

SOUTH AFRICA / JUDGMENT

China Construction Bank Corporation Johannesburg Branch v Gobel Agentskappe CC and Others (52295/2015) [2017] ZAGPPHC 447 (31 July 2017) [2017] ZAGPPHC 447

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson

CASE / FILE NUMBER

52295/2015

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 52295/2015

2017/07/31

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

CHINA CONSTRUCTION BANK CORPORATION

JOHANNESBURG BRANCH Plaintiff

and

GOBEL AGENTSKAPPE CC 1st Defendant

PETER HERMANN GOBEL 2nd Defendant

AUTOHAUS GOBEL NORTHCLIFF (PTY) LTD 3rd Defendant

ERF 717B HATFIELD CC 4th Defendant

2GENERAL HELPLINE CC 5th Defendant

QUICK LEAP INVESTMENTS 328 (PTY) LTD 6th Defendant

RED CORAL INVESTMENTS (PTY) LTD 7th Defendant

SUNSET BAY TRADING 327 (PTY) LTD 8th Defendant

JUDGMENT:

REASONS

AC BASSON, J

[1] This matter served before me on 20 April 2017. I made an order dismissing the application for a postponement, with costs, which

costs include the costs of two counsels.

[2] The nature of the claim is for monies lent and advanced, by the plaintiff, to the first defendant under a term loan facility

agreement concluded between the plaintiff and the first defendant. The second to seventh defendants are sued as sureties. The plaintiff

claims the sum of R 72 297 017.65 from the first, second, third, fourth, fifth, sixth and seventh defendants, jointly and severally.

[3] At the time when the matter served before me, the first, second and fourth to seventh defendants applied for a postponement of the main action against all the defendants, (applicants in the application for postponement) except for the third defendant. I will refer to the parties as they are cited in the main action. The court was also informed of the following: that the fourth, sixth and seventh defendants have been deregistered but that the fourth defendant is in the process of re-registration and that the first and fifth defendants are still in business but are in the process of being de-registered.³

[4] All the defendants except for the third defendant are controlled by the second defendant (Mr Peter Gobel). The third defendant is controlled by Mr Karl Gobel. Mr Peter Gobel and Mr Karl Gobel are brothers. Mr Peter Gobel and the third defendant have no financial or any other interests in the first defendant.

Application for postponement

[5] The deponent to the founding affidavit in the application to postpone is Mr Robert Scott ("Scott") - the attorney acting on behalf of the second defendant (Mr Peter Gobel).

[6] The defendants essentially relied on the following seven grounds for a postponement: (i) the matter is not ripe for hearing as the plaintiff has failed to make proper discovery of the relevant documentation; (ii) the defendants will be filing a further notice in terms of Rule 35(3) for full and proper discovery. As pointed out, it is contended that the matter is not ripe for hearing as the plaintiff has failed to make full and proper discovery of certain documents which are material to the issue in the matter; (iii) the defendants intend introducing

additional defences to the plaintiffs claim; (iv) the defendants intend to introduce various counter-claims; (v) the plaintiff has postponed the trial against the third defendant; (vi) the second defendant is unable to attend the hearing as he is unable to fund a trip to South Africa (financial constraints). In respect of the shortage of funds, Scott explains that he can attest to the financial distress as Gobel stands in arrears in relation to payments of accounts rendered to him by his firm. The second defendant blames the plaintiff for his financial predicament because of the manner in which the plaintiff allegedly manages the long term loan facility; (vii) there would be no prejudice to the plaintiff if the trial is postponed as the plaintiff has sufficient mortgage security to cover the outstanding debt; and (viii) the second defendant intends to refer the conduct of Rand Asia Trade (Pty) Ltd and that of the plaintiff to the Financial Services Board for investigation.

- [7] On 12 April 2017, Scott dispatched a letter to Mr Bhayat ("Bhayat" of Bowman Gilfillan) setting out the defendants' intention to apply for a postponement. As will be pointed out herein below, this letter was dispatched shortly before the date on which the matter was enrolled for trial.

Submissions

on behalf of the plaintiff

- [8] Bhayat - the attorney acting on behalf of the plaintiff - deposed the affidavit opposing the application for postponement. He confirms that he received a letter from the attorneys acting on behalf of the defendants during the course of the evening of Wednesday, 12 April 2017 - which was three days before the commencement of the trial on Thursday, 20 April 2017 (in light of the Easter weekend). This letter was preceded by a telephone call from Scott during which Bhayat was informed that the defendants intended seeking a postponement of the trial. The defendants were informed that any application for a postponement would be opposed. The defendants were placed on terms to deliver a formal application for a postponement no later than 16H00 on Thursday, 13 April 2017 - which is the day before the commencement of the Easter weekend so as to enable the plaintiff to deal with the application, particularly taking into account the fact that the defendants have been aware of the trial date for some 10 months.
- [9] The defendants failed to deliver a formal application for postponement by close of business on Thursday, 13 April 2017 and instead dispatched a letter dated 13 April 2017 to the plaintiff, indicating that the defendants would "endeavour to do so as soon as possible". The plaintiff's attorneys then dispatched a letter to the defendants' attorneys requesting that they deliver their application no later than 16H00 on Sunday, 16 April 2017 to afford the plaintiff an opportunity to respond to the application. Again the defendants

failed to comply with the deadline. The plaintiff then proceeded to prepare an opposing affidavit in answer to the attorneys' letter

dated 12 April 2017, in so far it was possible to do so.

[10] The application was only received by e-mail at 20H14 on Tuesday, 18 April 2017 - one day prior to the commencement of the trial. The affidavit in support of the application for postponement was not signed. In the e-mail it was further indicated that there may even be changes and additions to the founding affidavit. This *modus operandi* is, according to the plaintiff, indicative of the defendants' prior conduct to delay the prosecution of the plaintiff's claim at every opportunity. The late filing of the application also made it impossible for the plaintiff to properly deal with the allegations

contained in the founding affidavit.

[11] According to the plaintiff it would appear, in light of the history of the matter, that the defendants are quite content to delay the orderly prosecution of the plaintiff's claim at every opportunity. More in particular, it was submitted that the reason for the defendants only having delivered their letter dated 12 April 2017, three days prior to the commencement of the trial, in circumstances where they have known about the trial for some 10 months, is part of a strategy devised by them as early as September 2015 to delay the plaintiff's prosecution of the claim. In this regard the plaintiff referred to the documentation attached to the defendants' letter dated 12 April 2017 as well as the correspondence that was exchanged between the parties over the period 2015 to 2017. From this documentation, so it was submitted, it is evident that the principal grounds upon which the defendants contend for a postponement have been extensively debated between the parties since 2015. More in particular, the defendants were informed on more than one occasion, that the plaintiff has made proper discovery and should the defendants intend to amend their plea, they should do so timeously. They were also informed that should the defendants intend to introduce a counter-claim, they should do so timeously. Despite all of this, the defendants did not proceed to do so, but instead waited until three days before the commencement of the trial to seek a postponement on these (same) grounds.

[12] The court was also referred to the history preceding this application: the combined summons was issued as far back as 7 July

2015. On 25 November 2015, the first and second defendants' plea was delivered. Although the attorneys on behalf of the defendants have contended that they also act on behalf of the fourth to seventh defendants, the first and second defendants' pleas, referring to this fact, have not been amended. Furthermore, in paragraph 4 of the plea, the first and second defendants alleged that they have no knowledge of the allegations made by the plaintiff in relation to the fourth to seventh defendants in circumstances where it is common cause that the second defendant (Gobel) is the sole director of the fourth to seventh defendants.

[13] A pre-trial was held on 15 June 2016. In the letter dated 12 April 2017, reference is made to a letter dated 26 April 2016 which is the principal letter relied upon by the defendants for the postponement now sought by them. During the pre-trial the defendants were specifically asked if they intended to amend their plea and if so, they were requested to do so within 10

court days. This did not happen. The defendants also contended that they could not amend their plea due to the plaintiff's failure to make proper discovery. The defendants were then specifically requested to indicate to the plaintiff if they require discovery before they could amend their plea and if so, to precisely indicate which documents they required in order to amend their plea. The defendants did not revert back to the plaintiff in this regard.

- [14] The issue of the defendant's financial constraints was also discussed at the pre-trial. It is disputed in the answering affidavit that the second defendant (as the sole representative of the remaining defendants) are unable to travel to South Africa as he has, over the past two years, regularly commuted between the United Kingdom and South Africa. It is further pointed out that the trial was enrolled for hearing on 4 July 2016: the defendants and Mr Peter Gobel therefore had 10 months' notice of the trial date. Furthermore,

according to the plaintiff, Gobel (who disputes this allegation) also travelled between the two countries during the course of the last 10 months.

- [15] These issues are now used as a basis to apply for a postponement despite the fact that these issues were already alive months ago.

- [16] The plaintiff also points out in the answering affidavit that it had been required to launch various applications to seek relief

compelling the defendants to comply with the rules of this court. The defendants have also failed to effect payment on six of the seven costs orders which have been granted against them. The plaintiff is yet to prepare its bill of costs, pursuant to the last cost order granted in its favour on 14 March 2017.

- [17] In respect of prejudice, it was submitted on behalf of the plaintiff that it is not correct to conclude that the plaintiff will suffer no prejudice as a consequence of the postponement. In this regard it was contended on behalf of defendants that the plaintiff is entitled to interest and that the plaintiff has more than sufficient mortgage security to cover the outstanding debt. This was disputed by the plaintiff. Although the plaintiff concedes that it is entitled to interest on the outstanding debt, the court's attention was drawn to the fact that, on Gobel's own version, the defendants are unable to effect payment of the capital amount due to the plaintiff, let alone interest. Furthermore, if regard is had to the letter dated 12 April 2017 and more in particular clause 4 thereof, it is clear that Gobel is a man of straw. It was further pointed out that, at the time when the claim was instituted, the plaintiff's claim was for payment of an amount of R74 083 021 .44 with interest at the rate of 9% per annum calculated as from 22 June 2015. The plaintiff's claim at present, inclusive of interest, is in the region of R86 million. The amount of R86 million continues to accrue interest on a monthly basis in excess of R800 000.00 per month. In light of the fact that no capital repayments are made towards the outstanding debt, the indebtedness of the plaintiff will only increase exponentially with each passing month. According to the plaintiff, the current mortgage security is no longer adequate to meet the outstanding indebtedness, particularly in light of the fact that the debt is increasing on a monthly basis. It was therefore,

specifically denied that the plaintiff has more than sufficient "mortgage security" to cover the outstanding debt, particularly in light of the fact that the value of the mortgaged properties has decreased. Three of the mortgaged properties are vacant, one of which has been extensively damaged and has fallen into a state of disrepair. The plaintiff further reiterated the fact that six of the seven costs orders that have been obtained against the defendants, have not yet been paid, despite the fact that they have been submitted to the defendants'

attorneys. In this regard Bhayat pointed out that he has not even been given the courtesy- of a response in respect of these costs

orders.

[18] In its reply, the defendants merely stated that there is no prejudice to the plaintiff and that the plaintiff is somehow to be blamed for not settling the matter but instead are persisting with "aggressive litigationu.

The position of the third defendant

[19] The plaintiff and the third defendant have on a previous occasion agreed to postpone the trial as Mr Karl Gobel who, as already pointed out, is the "voice" and "controlling mind" of the third defendant (Autohaus Gobel Northcliff (Pty) Ltd) and the only one with personal knowledge of the third defendant's defence, has recently been diagnosed with cancer. In his application to this court in which he sought an order that the plaintiff's claim in the main action, as against the third defendant be postponed, he explained that he is medically unfit to attend the trial.

[20] In his application Mr Karl Gobel explained that, during the end of 2010 and beginning of 2011, the first defendant concluded a facility agreement in terms of which the plaintiff would provide the first defendant with a R1 00 million loan facility. During the period November 2010 to October 2011, the second to seventh defendants concluded surety agreements in favour of the plaintiff and on behalf of the first defendant. The third defendant (represented by Mr Karl Gobel) only concluded its suretyship agreement some 10 months after the conclusion of the facility agreement and was not a party to the conclusion of the facility agreement. According to Mr Karl Gobel's affidavit, he is a not party to the facility agreement or the dispute that revolves around it. Furthermore, the third defendant's defence is separate and standalone to any defences that the first, second or fourth to seventh defendants may have. He accordingly submitted in his affidavit that nothing prevents the plaintiff from persisting with its claim against the other defendants

[21] In respect of the postponement of the trial against the third defendant, Bhayat confirmed in his answering affidavit that Karl

Gobel is the only one with personal knowledge of the third defendant's defence and in light of the fact that the plaintiffs claim, as against the third defendant and the third defendant's defence, are wholly separate from the remaining defendants, it was agreed to postpone the trial against the third defendant. Bhayat also confirmed that this decision was also informed by the medical condition of Mr Karl Gobel.

Postponement

[22] It is trite that postponements are not for the taking and that they have to be properly motivated. Importantly, a court will consider whether an appropriate costs order will nullify the opposing party's prejudice. See in this regard *Carephone (Pty) Ltd v Marcus NO and Others*[1] where the court held as follows:

"[54] In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice."

See also *Lekolwane v The Minister of Justice and Constitutional Development*. [2]

"[17] The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes

into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties,

whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application."

[23] A court faced with an application for postponement must bear in mind on the one hand, that a plaintiff is entitled to an expeditious

resolution of its claim and on the other hand, that a defendant is also entitled to the right to put its case for consideration before a court. Where a litigant is the author of its own misfortune, it should also be taken into account in deciding whether or not to grant a postponement. See in this regard: *Momentum Life Assurers Ltd v Thirion*[3]:

"[34] Of course no court would feel the urge to come to the assistance of a litigant who has been the author of his own misfortune and has suffered injustice by his own conduct. Cognisance must, therefore, be taken of all the relevant facts and circumstances giving rise to such misfortune and injustice. If he has been careless, dilatory or in bad faith (*mala fide*), he cannot expect the courts to come to his assistance."

[24] Having regard to the history of the matter, the correspondence exchanged between the parties regarding further discovery and a further possible amendment of the pleadings, I am not persuaded that the defendants have properly motivated a postponement. The

defendants' were aware of the trial date for months and has elected to bring an application for a postponement on extremely short notice to the plaintiff. Although a court will always acutely be aware of the importance of providing a party with an opportunity to place his or her facts before a court, a court should be mindful, in exercising its discretion, that a plaintiff also has an equal right to have its claim adjudicated without undue delay. There is simply no plausible explanation as to why the application for postponement was brought on such extreme short notice.

There is also no plausible explanation before the court why the defendants remained completely inactive for months and made no attempt to amend their pleadings. Lastly, I have also weighed up the respective prejudice that the parties may suffer. In this regard, I am persuaded that the prejudice that the plaintiff will suffer, as set out by the plaintiff in the answering affidavit, far outweighs the prejudice that would be suffered by the defendants. More in particular, I have taken into account that the claim against the defendants have increased considerably and continues to increase on a monthly basis. This fact, coupled with the fact that there does not exist sufficient mortgage security to cover the outstanding debt as well as the fact that the second defendant is by his own admission a man of straw, tips the scales overwhelmingly in favour of the plaintiff. I have also taken into account the fact that the defendants have not settled the various cost orders against them and that they aren't even able to pay their own legal costs.

[25] I have also referred to the fact that some of the defendants have been deregistered and that one is in the process of deregistration.

This fact has a profound effect on the ability of the defendants to repay the loan, in that the property of the company passes into the ownership of the state as *bona vacantia*. See in this regard: *Newlands Surgical Clinic (Pty) Ltd v Peninsula Eye Clinic (Pty) Ltd*[4]:

"[15] This brings me to the issues relating to the retrospective effect of Newlands' reinstatement as a company under s 82(4) of the Act, those being the only ones arising from the ground upon which leave to appeal was obtained and hence the only ones open for reconsideration. The issues thus arising must be understood in the context of the established principle that deregistration puts an end to the existence of a company. It brings an end to its corporate personality 'in the same way that a natural person ceases to exist at death' (see *H Miller and Others v Nafcoc Investment Holding Co Ltd and Others* 2010 (6) SA 390 (SCA) ([2010] 4 All SA 44) para 11). All subsequent actions purportedly taken on behalf of the deregistered company are consequently void and of no effect. Its property passes automatically – ie without any form of delivery - into the

ownership of the state as bona vacantia (see eg I Rainbow Diamonds (Edms) Bpk en Andere v Suid- Afrikaanse Nasionale Lewensassuransiematskappy 1984 (3) SA 1 (A) at 10-11). It follows that unless the reinstatement of Newlands has, or is afforded, retrospective effect, (a) the arbitration proceedings; (b) the associated court proceedings; together with (c) the orders and awards that were made in favour of Peninsula against Newlands in those proceedings, would simply be null and void. This is so because, as far as dates are concerned, we know that Newlands was deregistered on 4 January 2008 and that all these proceedings occurred before it was reinstated on 3 April 2012. To say that a conclusion of non-retrospectivity would have a seriously detrimental effect on Peninsula would clearly be an understatement."

[26] In the event the following order was made:

"The application is dismissed with costs inclusive of the costs of two counsels."

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv AJ Eyles SC

Adv R Ismail

Instructed by: Bowman Gilfillan Inc

For the first, second, fourth, fifth, sixth, seventh and eight defendants: Adv Campbell

Instructed by: Clyde & Company (Klagsbrun Edelstein Bosman De Vries Inc)

[1] 1999 (3) SA 304 (LAC) at para [54].

[2] 2006 JDR 0897 (CC) at para [17]

[3] [2002] 2 All SA 62 (C) at para [34].

[4] 2015(4) SA 34 (SCA) at para [15].

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