IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU NATAL DIVISION
Pietermaritzburg

FULL COURT CIVIL APPEAL

AR NO. : 7/19
Case No.: 9669/17

PIETERMARITZBURG, FRIDAY the 22nd day of NOVEMBER 2019

BEFORE The Honourable Deputy Judge President Madondo ;
The Honourable Judge Poyo Dlwati and
The Honourable Judge Seegobin

Between :

ETHEKWINI MUNICIPALITY: WATER AND SANITATION UNIT APPELLANT

Versus

EKANSI TRADING ENTERPRISE (PTY) LTD RESPONDENT

HAVING on 18 October 2019 heard Counsel for the Appellant and Counsel for the Respondent on an appeal from the Judgment of the KwaZulu-Natal High Court, Pietermaritzburg, and
having read the record of the proceedings in the said Court.

THE COURT RESERVED JUDGMENT
THEREAFTER ON THIS DAY

THE COURT ORDERS THAT

(a) The appeal is upheld and each party is ordered to pay its own costs of appeal.

(b) The order of the court *a quo* is set aside and replaced with the following:

"1. The application is adjourned *sine die*.

2. The respondent is ordered to deliver its answering affidavit within five (5) days of the grant of this order.

J Venter

3. The respondent is ordered to pay the wasted costs occasioned by the adjournment, such costs to be paid on an attorney and client scale."

(c) The appellant shall be precluded from pursuing its defence to the respondent's claim until and unless it has paid the costs of the respondent as set out in paragraph (b) (3) above.

BY ORDER OF COURT

R J JOOSTE
REGISTRAR

The Registrar
Pietermaritzburg High Court
Ref: 9669/17P

Ngcobo Poyo & Diedricks Inc.
P O Box 1003
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IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: AR7/2019

In the matter between:

ETHEKWINI MUNICIPALITY: WATER AND SANITATION UNIT Appellant

and

EKANSI TRADING ENTERPRISE (PTY) LTD Respondent

Coram : Madondo DJP et Seegobin et Poyo Dlwati JJ

ORDER

In the result the order I make is the following:

(a) The appeal is upheld and each party is ordered to pay its own costs of appeal.

(b) The order of the court a quo is set aside and replaced with the following:

"1. The application is adjourned sine die.

2. The respondent is ordered to deliver its answering affidavit within five (5) days of the grant of this order.

3. The respondent is ordered to pay the wasted costs occasioned by the adjournment, such costs to be paid on an attorney and client scale."

(c) The appellant shall be precluded from pursuing its defence to the respondent's claim until and unless it has paid the costs of the respondent as set out in paragraph (b) (3) above.

APPEAL JUDGMENT

Seegobin J

Introduction

[1] The respondent Ekansi Trading Enterprise (Pty) Ltd ('Ekansi') sought a monetary judgment against the appellant being the Ethekwini Municipality: Water and Sanitation Unit ('Ethekwini') in an amount of R745 645.29 together with interest and costs. When the matter was called on the unopposed motion roll on 2 November 2017 Ethekwini's legal representative informed the court (Kruger J) that he was in possession of an unsigned answering affidavit on behalf of Ethekwini. He explained that the answering affidavit was in the process of being signed and requested that the matter stand down. The learned Judge, however, did not accede to this request and granted judgment against Ethekwini.

[2] A subsequent application for leave to appeal was refused by the learned Judge. Ethekwini now appeals the judgment and order of the court a quo with leave from the Supreme Court of Appeal.

Relevant facts

[3] The learned Judge's decision not to accede to the request made on Ethekwini's behalf to stand the matter down was no doubt influenced by the following facts. The application was issued on 2 August 2017. Service of the papers was duly effected on Ethekwini on 4 September 2017. Ordinarily and in terms of the Uniform Rules Ethekwini had fifteen (15) days within which to deliver an answering affidavit after the filing of a notice to oppose. On 2 October 2017 and following the delivery of a notice

of opposition the matter was removed from the unopposed roll. Given Ethekwini's failure to deliver an answering affidavit Ekansi's attorneys re-enrolled the matter for 2 November 2017 as they were no doubt entitled to do in terms of the KwaZulu-Natal Practice Directive 9.3.

[4] As matters stood before the learned Judge on 2 November 2017 there was in fact no answering affidavit on behalf of Ethekwini nor was there a substantive application for a postponement of the matter. In these circumstances it was understandable for the learned Judge to adopt the view that he was perfectly entitled to grant judgment against Ethekwini, more so bearing in mind that Ethekwini was in possession of the application papers for a period just short of two months and did nothing to comply with the rules of this court.

Ethekwini's grounds of appeal

[5] In pursuing this appeal Ethekwini relies on four grounds which it contends are sufficient to warrant appellate interference. They are the following: *first*, that the court a quo did not consider Ethekwini's defence; *second,* that it did not consider the possibility of a postponement and an adverse order of costs; *third*, that its refusal (to stand the matter down which was akin to a postponement) amounted to an unjustified violation of the *audi alteram partem* principle; and *fourth*, that it did not consider that public funds were implicated.

[6] Having regard to the view I take of this matter and the conclusion that I arrive at I see no reason to address each of these grounds in any great detail.

Legal principles governing applications for postponements

[7] The legal principles governing an application for a postponement were succinctly articulated by Mahomed AJA as only he could in *Myburgh Transport v Botha t/a SA Truck Bodies*[1] as follows:

'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* 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) B 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

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[1] *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 314F-315J.

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 costs or any other ancillary mechanisms. (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* 1963 (2) SA 413 (C) at 418; *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E) at 137.' [My emphasis]

[8] The following comments by the Constitutional Court *in National Police Service Union & others v Minister of Safety and Security & others,*[2] whilst made in the context of postponements in that court are, in my view, equally relevant to such applications in lower courts:

'[4] The Constitutional Court has the inherent power to protect and regulate its own process. The postponement of a matter set down for hearing on a particular date cannot be

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[2] *National Police Service Union & others v Minister of Safety and Security & others* 2000 (4) SA 1110 (CC).

claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the Court to determine whether it is in the interests of justice to grant the postponement.

[5] What is in the interests of justice will in turn be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this Court finalised without undue delay.'
[My emphasis; footnotes omitted.]

[9] Applying these principles to the material facts outlined above I consider that fundamental justice required the matter to stand down if only for a short while so as to allow Ethekwini's legal representative to obtain a properly signed and attested affidavit from his client *alternatively* to allow a postponement of the matter with a suitable costs order even if this was made on a punitive scale. Either of these options would have resulted in a measure of fair play ultimately ensuring that fair and substantial justice is achieved.

[10] Whilst I accept that the issue of a postponement always lies within the discretion of the court I nonetheless consider that such a discretion must be exercised judicially after a careful weighing up of the prejudice that either party may stand to suffer in the process. In the present matter I believe that the interests of justice would have been better served by allowing Ethekwini (which exercises a public function with public funds) an indulgence to place its case properly and fully before the court. This is not to say that in every case where a public body such as Ethekwini is involved a court should bend backwards to grant an indulgence. Each case will have to be assessed

on its own facts and circumstances. In the present matter I believe that any prejudice caused to Ekansi as a result of Ethekwini's remissness in not having its answering affidavit delivered timeously can and should be met with a special order of costs, payable on an attorney and client scale. It therefore follows that the appeal must succeed.

[11] The only remaining issue to consider is whether Ethekwini is entitled to its costs of appeal including all costs arising out of the applications for leave to appeal. Whilst ordinarily the costs should follow the result I consider that in this particular matter both in this court as well as in the Supreme Court of Appeal it would be manifestly unfair to burden Ekansi with such costs bearing in mind that it was not the guilty party herein. On behalf of Ethekwini Mr *Boúlle* submitted that the applications for leave to appeal were vigorously opposed by Ekansi thus resulting in more costs being incurred. One can well understand the stance adopted by Ekansi in this regard: it was favoured with a judgment against Ethekwini in a substantial amount and which it believed was justifiably granted at the time. In these circumstances it could be forgiven for believing that it was entitled to hold onto the judgment at all cost. In my view, this entire saga could have been avoided had Ethekwini complied with the rules and ensured that its answering affidavit was filed timeously. In these circumstances I see no reason why it should not carry its own costs in this regard.

Order

[12] In the result the order I make is the following:

(a) The appeal is upheld and each party is ordered to pay its own costs of appeal.

(b) The order of the court a quo is set aside and replaced with the following:

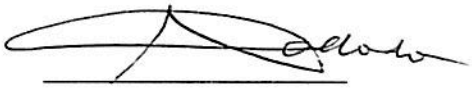
"1. The application is adjourned sine die.

2. The respondent is ordered to deliver its answering affidavit within five (5) days of the grant of this order.

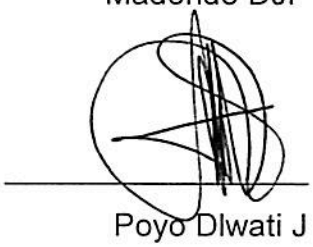
3. The respondent is ordered to pay the wasted costs occasioned by the adjournment, such costs to be paid on an attorney and client scale."

(c) The appellant shall be precluded from pursuing its defence to the respondent's claim until and unless it has paid the costs of the respondent as set out in paragraph (b) (3) above.

Seegobin J



Madondo DJP



Poyo Dlwati J

APPEARANCES:

FOR THE APPELLANT:	A J Boulle (instructed by S D Maloi & Associates)
FOR THE RESPONDENT:	V M Naidoo SC (instructed by Sergie Brimiah & Associates)
DATE OF HEARING:	18 October 2019
DATE OF JUDGMENT:	22 November 2019