**GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA**

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| 1. Reportable: Yes/No. |
| 2. Of interest to other judges: Yes/No. |
| 3. Revised: |

In the matter between - **CASE NO.: 2014/34731**

*6/ 6 /2016*

**JS PANELBEATERS AND PLASTIC BUMPERS** **APPLICANT**

**And**

**DEPARTMENT OF SPORTS AND RECREATION** **RESPONDENT**

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**JUDGMENT**

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**TSATSAWANE AJ**

1 This is an application for the rescission of an order granted on 6 May 2014. The application was enrolled for hearing by the respondent due to the applicant's failure to take the necessary steps to enrol the matter for hearing.

2 When the matter was called for hearing on 6 June 2016, two years from the date on which the judgment sought to be rescinded was granted, Mr. Molopedi

applied for a postponement on behalf of the applicant. Ms. Grobler opposed the application for postponement on behalf of the respondent.

3 I dismissed the application for postponement after hearing both counsel and advised that the reasons for my order will be delivered separately. The following are those reasons.

**The main application**

4 The respondent brought the main application in February 2014 and served it upon the applicant on 4 March 2014. The applicant does not contend that it was not properly served with the main application.

5 Despite having been served with the main application, the applicant failed to oppose the application. The notice of motion of the application expressly provides that application will be made on 6 May 2014.

6 In the main application, the respondent sought an order directing the applicant to return its motor vehicle, a Volkswagen Polo Vivo with registration number […] GP.

7 In view of the fact that the applicant did not oppose the application, the respondent took its order on 6 May 2014, the date of which the applicant was expressly notified in the notice of motion. The order was duly served upon the applicant on 15 May 2014 and the applicant does not contend that this was not so. Accordingly, the applicant became aware of the order on 15 May 2014.

Despite having been properly served with the order, the applicant refused to comply therewith and kept the motor vehicle in issue in its possession.

8 As I understand it from the papers filed of record, the applicant refused to release the motor vehicle in issue due to the fact that it contends that the respondent is indebted to it in the amount of approximately R 25 479, 00, being what is referred to in the papers as its *"release fee."* The basis of this alleged liability and the merits thereof are irrelevant for purposes of this judgment.

9 Prior to launching the main application, the respondent tendered to pay the applicant an amount of R 2 200, 00 plus value added tax being an amount which it considered to be a reasonable release fee in the circumstances. In addition, it tendered to provide security for the balance of the amount claimed by the applicant and to have such balance placed in a trust account pending the final determination of an action which the applicant had to institute to recover such balance. In my view, this was a reasonable proposal which would have curtailed the costs which no doubt have been incurred by the respondent in bringing the main application and opposing the present rescission application.

10 The applicant rejected the aforesaid proposal thereby forcing the respondent to bring the main application and to obtain the order which is now being sought to be rescinded and set aside.

**The rescission application**

11 Unhappy with the order granted against it, the applicant brought the present rescission application to rescind and set aside the order granted against it on 6 May 2014. This application was filed on 14 May 2014 and a period of two years has now lapsed before it is finalised.

12 The respondent filed its answering affidavit to the rescission application on 16 September 2014. The applicant has not, since September 2014, filed a replying its affidavit nor did it take any steps to bring the rescission application to finality.

13 In paragraph 5 of its founding affidavit, the applicant states that this Court *"should set aside the draft order dated 6th h May 2014. It is my contention that Respondent is duly indebted to Applicant and that before the vehicle is uplifted, payment as indicated on the annexure A should be effected by Respondent to Applicant."* This is the closest the applicant gets to making out a case for rescission.

14 The applicant's founding affidavit does not even indicate the basis on which the application for rescission is sought. It is not the applicant's case in its founding affidavit that the order sought to be rescinded was erroneously sought and erroneously granted. It is also not the applicant's case that rescission is sought under the common law or any other possible basis. All that is relevant and which is said in the applicant's founding affidavit is what is contained in paragraph 5 of the applicant's founding affidavit, the contents of which I have quoted above.

15 Without making out a case on the basis of which rescission is sought, the application for rescission is defective, if it is not stillborn.

**The application for postponement**

16 It was contended on behalf of the applicant that postponement is required in order to enable the applicant to amend its founding papers. I took this to mean filing a supplementary founding affidavit.

17 No reasonable explanation was given by the applicant as to why the application was not brought earlier and why the founding papers were not supplemented earlier. The suggestion that the founding papers were filed without the assistance of an attorney takes the matter no further due to the fact that the applicant's attorneys of record have been on record in this matter from time to time and there is no reason given as to why they did not supplement the founding papers.

18 Of importance, no submissions were made as to when the applicant realised that the papers needed to be supplemented. In my view, the fact that the rescission application is defective must have been realised from the date on which the respondent delivered its answering affidavit. This is so due to the fact that in paragraph 2 thereof, the respondent contended that *"the Application for Rescission by the Applicant is fatally flawed'* and then gave reasons for this contention. I fully agree with the basis on which the respondent contended that the rescission application is fatally flawed. Despite this notification, the applicant did nothing about supplementing its founding papers since September 2014 nor did it file a replying affidavit.

19 During argument, Mr. Molopedi correctly conceded that the rescission application was indeed defective. With this concession, there could never have been any rational basis to proceed with the application for rescission in its current format. In addition to this concession, it was not disputed that the applicant has another remedy available to it, i.e. an action against the respondent to recover the monies which it contends are due to it.

20 The principles applicable in an application for postponement are trite and there is no need to restate them in great detail. An application for a postponement is usually based on the argument that unless the postponement is granted, the applicant will suffer prejudice in the conduct of its case. It therefore follows that an applicant for a postponement must show the manner in which the applicant will be prejudiced if a postponement is not granted[1]. In this case, the applicant failed to establish prejudice sufficient enough to justify a postponement in the light of the fact that it has another remedy, which remedy would even be more cost-effective in that it can commence action proceedings against the respondent immediately as opposed to continuing with this present proceedings the aim of which is not to recover the money which it says is due to it.

21 In *Madnitzky v Rosenberg 1949 (2) SA 392 (A)* it was held that –

*"No doubt a Court should be slow to refuse to grant 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*



[1] Herbstein & Van Winsen 5'" Edition at 751.

*that he should have further time for the purpose of presenting his case. In the present case, however, it cannot be said that those requisites were satisfied ..."*

22 In this case, no reasonable explanation was given as to why the applicant did not fix its founding papers earlier. In addition, no indication was given given by the applicant itself as to when it realised that the papers needed to be supplemented. In my view, this must have been realised in September 2014 and it is only in the event of the applicant acting in a negligent and irresponsible manner that it did not realise this then. The respondent need not be prejudiced by this kind of conduct and justice does not demand that the applicant be given another chance to attempt to supplement its founding papers in circumstances where it must have been aware of the defects thereon since September 2014.

23 An application for postponement must be made timeously. In this case, the applicant received the notice of set down on 23 March 2016. From that date, the applicant knew that it must take the necessary steps to be ready to proceed with its application. It took no such steps until its letter dated 23 May 2016 in which it contended that the matter must be removed from the roll due to the fact that *"the matter is not yet ripe for hearing."* The matter was not ripe for hearing due to the fact that the applicant failed to file its replying affidavit. In my view, it ought not to have relied on its own problems to contend for the removal of the matter from the roll in circumstances where its replying affidavit was due in 2014. In addition, the applicant took no steps to get the matter ripe for hearing at least to

show that it is acting in good faith and not with the intention to delay the finalisation of the matter.

24 The respondent refused to remove the matter from the roll in its letter dated 31 May 2016 and further advised the applicant's attorneys as follows –

> *"6. Our client on 16 September 2014 filed their opposing affidavit to your client's Application for the Rescission of Judgment of the Order dated 6 May 2014. We reiterate, your client did very little in order to finalise the aforesaid application and as such, we contend that your client had enough time in order to file a farther founding affidavit, alternatively a replying affidavit to our client's opposing affidavit in the above matter.*
>
> *Our client will not let this matter drag out any longer, and as such, it is our instruction to proceed with the matter on 6 JUNE 2016 and should your client oppose same, a copy of this letter will be used in support of a punitive cost order that will be sought against your client."*

25 The respondent's position of refusing to remove the matter from the roll is understandable. In my view, the applicant's position would have been different and even better, if its request for a removal from the roll was accompanied by either its replying affidavit or a supplementary founding affidavit together with an application for leave to file same. This was not done even after receipt of the respondent's letter referred to above. There is no reason to condone the applicant's conduct in this matter.

26 In the light of the above, I came to the conclusion that –

26.1 the rescission application was defective (or fatally flawed as contended by the respondent);

26.2 the applicant has another remedy as aforesaid and that it would not be prejudiced if postponement was refused;

26.3 the application was brought too late and there was no reasonable explanation as to why it was not brought earlier to avoid the respondent incurring the costs which it has incurred;

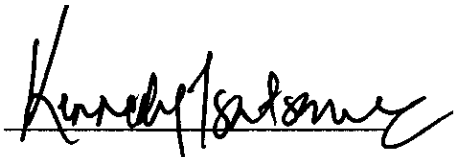
26.4 the respondent would be prejudiced if postponement was granted in that it would mean that it must incur further costs again to deal with the applicant's attempts to fix what is clearly a defective application; and

26.5 the appropriate order in circumstances where the application was defective is to refuse postponement as opposed to granting a postponement to enable the applicant to try to do the almost impossible. In this regard, the correct approach would be to issue a fresh application or to pursue an action to recover the amount allegedly due to the applicant by the respondent.

27 After I dismissed the application for postponement, Mr. Molopedi correctly withdrew the application for rescission and I then made an order recording the withdrawal of the rescission application and ordered the applicant to pay the respondent's costs on an attorney and own client scale. In the light of the fact

that the rescission application 1s defective (and the applicant failed to supplement its founding papers since being made aware of the defects in September 2014) and the applicant's failure to take any steps to bring the matter to finality, there is no reason why the respondent should be out of pocket and it is for this reason that I ordered the applicant to pay the respondent's costs on an attorney and own client scale.

28 The above are then the reasons which I undertook to give for my decision to refuse the application for postponement.



K TSATSAWANE

Acting Judge of the Gauteng Division of the High Court.

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| For the applicant: | Advocate Molopedi<br>Instructed by Ntimane Attorneys, Kempton Park |
| For the respondent: | Advocate C. Grobler<br>Instructed by Weavind & Weavind, Pretoria |
| Date of Hearing: | 6 June 2016. |
| Date of Judgment: | 6 June 2016. |
| Date of Reasons: | 8 June 2016. |