

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Appeal No: A38/2014

In the matter between:-

ERNEST JABULANI MOLOI

Appellant

and

MEDI-CLINIC (PTY) LIMITED

Respondent

CORAM:

KRUGER, J *et* POHL, AJ

JUDGMENT BY:

POHL, AJ

HEARD ON:

1 SEPTEMBER 2014

DELIVERED ON:

11 SEPTEMBER 2014

JUDGMENT

INTRODUCTION:

[1] The appellant appeals against certain orders of the Magistrate's Court, Welkom, more specifically:

- (a) The order dated 14 November 2013 dismissing the appellant's application to postpone the hearing of the application for eviction;
- (b) The order dated 28 November 2013 granting the respondent's application for the eviction of the appellant; and

- (c) The orders that the appellant pays the respondent's costs on the punitive scale as between attorney and client in respect of the application for the postponement of the matter and the eviction.

FACTUAL BACKGROUND:

- [2] The appellant is a specialist gynaecologist, who has been practising as such in Welkom, Free State Province. The respondent is the Medi-Clinic (Pty) Limited, a private company with limited liability, which conducts business as a registered private health establishment (hospital), *inter alia* in Welkom.
- [3] It is common cause that the appellant leased consulting rooms from the respondent at its Welkom Hospital since the year 2000. During this time, the appellant also utilized the respondent's hospital for the admission of his patients, where required. On or about 1 March 2010, the appellant entered into a further three year lease agreement with the respondent in respect of the property that he used as consulting rooms, which lease agreement terminated on 28 February 2013. Prior to the termination of the lease agreement the appellant requested a two month extension of this lease agreement. The respondent agreed to this and then signed a further lease agreement on 10 February 2013. This lease agreement terminated on 30 April 2013. Copies of these lease agreements were annexed to the eviction application which forms the basis of this appeal.

- [4] The respondent decided not to extend the appellant's lease agreements any further and required the appellant to vacate the premises by 30 April 2013. The appellant's attorney confirmed that the appellant would vacate the property by 30 April 2013 and wrote a letter to that effect to the respondent. The respondent also informed the appellant that his privilege to admit patients to the Medi-Clinic, Welkom terminates together with his lease agreement on 30 April 2013.
- [5] Despite the lease terminating on 30 April 2013 through effluxion of time, and despite the fact that the appellant's attorney gave the assurance that the appellant would vacate the premises by 30 April 2013, the appellant refused to vacate the premises. The appellant's refusal to vacate the premises, caused the respondent to issue the eviction application against the appellant on 10 May 2013. The eviction application was set down for hearing for 7 October 2013, but was postponed to 14 November 2013, by agreement between the parties.
- [6] In the meantime the appellant caused an application to be issued in the High Court of South Africa, Free State Division, Bloemfontein, for orders interdicting the respondent from interfering or preventing the appellant from admitting patients to its hospital and reviewing its decision to evict the appellant from its premises. This application was struck from roll after the duty judge ruled that it was not urgent. The High Court application does not form part of the record of appeal before this court.

- [7] During the afternoon of 13 November 2013 and after the legal representatives for the respondent had already flown from Cape Town to Bloemfontein and driven to Welkom, the attorney for the appellant advised them, for the first time, that he would be asking for a postponement. On the morning of 14 November 2013, the appellant's attorney handed the respondent's legal representative a copy of the application for postponement. The appellant had briefed counsel from the Johannesburg Bar, Adv Greyling, to argue the postponement. Adv Greyling informed the Court that she had no instructions to appear for the appellant in the eviction application. Adv Greyling moved the application for the postponement of the eviction application. When the Court refused the postponement, she asked to be released, which she duly was. The appellant was then left without counsel.
- [8] The Court *a quo* entertained argument from the respondent's advocate and thereafter postponed the matter for the preparation of reasons and granted the eviction order against the appellant on 28 November 2013.
- [9] A proper reading of the application for the postponement reveals that the only real and substantive reason why the appellant sought the postponement was the unavailability of both the senior counsel and junior counsel the appellant briefed to assist him in this matter. It further reveals that both the advocates and the attorney, acting for the appellant laboured under the mistaken belief that the High Court application would have the effect that the Magistrate's Court application for the eviction would not be able to proceed.

THE LEGAL PRINCIPLES - POSTPONEMENT:

[10] A Court entertaining an application for a postponement exercises a discretion. It is a discretion in the narrow sense. As correctly conceded by Mr Snellenburg for the appellant, this requires the appellant to establish that the magistrate exercised the power conferred on him capriciously or upon a wrong principle, or did not bring his unbiased judgment to bear on the question, or did not act for substantial reasons - **Manong and Associates (Pty) Ltd v City of Cape Town and Another** 2011 (2) SA 90 (SCA) par [92]. In the decision of **Myburgh Transport v Botha t/a SA Truck Bodies** 1991 (3) SA 310 (NmS) the court listed the applicable principles that govern the adjudication of applications for postponements as well as an appeal against the court's decision. At page 314 F to page 315 J Mahomed AJA (as he then was) verbalized these principles:

"The legal principles of application

The relevant legal principles of application in considering this appeal may be stated 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) 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 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 Matatiele Municipality** 1965 (3) SA 131 (E) at 137.”

[11] The non-availability of counsel is not, save in the most exceptional of cases, a ground upon which to grant a postponement of a matter in the face of objection by the other party. As Ogilvie Thompson J stated in **D’Anos v Heylon Court (Pty) Ltd** 1950 (1) SA 324 (C) at 335 to 336:

“...the non-availability of counsel cannot be allowed to thwart the bringing before the Court of the matter in issue. In all but the rarest of cases, other suitable counsel will be available. The test is not the convenience of counsel; it is the reasonable convenience of the parties - and by that I mean both parties - and the requirement of getting through the Court's work which must be the dominant considerations. The availability of counsel is a subsidiary consideration. A party's predilection for a particular counsel to take his case can, in my view, seldom, if indeed ever, be regarded as a decisive objection to a date of set down which is in all other respects reasonable and acceptable to both parties.”

[12] In **Shilubana and Others v Nwamitwa** 2007 (5) SA 620 (CC) at p. 625 in paragraph 15, the Constitutional Court found as follows:

“[15] At the hearing counsel admitted that he was unprepared to present his client's case, should the application for postponement be denied. He appeared to presume that the application would be granted – a presumption one makes at the peril of one's client. In *National Police Service Union* it was stated:

‘Ordinarily . . . if an application for a postponement is to be made on the day of the hearing of a case, the legal representatives . . . *must* appear and be ready to assist the Court both in regard to the application for the postponement itself and if the application is refused, the consequences that would follow.’”

APPEALABILITY:

[13] Mr Brown, for respondent, contended that the magistrate's ruling refusing the postponement is not appealable. He relied for this

submission on a dictum of Conradie J in **Priday t/a Pride Paving v Rubin** 1992 (3) SA 542 (C) at 547D-G. That case dealt with an application for leave to appeal against a refusal of a postponement before the trial started in the High Court before Conradie J. Conradie J dismissed the application for leave to appeal because the refusal to grant the postponement was a ruling and not appealable (at 543G-H; 549B-C). In that judgment Conradie J also says (at 545H-I) that High Courts control their procedure with a measure of flexibility. He also makes the point that courts are reluctant to permit piecemeal appeals (at 545E-F).

- [14] The crucial question before us is what the effect of the order was. In this case counsel arguing the postponement before the magistrate made it clear that she had no knowledge of the merits (p116 lines 18-22). Thus the magistrate knew that if the postponement was refused, the appellant would be without a legal representative to deal with the merits of the eviction application (p146 line 24 - p147 line 15). The refusal of the postponement was substantial in effect in the circumstances of this case. The refusal of the postponement led directly to the eviction order being granted. The refusal of the postponement was in this case appealable.

THE REFUSAL OF THE POSTPONEMENT:

- [15] Mr Snellenburg, who argued the appeal on behalf of the appellant contended that in considering a request for a postponement, the court must take all the circumstances into account, with reference to **Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers**

(Pty) Ltd 2012 (1) SA 256 (CC) par [22]. In particular Mr Snellenburg says that the magistrate should have taken into account that the appellant wanted the opportunity to argue the development of the common law in the High Court. The question whether the respondent was entitled to couple a doctor's right to admit patients into the respondent's facilities to the occupation of consulting rooms, is distinct from the contract of lease.

[16] It is important to have regard to the fact that this particular date when the eviction application served before the court *a quo*, was prearranged by agreement between the parties. The mistaken belief that the appellant's legal representatives may have laboured under, namely, that the magistrate's court application will not proceed because of the High Court application, was a presumption they made at the peril of the appellant - **Shilubana and Others v Nwamitwa**, *supra*, at p 625 par. [15].

[17] It is also important, to my mind, have regard to the fact that the application for a postponement was that the application be postponed for a mere two weeks. Over and above that, the appellant tendered to pay the applicants wasted costs occasioned by the postponement. The respondent in this matter utilized counsel from Cape Town. It meant that this advocate had to travel from Cape Town to Welkom to be there on the 14th of November 2013, which in fact happened. The fact that the 14th of November 2013 was a prearranged date to entertain the eviction application, must have meant that when the date was arranged, it suited both parties' counsel. There is no indication on the record that the

appellant even attempted to find out whether the proposed date for the postponement, *to wit* 28th of November 2013, would suit the respondent's counsel. On the contrary, the appellant's legal representatives only intimated that they will be seeking a postponement the day before the application, *to wit* on the 13th November 2013. The application itself was only handed to the respondent's legal representatives on the 14th November 2013. In the circumstances, it is conceivable that the respondent's counsel may not have been available on the 28th November 2013. Counsel is often booked well in advance. If so, the tender of wasted costs would not have cured the prejudice suffered by the respondent.

- [18] An important aspect, which the magistrate correctly took into account, is that the application was brought by the appellant at the last moment. It could hardly have been made at a later stage. It must have been apparent to the appellant well before the agreed date for the hearing that the matter was proceeding and that the High Court application, which was the apparent reason for the postponement, would not be ready in time. There was also no suggestion that the respondent agreed that the magistrate's court application would not proceed once such threatened application was launched. Despite this, the first suggestion that the appellant may not be prepared to proceed on the agreed date was provided on the afternoon before the hearing. This does not constitute timeous bringing of the application.

[19] The contract expired, it came to an end. In the papers before the court the appellant did not take the point that he wished to argue that the respondent was obliged to allow him to occupy the rooms, despite his agreement of lease having come to an end and despite his concession on the papers that he had no problem in vacating the rooms. The appellant's attitude illustrated a pattern of being obstructive and wanting to buy time, trying to find reasons to justify his continued occupation. The application for postponement was correctly refused.

[20] Another important aspect with regard to the prejudice to the respondent is the fact that by the time the eviction application was to be heard in the court *a quo*, the appellant had been in unlawful occupation of the premises for over six months. The fact that the application was, as mentioned before, not made timeously, means that the explanation for the appellant's counsel's non-availability was neither full nor satisfactory. The fact that there was significant prejudice to the respondent and that the application for the postponement was properly opposed, leads this court to the conclusion that the magistrate exercised his discretion judicially and that the appeal against the magistrate's refusal of the application for postponement should be dismissed.

THE EVICTION ORDER:

[21] The basis of the appellant's defence in his answering affidavit was that the respondent cancelled the lease agreement and that it was not entitled to do so. The appellant relied on clause 21 of the lease agreement, being a clause dealing with cancellation. But in

this case the respondent did not cancel the lease agreement. The lease agreement expired and terminated *ex lege* due to effluxion of time. A lease that has a fixed period terminates automatically, as a matter of law, upon the expiry of the time period. When a lease terminates due to the expiry of its fixed period, all rights terminate immediately and no rights to occupation remain. The tenant is obliged to vacate immediately upon such termination. It is not necessary for any notice of termination to be given as the lease terminates *ex lege*.

[22] On behalf of the appellant it is now submitted that it was incumbent upon the respondent to negotiate a new lease agreement with the appellant and that it ought not to have relied on the strict terms of the existing lease agreement. It is submitted on behalf of the appellant that this court should develop the common law in order to assist the appellant. This court is however not prepared to do so for the following reasons:

- (a) The court of appeal is confined to the evidence as contained in the record of appeal. No factual basis is laid for such a contention in the papers that served before the court *a quo*. It is a new argument that forms the basis of the heads of argument before this court, but it did not form the basis of the opposition before the court *a quo* and has no factual basis in the papers.
- (b) The suggestion that the lease was renewed automatically and without negotiations is without factual basis. It is common cause that when the lease expired at the end of February 2013, the appellant requested the respondent to

extend the lease for a further two months. This was duly done and a separate lease agreement was entered into and signed by the parties. It was these negotiations that led to the term of the last lease agreement, being only two months.

- (c) The above argument is in any event excluded by the specific terms of the lease agreements to which the appellant has agreed. The lease agreements contain a clear “whole agreement” clause, a non-variation and a “relaxation” clause, that exclude reliance on any latitude or other indulgence granted by the respondent over time. The lease expressly deals with the renewal of the lease agreement and this is the clause that the respondent followed. In the premises this is entirely destructive of any argument that the respondent was contractually obliged to renew the lease or to enter into negotiations with the appellant to renew the lease.
- (d) With regard to the submission that this court is obliged to develop the common law it must be borne in mind that this court sits as a court of appeal. It is thus confined to the record of appeal, which record of appeal in this instance emanates from the magistrate’s court. The magistrate’s court does not have the power to develop the common law. In any event, the development of the common law requires careful consideration once the issue has been fully ventilated, both on the facts and in argument, which did not happen in this case.

[23] I am satisfied that the magistrate was correct to grant the eviction order and that the appeal should be dismissed.

COSTS AWARD:

[24] The appellant negotiated an extension of the lease for a further two months expressly so as to enable him to find other premises. Having persuaded the respondent to give him this indulgence, he then made no attempt to vacate and instead remained in occupation unlawfully. The appellant provided an undertaking to the respondent that he would vacate the premises by 30 April 2013. He then elected to renege on this undertaking. It is furthermore true that the appellant waited till the very last moment before he informed the respondent about his intention to apply for a postponement and he then, on the day of the hearing of the eviction order, only gave the respondent his application for the postponement. From the replying affidavit to the application for the eviction it appears that the respondent has also stated under oath in the application brought in the High Court that he has “no problem” vacating the premises. The appellant furthermore wasted a considerable amount of time and legal costs by breaching the legal obligation and his undertaking given to respondent to vacate the premises. His defence to the eviction application was manifestly spurious.

[25] Costs are in the discretion of the presiding officer. The magistrate considered the abovementioned factors and it cannot be found that he failed to exercise his discretion judicially. There is no reason for this court to interfere with the magistrate’s order as to costs.

ORDER:

1. The appeal is dismissed with costs.

L. le R. POHL, AJ

I concur.

A. KRUGER, J

On behalf of appellant: Adv N. Snellenburg
Instructed by:
Blair Attorneys
BLOEMFONTEIN

On behalf of respondent: Adv A.D. Brown
Instructed by:
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