

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 2750/2016
Requested on: 01/06/2017
Provided on: 06/06/2017

In the matter between:

MULTIPRO INVESTMENTS (PTY) LTD	1ST APPLICANT
GABRIEL ACHEBE IWEKA	2ND APPLICANT

And

WINDSORTON & MONTE LEO PARTNERSHIP	1ST RESPONDENT
RAUTIES DIAMOND	2ND RESPONDENT
EB DIAMONDS CC	3RD RESPONDENT
SPARAX TRADING 144 (PTY) LTD	4TH RESPONDENTS

JUDGMENT

MAMOSEBO J

[1] On 26 May 2017 this matter was before me in the motion court. Adv Van Tonder, appearing for the 3rd and 4th respondents applied for a

postponement which was opposed by Adv Jankowitz appearing for the applicants. These were his submissions from the Bar:

- 1.1 He only received instructions by e-mail to request a postponement and to tender costs a day before the motion court, 25 May 2017 and was not made aware of the history of the case or the merits thereof;
- 1.2 The respondents needed time to file opposing papers.
- 1.3 He had already approached the office of the Registrar for a date of 08 September 2017 to the opposed roll.
- 1.4 He further submitted that any possible prejudice by the applicants can be alleviated by a tender of wasted costs.

I refused to grant the postponement which resulted in Mr Van Tonder withdrawing as counsel for the said respondents.

- [2] After the respondents' counsel's withdrawal, Mr Jankowitz asked for the prayers as appearing in the notice of motion winding up the first respondent, appointing Mr Bennie Kevy of Commonwealth Trust (Pty) Ltd as liquidator with specified powers. Costs were ordered to be costs in liquidation. On 01 June 2017 the respondents sought reasons for my decision to refuse the postponement.
- [3] The respondents have simultaneously filed an application for leave to appeal against the whole of the judgment and the order as to costs that I granted on 26 May 2017 to the Full Bench of the Northern Cape Division, alternatively, to the Supreme Court of Appeal.
- [4] Without knowing what my reasons are for the decision to refuse the postponement, the following are grounds upon which the respondent **will rely** for purposes of the application for leave to appeal. That I erred:

- 4.1 In refusing to grant a postponement for purposes of filing opposing affidavits;
- 4.2 I infringed on the rights of the respondents with reference to section 34 of the Constitution of the Republic of South Africa, 108 of 1996.

[5] A historical background is necessary. On 30 January 2017 the 3rd and 4th respondents filed a notice to oppose the application. In the notice of motion dated 06 December 2016 the following was specified:

“Take further notice that if you intend opposing this application you are required:

(a) To notify the applicant’s attorneys in writing within 5 (Five) days after receipt hereof; and

(b) Within 15 (fifteen) days after you have so given notice of your intention to oppose this application, to file your answering affidavits, if any;

(c) In your notice of intention to oppose, provide an address contemplated in rule 6(5)(b) where you will accept notice and service of all documents in these proceedings.

Take further notice that if no such notice of intention to oppose be given, the application will be made on 24 February 2017 at 09:30 or soon thereafter as the matter may be heard.”

[6] On 24 February 2017 the matter came before Pakati J in the unopposed motion and was postponed to 26 May 2017 to the opposed roll and costs were costs in the application.

[7] The respondents had fifteen (15) court days within to file their answering affidavits calculated from 30 January 2017. They had until 20 February

2017 to do so. Nothing was forthcoming. Hence the enrolment for 24 February 2017 and later 26 May 2017. On 26 May 2017 the matter came before me in the unopposed motion. Mr van Tonder, for the applicant, requested the court to postpone the application, but could give no cogent reason as to why the respondents had not filed the answering affidavits or brought a substantial application for postponement. In my view a postponement could not be granted as a matter of course. The respondents were in wilful disregard of the rules of the court.

[8] In ***Myburgh Transport v Botha t/a SA Truck Bodies*** 1991 (3) SA 310 (Nm) Mahomed AJA outlined the relevant legal principles of application in considering a postponement as follows:

- “ 1. *The trial Judge has a discretion as to whether an application for a postponement should be granted or refused (R v Zackey 1945 AD 505).*
2. *That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (R v Zackey (supra); Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398 - 9; Joshua v Joshua 1961 (1) SA 455 (GW) at 457D.)*
3. *An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if the members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.*

4. *An appeal Court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles. (Prinsloo v Saaiman 1984 (2) SA 56 (O); cf Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8E - G; Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) B at 152.)*
5. *A Court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case. Madnitsky v Rosenberg (supra at C 398 - 9).*
6. *An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. Greyvenstein v Neethling 1952 (1) SA 463 (C. Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made. Greyvenstein v Neethling (supra at 467F).*

7. *An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.*
8. *Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms. (Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed at 453.)*
9. *The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.*
10. *Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be. Van Dyk v*

Conradie and Another 1963 (2) SA 413 (C) at 418; Tarry & Co Ltd v J Matatiele Municipality 1965 (3) SA 131 (E) at 137.

- [9] The respondents have raised an infringement of their rights in terms of s 34 of the Constitution. The section stipulates:
- “Access to courts. – Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”*
- [10] The respondents have not been deprived of their constitutional right of access to court. The manner in which the respondents have dealt with this litigation amounts to an abuse of court process. In my view the respondents should have filed a substantive application timeously as soon as they became aware of circumstances that prevented them from complying with the Rules of the Court. As stated hereinbefore, they already served and filed their notice of intention to oppose by 30 January 2017 and until 26 May 2017 no opposing papers were in the court file; this clearly shows some tactical manoeuvre by the respondents for the purpose of obtaining an advantage to which they were not legitimately entitled. This is a nonchalant approach which seems to be overlooking interests of the other party. The respondents’ application has fallen woefully short of what is required of an application for a postponement. It is for these reasons that I refused to grant the application for the postponement and made the orders as set out in paragraph 2 of this judgment.

MAMOSEBO J

NORTHERN CAPE HIGH COURT

For the applicants:

Senekal Simmonds

c/o Duncan & Rothman

For the respondent:

Etienne Naude Attorneys

c/o Towell Groenewaldt Attorneys