THE SUPREME COURT OF APPEAL

REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case number: 484/08

In the matter between:

SUBLIME TECHNOLOGIES (PTY) LTD **Appellant**

and

JOHAN JONKER **First Respondent**

STEVEN ROCCO WILKINSON **Second Respondent**

Neutral citation: *Sublime Technologies v Jonker and Wilkinson* (484/2008) [2009] ZASCA 149 (27 November 2009)

Coram: Mthiyane, Lewis, Malan, Bosielo JJA and Griesel AJA

Heard: 23 November 2009

Delivered: 27 November 2009

Summary: Costs – whether correct exercise of judicial discretion in relation to award of wasted costs arising from a post-ponement of the trial. Court's imposition of undertaking by party to pay costs, especially punitive costs, should trial not finish within estimated time an undersirable practice.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Rasefate AJ).

Order:

1. The appeal is upheld with costs.

2. The order of the court below is set aside and substituted with the following:

   'The matter is postponed *sine die*. The wasted costs occasioned by the postponement shall stand over for later determination.'

JUDGMENT

GRIESEL AJA (MTHIYANE, LEWIS, MALAN, BOSIELO JJA concurring):

[1] This is an appeal against a costs order granted by the North Gauteng High Court, Pretoria. It concerns the wasted costs occasioned by a postponement of the trial at the behest of the appellant (as plaintiff). The high court ordered the appellant to pay the costs of the postponement on a punitive scale, thus giving rise to the present appeal, which comes before us with leave of this court.

[2] It is trite that the award of costs is a matter wholly within the discretion of the trial court. An appeal court will only interfere with discretionary orders granted by a lower court where it is shown that –

'. . . the lower 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 had 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.' [1]

[3] With regard to costs occasioned by a postponement, the general rule is that the party which is responsible for a case not proceeding on the day set down for hearing must ordinarily pay the wasted costs.[2] It is important to bear in mind, however, that a litigant is not necessarily 'responsible' for the case not proceeding merely because he or she applies for a postponement. In certain circumstances, a litigant may be forced to apply for a postponement as a result of the conduct of an opponent, eg through inadequate discovery; a late amendment or any number of other reasons. The 'normal rule' only applies to 'the party who was at fault or in default'.[3]

[4] When a trial court is likely to be in a better position than the court hearing the application for postponement to ascertain the facts and to decide who should be liable for the costs of a postponement, it is a salutary rule that costs should be reserved for later determination.[4]

[5] Turning to the facts of this case, the appellant is a company involved in the processing of mineral ore at a large plant in Vereeniging. The first and second respondents were two of the appellant's most senior employees, being its financial manager and logistics manager respectively. The appellant's case as it emerges from the pleadings is that the respondents, in breach of their fiduciary duties, dishonestly presented fictitious invoices in the names of Econo Hire ('Econo') and Nyala Contractors ('Nyala') for payment by the appellant. Through the dishonest presentation of these invoices, so it was alleged, the appellant was induced to pay amounts of approximately R3 million and R1,2 million to Econo and Nyala respectively. The appellant further alleged that Econo and Nyala did not exist, but that they were simply the alter egos of the respondents. In this regard, the appellant claims that the bank accounts

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[1] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11. See also *Naylor & another v Jansen* 2007 (1) SA 16 (SCA) para 14 and the authorities referred to therein.
[2] A C Cilliers *Law of Costs* (Service issue 17), para 8.11; H J Erasmus *Superior Court Practice* B1-306D–E (Service 28, 33).
[3] *Burger v Kotze & another* 1970 (4) SA 302 (W) at 304E–F.
[4] Cf Erasmus *loc cit*.

reflected on the invoices into which payments were to be made were, in respect of Nyala, the bank account of Mrs Jonker, the wife of the first respondent. In respect of the Econo invoices, three different bank accounts had been used from time to time: the first account belonged to a Ms Visagie, to whom one payment was made, whilst the balance of the payments were made to two bank accounts held in the name of a Mr C H Steyn. According to the appellant, payments were redistributed from these accounts to various other accounts held or controlled by the respondents.

[6] Copies of the various bank statements were obviously vital for the proof of the appellant's case. In the course of a criminal investigation against the respondents, the appellant obtained copies of the relevant bank statements from the police docket. The appellant sought to use these documents at the trial and further sought discovery from the respondents of the relevant bank statements. The discovery measures were strenuously resisted by the respondents who raised several objections, including an alleged violation of their constitutional right to privacy and lack of relevance.

[7] After many months of interlocutory skirmishes, the appellant eventually obtained an order compelling the respondents to make discovery. Notwithstanding such order, however, discovery of the bank statements was still not forthcoming, the respondents claiming that they were no longer in possession of such statements. At a pre-trial conference, held during the week preceding the trial, the appellant's legal representatives also unsuccessfully sought the respondents' agreement that copies of the bank statements could be produced at the trial by consent. Instead of obtaining the cooperation it had hoped for, the appellant was pointedly informed that the respondents would oppose the use of bank statements at the trial.

[8] The appellant thereupon served subpoenas *duces tecum* on the managers of the various branches of the banks at which the relevant accounts were held. Copies of the bank statements had been received from the banks and placed into a trial bundle a few days prior to the trial.

[9] The action was enrolled for trial in the high court on Tuesday, 31 July 2007. When the roll was called before the Deputy Judge President ('DJP') on that day, counsel for the appellant indicated that the trial was expected to run for not more than three days. Counsel for the respondents was less optimistic, estimating that it would run for at least five days. It appears that there is a rule of practice in the North Gauteng High Court that a trial requiring more than five days ought not to be enrolled except on a date specifically allocated by the Judge President or a judge delegated by him. From this rule, a practice has apparently developed in that court, adopted by the DJP, that unless counsel for both parties could give an undertaking at the calling of the roll that the trial action would not endure for more than five days, the matter would not be allocated to a judge and a new enrolment would have to be sought, resulting in a delay of anything up to two to three years before a new trial date can be obtained.

[10] In relation to the present matter, and in view of the conflicting estimates of the duration of the trial, the DJP enquired of counsel for the appellant whether the appellant would be prepared to accept the risk that if the matter was allocated for hearing and did not finish within the estimated time, the matter would be postponed *sine die,* that the trial would have to commence *de novo* before a new judge, and the appellant would have to pay the costs occasioned by the postponement on an attorney and client scale. Faced with Hobson's choice, the appellant agreed to the allocation of a judge on the basis as stipulated by the DJP and authorised counsel to give an undertaking to that effect.

[11] It should be said that the practice that has evolved in the high court appears to be highly prejudicial to litigants. Whilst the difficulties of preparing an efficient trial roll are understood, the inflexibility of the approach adopted by the DJP may lead to serious prejudice to litigants, as is demonstrated in this case. Whether it is within the power of the court to order that a trial that is part-heard is a nullity is doubtful. And instructing a trial judge to cease hearing a matter once seized of it is an unacceptable interference with judicial independence. Furthermore, imposing an undertaking to pay costs, especially on a punitive

scale, in the event of counsel's estimate turning out to be incorrect, is undesirable.

[12] When the trial commenced before Rasefate AJ, who had been designated to hear the matter, the appellant's counsel gave a short opening address. Thereafter he called his first witness, an officer in the service of Absa Bank, to identify and authenticate copies of bank statements which had been printed from the bank's computers. After the witness's evidence in chief, the first respondent's counsel sought an adjournment on the basis that he had been 'taken by surprise' and wished to consider the bank statements prior to any cross-examination. It appears that although indexes, which included and referred to the bank statements in the bundles, had been furnished to the respondents on the preceding Friday, copies of the actual bank statements were only delivered on the day before the trial.

[13] Upon the resumption of the trial after the luncheon adjournment, counsel for the respondents objected, on a number of different grounds, to the evidence proposed to be led on behalf of the appellant. One of the grounds raised was based on the provisions of s 30(1) of the Civil Proceedings Evidence Act 25 of 1965, which require ten days' notice to be given of the appellant's intention to adduce evidence of accounting records of a bank, which requirement had not been complied with.[5] Counsel for the appellant attempted to counter this argument by relying on the provisions of s 15(4) of the Electronic Communications and Transactions Act ('ECTA') 25 of 2002 which, so it was submitted, enabled the appellant to place the relevant documents before the court without complying with any notice period.[6]

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[5] Section 30(1) provides:
'No ledger, day-book, cash-book or other account book of any bank, and no copies of entries therein contained, shall be adduced or received in evidence under this Part, unless at least ten days' notice in writing, or such other notice as may be ordered by the person presiding at the proceedings concerned, containing a copy of the entries proposed to be adduced in evidence, has been given by the party proposing to adduce the same in evidence to the other party.'

[6] Section 15(4) reads as follows:
'A data message made by a person in the ordinary course of business, or a copy or printout of or an extract from such data message certified to be correct by an officer in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self regulatory organisation or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.'

[14] 'Data message', as defined in s 1 of ECTA, means 'data generated, sent, received or stored by electronic means and includes . . . a stored record'. It was common cause that these provisions are wide enough to include copies of bank statements.

[15] After hearing argument, the trial judge adjourned the matter to the following day, when he announced his ruling upholding the respondents' objection. In the result, he held that 'evidence of the bank records will be inadmissible unless the prescribed notice has been given'.

[16] Faced with this ruling, the appellant found itself on the horns of a dilemma: it could either decide to press on without such evidence, which would inevitably have resulted in the demise of its case; or it could apply for a post-ponement in order to give the requisite notice in compliance with the court's directive. Understandably, counsel for the appellant opted for the latter course, moving for a postponement and asking that the question of liability for the wasted costs be reserved for later determination.

[17] This application was vigorously opposed on behalf of the respondents, who asked that the application for postponement be refused; alternatively, if the court were minded to grant a postponement, that the appellant be ordered to pay costs of three days of trial on a punitive scale in accordance with its earlier undertaking.

[18] The trial judge, after a further adjournment to consider the issue, granted the postponement and issued an order in the following terms:

'. . . [T]he plaintiff is ordered to pay the wasted costs of both . . . the first and the second defendant, and also the reservation of counsel for the three days that were reserved, on an attorney and client scale.'

[19] In coming to his conclusion, the trial judge accepted the respondents' argument that the postponement was wholly attributable to the fault of the appellant in that it 'did not comply with the rules and requirements of s 30 of the Civil Proceedings Evidence act as it should have'. In fact, so the learned trial

judge held, the postponement was due to the 'recklessness' of the appellant because, despite prior warning, it elected to proceed with the matter without complying with the provisions of the Civil Proceedings Evidence Act, knowing that its case would rest on the production of bankers' books.

[20] Secondly, the court referred to the fact that the appellant had given an undertaking that if the matter was not finalised within three days, then it tendered to pay the costs on an attorney and client scale and the matter would lapse and proceed *de novo* on a future date.

[21] Counsel for the appellant took issue with the reasons furnished by the trial court, submitting that the court failed to exercise its discretion judicially. He submitted *inter alia* that it amounts to a misdirection to find, as the trial court did, that the appellant was reckless in seeking to circumvent the provisions of the Civil Proceedings Evidence Act by invoking the provisions of ECTA. In the light of my conclusion with regard to the exercise of the court's discretion, I do not find it necessary to undertake any detailed analysis of the provisions of s 15(4) of ECTA, which have been described as 'controversial'.[7]

[22] The present case is, in my view, an instance where the trial court is likely to be in a better position than the court hearing the application for postponement to decide who should be liable for the costs of the postponement. The mere fact that the appellant may, with the benefit of hindsight, be criticised for the fact that it did not, at an earlier stage give the requisite notice in terms of s 30 of Act 25 of 1965, or that it did not timeously utilise its remedies in terms of rule 38 to obtain copies of the bank statements, may or may not be decisive at the end of the trial when it comes to the costs of the postponement. On the other hand, it may appear in the fullness of time and after all the evidence has been heard, that the postponement was precipitated by a spurious objection on the part of the respondents; or that they had lied about their possession of the documents in question; or that they had been obstructive and had deliberately

[7] See for example the judgment of the full bench of the South Gauteng High Court in *LA Consortium & Vending CC t/a LA Enterprises v MTN Service Provider (Pty) Ltd* (Case No A5014/08, 17 August 2009, not yet reported) paras 12–13.

adopted delaying tactics throughout the process (as claimed by the appellant), in which event it would work great injustice to have rewarded them at this stage with an irrevocable order for costs arising from the postponement.

[23] To sum up, should it appear at the end of the trial that the appellant itself was entirely to blame for the postponement, or that it was pursuing vexatious and baseless claims against the respondents (as they allege), then the court can fully give effect to such a finding at that stage by mulcting the appellant in costs, in which event the respondents would have lost nothing.[8] Looked at in its totality, it is clear to me that the trial court will be in a far better position properly to assess the liability for the wasted costs occasioned by the postponement once it has all the evidence before it.

[24] With regard to the appellant's undertaking – leaving aside the propriety of requiring the appellant to furnish such an undertaking in order to be afforded access to the court – it seems to me that the undertaking to pay the costs of a postponement was given on the basis of the appellant's estimate of the time necessary for the conduct of the trial being inadequate; it was not given on the basis that the costs of a postponement – for whatever reason – would inevitably be for the appellant's account. To put it differently, the undertaking would be triggered if the trial could not finish within the estimated time; *not* if it could not even start. I accordingly conclude that the trial judge erred in relying on the undertaking furnished on behalf of the appellant.

[25] In these circumstances, I am of the view that an order reserving the wasted costs for later determination would undoubtedly have been the proper order to have made. In failing to make such an order the trial judge, in my respectful opinion, failed to exercise his discretion judicially. It follows that this court is at large to interfere with the exercise of the trial court's decision, that the appeal should succeed and the order of the high court should be changed to reflect the views expressed above.

[26] The following order is granted:

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[8] Compare the remarks of Marais JA in *Williams v Harris* 1998 (3) SA 970 (SCA) at 984F in similar circumstances.

1. The appeal is upheld with costs.

2. The order of the court below is set aside and substituted with the following:

   'The matter is postponed *sine die*. The wasted costs occasioned by the postponement shall stand over for later determination.'

B M GRIESEL
Acting Judge of Appeal

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