SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

Case No.2010/09079

Date:22/09/2010

In the matter between:

SP&C CATERING INVESTMENTS (PTY) LTD	Plaintiff
and	
MANUEL JORGE MAIA DA CRUZ	First Defendant
CASCAIS RESTAURANTS CC	Second Defendant
VENEZA COFFEE SHOP CC	Third Defendant
SERAB TRADERS CC	Fourth Defendant
COZ WORLD DEALERS 3 CC	Fifth Defendant
ADEGA DO MONGE RIVONIA CC	Sixth Defendant

JUDGMENT

MEYER, J

[1] The first to sixth applicants seek the postponement of this trial in the action between the respondent as plaintiff and them as the first to sixth defendants. I refer to the parties as they are referred to in the action. The Honourable Deputy Judge President, Mr. Justice Mojapelo, permitted this action as a preferential allocation to be enrolled for trial on Monday 20 September 2010.

[2] In its declaration, the plaintiff claims the ejectment of the second and third defendants from shops B3 and B2 in SP Pavilion Shopping Centre allegedly pursuant to the cancellation of written agreements of lease by reason of the second and third defendants' breaches thereof. The plaintiff also claims for the first to sixth defendants to render statements relating to their debtors allegedly pursuant to deeds of cession and pledge which the first defendant and the second to sixth defendants, represented by the first defendant, executed unto and in favour of the plaintiff. The defendants dispute the plaintiff's claims for ejectment and for the rendering of statements in their plea. The plaintiff's averments in its declaration are essentially all denied and defences *inter alia* of the conclusion of partnership agreements between the first defendant and the plaintiff's sole shareholder and managing director, Mr. Pereira, are alleged, misrepresentations made by the attorney of the plaintiff and of Mr. Pereira, but for which it is alleged the first defendant would not have appended his signature to the lease agreements and to the deeds of cession and pledge, are alleged, and the rectification of all the written recordals of agreements between the plaintiff and the defendants are sought in the alternative.

[3] The present proceedings commenced by way of an urgent application that was launched by the plaintiff on 9 March 2010, served on the defendants on 10 March 2010, and set down in the urgent motion court for hearing on 16 March 2010. Mayat, J made an order in terms whereof the matter was postponed *sine die* for hearing in the ordinary opposed motion court and the question of costs were reserved. This order clearly facilitated the exchange of answering and replying affidavits in the normal course and in terms of the Uniform Rules of Court. The defendants were thereafter late in the filing of their answering affidavits. The matter was enrolled for hearing on 13 April 2010, when it was postponed at the defendants

instance, and they were required to file their answering affidavits by 16 April 2010, which they did. The applicant's replying affidavit was filed four days later and the matter was set down for hearing in the opposed motion court for the week commencing on 27 April 2010. The matter was allocated to Blieden, J, who postponed the matter *sine die* so that a special allocation of two days for the hearing thereof be requested. A special allocation was made and the opposed application was heard on 24 May 2010. Mathopo, J referred the application to trial and further ordered that the founding affidavit stood as a simple summons and the answering affidavit as a notice of intention to defend, that the plaintiff was to file its declaration within ten days, whereafter the rules of court would apply, and the costs were reserved.

[4] The allocation of the present special preferential trial date for this matter was the result of representations made to the Deputy Judge President by the plaintiff's attorneys in letters dated 9 June 2010 and 28 July 2010. In the representations dated 9 June 2010, the Deputy Judge President was *inter alia* informed that *'[b]oth parties will be in a position to file their discovery affidavits by 6 August 2010 and thereafter to convene and attend a pre-trial conference by 18 August 2010, whereafter the matter will be ripe for hearing.'*

[5] The Deputy Judge President was not notified that the anticipated dates were not met and that none of the parties filed their discovery affidavits by 6 August 2010 or thereafter or that a pre-trial conference was not held by 18 August 2010 or thereafter, and that the matter accordingly did not become ripe for hearing. The Deputy Judge President should, in my view, promptly have been notified thereof. The Deputy Judge President, on Friday 3 September 2010, notified the plaintiff's

attorneys of the special allocation of a preferential date for the trial of this action for four days from Monday, 20 September 2010. The ineluctable inference is that the Deputy Judge President allocated a preferential trial date for the commencement of this trial within a mere eleven court days from the date of such notification based on the representations made to him that the matter was anticipated to be ripe for hearing by 18 August 2010, and the failure of the parties to have notified him otherwise.

[6] The defendants' attorneys by letter dated 9 September 2010, correctly in my view, advised the plaintiff's attorneys that the matter was *'...clearly not ripe for hearing.'* The plaintiff only discovered on 8 September 2010, and the defendants a day or so later. The defendants are not satisfied with the plaintiff's discovery and believe there are other relevant documents not discovered. The defendants wish to take the necessary steps to procure what they consider further and better discovery. The plaintiff was able to adequately prepare for trial and is ready to proceed. Its case is not complicated. The defences raised by the defendants are more complex. The documents in this matter are voluminous. The defendants' legal representatives consult with the first defendant through an interpreter, which is more time consuming. The considered and acknowledged view of senior and junior counsel for the defendant is that they are not adequately prepared to conduct the trial. There is merit in the criticism raised about the briefing of counsel for the defendants who '*only became available to deal with the matter meaningfully on 15 September 2010'*, but I am nevertheless in all the circumstances unable to find that the defendants had sufficient time to brief counsel, to attempt to obtain further discovery, and to prepare their defences adequately in the mere eleven court days afforded to them. My conclusion, I hasten to add, would have been different had discovery taken place

and a pre-trial conference been held on the anticipated dates in terms the representations made to the Deputy Judge President.

[7] I am in all the circumstances satisfied that the defendants' non-preparedness has been fully explained, that their unreadiness to proceed is not due to delaying tactics, and that justice demands that they should have further time tor the purpose of presenting their case. See: *Madnitsky v Rosenberg* 1949 (2) 392 (A), at p 399.

[8] The plaintiff's attorney requested the defendants' attorney repeatedly to launch the application for the postponement since the defendant's attorney had written to him on 9 September 2010 and contended that the matter was not ripe for hearing. Adv. van Blerk SC, who appears with Adv. Sawma, submitted on behalf of the plaintiff that the application for a postponement was not brought timeously, but at a time that was calculated to prejudice the plaintiff. It is true that the plaintiff was in no uncertain terms notified in terms of the defendants' pre-trial list, which was served on the plaintiff's attorneys on 15 September 2010, that *'[t]he defendants shall seek the postponement of the trial in order to prepare properly'*, but yet the application was only given to the plaintiff's legal representatives on Monday morning, 20 November 2010. It is, however, stated in the replying affidavit that an attempt was made to prepare for trial after the defendants' counsel became available to deal with the matter meaningfully. Counsel consulted on 17 November in order to prepare for trial. It was during that consultation that it finally became clear that it would be impossible to continue. Adv. Theron then proceeded to draft the postponement application. Adv Theron confirmed this when he argued the postponement application on behalf of the defendants. I am accordingly of the view that justice

nevertheless justifies a postponement in the particular circumstances of this case and that no adverse costs order is warranted.

[9] It will in my view be appropriate to order each party to pay its or his own costs of this application. Each party was aware of the representations that were made to the Deputy Judge President, of the anticipated dates by which the exchange of discovery affidavits and the holding of the pre-trial conference were to take place, and that such did not eventuate. The duty, in my view, rested on all the parties concerned to ensure that the Deputy Judge President was notified accordingly.

[10] In the result the following order is made:

1. The trial is postponed *sine die*.
2. Each party is to pay its or his own costs of this application.

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P.A. MEYER
JUDGE OF THE HIGH COURT

22 September 2010