

IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NUMBER 11711/2006DATE 2008-02-265 GILBERT T J M WEBSTER PLAINTIFF

and

OUBAAI GOLF ESTATE (PTY) LTD DEFENDANT

J U D G M E N T

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FOURIE, J:

This matter is set down for hearing on the 25th and the 26th of February 2008, during the extended civil circuit at George. Due to problems with accommodation at the George Magistrates' Court and the unavailability of the envisaged court room at the George Municipal Chambers, a special arrangement has been made with the Chief Magistrate of Mossel Bay, Mr Vermeulen, to use one of their courts. He has gone out of his way to reschedule his courts to enable us to sit 20 at Mossel Bay this week. I thank him for his kind assistance in this regard. In the result my Registrar and I, as well as the stenographer, have travelled to Mossel Bay from George and will do so for the rest of the week.

The second matter on the roll for this week is that of E. Vorster versus J.J. Vorster, which is scheduled to run on 25

Wednesday and Thursday, the 27th and 28th instant. On Friday the 29th unopposed motion matters will be heard. The extended period of this circuit was agreed to by the Judge-President at the request of the legal practitioners of the Southern Cape, who made representations to him regarding the state of the roll. They complained about an alleged backlog of civil trials and the Judge-President agreed to provide a Judge to sit permanently in George for the first two terms of this year, on the understanding that trials which were to be enrolled were ready to proceed to trial. On Friday, in the late afternoon, I was advised telephonically by Mr Coetsee who appears for Plaintiff in this matter, that the parties have agreed that the trial should be postponed. I indicated to him that I require an explanation by the parties as to why the matter was not ready to proceed. I should mentioned that the pleadings in this matter run to some 540 pages and involve some intricate points of law. I have studied these pleadings over a number of days and am ready to hear the matter, but now the parties have decided to seek a postponement. This means that when the matter is in future re-enrolled, another Judge who will then preside over this circuit will yet again have to read and study these papers.

A similar situation has arisen in the Vorster matter which is to be heard this coming Thursday and Friday. I have now been informed that the parties in the Vorster matter

have also agreed to seek a postponement. The papers in the Vorster matter, which I also studied, are in excess of 370 pages. I am also ready to hear that matter, but now another Judge will in due course have to be burdened with it again.

5 These are not the only two cases on the roll in which applications for postponement have been brought. In fact, to date a staggering 42% of the matters set down for trial during this extended civil circuit, forming part of an alleged backlog, had to be postponed. In a number of these matters, the legal
10 representatives have shown a total disregard for the rules of court and failed to pay the court the basic courtesy of keeping it informed regarding matters which had been settled or are to be postponed. In certain instances, matters had been settled several days before the allocated trial date, yet the attorneys
15 failed to inform the court forthwith of the settlement. In one instance the parties had settled the case seven days before the trial date, but kept the court in the dark and only mentioned it when the matter was called. In another, a postponement was sought as the defendant's attorney was on
20 holiday, but no effort was made to inform the court of this state of affairs prior to the matter being called. And so the sad tale continues.

I find this most disturbing and in appropriate cases I have voiced my strong disapproval, and in one instance I have
25 made a punitive costs order, but all to no avail. This

has resulted in several court days being wasted as I was unable to find sufficient alternative matters to slot into the gaps which have opened up on the roll. In fact, I had to scrounge around for other matters to be heard. Now the same scenario is to play itself out this week. Four court days are going abegging. I unfortunately have to conclude, that if this is the attitude displayed by practitioners who have matters on this roll, then the Southern Cape does not deserve an extended civil circuit. Finally, as a matter of interest I should mention that to date 80% of the days on the roll allocated for trials, have due to postponements and settlements not been taken up by the hearing of trials. I have been able to hear a number of applications in their stead, but it has still resulted in a significant number of court days being wasted. I shudder to think of the costs incurred to provide this forum, which costs not only include direct costs, but also the costs of appointing an acting Judge to take my place in Cape Town.

I now deal with the matter presently before me. As I have said in a previous matter in which the parties had applied for a postponement, an applicant for a postponement seeks an indulgence and a postponement is not merely there for the asking. Full reasons and a satisfactory explanation of the circumstances giving rise to the application for a postponement, should be given to the court. It is also trite that an application for a postponement should be made timeously to

prevent inconvenience being caused to the other party and the court. The court has a discretion to grant or refuse a postponement. A postponement cannot be secured by mere agreement between the parties. It is for the court to determine whether it is in the interests of justice to grant a postponement. But the interests of justice would be determined not only by what is in the interests of the parties themselves, but also by the need to have matters before this court finalised without undue delay.

10 In the instant matter a postponement is sought as Defendant now seeks an amendment in accordance with a notice of intention to amend, delivered on 18th of February 2008, i.e. four court days before the trial date. In the amendment two additional special pleas are added as special
15 pleas numbers 4 and 5. It is clear that Plaintiff requires time to respond thereto. As a result the matter will have to be postponed if the interests of justice are to be served. In these circumstances I would have expected defendant's legal representatives to, at least, have placed the circumstances
20 giving rise to the belated amendment and postponement, before me. This was not done and it was left to Mr Coetsee on behalf of Plaintiff to explain the circumstances to the court. In view thereof, I requested Mr Coetsee, through his attorney, to contact Defendant's attorneys and to advise them that they
25 should place representations before me by 10a.m. today as to

the circumstances which led to the matter being postponed and why a punitive costs order should not be made against Defendant.

I have now received written representations from Defendant's attorney. The attorney states that it was only during the course of preparation that two potential legal defences came to light, namely those reflected in special pleas numbers 4 and 5. However, no explanation is given why these defences only "came to light" at this late stage. The attorney also, rather unconvincingly, suggests that Defendant's tender to make payment of the wasted costs occasioned by the postponement, as per the draft order handed up by Mr Coetsee, was motivated by economic and commercial reasons and that such tender does not justify the inference that a postponement has been necessitated by Defendant's conduct alone. It is clear to me that the late introduction of special pleas numbers 4 and 5, is the causa causans of the postponement of the trial. The suggestion of Defendant's attorney that Plaintiff's "unpreparedness to deal with special pleas numbers 4 and 5" attributed to the matter being postponed, may be factually correct, but fails to take into account that such unpreparedness is the direct result of the late introduction of the additional two special pleas by Defendant.

In the draft order the parties have agreed that Defendant shall be liable to pay Plaintiff's wasted costs occasioned by

the postponement, on the scale as between party and party. My view of the matter is that a punitive costs order would have been justified, especially having regard to the late introduction of the additional special pleas by Defendant. In his written representation Defendant's attorney emphasises that the terms of the draft court order are the subject matter of an agreement between litigants in civil litigation. In so far as this statement may be construed as implying that the court is bound by the agreed draft order, regardless of the circumstances prevailing, it is without merit. The postponement of the trial, dealt with in paragraph 2 of the draft order, is, as I have already indicated, not merely there for the asking, but subject to the exercising of a discretion by the court. Similarly, the agreement in paragraph 3 of the draft order, is subject to the court ordering it in terms of Rule 33(4), namely if the court considers it to be convenient to hear the said special pleas mentioned therein, separately. Finally, the agreement of the parties in regard to the issue of wasted costs, cannot bind the court, especially in circumstances where the court is of the view that a punitive costs order should be made as a mark of its disapproval of the manner in which a party has conducted itself, or where an order de bonis propriis against a party's attorneys is called for. As I have mentioned, a postponement is necessary to enable Plaintiff to deal with the late amendments of its plea by Defendant. A trial date has to be arranged with Mr Botes of

Millers Inc., George, who compiles the roll on behalf of the Registrar. In regard to paragraph 3 of the draft order, I believe that the presiding Judge who hears the trial, should consider whether the suggested separation is convenient or not.

5 As far as the issue of the wasted costs is concerned, I would, if I were required to decide same, have had no hesitation in ordering Defendant to pay these costs on the scale as between attorney and client. Although I am not bound by the parties' agreement in regard to the wasted costs, 10 it, however, appears to me that if I were to make such a punitive order, it could amount to a brutum fulmen, as Plaintiff could, inter partes, be regarded as contractually limited to recover his wasted on the lesser scale only. In the result I make an order in terms of the draft order, which I have 15 amended and marked X.

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FOURIE J