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**HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

Case No. 54791/2017

**(1) REPORTABLE: NO**

**(2) OF INTEREST TO OTHER JUDGES: NO**

**(3) REVISED.**

**DATE: 2023-05-15**

**SIGNATURE:**

In the matter between:

**SMALL ENTERPRISE FINANCE AGENCY SOC LIMITED**

(Registration no. 1[...])

Plaintiff

and

**KGALEMO CONSTRUCTION CC**

(Registration no. 2[...])

First Defendant

**WELHEMINA SEMEEMEE APHANE**

(Id no. 6[...])

Second Defendant

**LEHUMO MAKGALEMELE APHANE**

(Id no. 8[...])

Third Defendant

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**JUDGMENT**

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The judgment and order are *published and distributed electronically*.

**VAN NIEKERK PA, AJ**

- [1] Plaintiff is a State-owned company with limited liability which provides development loans to approved lenders. First Defendant is a close corporation and Second Defendant and Third Defendants are members of the First Defendant.
- [2] On 8 August 2017 Plaintiff instituted action against the First Defendant, Second Defendant and Third Defendant jointly and severally, the one paying the other to be absolved, for payment of the amount of R2 485 647.94 with interest at the rate of 13.30% per annum from 1 March 2017 to date of payment, such interest calculated and capitalised monthly in arrears. The cause of action upon which Plaintiff relies for the institution of such claim is a written agreement entered into between Plaintiff and First Defendant, duly represented by the Second Defendant, in terms whereof it was agreed that a loan be made to the First Defendant in respect of which the Second Defendant and Third Defendant bound themselves as sureties. The three defendants opposed such action instituted, and after a protracted period the matter was eventually enrolled for hearing on the civil trial roll of this Court on 11 May 2023.
- [3] On 5 May 2023 the Defendants served a substantive application for postponement of the matter to be heard on the date of the trial, which resulted in the Plaintiff filing an Opposing Affidavit to such application for postponement on the 10<sup>th</sup> of May 2023, one day before the trial date. Defendants did not file any replying affidavit. Defendants tendered costs occasioned by the postponement.
- [4] The purpose of the postponement sought by the Defendants was namely to enable the Defendants to file an amended Plea to the Plaintiff's Particulars of Claim wherein various defences are raised against the Plaintiff's cause of action which were not previously raised in the pleadings filed on behalf of the Defendants.

- [5] In essence the Defendants attempts to achieve a postponement to enable the Defendants to file an amended Plea which would have the following characteristics:
- [5.1] Matters which were previously common cause and admitted in the Plaintiff's Declaration will now be denied;
- [5.2] Rectification is sought of the written Loan Agreement upon which the Plaintiff based its cause of action in that the Defendants now intend to plead that various of the material terms of the agreement, according to the Defendants, were agreed upon by the Defendants pursuant to a negligent misrepresentation by the Plaintiff alternatively on the basis that it does not reflect the true intention of the parties.
- [6] For purposes of the judgment, I deem it not necessary to deal comprehensively with the nature of the amendment sought, and I also do not deem it necessary to decide whether a *bona fide* defence is disclosed in the intended amendment for the reasons as will appear *infra*.
- [7] The Court's approach in an application for postponement was the subject of an oft quoted judgment of Mahomed AJA (as he then was)<sup>1</sup> and on p. 314 (f) to p.315 (j) in such judgment the legal principles applicable to an application for postponement are set out.
- [8] Considering the principles as set out in the judgment referred to *supra*, I am of the view that the following background facts as set out hereunder relating to the history of the litigation between the parties are relevant for purposes of exercising a discretion on the issue whether the matter should be postponed as prayed for by the Defendants in the application.

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<sup>1</sup> *Myburgh Transport v Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmS)

#### HISTORY OF LITIGATION:

- [9] After the Plaintiff instituted action against the Defendants on 8 August 2017, the Defendants filed a Notice of Intention to Defend on 18 August 2017 which resulted in the Plaintiff applying for Summary Judgment on 17 September 2017. The Defendants filed an Opposing Affidavit in the Summary Judgment application on 25 October 2017 whereafter the Summary Judgment application was argued in this Court on 9 January 2018 and the Defendants were granted leave to defend the action.
- [10] Plaintiff thereafter filed its Declaration on 13 September 2018 and the Defendants filed a Plea on 31 October 2018. The Plea filed by the Defendants consisted of two paragraphs, the first whereof serves to admit the particulars regarding the parties together with a blanket denial and the second paragraph of the Defendants' Plea pleads that the National Credit Act does not apply, an admission that the Plaintiff is a registered credit provider, and the Defendants thereafter *"jointly deny the contents of this paragraph"*. From a perusal of this *"Plea"* it appears that the Defendants erroneously pleaded to the Plaintiff's Summons and not the Declaration that was filed after the application for Summary Judgment resulted in the Defendants being granted leave to defend the action.
- [11] On 8 December 2018 a pre-trial conference was convened. The Plaintiff obtained a signed copy of the pre-trial minutes from the Defendants' attorneys on 10 December 2018, wherein it was agreed that the matter is ready to proceed to trial and application for a trial date was made during December 2018 whereafter the Registrar of this Court allocated a trial date for 19 May 2020. Due notice of this trial date was given to the Defendants in December 2018.
- [12] Plaintiff thereafter applied for an order to compel the Defendants to discover in terms of Rule 35(1) during March 2019 and was successful in that the

Defendants consented to an order and tendered the wasted costs incurred by the Plaintiff resulting in the interlocutory application being removed from the roll. The matter did not proceed on trial on 19 May 2020 due to the Covid19 pandemic and the parties agreed that a new trial date be obtained.

- [13] A further pre-trial conference was scheduled on 11 November 2020 during which the parties again agreed that the matter is ready to proceed on trial whereafter the Plaintiff re-applied for a trial date during February 2021 and which resulted in the Registrar of this Court allocating the 11<sup>th</sup> of November 2021 as a date of the trial. Shortly before the trial which would have taken place on 11 November 2021 the Defendants indicated in correspondence that they intended to amend their Plea and this resulted in the matter being removed from the roll by agreement between the parties at the costs of the Defendants. The Defendants thereafter delivered a Notice of Intention to amend its Plea and counterclaim dated 23 November 2021 which resulted in the Plaintiff filing a Notice of Objection to the Defendants' Notice of Amendment and which objection was filed on 7 December 2021.
- [14] After the 7<sup>th</sup> of December 2021 Defendants failed to act in accordance with their Notice of Intention to Amend and took no further steps which would have enabled the Defendants to be prepared to continue with the trial.
- [15] The Plaintiff's Answering Affidavit in the application for postponement sets out detailed averments illustrating that various correspondence was addressed to the Defendants' attorneys of record regarding the issue of the amendment which had not yet been finalised, and it is clear that the Plaintiff's attorney of record went to substantial lengths to encourage the Defendants' attorney of record to ensure that the Defendants would be ready to proceed on trial. Defendants failed to take any further procedural steps thereafter.

[16] On 24 January 2022 Plaintiff served a fresh application for trial date on the Defendants, and on 10 March 2022 the Plaintiff served a Notice of Set-down for the trial to be held on 11 May 2023 on the Defendants. During April 2022 Plaintiff's attorneys of record again transmitted correspondence to the Defendants' attorneys of record reminding them about the trial date for 11 May 2023 and placing on record that the issue regarding the Defendants' intended amendment of their Plea was not finalised.

[17] During February 2023 Plaintiff's attorneys of record again informed the Defendants' attorneys of record by way of correspondence of the trial that was set down for 11 May 2023 and required that a further pre-trial conference be scheduled for 16 February 2023. Defendants failed to respond to this letter resulting in the Plaintiff's attorneys of record addressing correspondence to the Deputy Judge President of this Court, complaining about the Defendants' lack of co-operation in attending a pre-trial conference and which correspondence was simultaneously also sent to the Defendants' attorneys of record. This correspondence also did not have any effect on the Defendants.

#### REFUSAL OF APPLICATION FOR POSTPONEMENT:

[18] Considering the history of the litigation between the parties as it is recorded in the Plaintiff's Answering Affidavit to the application for postponement, I can find no reason why I should exercise a discretion in favour of the Defendants and accede to the request for postponement. The reasons follow hereunder.

[19] The true reason for the Defendants' failure to pursue the intended amendment is not explained at all, except for a cursory averment that the Defendants were not financially able to pursue the amendment but now, shortly before the commencement of this trial, they apparently are able to do so. No particular facts are placed before Court to substantiate this averment and considering the fact that the Defendants are seeking an indulgence under the circumstances as set out *supra*, I am of the view that the Defendants' failure to provide adequate

information in the application for postponement in order to enable the Court to duly consider the Defendants alleged lack of means is a material omission.

[20] The application for postponement was not made timeously. The Defendants have been aware of the trial date since 10 March 2022 as set out in paragraph [16] *supra* and notwithstanding requests from the Plaintiff to attend a pre-trial conference, simply did nothing. At the proverbial eve of the trial, the application for postponement is launched.

[21] Defendants' Counsel argued that Plaintiff's prejudice can be compensated by an appropriate order for costs. I regard this as a simplistic approach for the reason that the Plaintiff conducts business in the sphere of the provision of loans, is a State-owned company, and it is in the interest of the Plaintiff and the public at large that loan agreements entered into between Plaintiff and other parties be honoured. Plaintiff is prejudiced in its commercial operations by the postponement. Any prejudice which the Defendants may suffer is directly attributable to their failure to take any reasonable timeous steps to advance their case and Plaintiff has not caused any prejudice to Defendants.

[22] Counsel for Defendants argued that it is in the interest of justice that the Defendants be awarded an opportunity to place their defence before this Court. The same consideration namely the interest of justice also dictates that a litigant be afforded the opportunity to finalise litigation instituted in a Court of law, and the interest of justice further requires litigation to be disposed of speedily. This matter has been enrolled in this Court on two previous occasions resulting in other matters being crowded out, only then to be removed from the roll and re-enrolled. I am therefore of the view that the Defendants cannot call on the interest of justice to advance the merits of their application for postponement where they have acted in a dilatory manner *contra* the interests of justice. There is in my view a limit to where a Court should allow a litigant to delay justice and in this matter I am of the view that such limit has been exceeded. The delay of this

matter does not only affect the parties to this matter but also the administration of this court and other parties who have an expectation to present their matters to court and who are prevented to do so by this matter being enrolled repeatedly.

[23] Considering the dilatory approach adopted by the Defendants in this matter, the lack of properly motivated reasons advanced in the application for postponement why the Defendants did not timeously and diligently pursue the intended amendment of their Plea, the considerations of prejudice and the interest of justice as set out *supra*, I dismissed the application for postponement with costs and the legal representatives acting on behalf of the Defendants thereafter withdrew from the matter.

CONCLUSION:

[24] The Defendants' legal representatives having withdrawn from the matter, Plaintiff's counsel moved for judgment in terms of a draft order prepared by Counsel acting on behalf of the Plaintiff. The Plaintiff's claim is a liquidated claim based on an written agreement supported by a certificate of the outstanding balance as provided for in the agreement and I am satisfied that the Plaintiff is entitled to the relief as claimed and which is embodied in the draft order which I have marked "X, dated and signed, and which order is made an order of Court.

**P A VAN NIEKERK AJ.**

Acting Judge of the High Court  
Gauteng Division, Pretoria

CASE NUMBER: 54791/2017

HEARD ON: 11 May 2023

FOR THE PLAINTIFF: ADV. J. VAN DER MERWE

INSTRUCTED BY: Tim du Toit & Co Inc.

FOR THE DEFENDANT:

ADV. J. PRINSLOO

INSTRUCTED BY:

Waldick Jansen van Rensburg Inc.

DATE OF JUDGMENT:

15 May 2023