

SOUTH AFRICA / JUDGMENT

Cytek Cycles Distributor CC v Bicycle Company (Pty) Ltd and Another (2024/015605) [2025] ZAGPJHC 450 (2 May 2025)

[2025] ZAGPJHC 450

COURT

South Gauteng High Court, Johannesburg

BEFORE

A Liversage

CASE / FILE NUMBER

2024/015605

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FLYNOTES:

PROFESSION

– Legal practitioner – Unavailability

– To

argue opposed motion on date allocated by presiding judge –

Undesirable practice developing in Division – Practice

Directive being abused by some legal practitioners – Conduct unacceptable and breach of Rule 28(5) of the Code of Conduct

–

Application in this case postponed sine die – Unavailable

practitioner and attorney to pay the wasted costs

occasioned by

postponement on party and party basis on Scale A – Attorney

forfeiting any fees in preparation of and

attending the hearing.

IN

THE HIGH COURT OF SOUTH AFRICA

[GAUTENG

LOCAL DIVISION, JOHANNESBURG]

CASE

NUMBER: 2024-015605

(1)

REPORTABLE: YES.

(2)
OF INTEREST TO OTHER JUDGES: YES.

(3)
REVISED: NO.

A
LIVERSAGE AJ

[*
The date of this judgment, despite any contraindications contained
herein, is the date of uploading onto CaseLines.]
IN

THE MATTER BETWEEN: CYTEK
CYCLE DISTRIBUTOR CC
Applicant
AND
THE
BICYCLE COMPANY (PTY) LTD
First Respondent
DAVID
HERMANUS LABUSCHAGNE
Second Respondent

JUDGMENT

Summary: Opposed Motion Court – Unavailability of Legal Practitioner

[1] This is an opposed motion set down for the week commencing on Monday, 24 February 2025.

[2] The Applicant seeks the following relief:

“1. Judgement against the 1st Respondent for payment of an amount of R 811 060.52 (...),

2. Declaring the 2nd Respondent liable for payment of the amount of R 811 060.52 (...) jointly and/ or severally with the 1st Respondent,

3. That interest be made payable by the Respondents jointly and/ or severally on the aforesaid amount of R 811 060.52 at the prescribed rate of 11.75% per annum from date of service of this Application,

4. That the 1st Respondent and 2nd Respondent be Ordered to pay the costs of this Application on scale as between Party and Party, jointly and/ or severally,

5. An order for further and/ or alternative relief as may be just or required.”

[3] The following chronology of events is relevant:

[3.1] 13 February 2024 – The application is issued;

[3.2] 8 March 2024 – The First and Second Respondents served their notice of intention to oppose;

[3.3] 25 March 2024 – The First Respondent was voluntarily liquidated;

[3.4] 29 April 2024 – The First and Second Respondents filed an answering affidavit;

[3.5] 30 April 2024 – The application served in the Unopposed Motion Court when it was removed by agreement and costs reserved;

[3.6] 14 May 2024 – The Applicant’s replying affidavit was filed;

[3.7] 7 June 2024 – The Applicant filed provisional heads of argument, signed by Mr JC Van der Merwe, the Applicant’s attorney of record (“Mr Van der Merwe”), ostensibly with right of appearance in terms of section 25 of the Legal Practice Act 28 of 2014 (“LPA”);

[3.8] 25 June 2024 – The Applicant’s chronology was filed by Mr Van der Merwe;

[3.9] 8 July 2024 – The matter was set down for hearing by the Applicant in the Opposed Motion Court for the week of 24 February

2025;

[3.10] 1 October 2024 – The Second Respondent filed a notice of motion indicating that on 24 February 2025, application will be made for an order:

“1. That the Supplementary Affidavit attached to the notice of motion of the SECOND RESPONDENT be admitted.

2. That the late filing of the Answering Affidavit dated 29 April 2024 by the FIRST AND SECOND RESPONDENT be condoned.

3. Further and/or alternative relief.”

[3.11] 1 October 2024 – The Second Respondent filed a supplementary answering affidavit;

[3.12] 15 January 2025 – The Second Respondent filed a notice of motion for the striking out of parts of the Applicant’s founding

affidavit and for costs thereof, including costs of counsel on the A-scale;

[3.13] 22 January 2025 – The Second Respondent’s heads of argument was filed;

[3.14] 3 February 2025 – The Applicant filed a second replying affidavit to the Second Respondent’s supplementary answering affidavit; and

[3.15] 6 February 2025 – A further supplementary affidavit was filed on behalf of the Second Respondent.

[4] On 17 February 2025, this Court’s roll for the week of 24 February 2025 was published. This matter was accordingly set down for hearing on Tuesday, 25 February 2025 at 10:00 in open Court.

[5] Subsequent to the roll having been published, this Court was informed on 24 February 2025 in open Court by Mr Van der Merwe that:

[5.1] On 13 February 2025, an e-mail was addressed to the designated secretary allocated to the presiding acting Judge for the period 24 February to 28 February 2025. This e-mail was sent by a certain Mr Matthew Webbstock (“Mr Webbstock”) with e-mail address of m[...]. It informs the designated secretary that Mr Webbstock has not had sight of the roll and that he tried to make contact with the Judge’s secretary, but to no avail. Mr Webbstock therein seeks an allocation either for Monday, 24 February 2025, or Wednesday, 26 February 2025 due to his non-availability during the remainder of that week;

[5.2] No response was forthcoming from the acting Judge’s secretary;

[5.3] On 19 February 2025, another e-mail was dispatched by Mr Webbstock to the acting Judge’s secretary, indicating that Mr Webbstock

became aware that the matter was allocated for hearing on Tuesday, 25 February 2025, requesting whether the matter could be re-allocated to either Monday, 24 February 2025, alternatively to Wednesday, 26 February 2025; and

[5.4] On Thursday, 20 February 2025, Mr Webbstock allegedly phoned the acting Judge’s secretary, indicating that he had made contact with the Second Respondent’s counsel and requested whether she would be agreeable to the matter being heard on either the Monday or Wednesday aforesaid.

[6] Subsequent to the aforesaid, this Court issued a further directive on Friday, 21 February 2025, indicating that this matter could be heard on Thursday, 27 February 2025, should the legal representatives of the parties reach an agreement to that effect, also informing that the matter could be heard virtually instead. This directive further indicated that if no agreement is reached between the respective legal representatives, the matter will be heard on Tuesday, 25 February 2025, as per the original allocation of 17 February 2025.

[7] No agreement was reached between the respective legal representatives of the parties and the matter was called on Tuesday, 25 February 2025 at 10:00.

[8] When the matter was called on Tuesday, 25 February 2025, Mr Van der Merwe appeared and indicated to the Court, *inter alia*, that:

[8.1] Mr Webbstock, to whom he referred to as his “counsel”, is an attorney he often briefs for appearances in the High Court, allegedly being a member of the Legal Practice Council;

[8.2] Mr Webbstock exchanged the e-mails referred to above to the designated secretary as from 13 February 2025; and

[8.3] Mr Webbstock informed Mr Van der Merwe at 14:00 on Monday, 24 February 2025, that he is not available to appear before this Court on 25 February 2025 due to another matter that he is involved in, which he thought would settle, continues to run.

- [9] The Court then expressly asked Mr Van der Merwe whether he is in a position to move the application. Mr Van der Merwe indicated that, due to the Mr Webbstock having become unavailable on such short notice, he is not in a position to continue. Mr Van der Merwe resultantly requested that the application be postponed sine die, and tendered the wasted costs of the day.
- [10] Counsel for the Second Respondent opposed the application for a postponement by, inter alia:
- [10.1] referring to the Cab Rank Rule;
- [10.2] referring to the Consolidated Practice Directive 1 of 2024 (“the Consolidated Practice Directive”), particularly paragraph 25.17.8 thereof; and
- [10.3] indicating that in the event of the Court granting a postponement, that the Applicant should be ordered to pay the costs on a punitive scale.
- [11] On 25 February 2025, the matter was postponed sine die and the Court indicated that it would give reasons and deal with costs in a written judgment.
- [12] There seems to be a practice developing in this Division of legal practitioners informing the Registrar or designated secretaries of Judges by electronic mail or in a practice note, dispatched electronically, of their unavailability on certain days of the opposed motion week (“the developing practice”).
- [13] This developing practice seems to ignore the fact that the Judge seized with opposed motions:
- [13.1] peruses all documents filed on the CaseLines platform in preparation of the matters allocated to such a Judge;
- [13.2] after meticulously preparing for such matters, independently sets his/her roll down for the week in accordance with his/her insights as to the issues in dispute and the time it will require in order to do justice to the parties and the case;
- [13.3] thereafter allocates matters for the week in accordance with such insights; and
- [13.4] publishes his/her roll for the week.
- [14] The developing practice might result in Judges sitting in the Opposed Motion Court not allocating matters for a particular day during the particular week. In that event, all legal practitioners involved in all matters set down for the particular week will be expected either to attend roll call on a Monday, or, worse even, remain in attendance for the whole week until their matters are called. The cost of litigation will become prohibitively expensive should this become the norm, not to mention the inconvenience to all concerned.
- [15] This developing practice seems to derive its existence from an opportunistic reading of paragraph 25.17.8. of the Consolidated

Practice Directive, which demands that a joint practice note be filed, timeously as prescribed, dealing with a number of issues and especially:

“25.17.8. Any other matters relevant for the efficient conduct of the hearing, to present to the Judge seized with the matter.”

- [16] Paragraph 25.17.8. of the Consolidated Practice Directive is now being abused by some legal practitioners as an invitation for them to indicate their availability or unavailability on certain days for matters being heard in the Opposed Motion Court. Such legal practitioners request the presiding Judge to allocate his/her roll for the week in the Opposed Motion Court to suit the roll of such legal practitioners. If such requests are not responded to timeously or at all, some of these legal practitioners seek to rely on a somewhat misplaced legitimate expectation that the particular matter will not be set down for hearing on a date on which such particular practitioner indicated his/her unavailability.
- [17] Paragraph 25.17.8. of the Consolidated Practice Directive was never intended to accommodate the diaries of legal practitioners during opposed motion week. It pertains to matters relevant for the efficient conduct of the hearing, such as points in limine, order of presentation, duration, special reliance on new authorities which came to hand after the filing of heads of argument and the like matters relevant for the efficient conduct of the hearing and this Court.
- [18] This undesirable developing practice should be ceased with, before it develops into another “institutionalised practice” such as the one that resulted in a number of advocates being struck from the roll for engaging in double briefing, as was exposed in the *General Council of the Bar of South Africa v Geach and Others*, *Pillay and Others v Pretoria Society of Advocates and Another*, *Bezuidenhout v Pretoria Society of Advocates* 2013 (2) SA 52 (SCA).
- [19] The unavailability of a legal practitioner to argue an opposed motion on the date it has been allocated by the presiding Judge often results in an embarrassment to the relevant instructing attorney, but more so, to the relevant client, whose legal practitioner may have been involved in the matter for some time and in which the client puts his trust. The client could also be penalised with costs in such an event, which in itself fuels distrust in the legal profession.
- [20] Not only is the above conduct unacceptable, it also constitutes a breach of Rule 28(5) of the Code of Conduct for Legal Practitioners, Candidate Legal Practitioners and Juristic Entities, published in Government Gazette No. 168 in Government Notice No. 42337 on 29 March 2019 and corrected by Correction Notice No. 198 of 2019 in Government Gazette No. 42364 of 29 March 2019 (“the Code of Conduct”). It provides:

“28.5 Counsel, upon accepting a brief, shall perform the necessary work to the best of their abilities, in keeping with counsels' seniority and relevant experience and:

28.5.1 ...;

28.5.2 counsel, upon acceptance of a brief in any opposed application, tacitly represent that they can properly commit themselves to remaining available throughout the period during which that opposed application may be heard without compromising such commitment by reason of any prior commitments in other matters, regardless of whether such other matters have been set down at a time before or after the period during which the opposed application may be heard.”

[21] For purposes of the Code of Conduct, “legal practitioner” means an advocate or attorney admitted and enrolled as such in terms of sections 24 and 30 respectively of the LPA. “Counsel” for purposes of the Code of Conduct means an advocate referred to in section 34(2)(a)(i) of the LPA.

[22] This Court is mindful of the fact that Mr Van der Merwe indicated that Mr Webbstock is an attorney registered with the Legal Practice Council. Mr Van der Merwe, however, throughout his address and in his practice note referred to Mr Webbstock as his “counsel”. Such reference, however, does not render Mr Webbstock an advocate or counsel for purposes of the Code of Conduct and the LPA. However, I find that the distinction for purposes of this matter to be irrelevant for reason of the fact that Conduct Rule 20.2 determines as follows:

“20.2 An attorney who accepts an instruction to appear in court on behalf of a client shall not resile from the undertaking to carry out the instruction in order to attend to another instruction offered later, except for good cause, which shall be deemed to be present under either of the following circumstances –

20.2.1 the interests of justice would otherwise be impaired;

20.2.2 the instructing clients of both the initially offered instruction and of the later offered instruction agree in writing to release the attorney from the initially offered instruction.”

[23] In addition, Conduct Rule 20.3 determines:

“20.3 If, after an attorney has accepted an instruction to appear in court on behalf of a client, any circumstances arise that imperil the proper discharge of his or her duties of diligence, he or she shall, once such eventuality is apparent, especially in relating to trials, report such circumstances to the client to facilitate timeous steps to inhibit prejudice to the client and facilitate a successor to be instructed in time to take over the instructions.”

[24] In view of the above, the following order is made:

[24.1] The application is postponed sine die;

[24.2] Mr Webbstock and Mr Van der Merwe are ordered, jointly and severally, the one paying the other to be absolved, to pay the wasted

costs occasioned by the postponement on a party and party basis on Scale A;

[24.3] The Applicant’s attorney, Mr Van der Merwe, forfeits any fees in preparation of and attending the hearing on Tuesday, 25 February 2025.

A LIVERSAGE

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

HEARD ON:

25 FEBRUARY 2025

* DECIDED ON: 2 MAY 2025

APPEARANCES

Attorneys for Applicant: Mr JC Van der Merwe

JC Van der Merwe Attorneys

Counsel for Respondents: Adv A Lingenfelder

Attorneys for Respondents: Dawie Beyers Attorneys

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