

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <u>YES/NO.</u>	
(2) OF INTEREST TO OTHER JUDGES: <u>YES/NO.</u>	
(3) REVISED.	
10/4/2011 DATE	 SIGNATURE

Case No.: 35725/2008

1/4/2011

In the matter between:

BUSHVELD CRUSHERS (PTY) LTD

Applicant

and

WK PIPELINES (PTY) LTD (known
as **WK CONSTRUCTION (PTY) LTD**)

Respondent

JUDGMENT

MNGQIBISA-THUSI J

[1] This is an application for an order rescinding the order granted by default on 26 February 2010. In terms of the order the applicant was ordered to pay the respondent:

- 1.1 R1 507 29954 in respect of the claim plus interest;
- 1.2 R2 039 602.50 in respect of claim 2 and interest thereon;
- 1.3 R1 540 000.00 in respect of claim 3 and interest thereon.

[2] On the day of the hearing of this application, counsel for the applicant addressed me by indicating that the applicant was not ready to proceed and asked for a postponement. He indicated that the respondent's attorneys were aware of the fact that the applicant would be seeking a postponement. I, however, declined to entertain the application without a substantive application for a postponement. It was then agreed between the parties that the applicant would provide counsel for the respondent with its affidavit for postponement and that the respondent would be given an opportunity of responding to the applicant's affidavit. The matter stood down for a day or two for the parties to exchange pleadings.

[3] The basis on which the applicant is seeking a postponement is set out in an affidavit deposed to by the applicant's attorney, Mr. Sebola. In it is alleged that after applicant's counsel received the respondent's answering affidavit on 20 April 2010 in the application for rescission of judgment, applicant's counsel requested that the court record in the main action be obtained. On 13 May 2010 the respondent's attorneys served him with a notice of set-down indicating the date of hearing of the rescission application as 16 August 2010. Mr Sebola alleges that he had sought agreement from the respondent's attorneys that the matter should be removed from the roll as applicant's counsel was still awaiting a copy of the

court record in the main action. Further it is alleged that the applicant's counsel was not available on 16 August 2010. On 28 May 2010 respondent's attorneys indicated in a letter to Mr Sebola that they were not amenable to a postponement. Subsequently and on 5 August 2010 Mr Sebola wrote a letter to the respondent's attorneys indicating that he had received a copy of the court record and that the former directors of the applicant had indicated their willingness to intervene in the application for rescission and again requested that the matter be removed from the roll. The respondent's attorneys did not respond to the latest request.

[4] Furthermore Mr Sebola alleges that the postponement is necessary in that the applicant wishes to file a supplementary affidavit clarifying issues raised in the respondent's answering affidavit served on the applicant on 20 April 2010. Further that the applicant does have a defence to the respondent's claim and that the current directors, who took over the company in November 2009, will not be able to testify but the former will.

[5] In dealing with the applicant's default Mr Sebola alleges that even though he was the correspondent attorney in the main action, he had withdrawn after the applicant's attorneys of record had withdrawn a few days before the hearing.

[6] The respondent made it clear right from the start that it was going to oppose the application for postponement and would ask the court to proceed with the rescission application. The reasons for opposing the application for a postponement are set out in the respondent's opposing affidavit to the application for a postponement. It is the respondent's contention that despite the fact that the applicant was aware from May 2010 that the respondent would resist any application for a postponement, the applicant had not applied for an extension of the period for the filing of a replying affidavit nor had the applicant applied for condonation. Further, that even though applicant's counsel on receipt of the respondent's answering affidavit on 20 April 2010, the applicant requested the court record only on 26 May 2010 and paid the deposit for the record on 5 July 2010. Further that although the postponement was purportedly needed in order to obtain the court record in the main action, which record was received by the applicant's counsel on 30 July 2010, to date no replying affidavit had been filed. Further that it appears that the applicant do not seem to intend using the contents of the record as they are now claiming that the former directors of the applicant are now prepared to testify in the main action should the order be rescinded.

[7] As regards the rescission application it was submitted on behalf of the respondent that the application for rescission should

not be dismissed in that the applicant have not explained why they were in wilful default since the order was granted with applicant counsel and attorney who had withdrawn at the hearing being present in court. Further that the applicant have not provided a copy of the court record to substantiate their version.

[8] A postponement is not a given. If a party seeks the court's indulgence it has to motivate why the court should grant it a postponement. The applicant had come to court fully knowing that it was going to seek a postponement without preparing a substantive application for a postponement. On the basis of the reasons given for seeking a postponement I am not convinced that a postponement should be granted.

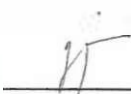
[9] As regards the application for rescission, even if a party has not proven that it was not in wilful default, that does not preclude the court from granting a rescinding an order granted in the absence of the party seeking rescission provided it has provided sufficient cause showing that it has a defence to the respondent's claim in the main application. Since the applicant has not provided the court, from the papers filed in this application it is not clear whether any evidence was led in the main action particularly as one of the respondent's claim in the main action was a claim for damages (claim 3). The applicant is given the benefit of doubt that

the default judgement was granted only on the basis that there was no representation for the applicant and for this reason only it is in the interest of justice and in fairness to both parties that the default judgment be rescinded and the issues be ventilated in particular the claim for damages. It is only fair that the respondent prove its quantum of damages in a trial.

[10] However in order to show the court's displeasure in the way the applicant has conducted itself in these proceedings a punitive cost order is appropriate with regard to the application for a postponement.

[11] In the premises the following order is made:

1. The application for a postponement is dismissed with costs as between attorney and client.
2. The order granted on 26 February 2010 is hereby rescinded.
3. Costs to be cost in the cause.


NP MNGQIBISA-THUSI
Judge of the North Gauteng High Court