



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO.

(3) REVISED: ☒

08/09/2014

DATE

[Signature]

SIGNATURE

Case No: 22767/2011²⁰¹¹
Date heard: 25 August 2014
Date of judgment: 26 August 2014

In the matter between:

PROCONSE CONSULTING ENGINEERS (PTY) LIMITED

Applicant

and

INTERSITE PROPERTY MANAGEMENT SERVICES
(PTY) LIMITED

Defendant

JUDGMENT

A.M.L. PHATUDI J:

[1] This matter has been set down for hearing for 4 – 5 days from 25 August 2014. On the first day of trial, the plaintiff files at court a

substantive application for postponement of the matter *sine die*. The applicant (plaintiff) tenders wasted costs in respect of postponement up to and including 7 August 2014. The plaintiff further seeks an order mulcting the defendant with wasted costs incurred from 8 August 2014 to date hereof.

[2] The plaintiff's application for postponement was served on the defendant on Friday 22 August 2014. The plaintiff's counsel places on record that the plaintiff received the defendant's answering affidavit on Sunday 24 August 2014. The plaintiff replied thereto on Monday 25 August 2014 just before attendance to roll call for allocation of this matter to a judge.

[3] The plaintiff caused issue of summons against the defendant on the 13 April 2011. The plaintiff claims damages it incurred as a result of the defendant breach of an oral agreement the parties entered into during December 2008 (oral agreement). Alternatively, the plaintiff claims payment for services it had in fact rendered to the defendant before the breach of the oral agreement. Both claims are quantified.

[4] The plaintiff sets out reasons for postponement in its founding affidavit. The said reasons are, among others, their failure to secure documentation in the possession of third parties, i.e. Department of Roads and Transport, Limpopo Provincial Government; the Curator of On-Point Engineering (Pty) Ltd; The National Treasury and Thabazimbi Local Municipality. The plaintiff further alleges that it has been revealed that the plaintiff's contract was cancelled due to a lack of funding by the Department in the Limpopo Province for the Intermodal Transportation Facilities Project. The plaintiff is not in possession of such documentation.

[5] Further thereto, the defendant failed to produce certain relevant documentation in its possession as requested in the plaintiff's application in term of Rule 35 (3).

[6] The plaintiff's counsel submits that the plaintiff could not compel the defendant to produce such documents because the defendant had indicated that such documents are not in their possession if they exist.

[7] In opposing the plaintiff's application, the defendant states that the 'real reason for the defendant opposition to the plaintiff's claim is lack of funding by the Limpopo Provincial Government and Department of Treasury of the project' is incorrect. In support thereto, the defendant's counsel submits that the application does not pass the mark for postponement. He sets out the legal principle applicable to an application for the granting of a postponement by the court. Counsel refers to the commentary in Harms, Superior Court Practice to that effect.

[8] It is trite that the applicant for a postponement seeks the court's indulgence. It is further trite that the court has a discretion, which must be exercised judicially, as to whether an application for a postponement should be granted or refused. The applicant must comply with the following in his/her application.

- (a) The applicant must show good and strong reasons for the matter to be postponed.
- (b) The application must be made timeously.
- (c) The application must always be *bona fide*.

[9] A further principle is set out that where a party applies for postponement to obtain further evidence he/she must show

- (i) That the evidence he desires to make available is relevant and material to an issue in the case.
- (ii) That there is such evidence to be heard and
- (iii) That it is through no fault of his that the evidence is not available at the moment.

If the applicant can establish the above, he/she is entitled to claim that the discretion of the court be exercised in his favour.

[10] In exercising its discretion, the court must consider:

- (i) The prejudice to the parties
- (ii) The balance of convenience or inconvenience to both parties
- (iii) The public interest and
- (iv) The applicant's prospect of success in the main action.

[11] Counsel for the plaintiff submits that the defendant's failure to provide the plaintiff with all invoices and receipts regarding all payments made by the Department of Roads and Transport, Limpopo Government to the defendant in respect of the project and all invoices and receipts regarding all payments made by the defendant to any

successful tenders of the project, are of such crucial importance to substantiate the plaintiff's case.

[12] Counsel further submits that the unavailability of one witness, due to the Parliament being in session, is the core reasons for postponement.

[13] In my evaluation of the submissions made I am persuaded by the plaintiff's counsel submissions that an oral agreement may have been concluded between the parties in respect of Phases 2 and 3. The defence concedes technically to the conclusion of an oral agreement in respect of Phase 1. Phase 1 is undisputedly the preparation Phase to Phase 2 and subsequent Phase 3. The uncontested existence of agreement in respect of Phase 1 and the revelation of cancelation of plaintiff's contract by the defendant was due to a lack of funding by the Department of Roads and Transportation, Limpopo Provincial Government, is in my view, good and strong reasons to seek postponement in order to retrieve relevant documentary information which is in possession of third parties.

[14] As indicated earlier, an application for postponement must be made timeously, or as soon as the circumstances which might justify an application become known to the applicant. However, where fundamental fairness and justice justify a postponement, the court may, in appropriate case allow such application (**See Greyvenstein v Neethling 1952 (1) SA 463 (C)**) even when the application was not made timeously.

[15] The revelation to the plaintiff of the cancelation of the plaintiff's contract by the defendant due to alleged lack of funding prompted the plaintiff to seek relevant documentation from the defendant. An umpteenth correspondence is evident from the record. The plaintiff brought their intention to seek postponement of the matter to the defendant's attention if the defendant fails to favour them with the relevant documentation. I however, do not condone the plaintiff's waiting time from the time the defendant informed them of the unavailability of the relevant documents to the time of the actual application for postponement. The plaintiff only brought the application on Friday 22 August 2014 when the matter has already been placed on the trial roll for Monday 25 August 2014.

[16] The defendant had no option but to file their answering affidavit on Sunday 24 August 2014. The plaintiff's conduct, in my view, warrants an order for costs against them.

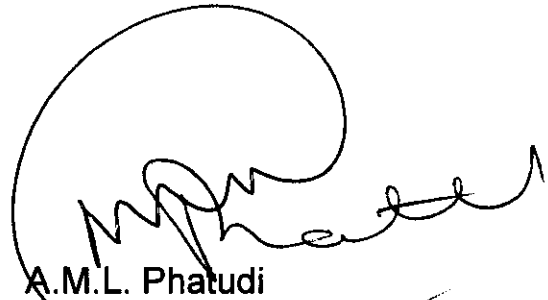
[17] Considering persuasion that the evidence the plaintiff desires to have from the third parties may be relevant and material to the main action and further that it is not through the plaintiff's fault that the said evidence is not available, I find it to be in the interest of justice that a postponement be granted.

In the result, I make the following order:

Order:

1. The trial set down for 25 August 2014 is hereby postponed sine die.
2. The plaintiff/applicant is ordered to secure the documents in possession of the third party within 3 (three) months from date hereof.

3. If the plaintiff/applicant secures or fails to secure the documents in possession of the third parties within 3 months, the parties may approach the office of the DJP for a preferential date.
4. There shall be no separation of the merits and quantum as envisaged in terms of Rule 33(4) of the Uniform Rules of this court.
5. The plaintiff/applicant is ordered to pay the wasted costs occasioned by this postponement including the costs of two counsel.

A handwritten signature in black ink, appearing to read 'A.M.L. Phatudi', is written over a large, faint circular stamp or watermark.

Judge of the High Court

On behalf of the Plaintiff/Applicant: Adams & Adams Inc
Lynnwood Bridge Office
Park
4 Daventry Street
Lynnwood Manor
Pretoria

Adv. E. Labuschagne SC
Adv. R Bouwer

On behalf of the Defendant/Respondent: Mncedisi Ndlovu &
Sedumedi Inc
Adv. A Kenmack SC
Adv. A. Pantazis