

SOUTH AFRICA / JUDGMENT

Alberts, Bekker, Vorster, Pillay & Associates v Makgolego Troskie Incorporated (50109/2012) [2013] ZAGPPHC 445 (4 December 2013)

[2013] ZAGPPHC 445**COURT**

North Gauteng High Court, Pretoria

BEFORE

Naidoo AJ

CASE / FILE NUMBER

50109/2012

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA****(NORTH GAUTENG****HIGH COURT, PRETORIA)****CASE****NO. 50109/2012****DATE:**

04 DECEMBER 2013

In the matter between:

ALBERTS, BEKKER, VORSTER,
PILLAY.....APPLICANT
& ASSOCIATES
and
MAKGOLEGO TROSKIE
INCORPORATED.....RESPONDENT

JUDGMENT

NAIDOO AJ

- (1) This is an application for leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench of the North Gauteng High Court, against the refusal of an application for postponement on Monday 5 August 2013, and/or the granting of a final order for the liquidation of the applicant, who was the respondent in the main application. The application also incorporated, inter alia, a prayer for condonation for late filing of the application for postponement, handed up to court on 5 August

2013. The application for postponement was served on the respondent on Friday 2 August 2013 at 14:15.

- (2) The application for postponement was vigorously opposed by the respondent (applicant in the main action), who implored the court to enforce a court order made on 14 June 2013, being the hearing of the matter immediately prior to the matter coming before this court. That order read as follows:

“By agreement between the parties an order is made in the following terms:

1. That the respondent is ordered to pay an amount of R1 400 000.00 (ONE MILLION FOUR HUNDRED THOUSAND RAND) to the Applicant within 30 days from date of granting this order;
 2. That the Respondent is ordered to pay the Applicant’s agreed or taxed costs of the main application and the costs occasioned by the postponement of the application on 29 April 2013, within 7 days of receipt of agreement or taxation;
 3. That in the event that the Respondent fails to comply with the provisions in terms of the abovementioned prayers 1 and 2 within 30 days of date of granting this order the Applicant Magolego Troskie Inc t/a MMT Attorneys undertakes to furnish the respondent with a tax invoice in the amount of R1 400 000,00 (ONE MILLION FOUR HUNDRED THOUSAND RAND) plus taxed or agreed legal costs, which tax invoice the Respondent, Alberts Bekker Vorster Pillay & Associates, undertakes to present to the Standard Bank of South Africa Ltd, Menlyn for immediate payment of the amount of R1 400 000.00 (ONE MILLION FOUR HUNDRED THOUSAND RAND) plus taxed or agreed legal costs to the Applicant in terms of the bank guarantee issued by Norange Capital Markets in favour of the Respondent, Alberts Bekker Vorster Pillay & Associates Inc;
 4. That in the event that the Respondent, Alberts Bekker Vorster Pillay & Associates Inc do not comply with the provisions of prayers 1, 2 and 3 above, the Respondent, Alberts Bekker Vorster Pillay & Associates, consent to a liquidation order granted against them on an unopposed basis provided that Notice of Set Down be served prior to taking the final liquidation order.”
- (3) By way of background, the respondent rendered certain legal services to the applicant and as a result of the non-payment of the amount owed in respect of such services, the respondent obtained judgment against the applicant, in the Pretoria Magistrate’s Court, in the amount of R1 986 267.00 (One Million Nine Hundred and Eighty Six Thousand Two Hundred and Sixty Seven Rand) plus costs. The judgment remained unsatisfied, and a warrant of execution against the movable assets of the applicant yielded a nulla bona return by the Sherriff of the Court. This, in turn, resulted in an application being brought by the respondent for the provisional winding up of the applicant.

- (4) The applicant opposed the application, but failed to file an answering affidavit, hence the winding up application being enrolled on the unopposed roll for 12 October 2012. On the day of the hearing, a representative of the applicant arrived with its legal representative and applied for a postponement of the matter to file its answering affidavit, which was granted. The answering affidavit was thereafter filed (albeit after the time stipulated in the court order of 12 October 2012).
- (5) By way of a notice of set down served on the applicant on 26 March 2013, the matter was then enrolled on the opposed motion court roll for hearing on Monday 29 April 2013. After a change of attorneys representing the applicant and several unsuccessful attempts by the respondent to secure the applicant's timeous compliance with the Rules of Court as well as the Practice Directives of this Division, the applicant, on Friday 26 April 2013, served on the respondents attorneys, an application for postponement of the winding-up application set down for Monday 29 April 2013.
- (6) The basis for the postponement sought was that the applicant had successfully concluded an international financial transaction which yielded a commission in an amount in excess of the amount owed to the respondent. That commission was expected in a short period from the date of hearing (29 April 2013). Consequently, a postponement was granted on 29 April 2013 and the court ordered as follows:
1. That the application be and is hereby postponed until 14 June 2013
 2. That the respondent pays the applicant's costs occasioned by the postponement.
 3. That the applicant is granted leave to enroll the main application for the final final winding-up of the respondent again, in the event that any of the orders set out below are not complied with:
- 3.1 The respondent shall make payment of R1 846 267.00 before or on 31 May 2013, plus interest at 15.5% a tempore morae to date of payment.
- 3.2 The respondent shall make payment of the applicant's taxed attorney and client costs of the main application and the attorney and client costs occasioned by the postponement of the application on 29 April 2013, within seven (7) days of receipt"
- (7) Due to administrative reasons, the matter could not be heard in court on 14 June 2013, but the applicant and respondent prepared a draft order which resulted in the order set out in (2) above. I pause to note that no payment at all was made by the applicant to the respondent in terms of the court orders made on 29 April 2013 and 14 June 2013, resulting in the matter being set down on Monday 5 August 2013 before this court. As required by the court order dated 14 June 2013, the respondent served on the applicant, on 23 July 2013, a notice of set down for the matter to be heard on the unopposed motion court roll on 5 August 2013.

- (8) There was no reaction from the applicant until Friday 2 August 2013, when it served the application for postponement on the respondent. Needless to say, the application was again strenuously opposed by the respondent. The grounds for the postponement were contained in the founding affidavit setting out a somewhat convoluted account of the various purported international transactions that the applicant concluded, entitling it to payment of vast amounts of monies, thereby placing it in a position to pay the debt owed to the respondent within two to three weeks from 2 August

2013. A confirmatory affidavit by one Johannes Hendrik Steenkamp

dated 3 August 2013 was also filed, alleging that, acting on behalf of the applicant, he instructed a Canadian law firm to make a direct payment of USD 160 000.00 into the bank account of the respondent. He gave no indication of when such an instruction was given, but attached to his confirmatory affidavit was a letter from an entity calling itself Elite International Capital Limited. The letter indicates that the payment instruction to transfer funds into the account of the respondent was received by them on 10 July 2013 and that the wire transfer to the respondent would be made by 17 July

2013. The confirmatory affidavit was signed on 3 August 2013 (notably a day after the application for postponement was served on the respondent).

- (9) The representative of the applicant, Mr Andre Vorster, appeared in court, in person, on 5 August and requested the postponement, alleging that the advocate instructed to appear for him was unable to attend due to the death of his mother. In any event, he produced a copy of what appeared to be a money draft issued on 6 June 2013, in favour of the applicant for payment of an amount of Euro 15 000 000.00, alleging that payment in terms of that draft was due shortly, hence a two week postponement was sought. After consideration of the document he brought to court, it transpired that the amount allegedly due to the applicant could only be collected on the maturity date which was 6 June 2014. It is also noteworthy that the relief sought and the grounds for the postponement were very similar to the application for postponement made on the eve of the hearing scheduled for 29 April 2013. It must also be noted that up to this date (5 August 2013) no payments were made to the respondent, in spite of previous undertakings and the court orders mentioned above, and specifically, Mr Vorster gave no explanation for why the transfer of funds to the respondent on 17 July 2013, mentioned above, did not take place.
- (10) Having considered the history of the matter and the previous court orders made, it was apparent that the applicant was not in a position to pay its debt to the respondent and repeatedly resorted to spurious tactics to buy itself time in avoidance of a winding-up order. It was an unavoidable inference that the applicant had lacked bona fides in its conduct of this matter, and resorted to the tactics referred to, in an attempt to mask its inability to pay its debts.

- (11) The granting or refusal of a postponement is eminently within the discretion of the court. Certain legal principles and guidelines apply when a court considers an application for postponement:

11.1 The court's discretion in considering an application for postponement must be exercised judiciously and for substantial

reasons.

11.2 The application must be made timeously and must contain a full and satisfactory explanation of the reasons why the application is necessary;

11.3 The application must be bona fides and not brought to obtain an improper or unfair advantage over the respondent.

[See National Police Service Union v Minister of Safety and Security 2000(4) SA 1110 (CC); Greyvenstein v Neethling 1952(1) SA 463 (C):

MyburghTransport v Botha t/a SA Truck Bodies1991(3) SA 310 (NMS)]

- (12) In considering the circumstances and facts outlined above, this court found that it was not in a position to, once again, come to the rescue of the applicant (respondent in the main application). In the interests of fairness and justice, this court felt obliged to uphold the order of court made on 14 June 2013 and this led to the refusal of the postponement on 5 August 2013.

- (13) The respondent raised, in its Heads of Argument, the point in limine that the application for leave to appeal is defective in that it did not comply with Rule 49(1)(d), which provides, inter alia, that:

“The application for leave to appeal should state whether the whole or part only of the judgment or order is appealed against and if only part of such judgment or order is appealed against, it shall state which part and shall further specify the finding of fact and/or ruling of [aw appealed against and the grounds upon which the appeal is founded”

The respondent contended that the grounds of appeal must be set out clearly and succinctly in unambiguous terms, so that the court and the respondent are aware of what the applicant's case is and what case the respondent must meet in opposing such an application. The applicant failed to do so and the respondent therefore contended that the application for leave to appeal must fail.

- (14) The application for leave to appeal indeed falls far short of the requirements of Rule 49(1)(d), and would fall to be dismissed on that ground alone. The court however, takes into consideration that the refusal of the postponement on 5 August 2013 led to the grant of a final order for liquidation, and hence considered it prudent to give full reasons for its ruling on 5 August 2013. In considering the application for leave to appeal, important considerations are whether there is any prospect of success on appeal and whether another

could would have ruled differently to this court. It must also be pointed out that a court has the discretion, if it considers that the interests of justice and the interests of creditors demand it, to grant a final order of sequestration.

- (15) From the history of the matter as outlined above, it is clear that the applicant in this matter is unable to satisfy its debts. The manner in which the respondent chose to litigate against the respondent in this matter is also indicative of the fact that it would not hesitate to resort to spurious tactics and strategies to hide the fact that it is unable to make payment of its debts, which are clearly due. This is clearly not in the interest of creditors. I am not convinced that the applicant has any prospect

of success on appeal or that another court would have come to a different decision.

- (16) I turn now to the respondent's application for the costs in this matter to be awarded *de bonis propriis* against the applicant's attorney, Roeleof van der Merwe. Costs orders are also in the discretion of the court, and the usual situation is that costs follow the result. The court can also make costs orders to show its dissatisfaction or disapproval of the manner in which a particular party conducts himself/herself and this may sometimes entail making an adverse costs order against a successful party. In awarding costs against a legal representative personally in a matter, the court must assess his/her conduct and the manner in which he conducted the litigation in the matter.

- (17) Mr Roelof van der Merwe has been the correspondent attorney in Pretoria for Van der Hoven van Zyl Attorneys, who are based in Cape Town, and who placed themselves on record as the applicant's attorneys by way of notice dated and served on 16 April

2013. Prior to that, the applicant was represented by Pretoria-based attorneys, De Klerk and Marais Inc., the latter having withdrawn as the applicant's attorneys of record by way of a notice of withdrawal dated 28 March 2013 and apparently served on the respondent on 9 April 2013. Mr van der Merwe has therefore been involved in this matter since 16 April 2013, and would have acted for the applicant's in the hearing on 29 April 2013. As with the current matter, the application for postponement at that

stage was also served on the Friday (26th April 2013) before the scheduled hearing on the Monday thereafter. It is not clear who

drafted that application for postponement, but the pattern of approaching the court for postponements at the proverbial eleventh

hour, has emerged since that date. A further feature has been the empty promises for payment of the debt owed to the respondent, within a few days of each application for postponement. Mr van der Merwe, as an officer of the court, must have been fully aware, after 29th April 2013, that such payments were not forthcoming, but made himself party to further similar conduct on 14 June 2013, and again on 5 August 2013, with similar requests for postponements and offers of speedy payment to the respondent. He was not open and honest with the court, given the spurious claims made by the applicant's representative, Mr Andre Vorster, regarding the impending

receipt of vast sums of money by the applicant.

(18) His non-appearance or that of any other legal representative on 12 September 2013 and the reasons therefor are similarly shrouded in unacceptable explanations that merely serve to cast a cloud over the conduct of the applicant and Mr van der Merwe. On 12 August 2013, the court received a letter by electronic mail from Mr van der Merwe (ostensibly sent on 11 August

2013) advising that "...we will be in attendance at court tomorrow at 9h00 ready to present due argument in the matter". Mr Vorster explained that Mr van der Merwe's absence on 12 August 2012 was due to his (van der Merwe) being away on business.

(19) It was only on 18 September 2013, that Mr van der Merwe revealed, via a written statement, that he had allegedly been arrested on 5 September and was in custody until the afternoon of 12 September 2013. His explanation regarding the electronic communication to the court was that it was sent by his office as they did not know what else to do. He gave no satisfactory explanation for why his instructing attorney was not contacted to deal with the matter in his absence or why counsel who had consulted with Mr Vorster prior to 12 August 2013 was not properly mandated to appear on 12 August 2013. In addition, it would appear that Mr van der Merwe drafted the Notice of Application for Leave to Appeal, although he insisted that he merely assisted in the drafting thereof. It is not clear who he assisted. He attempted, however, to create the impression that he signed it only after it was approved by his

instructing attorney. It is also clear that he made no attempt whatsoever to obtain a transcript of proceedings or even listen to the recording of proceedings relevant to 5 August 2013, in order to enable him to properly draft the said notice. He appears to have done so on 6 August 2012 and on the say-so of Mr Vorster, a lay person, hence the inaccuracies therein. It is also noteworthy that, on his version, he would, purportedly, still have been in custody on 6 August 2013 when he drafted the Notice of Application for Leave to Appeal. His conduct was certainly not in the best interests of his client. I pause to mention that on 18 September 2013, Attorneys Cremer and Strydom, who had also instructed counsel to appear for the applicant, placed themselves on record for the applicant, after Mr van der Merwe withdrew as their attorney of record.

(20) I had seriously considered granting the costs order *de bonis propriis* against Mr van der Merwe although he is the correspondent attorney in this matter, by virtue of the manner in which he has conducted himself since he became involved in this matter. However, I cannot ignore the fact that he was acting under instructions from the instructing attorney and his culpability may be reduced in view of that. I will reluctantly give him the benefit of the doubt. However, I am of the view that both his conduct as well as that of his instructing attorney should be brought to the attention of the relevant Law Societies. I am also of the view that the applicant's conduct throughout this matter is serious enough to attract a strict sanction, and that it should be visited

with an adverse costs order.

(21) In the circumstances, I make the following order:

19.1 The application for leave to appeal is refused;

19.2 The applicant is ordered to pay the costs of this matter on an attorney and client scale

19.3 The Registrar of this court is directed to bring a copy of this judgment and the record of proceedings to the attention of the Law Society for the Northern Provinces for further investigation into the conduct of Attorney Roelof van der Merwe and/or his instructing attorneys Van der Hoven van Zyl.

Dates of Hearing:.....5 August, 12 and 18 September 2013

Date of judgment:.....December 2013

Counsel for Applicant:.....Mr HC Van Zyl

Instructed by:.....Cremer and Strydom

Counsel for the Respondent:.....Ms S Maritz

Instructed by:Magolego Troskie Incorporated

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