondent says that Appellant must deliver the property free of any illegal occupant in terms of the Sale and Transfer agreements. That Appellant never at

any stage prior to transfer state that the property was occupied. Respondent points at the last sentence in Clause 4 of the Deed of Sale which reads: "There is no tenant occupying the property." Even ifLungile was not a tenant her presence on the property should have been mentioned. The Deed of Transfer indicated no obstacle, human or other, to the free occupation of the property. As already pointed out, it was in the Memorandum of Agreement, signed on 17 March 2020, that the presence of an occupant on the property was acknowledged.

(20) We have already stated the four purposes for which the sum ofE 120,000.00 was to be used. None of those purposes, save the third, speaks to action necessary for the purchaser to obtain free occupation of the property. The gist of the dispute seems to be in the wording of the clause, I 0.3. The clause refers to "cost, at attorney and client scale, the purchaser may incur in instituting or defending any action that may be necessary for the purchaser to obtain free and undisturbed occupation" of the property. Counsel for Appellant insisted that the action contemplated under the clause was not one directed to the Appellant as counsel for Respondent contended. And, Respondent would not refuse lending necessary power or authority to confer standing on Appellant for him to discharge his duties.

[21] As already intimated, the trick in the wording of Clause IO.3 is in stipulating the scale of the costs likely to be incurred by Respondent in the pursuit of the free occupation. That stipulation cannot bind a person who was no party to the agreement. The clause can then only operate as between the parties to it. It is evident in the circumstances that the reference to "all legal steps" in the prayer and order of court, includes but not limited to action to evict the illegal occupier of the property. Thus, even if it be argued that the Memorandum of Agreement dated 17 March 2020 somehow novated the sale agreement, the novation could not have been complete as the Appellant was not freed from handing over the property free of (illegal) occupants.

[22] The Appellant has argued that the Judge *a quo* erred *"in directing that the Appellant. takes legal steps to handover possession of the immovable property (Lot 30 situate at eZulwini, Mountain View Township) notwithstanding that possession and legal control over the immovable property had already been given to the Respondent by virtue of transfer of the ...property into the Respondent's name".* Reference is made to the deed of transfer. Accordingly, the property has since vested in the Respondent. Notwithstanding the transfer

and vesting, the Respondent has apparently refused to take occupation as a result of illegal occupant of the property. Respondent alleged that she never knew that the property was occupied as neither the Deed of Sale nor Deed of Transfer reflected that situation. According to the Appellant, efforts to compensate the Respondent for losses and expenses incurred as a result of being unable to take possession were undertaken resulting in a payment of El20,000-00 to be held by the Respondent's attorneys of record. Still, Respondent would not take occupation. Respondent contended that in terms of the deed of sale, Appellant *"had the obligation to hand over to the Respondent a vacant and fi'ee possession of the property upon transfer ...* "

[23] The Respondent pointed out that.the property was occupied by one Lungile Dlamini, a fact which was not disclosed at the conclusion of the Deed of Sale. Respondent, among others, referred to a sentence under clause 4 of the Deed of Sale, which stated that there was no tenant occupying the property. Assuring that the property was without any tenant, it would be natural to assume that there was also no casual or illegal occupant and that if there was any such occupant it was the business of the seller to clear the property of same. It would otherwise be insincere to say there was no tenant when in fact there was a squatter on the property.

[24] It would also seem that even though in terms of the Deed of Sale the Respondent had acknowledged to be "fully acquainted with the property sold" and to have "inspected the same" and that the property was "sold as it stands without any warrantees whatsoever" all that did not negate or compromise the commitment which Appellant made in the Deed

of Transfer to "cede and transfer in full and free property" to the Respondent. And it could further be argued that if the possession to be given under Clause 6 of the Deed of Sale was in any way encumbered that should have been disclosed. That not having been done, it was fair to assume that the possession at date of transfer would be free. Schulze *et al*[2] write: "In our law it is not an automatic consequence of a contract of sale that the seller

> has to transfer ownership in the *merx* to the purchaser. *The seller merely undertakes that the purchaser will not be disturbed in his/her erifoyment and possession of the* merx *by another person with a better title to the* merx *than that of the purchaser.* This understanding is implied by our law in every contract of sale. However, as a general rule nothing prevents the parties from excluding this consequence." [Emphasis added]

(25] The position in our common law is that the seller warrants undisturbed possession of the thing sold. This means that the purchaser is guaranteed a right better than any other person's over the *merx.* The purchaser is expected to reasonably defend his right over the property purchased and if he fails, the seller may be called upon to intervene. If the seller also fails, then the purchaser may sue the seller on a failed contract. In the present case, the purchaser has insisted that seller delivers the property free of any encumbrance. The Memorandum of Agreement reflects that the seller retained the responsibility to clear the property of any occupant before assumption of possession by purchaser. That is, Respondent is not expected to take action to evict the occupant from the house on the property. If the Appellant fails to remove the illegal occupier, then Respondent may decide to cancel the agreement and claim the purchase price and damages.

(26] In my view, the Memorandum of Agreement of 17 March 2021 did not novate the contract of sale: *"Novation* is *an agreement between creditor and debtor in terms of which the old obligation between them* is *extinguished and a new obligation created in its place.* "

'General Principles of Commercial Law, 8th edition, p 156

[3] I base this conclusion on my understanding of Clause 10.3. It was Mr. Tengbeh's argument that the Judge *a quo* leaned more on the original contract of sale instead of the later memorandum of agreement which, according to him, effected a novation of the contract. With respect, in my opinion, the later agreement was also of not much relief to the Appellant.

[27) The Respondent further relied on the fact that the Appellant had at all material times relevant hereto been armed in respect of his duties in this matter with authority *"to eject anyone currently occupying the said property and institute proceedings for same in the event there is resistance. "* [4] Appellant accordingly has always had the power to evict any unwanted occupant on the property. The deed of sale and of transfer did not extinguish this power and responsibility. By agreeing to compensate the Respondent for loss of rental and other inconvenience consequent upon the delayed free occupation the Appellant impliedly acknowledged the continued responsibility to pass on free possession. This was so even as the deed of transfer attested to cession and *"transfer in full andftee property. . .*" This error as to "free property" being transferred was realized and acknowledged in the Memorandum of Agreement which recorded that the property was in fact occupied.

[28) We have already seen that at the time of transfer, the property happened to be occupied by one Lungile Dlamini. How she got to occupy the property is not explained. Why Appellant could not evict the said Lungile Dlamini from the property before transfer, is also not explained. Who this Lungile Dlamini is that has brought about these proceedings was not revealed. For some unknown reason proceedings by Respondent's attorneys to remove Lungile from the property were stopped by the Respondent on the basis that she had not given the necessary instruction. Apparently, Respondent insisted that it was the responsibility of the Appellant to clear the property of any occupant, as anticipated in the Deed of Sale. Whether at any time before transfer Respondent was aware or not of the

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[3] fbid at p 143

[4] See para. 2 of the **Special Power of Attorney** appointing Appellant as Seller of the property in question.

occupation of the property was held by the court *a quo* not to be a serious issue. The learned Judge *a quo* felt that was irrelevant.

[29] When said Lungile Dlamini would not vacate the property even after transfer to Respondent, the parties entered into a Memorandum of Agreement in terms of which the presence of "an occupier of the property" was recognized making it difficult for the "purchaser obtaining free and undisturbed occupation of the property". An amount was then set aside at cost to the Appellant to facilitate and compensate, among other things, for the clearing of the property of any impediments to free occupation and compensate Respondent for loss suffered due to lack of free possession. Part of this process was the change of locks to the house on the property, a 24-hour security guard to the house; loss of rental to Respondent until "the date of obtaining free and undisturbed occupation of the house"; cost of storage and disposal of the items found in the house. A period of two months for clearing and preparing the house for vacant occupation was agreed between the parties. In Clause 10.3 of the Agreement, it was provided that the money (E 120,000.00) would also cover -

> "The cost, at attorney and client scale, that the purchaser may incur in instituting or defending any action that may be necessary for the purchaser to obtain free and undisturbed occupation of the house on the property".

[30] The parties argued as to the meaning of Clause 10.3. Mr. Tengbeh for the Appellant argued that the sub-clause was for the Respondent to institute eviction proceedings against any occupier on the property. Mr. Tengbeh based his contention, in part, on the consideration that his client, the Appellant, since the sale and transfer of the property, no longer had the *standing* in law to act against the occupier. And that it was for the Respondent to proceed against the occupier in question. Mr. Jele on the other hand argued that Clause 10.3 was intended to permit, 'at attorney and client scale,' action against the Appellant necessary to "obtain free and undisturbed occupation" of the property. Without

much argumentation, it seems clear that clause 10.3 could not be interpreted as was contended for the Appellant, for the simple reason that costs 'at attorney and client scale' as agreed between the parties could not bind a third party. Notwithstanding the transfer, it was still incumbent upon the Appellant to remove by whatever means lawful the presence of the (illegal) occupier or any other impediment obstructing free possession of the property.

[31] On this question of the disputed occupation of Lungile Dlamini, the learned Judge *a quo* observed as follows:

> "[5] It is not insignificant to observe that when the negotiations for the purchase of the property took place, the [Respodent] was not in eSwatini but in Botswana. ... She avers that, when she agreed to purchase the property, she was not aware that Lungile was in occupation thereof. … Whether or not the [Respondent] was aware of the said occupant at the time is, in my view, largely irrelevant. The nub or crucial issue in this case is that the seller undertook or made a compact or covenant to give free and vacant occupation of the property to the Trust upon transfer of the property into the name of the Trust. Whilst the property has been transferred into the name of the Trust, the Trust has not been given free and vacant occupation thereof. Lungile Dlamini is still in occupation".

[32] It was argued for the Appellant that the Memorandum of Agreement novated and overrode the Deed of Sale. To that end, the Appellant's main gripe is that the Court *a quo* relied more on the Deed of Sale and paid less attention to the Memorandum of Agreement which had arguably effected a novation. In my view, the alleged novation does not carry the day. Whilst providing for cooperation between the parties to clear the property of any obstacles in the way of free occupation, the Memorandum did not sufficiently free Appellant from the responsibility to give free possession. The Respondent argued that if Appellant needed the power for a *standing* to lawfully evict the occupant, the Respondent

was willing and ready to assist in that regard, if requested. It is not clear what other straws the Appellant could clutch at to avoid the responsibility.

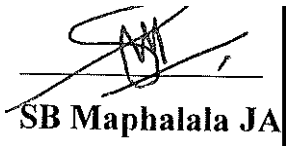
[33] On the understanding as already intimated, that Respondent would assist Appellant on the question of *standing* for any appropriate action, I do not see the order of the court *a quo* as being *"not capable of performance by the Appellant"*, that is, the order that *"the Appellant takes legal steps to handover occupation of the immovable property ... notwithstanding the fact that the Appellant is not the owner of the immovable property ...* " in accordance with the Deed of Sale.

[34] The Appellant also took issue with the punitive costs awarded. Mr. Tengbeh argued that there was nothing in what the Appellant did in this matter which justified costs at such punitive scale. Pertinent in this regard is that the application for the order "to take all legal steps" was launched in July 2021, and the Memorandum of Agreement providing for costs at such a scale is dated March 2020. If our understanding of Clause 10.3 is correct, as we so hold, then the punitive scale of the costs awarded was in terms of the Agreement between the parties. The rationale for the scale of the costs in my view was to persuade and expedite whatever action was needed to be taken to meet the transfer terms of the Deed of Scale.

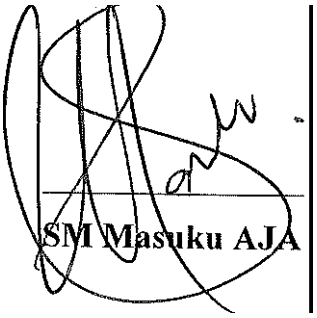
[35] In the result and for the foregoing considerations, I find that the Court *a quo* did not err or misdirect itself and the appeal is dismissed with costs at ordinary scale.

MJ Dlamini JA

I Agree



I Agree



M. Tengbeh for the Appellant

D. Jele for the Respondent.