REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: A58/2023

In the matter between:

ABDUL KADER SUNGAY **Appellant**

And

JAN EBERHARD SCHLIEMANN N.O. **Respondent**

Heard: 19 May 2023

Delivered: 09 June 2023

This judgment was handed down electronically by circulation to the parties' representatives via email and released to SAFLII. The date and time for hand-down is deemed to be 09 June 2023 at 10h00.

JUDGMENT

LEKHULENI J

[1] This is an appeal against the whole judgment and order granted against the appellant by the Oudshoorn Magistrates Court on 25 May 2022, for payment of R291

285 plus interest thereon payable to the respondent pursuant to a motor vehicle accident that took place on 04 December 2009, on the R62 at Huiserievierpass between Calitzdorp and Ladismith. The collision occurred between a Peugeot motor vehicle driven by the appellant and a motorcycle driven by one Wolf Farber ("the deceased"), who died at the scene due to injuries he sustained in the aforesaid collision. Pursuant to that collision, the respondent was appointed as the executor of the deceased's estate. The respondent instituted a delictual claim against the appellant seeking compensation for damages to the motorcycle and the loss suffered by the deceased's estate due to the accident. The appellant defended the matter however, before the trial could commence, he conceded liability on the merits and the question of costs was reserved for later determination.

[2] The trial before the court below proceeded on quantum only. The respondent presented the evidence of an expert witness to prove his claim for damages. The appellant closed his case without giving any evidence in rebuttal.

[3] At the conclusion of the trial, the presiding magistrate granted judgment against the appellant for the payment of the total sum of R291285,00 calculated as follows: R250 000 being in respect of the market value of the motorcycle, R20 000 for towing and storage, R11500 being for road cost and paint set, and R9753 being for additional accessories on the motorcycle. It is this order that the appellant seeks to set aside in this appeal.

PRELIMINARY POINTS

[4] There are two preliminary points that this court is enjoined to consider before the merits of this appeal can be considered. *First*, this court is enjoined to consider

the respondent's counter-application for a declaratory order that the appellant's appeal has lapsed and that an application for condonation cannot revive it. The respondent contends that an appeal that has lapsed no longer exists. As such, the appellant cannot ask for condonation for not complying with the rules of court in respect of a nullity. To this end, the respondent sought an order that the appeal be struck from the roll and that the appellant be ordered to pay the costs of suit on an attorney and client scale. *Secondly*, this court must consider the appellant's application for condonation in terms of Rule 27(1) of the Uniform Rules for his failure to prosecute the appeal within the prescribed period as set out in Rule 50(1) of the Uniform Rules.

Can a lapsed Appeal from the lower court be revived without an application for reinstatement?

[5] The two preliminary points raised by the opposing parties are inextricably imbricated and for the sake of brevity, I will consider them sequentially. In his counter-application, the respondent contends that the appeal has lapsed and cannot be revived through an application for condonation in terms of rule 27 of the Uniform Rules. Ms Ipser, who appeared on behalf of the respondent, submitted that there is no appeal before this court as the appeal lapsed on 14 October 2022, and that the court consequently cannot, in the absence of an application for reinstatement, condone the appellant's non-compliance with the rules of court.

[6] Counsel further submitted that an appeal that has lapsed no longer exists and that the appellant cannot ask for condonation for not complying with the rules of court in respect of a nullity. In her heads of argument, Counsel referred the court to Rule 50(1) of the Uniform Rules, which states that an appeal to this court against the

decision of a magistrate in civil matters must be prosecuted within 60 days after the noting of the appeal, and unless so prosecuted, it shall be deemed to have lapsed.

[7] Counsel submitted that the 60-day period within which the appellant was to file the copies of the record and apply for a court date lapsed on 14 October 2022, without either step having been taken. The appellant only applied for a court date six months later, on 4 April 2023, without notice to the respondent, and served a copy of the record on the respondent on 3 May 2023. Although rule 50 of the Uniform Rules does not make provision for the reinstatement of an appeal that has lapsed, Counsel argued that such a process is envisaged in rule 49, which governs the procedure to be followed in respect of appeals from the high court as opposed to appeals from the Magistrates Court like this one. Ms Ipser submitted on behalf of the respondent that in terms of rule 49(6)(b) of the Uniform rules, the court to which the appeal is made may, on application of the appellant or respondent in a cross-appeal, and upon good cause shown, reinstate an appeal or cross-appeal which has lapsed.

[8] Counsel contended that there is no conceivable reason why the same process could not be followed in respect of an appeal from the magistrate's court which has lapsed. In summary, Ms Ipser argued that the appellant should have applied to have the appeal reinstated as opposed to applying for condonation. To this end, Counsel submitted that the appellant had not made an application for the reinstatement of the appeal to this court, and consequently, there is no appeal before this court in respect of which condonation can be granted.

[9] Meanwhile, the appellant did not file any answering affidavit to the respondent's counter-application. However, during argument, Mr Visser, who appeared on behalf of the appellant, relied on the appellant's application for

condonation and the reasons contained therein. Mr Visser also argued that should the court find that the appellant should have applied for the reinstatement of the appeal as suggested by the respondent, the appellant would then rely on the prayer for further and or alternative relief that the appellant sought in the condonation application. He implored the court to dismiss the respondent's counter-application and to grant the condonation application.

[10] For the sake of completeness, Rule 27(1) of the Uniform Rules provides as follows:

> (1) 'In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet.
>
> (2) ……..
>
> (3) The court may, on good cause shown, condone any non-compliance with these rules.'

[11] This rule empowers the court to condone non-compliance with the rules of court, provided an applicant shows good cause for non-compliance. In the present matter, it is common cause that this appeal impugns the decision of a Magistrate in the lower court. Although the noting of an appeal lays the foundation of the proceedings in the High Court, it is an act done in the magistrate's court. The prosecution of an appeal is a proceeding in the High Court. An appeal must therefore be noted within the period and in the manner prescribed by rule 51 of the

Magistrates Court rules, and prosecuted within the period and in the manner prescribed by Rule 50 of the Uniform Rules of court.

[12] For the sake of brevity, the relevant parts of rule 51 of the Magistrate's Court Rules provides as follows:

> 51(3) An appeal may be noted within 20 days after the date of a judgment appealed against or within 20 days after the registrar or clerk of the court has supplied a copy of the judgment in writing to the party applying therefor, whichever period shall be longer.
>
> (9) A party noting an appeal or a cross-appeal shall prosecute the same within such time as may be prescribed by rule of the court of appeal and, in default of such prosecution, the appeal or cross-appeal shall be deemed to have lapsed, unless the court of appeal shall see fit to make to make an order to the contrary.

[13] Meanwhile, rule 50 of the Uniform rules provides:

> (1) An appeal to the court against the decision of a magistrate in a civil matter shall be prosecuted within 60 days after the noting of such appeal, and unless so prosecuted it shall be deemed to have lapsed.

[14] Notwithstanding these provisions, section 84 of the Magistrates' Courts Act 32 of 1944 affords the High Court, as a court of appeal against orders of the magistrate's courts, an unfettered discretion to grant an extension of time for the noting or prosecution of an appeal. see also *Belo v Commissioner of Child Welfare, Johannesburg* [2002] 3 AII SA 286 (W) at 290 C-D. This section provides that 'Every party so appealing shall do so within the period and in the manner prescribed by the rules; but the court of appeal may in any case extend such period.'

[15] In terms of this section, the discretion of the High Court is not in any way restricted by rule 27(1) quoted above, which empowers the court, upon application and on good cause shown, to make an order extending any time prescribed by the Uniform Rules of court. See *Fortman v SAR & H* (2) 1947 (3) SA 505 (N) at 509. Importantly, this court enjoys inherent jurisdiction to extend the period for noting an appeal and for prosecuting the appeal. This court is also empowered to restore to the roll, after the period limited for prosecution has lapsed, an appeal which has been struck off for lack of appearance.

[16] Therefore, the respondent's submission that the appellant's appeal has lapsed and cannot be restored is mistaken and incorrect. Where a party has shown good cause in an appeal from a lower court, the court enjoys an unfettered discretion to extend the time limits and to reinstate the appeal. From the foregoing, it is evident that the appellant in this matter was well within his right to apply for condonation for the extension of the time limits involved in the noting of the appeal and in the prosecution of the appeal.

[17] In my view, from now on, Rule 50 of the Uniform Rules must be interpreted in tandem with rule 49(6)(b) which regulates appeals from the High Court. The two rules complement each other. Indeed, rule 50 of the Uniform Rules does not expressly make provision for the reinstatement of an appeal from the magistrate's court that has lapsed. In my view, notwithstanding the absence thereof, rule 50 must be interpreted to have impliedly included an application for the reinstatement of lapsed appeals on good cause shown. The effect thereof would place appeals in terms of rule 50 on the same footing as rule 49(6)(b) of the Uniform Rules.

[18] Consequently, an appeal or a cross-appeal from the Magistrate's Court that has lapsed may be reinstated in terms of rule 27(1) of the Uniform Rules once the court is satisfied that good cause has been shown for non-compliance with the rules.

Should the Appellant's failure to prosecute the appeal within the time prescribed be condoned?

[19] I now turn to consider whether or not the appellant's appeal against the trial court's judgment should be reinstated. It is common cause that the appeal herein lapsed on 14 October 2022, because of the appellant's failure to lodge the appeal record with the court's registrar within sixty days of his notice of appeal as required by rule 50 of the Uniform Rules. The record was eventually lodged more than six months later, on 04 April 2023.

[20] It is now trite that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of the case before it. See *Grootboom v NPA* 2014 (2) SA 68 (CC) at para 35. An application for condonation should be granted if it is in the interests of justice and refused if it is not. See *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC), para 3. The appellant must give a full explanation for the delay, and the explanation must cover the entire period of delay and be reasonable. In *Uitenhage Transitional Local Council v South African Revenue Service* [2003] 4 AII SA 37 (SCA) para 6, while seized with an application for condonation, the Supreme Court of Appeal noted that 'an application for condonation is not to be had merely for the asking; a full, detailed and accurate account of the

causes of the delay and their effects must be furnished to enable the court to understand clearly the reasons and to assess the responsibility.' The court noted that 'if the non-compliance is time-related, then the date, duration, and extent of any obstacle on which reliance is placed must be spelled out.'

[21] Importantly, what calls for an explanation is not only the delay in the timeous prosecution of the appeal, but also the delay in seeking condonation. See *Mulaudzi v Old Mutual Life Assurance* 2017 (6) SA 90 (SCA) para 26. In this respect, an appellant should apply for condonation without delay whenever he realises that he has not complied with a rule of court. Any delay in bringing the application timeously must be fully explained. *Darries v Sheriff Magistrate's Court Wynberg & Ano* 1998 (3) SA 34 (SCA) at 40H – 41 E; See *Van Wyk v Unitas Hospital & Another (open Democratic Advice Centre as amicus curiae)* 2008 (2) SA 472 (CC) at para 22.

[22] The standard for considering an application for condonation is the interest of justice. *S v Mecer* 2004 (2) SA 598 (CC) para 4. The question whether it is in the interest of justice to grant condonation depends upon the facts and the circumstances of each case. Factors that the courts have crystallised over the years in considering an application for condonation include but are not limited to the nature of the relief sought, the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of the court and the avoidance of unnecessary delay in the administration of justice. See *Federated Employers Fire & General Insurance Co Ltd and Another v McKenzie* 1969 (3) SA 360 (A) at 362F-G; see *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] 2 AII SA 251 (SCA) para 11.

[23] In the present matter, the explanation proffered by the appellant for his delay of almost six months in filing the appeal record was an alleged delay by the transcribers. The appellant's legal representative filed an affidavit on behalf of the appellant in support of the condonation application and averred that a notice of appeal and a bond of security were filed on 21 July 2022. Thereafter, a quotation was requested from the transcribers on 28 July 2022 for the purposes of the appeal. On 22 August 2022, a quote was received, and was accepted and paid for on 26 August 2022. The appellant states that on 12 September 2022, the transcribers requested certain documents which they could not locate in the incomplete court file. According to appellant, these documents were forwarded to the transcribers on the same day (12 September 2022).

[24] On 2 November 2022, the appellant's attorney addressed an email to the correspondent attorney in Oudtshoorn asking them to follow up with the transcribers and requesting an update on the progress of obtaining the transcribed record. It is not clear from the record before us whether that was done. On 10 November 2022, a draft was received from the transcribers with a request for the pleadings, which they could not locate in the court file. On 21 November 2022 the respondent's attorneys of record were informed of the challenges in obtaining the record from the transcribers and requested a stay of execution proceedings pending the outcome of the appeal.

[25] In the appellant's replying affidavit in the application to stay the execution of the judgment of the court *a quo*, the appellant's legal representative stated under oath that she received the appeal bundles from the transcribers and after perusal on 23 November 2022, forwarded the record to her correspondent in Cape Town on 28

November 2022 for filing. However, in the application for condonation before this court, the appellant's legal representative, in an affidavit under oath, stated that the completed transcribed record was finally received on 13 January 2023.

[26] From the above explanation, it is apparent that there are huge unexplained gaps in the version of the appellant. The appellant failed to take the court into his confidence and give a complete and thorough explanation for the delay. The explanation given by him falls short of the requirements discussed above. The appellant's explanation is cursory, superficial, and unconvincing. This is borne out by the following:

[27] The appellant does not explain why he took no steps to address the delay in receiving the quotation from the transcribers or to follow up on the progress. The appellant does not explain why it took a week to request a quote from the transcribers after the appeal was noted. Crucially, the appellant makes no effort to explain what steps, if any, were taken by him between 12 September 2022 and 2 November 2022 to expedite the lodging of the appeal record. From the record, it is abundantly clear that the electronic mail that the appellant's attorney wrote on 2 November 2022 to his correspondent to follow up on the transcribers was prompted by a letter of demand from the respondent dated 31 October 2022, in which the latter demanded payment of the amount the court ordered at the trial. In all probability, if the respondent did not proceed with execution proceedings, the appellant would not have expedited the matter.

[28] In my view, the appellant and his legal representative adopted a lackadaisical approach and showed no enthusiasm in prosecuting this appeal. They gave no satisfactory explanation for their failure to observe the court rules. Notably, the

appellant only took steps when the respondent executed a writ in respect of the judgment granted against the appellant. Only after the sheriff attempted to execute the warrant on 21 November 2022, did the appellant's legal representative contact the respondent's legal representative and requested that they stay the execution pending the outcome of the appeal.

[29] As stated above, the appellant blamed the delay in prosecuting this appeal timeously on the transcribers. Notwithstanding, he made no efforts whatsoever to contact the transcribers to expedite the transcription of the record nor to bring an application before court to compel the transcribers to produce the record. See *Unitrans Fuel & Chemical (Pty) Ltd v Dove –Co Carriers CC* 2010 (5) SA 340 (GSJ). It seems to me that the appellant unfairly shifts the blame to the transcribers. The only step the appellant's attorney took to follow up on the progress of the transcription was an email sent to its correspondent attorneys on 2 November 2022, six weeks after the record should have been filed at the court, asking them to make inquiries from the transcribers. As explained above, this correspondence was prompted by the respondent's demand of payment of the judgment amount. To this end, I agree with the submission made by Ms Ipser that the appellant was content to simply sit back and wait until the record was delivered to his attorney, notwithstanding the requirements of the rules of court.

[30] The record speaks for itself. What I find very concerning is the conflicting versions the appellant's legal representative gave under oath. In an affidavit before the court *a quo,* the appellant’s legal representative averred that they received the record from the transcribers on 23 November 2022 and perused it. They experienced some problems with their courier services however, the record was eventually

delivered to their correspondent in Cape Town on 28 November 2022. In the founding affidavit before this court supporting the condonation application, the appellant's attorneys averred that the record was received on 03 January 2023. Disturbingly, notwithstanding that the respondent brought these contradictory statements to the attention of the appellant and his legal representative, the appellant did not file a replying affidavit to address or correct this which one would have reasonably expected if it was an error.

[31] If indeed the record was delivered at the correspondent attorney on 28 November 2022, it is strange why the record was not lodged with the registrar in November or in the beginning of December 2022. Furthermore, even if I were to accept that the appellant received the record on 03 January 2023, I still have some difficulty with the explanation proffered by the appellant. The appellant does not explain why the record was only filed on 04 April 2023, some 11 weeks later, when it was received on 03 January 2023. In my view, the appellant's application demonstrates a flagrant violation of the court rules and a lack of attention to issues that plainly called for an explanation. It evidences a failure to fully and candidly enlighten the court, as a litigant in a matter such as this was obliged to do.

[32] What militates and compounds the appellant's problems is that it is unfathomable that a relatively short record such as this would be a struggle to obtain or transcribe. Simply, the record only encapsulates the evidence of one witness, the brief address by both counsels, and the court's judgment. This record should easily have been obtainable in a limited period of time. It is irresistible not to conclude that the delay was due to the tardiness and indolent attitude of the appellant.

[33] In addition, the appellant does not explain why this application was only launched six months after the *dies* for the filing of the appeal record had expired. Throughout these proceedings, the appellant was assisted by attorneys. As early as November 2022, the appellant and his attorneys were aware that the appellant was out of time and that he had to apply for condonation. Notwithstanding this knowledge, they did nothing to bring this application. It must be borne in mind that an applicant should apply to court for condonation without delay whenever he realises that he has not complied with a rule. See *Commissioner for Inland Revenue v Burger* 1956 (4) 446 at 449GH).

Are there any prospects of success on Appeal?

[34] It is trite that where an application for condonation is made, the applicant should set forth briefly and succinctly such essential information as may enable the court to assess the applicant's prospects of success. See *Rennie v Kamby Frams (Pty) Ltd* 1989 (2) SA 124 (A) at 131E. The prospects of success are generally important, although not a decisive consideration. See *Mulaudzi v Old Mutual Life Assurance (supra)* para 34. The court is bound to assess an applicant's prospects of success as one of the factors relevant to the exercise of its discretion unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. See *Fibro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein and Others* 1985 (4) SA 773 (A) at 789C.

[35] Notwithstanding the findings I made hereinabove, I will be charitable to the appellant and consider whether there are prospects of success in this appeal.

[36] In this case, the appellant referred the court to the Notice of Appeal, particularly his grounds of appeal, and contended that should the application succeed and the appeal be dealt with by the court, the prospects of success favours the appellant.

[37] In summary, the appellant's grounds of appeal are that the court *a quo* erred in not finding that the documentary evidence relied upon by the respondent to prove its damages had not been proved, and thus, the court *a quo* made its findings based on hearsay evidence. The appellant also contends that the learned magistrate erred in finding that the respondent had placed before court all relevant evidence relating to the issues of damages suffered by the respondent, specifically evidence pertaining to the fair and reasonable cost of repair to the motorcycle and evidence relating to the post-collision value.

[38] In his summons, the respondent claimed damages against the appellant as stated in paragraph 1 above. The appellant conceded merits, and the matter proceeded to trial on quantum only. At the trial, the respondent led the evidence of an expert witness Nicholas Benn. He is a qualified master technician. He was previously employed for 11 years at Harley Davidson Motorcycles. His credentials as an assessor were not placed in dispute. His job at Harley Davidson had included the valuation of pre-owned motorcycles and assessment of repairs. The witness testified that he could provide a valuation of Harley Davidson motorcycles.

[39] He did not physically inspect the motorcycle involved in this matter after the collision. However, he was shown photographs of the motorcycle in question and testified that the motorcycle was in a state of disrepair such that it was uneconomical to repair. He formed this opinion because the motorcycle took an "incredible knock"

from the front and on both sides. The witness testified that the frame and the chassis were damaged and to repair the whole frame would not be economical.

[40] From looking at the photographs of the damaged motorcycle, Mr Benn testified that everything was utterly smashed and wrecked, and he could not see any part that could be salvaged. In addition, the witness testified that the motorcycle was damaged to such an extent that no spare parts could be salvaged from it and that its sole residual value would be scrap metal. In his opinion, no second hand dealer could salvage parts from this motorcycle for resale purposes. He mentioned that the motorcycle's chassis was bent and this was the immediate reason to write it off. The witness testified that, according to his opinion, the market value of the motorcycle was R250 000.

[41] In addition, he testified that the motorcycle was not in its standard form. It had been accessorised in that it had many extra parts / accessories added to it. He listed some additional accessories that he could see on the photographs. He was shown documents relating to the storage and the towing of the motorcycle. In his expert opinion, the amount of R16 491,22 for storage and the sum of R1052, 62 listed in those documents are reasonable in the circumstances. As previously mentioned, the appellant closed his case without calling any witnesses.

[42] Pursuant to Mr Benn's evidence, the appellant contended that there are prospects of success in the appeal because the court *a quo* could not have found that the respondent had proven its damages because Mr Benn did not inspect the motorcycle and did not give evidence on the post-collision value of the motorcycle. The appellant also contended that the respondent did not place evidence before the court regarding the costs of repairing the motorcycle as is the norm in proving

damages of this nature. The appellant also submitted that Mr Benn did not give evidence on the additional accessories and further that the documents upon which he based his opinion, were not proven by their authors during the trial.

[43] The appellant's argument, in my view, is at variance with the compelling and uncontroverted evidence the respondent tendered at the court *a quo*. Indeed, it is the general practice in our courts in cases of this nature to prove damages by deducting the post-accident value of the vehicle from its pre-accident value. However, I must stress the fact that the courts have cautioned against adopting a formalistic approach when determining damages. See *Monument Art Co v Kenston Pharmacy (Pty) Ltd* 1976 (2) Sa 111 (C) at 118A – F. The measure of the loss and the evidence proving the loss may vary according to the circumstances of each case. In a particular case, there may be more than one method that can appropriately be applied. *Turkstra Ltd v Richards* 1926 TPD 276 at 282-283). In some types of cases, damages are difficult to estimate, and the fact that they cannot be assessed with certainty or precision will not relieve the wrongdoer of the necessity of paying damages for his breach of duty. See *Esso Standard (Pty) Ltd v Katz* 1981 (1) SA 964 (A) at 968H – 969A.

[44] Once the damage or loss is established a court will do its best to quantify that loss, even if this involves a degree of guesswork. *Jowell v Bramwell-Jones & others* 2000 (3) SA 274 SCA at para 22); *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 at 114. In other words, where there is evidence before the court that damages have been caused, the court will not adopt a *non possumus* attitude and make no award. The court will be bound to make some assessment on the material before it, even if the damage cannot be computed exactly.

[45] In this case, it is undisputed that the deceased's estate suffered damages as a result of the collision solely caused by the appellant. Mr Benn testified that from the images depicted in the photographs, the motorcycle was irreparable, that none of its parts could be sold as second-hand parts and that its value was that of scrap metal. He specifically mentioned that the motorcycle's chassis was bent on both sides and this is the reason to write it off immediately. The witness testified that the motorcycle was damaged in front, on the sides, and every part was damaged and not salvageable. Based on these facts, it was his opinion that it was not economical to repair the motorcycle. His evidence was not rebutted, and his expertise was not challenged.

[46] The court below accepted his evidence as it was of appreciable help to it. The trial court found Mr Benn's expert opinion to be based on logical reasoning. The court was satisfied that the opinion expressed had a logical basis, and that the expert witness had reached a defensible conclusion on the damages suffered by the respondent. See *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) para 36 and 37.

[47] In my view, the findings of the court *a quo* cannot be faulted. As explained above, the trial court was alive to the judicial injunction of assessing damages in cases of this nature. Relying on *Herman V Shapiro & Co,* 1926 TPD 367, the court was satisfied that the respondent produced the best evidence available, and assessed the damages as best as possible. The submission that the court *a quo* erred because Mr Benn did not give evidence on the post-collision value of the motorcycle is devoid of substance. It ignores the uncontroverted and overwhelming evidence that Mr Benn gave in court.

[48] The further submission that the court *a quo* based its finding on hearsay evidence is misplaced, and without merit. It must be stressed that Mr Benn expressed his own opinion on the pre-collision value of the motorcycle and his opinion on its condition after the collision. The witness further expressed his opinion on the motorcycle's storage costs, towing charges, and extra accessories. His independent opinion was not dependent on the documents placed before him. To the contrary, his opinion was consistent with what was contained in the impugned documents to which the parties agreed to use at the trial without admitting the contents as evidence. The appellant did not present any evidence to rebut the respondent's version.

[49] A similar argument raised in this matter, was rejected by this court in *Blaauw v Veenman* [2012] JOL 29184 (WCC) and *Maxfit Transport v Warric Eccles,* Case Number A330/19 (04 May 2020) (WCC). In *Blaauw v Veenman (supra),* the plaintiff's vehicle was damaged beyond economic repair pursuant to a motor vehicle accident along the N2 route. Mr Viljoen, an expert witness who assessed the damages of the plaintiff's vehicle and filed a notice in terms of rule 36(9)(a) and (b) of the Uniform Rules, passed away before he could give expert evidence for the plaintiff. The plaintiff called another senior assessor, Mr Laubscher, who worked with Mr Viljoen for 15 years at Santam, to testify on his behalf. Mr Laubscher gave evidence based on Mr Viljoen's report and confirmed his colleague's report. He viewed photographs of the plaintiff's vehicle and formed an opinion that the plaintiff's vehicle was damaged beyond economic repair. Mr Laubscher confirmed that in formulating his opinion, he had regard to the assessment report and accompanying documentation prepared by Mr Viljoen with whose opinion he was in agreement. The

court accepted his evidence and found that an amount of R140 000.00 which the two witnesses recommended, represented the market value of the plaintiff's vehicle.

[50] Meanwhile, in *Maxfit Transport v Warric Eccles*, the appellant appealed against the whole judgment and order of the magistrate sitting in Cape Town, issued on 1 February 2019, in an action for damages instituted by the respondent arising out of a motor vehicle collision that occurred on 5 October 2015, between the latter, who was driving a motorcycle, and one Webster Guyo, whom the appellant employed. The merits were conceded on a 90/10 basis in favour of the respondent. In support of its claim for damages, the respondent called five witnesses, and the appellant closed its case without tendering any evidence. The respondent called an expert witness who inspected and assessed the damaged motorcycle driven by the respondent, and in his opinion, the repair costs of the motorcycle would exceed 70% percent of its value. For this reason, he recommended that it be considered a total loss and that the claim be settled on that basis. After listening to the evidence, the trial court granted judgment in favour of the respondent in the sum of R116, 229.60.

[51] On appeal to this court, the appellant, among others, challenged the computation of the quantum of the damages that was accepted by the trial court. The appellant contended that the expert witness, in his assessment, did not break the components of the motorcycle into separate components and valued them. For this reason, so the argument went, it could not be said that the post collision condition of the motorcycle was proved. Thus, the appellant argued that the trial court erred in finding that the respondent had proved the quantum of his patrimonial loss on a balance of probabilities. Ndita J, writing for the full bench, and after reviewing several cases on the assessment of damages, rejected the appellant's argument and found

that the attack on the expert witness' methodology of assessing the damages of the respondent's motorcycle was unwarranted. The learned justice considered the expert's evidence particularly, that he inspected the motorcycle and observed damages to its structural side, engine, suspension components, and body soft panels, and that no repairs could be effected on the motorcycle. Accordingly, the appeal court held that the trial court's finding that the motorcycle was damaged beyond economic repair could not be faulted. The court dismissed the appeal and found that the trial court's damages award to the respondent was unimpeachable.

[52] From the aforegoing, it is clear that there are no prospects of success in the appellant prosecuting this appeal. In addition to the unreasonable delay and the inadequate explanation the appellant proffered, I am of the view that the contemplated appeal is devoid of merit. Importantly, to tolerate a flagrant disregard of the court rules and the type of conduct encountered in this matter would be prejudicial to the administration of justice and to the respondent, who is bound by the time limits prescribed in the Administration of Estate Act 66 of 1965, to finalise the estate of the deceased. In my view, a further delay in the finalisation of this matter stands to prejudice the heirs of the deceased estate who have been waiting for a long time for the finalisation of the estate.

[53] That the deceased estate has suffered further prejudice in the form of additional legal costs arising from these proceedings cannot be denied. On a conspectus of all the evidence placed before this court, I am of the view that it is not in the interest of justice that condonation be granted in this matter. Thus, it follows that the appellant’s application for condonation must fail. Furthermore, nothing was presented to warrant a departure from the norm that costs follow the event.

ORDER

[54] In the result, I propose that the appellant's application for condonation for the revival of the lapsed appeal be dismissed and that the appellant be ordered to pay the costs hereof including the costs of counsel.

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LEKHULENI J

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

_____

NDITA J

JUDGE OF THE HIGH COURT