IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 309/06

DATE: 17 APRIL 2008

In the matter between:

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| ENNO GüNTER STOLTENBERG | Plaintiff |
| versus | |
| VALERIE SYLVIA BUTLER | 1st Defendant |
| S A MEDICAL IMPORTERS CC | 2nd Defendant |
| IRWING 430 CC (in liquidation) | 3rd Defendant |
| GERHARDUS CORNELIUS KACHELHOFFER N.O. | 4th Defendant |
| FEIROUZ WEHR-WILLIAMS N.O. | 5th Defendant |
| THE MASTER OF THE HIGH COURT | 6th Defendant |

JUDGMENT

STEYN, AJ

I am sorry there has been a small delay, but at least the representatives can be aware that I have given this matter some consideration. I have prepared quite a long judgment in the circumstances in order to explain the position clearly.

I will firstly deal with the background facts in this matter. On 18 January 2006 the plaintiff issued a summons for declaratory relief against a number of defendants. The relief claimed relates mainly to disputed claims in a liquidated estate. The plaintiff, the respondent in the application for postponement, claims declaratory order that the first and second defendant's claims, the applicant's in the application for postponement, be disallowed, and that a second liquidation and distribution account be amended accordingly.

At the time of the institution of the action the first and second defendants, hereinafter referred to as the applicants, were represented by Mallinicks Attorneys in Cape Town. A notice of intention to defend was filed on 30 January 2006. A notice of bar was eventually served on 17 March 2006 after no further action was taken by the applicants. The applicants were compelled to file their plea by 24 March 2006. Prior to 24 March 2006 Mallinicks Attorneys informed respondent's attorneys that they were withdrawing as attorneys of record and that the applicants would henceforth be represented by attorneys from Bloemfontein, the attorneys E G Cooper and Sons, represented by the correspondents in Cape Town, MacGregor, Stanford, Crew.

Only on 7 April 2006, after the plaintiff, referred to as the respondent, refused to allow further time extensions, a plea was filed by the applicants, now represented by E G Cooper and Sons. It was recorded in the correspondence that the plea had been prepared in haste and rights to amend were reserved. No amendments have been effected or requested to date. On 19 May 2006 a notice of discover, in terms of Rule 35, was served on the applicants, requesting discovery of certain documents by 19 June 2006.

This notice, and later requests for discovery, were not complied with. On 10 October 2006 the trial was set down for hearing on 21 November 2007. Due to applicant's continued failure to discover an application had to be launched to compel discovery by the applicants, and it was served on the applicant's attorneys on 12 March 2007. On the same date the applicant's attorneys withdrew. The order was granted on 29 March 2007, that applicants should comply with discovery by 19 April 2007. On 19 April the applicants filed the discovery and were now represented by Attorneys Hugo, Teneyne and Brewer, hereinafter referred to as HTB from Bloemfontein.

The minute of the prescribed Rule 37 meeting of the parties, dated 2 October 2007, was filed by respondent's attorneys. It appeared there from that the applicant's attorneys had elected not to attend the meeting after attempts to arrange such meeting had not met with success. On 21 November 2007, the allocated trial date, the applicants, in a substantive application, applied for a postponement of the trial, which apparently was vehemently opposed.

The attorney then acting for the applicants raised three main reasons why the postponement was necessary. One for the excuses for his non-preparedness for trial was that certain documentation was being retained by the erstwhile attorneys of the applicants, Mallinicks, who refused to hand over the documents due to applicant's non-payment of their fees due. It was mentioned that the relationship between applicants and her erstwhile attorney had turned sour. It was alleged that the applicant could not be properly represented without insight into the documents retained by Mallinicks. The matter was postponed by order of the Court to a date that the parties finally agreed to, namely 16 April 2008.

Only on 14 March 2008 a notice was received by the respondent that applicant's last set of attorneys, HTB, had withdrawn as attorneys representing the applicants.

In the present application for leave to postpone it is alleged on behalf of the applicant's by Mr Hassan of Hassan Bassier and Valingham, attorneys of Durban, that they were requested in January 2008 to represent the first applicant in several matters. As regards the present matter they were initially instructed to hold a watching brief for a reason undisclosed to this Court. The firm then representing applicants in this matter was still HTB of Bloemfontein. Mr Hassan states that the first applicant had informed him that she had encountered, in his words, a difference of opinion with Mr Bruwer of HTB attorneys and no detail is provided. On 29 January 2008 a letter was addressed to applicant's erstwhile attorneys, HTB attorneys of Bloemfontein by her soon to be new set of attorneys, Hassam, Bassier and Valingham, that first defendant, that was the first applicant, had terminated the power of attorney previously held by HTB attorneys on behalf of the applicant. Mr Bruwer, unsurprisingly responded by requesting his fees due before withdrawing and providing documentation.

Correspondence ensued between these new attorneys and respondent's attorneys, some of which is quite puzzling. Mr Hassan seemed to believe he could not legally represent the applicant's despite his instructions and the withdrawal of a previous power of attorney to the erstwhile attorneys, unless the erstwhile attorneys consent to such representation. Even after the previous attorneys, HTB, withdrew officially, Mr Hassan still persisted in asking them to confirm that they consented to his firm taking over the matter. In the meantime, despite such lack of direct consent, consultations were in fact held with the applicant and correspondence continued.

Mr Hassan states that he consulted with the first applicant, one of the dates that the Court is aware of, on 13 March 2008. It is obvious from the papers that instead of preparing for the eminent trial first applicant then left the Republic at some stage prior to 19 March 2008, only to return on or about 5 April, we heard in court that it was in fact a few days later. The matter relating to the outstanding fees of Mr Bruwer remained unresolved. On 26 March 2008 a letter was finally forwarded by Mr Hassan of the respondent's attorney, informing them of the fact that they had been requested to represent the first applicant in the present matter. The averment of the consent awaited was made. No

mention is made of any proposed postponement, despite the fact that there had been consultation with the applicant. On the very next day a letter was addressed by the respondent's attorneys to attorney Hassan, setting out a brief history of the matter pertaining to the previous postponement. Reference is made to the fact that applicant previously requested a postponement ostensibly to obtain documents.

Applicant's attorneys are specifically requested to take such steps as may be necessary to obtain the so-called crucial documents. They were even informed of possible ways to attend to the matter. The pleadings filed in the postponement application were also sent to Mr Hassan in order to update. It was further pointed out that it was the perception of the respondent that the applicant has, since 2001, and the commencement of the dispute, done everything in her power to postpone finalisation of the matter. In a response dated 7 April 2008 Mr Hassan indicates for the first time that he does not know if he will be, as he said, in a position to be ready for hearing.

Some correspondence between Mr Hassan and attorneys Mallinicks, now Webber, Wentzel, Mallinicks, regarding outstanding documentation, allegedly in the safekeeping of

attorneys Mallinicks followed. In a letter dated 15 April 2008 Mr Arranouf of Mallinicks states that the applicant has had a period of two years to settle outstanding accounts. It is recorded that she had not been prepared to undertake to pay her account in exchange for the documents. It was felt even by him that the applicant was manipulating the situation to facilitate another postponement. Most importantly in the letter it is stated that we have never denied your client access to the documents. Your client and her legal advisors have always been free to attend on our offices in order to inspect and make copies of the documents. The fact that for a period of over two years your client and her legal representatives have failed to do so speaks for itself.

It was further recorded that in view of the subpoena that was threatened, as it could have been done a long time ago, the documents would be delivered the same day to the office of the registrar of the High Court Cape Town, where they could be inspected. Proof that the documents had been delivered as promised was later provided.

Despite the fact that applicant's attorneys must have been aware that the respondent would not agree to a further postponement of the matter the legal representatives of the applicant only arrived

Despite the advice of respondent's attorneys regarding the importance of obtaining documentation allegedly required by applicants, no steps were immediately taken in this regard and no adequate acceptable reason for such failure is provided. Mr Hassan's averment that he could not attend to this issue prior to confirmation from applicant's previous attorneys that he could act on her behalf, despite the filing of a notice of withdrawal by the previous attorneys, is rejected. The outstanding fees due to yet another firm of attorneys need not have prevented him from proceeding to attempt to obtain the documents from another set of previous attorneys.

On 9 April 2008 Mr Hassan states that he commenced preparation for trial. He states that he consulted with applicant on 11 April 2008, immediately on her return to South Africa from abroad. As stated previously it had been advised that she was due to return on 5 April 2008. It is quite apparent that neither the attorney or the applicant or both had allowed an inordinate amount of time to elapse, prior to actually attempting to start preparation for trial. Applicant clearly regarded her overseas visit as more important that attending to a trial set down for a date she had agreed to after a previous indulgence to her. It is further alleged that it became apparent during a consultation on 12 April 2008 that

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certain crucial documents were possibly among the documents retained by attorneys Mallinicks. These documents will purportedly show whether certain monies advanced by the respondent were in repayment of a debt, or whether the payments were a loan to the applicant.

No explanation is given why no action was taken after the previous postponement to obtain these documents. On 16 April 2008 the documents delivered to the registrar's office were inspected, as stated herein above. Mr Hassan states that it is obvious that there are many, as he calls them, pertinent documents, that relate to the issues in this matter. No details are provided. It is further submitted that the applicants will be irreparably prejudiced if the trial were to continue and they were unable to counter-contest the allegations that the respondent's advancement of funds constituted loans payable on demand, because of inadequate documentary preparation.

As advised, and warned, previously by respondent's attorneys, applicant's attorney now realised that the marshalling of all available documentation is critical to ensure that justice is done. A postponement is requested and wasted costs tendered once again. Previously ordered costs have not yet been paid. Not

the respondent that the main issue in the trial is whether respondents advances to the third defendant constituted loans or not, and that this issue does not necessitate a detailed inspection of voluminous documentation necessitating another postponement.

On behalf of the respondent it was submitted that he will suffer prejudice in the event of a postponement. His financial resources have been depleted and he relies on a pension and social security. In addition the stress of the matter is affecting his health detrimentally.

As regards the legal position it is correct that the granting of a postponement is an indulgence and that it is in the Court's discretion whether or not to allow a postponement. The discretion must obviously be exercised judicially. The Court is usually slow to refuse a postponement where the true reason for the non-preparedness for a litigant has been fully and satisfactorily explained and where it is clear that a postponement is not due to delaying tactics, or where justice demands a further extension. A postponement is not granted where the application is brought about by an applicant's lack of interest in proceedings or inexcusable conduct on the part of the attorney or the litigant or when a finalisation of a matter is inordinately delayed.

After consideration of all the facts and the law in this matter the applicants have failed to convince the court that they are entitled to a postponement in the matter. There is a clear indication that the first applicant is employing delaying tactics. No explanation has been given for her failure to attend to the matter and especially her failure to obtain the so-called crucial documentation after the previous postponement she was granted. I am not convinced that the further evidence that is sought will be relevant and material or that it even exists. Applicant has not shown that such evidence is not available through no fault of her own. Even if the documents are crucial the applicant and her representatives will have sufficient time to deal there with.

I do not believe the applicant will be irreparably prejudiced if the matter were to proceed. I agree with Mr Vivier that respondent will be prejudiced by a further postponement. In this case justice demands that the matter be brought to finality. It is not only the interests of the applicant that are at stake. Finally finality should now be reached in this matter that has dragged on for far too long, with a lot of indulgence shown to the applicant. I do not agree with Mr Jefferies that prejudice is the only important factor in a

matter such as this, I believe that proper administration of justice is.

If the matter commences today, on a Thursday afternoon, or on Monday, the applicant and her representatives will have the weekend, starting on Friday morning the 18th of April, to further prepare for trial. Applicant is in the fortunate position that she does not have to commence to give evidence. There is no reason why applicant should not be ready to proceed on Monday 21 April 2008. If this date is unacceptable for a good reason the parties may decide if they would prefer to start on Tuesday. I may be addressed in chambers in this regard.

The APPLICATION FOR A POSTPONEMENT IS ACCORDINGLY REFUSED WITH COSTS, such costs to be on a scale as between attorney and client.

STEYN, AJ

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