

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

CASE NUMBER: 5932/2006

DATE: 3 AUGUST 2010

5 In the matter between:

**INDUSTRIAL DEVELOPMENT CORPORATION**

**OF SOUTH AFRICA LIMITED**

First Plaintiff

**FINDEVCO (PTY) LIMITED**

Second Plaintiff

and

10 **ROBERT HSU-NAN TSUNG**

First Defendant

**ROBERT CHENG-LI TSUNG**

Second Defendant

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CASE NUMBER: 13100/2009

DATE: (WLD) CASE NO: 9353/2008

15 In the matter between:

**GARY DONOVAN WALLACE N.O.**

First Plaintiff

**SHAUN LOUIS RAI N.O.**

Second Plaintiff

and

**FINDEVCO (PTY) LIMITED**

First Defendant

20 **PRILLA 2000 (PTY) LIMITED**

Second Defendant

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**J U D G M E N T**

**DAVIS, J:**

25 The Court is put in a difficult position, because on the one  
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hand this application for postponement raises a plethora of difficulties. In the first place it is trite to remark that postponements are not for the taking. They have to be properly motivated. The reason that they have to be properly motivated is because the interests of both parties have to be safeguarded by a court.

Plaintiffs are also entitled to ensure an expeditious resolution of the claims that they have brought before the Court. It goes without saying that defendants are also entitled to be given every opportunity to put their case in the best possible light. In this case, however, further difficulties arose which can be outlined as follows. The matter was due to start today after postponements during 2009. There is no disputing that the applicants' expert forensic account, Mr Hudson-Bennett, is sadly ill and not available to provide the applicants with the expert evidence required. There is no dispute, on the evidence, that the applicants sought to obtain the services of other experts, two of whom indicated that there was no basis by which they could prepare a report and be available to provide the necessary expertise for this case by 3 August 2010.

It has emerged through argument (based I might add on averments which have been teased out in argument) that the

only available, say on 30 August 2010 and we wish to procure a postponement to that date", such postponement would have been properly motivated and understood by the Court. But this is not what occurred. What compounds the difficulty is the  
5 astonishing, (and I use that word advisedly) admission by Mr Crowe that the defendants are not to be located in the country and thus not available to attend the court, were this Court indeed to order that the matter proceed.

10 Since defendants could have only known, at the very earliest at the commencement of July 2010 that a postponement was being sought, in that their attorney had failed to procure the necessary expert, it appears to me that it cannot be argued that they were now caught with so short a time span in which  
15 to make arrangements to travel to South Africa. There is something deeply disturbing about defendants taking the attitude that they were going to be granted a postponement anyway and, therefore, do not need to attend court. I say this, because Mr Crowe pressed upon me the point that his clients  
20 were not present and that, therefore, he would be in a disadvantageous position were the trial to commence.

Mr Fitzgerald, who appears together with Ms Buikman on behalf of the plaintiffs in this particular application, submitted  
25 that, apart from all of these difficulties, it was perfectly  
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possible for him to commence the trial by way of a series of witnesses, who could be described as "lay witnesses" and who would provide testimony of a nature which would not necessarily require any recourse to an expert. In other words,  
5 Mr Crowe would not be prejudiced in his cross-examination of these witnesses, absent his expert.

At the commencement I commented that I was placed in a difficulty. The difficulty is that a senior member of the Bar,  
10 namely Mr Crowe, has assured me that he would be placed in significant difficulties were this case to proceed today. In the first place, his clients are not present, in the second place he does not have an expert and indicates that both the presence of the defendants and expert may be necessary. I simply do  
15 not know whether that is the case, because I cannot know more about the case than the papers that had been presented to me. That I may have some difficulty in understanding the submission, having read the expert reports provided to the Court, that is the reports of Mr Hudson-Bennett, together with  
20 two expert reports deposed to by the plaintiff, compound my anxiety.

However, I have to accept that the defendants have a right to a fair trial and with grave reluctance, therefore, I have to grant a  
25 postponement. But that postponement is not going to be for  
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the six months period that Mr Crowe's attorney suggested to the respondents' attorney. Mr Crowe, of course, informed me in open court that this was merely a suggestion. I am not entirely certain as to what the flexibility of that suggestion was

5 in the light of the following: When I put to Mr Crowe that I was prepared to hear this matter in the first week of the fourth term, that is the week beginning 11 October and that I propose that the trial commence on 13 October, it was suggested to me that this may not be convenient and that he would have to take

10 instructions.

Inherent is the problem that the matter cannot be heard in that week or the following week or the week thereafter, it may well be that this case will have to be heard, would be in the first

15 term of the following year, which would be more than six months. That would certainly, in my view, work to the considerable prejudice of the respondents in this application. Insofar as this suggestion is concerned, I will go so far as to suggest that the matter commences on 13 October unless

20 counsel wish to approach me about some date that may be more convenient to all of them, but I would be very reluctant to extend any postponement beyond that date.

Turning to the question of costs. Mr Crowe, suggested in his heads of argument, and there was some further suggestion

25 that this postponement had to be granted and that the plaintiffs



in this case had taken a view to oppose an application. They had known about it, the difficulties were clear and there had been a lack of co-operation in order to facilitate a resolution to the problem. Furthermore, the submission by Mr Crowe is that  
5 there was no basis by which this case could ever have been presented to the Judge President in such a piecemeal fashion and for the Judge President to have consented to having it been heard on 3 August in the piecemeal fashion which Mr Crowe had characterised the suggestion to Mr Fitzgerald.

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Whatever the merits of those arguments, the overriding fact is that the defendants placed this Court in a position that was extremely unlikely that the Court could force the case to go ahead without prejudice. That a skeletal explanation, at the  
15 very best, was provided as to why a definite date could not have been proposed as to when Professor Everingham was available and the trial might have been begun. For this reason, it appears to me that this is an application for a postponement which was caused, in a large measure, by an  
20 inability on the part of the applicants to come up with a date that would have been practical and which would have then placed the defendants in the position that they would have either had to accept it, or arguably run the risk that their conduct would have been classified as unreasonable. For  
25 these reasons, therefore, the postponement is granted, but the


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costs, insofar as this application is concerned, are to be paid for by the defendants and those will include the cost of two counsel.

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DAVIS, J