

SOUTH AFRICA / JUDGMENT

Rabie v Cotterell N.O and Others (813/2017) [2023] ZAECELLC 1 (31 January 2023) [2023] ZAECELLC 1

COURT

Eastern Cape High Court, East London Local Court

BEFORE

Matotie

CASE / FILE NUMBER

813/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, EAST LONDON CIRCUIT COURT)

Case

No: 813/2017

In

the matter between:

PANTELLIS
YIANNIS RABIE
PLAINTIFF
and
ANTONY
CHARLES PATRICK
FIRST
DEFENDANT
COTTERELL
N.O.
ANITA
BHIKA N.O.
SECOND
DEFENDANT
BRIDGET
MARY NAUDE N.O.
THIRD DEFENDANT

JUDGMENT

Matotie AJ

Introduction

[1] On 18 January 2023 the defendant applied for a postponement of the hearing of this civil action which was vigorously opposed by the plaintiff. After hearing both parties, I then issued an order postponing the matter sine die and placed the parties on terms regulating the future conduct thereof. I stated that reasons would follow in due course.

[2] These are the reasons.

Background

[3] The Plaintiff commenced action in 2017, suing the Defendants for recovery of R405 000 plus interest as a result of the plaintiff's alleged short payment of R15 000 from the agreed amount, in breach of contract.

[4] The defendants filed their plea and simultaneously instituted two counterclaims for damages arising from the Plaintiff's alleged breach contract and dishonest, alternately fraudulent conduct.

[5] The matter was certified trial ready by the case flow management judge on 22 July

2022. It would appear that the defendant applied for the matter to be allocated a date beyond 1 January 2023 owing to a possible amendment which was also communicated to the plaintiff's attorneys on 13 July 2022 at a pre-trial conference.

[6] On 17 August 2022 and almost a month later the defendants consulted with their legal representatives about the possible amendment. In that consultation the merits and demerits of the counterclaims were discussed.

[7] It would appear that nothing developed on the defendants' front for a couple of months in pursuit of the amendment. The matter was eventually set down for trial on 19 October 2022 at the instance of the Plaintiff

[8] A month after the matter had been set down for trial, those representing the defendants communicated that they had received instructions to amend their plea, however, they were yet to consult and confirm the correctness of their instruction.

[9] The matter was certified trial ready on 25 November 2023. On 19 December 2023, the defendants' attorneys advised the Plaintiff's attorneys that the amendment should be served via email, to which Plaintiff's attorneys retorted that the amendment should be filed with the correspondent attorneys as he would not have access to his emails until 4 January 2023.

- [10] At this point it became apparent that the postponement of this matter was highly likely and the defendants were charged with the responsibility to seek consent to that postponement at that point. It appears that the defendants assumed that there was a meeting of the minds insofar as the future conduct of the matter, in particular that the matter would be postponed on 18 January 2023.
- [11] On 4 January 2023 the defendants' notice of intention to amend was served together with a notice of withdrawal for the counterclaim mounted by the Defendants.
- [12] On 6 January 2023 the plaintiff confirmed that he was bracing himself for trial and sought confirmation that he should not bother preparing for the counterclaims.
- [13] On 10 January 2023 the defendants formally sought a postponement and the plaintiff did not accede thereto and sought that the defendant immediately make discoveries to avoid the possible postponement. It would appear that, depending on the discovered documents, consent could have been granted after a proper assessment thereof.
- [14] An application for postponement was served and filed on 16 January 2023, two days' shy of the trial date.

Legal framework

- [15] Erasmus,[1] says the following about postponements:

'The legal principles applicable to an application for the grant of a postponement by the court are as follows:

- (a) The court has a discretion as to whether an application for a postponement should be granted or refused. Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered or even when the parties have agreed to postpone the matter.
- (b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal.
- (c) An applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons, i.e. the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case.

- (d) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made.
 - (e) An application for postponement must always be bona fide and not used simply as a tactical maneuver for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.
 - (f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism.
 - (g) The balance of convenience or inconvenience to both parties should be considered: the court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.' (Footnotes omitted.)
- [16] A postponement is an indulgence sought by one party to a suit and it must be made timeously, that is, as soon as the circumstances which give rise to the application are known to the party seeking it. It has been held that postponement is not merely for the taking.[2]
- [17] Factors that need to be taken into account in an application for a postponement are set out by the Constitutional Court in *National Police Service Union and Others v Minister of Safety and Security and Others*[3] where Makgoro J said:

'The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such 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 show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take 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 and whether the application is opposed.'

- [18] In *Psychological Society of South Africa v Qwelane and Others*[4] the Constitutional Court held:

‘In exercising its discretion, a court will consider whether the application has been timeously made, whether the explanation for the postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. And, importantly,

this Court has added to the mix. It has said that what is in the interests of justice is determined not only by what is in the

interests of the immediate parties, but also by what is in the broader public interest.’

[19] It is trite that the party seeking postponement must proffer good and strong reasons therefor, and that the applicant must give full and satisfactory explanation of the circumstances that give rise to the application.[5] The application itself must be bona fide and must not be used as a tactical endeavour to obtain an advantage to which the applicant is not entitled.

[20] The defendants have advanced one reason for seeking the postponement, namely, their intention to amend their plea, having filed a notice of intention to do so as at the time of the hearing of this matter. As a consequence to the intended plea, it would appear that further discoveries would be necessary for purposes of trial. For that reason the trial would have to, in the interest of justice, be postponed.

[21] It is apposite at this stage to consider the purpose of Uniform rule 28. In this regard, *All Alloys (Pty) Ltd v Du Preez*[6] is instructive. The court iterated what is now commonplace, that Uniform rule 28 is intended to regulate the amendment of pleadings

and documents in respect of which the parties' procedural rights in proceedings may be affected. The notification requirement in Uniform rule 28(1) grants the other party to the proceedings an opportunity to object to the intended amendment under the provisions of Uniform rule 28(4). Objections customarily arise if a party may be prejudiced in the conduct or outcome of the proceedings because of the amendment or its timing.

[22] The principles governing the grant or refusal of an amendment have been expounded in several cases. The key principles evident in these cases were also echoed by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*.^[7] Referring, with approval, to *Moolman v Estate Moolman and Another*,^[8] the court, in paragraph 9, indicated that:

‘the practical rule that emerges . . . is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or “unless

the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed”’

- [23] The essence of these principles were recently crystalized by the Constitutional Court in *Ascendis Animal Health (Pty) Ltd v Merck Sharp Dohme Corporation and Others*,^[9] in paragraph 89, when it stated that Uniform rule 28 ‘is an enabling rule and amendments should generally be allowed unless there is good cause for not allowing an amendment’.
- [24] The plaintiff confirmed that the amendment is not opposed and sought that the defendants perfect the amendment without further delay. The plaintiff’s consent to the amendment has somewhat tilted the pans of scale in favour of the defendants insofar as the postponement sought.
- [25] The plaintiff proposed that issues be separated and that trial should proceed. No proper application for separation was mounted by the plaintiff and, in any event, it was apparent that the separation would not be convenient and consequently not appropriate in the circumstances.
- [26] In granting the postponement I had to make further considerations as to the future conduct of the matter and an appropriate order as to costs.
- [27] The plaintiff has strenuously opposed postponement of this matter to ensure that the matter proceed on the scheduled date and that his right to a speedy resolution of this dispute is protected. I cannot agree more with the plaintiff in this regard. The interests of justice demand that this matter is finalised. In dealing with similar circumstances in *McCarthy Retail Ltd v Shortdistance Carriers CC*,^[10] Schutz JA said that ‘a party opposing an application to postpone an appeal has a procedural right that the appeal should proceed on the appointed day. It is also in the public interest that there should be an end to litigation. Accordingly in order for an applicant for a postponement to succeed, he must show a ‘good and strong reason for the grant of such relief’. There is no reason why these remarks should not apply to the postponement of trials.
- [28] In *Persadh and Another v General Motors SA (Pty) Ltd*,^[11] Plasket J proposed that as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised.
- [29] I place emphasis on a litigant’s right to have a matter wherein he or she is a party finalized speedily. It is of great concern that the pre-trial procedures as between the parties in the form of a pre-trial conference and before a judge handling the case flow management of the matter may be aborted with ease. These procedures are designed to ensure that only matters that are ready to run should be enrolled. This is a helpful process that ensures that those litigants who would ordinarily have to wait longer to have their matters heard can be heard sooner than later and finalized.
- [30] It further concerned me that the matter bears a 2017 case number and I would have imagined that, at the very least, parties would have dealt with pleadings to finality. The reason advanced by the defendants has always been at the disposal of the defendant and

when I enquired from counsel for the defendant about the cause for the delay in drawing this amendment, counsel advised me that his predecessor did not identify this defence. This is cold comfort to the plaintiff and the court in that the defence is for the defendant and not its representatives. In any event, it is apparent that counsel has been engaged in this matter as far back as 18 October 2018 where he appeared and argued on behalf of the defendants an application to compel before Bloem J.

[31] The conduct of the defendants is inexcusable for the following

reasons:

a) the foundational information to effect the amendment has always

resided with the defendant;

b) the defendants intimated for the first time that an amendment would be sought in July 2022, well over four years after the initial plea was filed, and six months later no amendment had been effected;

c) it took the defendants, at best for the defendants, six days to mount the application for postponement; and

d) the defendants were not in possession of all original documents which they needed for trial as at the time of mounting the application for postponement.

[32] In *Reid N.O. v Royal Insurance Co*, [12] Roper J had the following to say:

‘In the present case the application has been brought under a complete misconception as to the function of particulars, and it also had the effect of unnecessarily delaying the further prosecution of the action, and in the circumstances I feel that the plaintiff ought to have his costs as between attorney and client.’ (Emphasis added.)

[33] I do not see why the plaintiff should shoulder any portion of the costs in circumstances of the present matter.

[34] To mitigate the inconvenience to the plaintiff and ensuring that trial proceeds in this matter, I directed that a date be allocated by the registrar in the second term and directed the parties to approach the Judge President for case flow management of this matter.

Conclusion

[35] It is for these constitute reasons that I granted the order I did on 18 January 2023, which, for the sake of completeness, reads:

‘1. The trial is postponed sine die.

2. The Registrar is directed to allocate a date in the second term for trial.

3. Parties are directed to approach the Judge President for case flow management of this

matter

4. The defendants, in their representative capacities, are directed to pay costs occasioned by the postponement on an attorney and client scale, the one paying the other to be absolved.'

L. MATOTIE

ACTING JUDGE OF THE HIGH COURT

For the plaintiff/respondent Dr G Ebersohn

Instructed by:

Ebersohn Attorneys,

c/o Bate Chubb & Dickson Inc,

EAST LONDON

For the defendants/applicants: Adv C Kotze,

Instructed by:

Kirchmanns Inc,

Date of hearing:

18 January 2023

Date order issued:

19 January 2023

Date of delivery of judgment: 31 January 2023

[1] D E Van Loggerenberg Superior Court Practice Vol 2 at D1-552A.

[2] See Isaacs and Others v University of the Western Cape 1974

(2) SA 409 (C) at 411H; also Grootboom v National Prosecuting Authority 2014 (2) SA 68 (CC) at 76C-D.

[3] See National Police Service Union and Others v Minister of Safety and Security and Others [2000] ZACC 15; 2000 (4) SA 1110; 2001 (8) BCLR 775 (CC) para 4 ('National Police Service Union').

[4] Psychological Society of South Africa v Qwelane and Others (CCT226/16) [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) para 31.

[5] See National Police Service Union fn 2 at 1112C-F; Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amicus Curiae)

[2007] ZACC 14; 2007 (5) SA 620 (CC) at 624B-C;

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- [6] All Alloys (Pty) Ltd v Du Preez 2013 JDR 1648 (GSJ) para 15.
- [7] Affordable Medicines Trust and Others v Minister of Health and Another
- [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC).
- [8] Moolman v Estate Moolman and Another 1927 CPD 27 at 29.
- [9] Ascendis Animal Health (Pty) Limited v Merck Sharpe Dohme Corporation and Others
- [2019] ZACC 41; 2020 (1) SA 327 (CC); 2020 (1) BCLR 1 (CC); 2019 BIP 34 (CC).
- [10] McCarthy Retail Ltd v Shortdistance Carriers CC
- [2001] ZASCA 14; [2001] 3 All SA 236 (A) para 28.
- [11] Persadh and Another v General Motors SA (Pty) Ltd 2006 (1) SA 455 (SE) para 13.
- [12] Reid N.O. v Royal Insurance Co 1951
- (1) SA 713 (T) at 720C-D.
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