IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Date: 2013-03-12

Case Number: 62171/11

In the matter between:

TOVANI TRADING 269 CC t/a BERLO CONSTRUCTION Plaintiff

and

M S CHIKALA NO First Defendant

M D MAPONYANE-CHIKALA NO Second Defendant

M MICHAU NO Third Defendant

JUDGMENT

A B ROSSOUW A J

[1] The plaintiff instituted action against the defendants in their official capacities as trustees of the KK Trust for payment of an amount of R1 407 540,61 plus interest and costs. The plaintiff's claim is basically in respect of work done and services rendered in terms of an oral building

agreement that has not been lawfully cancelled by the trust and in respect of which the plaintiff has been prevented to render complete performance because of the repudiation of the agreement by the trust, which repudiation the plaintiff has not accepted. It is not necessary to deal with the plaintiff's particulars of claim in detail.

[2] The defendant, in its plea, inter alia, disputes the terms of the agreement and the quantum of the plaintiff's claim and it alleges that the agreement has been duly cancelled.

[3] This matter was allocated to this court for purposes of default judgement. Mr Stoop, who appears for the plaintiff, informed me that there was no appearance on behalf of the trust when the matter was called during the calling of the role. He also informed me that the first defendant was seen in the court building earlier this morning. When the matter was called in this court, there was likewise no appearance on behalf of the trust.

[4] According to the papers before me the notice of set down was served on the trust's erstwhile attorneys on 22 March 2012. It also appears from the papers that the trust's erstwhile attorneys withdrew as attorneys of record on or about 13 December 2012 and a notice to this effect was properly served on the plaintiff's attorneys. Thereafter notices in terms of a rule 36 (9) (a) as well as a notice in terms of rule 37 (2), calling upon the

defendants to attend a pre-trial meeting on 31 January 2013, were delivered by leaving copies thereof at the first defendant's private residence on 14 January 2013, as more fully appears from the affidavit of Mr Van der Merwe, a candidate attorney in the employ of the plaintiff's attorneys of record. It also appears from Mr Van der Merwe's affidavit that the first defendant was until middle January 2013 not aware of the fact that the trust's attorneys had withdrawn. Further notices in terms of rule 36 (9) (b) were delivered by hand at the first defendant's private residence. When the pre-trial was held on 31 January 2013 there was no attendance on behalf of the trust.

[5] In view of the aforesaid, the court was satisfied that the matter could proceed on an unopposed basis, whereafter the plaintiff started to lead evidence to prove its quantum. Shortly before the tea adjournment the court, mindful of the first defendant being observed in the court building earlier on, and in all fairness to the trust, requested the plaintiff to make an attempt to get hold of the first defendant to find out what the trust's position was. The plaintiff's attorneys were successful in contacting the first defendant. When contact was made with the first defendant, he had already left the court building and was on his way to, I think, Centurion.

[6] The first defendant later appeared in court, without representation, and asked for a postponement, which was opposed by the plaintiff.

[7] The first defendant explained that he could not find the court where the matter was to be heard. This explanation is not convincing because if the first defendant had made an honest effort he would have found that the matter was number 68 on the roll in court 6E, which court deals, *inter alia*, with matters requiring an allocation to a judge.

[8] The first defendant further explained that during 2012 he was involved in a dispute with his erstwhile attorneys of record regarding the further funding of the trust's case in view of which, I assume, the said attorneys withdrew as the trust's attorneys of record during late 2012. The first defendant also stated that although the trust was in a position to pay the said attorneys, he was, in the light of the dispute with the attorneys, not willing to do so. The plaintiff can certainly not be blamed for this. The first defendant further informed the court that he only became aware of the fact that the trust's attorneys had withdrawn during January 2013, whereafter he approached another firm of attorneys, ie MKM Attorneys and more in particular Mr Maritz. The first defendant told the court that he had given instructions to Mr Maritz to handle the matter on the trust's behalf and that he had laboured under the impression that his new attorney would do what was necessary, hence his inactiveness since January 2013. The first defendant also told the court that he phoned his attorney earlier this morning to find out what was going on and that his attorney's explanation for not being at court was the holding of 'partial instructions'.

[9] I instructed Mr Maritz to be present in court to hear from him what transpired between him and the first defendant. Mr Maritz told the court that, although the first defendant sought his advice in respect of certain matters, he at no given point in time held instructions to represent the trust in this matter. It appears from what Mr Maritz told the court that there could have been some form of misunderstanding or lack of proper communication between him and the first defendant.

[10] Be that as it may, the first defendant neglected to follow up the trust's instructions to its own attorney in circumstances where he ought to have done so. The first defendant also failed to contact the plaintiff's attorneys about his intention to ask for a postponement under circumstance where he could and should have done so. The first defendant could not give any reasonable explanation for these omissions.

[11] Initially I was inclined to consider refusing the application for a postponement, but after giving it some thought I realised that I would not only do an injustice to the trust but also to the plaintiff. No pre-trial has been held to curtail the proceedings. This means that if the trial does proceed, the parties will in all likelihood have to stand down from time to time, *inter alia*, to reach an agreement regarding the authenticity of the documents contained in the court bundle that was handed up by the plaintiff as well as other factual issues in order to curtail the proceedings. Witnesses will further have to be called by the defendants, and if these

witnesses are necessary but unavailable, this case will have to be postponed. It is not desirable for matters to become part heard for obvious reasons. The defendants will further have to be guided through the proceedings, which will cause this matter to be further dragged out and unduly delayed, at the unnecessary expense of both parties.

[12] It is trite law that a judge has a discretion as to whether an application for a postponement should be granted or refused. That discretion must be exercised judicially. 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. An application for a postponement must be made timeously, as soon as circumstances, which might justify such an application, become known to the applicant. Where, however, fundamental fairness and justice justifies a postponement, the court may in an appropriate case allow such application for postponement even if the application was not timeously made. An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of gaining an advantage to which the applicant is not legitimately entitled. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the 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 cost order or any other ancillary mechanisms. 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. 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.

[13] I cannot ignore the fact that an attorney represented the trust until at least December 2012 and the fact that, when the first defendant became aware of trust's attorneys' withdrawal, he approached another attorney to assist the trust. I also cannot ignore the fact that the first defendant was in the court building prior to the matter being called in this court and that he made an effort to be in court when he was called upon to do so. This is not the conduct of a person who is in wilful default or who seeks to delay the matter or who wants to obtain an advantage to which he is not entitled. Furthermore, if a postponement is not granted, the trust will be severely prejudiced because it has no expert witnesses to counter those of the plaintiff. I am of the view justice demands that the trust be given a proper opportunity to present its case and that the plaintiff's prejudice

caused by the delay can be fairly compensated by an appropriate costs order.

[14] I find that the plaintiff has shown utter indifference to the necessity of saving wasted costs as far as possible. The trust's conduct in moving for an application for a postponement at such a late stage is blameworthy in a high degree and I can find no reason why the plaintiff should be out of pocket and why the trust should not be penalised with a special order as to costs.

[15] Mr Stoop suggested that the trust be ordered to file its notices in terms of rule 36 (9) (a) and (b) within 30 days in order to expedite the matter, failing which the plaintiff would be entitled to approach the court to have the trust's defence struck out. The first defendant indicated that he had no objection against the making of such an order.

[16] For completeness sake, I wish to point out that Mr Stoop informed me the third defendant has in the mean time resigned as a trustee.

[17] In the premises, I make the following order:

1. The case is postponed *sine die*;

2. The first and second defendants in their official capacities as trustees are ordered to pay the wasted costs on an attorney and client scale including, but not limited to, the preparation, qualifying, attendance and reservation fees of the plaintiff's experts in respect of which expert notices have been given;

3. The first and second defendants in their official capacities as trustees are ordered to file the trust's notices in terms of rule 36 (9) (a) and (b) within 30 days from date hereof, failing which the plaintiff will be entitled to approach the court to have the trust's defence struck out.

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A B ROSSOUW A J

DATE: 12 March 2013