REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

APPEAL CASE NO: HCAA18/2023
COURT A QUO CASE NO:4478/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.
NKOANA A.J
DATE 27/06/25 SIGNATURE [redacted]

In the matter between:

MATHOMOMAYO INVESTMENT HOLDING CC **APPELLANT**

and

GAVIN CECIL GAINSFORD N.O. **1ST RESPONDENT**

KGASHANE CHRISTOPHER MONYELA N.O. **2ND RESPONDENT**

ABDURUMAN MOOLLAJIE N.O. **3rd RESPONDENT**

ROBOR PIPE SYSTEMS (PTY) LTD
(IN LIQUIDATION) **4TH RESPONDENT**

(REGISTRATION NO: 2016/117187/07)

POLOKWANE HIGH COURT

This Judgment was handed down electronically by circulation to the Parties' representatives by e-mail, the date and time for hand down of the Judgment is deemed to be **27 June 2025** at **10:00.**

JUDGMENT

NKOANA A.J

Introduction

[1] This is an appeal against the whole judgment and order of Mashaba A.J, delivered by the Court a *quo* on 7 September 2022.

[2] The Court a *quo* after hearing the matter granted the following orders:

2.1 The Respondent is ordered to pay the Fourth Applicant the amount of R862 091.56 (Eight Hundred and Sixty Two Thousand Ninety One Rand and Fifty Six Cents only).

2.2 The Respondent is ordered to pay costs of this application.

[3] The Appellant aggrieved by the orders, made an application for leave to appeal which was subsequently granted by the Court *a quo* on 10 March 2023.

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The Parties

[4] The Appellant is **Mathomomayo Investment Holding CC** a Close Corporation registered and incorporated in accordance with the Close Corporation Laws of the Republic of South Africa.

[5] The First, Second and Third Respondents have been duly appointed as joint liquidators of the Fourth Respondent, by the Master of the High Court, Johannesburg.

[6] The Fourth Respondent is **Robor Pipe Systems (PTY) LTD** a private company registered and incorporated in accordance with the Company Laws of the Republic of South Africa which is in liquidation.

Background Facts

[7] The central players in this appeal are the Appellant and the Fourth Respondent. They entered into a Credit Agreement on or about 23 January 2019. The said Credit Agreement contained terms and conditions resulting in a contractual relationship between the Appellant and the Fourth Respondent. between January 2019 and September 2019, the Fourth Respondent fulfilled its contractual obligations under the Credit Agreement by delivering the ordered goods to the Appellant. The Appellant accepted the goods. The Fourth Respondent issued invoices, as far back as 31 July 2019, but the Appellant failed to make any payment.

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[8] On 18 September 2019, the Fourth Respondent entered into voluntary liquidation. After reviewing the books and records of the Fourth Respondent, the First to Third Respondents determined that the Appellant owed a debt to the Fourth Respondent. On 1 June 2020, a Letter of Demand was sent to the Appellant wherein an amount of R 862 091.56 was sought based on the copies of invoices, delivery notes, and credit notes verifying the supply of goods by the Fourth Respondent and their acceptance by the Appellant. The letter requested payment of this amount, stating that if payment was not made, legal proceedings would be instituted. As there was no positive response, from the Appellant, the proceedings were initiated and eventually adjudicated by the Court *a quo*.

Proceedings in the Court a *quo*:

[9] The Appellant resisted the application launched by the Respondents and filed an Answering Affidavit which indicated that upon being appointed as a contractor by Sekhukhune District Municipality, it placed an order for the supply of piping equipment with the Fourth Respondent, which amounted to R5 509 392.27. The said order was placed on 15 February 2019 and was accepted by the Fourth Respondent through written acceptance. The Appellant stated that out of the order that it had placed, the Fourth Respondent only delivered the piping equipment, to an approximate value of R4 000 000.00 (Four Million Rands) and that the Fourth Respondent breached the contract, as it failed to deliver the ordered goods on the agreed date of 30 April 2019.

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[10] The Appellant denied that it entered into any Credit Agreement which incorporated credit terms and conditions. Furthermore, it stated that the Fourth Respondent never accepted the Appellant's application as Annexure "FA3" was not signed by both parties to have any force and/or effect. The Appellant argued that the Fourth Respondent was not entitled to an order for specific performance because the Fourth Respondent did not fulfill its obligation to deliver the entire order as per the agreement.

[11] The Appellant conceded that it made certain payments to the Fourth Respondent after goods were delivered. The payments were as follows:

[11.1] R984 753.68 (paid on 18 April 2019);

[11.2] R669 584.34 (paid on 31 May 2019);

[11.3] R700 000.00 (paid on 15 July 2019);

[11.4] R575 062.48 (paid on 2 September 2019);

[11.5] R575 062.48 (paid on 3 September 2019);

Total amount R3 504 462.98

[12] The Appellant stated that because of the breach perpetuated by the Fourth Respondent, it was entitled to cancel the agreement on 30 September 2019. The Fourth Respondent ought to have been aware that its failure to perform in terms of the contract would cause the Appellant to suffer damage, which were quantified to be valued at R3 362 411.94. The Appellant contended that it had a counterclaim of about R4 000 000,00 which exceeds the Fourth Respondent's claim. The Appellant then

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contended that the dispute between the parties was foreseeable, and the Respondents ought to have proceeded by way of an action procedure.

Proceedings before the Appeal Court:

[13] The Appellant's grounds for appeal can be summarised as follows:

[13.1] It relied on the defence of *exceptio adimpleti non contractus*. This defence entailed that a party couldnot claim specific performance from another, in a situation where they had not complied with their obligations in terms of the agreement or tendered performance.

[13.2] That the Court a quo erred in not finding, that there was a dispute of fact which was incapable of resolution on paper. The dispute of facts pertained to whether the Fourth Respondent had complied with the terms of the agreement to produce the piping equipment.

[14] As the Appeal Court, we were called upon to determine the following issues;

[14.1] Whether there was merit to the Appellant's version that the Respondents were not entitled to an order for specific performance, in instances where the Fourth Respondent has failed to comply with the terms of the agreement.

[14.2] Whether the Respondents were entitled to be granted an order for specific performance, in circumstances where the contract had already been cancelled.

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[14.3] Whether the alleged dispute of fact, concerning the Credit Agreement, as annexed to the Founding Affidavit, bound the parties to that agreement;

[14.4] Whether the Court a *quo* ought to have not granted the orders.

[15] The Appellant argued that the Respondents were not able to claim specific performance in circumstances where that party had failed to comply with its obligations. Moreover, the Fourth Respondent did not tender any performance to deliver the remaining piping equipment. The Appellant argued that in accordance with the general principles appliable to reciprocal obligations, a party that claimed specific performance must perform or tender to perform its own reciprocal obligations. Even if the Appellant was in breach of the contract, the party claiming specific performance was not relieved of its duty to perform.

[16] The Appellant indicated that the Respondents were obliged to allege in its Founding Affidavit that it had already performed properly or that it was ready and able to perform properly and tender performance which was not done. The First to Third Respondents failed to consider the express and implied terms associated with the purchase order placed by the Appellant and accepted by the Fourth Respondent. Furthermore, the terms and conditions stipulated that the Fourth Respondent was to deliver goods within thirty (30) days of the delivery date and that goods to the value of R1 100 000,00, had not been delivered to the Appellant. Therefore, the Respondents were not entitled to the order granted.

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[17] In respect of the factual disputes, the Appellant contended that the Respondents were not entitled to an order, as there was a material dispute of fact which could not be resolved on paper. Therefore, a final order should not have been granted in favour of the Respondents. Reliance was placed on the leading cases regarding disputes of fact being **PLASCON – EVANS PAINTS V VAN RIEBEECK PAINTS (PTY) LTD, 1984 (3) SA 623 (A).& NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS V ZUMA 2009(2)SA 277(SCA).** The Appellant indicated that the Court a *quo* misdirected itself, by failing to accept the Appellant's version because the test was that in cases of dispute of fact, an Applicant could only succeed, if the facts as stated by the Respondent, together with those facts in the Applicant's affidavit which have been admitted by the Respondent, justified the order sought. The matter was essentially decided on the Respondent's version.

[18] The Appellant noted that granting specific performance was in the discretion of the Court, but in instances where there would be unreasonable hardship that would follow, then specific performance should not be granted. It was argued further that the Court a *quo* failed to deal at all, with the aspect of specific performance and the inability of a party to claim specific performance in instances where it was at fault. The Appellant prayed for the appeal to be upheld with costs.

[19] The Respondents' contentions were that the agreement which was the subject matter of the proceedings was divisible in nature. In other words, it created several distinct

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and separate obligations. It was common cause that the Appellant placed an order pursuant to the credit agreement in the amount of R5 509 392.27. The order was broken up into separate deliveries, there were separate invoices for each delivery, which were accepted and paid for by the Appellant in the cumulative amount of R3 504 462.98. If the principle of reciprocity was to be applied, it must be applied to each distinct obligation as the ordered goods were delivered in separate distinct batches and were accepted by the Appellant as such.

[20] The Respondents indicated that once the Appellant accepted the goods, an obligation to pay for the goods received then arose. Once an invoice was generated, then payment was to be made. The Respondents sought payment, only for goods that were delivered, with their delivery having been accepted by the Appellant. There was no dispute before Court regarding the delivered goods. The Respondents contended further that, as they were not claiming payments for goods not delivered, it could not be said that there was a reciprocal obligation that arose in respect of outstanding goods. The case according to the Respondents was crisp and focused on goods that were ordered by the Appellant and were delivered to the Appellant. Such goods were not paid for by the Appellant, after the invoices were issued. The Respondents sought for the dismissal of the Appeal with Costs.

Discussion:

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[21] The defence of *exceptio adimpleti non contractus* as raised by the Appellant was based on the Fourth Respondent's alleged failure to perform or tender performance. Where one party's obligation has not been performed, and it will never be performed, the party claiming performance can treat the contract as being at the end and will be released from its reciprocal obligation. See **UNIVERSAL STORAGE SYSTEMS (PTY) LTD V CRAFFORD 2001 (4) SA 249 (W).**

[22] It was not in dispute that the Appellant placed an order in the amount of R509 392.27,00 under the existing credit agreement between the Appellant and Fourth Respondent. The Appellant conceded that goods to the value of approximately R4 000 000.00 were delivered. The ordered goods were delivered in separate batches and the Appellant made payments separately. The total amount of payment made is R3 504 462.98. From the papers it was clear that indeed the contract was divisible, as separate deliveries and payments were made.

[23] The Supreme Court of Appeal in the matter of **EXDEV (PTY) LTD AND RODNEY WOLMER v PEKUDEI INVESTMENTS (PTY) LTD, 2011(2) SA 282 (SCA)** held as follows at paragraphs 10 and 11:

> *"[10] At the outset it must be remembered that there is a distinction between the severance of a portion of a contract, eg on grounds of vagueness or illegality, and recognising that a contract may contain several distinct and*

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separate agreements divisible from each other. As was explained in Wessels, The Law of Contract in South Africa 2 ed vol 1 para 1615:

'It is often loosely said that a contract is divisible or separable where, though in form there is only one contract, in reality there are several distinct agreements entered into at the same time. There is, however, a clear distinction between this class of contract and a divisible or separable contract.

If the obligation is divisible in the material or physical sense, there is only one contract, though the subject matter may consist of several parts considered as one whole. The contract is entire, but the object of the obligation is separable into homogeneous parts. If, however, there are several distinct obligations, we are not dealing with a divisible or separable contract at all, but with a collection of separate contracts embodied in one single writing or agreement.

Thus, the sale of a quantity of coal to be delivered by instalments of so many tons is, as a rule, an entire contract in which the obligation is divisible. In such a case it may be the intention of the parties that a default on the part of the seller in delivering, or on the part of the purchaser in accepting, one instalment will not justify a cancellation of the contract (Simpson v Crippin, 1872, 8 LRQB 14: 42 LJQB 28: 27 LT 546). On the other hand, the sale of Stichus and Pamphilus for 100 and 200 aurei respectively is in reality an independent sale of Stichus for 100 and of Pamphilus for 200 aurei (D. 45.1.29.pr.).'"

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[11] Where there is a sale 'of several distinct and separate items and a price is fixed to each, the contract as a rule, will be held to be composed of several agreements'. Furthermore, the nature of the performance required under a contract can be of decisive importance, and a contract is usually divisible where it makes provision for separate or distinctive performances.3 Thus in Middleton v Carr 1949 (2) SA 374 (A) at 391 Schreiner JA, in concluding that an undertaking by a husband to pay his estranged wife a substantial sum of money was severable from a collusive agreement for divorce, said:

'But the fact that the two agreements were made at the same time does not provide sufficient reason for treating them as in fact one agreement; to reach that conclusion it would be necessary to find some express or implied interlocking of their terms.'"

[24] This Court noted that indeed the contract created several distinct and separate agreements divisible from each other and was unable to find a cogent reason why the Appellant made separate payments totaling R3 504 462.98 on various occasions and in various amounts. This Court accepts that from the documents submitted these payments were made in respect of delivered and invoiced equipment. It was also curious that the Appellant, neither in its Answering Affidavit nor Heads of Argument offered an explanation as to why it made separate payments after goods were delivered to it. This shows that by its own actions, the Appellant accepted that the order placed with the Fourth Respondent created several pairs of distinct obligations, which arose with each batch of delivery that the Appellant accepted.

[25] The Appellant was making payments to the Fourth Respondent for goods delivered up until September 2019, coincidentally the same month the Fourth Respondent

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applied for voluntary liquidation. The contract was purportedly terminated by the Appellant in January 2020. This was after the First to Third Respondents caused a letter to be written to the Appellant, demanding payment for outstanding delivered equipment. The Appellant in its papers and during argument, referred to a Counterclaim / Counter Application and/or damages claim it intended to pursue against the Fourth Respondent. Nothing materialised in this regard. It is this Courts finding that the Appellant's first ground of appeal, therefore stands to fail, as the agreement was divisible and created several pairs of distinct obligations.

[26] On the second ground of appeal, the Court *a quo* correctly found that there was no dispute of facts which prevented it from disposing of the matter. In the case of **WIGHTMAN T/A JW CONSTRUCTION v HEADFOUR (PTY) LIMITED, 2008 (3) SA 371 (SCA)** at paragraph 13 stated that the legal test for a dispute of fact was discussed and Heher JA set out the following:

> *"[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed..."*

[27] Having considered the Founding, Answering and Replying Affidavits as well as both written and oral submissions, this Court found it difficult to locate the said dispute of fact because it was not disputed, that an order was made and the goods were

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delivered in separate batches and part payment was made. The Appellant indicated that only goods approximating R4 000 000.00 (Four Million Rands) were delivered and there was an outstanding order. The concession by the Appellant that it paid an accumulative amount of R3 504 462,00 demonstrates that goods were delivered to it, whereafter the Fourth Respondent generated an invoice. After receiving the invoices, the Appellant made payments. After all, the Respondents were not claiming for goods not delivered. As already mentioned, there was no counter application nor any claim for damages initiated against the Fourth Respondent. This Court is satisfied that the contract was divisible in nature, creating numerous obligations, it could not be said that a dispute of fact existed. Having received the goods delivered, the Appellant was obligated to pay for them. This Court is satisfied that there was no merit in the second ground of appeal, and it is dismissed.

Ruling:

[28] In light of the aforesaid having considered all the relevant documentation with specific reference to the Appellant's version, this Court is satisfied that the Appeal is without merit and must fail.

Costs:

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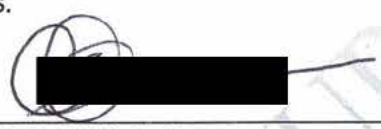
[29] Both parties sought costs to be awarded them in the event of them succeeding. Costs follow the result, and there is no reason to order differently.

Order:

[30] In the result the following order is made:

[30.1] The appeal is dismissed with costs.



NKOANA A.J
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

I agree

PILLAY A.J
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

I agree

MASHAMBA A.J
ACTING JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE

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Heard on 11 October 2024

Appearances:

For the Appellant:	Adv. A A Basson
Instructed by	Thomas and Swanepoel Inc. Tzaneen
For the First to Fourth Respondents:	Adv. T Ramogale
Instructed by	Edward Nathan and Sonnenbergs Inc Sandton

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