

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

CASE NUMBER:

18615/2009

5 DATE:

29 NOVEMBER 2010

In the matter between:

CHANGING TIDES 17 (PTY) LIMITED

Applicant

and

10 **BELINDA-ANN BRÜGGE**

1st Respondent

JÜRGEN BRÜGGE

2nd Respondent

J U D G M E N T

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TRAVERSO, D J P:

I have considered this application which was brought in terms of Rule 42 for the amendment of a court order. Rule 42 provides that a court may rescind or vary an order or judgment erroneously sought or erroneously granted in the absence of any party effected thereby, or clarify the order where there is any ambiguity or patent error or omission, or an order that the judgment was granted as a mistake common to both parties.

25 In my view this application is ill conceived . The law is trite.

/bw

/...

If an order is not made in terms whereof an immovable property is specifically declared executable, the creditor is obliged to first execute against the movables of the debtor, whereafter the creditor will execute against the immovable property of the creditor. This order, the summary judgment order, was granted in December last year. A year later we are still busy with an application to vary the order to give effect to a process which could have been long finalised by now, with our without the incurrence of further legal expense.

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There is, in my view, no reason to come to court in those circumstances to apply for a variation of the order when exactly the same result can be achieved by the normal process provided for by the rules of court. The respondent appeared in person today. He is opposing the relief sought. His grounds are, in my view, not sound, but that does not change the fact that in my view the applicant was ill advised in bringing this application. Mr Brügge applied for a postponement. In my view there is no earthly reason why the matter should be postponed, particularly in view of my view that the application cannot succeed.

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In the circumstances, **THE APPLICATION IS DISMISSED.** I am informed that the applicant's legal representatives are not appearing for any fee today. Mr Brügge appeared in person,

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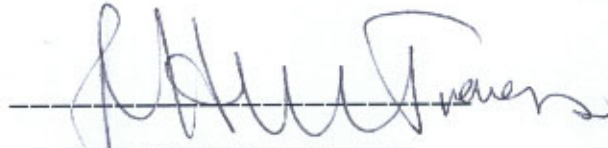
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so, therefore, there will simply be no order as to costs.

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A handwritten signature in dark ink, appearing to read 'D J P Traverso', is written over a horizontal dashed line.

TRAVERSO, D J P

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

CASE NUMBER:

7513/00

DATE:

28 SEPTEMBER 2010

5 In the matter between:

BRAIT INVESTMENTS LTD

PLAINTIFF

and

IKWEZI INDUSTRIAL CORP. (PTY) LTD FIRST DEFENDANT

MOHAMMED SHAFFIE MOWSER SECOND DEFENDANT

10

J U D G M E N T

ZONDI, J:

Arguments on the merits of this matter were presented on 16
September 2010 following a dismissal of the defendants'
15 application for the postponement of its further hearing. The
application for a postponement on the 15th of September 2010
had been brought by the second defendant who at that stage
appeared in person on behalf of himself and the first
defendant.

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The basis for the application was that the defendants needed
time to engage the services of the new legal team as their
erstwhile legal team's mandate had been terminated. The
application for a postponement was refused and the matter
25 proceeded in the absence of the second defendant who had

asked that his further attendance of the court be excused.

Mr Smalberger, who appeared for the plaintiff, handed up comprehensive heads of argument from which he argued the matter. At the conclusion of the closing arguments by the
5 Plaintiff, judgment was reserved. The parties were subsequently notified by the registrar on the 27th of September 2010 that the judgment was to be delivered on the 28th of September 2010 at 10 o'clock.

10 Today this morning just shortly before ten o'clock in the morning, Mr Lamprecht, who now appears for the defendant, filed an application for the postponement of the handing down of the judgment on two grounds, firstly, to afford the defendants an opportunity to present their closing arguments
15 on the merits as they lost this opportunity when their application for the postponement was dismissed on 15 September 2010.

In this regard it was pointed out by him that he had not
20 had an opportunity to study and analyse the pleadings and evidence presented thus far in this matter. He indicated that the record of the proceedings relating to this matter was only brought to him by the second defendant on 22 September 2010.

Secondly, it was pointed out by Mr Lamprecht that should the postponement be granted, it may become necessary for the defendants to apply to this Court for leave to reopen their case, and adduce further evidence.

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Mr Ash opposed the application on behalf of the plaintiff on the basis that it was nothing else but another attempt by the defendant to once more frustrate the finalization of the proceedings. It is significant to note that the order of the 15th of September 2010 refusing postponement is not under attack. There is no appeal against it.

Postponement is rather sought today on different grounds although its aim is to enable the defendants to obtain the opportunity which they were unable to get when they sought postponement on the 15th of September 2010.

By way of background on the 1st of September 2010 the defendants sought postponement on the ground that certain counsel, whom they had briefed to replace counsel whose mandate they had terminated, was not immediately available to assist them, and that in any event even if he was, he would need more time to go through the voluminous record. I find this assertion quite disturbing in view of the fact that counsel whom they said they had previously briefed had appeared on

their behalf in the ill-fated rescission application of the summary judgment and was familiar with the matter.

Nevertheless the defendants were granted time up until the
5 15th of September 2010. Again there was another request for a
postponement on the 15 September 2010. Inability to fund
litigation of this matter was never raised as an issue by the
defendants. Rather postponement was sought on the ground
that a particular counsel whom they had briefed to conduct
10 trial on their behalf, was not immediately available. It is
significant to point out that mere withdrawal by a practitioner
or the mere termination of a mandate does not entitle a party
to a postponement as of right (Take and Save Trading CC v
Standard Bank 2004(4) SA 1 (SCA) at 5B).

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It is surprising to learn today that the defendants have
now briefed a different counsel and not counsel whose
unavailability was in the past used as a reason for a
postponement. In my view this application is not bona fide. It
20 is used simply as a tactical manoeuvre for the purpose of
obtaining an advantage to which the defendants are not
legitimately entitled. In reaching the decision in this matter, I
have taken account of the fact that it is important that the
proceedings should reach finality and that the matter should
25 not be decided on piecemeal basis.

This matter has been postponed on a number of occasions in the past and it is important that it should now reach finality.

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In the circumstances application for a postponement should be refused. In the result the **APPLICATION FOR POSTPONEMENT IS REFUSED WITH COSTS.**

10 I now proceed to read the order which I prepared on the assumption that the matter was before me on default.

Reasons will be furnished in due course, if requested. Having heard the evidence and having considered the
15 arguments advanced by the plaintiff, judgment is granted in favour of the plaintiff against the first and second defendants jointly and severally, the one paying the other to be absolved in the following terms:

1. Payment in the sum of R1.7 million;
- 20 2. Interest on the sum of R11 400 000 at the rate of 15.5% from the 18th of December 2000 to date of registration of transfer of erf 2762, Cape Town, ("the Property") into the name of Spearhead Property Holdings Limited ("SPH");
- 25 3. Interest on the sum of R1.7 million at the rate of 15.5%

from the date of registration of transfer of the property into the name of Spearhead Holdings (Pty) Ltd to date of payment in full;

4. Payment in the sum of R551 947,12;

5 5. Interest on the sum of R551 947,12 at the rate of 15.5% *a tempore morae*;

6. Costs of suit on the party and party scale;

7. The qualifying expenses of the expert witness, Mr Gibbons;

10 8. In regard to the defendants' counterclaims:

8.1 The counterclaim introduced during February 2009 is dismissed with costs, on the party and party scale;

15 8.2 The costs of the defendants' initial counterclaim, which was withdrawn by the defendant, are awarded to the plaintiff on a party and party scale. Such costs to include the qualifying expenses of the expert witness, Mr Bertrand.

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ZONDI, J