

SOUTH AFRICA / JUDGMENT

Desert Fruit (Pty) Ltd v Smith (20947/2018) [2023] ZAWCHC 338 (13 December 2023) [2023] ZAWCHC 338

COURT

Western Cape High Court, Cape Town

BEFORE

M J Bishop

CASE / FILE NUMBER

20947/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

CASE

NO: 20947/2018

In the matter between: DESERT FRUIT (PTY)
LTD
AND
JACOMINA
MARGRIETHA SMITH
PLAINTIFF
DEFENDANT

Coram: Bishop, AJ
Date

of Hearing: 28 November 2023
Date
of Judgment: 13
December 2023

JUDGMENT

BISHOP, AJ

[1] The dispute before me is solely about costs. The Defendant's last minute application to amend her plea forced the postponement of a trial set down for four days. The merits of three interlocutory applications before me – for amendment, for separation, and for postponement – are largely water under the bridge. With a minor exception concerning the separation of issues, the parties agree on the future course of the litigation. They do not agree about who should pay the costs, or even which court should

decide who pays the costs.

[2] The Plaintiff (Desert Fruit) argues that the Defendant caused the postponement, and so should pay the costs. Indeed, it goes further. It blames the Defendant's erstwhile counsel and current attorney for the postponement, and seeks costs against them personally. And it asks that whoever pays its costs should do so on a punitive scale. Finally, it requests an order that the Defendant pay the costs before in order to defend the underlying action.

[3] The Defendant has tendered some costs – the costs of the amendment, and costs occasioned by it. Unsurprisingly, she argues that the remaining costs should be left for the trial court. This Court, she contends, does not have the full facts that will be available at trial to assess the consequences of postponement. She also denies that her counsel is to blame for the postponement, or that there is any basis for punitive or other ancillary costs awards.

[4] To appreciate the arguments about costs, it is necessary to first understand the underlying action. It is based on a guarantee.

[5] The Defendant's husband, Mr Wayne Smith, used to work for Desert Fruit, a company that grows dates in Namibia, close to the Orange River. In 2016, Wayne borrowed R4 000 000 from Desert Fruit. The loan was to be repaid from deductions of R40 000 per month from his salary. Wayne signed the loan on behalf of both himself, and his then employer – Desert Fruit. He was in Stellenbosch when he did so. The loan included an acceleration clause rendering him liable for the full outstanding amount if he failed to pay any amount owing, or if Desert Fruit determined there had been a material change in his, or the Defendant's, financial position.

[6] That loan was secured by a guarantee signed by the Defendant on the same day. The guarantee, too, was signed in Stellenbosch, by the Defendant and by her husband on behalf of Desert Fruit. The Defendant bound herself not only as surety, but also as a principal debtor for Wayne's debt under the loan agreement. The defendant's obligations under the guarantee were in turn secured by a covering mortgage bond in favour of the Plaintiff over a property in Stellenbosch.

- [7] It seems that, shortly after the loan, the guarantee, and the mortgage were concluded, Wayne and Desert Fruit's relationship deteriorated. The details are not relevant for present purposes, and the evidence before me offered only a snapshot. These are the bare bones.
- [8] Wayne was suspended without pay in September 2017. His employment was ultimately terminated on 11 December 2019. A dispute about the lawfulness of his dismissal was settled in December 2021. Desert

Fruit paid him N\$1 344 000, without admitting that he had not been unfairly dismissed. All of this happened in Namibia.

- [9] However, in November 2018, while the employment dispute was ongoing in Namibia, Desert Fruit sued the Defendant under the guarantee in Cape Town. It alleged that, from April 2017, Wayne had ceased making payments under the loan. Desert Fruit had then determined there had been a material change in Waynes' financial position, and called up the balance of the loan on 23 August 2018. Wayne did not pay. Desert Fruit subsequently amended its particulars of claim to include another default when Wayne had failed to pay the outstanding amount on demand in May 2022. As a result of Wayne's default under the loan, Desert Fruit claims that the Defendant is liable under the guarantee, and the property is executable under the bond. The action seeks the full outstanding

amount from the Defendant (approximately R4.9 million plus interest) and the right to execute against the mortgaged property.

- [10] The Defendant's the primary defence is that the loan agreement is a "credit agreement" subject to the National Credit Act 34 of 2005 (NCA). Because Desert Fruit is not a registered credit provider under the NCA, she argues, the loan is void. The plea did not allege that the guarantee was subject to the NCA.
- [11] In replication, Desert Fruit denies that the loan agreement is subject to the NCA. It also claims that, even if the loan is void for non-compliance with the NCA, it would be entitled to restitution of the monies lent. It seems that Desert Fruit takes the view that there are two possible routes open to a credit provider who has loaned monies under an invalid credit agreement – an enrichment action,[1] or a claim under s 89(5) of the NCA.[2] In any event, Desert Fruit has not relied on s 89(5) of the NCA in the event the loan is void.
- [12] That was the outline of the dispute up to two weeks before the hearing. The Defendant had, at a pre-trial conference on 23 January 2023 indicated that she thought the application of the NCA should be decided as a separated issue. Desert Fruit disagreed. But, a week before the hearing, the Defendant had not brought an application to separate out the issue. The case seemed ready for trial.
- [13] It is now, unfortunately, necessary to consider the conduct of the Defendant's counsel and attorney. This is because Desert Fruit seeks personal costs from them.

[14] At all times, the Defendant was represented by Mr JC Kriek and, until shortly before the hearing, by Adv Alan Newton. This trial was set down for hearing on 28 November 2023 by a notice of set down dated 4 May 2023. 26 days later, another matter Newton was involved in was set down for hearing in the Durban High Court. Newton states that he only received that notice of set down on 12

September 2023. The Durban case concerns the outcomes of an insolvency inquiry that Newton had been involved in. He determined it was vital that he remain involved, but was hopeful that the Durban matter would settle. He therefore kept both briefs.

[15] Newton realised that, if the Durban matter did not settle, he would be double briefed. He therefore approached Adv Van Riet SC who was familiar with the case because he was involved in other related litigation between Desert Fruit and Wayne Smith in Namibia. Van Riet SC agreed that, if necessary, he would run the trial in November. Newton told Kriek about the arrangement – he would remain on brief, but Van Riet SC was on standby. It is not clear exactly when this occurred.

[16] Five weeks before the hearing of the two matters, when it became apparent that both matters would run, Newton informed Kriek, who agreed to make Van Riet SC's appointment final. The three met on 30 October 2023 to discuss the matter. They discussed the prospects and did not contemplate any amendments. It was agreed Newton would keep his brief, in case Van Riet SC wished to discuss

the matter with him in preparation for trial. Mr Kriek's assistant – Ms Matthee – would brief Van Riet SC with his own file. Ms Matthee, however, became ill and the file was only delivered to Van Riet SC on 13 November 2023; just 15 days before the hearing.

[17] Van Riet SC, Newton and Kriek met again the next day, in preparation for a pre trial conference on 15 November

2023. At that pre-trial (which Van Riet SC and Newton attended) the Defendant indicated that it would "revert to the plaintiff regarding whether it considered that a separation of issues would be necessary". The Defendant's counsel did not indicate that

they intended to make any amendments to her particulars of claim. All indications were that the matter would proceed to trial thirteen days later.

[18] But a week later, on 22 November 2023 – now just six days before the trial – the Defendant filed an application to amend her plea and separate issues. The intended amendments had two parts:

[18.1] Amending the NCA plea to claim that not only the loan, but also the guarantee were credit agreements under the NCA, and therefore void.

[18.2] Adding additional defences. The details are not of much moment, so I describe them only briefly. First, that Desert Fruit was guilty of a misrepresentation that had induced Wayne to sign the loan. Desert Fruit, the Defendant alleged, had represented that Wayne would have a long-term future with the company – and therefore be able to repay the loan from his salary – when Desert Fruit had already resolved to, or anticipated it would, fire Wayne. Second, that it was a tacit or implied term of the loan that

Desert Fruit would not unlawfully suspend or fire Wayne and that, if it did, Wayne would be excused from making payments under the loan, and be entitled to withhold performance to the extent of any damages he suffered. Wayne was unlawfully suspended and fired, and suffered damages in excess of the amount claimed under the loan, excusing him from payment under the loan, and therefore his wife from payment under the guarantee.

[19] These amendments, on the Defendant's own version, were entirely the "brain child" of Van Riet SC. He concluded, based on his underlying knowledge of the dispute, that it was in the Defendant's interest to make the amendments. The Defendant tendered any "wasted costs which may be incurred as a result of the late filing thereof". She anticipated that there

would have to be a postponement to allow Desert Fruit to decide how to respond to the amendments.

[20] In order to avoid wasted costs, the Defendant proposed a that the NCA issue be decided separately. The notice of motion tersely describes the order sought as: "Separation of issues." It does not describe which issue should be separated. Mr Kriek's founding affidavit explains that the issue the Defendant sought to have decided separately was whether the loan agreement and the guarantee were void for non-compliance with the NCA; it needed time to consider the amendments and decide whether to amend its pleadings.

[21] Desert Fruit accepted that the trial could not proceed. But it argued that the Defendant should bear all the resultant costs. It also argued that the amendments were not made in good faith, and that Newton and Kriek should personally bear the costs occasioned by the amendment and the resultant postponement. It objected to the separation on the basis that it was premature; until the pleadings had been finalised, it was impossible to tell whether a separation was appropriate or not.

[22] It is useful to step back from this procedural morass and identify what the parties agree on, and what they do not agree on. The parties agreed that:

[22.1] The Defendant's amendments to her plea should be permitted;

[22.2] The matter could not proceed and should be postponed;

[22.3] The separation of issues could only be determined once the pleadings had been amended; and

[22.4] The Defendant should bear the costs occasioned by the amendment, but not by the postponement or the separation.

[23] The parties disagreed on:

[23.1] What should happen to the application to separate. Desert Fruit argued that it should be dismissed with costs. The Defendant contended it should be postponed sine die, and costs should stand over.

[23.2] Who should pay the costs occasioned by the postponement of the trial. The Defendant urged that the trial court would be in the best position to judge, and that those costs should also stand over or trial. Desert Fruit submitted that I should order the Defendant to pay the costs.

[23.3] The scale of costs, and who should pay them. Desert Fruit sought costs de bonis propriis against Newton and Kriek. It also sought costs on an attorney client scale, including the costs of a witness and his son who had flown from the Netherlands. The Defendant argued that, if any costs order was made, it should simply be an ordinary order of costs.

[23.4] Whether the Defendant should be allowed to proceed with her defence without paying whatever costs I might award. Alternatively, whether Desert Fruit should be entitled to immediately enforce the costs awards.

[24] Before I address the issues in dispute, I note two events that occurred after the hearing:

[24.1] Newton did not initially file an affidavit explaining his position on the issue of personal costs. At the hearing, Van Riet SC suggested that he should be afforded an opportunity to do so. I agreed and gave Newton and Kriek a chance to file affidavits, and both parties to file consequent written submissions. They duly did so.

[24.2] At the hearing, I also asked the parties to propose a timetable to regulate the further conduct of the matter to get it ready for trial again as quickly as possible. The parties agreed on a timetable Desert Fruit proposed. I make that timetable part of my order, with just a one week extension to cater for the timing of this judgment.

The Separation

[25] The Defendant initially brought the separation application, at least in part, as a way to mitigate the impact of the postponement that would inevitably follow its application to amend. Her approach was that the application of the NCA was a simple issue that could be determined in the time set down for trial and thus avoid or limit wasted costs.

[26] Desert Fruit contended that it was not possible to separate out the NCA issue because the Defendant's proposed amendment not only added a challenge to the guarantee, but might also affect its strategy to the trial. Until the amendment, the Defendant had decided not to rely on s 89(5) of the NCA because it feared it would increase the scope and cost of the trial. Section 89(5) allows

a court that concludes a credit agreement is invalid to make “a just and equitable order”. That can include an order that the debtor repays the money advanced, but the Court has a discretion whether to order that or not, and to determine how much should be repaid. A claim based on s 89(5) would require a deeper assessment of the circumstances under which the money was lent, and not repaid. Desert Fruit had intentionally chosen not to rely on s 89(5). It intended to argue that the NCA did not apply and that the loan was valid. But even if the loan was invalid, it would argue that several clauses in the guarantee – which the Defendant had not attacked – indicated that it was not dependent on the validity of the loan agreement. The Defendant would be liable under the guarantee, even if the loan was invalid. As the Defendant had not argued that the NCA applied to the guarantee, it was not worth the increased costs of running a claim based on s 89(5).

- [27] The Defendant’s amendment to attack the validity of the guarantee might change that calculus for Desert Fruit. So too might the Defendant’s other amendments that introduced as defences much of the evidential material that Desert Fruit hoped to avoid by not relying on s 89(5). Adv Farlam SC – who appeared for Desert Fruit – was understandably not able to say what course Desert Fruit would ultimately adopt. But he indicated it was impossible to predict how the pleadings would end up, and therefore impossible to determine whether a separation would be appropriate. The NCA issue may be determinative of the case, or it may be bound up in all the other issues so as to render separation unhelpful.
- [28] The Defendant ultimately accepted this and did not persist with an order for separation. She conceded that the desirability of separation could only be determined after Desert Fruit had had an opportunity to amend its pleadings. Therefore, she argued, the separation application should be postponed sine die for determination once the pleadings had (re)crystallised.
- [29] But that outcome was obvious. Once the Defendant sought to amend her defence based on the NCA, and accepted that further amendments would follow, logic dictates that the nature of the dispute concerning the NCA was inchoate. It could only be defined once the pleadings were finalised. The Defendant recognised as much in her application which contemplated a postponement for further amendments. But a separation could never be granted until those further amendments occurred.
- [30] The separation application, brought at this stage was bad. It was always doomed to fail. There is no reason to postpone it. Parties should not be encouraged to bring interlocutory applications before they are ready for adjudication and hope that courts will simply kick the can down the road to the trial court. Applications must be brought when they are ready to be determined, not before.
- [31] The separation application must be dismissed, with costs. I consider who should pay those costs and on what scale below.

The Wasted Costs of Postponement

- [32] It is necessary to separate three related sets of costs. First, there are the costs of the application to amend. Second, there are the costs of the application to postpone. Third, there are the wasted costs occasioned by the postponement. The Defendant has tendered the first two.[3] It has also tendered the “wasted costs which may be incurred as a result of the late filing” of the application to amend. But the Defendant argues that the costs occasioned by the postponement should stand over for determination by the trial court.[4].
- [33] Desert Fruit’s argument for why the Defendant should pay the costs was simple: She caused it. It relied on “the general rule ... that the party which is responsible for a case not proceeding on the day set down for hearing must ordinarily pay the wasted costs.”[5]
- [34] The Defendant’s argument was more inventive. It had three related strands:
- [34.1] The first strand was that costs should be left for the trial court because it would be in a better position to see where all the cards fell, and then determine who should bear which costs. [6] Nine out of ten judges, Van Riet SC assured me, would not be so bold as to usurp the role of the trial court.
- [34.2] The second, interwoven strand was that the postponement would have occurred even if the Defendant had not sought to amend. Desert Fruit would have had to amend to include a claim resting on s 89(5) of the NCA and to have sought a postponement to do so. But Farlam SC explained in argument that, prior to receiving the Defendant’s amendments, Desert Fruit had had no intention of relying on s 89(5). It was going to run the trial on its pleadings, and take the risk of foregoing a s 89(5) claim.
- [34.3] Van Riet SC then changed tack in reply to the third strand: the postponement might redound to Desert Fruit’s benefit by saving it from its own error. He argued that, if Desert Fruit, in answer to the Defendant’s amendments, added a claim based on s 89(5) which ultimately succeeded at trial, then the postponement would have been to its advantage after all. Only the trial court would know how this would all turn out.
- [35] As ingenious as these arguments were, I hold the Defendant is liable for the wasted costs. That is the default rule. It is not the case that wasted costs ordinarily stand over to trial.[7] While there will be cases in which liability for costs are best left to the trial court, that is not the “general rule”, but an exception from it.
- [36] Speculation about how Desert Fruit might amend its pleadings, and what arguments might succeed or fail at trial are therefore immaterial. An order for wasted costs caused by a postponement is not seeking to do ultimate justice between the parties; it is seeking to put the burden of wasted costs on the party who caused the waste. It may be that the guilty party is ultimately successful at trial. It may be that the postponement aids the other party because a witness dies, or new evidence emerges during the postponement. Those imponderables will exist in every case. Yet the general rule holds – the responsible party pays the wasted costs.

[37] I see no reason to depart from that salutary rule here. It appropriately places the risk with the party that causes the delay. Accordingly, the Defendant must bear the costs; unless, that is, there is some reason to require her legal representatives to pay those costs.

De Bonis Propriis Costs

[38] Ordinarily it is litigants, not lawyers, who bear the risk of paying their opponent's costs. But courts have the power to order attorneys and advocates to pay costs from their own pockets (de bonis propriis) "where a practitioner has acted inappropriately in a reasonably egregious manner." [8] When this is appropriate is a matter of judicial discretion. It is generally reserved for conduct that is "unreasonable, wilfully

disruptive or negligent". [9]

[39] Desert Fruit placed the ultimate blame for the postponement at the feet of Newton and Kriek. Newton, it argued, was guilty of double-briefing – a serious ethical offence. [10] Double briefing creates a conflict of interest between a counsel's own interests, and his client's. One of the way that manifests is that one "brief may have to be surrendered at a late stage, with resulting inconvenience, embarrassment and/or prejudice to somebody". [11] That, Desert Fruit argues, is what happened here.

[40] Newton held onto both this brief, and the Durban brief when he knew both were set down on the same day. If he had given one up immediately when he learnt of the conflict, Van Riet SC would have been brought on board earlier, would have made the amendments earlier, and the trial would have run. Newton's double briefing was the original sin leading to postponement. Kriek bore responsibility because he knew of Newton's double-booking and allowed it to continue. The Defendant also criticizes Newton's version on oath as improperly vague about precisely when the various steps were taken.

[41] The Defendant argued that Newton and Kriek could not be held liable for the consequences of Van Riet SC's amendments. Newton only learnt of the potential double-booking in September, and immediately approached Van Riet SC to ensure he could run this matter if the Durban matter did not settle. When it became apparent that the Durban matter would not settle, he ensured Van Riet SC was briefed and assisted him to prepare. Newton did not anticipate that Van Riet SC would seek to amend the pleadings in a way that

would cause a postponement. He had acted reasonably, and should not be liable for personal costs. Desert Fruit accepted that Van Riet SC had acted in good faith in making the amendments, and therefore could not imply that Newton had acted with any nefarious motive. If legal representatives are held liable for the costs caused by late amendments, they will be dissuaded from making those amendments, even if that would be detrimental to their client's interests.

[42] I prefer not to determine whether Newton acted ethically or unethically. For what it is worth, it seems that he acted how many members of the Bar might act. He did not formally abandon a brief, but took steps that he believed would ensure that both matters could proceed. Whether he was ethically obliged to immediately give up the Durban brief when he learnt it was set down for the same day is, luckily, not for me to judge.[12]

[43] That is so because, even assuming that Newton (and therefore Kriek) acted unethically, I do not believe they should be held liable for Desert Fruit's costs. There are four reasons: the Defendant must have assumed responsibility; his conduct was not the cause of the postponement; Newton's conduct was not so egregious that it justifies personal costs; and his explanation while

imperfect, was adequate.

[44] First, it is inconceivable to me that the Defendant's legal representatives did not inform her that the amendment came with a high risk of postponement, and that she may be required to pay the wasted costs. Desert Fruit points out that the Defendant has never deposed to an affidavit. That is so. But both Van Riet SC and Newton are experienced counsel. They could not have been blind to the risk. They must have given her that advice. The Defendant must then have weighed that risk, and decided to instruct her attorney to amend. That was ultimately her risk to take, not her attorney's or her advocates'. I agree that, if counsel are too readily held liable for costs, it may inhibit them from providing the best advice to clients who can then make their own choices about what risks to take, including the risk of adverse costs.

[45] Second, there is no guarantee that if Newton had immediately abandoned his Durban brief in September, the case would not have ended in the same position. Van Riet SC might still have only fully considered the case closer to the date of trial, as counsel often do. He may still have only advised the Defendant to amend so close to the trial as to force a postponement. Applying an ordinary "but for" analysis for factual causation, the cause of the postponement was Van Riet SC's "brain child", not Newton's delay. It is so that, if Newton had remained on brief, there would have been no amendment and no postponement. But that is not the question. The question is whether his delay in passing on the brief caused the amendment and postponement. In my view, it did not.

[46] Third, whether Newton breached the rules of professional conduct or not, his conduct was not, to my mind, so "unreasonable, wilfully disruptive or negligent" as to justify that he pay Desert Fruit's costs. Not every ethical breach translates automatically to an award of costs against a legal practitioner. It remains for the court to assess, on the particular facts, whether personal costs are justified.

[47] Fourth, Newton's explanation is imperfect. Some of the dates are not provided, and there was arguably some degree of laxness in bringing Van Riet SC on board. But the information that he does provide is enough for me to form the view that personal costs are not warranted. He has provided a sufficient – if barely – account of what occurred.

[48] Accordingly, I conclude that the Defendant herself must pay the wasted costs occasioned by the postponement. But at what scale?

The Scale and Scope of Costs

[49] Desert Fruit sought costs on an attorney and client scale. It argued that the Defendant's conduct was abusive. Many of the amendments it sought to make were factually unsustainable in light of clear documentary evidence. For example, the Defendant claims that Wayne was unfairly dismissed, yet a dispute about his dismissal was settled with no admission by Desert Fruit that it was unfair. The Defendant's amendment also misstates Wayne's salary, and does not factor in the substantial amount paid to him in settlement. The claim that Wayne was dismissed without good reason is, Desert Fruit alleges, belied by the fact that he was dismissed for threatening to kill its general manager. Farlam SC described the attitude of the Defendant in making these

last-minute amendments contrary to known facts as "cavalier litigation" justifying a punitive award of costs.

[50] In my view, attorney and client costs are warranted. Punitive costs exist "to counteract reprehensible behaviour on the part of a litigant" and "in circumstances where it would be unfair to expect a party to bear any of the costs occasioned by litigation." [13] There is authority that, where a postponement is sought belatedly and with disregard to the rules of court, an attorney and client costs award is justified. [14] That is what has occurred here.

[51] This case was a long time coming. It was set down in May this year for a hearing in November. At a pre-trial conference on 15 November 2023, several weeks after Van Riet SC's first meeting with Newton and Kriek, there was still no indication there would be any amendment, or any reason to postpone. Yet less than a week before the hearing, the Defendant dropped its amendment forcing a postponement. I do not wish to comment in any detail on the contents of those amendments. But it seems likely, in light of the

documents put up by Desert Fruit, that they may need to be substantially refined before trial in order to fully align with the

facts.

- [52] It is always open to litigants to amend their pleadings. Courts will almost always allow amendments to ensure that a dispute is properly and fully ventilated between the parties; provided only that prejudice to other parties can be ameliorated. But when parties amend at the eleventh hour, causing substantial costs to the other side, they must be willing to bear the full cost of their conduct, not merely a portion of it.
- [53] I am also of the view that the Defendant should bear the costs of Mr Jeroen van der Nieuwenhuijzen, a director of Desert Fruit who travelled from the Netherlands to give evidence at trial. If the trial had run, he would almost certainly have been called to testify. In my view, Desert Fruit is not entitled to the costs occasioned by his son Kevin's travel. His attendance was necessary only to advise, not to testify. While it may have been useful for Kevin to be physically present, it was not essential for trial. Any information or consultation could have been done telephonically or virtually.

When Should Costs be Paid?

- [54] Finally, Desert Fruit asked for an order that the Defendant be required to pay the costs prior to the hearing of the matter, failing which it should be entitled to apply for her defence to be struck out. In the alternative, it sought an order permitting Desert Fruit to immediately tax and enforce whatever costs order the Court would grant.
- [55] The Defendant resisted the order. In reply, her attorney explained that he and counsel were operating on an "at risk" basis and such an order "would effectively prevent the Defendant from prosecuting her defence." In argument Van Riet SC explained that the Defendant did have means to satisfy any costs order and any award against her; but only by selling the bonded

property.

- [56] There is precedent for both the variations Desert Fruit sought.[15] In Van Dyk, Corbett AJ (as he then was) held that to justify an order requiring payment of prior costs before a litigant could prosecute a case or a defence "there must be negligence, blameworthiness or ... utter indifference of a high degree. It seems to me that the Court should always be slow to place a clog upon a litigant's free access to the Courts".[16] Sanvido provides authority for the lesser order in cases like this where a postponement is forced at a late stage, even in the absence of

blameworthiness. Berman AJ held that the "usual practice" of allowing costs to be taxed only at the end of a trial should not apply to "cases of wasted costs incurred as a result of a trial having to be postponed because of an amendment to a party's pleading applied for and granted at a very late stage".[17]

- [57] I intend to follow the approach adopted in Sanvido. The Defendant's conduct here was negligent and there is a degree of blameworthiness in the dilatory manner in which the

amendment was brought. But the Defendant ought not to be precluded from defending the main action as a result. This is not a case where Desert Fruit will ultimately be unable to recover any of its costs. At the same time, Desert Fruit should not have to wait to recover its costs. The order I make strikes a fair balance in the circumstances.

Conclusion

[58] In sum, I hold that the amendments must be permitted, and the application to separate dismissed. The Defendant must pay all the costs occasioned by the amendment, the separation and the postponement, including all wasted costs. Newton and Kriek should not have to pay those costs. But those costs must be paid on the attorney and client scale, must include the costs of Mr van der Nieuwenhuijzen Snr, and are immediately taxable. That is the consequence of making such a substantial amendment so late in the day.

[59] Accordingly, I make the following order:

1. The Defendant's application to amend her plea is granted.
2. The Defendant's application to separate issues is dismissed.
3. The action is postponed according to the following timeline:
 - 3.1. To the extent the Defendant wishes further to amend her plea, her notice of intention to amend is to be filed on or before 21 December 2023.
 - 3.2. The Plaintiff is to effect any consequential amendments to its particulars of claim and/or replication on or before 26 January 2024.
 - 3.3. To the extent the Defendant wishes to effect any amendments consequential upon the Plaintiff's further amendments, any such amendments are to be effected on or before 7 February 2024.
 - 3.4. The parties are to make further discovery on or before 7 March 2024.
 - 3.5. The parties are to serve any requests for further particulars on or before 22 March 2024.
 - 3.6. The parties are to respond to the aforesaid requests for further particulars on or before 5 April 2024.
 - 3.7. The trial is to be set down as soon as possible after the commencement of the second term of 2024, in accordance with the directions of the Court and/or the Acting Judge President in consultation with the parties taking into account counsel's availability.
4. The Defendant shall pay:
 - 4.1. The costs of the application to amend;
 - 4.2. The costs of the application to separate issues;
 - 4.3. The costs of the postponement; and

4.4. The wasted costs of the postponement, including the costs occasioned by the attendance of Mr Jeroen van der Nieuwenhuizen.

5. The costs in paragraph 4 shall be paid on the attorney and client scale, and shall include the costs of two counsel.
6. The costs awarded to Plaintiff under paragraphs 4 and 5 above may be submitted for taxation by Plaintiff at any time at its convenience and when submitted shall be taxed by the Taxing Master without delay, and shall, when taxed, be payable by Defendant upon demand.

M J BISHOP

Acting Judge of the High Court

Counsel for Plaintiff: Adv P Farlam SC G Quixley Attorneys for Applicant Edward Nathan Sonnenbergs Inc. Counsel for Respondent: Adv R Van Riet SC Attorneys for Applicant Lombard & Kriek Inc.

[1] See *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others*

[2015] ZACC 15; 2015 (10) BCLR 1158 (CC).

[2] Section 89(5) reads: "If a credit agreement is unlawful in terms of this section, despite any other legislation or any

provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that-(a) the credit agreement is void as from the date the agreement was entered into."

[3] Rule 28(9) requires the Defendant to pay the costs of the amendment. It reads: "A party giving notice of amendment in terms of subrule (1) shall, unless the court otherwise directs, be liable for the costs thereby occasioned to any other party."

[4] It is not clear to me whether there is a difference between the wasted costs incurred as a result of the late amendment, which the Defendant has tendered, and the wasted costs of the postponement precipitated by the amendment, which it has not. I do not purport to understand the mysterious ways of the taxing master, but if the postponement is occasioned by the amendment, surely these two costs are one and the same. Fortunately, given the conclusion I reach (that the Defendant is liable for all the costs) the distinction makes no difference.

[5] *Sublime Technologies (Pty) Ltd v Jonker and another* [2009] ZASCA 149; 2010 (2) SA 522 (SCA); [2010] 2 All SA 267 (SCA) at para

3. See also M Dendy 'Costs' in WA Joubert et al *Law of South Africa* (3 ed, Vol 10) at p 243, para 314, and the additional authorities cited at fn 8.

- [6] This proposition has support in the same judgment laying down the “general rule” that the responsible party must pay the wasted costs of postponement. See *Sublime Technologies* (n 5 above) at paras 22-3.
- [7] I asked Van Riet SC for authority for that proposition. He relied on his own authority as an experienced member of the bar. Experience at the bar is, to many silks’ dismay, no substitute for judicial pronouncement.
- [8] *Stainbank v South African Apartheid Museum at Freedom Park and Another*
- [2011] ZACC 20; 2011 (10) BCLR 1058 (CC) at para 52.
- [9] *Ibid.*
- [10] See *Pretoria Society of Advocates and Another v Geach and Others* 2011 (6) SA 441 (GNP); *General Council of the Bar of South Africa v Geach and Others* 2013 (2) SA 52 (SCA).
- [11] *Geach HC* (n 10 above) at par 14.
- [12] *Desert Fruit* relied on Rule 2.2 of the General Council of the Bar’s Uniform Rules of Professional Conduct which only permits counsel to abandon an earlier brief in favour of a later one “with the consent of both instructing attorneys.” It is not clear to me whether the rule requires the consent of that counsel’s instructing attorney in both the earlier brief and the later brief, or the consent of his attorney in the earlier matter, and the attorney briefed by any other party in the earlier matter. *Newton* had the consent of *Kriek* (the earlier brief) and, presumably, his attorney in the later brief. He did not have *Desert Fruit*’s attorney’s consent. To me the language more naturally implies that it is the counsel’s “instructing attorneys” in the two matters who must consent. It is also not apparent to me why the opposing litigant’s attorney should have to consent, as in many cases a change of counsel will not prejudice the opponent in any way. But I need not decide the issue because, on the view I take, even if *Newton* breached the professional rule, personal costs are not warranted.
- [13] *Public Protector v South African Reserve Bank*
- [2019] ZACC 29; 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) at para 221.
- [14] See, for example, *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS); *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E) at 137.
- [15] See, for authority prohibiting a party from proceeding until the costs are paid, *Van Dyk v Conradie and Another* 1963 (2) SA 413 (C); *Solomons v Allie* 1965

(4) SA 755 (T). For authority for the immediate payment of costs, see Sanvido & Sons (Civil Engineering) (Pty) Ltd v Aglime (Pty) Ltd 1984

(4) SA 339 (C).

[16] Van Dyk (n 15 above) at 417B-C.

[17] Sanvido (n 15 above) at 345D-E.

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