

SOUTH AFRICA / JUDGMENT

Fourie and Another v Matjhabeng Local Municipality (5316/2019) [2024] ZAFSHC 206 (28 June 2024) [2024] ZAFSHC 206

COURT

Free State High Court, Bloemfontein

BEFORE

Van Rhyn

CASE / FILE NUMBER

5316/2019

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case No.: 5316/2019

In the matter between: SUSANNA CATHARINA FOURIE FIRST PLAINTIFF JOHANNES
CHRISTOFFEL WELMAN SECOND PLAINTIFF And MATJHABENG LOCAL MUNICIPALITY
DEFENDANT

Judgment

by: VAN RHYN, J

Heard on: 15 MAY 2024

DELIVERED ON: 28 JUNE 2024

- [1] The applicants, the plaintiffs in the action, is applying for a postponement of a trial that was set down by the plaintiffs for hearing on the 14th, 15th and 17th of May 2024. The application is opposed by the respondent. For ease of reference I refer to the applicants as the plaintiffs and the respondent as the defendant.

[2] The plaintiffs are Mrs Susanna Catharina Fourie, a farmer from Henneman, Free State Province, cited as the first plaintiff and Mr Johannes Christoffel Welman, the second plaintiff. The second plaintiff used to farm on a farm in the Ventersburg

district, Free State Province. Prior to the hearing of this matter the second plaintiff passed away. The action instituted by the

plaintiffs on 15 November 2019 concern a claim for damages against the defendant, Matjhabeng Local Municipality in respect of a fire that allegedly originated, alternatively, spread from the property owned by the defendant at Phomolong Township, Henneman.

[3] To comprehensively deal with the application for postponement it is necessary to set out the history that precipitated the application for postponement. The background and chronology of the events leading to the application for postponement are as follows:

3.1 Subsequent to the closing of pleadings, the plaintiffs filed a discovery affidavit on 12 April 2021.

3.2 On 13 August 2021 the plaintiffs issued a substantive application for an order for the defendant to deliver their reply to the plaintiffs' request to make discovery in terms of Rule 35(1)(2)(6)(8) and (12) dated 28 January 2021.

3.3 The defendant filed a discovery affidavit on 25 August 2021.

3.4 The plaintiffs appointed 21 April 2023 and their counsel's chambers as the date and place for convening a pre-trial conference.

3.5 The minutes pertaining to the first pre-trial conference, held on 21 April 2023 was filed on 23 May 2023.

3.6 On 4 December 2023 the matter was declared to be trial ready.

3.6 The plaintiffs enrolled the matter on 19 January 2024 to be heard on 14, 15 and 17 May 2024.

3.7 The plaintiff's filed a supplementary discovery affidavit on 25 March 2024.

3.8 The defendant filed an unsigned supplementary discovery affidavit on 14 May 2024.

3.9 The plaintiffs made amendments to the particulars of claim, on 25 August 2020 and on 25 March 2024 to which no objection was raised and the amendment was effected on 11 April 2024.

3.10 On 9 May 2024 the defendant filed a notice to amend the plea in terms of Rule 28.

3.11 On 10 May 2024 the plaintiff filed a notice of objection to the defendant's proposed amendment dated 9 May 2024.

[4] On 14 May 2024, the first day of the trial, the matter stood down until the following morning to enable the parties to discuss certain aspects. On 15 May 2024, Mr Roux, counsel on behalf of the plaintiffs, handed up a bundle of correspondence and documents relating to the defendant's amendment during the application for postponement brought from the bar.

From the correspondence included in the bundle it appears that the attorneys on record for the defendant informed the attorney on record for the plaintiffs on 8 May 2024 that the defendant intends to amend the defendant's Plea in terms of the Notice to Amend attached to the letter pursuant to the plaintiffs' amendment delivered on the 11th of April 2024.

- [5] The plaintiffs were requested to consent to the defendant's amendment of its plea to avoid delays in the adjudication of the matter. On 10 May 2024 the plaintiffs addressed a letter to the defendant in response to the letter dated 8 May 2024 and subsequent to considering the proposed amendment of the plea and responded as follows:

"2.1 We do not object to your proposed amendment regarding paragraph 5 of your client's plea.

2.2 We do object to your proposed amendment to paragraph 9 of the plea. Kindly find attached hereto the formal Notice of Objection."

- [6] The plaintiffs' objection to the defendant's proposed amendment of its plea is based on the following grounds:

6.1 The notice of the proposed intention to amend was served 3 court days prior to the commencement of the trial;

6.2 The amendment raises further issues on which the plaintiffs will need to obtain instructions, consider a replication and further trial preparation.

6.3 Summons was issued during 2019. The defendant filed its plea during January 2020. The amendment would furthermore entail that the plaintiffs obtain instructions and possible witnesses relating to a fire that occurred during August 2017. According to the plaintiffs, it is doubtful whether such witnesses, including documentary evidence, will still be available.

6.4 In the event of the proposed amendment to the defendant's plea being allowed, it would lead to the postponement of the trial.

6.5 The plaintiffs will be severely prejudiced if the amendment is allowed.

- [7] On 10 May 2024 the defendant indicated that as a result of the plaintiffs' initial averment that the fire occurred on 14 August 2017, which date has been amended on 11 April 2024 without objection to read 12 August 2017, the defendant had to substantially re-prepare for trial, consult, take instructions, all as a matter of urgency, and thereby requiring an amendment to the defendant's plea. The defendant confirmed its intention to proceed with the proposed amendment of the plea which was prompted by the late amendment of the plaintiffs' particulars of claim. The defendant stated that it is ready to proceed with the trial on the allocated dates and if the plaintiffs intend to ask for a postponement of the trial, a tender for costs is awaited.

- [8] In response to the above mentioned letter, the plaintiffs replied that the plaintiffs effected the amendment of the particulars of claim on 11 April 2024, where after it took the defendant 19 court days to file a notice of its intention to amend its plea. In any event, the

plaintiffs merely amended the date on which the fire occurred which could hardly have resulted in a reason to “substantially re-prepare for trial”. Accordingly, the plaintiffs proposed that should the defendant accept liability for the plaintiffs’ wasted costs occasioned by the postponement, including the costs of counsel, the applicant will proceed to obtain instructions regarding the possibility to agree to the postponement of the trial.

- [9] During his address, Mr Roux argued that on 14 May 2024 when the plaintiff’s legal team arrived at court they received an unsigned supplementary discovery affidavit from the legal representatives of the defendant. From the supplementary discovery affidavit it was ascertained that Incident Report 164/2018 by the Matjhabeng Fire Station pertaining to an incident on 12 August 2017 was available. A copy of the said report was requested by the plaintiffs and received per WhatsApp during the evening of 14 May 2024, the first day of the trial.
- [10] The plaintiffs endeavoured to finalize a supplementary expert report subsequent to studying Incident report 164/2018, however, the expert, who is said to have worked most of the previous night, was unable to finalize the supplementary report with the result that the plaintiffs are not in a position to proceed with the trial. Due to the late discovery of the said incident report, the plaintiffs are placed in a predicament regarding the evidence they wish to present during the trial. The defendant did not advance any reason why the said incident report had not been discovered in terms of the Rules of Court.
- [11] Counsel on behalf of the defendant, Ms Manyelo, argued that the defendant did not receive any indication that the plaintiff would be seeking a postponement of the trial and are therefore quite surprised by the conduct of the plaintiffs. In any event if the proposed amendment by the defendant is the cause for the request for the postponement, the defendant is willing to withdraw the proposed amendment of the plea in order for the trial to proceed. On behalf of the defendant it was contended that if the court should grant the postponement that the plaintiff should carry the costs.
- [12] A court has a wide discretion as to whether an application for a postponement should be granted or refused. The discretion must be exercised in a judicial manner. An applicant for a postponement is seeking an indulgence and therefore the applicant must set out good and strong reasons furnishing a full and satisfactory explanation of the circumstances that gave rise to the application for postponement.
- [13] An application for postponement must be made timeously, as soon as the circumstances which must justify such an application becomes known to the applicant. Naturally an application for postponement must be made bona fide and must not be used as a tactical manoeuvre. The main test for a court in deciding whether a postponement must be granted is considerations of prejudice. [1]
- [14] The term ‘discovery’ is used to describe the process by which the parties to civil proceeding are enabled to obtain, within certain defined limits, full information of the existence and the contents of all relevant documents relating to any matter in question between the parties

and which are, or have been in their possession. The function of discovery is to provide the parties with the relevant documentation prior to the trial or hearing so as to assist them in appraising the strength or weakness of their respective cases and thus to provide the basis for a fair disposal of the proceedings before or at the hearing.

- [15] Each party is therefore enabled to use, before the hearing or adduce in evidence at the hearing, documentary evidence to support or rebut the case made by or against him or her. The function of discovery is further to eliminate surprise at or before the hearing relating to documentary evidence and to reduce the costs of litigation.
- [16] In the matter at hand the plaintiffs filed a notice to make discovery in terms of Rule 35 on 28 January 2021 and was obliged to file a substantive application before the defendant complied with the provisions of Rule 35. Discovery affidavits and the discovery of relevant documents are very important in every trial. During the pre-trial conference held on 21 April 2023 it was noted that both parties have already filed their discovery affidavits and reserve the right to file further discovery affidavits. It can be assumed that both parties agreed and informed the court during the pre-trial conference, held on 4 December 2023, that the matter is trial ready, which resulted in the court certifying the matter ready for trial.
- [17] The subsequent attempt by the defendant to hand an unsigned supplementary discovery affidavit to the plaintiffs on the first day of the trial is not proper compliance with the Rules and the plaintiffs cannot be required to content themselves with such conduct. To my mind the plaintiffs cannot be compelled to commence with the trial after having received a document relating to the fire station's report pertaining to the incident which forms the subject of the claim instituted by the plaintiffs, the fire on 12 August 2017.
- [18] Where there has been late discovery as in the matter at hand, there is no onus on the party seeking a postponement to satisfy the court that he or she will be prejudiced. The onus is on the party making late discovery to show that there will be no prejudice.[2]

In *Maeder v Carnes*[3] the court held as follows in considering the question of prejudice:

“...the party on whom the affidavit was served was entitled to a proper opportunity of considering the documents, reading the affidavits, comparing the documents in his possession so as to make a case, if possible, that there were further documents in existence which should have been disclosed, and to deliberate whether the Court should be moved to order a further and better discovery.”

- [19] On behalf of the defendants it was argued that the document handed to the plaintiffs the previous evening, is similar to another document, namely the occurrence book discovered by the defendants. Therefore, the document cannot be regarded as very significant and there can be no prejudice to the plaintiffs as a result of the late discovery. I do not agree with this submission. The issue remains- why has there not been complete discovery by the defendant during 2021 or at least soon thereafter. The document was not handed up during argument and it is not possible to decide whether the document is similar or not to the occurrence book that was previously discovered by the defendant.

- [20] The defendant has provided no explanation for the late discovery of the document and has failed to advance convincing arguments that the plaintiffs did not suffer any prejudice. The defendant disregarded the Rules of Court by failing to comply with the provisions of Rule 35. I am satisfied that the application for postponement was necessitated entirely by the late discovery as well as the late proposed amendment by the defendant of its plea.
- [21] In the premises, the reasons for the plaintiffs' inability to proceed with the trial were fully explained and the postponement sought is not a delaying tactic. Justice demands that the legal team and especially the expert witness for the plaintiffs be afforded the opportunity to consult and to properly prepare for the trial.
- [22] The court has a discretion to make an order for costs, which discretion must be exercised judicially upon a consideration of the facts in each case. The Court has to take into consideration the circumstances of each case, carefully weighing the

issues

in the case, the conduct of the parties and any other circumstances which may have a bearing on the issue of costs in order to make an order which would be fair and just between the parties. With regard to the costs occasioned by a postponement, the general rule, as re-stated by Griesel AJ in *Sublime Technologies (Pty) Ltd v Jonker*[4], is that the party responsible for a case not proceeding on the day of the trial, must ordinarily pay the wasted costs.

[23] ORDER:

In the result the following order is made:

1. The application for postponement is granted.
2. The matter is postponed to the pre-trial roll of 1 July 2024.
3. The defendant shall pay the costs occasioned by the postponement on scale B.

I VAN RHYN

JUDGE OF THE HIGH COURT,

On behalf of the Plaintiffs: ADV. L A ROUX Instructed by: HILL McHARDY & HERBST
ATTORNEYS BLOEMFONTEIN On behalf of the Defendant: ADV. C B MANYELO Instructed by: EG
COOPER MAJIEDT ATTORNEYS BLOEMFONTEIN

[1] *Myburgh Transport v Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmSC) at 315B-G.

[2] *Ferreira v Endley* 1966(3) SA 618 [ECD].

[3] 1944

(1) P.H.F 18.

[4] 2010(2) SA 522 (SCA) at para [3]

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