

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION - PORT ELIZABETH)**

**CASE NO: 2384/2011
DATE HEARD: 14/08/2012
DATE DELIVERED: 25/09/2012**

In the matter between

RAYMOND GILBERT GREEN

PLAINTIFF

and

IAN DORFLING

1ST DEFENDANT

JULIE PAMELA DORFLING

2ND DEFENDANT

JUDGMENT

ROBERSON J:-

[1] On 15 August 2012 I granted the defendants' application for a postponement of the trial. I indicated that my reasons, as well as my judgment on the wasted costs occasioned by the postponement, would follow.

[2] It is necessary to refer in some detail to the pleadings and certain proposed amendments to the plaintiff's particulars of claim, as well as to the conduct of the matter by the plaintiff, in order to appreciate why the defendants applied for a

postponement.

[3] The plaintiff is the father-in-law of the first defendant and the father of the second defendant. In this action he has six claims against the defendants. Claim 1 is for the rectification of a written agreement of sale of immovable property. The plaintiff alleged that on 15 April 2008 he and the defendants concluded an agreement in terms of which the defendants purchased from the plaintiff the immovable property described as erf 1911, Lorraine, Port Elizabeth (the property). The market value of the property was R1 300 000.00, but the purchase price was R800 000.00, because the parties had agreed that the plaintiff would be entitled to occupy the flatlet on the property for the rest of his life. The parties failed to include this life right in the written agreement and the plaintiff accordingly claimed rectification of the agreement, to include this term.

[4] In claim 2 the plaintiff alleged that the defendants had paid the purchase price but transfer has not yet taken place. He alleged that the defendants refused to honour the agreement in that he was not allowed to occupy the flatlet. Tendering return of the purchase price, he claimed cancellation of the agreement and restoration of possession of the property. In the alternative he claimed enforcement of the term of the agreement entitling him to occupation of the flatlet.

[5] Claims 3, 4, and 5 were for the repayment of loans allegedly made by the

plaintiff to the defendant, and claim 6 was payment of monies he allegedly expended on their behalf.

[6] The defendants denied that the price of the property would be reduced on the basis alleged. They admitted concluding the agreement on 15 April 2008 but denied that it was the parties' intention that the plaintiff retained a right to occupy the flatlet for the rest of his life. They further alleged that a second written agreement of sale of the same property for the same price was concluded between the parties on 21 September 2010, which second agreement novated the first written agreement. They accordingly denied that they were in breach of the first agreement and that the plaintiff was entitled to cancellation and restoration of the property. They pleaded various defences to the other claims.

[7] The defendants have two claims in re-convention but only the first claim is relevant for present purposes. Relying on the second written agreement, they alleged that they have performed by paying the purchase price of R800 000.00 and accordingly claim that the plaintiff, failing whom the Sheriff, signs the necessary documentation to transfer the property into their names.

[8] In his plea to the first claim in re-convention, the plaintiff admitted the second agreement but again pleaded the term that he would have a life right to occupy the flatlet.

[9] The Registrar's notice of set down of trial was dated 12 December 2011 and

the trial date allocated was 14 August 2011.

[10] On 27 June 2012 the plaintiff delivered a notice of intention to amend his particulars of claim. The proposed amendment relating to claim 1 was to substitute the date of the agreement with the date 21 September 2010, in place of 15 April 2008, and to add a paragraph pleading that the failure to include the term concerning the life right was a result of a bona fide mutual error. The proposed amendment to claim 2 was to add to his tender to repay the purchase price, that the sum of R600 000.00 allegedly loaned to the defendants (this was the subject matter of claim 3), be set off. Other proposed amendments related to the terms of repayment of the various loans. The defendants did not object to this notice of intention to amend but on 23 July 2012 the notice was withdrawn.

[11] On the same day a further notice of intention to amend was delivered. Again the date of the conclusion of the agreement was to be substituted with the date of 21 September 2010. Further paragraphs sought to be added, were that both written agreements were to include the term concerning the life right, and that the failure to include this term resulted from a bona fide mutual error, or that it was an intentional act on the part of the defendants. The set off of R600 000 and the terms of repayment of the loans were repeated.

[12] The defendants objected to this second notice of intention to amend, on the grounds that the plaintiff was now relying on, and seeking rectification of, a

different agreement, and that they were unable to prepare timeously for trial owing to the late delivery of the notice of intention to amend. In the meanwhile the plaintiff prematurely filed his amended pleadings.

[13] On 7 August 2012 the plaintiff's attorney wrote to the defendants' attorney stating that the first paragraph of the notice of intention to amend would be abandoned (the substitution of the date of the agreement), and that the rest of the amendments would be sought at the close of the plaintiff's case at the trial.

[14] In a Rule 37 minute dated 13 August 2012 it was recorded that the defendants' stance was that unless the plaintiff gave an undertaking not to amend his particulars of claim or cause of action as they presently stood, the defendants would apply for a postponement of the trial.

[15] On 13 August 2012 the plaintiff's attorney wrote to the defendants' attorney stating *inter alia* that the proposed amendments would not prejudice the defendants in their preparation for trial, and suggesting that they start preparing a substantive application for a postponement.

[16] A substantive application for a postponement was brought by the defendants. It could not be heard on 14 August 2012 because there was no court available and was only heard on 15 August 2012. By that time answering

and replying affidavits had been delivered.

[17] It was submitted at the hearing of the application that given the date of the notice of intention to amend, the application of the time periods contained in Rule 28 would take the amendment procedure beyond the trial date. A postponement was necessary in order that the pleadings could be properly ventilated. The proposed amendments introduced a new cause of action and if an amendment was sought at the close of the plaintiff's case, it would inevitably lead to a postponement, resulting in a piecemeal trial.

[18] The application was opposed by the plaintiff. It was submitted that the proposed amendments caused no prejudice to the defendants because the 2010 agreement was dealt with in the counterclaim and the defendants knew that the plaintiff would make the same allegation in relation to the 2010 agreement. There was no new cause of action. It was mentioned during argument that it was the plaintiff's case that the 2008 agreement was the true agreement. In the event of a postponement being refused, the plaintiff's counsel indicated that the amendments would be moved for at the outset of the trial.

[19] In my view at this stage the defendants were justified in seeking a postponement. The proposed amendment did create a new cause of action which would have required the defendants to amend their plea. Rectification of a different agreement was now being sought, such agreement being concluded in

different circumstances. If the plaintiff was going to argue that the 2008 agreement was the true agreement, this added a further dimension to the amendment and the plaintiff's cause of action based on the 2010 agreement. Moreover, as pointed out by counsel for the defendants, the counterclaim was separate and the defendants needed to know what case they had to meet on the claim. The time periods referred to in Rule 28 had not expired and it was not for the plaintiff to accelerate them, when he in the first place had delivered a notice of intention to amend so near to the trial date. The bottom line was that the trial could not proceed in an atmosphere of such uncertainty.

[20] That was not the end of the matter however. After the defendants' counsel had replied, the plaintiff's counsel informed the court that the plaintiff would conduct his case on the basis of the 2008 agreement and his plea to the counterclaim. He gave an undertaking that the trial would proceed on the basis that rectification of the 2008 agreement would be sought and that claim 2 would relate to a breach of the 2008 agreement. The plea to the counterclaim would remain and in the event of the 2010 agreement being capable of rectification, the plaintiff would be entitled to cancellation of the 2010 agreement, recover possession of the property against a refund of the purchase price.

[21] Thereupon the defendants applied again for a postponement. It was submitted that the pleadings were "a total mess". The plaintiff would only be allowed to present evidence in support of his claim by relying on the 2008

agreement and would have to amend his pleadings in relation to the counterclaim, because in his plea he incorporates the 2010 agreement. The defendants came to court to move for a postponement because the plaintiff had indicated he would seek an amendment at the close of his case. As I understood counsel's argument, preparation for trial was therefore impeded, because the defendants were entitled to know what the plaintiff intended to do.

[22] The plaintiff again opposed a postponement because the defendant's earlier grounds for a postponement had fallen away. Plaintiff's counsel suggested in argument that in the event of a postponement, amendments might still be sought by the plaintiff and the undertaking to seek relief on the basis of the 2008 agreement would fall away.

[23] In my view, again, the trial could not proceed in this atmosphere of uncertainty. The sudden abandonment of the amendments which up to this point were to be strenuously sought, caught the defendants (and the Court) by surprise.

[24] As counsel for the defendants submitted, a postponement would be fair to both parties. Certainty had to be achieved as to precisely what the plaintiff's cause of action was and it was clear from the manner in which his case was conducted in the application for a postponement, that there was uncertainty.

[25] I therefore granted a postponement, and postponed the matter *sine die*.

Costs

[26] I have already indicated that up to the stage when the plaintiff abandoned his proposed amendments regarding the 2010 agreement, a postponement was justified. The postponement was brought about by the late notice of intention to amend and the plaintiff's firmly stated intention to seek amendments at the close of his case. The trial could not possibly have run on this basis, and the defendants had been put in a difficult position and were obliged to move for a postponement. The plaintiff persisted in his opposition to the postponement up until shortly before the lunch adjournment. The defendants are therefore entitled to the wasted costs occasioned by the postponement up until the time the undertaking to rely on the 2008 agreement was given. They are also entitled to the costs of the substantive application for a postponement.

[27] In view of the uncertainty of the future conduct of the plaintiff's case I am of the view that the remaining costs of 15 August 2010 should be reserved for the decision of the trial court. There was argument about the costs of 14 August 2012 when no court was available. I leave this aspect to the discretion of the Taxing Master/Mistress.

[28] The following order is made:

[28.1] The plaintiff is ordered to pay the wasted costs occasioned by the postponement of the trial up to the stage of the undertaking given by the plaintiff regarding reliance on the 2008 agreement.

[28.2] The plaintiff is ordered to pay the costs of the substantive application for a postponement.

[28.3] The remaining wasted costs occasioned by the postponement are reserved for the decision of the trial court.

J M ROBERSON
JUDGE OF THE HIGH COURT

Appearances:-

**For the Plaintiff: Adv D Smith, instructed by J R Bester & Associates,
Port Elizabeth**

**For the Defendants: Adv B Pretorius, instructed by Howard Collen
Attorney, Port Elizabeth**