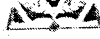
IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)



Case number: A182/2015

Date: 16/11/16

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

16.11.2016 ....
DATE SIGNATURE

In the matter between:

PHUTUMA NETWORKS (PTY) LTD **APPELLANT**

Vs

TELKOM SA LIMITED **RESPONDENT**

JUDGMENT

TOLMAY, J:

[1] This appeal came before us with leave of the Supreme Court of Appeal. The appeal is against two orders and judgments by the court *a quo*, namely:

1. An order refusing an application for postponement on the second day of the trial that commenced on 20 May 2016, and
2. An order granting absolution from the instance with costs in favour of the Respondent after the dismissal of the application for postponement.

[2] The Appellant contends that the Court *a quo* erred in the refusal of the application for postponement. It is also contended that the Court *a quo* could and should not have granted the subsequent application for absolution from the instance.

[3] The appeal record was not complete as the transcript of the proceedings from the commencement of the trial on 20 May 2013 until the lunch adjournment on the same day was not transcribed. The record is also incomplete in that the evidence in chief of the Appellant's witness, Dr Scott, on the afternoon of 20 May 2013 has been omitted and only the first and last pages of the transcription of that evidence has been included.

[4] The Respondent agreed that the Court could, despite the aforesaid, entertain the appeal if certain statements in the Respondent's heads of argument are accepted as correct. Appellant agreed and the appeal

proceeded on that basis. I will later on in my judgment deal with the contents of the heads of argument that was admitted by the Appellant.

BACKGROUND

[5] The trial commenced on 20 May 2013 in the Court *a quo* as a special trial. Both parties appeared and were represented by counsel and an attorney.

[6] There was apparently an opening address and as per the agreement, pertaining to the incomplete record. Mr Maritz (SC) for the Respondent's heads of argument states that he, at this stage, drew the Court's attention to par 10 and 12 of the pre-trial minute and the Respondent alerted the Appellant to the fact that it had no evidence available to support its pleaded case. Paragraph 10 and 12 of the pre-trial minute reads as follows:

"10. The defendant wishes to record the following, and insists that its view be brought pertinently to the attention of the Court at the commencement of the hearing:

10.1 The services which Network Telex has provided to the defendant in the period January 2007 to date consists only of the supply of equipment and facilities to distribute and transmit telexes and e-mail messages from shore-to-ship via the Inmarsat C satellite system (on which Network Telex has leased capacity). Telkom has not caused any messages to be transmitted via the Network Telex link on behalf of ship agents

or any other private individuals since January 2007. The engaging of Network Telex to provide this link became necessary in an emergency situation when British Telecoms in January 2007 terminated Telkom's use of an undersea IPLA cable to the United Kingdom, and by means of which Telkom previously had access to the Inmarsat satellite system for purpose of the distribution and transmission of telexes from shore-to-ship.

10.2 *The total amount which Telkom has paid Network Telex for the provision of this satellite link to distribute and transmit e-mails and e-telex from shore-to-ship in the period from January 2007 to date is less than R25 000-00. Telkom has not contracted with Network Telex to provide any of the Telex/Gentex services which formed the subject matter of the tender RPF 0112/2007.*

10.3 *The plaintiff has no evidence available which could refute or contradict the defendant's version as set out above, as such evidence simply does not exist.* (My emphasis)

10.4 *If the service which has been rendered by Network Telex to Telkom (being the provision of the equipment and facility to distribute and transmit e-mail and e-telex messages from shore-to-ship via the Inmarsat C satellite) had been rendered by the plaintiff, the gross amount which the plaintiff would have been*

paid to date would not have exceeded R25 000-00. After deduction of the costs which the plaintiff would have incurred, the plaintiff's profit, if any would have been negligible. The plaintiff's claim for damages, which is premised on the allegation that approximately 80% of the services specified in Tender RFP 0112/2007 are being rendered by Network Telex (which the defendant denies) and that had it not been for the involvement of Network Telex the tender would have been awarded to the plaintiff (which the defendant denies) and that the plaintiff would have performed the services (which it alleges Network Telex is performing) at a profit, is without any conceivable factual or legal foundation, and is spurious and vexatious.

10.5 *The defendant gives notice that it intends to seek a punitive order against the plaintiff in this matter. The defendant challenges the plaintiff to place on record, with the concurrence of all its directors, whether or not it would be in a financial position to pay the defendant's costs of the action should the plaintiff be unsuccessful in the action to be ordered to pay the defendant's costs.*

ANSWER:

(i) *The plaintiff disagrees with the factual allegations made by the defendant in paragraphs 1.1 to 1.4 but submits that it is a matter*

for evidence and the issues will be adjudicated upon by the above Honourable Court.

(ii) *The plaintiff has noted that the defendant will seek a punitive cost order against the plaintiff in the matter, but denies, even in the event of the defendant being successful (which the plaintiff submits with respect should not be the case) that the defendant is entitled to a punitive cost order.*

(iii) *The defendant availed itself of its remedies in terms of Rule 47 of the Uniform Rules of Court by seeking from the plaintiff to furnish security for the defendant's cost. When the plaintiff refused, an application was brought by the defendants to the above Honourable Court to obtain an order that the plaintiff should furnish security for the defendant's cost, which application was dismissed with costs.*

(iv) *Therefore, the request of the defendant as contained in paragraph 1.5 has already been adjudicated upon by the above Honourable Court.*

REQUEST FOR ADMISSIONS AND PARTICULARS:

The defendant requests the following admissions and particulars from the plaintiff in respect of the pleadings:

12.1 *With reference to paragraph 18 of the particulars of claim, is it the plaintiff's contention that the alleged legitimate expectation would give rise to a substantive right in law vesting in the plaintiff? If so, the plaintiff is requested to identify the*

substantive right which allegedly vested in the plaintiff, and to identify, with reference to the allegations in the particulars of claim, how such right was infringed?

Answer:

(i) *The plaintiff point out to the defendant that the plaintiff's cause of action is based not only on the provisions of paragraph 18 of its Particulars of Claim, but that the cause of action as pleaded from paragraphs 3 to 26 should be read as a whole.*

(ii) *The plaintiff alleges in [paragraphs 3 to 26 of its Particulars of Claim that the plaintiff has a cause of action based on a substantive right recognised in law as pleaded in paragraphs 3 to 26 of its Particulars of Claim.*

(iii) *The plaintiff has referred to the provisions of Section 217 of the Constitution of the Republic of South Africa, 1996, which of course should be read together with Section 33, 38 and 195 of the Constitution.*

12.2 *With reference to paragraph 19 of the particulars of claim the plaintiff is required to specify in detail precisely which of the service specified in the tender (and which allegedly constitute approximately 80% of the services specified in the tender) are being performed or have at any time since the publication of the tender been performed by Network Telex.*

Answer:

The services as set out in die defendant's "TECHNICAL SPECIFICATION FOR TELKOM's TELEX"_GENTEX" outsourcing projects as contained in the Executive Summary (ALL PAGE NUMBERS ARE REFERENCE TO THE BUNDLE AS PREPARED BY THE DEFENDANT) read with the scope of the tender, the specifications read together with paragraph 5 and furthermore read with paragraph 6.

12.3 *With reference to paragraph 20 of the particulars of claim the plaintiff is required to specify the facts and legal principles on which it relies for the conclusion of unlawfulness and illegality alleged in this paragraph.*

Answer:

For the reasons pleaded by the plaintiff in its Particulars of Claim and specifically as contained in the following:

(i) Paragraph 16;

(ii) Paragraph 17;

(iii) Paragraph 18;

(iv) Paragraph 19;

(v) Paragraph 21;

(vi) paragraph 22;

(vii) paragraph 23;

(viii) paragraph 24;

(ix) paragraphs 25 and

(x) paragraph 26

12.4 With reference to paragraph 21 of the particulars of claim, does the plaintiff concede that as a matter of law it would have no claim for damages against the defendant on the grounds that the tender should have been awarded to the plaintiff unless the plaintiff proves that the non-award of the tender to the plaintiff was due to corruption, dishonesty or mala fine conduct on the part of the defendant. The plaintiff is invited to consider the numerous decisions of the SCA and the Constitutional Court to this effect.

Answer:

No. The plaintiff is of the view that each matter should be considered on its own facts and merits, and the plaintiff therefore contends, even if no corruption, dishonesty or mala fide conduct is found on the part of the defendant, that the plaintiff still has a cause of action against the defendant.

12.5 With reference to paragraph 21 of the particulars of claim, the plaintiff is required to specify who, acting on behalf of the defendant, allegedly acted corruptly, allegedly acted dishonestly, allegedly acted in bad faith, allegedly acted unethically, and allegedly acted illegally.

Answer:

The defendant does not require the requested information in order to prepare for the matter. *(My emphasis)*

12.6 *The defendant contends that it is entitled to this particularity in order to know with whom consultations must be held and who the witnesses are whom the defendant might be required to call to refute these allegations.*

Answer:

The defendant knows who has been involved with the matter, and the defendant therefore does not require any information in order to assist it to prepare for the matter. *(My emphasis)*

12.7 *With reference to paragraph 17 of the particulars of claim, the plaintiff is required to stipulate when the validity date of the tender was extended, by whom acting on behalf of the defendant the validity date was extended, whether the extension was communicated in writing (if so, a copy of such written extension is required), and to stipulate to what date the validity date of the tender was extended in each case.*

Answer:

(i) *The plaintiff does not have any knowledge regarding the internal workings of the defendant and the extensions of the validity period of the tender.*

(ii) The defendant's representatives however continued to have clarification meetings and other contact and communication with the plaintiff regarding the tender and the final clarification session was held between plaintiff and defendant on 4 December 2008.

(iii) The defendant only notified the plaintiff or/on about 10 June 2009 that no award has allegedly been made in respect of the tender, and that the validity period of the tender has expired.

(iv) On/or about 12 March 2009 and in a Memorandum (pp 511-512, Vol 2 of the bundle) the defendant's Executive Strategic Sourcing and BEE recorded that the RFP was still in the adjudication process and no award has been made as yet.

(v) On/or about 29 April 2009 the defendant still corresponded with the plaintiff regarding the tender.

(vi) A meeting was held by the defendant's Procurement Review Council on/or about 8 May 2009 and it was only during this meeting that a recommendation was made that RFP 0112/2007 be cancelled.

12.8 Does the plaintiff admit that, if the validity date of the tender was not extended (as has been alleged in paragraph 17 of the particulars of claim) the plaintiff's bid or proposal was open for acceptance only for a period of 180 days from 16 January 2008.

Answer:

No, and the plaintiff refers the defendant to its answer in paragraph 12.7 hereof.

12.9 *Does the plaintiff admit the allegation made in paragraph 17.2 of the plea?*

Answer:

The admission is not made.

12.10 *Does the plaintiff admit the allegations made in paragraph 14.2 of the plea?*

Answer:

Insofar as the allegation is in accordance with the provisions of the RFP it is admitted, although the plaintiff therefore does not derogate at all from the allegation as made in its Particulars of Claim.

12.11 *Does the plaintiff admit the allegations made in paragraph 25.1 of the plea?*

Answer:

The admission is not made.

12.12 *Does the plaintiff admit the allegations made in paragraph 25.2 of the plea, or any of such allegations?*

Answer:

The admission is not made.

[7] After the opening address Dr Scott, the director of the Appellant was called as the first witness on behalf of the Appellant. It was, according to the admitted parts of the heads of argument, during the evidence of Dr Scott that Respondent's counsel successfully objected to the admissibility of speculative allegations made by Dr Scott, not based on his personal knowledge as to fraud, dishonesty and corruption on the part of unidentified Telkom officials. It must also be accepted, as per the agreement between counsel as referred to above, that counsel for Respondent challenged Appellant's counsel to place on record whether the Appellant had witnesses available and intended to lead evidence to support these allegations and the appellant's pleaded case. Appellant's counsel was unable to give such assurance.

[8] The Court adjourned at 15:52 on 20 May 2013 for the day. At that point Dr Scott's evidence was not concluded. The next morning when the trial resumed the entire legal team of the Appellant withdrew. Mr Erasmus SC, who appeared for the Appellant, placed on record that they were withdrawing because they could not carry out their mandate. At this point counsel did not reveal the reasons for the inability to execute their mandate due to attorney/client privilege.

[9] When the legal team of the Appellant withdrew Dr Scott's evidence was not concluded and the Appellant's case was not closed.

[10] At that point Dr Scott requested a postponement, which Mr Maritz SC opposed. Mr Maritz SC challenged the Appellant to bring a substantive application or tender evidence to support its request for a postponement. After lengthy argument the matter stood down until 22 May 2013 to allow Dr Scott, to obtain legal representation and to bring an application for postponement.

[11] On 22 May 2013 the Appellant appeared with a new legal team and brought an application for postponement on the grounds set out in an affidavit deposed to by Dr Scott. No opposing affidavit was filed by the Respondent.

[12] On 22 May 2013 Seymore Du Toit Basson Pretoria Inc served a notice of appointment as attorneys of record on the attorneys for the Respondent. The court's attention was drawn to the notice.

[13] No notice of motion was filed but an affidavit was filed in support of the application for postponement. The following issues were *inter alia* raised by Dr Scott in this affidavit:

a. Dr Scott stated that neither he nor the Appellant was made aware of the fact that the legal representatives encountered difficulties that rendered them unable to carry out their mandate

prior to Tuesday 21 May 2013. Dr Scott was still testifying and was only advised about the position shortly before it was put on record.

b. Dr Scott waived Appellant's legal privilege and set out the reasons why the legal team withdrew, he stated that:

    i. Appellant planned to call a number of witnesses that would testify to the fact that Respondent acted unlawfully, unethically, unfairly and in bad faith in its dealings with the Appellant. These witnesses would, according to him, substantiate the necessary averments in the Appellant's case;

    ii. The Appellant's attorney did not formally subpoena these witnesses but relied on informal arrangements with them that they will testify; and

    iii Appellant's senior counsel requested on Monday 20 May 2013 to have these witnesses available on Tuesday morning. On Tuesday it transpired that the witnesses that were requested to attend Court expressed their reluctance and refused to adhere to the informal request to attend Court.

[14] It is important to note that, according to this affidavit, Dr Scott was only requested by his legal representatives to have the witnesses available on 20 May 2013, which was the day that the trial commenced.

[15] Before the newly appointed senior counsel on behalf of the Appellant, Mr Cilliers SC, could move the application for postponement on the basis of the aforementioned affidavit, Mr Maritz SC on behalf of the Respondent addressed the court. During this address it was placed on record that the Respondent elected to oppose the application for postponement without filing an answering affidavit in response to the Appellant's affidavit in support of the postponement.

[16] Counsel for the Respondent also advised the Court that he had a discussion with Mr Erasmus SC. The record reads as follows:

"MR MARITZ: Having regard to the fact that the privilege in the communications with the previous legal advisors was waived, I telephoned Advocate Erasmus and I communicated to my learned friend and his client in his presence, what Advocate Erasmus had relayed to me, having regard to the waiver of the privilege. He has never consulted with any other witness, except Dr Scott [?]. He does not know who any of the other witnesses are and he does not know whether they are in fact able to give any positive contribution to the case. He has nothing more than the allegation of Dr Scott, that they can do so. Otherwise it is so, he impressed on Dr Scott, it is necessary for the witnesses to be produced so that he can consult with them and decide whether they can support the allegations. The witnesses were never forthcoming. So that I relayed to him.
COURT: Thank you.
MR MARITZ: So in the light of that, we accept that they withdrew because they had no evidence available to support the case.

[17] In opposition to the application for postponement it was suggested from the bar that the content of the Appellant's

affidavit was false because the witnesses which the Appellant testified that it wished to call did not exist.

[18] It was specifically suggested from the bar that the Appellant's previous legal representatives and specifically Mr Erasmus SC did not even know if the witnesses which the Appellant intended to call in fact existed. The submission was made from the bar as follows:

> *"MR MARITZ: Now they tell, now Dr Scott tells Your Ladyship what happened after that day. They then said to him you had better get the witnesses here, because Counsel had never seen the witnesses. Counsel did not even know if the witnesses existed and Counsel had no knowledge whatsoever as to whether the evidence was in fact available."*

[19] The discussion between Mr Maritz SC and Mr Erasmus SC did not contradict Dr Scott's submission that he was only requested on the day that the trial commenced to have the witnesses available the following day. It also did not dispute the fact that Dr Scott was only informed of the fact that his legal representatives were unable to execute their mandate on 21 May 2013. One would have hoped that a proper consultation in preparation of the trial would have revealed potential problems in the presentation of the case long before the commencement of the trial. Even on what Mr Erasmus SC conveyed to Mr Maritz SC there is no indication that Appellant, or Dr Scott in particular, was timeously requested to identify the witnesses or asked to make them available.

[20] Mr Cilliers SC, on behalf of the Appellant placed on record that he was briefed late on the previous afternoon to move the application for postponement, and that he did not have the opportunity to study the merits of the case set out in the pleadings.

[21] When the application for postponement was moved it was pointed out by Mr Cilliers SC to the court that the Appellant's previous legal team, who withdrew on the previous day i.e. the 21st of May 2013, came on record on 29 April 2013. This would at least have given them three weeks to prepare for the trial and to identify any difficulties that could have prevented them to execute their mandate.

[22] Mr Maritz SC insisted that the identities of the witnesses that the Appellant intended to call be disclosed during his argument in opposition to the postponement. Mr Cilliers SC informed the court that he had been presented in court with an affidavit of a candidate attorney from the previous attorneys' offices which identified certain witnesses. He also told the Court that he was instructed not to reveal their identities because of fears of intimidation.

[23] It was pointed out by Mr Cilliers SC, to the Court that the suggestion that no evidence was available to prove the Appellant's claim was incorrect and that the correct position is

rather that the witnesses necessary to substantiate the content of the particulars of claim were not available, due to the fact that they were not subpoenaed.

[24] After argument the Court refused the application for postponement. Mr Cilliers SC who argued the postponement withdrew. Junior counsel was appointed to note the judgment and withdrew after the noting of the judgment.

[25] Respondent then proceeded with an application for absolution from the instance. At this point Dr Scott and Mr Day, his attorney, were present. The Court proceeded to grant absolution from the instance. The record indicates that this was done without engaging Dr Scott or his attorney who were still present.

[26] In the judgment the Court recognised that the affidavit in support of the application for postponement and more specifically the facts set out therein were central to the Appellant's reasons for asking for a postponement. The Court however recorded and emphasised what was relayed by Mr Maritz SC to the court, from the bar, in respect of Mr Maritz SC's telephonic conversation with Mr Erasmus SC as follows:

"...he had spoken personally to Mr Erasmus, the plaintiff's erstwhile counsel, who indicated to him that the only witness that he had consulted with during preparation for trial, was Dr Scott and that no other witness was made available to him by the plaintiff, despite the say so of Dr Scott that the plaintiff had other witnesses."

[27] The Court also found as follows:

> *...It has become clear in this matter that the plaintiff's legal representatives had withdrawn because the plaintiff does not have the evidence available to prove the allegations made out in its particulars of claim. The Plaintiff's affidavit in support of the application for postponement is, at best, vague on the question of the witnesses that plaintiff intends to call to prove its case, and specifically on what aspects of its case they will give evidence."*

[28] The Court rejected the Appellant's explanation as to why the identity of its witnesses was not disclosed to Court. The explanation was rejected apparently because it was not given under oath but merely recorded from the bar. One has to note that Mr Maritz SC's remarks, which were also not under oath, were however accepted.

[29] The Court concluded that:

> *"... Having regard to the allegations of the Appellant in its affidavit in support of the application for postponement, its evasive response to questions posed by the Defendant in the pre-trial minute and its failure to accept the invitation of the Defendant to disclose the names of the witnesses it intends to call, the relevance of the testimony which they will give and the names of those witnesses who are refusing to testify, I am compelled to the conclusion that the Plaintiff will be unable to present any direct or circumstantial evidence that there was fraud, corruption or bad faith in the evaluation by the Defendant of the tenders."*

[30] The appellant attached a memorandum by Mr Erasmus SC and his junior to the application for leave to appeal. This memorandum only came to the knowledge of the Appellant's attorney on 27 May 2013. This memorandum was not before the Court. It accordingly falls within the category of new evidence which was not before the Court *a quo*.

[31] Section 19 (b) of the Superior Court's Act No 10 of 2013 provides that a division of the High Court exercising appeal jurisdiction may in an appeal *"receive further evidence"*. In the matter of **Dormell Properties vs Renasa Insurance NNO**[1] the court held (with reference to the provisions of section 22 (a) of the now repealed Supreme Court Act 59 of 1959) that a court of appeal may admit new evidence, but that the power should be exercised sparingly and only if the further evidence is reliable, weighty and material and presumably to be believed. In addition, there must be an acceptable explanation for the fact that the evidence was not adduced in the trial court.

[32] Counsel for the Respondent submitted that it would be in the interest of justice for the Court to take the content of that memorandum into account, but only to the extent that it clarifies, according to Respondent, certain ambiguities in Dr Scott's affidavit, and established that counsel at no time consulted with any witnesses other than Dr Scott. I am of the view that this approach will not be just. Either the memorandum should be considered in totality or not at all. The Court

[1] 2011 (1) SA 70 at par 21

should not rely on parts of the memorandum which suits a certain party's case and ignore the rest. Such an approach will be manifestly unjust. In this memorandum, several people are identified that are potential witnesses. At the very least it seems that Mr Erasmus SC was aware of who the Appellant intended to call which contradicts the statement from the bar that Mr Erasmus SC was unaware of the identity of any of the witnesses.

THE REFUSAL OF THE POSTPONEMENT

[33] It is trite that a trial Judge has a discretion as to whether a postponement should be granted or refused. In **Myburgh Transport v Botha t/a SA Truck Bodies** the applicable legal principles pertaining to the consideration of an application for postponement were set out as follows[2]:

"The legal principles of application

The relevant legal principles of application in considering this appeal may be stated as follows:

1. *The trial Judge has a discretion as to whether an application for a postponement should be granted or refused (R v Zackey 1945 AD 505).*
2. *That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (R v Zackey (supra); Madnitsky v Rosenberg*

[2] 1991 (3) SA 310 (NMS) on 314-315

1949 (2) SA 392 (A) at 398 – 9; Joshua v Joshua 1961 (1) SA 455 (GW) at 457D.)

3. *An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if the members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.*
4. *An appeal court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles. (Prinsloo v Saaiman 1984 (2) SA 56 (O); cf Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8E-G; Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152).*
5. *A Court should be slow to refuse 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 that he should have further time for the purpose of presenting his case. Madnitsky v Rosenberg (supra at 398 – 9)*

6. *An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. Greyvenstein v Neethling 1952 (1) SA 463 (C). Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made. Greyvenstein v Neethling (supra at 467F).*
7. *An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.*
8. *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 cost or any other ancillary mechanism. (Herbstein and Van Winsen The civil Practice of the Superior Courts in South Africa 3rd ed at 453).*
9. *The Court should weigh 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 if it is not.*
10. *Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the*

procedure which he 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 the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be. Van Dyk v Conradie and Another 1962 (2) SA 413 (C) at 418; Tarry & Co Ltd v Matatiele Municipality 1965 (3) SA 131 (E) at 137.

[34] It is trite that a party is not as a matter of right entitled to a postponement and should be able to show *prima facie* that if it is granted the indulgence it will be able to place facts before the Court which will constitute a ground of opposition to the relief sought.[3]

[35] In this matter the Appellant was not forewarned by his legal representatives that they foresaw difficulty in executing their mandate. It is uncontested that Dr Scott, the director of the Appellant was only informed of their decision shortly before they placed on record that they are withdrawing and that was after the trial had commenced. The record reflects that the team that appeared at the trial came on record on 29 April 2013, nearly a month before the trial date. Any difficulty

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[3] Manufacturers Development Co (Pty) Ltd v diesel & Auto Engineering Co and Others 1975(2) SA 776 (W); Motaung v Makubela & Another NNO; Motaung Mothiba, NO 1975(1) SA 618 (O)

with the presentation of the case should have been addressed by them before the trial commenced.

[36] In this regard it must also be considered that the pre-trial took place on 10 May 2013, ten days before the trial commenced and in this pre-trial it was recorded that the Respondent was of the view that:

a. the Plaintiff has no evidence which could refute or contradict the Defendant's version; and

b. the Defendant specifically asked who Plaintiff alleges acted corruptly, dishonestly in bad faith, unethically and illegally. The answer to this question given by the Plaintiff's legal team was merely that the Defendant does not require this information in order to prepare for the trial. The Defendant persisted that it needs the information and Plaintiff's legal representatives answered that the Defendant knows who has been involved and therefore does not require this information.

[37] Appellant's legal representatives should at the very least at that point have determined who the witnesses were that were required to testify and should have subpoenaed them. One would have hoped that at this stage already they would have realised that this point will be raised at the trial and would have made arrangements to ensure their presence at Court.

[38] The legal representatives should therefore have been well aware of any potential inability to execute their mandate long before the trial commenced. The Appellant was left in a predicament as a result of the withdrawal of his legal team as new representatives had to be found overnight. It is obvious that these representatives would not be able to prepare on the merits but would only be able to prepare the application for postponement.

[39] Even if one accepts that the contention by Appellant's legal representatives that they need not reveal the identity of the witnesses that they intended to call was incorrect, Appellant relied on his legal team for advice There is nothing to indicate that the Appellant was informed that it was obliged to reveal the identity of witnesses but refused to do so.

[40] In the light of the fact that the Appellant was left in the lurch by his legal team a postponement should have been granted. The Court *a quo,* in my view, misdirected itself when it did not take in consideration the Appellant was placed in an untenable situation due to the late withdrawal of its legal representatives. The Court also misdirected itself when it found that the Appellant had no evidence to prove its case. No exception was ever raised by the Respondent, consequently at least on the papers Appellant revealed a cause of action. There was a dispute pertaining to the availability and/or existence of witnesses to support the claim. Mr Cilliers SC however referred to information

contained in an affidavit about the identity of witnesses and for the Court to infer from Mr Maritz SC's submissions only that no evidence could be led to sustain the Plaintiff's cause of action amounts in my view to a misdirection.

[41] It is trite that a Court should be slow to refuse a postponement where the reasons for the postponement are explained. In the final analysis this predicament would not have arisen if Appellant's legal team did not withdraw. In my view the postponement should have been granted and Appellant should have been ordered to pay the costs of the postponement.

ABSOLUTION FROM THE INSTANCE

[42] I only deal with this aspect if it is found that I erred in my finding pertaining to the postponement, because it follows that if the postponement is granted that the order granting absolution from the instance should be set aside. If however another Court should find that the postponement was correctly refused I deal with the order of absolution from the instance.

[43] An order of absolution from the instance is generally not appealable as it is not final in its effect and the order is still susceptible to being revisited and rescinded.[4] The consequences of the award of absolution from the instance are that Appellant would be entitled to raise the issue

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[4] Zweni v Minister of Law and Order 1993(1) SA 523 A at 532; Pitelli v Everton Garden Projects CC 2010(5) SA 171 SCA

between it and the Appellant again in future.[5] I am accordingly of the view that standing on its own the order of absolution from the instance is not appealable.

[44] However if I am wrong pertaining to the appealability of the order I am of the view that the order for absolution should not have been granted.

[45] When the trial was called on 20 May 2013 the Appellant was present and the trial of the matter commenced. The first witness on behalf of the Appellant was still testifying and his testimony in chief was incomplete when the Appellant's entire legal team withdrew on 21 May 2013 i.e. the second day of trial.

[46] After the withdrawal of the Appellant's entire legal team the Court engaged the director of the Appellant, i.e. Dr Scott and after such engagement, at the request of Dr Scott, allowed the matter to stand down for the Appellant to obtain the services of new legal representatives.

[47] Prior to the matter standing down for the aforementioned purposes on the 21st of May 2013 counsel for the Respondent pointed out to the Court that the matter was part-heard, at the stage when the court allowed it to stand down to the 22nd May

[5] Irish & C Inc (Now Irsih & Menell Rosenberg Inc) v Kritzos 1992(2) SA 623 (W)

2013 for purposes of the Appellant to make application for a postponement.

[48] On 22 May 2013 new attorneys entered appearance on behalf of the Appellant and stated by means of the notice (that was brought to the attention of the Court) that they entered appearance as attorneys of record for purposes of the action as a whole.

[49] When the aforementioned notice of appointment as attorneys of record was served and made available to the Court on 22 May 2013 the Appellant was duly represented notwithstanding the withdrawal of its entire legal team the day before.

[50] After presenting argument in respect of the application for postponement Mr Cilliers SC obtained the leave of the Court to absent himself under circumstances where he was only briefed to move the application for postponement on behalf of the Appellant. Counsel who noted the judgment also excused himself.

[51] The attorneys on behalf of the Appellant and more specifically Mr Day and Dr Scott of the Appellant remained present in court. At that stage Dr Scott was still sworn in as a witness whose testimony remained unconcluded. The presence of Mr

Day and Dr Scott was pointed out to the Court by Mr Maritz SC.

[52] Immediately after their presence was pointed out and placed on record, Mr Maritz SC proceeded with an application for absolution from the instance in terms of Rule 39 of the Uniform Rules of Court. The Court dealt with the application without engaging the Appellant's director, Dr Scott, or the Appellant's attorney, Mr Day. The Court then proceeded to grant the application for absolution from the instance with costs.

[53] The Appellant argued that the jurisdictional requirements for an application for absolution from the instance in terms of Rule 39(3) of the Uniform Rules of court were not satisfied. This rule reads as follows:

"if, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs, but may lead evidence with a view to satisfying the court that final judgment should be granted in his favour and the court, if so satisfied, may grant such judgment".

[54] It was also argued that Appellant's case was not closed at the point that the application was brought.

[55] The Appellant was not only physically present in the person of Dr Scott, but still represented by Mr Day and as such Appellant was not absent, which would have allowed for absolution from the instance to be granted. Mr Day at no stage withdrew as attorney of record. Appellant was both represented and present when absolution was granted.[6]

[56] In my view Appellant should have been given at least an opportunity to consider its position after the postponement was refused as was done in **Katritsis v De Macedo**.[7] Especially in the light of the fact that Dr Scott could not represent the Appellant.[8] Neither Dr Scott nor Mr Day was given an opportunity to consider their position or to address the Court. Mr Day or Dr Scott could not be expected to interrupt the proceedings to obtain a hearing. The Court should have created that opportunity as it did on the previous day when Dr Scott's team withdrew.

[57] In the light thereof I am of the view that the Court *a quo* misdirected itself when it granted absolution from the instance.

[58] Consequently I make the following order:

58.1 The appeal is upheld;

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[6] De Allen v Baraldi t./a Embassy Drive Medical Centre 2000 (1) SA 390 (T); Meer Leather Works Co v Afican Sole and Leather Works (Pty) Limited 1948 (1) SA 321 (T)
[7] 1966(1) SA 613 (A) on p 616-617
[8] Manong & Associates (Pty) L:td v Minister of Public Works and another 2010(2) SA 167 (SCA)

58.2 The orders of the Court a quo are set aside and substituted with the following;

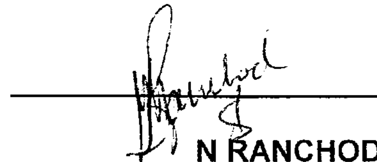
58.3 The application for postponement is granted and Appellant is ordered to pay the wasted cost occasioned by the postponement;

58.4 The order of absolution from the instance is set aside; and

58.5 Respondent is ordered to pay the costs of the appeal.

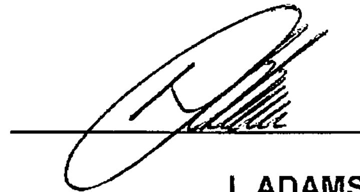
R G TOLMAY

JUDGE OF THE HIGH COURT



N RANCHOD

JUDGE OF THE HIGH COURT



L ADAMS

ACTING JUDGE OF THE HIGH COURT