

REPUBLIC OF SOUTH AFRICA



THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
28/9/2018	

CASE NO: 2017/ 48910

In the matter between:

NEW SHELF 944 (PTY) LIMITED
NTSHANGASE, MBULELO SIMON

FIRST APPLICANT
SECOND APPLICANT

and

MASHABA, JABULANI HLAMARISA PRIDE

RESPONDENT

JUDGMENT

NKOSI - THOMAS AJ

A. INTRODUCTION

[1] Before me is an application for the enforcement of the consent order of this Court dated 11 September 2017, under case number - 43065/ 2016 (***“the main application”***). While the applicants persist with obtaining the relief sought in the main application, the respondent seeks an order postponing the main application *sine die*. The applicants seek the following forms of relief in the main application:

[1.1] Directing the respondent to deliver his share certificate in respect of his 50% shareholding in the first applicant within four (4) calendar months from the grant of the order;

[1.2] Directing the respondent to deliver a share transfer form duly completed and signed in order for his 50% shareholding in the first applicant to be transferred to the second applicant within four (4) calendar months;

[1.3] Ordering that the respondent is in contempt of the court order of 11 September 2017 inasmuch as he had hitherto failed to comply therewith;
and

[1.4] Ordering the respondent to pay the costs of suit.

[2] It is common ground, as between the parties, that should this Court be disinclined to postpone the main application, the applicant would be entitled to the relief sought in the main application.

[3] The grounds upon which the respondent seeks a postponement of the main application are, *inter alia*, the following:

[3.1] That the respondent launched a counter-application on 25 July 2018 (***“the counter-application”***) in terms whereof he seeks an order staying the execution of the consent order of 11 September 2017 granted under case number. 43065/ 2016 (***“the consent order”***) pending the finalisation of an action instituted by him against the applicants under case number 4297/ 2018 (***“the action”***);

[3.2] That the main application and the counter-application be heard simultaneously inasmuch as the two are inextricably linked to each other;

[3.3] That when the main application was launched, the applicants, and more particularly the second applicant, had knowledge of the disputes relating to the existence or otherwise of fraud that had induced the respondent to conclude the settlement agreement leading to the consent order;

[3.4] That the second applicant was aware that the true and only reason for the respondent's non-compliance with the consent order was his purported cancellation of the settlement agreement based on certain alleged misrepresentation and non-disclosure on the part of the second applicant;

[3.5] That the respondent was advised that it would have been both futile and prejudicial for him to comply with the consent order by transferring his

shares and resigning as a director and to, in due course, seek a cancellation of the settlement agreement and the setting aside of the consent order; and

- [3.6] That a grave injustice would result were the respondent to be held in contempt of court, thus compelling the respondent to transfer his shares and resign as a director, all while he may still be successful at the trial in due course.
- [4] The applicants, even though not having filed an answering affidavit in opposition to the substantive application for a postponement, opposed the postponement application and persisted in regard to their entitlement to relief under the main application. Their main basis for opposition is that the postponement application is a procedural device to keep the applicant's out of relief. In other words, as I understood the argument, the postponement application is nothing but a tactical manoeuvre to frustrate applicants' entitlement to relief.

B. MATERIAL COMMON CAUSE FACTS

- [5] The consent order was granted on 11 May 2017.
- [6] The consent order in issue in these proceedings was a culmination of a settlement agreement reached in respect of eight cases, in total, between the parties before me. All of these cases were settled under the consolidated case number

43065/2011 on 11 September 2017¹. The impugned consent order reads, *inter alia*, that:

- "1. The parties agree to settle all triable issues / matters under the following case numbers, together with all claims between the Plaintiff, the Defendant and Mr. Simon Ntshangase ... [here 7 case numbers were expressly mentioned]*
- 2. This agreement is to be made an order of court. This agreement settles all the triable issues between the parties...*
- 3. Ntshangase sells to ... Mashaba ... his shareholding comprising 50% ... of the issued share capital in New Shelf 944 (Pty) Limited including all loan accounts of whatsoever nature for a purchase price of R12 million ...*
- 4. The sale by Ntshangase of his shares ... [is] voetstoets... without any representations being made in regard thereto ...*
- 5. New Shelf and/ or Ntshangase shall ... furnish Mashaba with a copy of New Shelf's audited financial statements for the financial years ending 28 February 2015, 28 February 2016 and 28 February 2017.*
- 6. Subject to the compliance of [sic] the provisions of clause 5, the purchase price of R12 million ... shall be paid by Mashaba to Ntshangase by no later than 16.00 on 27 October 2017...*

¹

Record, page 43, Annex "SN1".

14. In the event that Mashaba does not pay the purchase price of his share and loan accounts to Ntshangase within the period as provided in paragraph 6 above, then and in such event... there shall be a deemed sale by Mashaba to Ntshangase of Mashaba's loan account and shares in New Shelf... for the sum of R 3.2 million."

- [7] The respondent breached the terms of the consent order.
- [8] In consequence, the reverse purchase provisions of the consent order became operative resulting in the respondent selling his 50% shareholding in the first applicant to the second applicant for a purchase consideration of R 3,2million.
- [9] Correspondingly the respondent was, by operation of paragraphs 6 and 9 of the consent order, obliged to deliver to the second applicant a complete and signed share transfer form as well as the original share certificate held by him within a period of 48 hours after 30 October 2017.
- [10] The respondent, however, failed to deliver the aforesaid share certificate and the share transfer form in accordance with the express terms of the consent order.
- [11] Consequently, the main application was launched. As stated, the applicants seek, thereby to enforce, *inter alia*, the above terms of the consent order.
- [12] The respondent, in answer to the main application, challenges the validity of the settlement agreement that resulted in the consent order. In so doing, the respondent relies on certain alleged acts of misrepresentation and non-disclosure.

The respondent relies, thereupon, further for his non-compliance with the express terms of the consent order.

- [13] It was quite properly conceded before me, in argument, that the respondent's unilateral cancellation of the settlement agreement that led to the consent order does not avail the respondent, absent an order staying and/ or suspending the operation of the court order pending the finalisation of the action.²

C. THE POSTPONEMENT APPLICATION

- [14] It is trite that an applicant for relief must show "*good cause*" for relief.
- [15] The *locus classicus* in applications for postponement is ***Myburgh Transport v Botha t/a SA Truck Bodies***,³ in which an application for postponement was based on the unavailability of an essential witness of the defendant.
- [16] There, the court set out the principle that where a postponement is sought, the Court has a discretion to exercise which discretion is to be exercised judicially. It should not be exercised capriciously or upon a wrong principle, but for substantial reasons.⁴

² RU Tergeta Zerga and 20 Others v Powerment CC, Unreported Judgment GLD JHB 43785/2011.; EKE v Parsons 2016(3) SA 37 (CC) at [24].

³ 1991 (3) SA 310 (NMSC). This case was approved by the Constitutional Court in the *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) and also applied in *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae* 2007 (5) SA 620 (CC) at para [3] and [10] - [12].

⁴ At p314 G-H.

[17] The court went on to emphasise that the fundamental consideration in such an application is whether it is in the interests of justice to grant the postponement.⁵

[18] Following on the **Myburgh Transport** decision, the Labour Court went on to summarise the principles applicable to applications for postponement in the case of **Insurance and Banking Staff Association and Others v SA Mutual Life Assurance Society**,⁶ where it stated the following:

"In an application for postponement, the legal principles established in the High Court over the years apply equally in practice in the Labour Courts. For the purpose of the present application, the following principles apply:

- (a) *The trial judge has a discretion as to whether an application should be granted or refused (R v Zackey 1945 AD 505; Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NM)).*
- (b) *That discretion must at all times be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.*
- (c) *The trial judge must reach a decision after properly directing his/her attention to all relevant facts and principles.*
- (d) *An application for postponement must be made timeously, as soon as the circumstances which might justify an application become known to the applicant. However, in cases where fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement, even though the application was not timeously made.*
- (e) *The application for postponement must always be bona fide*

⁵ At p315 H-J.

⁶ (2000) 21 ILJ 386 (LC).

and not used simply as a tactical manoeuvre 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 a court will be exercised. What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms.*
- (g) *The court should waive 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.*
- (h) *Where the applicant for a postponement has not made the application timeously, or is otherwise to blame with respect to the procedure which the applicant has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on a scale of attorney and client. Such an applicant might even be directed to pay the costs of the adversary before the applicant is allowed to proceed with the action or defence in the action, as the case may be.*⁷

[19] It may also be apposite to refer to the judgment of the Labour Appeal Court in the matter of **Carephone (Pty) Ltd v Marcus NO and Others**⁸ where the court stated the following with regard to issues to be considered in relation to applications for postponement:

"In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence

⁷ Footnotes and references omitted.

⁸ (1998) 19 ILJ 1425 (LAC).

granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice. Interference on appeal in a matter involving the lower court's exercise of a discretion will follow only if it is concluded that the discretion was not judicially exercised (Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398-9)."

[20] This postponement application is akin to an application for a stay of execution.⁹ It is akin thereto because in the event of this Court being disinclined to granting the postponement sought, the consent order falls to be given effect to.

[21] In terms thereof, in order for the respondent to succeed, he must demonstrate the possibility of the underlying "*causa*" to the consent order being ultimately removed. The real question becomes whether "*real and substantial justice requires such a stay, or put differently, [whether] injustice would otherwise result*"¹⁰ were the postponement application not be granted.

[22] I am by no means persuaded that the possibility does exist for the underlying *causa* for the consent order being ultimately removed. I say so for the following reasons:

⁹ See Rule 45 (A) of the Uniform Rules of the Court.

¹⁰ Gois t/a Shakespeare's Pub v Van Zyl and Others 2011 (1) SA 148 (LC).

- [22.1] The consent order was based on a settlement agreement entered into by the parties in terms of which no less than seven (7) disputes hitherto extant as between the parties were settled fully and finally.
- [22.2] The settlement agreement provided expressly for the settlement of all the triable issues / matters in several litigious matters therein referred to.¹¹
- [22.3] One such matter being an Anton Pillar launched by the respondent¹² where allegations of fraud were made against the applicants in respect of the KPMG valuation of the parties' respective shareholding in the first applicant as at 28 February 2013.¹³
- [22.4] As stated, the settlement agreement settled all the triable issues between the parties including the alleged fraud tainting the parties' respective shares and loan accounts in the first applicant.
- [22.5] Significantly, one of the many cases settled between the parties was concerned with the respondent's obligation to transfer his shares to the second applicant in terms of the original settlement agreement for the purchase consideration as determined by KPMG, where a significant issue and, indeed, in the Anton Pillar application had been the alleged fraudulent non-disclosure of material facts to the KPMG valuation.

¹¹ FA, P15, para 29.1, clause 1.

¹² Case Number 32658/15.

¹³ Record, p 68-85, Annexure "SN4".

[22.6] The settlement of 11 September 2017 recorded specifically that the contemplated sale of shares was to be *voetstoets* and free of any encumbrance and representations being made in regard thereto.¹⁴

[22.7] The settlement agreement also made provision for reverse purchase by the respondent of his shareholding to the second applicant in the purchase consideration of R 3.2 million upon the respondent 's failure to pay R12 million or procuring the release of the second applicant from his overdraft obligations.¹⁵

[22.8] The second applicant caused the R3.2 million purchase consideration under the reverse purchase to be paid into the respondent's attorneys of record's trust account.

[22.9] According to the reverse purchase provisions which became operative on 27 October 2017, the respondent became entitled to payment from his attorney's trust account of the purchase consideration of R 3.2 million on 30 October 2017, and correspondingly, became obliged within 48 hours thereafter to deliver the relevant share transfer documents to the second applicant.

¹⁴ Record p 44, Clause 4.

¹⁵ Record p 47, Clause 14.

[22.10] The respondent failed to comply with his obligations in terms of the consent order contending, yet again, that the applicants have acted fraudulently.

[22.11] The respondent did not bring any counter-claim in its answering affidavit for the setting aside of the consent order on account of the alleged fraud.

[23] The picture that emerges from the common cause facts set out above is that there are no reasonable prospects for respondent successfully setting aside the *causa* underlying the consent order.

[24] That being the case I must, of necessity, find that the respondent has failed to show “good cause” for the postponement of these proceedings.

[25] It must follow in my judgment that the postponement application must be refused.

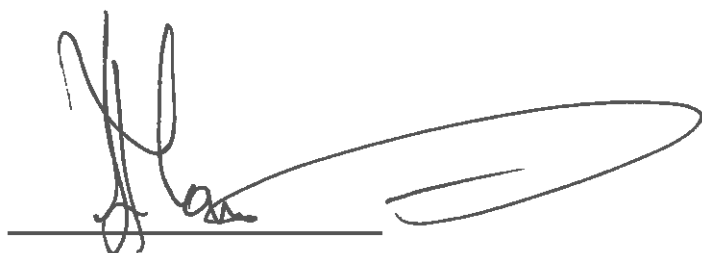
[26] As stated above, the parties are *ad idem* that in the event of the postponement application being refused, the applicants would be entitled to the relief sought in the main application.

[27] In the result, I make the following order:

[27.1] The respondent is ordered to deliver his share certificate in respect of his 50% shareholding in the first applicant within four (4) calendar months from the grant of the order;

[27.2] The respondent is ordered to deliver a share transfer form duly completed and signed in order for his 50% shareholding in the first applicant to be transferred to the second applicant within four (4) calendar months;

[27.3] The respondent is ordered to pay the costs of suit.

A handwritten signature in black ink, appearing to be 'L.G. Nkosi-Thomas', is written over a horizontal line. To the right of the signature is a large, loopy flourish.

L.G NKOSI-THOMAS AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Heard: 30 July 2018

For the Applicant: Advocate I Miltz SC and R Cohen

Instructed by Glynnis Cohen Attorney

For the Respondent: Advocate S Pincus SC

Instructed by Bicarri, Bollo and Mariano Inc