

SOUTH AFRICA / JUDGMENT

Roseveare and Others v Simelane and Others (27833/2021) [2022] ZAGPJHC 838 (24 October 2022)

[2022] ZAGPJHC 838

COURT

South Gauteng High Court, Johannesburg

BEFORE

Mahomed

CASE / FILE NUMBER

27833/2021

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA****GAUTENG LOCAL****DIVISION, JOHANNESBURG****Case****No. 27833/2021****REPORTABLE: NO****OF****INTEREST TO OTHER JUDGES: NO**

REVISED: 24/10/2022

In

the matter between:

ROSEVEARE,

SHAUN

1st Applicant

ROSEVEARE,

SHAUN BRADLEY N.O.

2nd Applicant

ROSEVEARE,

RYAN EDGAR DENNIS N.O.

3rd Applicant

WHITTAKER,

CHRISTINE MARY N.O.

4th Applicant

MUNRO,

CRAIG

5th Applicant

SHAULIS,
STEVEN PATRICK
6th Applicant
NATIONAL
AIRWAYS CORPORATION (PTY) LTD

7th Applicant
and
SIMELANE,
DAVID NDABENHLE

1st Respondent
ULTIMATE
HELI (PTY) LIMITED

2nd Respondent
ULTIMATE
AIRWAYS (PTY) LIMITED

3rd Respondent
ULTIMATE
HELIPORT (PTY) LIMITED

4th Respondent
REASONS

MAHOMED

AJ

INTRODUCTION

1.

This matter was on my opposed roll. Miltz SC appeared for the applicants and informed the court that a few minutes before the matter was to commence, the first respondent's attorneys contacted his attorney and advised that the first respondent ("the respondent") intended to apply for a postponement. This is the third postponement the first respondent seeks and the third occasion

that he applies on the morning of the hearing of the matter. The applicants seek an order for the first respondent to deliver share

certificates, against a tender of payment for his shares in the 2nd to 4th respondents.

BACKGROUND

2.

The parties

were directors and shareholders in the companies cited as the 2nd to 4th

respondents. The applicants rely on the prejudicial conduct of the 1st

respondent in terms of s163 of the Companies Act 71 of 2008[1].

Therefore, a breach was established which triggered the "deemed offers provisions" in their shareholder agreements

in the 2nd

and 4th

respondents. The applicants seek to purchase his shares therein.

Furthermore, the applicants cancelled the agreements in the 3rd respondent, having established that the first respondent breached a

confidentiality clause and accordingly cancelled this agreement.

The

applicants therefore seek to purchase all shares which the first respondent held in the 2nd

to 4th

respondents. The shares were valued by application of contractually agreed formula.

Miltz SC proffered that

on his reading of the answering affidavit, the valuation of the shares is disputed. The first respondent

believes that his shares are

undervalued. The first respondent has not raised any dispute as to

the validity of the contractual

terms, he disputes only the valuation

of his shares in the 2nd to 4th respondents.

THE APPLICATIONS

Striking of Defence

3.

The applicants applied to strike out the respondent's defence and for the matter to proceed by default.

4.

Miltz SC submitted that the respondent has on two previous occasions adopted the same modus operandi, when he applied for postponements on

the morning of the hearing of the matter and without any substantive application. He informed the court that a few minutes before court

commenced, the first respondent filed an application for postponement and an application for condonation. He had not had

an opportunity to

peruse the papers at this late stage.

5.

The matter

was previously before Judge Maier Frawley on 18 August 2021[2]

when the matter was postponed sine die and the first respondent was ordered to, file his answering affidavit and apply for condonation

for the late filing of his papers by 2 September 2021. He was ordered

to pay the costs.

6.

On 17

November 2021 the matter was before Opperman J, who granted a postponement and ordered,[3]

that by 2 December 2021, he was to deliver an application for condonation due to his late filing of his answering affidavit and his

failure to comply with the earlier order of August 2021. He was

ordered to file his answering affidavit. The applicants were

to file

their heads and practise note, by 3 January 2022 and the respondent

was to file his heads of argument and practise note

10 days

thereafter. It was ordered that should he fail to file his heads of argument and practise note, the applicants could apply for a strike out of the defence.

7.

Miltz SC submitted that the respondent failed to comply with the two previous orders and counsel that as he addressed this court no practise note, or heads have been filed.

8.

Furthermore, the respondent has to date failed to pay the taxed bill of costs in respect of the last two occasions in court.

9.

Counsel applied for the striking out of the defence and to proceed by default.

10.

He submitted further that the answering papers do not comply with Rule 6 as they are non-responsive to the issues and grounds raised by the applicants and from the papers the respondent disputes the valuation

of his shares only.

Counsel reminded the court, that the respondent participated in discussions with the applicants, long before this application was launched on 14 June 2021 regarding the values.

10.1.

The financial statements of each of the entities were sent to him, and he signed off on them. He was invited to comment of the assessed values but failed to engage with the applicants on the valuation.

10.2.

Moreover, the valuations have been assessed based on a formula which is included in the agreements between the parties. The respondent has to date not submitted any of his own valuations nor has he raised a counterapplication.

10.3.

The evidence is that in respect of the 2nd and 4th respondents the agreements provide time periods within which the parties were to raise objections. The respondent has failed to take any of the opportunities available to him.

10.4.

He submitted that all the valuations and assessments in respect of all the respondent companies, were presented to the first respondent and he has had sufficient time to consider and counter them.

11.

Miltz SC argued that although the application for postponement alludes to a valuation made by an employee of Standard Bank who

prima facie, assessed the shares at a higher value, there are no details as to how this valuation was arrived at, when and what he looked at to determine the value. He submitted this cannot assist a court either, in the assessment of a fair value.

12.

Counsel argued that whether contractually or based on s163 of the Companies Act, no proper defence is raised. Miltz SC submitted a postponement will not assist the respondent and it only serves to delay the finalisation of the matter.

13.

In response to the court's inquiry on a mediated settlement Miltz SC submitted the mediation would not achieve any resolution the applicants have on several occasions tried to discuss matters with the respondent, who has elected not to take up the opportunities afforded him.

14.

Counsel argued further that the delay not only prejudices the applicants but also prejudices[4] the 2nd to 4th respondents, which are corporate entities.

The first respondent has failed to authorise the release of shareholder funding.

14.1.

He failed to establish a BEE entity which is to advance the development of Black employees

14.2.

He unlawfully threatened to liquidate a company, and the like. He has frustrated the progress and operations of the other respondents as well.

15.

Miltz SC, submitted that the only explanation that the respondent has proffered all along is that he is unable to afford the legal fees to litigate the matter.

Counsel argued that the respondent was legally represented by counsel on the two previous occasions and must have placed his attorneys in funds to do so, there was no indication that his legal team were acting pro bono.

15.1.

Moreover, at his hearing at the CCMA he was represented by senior counsel, which process he eventually abandoned, and the matter was dismissed.

16.

He offers no proof of his earnings and fails to provide the court with any details as to his personal commitments.

17.

Counsel submitted that the court has only a narrow discretion in this instance and that it is only when the respondent has purged his default of the order of court of 19 August 2021, can a court even consider his arguments. He has failed to do so, even at this stage there are no heads filed, no practise note, or chronology filed.

18.

Miltz SC submitted that nowhere in the answering affidavit nor in his counsel's submissions, have the contractual terms ever been disputed.

19.

The method of assessment of share values employed was set out in the contract and in respect of the third respondent the agreement provided for restitution, however the first respondent paid nothing for those shares. The applicants nevertheless adopted the same assessment method as in the other shares and arrived at a figure of R230 000 for those shares, which it has tendered.

20.

If there was a valid defence in respect of the calculation methods of the share values, the respondent would be expected to put an argument that the method of assessment is against public policy and unenforceable.

21.

Nothing was done. Miltz SC argued that the submissions made by counsel for the respondent are not new, they were all known to the respondent at the time that the answering affidavit was filed. The facts submitted by counsel are not complex to have required the expertise of "expensive" lawyers, but they are basic facts that were well within his knowledge. He cannot rely on poor legal representation as an excuse. A litigant is to ensure that he participates in a matter sufficiently to address the substance of the issues raised by his opponent.

22.

He has failed to exercise his rights and take up opportunities which he was offered through the entire process of the valuations and his relationship with the respondent companies.

23.

The court was also advised that each time the matter is in court a set down was served on the attorneys. The attorneys did nothing either and chose to ignore the court orders. There is still no

explanation for a postponement in this matter, since the first application.

24.

Advocate Saint appeared for the first respondent and argued that striking off the defence would effectively deny the first respondent his constitutional right to a hearing.

25.

Counsel conceded that the answering papers say little and argued therefor that the first respondent has not had an opportunity to

fully ventilate his case and his papers need to be supplemented.

26.

He submitted that since he had taken over the matter, it was the first time that the first respondent was aware that the papers needed

to be regularised.

27.

He proffered that he advised his attorneys that the respondent must comply with the orders of court. Therefore, he has now filed his

condonation application earlier this morning.

POSTPONEMENT

28.

Advocate Saint submitted that the papers filed earlier this morning are relevant and present a cogent argument for the first respondent

to succeed in this application.

29.

He informed the court that the application for condonation was filed earlier this morning, however it is not before this court.

This court

is to determine only the application for postponement.

30.

Mr Saint submitted that the applicants have not offered fair value for the first respondent's shares. They seek to strike

a

bargain when they offered him only R3.2 million for his shares in the 2nd respondent.

31.

He argued further that the applicants have treated his client poorly and that they have fired him from two companies and seek to do so in

respect of the third company as well.

32.

The respondent must be allowed to fully ventilate his case. He will suffer grave injustice if he were not granted a postponement.

His

shares will be "irretrievably lost" to him.

33.

Mr Saint argued that the court should not close the doors on this respondent as the matter will again be set down in due course

when

the applicants can set out their argument if they are prejudiced.

34.

He submitted the applicants suffer no prejudice since the first respondent has left the business premises after he was fired in 2019.

He does not interfere with the business operations in any way.

35.

The court must note that he has not received dividends for many years and due to their poor treatment of him, and his dismissal

he has had

to find employment elsewhere where he now earns only R45 000 per month, a fraction of what he earned when he was

a director and

shareholder in the respondent companies. He has had to support a family and lives away from home.

36.

Counsel proffered that he could not inform the applicants any earlier about the postponement application since the papers were not ready

any earlier for service.

37.

Mr Saint informed the court that the first respondent tenders to pay attorney client costs to compensate for any prejudice they suffer if

the matter were postponed.

38.

The first respondent has had no opportunity to make any inputs into the valuation of his shares. A representative from Standard

Bank has

provided only a prima facie assessment which is far more than what the applicants assessed the share value. He must be

given an

opportunity to obtain a proper valuation of his shares and receive fair value for them.

39.

The respondent companies are a state-of-the-art operation and the most sophisticated on the continent. The whole concept was his idea,

and he is the first Black chief pilot in the country.

40.

Counsel argued that the allegations made against the first respondent were orchestrated to trigger the deemed offer for the shares which he

held in the second and fourth respondents. The first respondent was simply a “front” for the applicants.

41.

Counsel submitted further that there is a dispute of fact on noting the accusations by the applicants about the respondent’s conduct and attitude toward the companies as director.

42.

Counsel submitted that his client has not had the money to litigate the matter at the same level as the applicants and denied that he was adopting delaying tactics, to frustrate the applicants. He argued that the applicants were in fact using his monies to litigate against him.

43.

Advocate Saint argued the first respondent is lay person and could not have known that he needed to regularise his papers and the applicants can argue their case once the papers are supplemented.

44.

In reply,

Miltz SC referred the court to the requirements for a postponement as set out in MYBURG

TRANSPORT v BOTHA t/a SA TRUCK BODIES[5],

which

provides that the application for postponement must be made timeously,

as soon as the circumstances which might justify such an application become known to the applicant.

45.

Counsel further submitted that the “application must be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.”

46.

The applicants in casu were awarded costs in the earlier matters which have not been paid and the respondents tender of costs for a third postponement is meaningless and will not address the issue of prejudice as mentioned in the Myburg Transport case.

47.

Counsel referred the court to the requirements for condonation where “good cause must be shown.”

48.

Counsel submitted that the Court has a wide discretion, and it must look at the merits of the matter and the application is to be seen as

a whole and determine if there is indeed a defence in this instance.

49.

Counsel submitted that nowhere in the respondent’s papers or in his counsel’s address has he disputed the contractual terms

that regulate the relationship of the parties. The only defence argued today is on the valuation of shares. What he thinks subjectively is irrelevant.

50.

Miltz SC submitted that his client and the Court are still not informed of the “real reason” for the postponement and the reasons why the orders by two previous courts were not complied with.

51.

It was argued that the first respondent failed to furnish pay slips to prove his income. He should provide full financial disclosure as in a R43 procedure. He holds a prominent position as a chief pilot, he cannot be a pauper as he claims. Each time the matter was in court his legal team is in funds and they arrive with counsel. Even at the CCMA, senior counsel represented him. One cannot simply accept his word.

52.

Counsel submitted that there is no case to allow a postponement or to supplement his papers.

53.

Furthermore, there is no case that the valuation is wrong, therefore there is less possibility of successfully defending the valuation, and therefore more difficult it will be to get the indulgence sought.

54.

Miltz SC submitted that both the applications fail to address the non-compliance with two previous orders of court and the failure to file practise note and heads or argument as ordered.

55.

The papers before court do not address the points of substance, and the applications are simply an abuse, there are no proper explanations.

56.

Miltz SC persisted with the application to strike out, it must be granted, and attorney client costs be awarded.

JUDGMENT

57. I shall refer to the parties as they appear in the main application.
58. An applicant for a postponement seeks an indulgence from the court. A court will grant the postponement if it is in the interest of justice.
59. In *McCARTHY RETAIL LTD v SHORT DISTANCE CARRIERS CC*, [6] Schultz JA, stated:

“a party opposing an application to postpone, and 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.

... the interests of other litigants and the convenience of the Court are also important. The record and heads have been read by five Judges, variously months or weeks before the appeal date. The fact that this case was placed on the roll meant that another case had to wait for the following term and if a postponement is granted this consequence will extend into succeeding terms.”

60. Three judges of the High Court of the busiest division in the country, have read the voluminous files in this matter. The first

respondent conceded that the file is large. This matter has taken up three allocations in the past year, all occasioned by the first respondent’s failure/refusal to recognise the orders of this court, which effectively places him in contempt.

61. Ironically though, he appoints his legal team to ask this court for an indulgence and to “protect his constitutional rights to a hearing.”

62. The court is of the view that that respondent has only himself to blame if he feels he has not had a hearing and not fully ventilated

his matter.

63. The objective facts are, on the evidence set out above, the first respondent has been indulged, over the past year by two previous

courts. He has been further indulged by this court, when his counsel was permitted to address the court on his application for

postponement filed only a few minutes before the commencement of the hearing of this matter and when this court was obliged to stand the matter down to read his papers.

64. I agree with Miltz SC that the respondent has been afforded his right to a hearing, when he was granted two postponements, he was afforded a two opportunities to apply for condonation wherein he could have set out his prospects of success, when he was afforded an opportunity to file his answering affidavit, and when he failed to do so timeously, the period to file was extended by the second order of Opperman J. He could also have exercised his right to a hearing when if he filed his heads of argument (although not pleadings, they could have persuasive value) or even on filing of his practise note. He did not take up his opportunities.

65. This court is asked “not to close the door on him, he will suffer irretrievable loss of his shares.” He has failed to assist himself when he could have.

66. None of his counsel's submissions before this court are new. The facts have been known to him since well before the application was launched, even the assessment of the value of his shares. It is logical that if he disputed the assessed values, the must furnish his own values, notwithstanding that he was contractually bound to the method of calculation and assessment of the shares. In *SALOOJEE AND ANOTHER NNO v MINISTER OF COMMUNITY DEVELOPMENT*[7], Steyn CJ referred to the judgment in *Regal v African Superslate (Pty) Ltd*[8], where the court held that.

“the attorney’s neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief.”

67. Steyn CJ further stated[9], albeit, on considering an application for condonation,

“There is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence, or the insufficiency of the explanation tendered. To hold otherwise might have disastrous effect upon the observance of the Rules of this Court. Considerations of ad misericordiam should not be allowed to become an invitation to laxity. the attorney after all is the representative whom the litigant has chosen for himself, and there is little reason why in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are.”

68. He failed to take up the opportunities that were afforded him and a valuation was alluded to only at this third application for postponement.

69. In his answering papers he disputed the value of his shares. I agree with Miltz SC, disputing the assessed value of the share is not enough, he must do more. He failed to present the court with any reliable valuation and even at this late stage, counsel proffered that a proper evaluation “will be done in due course.” It is noteworthy that although he disputed the valuation, he failed to even raise a counterclaim. In my view this is a critical issue, as the respondent is contractually bound to the method of calculation.

70. I am not persuaded that he has not been able to afford legal services. He was represented on each of the occasions when he applied for postponements and it is not disputed that at his hearing before the CCMA, senior counsel represented him. It is noteworthy that despite the legal costs, he failed to appear for this hearing before that forum. Moreover, the first respondent fails to file confirmatory papers from persons who may have paid for his legal fees as he alleged.

71. In *TAKE AND SAVE TRADING CC AND OTHERS v STANDARD BANK OF SA LTD*[10], Harms JA, referred to tactics sometimes employed by litigants, for example, when a party terminates a mandate deliberately so that a court is obliged to grant a postponement, and stated:

“judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by in suitable cases refusing a postponement.”

72. A lack of funds defence could fall into this category. There was no evidence before this court that the attorneys acted pro bono. They must have been placed in funds.
73. I cannot find it is in the interest of justice that the matter be further postponed, but that it be finalised.
74. Having regard to the requirements set out in MYBURG TRANSPORT supra, the application for postponement was not timeously brought, including on the last two occasions. On all three occasions the applications were brought on the morning of the hearing of the matter. Notices of set down were served on his attorneys on every occasion.
75. In my view the respondent does not have prospects of success particularly, in that the claim is founded in contract and he does

not dispute the terms of that contract. A further postponement will not assist the respondent.

76. In casu both the applicants and the 2nd to 4th respondents are prejudiced by the long delay in this matter due to the various postponements.
77. An order for costs as compensation for the prejudice suffered, is of no more in casu, the respondent has failed to pay a taxed bill for costs.
78. Accordingly, the application for postponement must fail. The application is refused.
79. Miltz SC proceeded on a default basis and submitted that the first respondent's shares were assessed according to the formula

agreed to in the shareholders agreements. He identified the portions held as, 26% in the 2nd respondent, 33 1/3 % in 3rd respondent (in terms of a restitution clause, however first respondent did not pay for any shares, these were calculated by the

same method as the other shares for a value of R290 000) and 26% in the 4th respondent.[11] Counsel directed the court to the purchase of the respondent's shares in terms of the deemed offer in clause 16.1[12] and the assessed values.

80. The applicants relied on several breaches to constitute prejudicial conduct in terms of s163 of the Companies Act 71 of 2008,[13] and submitted that the applicants need to be protected.
81. The values of the shares in each of the 2nd to 4th respondents was confirmed to the court.

I make the following order:

1. The first respondent's defence is struck.
2. The order as appears at caselines 0001-9 is granted.
3. The first respondent shall pay the costs of Senior Counsel on an attorney client scale.

Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 24 October 2022.

Date of hearing:

5 September 2022

Date of Judgment: 24 October 2022

Appearances

For applicants:

Miltz SC

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For First Respondent: Advocate F Saint

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[1] Caselines 02-29 paragraphs 44 following

[2] Caselines 0001-1

[3] Caselines 0001-3

[4] Caselines 02-29 to 56

[5] 1991 (3) SA 310 (Nm SC) a5 314-15

[6] 2002 (3) SA 482 (SCA) AT 494-95 (Herbstein van Winsen Civil Practise in the High Courts 5th ed p756 -757

[7] 1965 (2) SA 135 (A) at

[8] 1962 (3) SA 18 AD at p23

[9] Saloojee supra at 141

[10] 2004 (4) SA 1 SCA

[11] Caselines 02-20 following

[12] Caselines 02-57

[13] Caselines 02-29 following

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