

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case number: **2197/2011**

In the matter between:-

M AND K ACCOUNTING AND TAX CONSULTANTS

Applicant

and

CENTLEC (PTY) LTD

Respondent

CORAM: SNELLENBURG, AJ

JUDGMENT: SNELLENBURG, AJ

HEARD: 14 JUNE 2013

DELIVERED: 27 JUNE 2013

[1] The applicant applied by way of motion that the respondent be ordered to make payment to it in the amount of R29 517 957.62 (together with interest *a tempore morae* and cost) for services rendered. The motion was issued on 9 June 2011.¹

¹ At date hereof the said amount is still the amount provided for in the notice of motion. As will dealt with below, it is the applicant's intention to lead evidence and claim the amount of R38,664,577.35.

- [2] The matter was referred for hearing of oral evidence, as will be dealt with later in this judgment, and enrolled for this purpose on the 11th, 12th, 14th, 18th, 19th and 21st June 2013. I will refer to the dates as trial days for sake of convenience.
- [3] During the morning of the first trial day, before the matter could proceed, the respondent filed a substantial application seeking, *inter alia*, that the matter be postponed *sine die*. Other relief is also sought with which I shall deal later.
- [4] The representatives approached me in chambers and requested that the matter be dealt with as suggested by the applicant, namely that the matter stand down to Friday, 14 June 2013 for arguments in the application for postponement. The applicant would and indeed did file an answering affidavit on the second trial day. The respondent filed its reply on Thursday, 13 June 2013.
- [5] After hearing arguments in the respondent's application for postponement, I made an order and indicated that I will furnish the parties with the reasons for my order.² I accordingly furnish the reasons.

² I am indebted to the thorough arguments presented in the matter. Due to the ambit of the matter, the arguments only concluded at 15h25 on Friday, 14 June 2013. The next trial date allocated for the matter was Tuesday, 18 June 2012. In light of the order I intended to and did indeed make, and in order to avoid further wasted costs by having the parties prepare for the possible continuance (commencement) of the matter and to return to court on the next trial day simply to get an order that the matter is postponed with the reasons therefore, I indicated that I would make the order immediately and then furnish my reasons as I herewith do.

- [6] Some background is necessary to understand the context of the application for postponement and the respective parties' stances.
- [7] The matter first served before Molemela, J on 28 July 2011. At that stage the respondent's answering affidavit had still not been filed. The order regulated the furnishing of documents by the applicant, in terms of Uniform rule 35, within five days from receipt of a list from the respondent wherein the documents sought had to be specified. Other matters were also recorded, which are to my mind not relevant at this stage and which I do not specifically set out herein. The wasted cost was reserved.
- [8] The matter thereafter served before Ebrahim, J on 22 September 2011. By this time an answering affidavit had been filed shortly before the hearing of the matter. After hearing argument an order was made, which provided, *inter alia*, that –
- 8.1 The matter is referred for hearing of oral evidence on the question of whether the respondent is indebted to the applicant in the amount of R29 517 957.62 together with interest thereon (*a tempore morae*) and/or whether the applicant is entitled to any payment in any amount at all.
- 8.2 The evidence will be that of any witness who the parties intend to call subject thereto that a party is only entitled to call a witness if a statement is served within the prescribed periods before the hearing of evidence. In the statement the evidence to be given in chief by such party must be set out.

This is however subject to the court's prerogative to allow a party to be called despite the fact that no such statement was served in respect of his evidence.

8.3 The parties make discovery, on oath, of all documents relating to the issue referred to oral evidence, which are or have at any time been in the possession or under control of such party, which discovery must be done in terms of the provisions of Uniform Rule 35 regarding inspection and production of documents so discovered.

8.4 The incidence of cost stands over to be adjudicated by the court hearing oral evidence.

[9] On 26 April 2012 the matter served before Lekale, J. An order was granted by agreement between the parties. It provided, *inter alia* –

- “1. The parties confirm that it is common cause that they concluded the Consultancy Agreement.
2. The parties confirm that the Consultancy Agreement was terminated by the Settlement Agreement.
3. The Applicant subsequently rendered an invoice for payment to the Respondent in respect of the services rendered.
4. There exists a dispute between the parties on a limited issue of the amount due and payable, if any,.
5. The matter is referred for hearing of oral evidence on the following limited issue;

- 5.1 To determine the amount due to the Applicant by the Respondent for the services rendered in terms of the provisions of paragraph 3 of the settlement agreement read with paragraph 9.1 of the Consultancy agreement, if any.
 - 5.2 It is hereby recorded that in computing the amount due to the Applicant, if any, the Respondent is entitled to deduct any amount(s) that it may lawfully claim for the Applicant or lawfully deduct from any amount due to the Applicant, although the Applicant does not concede in advance that any amount is liable to be deducted.
6. It is hereby recorded that the Respondent is of the view that despite the discovery of certain documents in terms of Respondent's Rule 35 Notice, such discovery is insufficient.
7. The Applicant, on the other hand, contends that it has discovered all documents it could.
8. In order to resolve the dispute as regards discovery, the parties agree that the Respondent is entitled to request the discovery of the following documents from the Applicant, within fifteen days of this order:
 - 8.1 Copies of the initial and revised VAT 201 returns submitted to SARS by the Applicant relevant to the Applicant's claim, as well as all source documents used by the Applicant in compiling the said VAT 201 returns.
 - 8.2 All records generated by the Applicant in the compilation of the *above mentioned* VAT returns.

- 8.3 The particulars of all computer software packages, if any, that were used by the Applicant in compiling the abovementioned VAT returns.
- 8.4 The details regarding any journal entries that were either made or suggested in the records of the Respondent and Mangaung Local Municipalities suggested by the Applicant.
- 8.5
- 8.6
- 8.7 All submissions made by the Applicant to SARS in relation to the services rendered by the Applicant to the Respondent in terms of the provisions of the Consultancy or Settlement Agreement.
- 8.8 All correspondence exchanged between SARS and the Applicant in relation to the services rendered by the Applicant to the Respondent in terms of the provisions of the Consultancy or Settlement Agreement.
- 8.9 All correspondence exchanged between Applicant and Respondent in relation to services rendered by the Applicant to Respondent in terms of the provisions of the Consultancy or Settlement Agreement.
- 8.10 All working papers generated by Applicant in compilation of the abovementioned VAT returns.
- 8.11 All records of tests performed by Applicant to confirm the accuracy of the VAT system as used.

9.
10. The Respondent's auditors or experts, if any, must, within one hundred days of receipt of the documents or responses in respect of the request approach the Applicant with their report concerning their audit or findings in relation to the Applicant's claim against the Respondent to the Applicant, which report must, amongst others, state their findings regarding the amount due and payable to the Applicant, if any, and a detailed explanation of how that amount has been arrived at.
11. The parties must, within fifteen days of receipt of the report referred to in paragraph 10 above, convene and attend a meeting with the parties' auditors or experts in order to determine:
 - 11.1 Aspects pertaining to the compilation of the Applicant's claim which are not in dispute;
 - 11.2 Aspects pertaining to the compilation of the Applicant's claim which are in dispute;
 - 11.3 Amounts, if any, which the parties and/or their auditors or experts are *ad idem* about their relevance to the Applicant's claim.
12. Costs, including the cost of the 24th and 25th April 2012 stand over.
13. The Rules of Court pertaining to expert witnesses will apply."

[I have intentionally only quoted certain portions of the order. I have also intentionally left out the headings that are contained in the order.]

- [10] There were further interlocutory proceedings before the matter ultimately served before me which I do not deem relevant to the adjudication of the matter.
- [11] Mr. Van Rhyn (assisted by Mr Edeling), on behalf of the respondent, and Mr. Ike Motloun, on behalf of the applicant, addressed the history in detail. Various cost orders stand over for adjudication. Those matters are best left to be adjudicated upon by the court hearing oral evidence in this matter after the dispute has been properly ventilated. See **Sublime Technologies (Pty) Ltd v Jonker and Another** 2010 (2) SA 522 (SCA) par [4] at 525B. I am equally mindful not to prejudge any of those matters in these proceedings. The merits of the present application do not call for the determination of those issues.
- [12] On 8 May 2013, the respondent availed its forensic report to the applicant.
- [13] The meeting envisaged in terms of paragraph 11 of the court order was held on 15 May 2013. At conclusion the parties agreed to a follow-up meeting. This was agreed to take place on 29 May 2013. The nature of this further meeting is also in dispute between the parties, but nothing turns around this as the parties did ultimately record their respective positions in the 'pre-trial' minute which was duly signed on behalf of the parties by their respective attorneys.

- [14] Suffice it to state that the parties are not *ad idem* regarding whether the report was delivered in terms of Lekale, J's order. To this end the parties recorded their respective stances in a 'pre-trial' minute, dated 10 June 2013-

"The Applicant records that it was prejudiced by the late filing of the report by PWC in terms of the Court order dated 26 April 2012. As a result of the late filing, there was no time to, should the Applicant have wished to do so, supplement and/or amend their application or do any other thing in terms of the Rules.

The Respondent records that it was prejudiced in that the Applicant failed to provide all the necessary documentation in terms of the Court order dated 26 April 2013 (*sic* 2012). As a result, it could not finalise the report timeously."

The applicant, although it recorded prejudice during the pre-trial meeting, elected not to approach court for any relief. The respondent contends that the report was delivered in terms of the court order. I make no finding in this regard.

- [15] The applicant did not avail itself to any relief in the form of seeking a postponement. It strenuously opposed the respondent's application for postponement and repeatedly recorded that it was ready to proceed and that the matter should proceed.
- [16] The prejudice recorded by the respondent does feature to some extent in the order it ultimately sought in the application for

postponement, but it does not form the foundation of the application. If that was the case there would have been a lot of merit in the argument that the application for postponement should have been made as soon as the respondent became aware of the reason for the postponement. The same principles would obviously apply to the applicant.

[17] In terms of an agreement between the parties they exchanged court bundles [core bundles] on Friday, 7 June 2013.

[18] The respondent's attorney required that the applicants bundle be indexed with the result that an indexed bundle was only supplied the following Monday, the day preceding the first court day scheduled for the hearing this matter.

[19] Included in the applicant's bundle as annexure "N" is an invoice, dated 16 May 2013. It is common cause between the parties that the invoice is a revision of the initial invoice, dated 14 April 2011, rendered by the applicant and which, until the date of production of annexure "N", formed the foundation of the applicant's claim against the respondent.³

[20] The respondent's application is premised on the following facts:

³ The invoice is appended to the founding affidavit as annexure "L".

- (a) The amount claimed by the applicant in the motion, supported by the evidence in the founding affidavit, is R29,517,957.62.⁴
- (b) That is also the amount requested to be audited;
- (c) According to annexure “N” the amount *now* claimed by the applicant for services rendered is R57,004,966.24 of which the amounts paid (R18,340,388.89) must be subtracted.
- (d) Mr Holtzhausen, the respondent’s attorney of record contacted the applicant’s local attorney, Me Pienaar and enquired whether the amount in annexure “N” was substituting the amount claimed in annexure “L” to the founding affidavit, in other words, whether the applicant now intended to claim the amount evidenced by annexure “N”.
- (e) Me Pienaar confirmed that the applicant would indeed claim the amount in annexure “N” of which must be subtracted the amount already paid by the respondent.
- (f) The respondent’s auditors’ have previously encountered enormous difficulty to obtain documents relevant to the months for which the applicant claimed in annexure “L” and does not have, nor did they require, the documentation regarding to the amounts now claimed in annexure “N”.
- (g) The respondent’s auditors will need to consider the new [additional months’] claims by the applicant. This will result in

⁴ The amount claimed for as per annexure “L” to the founding affidavit was R47 858 346.51 of which payments in the amount of R18 340 388.89 is subtracted leaving the balance due and owing R29 517 957.62. Annexure “N” shows the amount due, before subtracting the amounts paid, as R57 004 966.24. If the amounts paid are subtracted, the balance of R38,664,577.35 remains.

the calculation and revision of figures taking into account the additional months for which the applicant claims. It will involve further investigation of documents and consultations in order for the respondent to be properly prepared to put its case before the court.

[21] The applicant opposes the application on the following basis:

- (a) It admits that it intends to pursue the claim as evidenced by annexure “N”, but argues that whether it will be successful with the claim is not a matter this court needs concern itself with at this stage. It also argues that annexure “N” is merely a document forming part of the trial bundle which has not been entered into evidence. Accordingly, so the argument develops, annexure “N” will only become relevant once it is referred to or used during the proceedings. At that stage, and only then, may the respondent object. This application is therefore, according to the applicant, premature.
- (b) Annexure “N” does not contain a new claim. Only the figures are affected as result of an agreement reached during the pre-trial meeting with regards to the meaning of savings, and in respect of the same months.
- (c) The respondent received all the documentation for the months claimed for, and it can therefore not be heard to complain of any prejudice, at least not to the extent that the trial needs to be postponed.

- (d) The applicant also contends that it does not claim for months for which documentation has not been submitted. It is argued that if the report is considered, it will be evident that the months which were included in annexure "N", were indeed also considered, or should have been considered for the respondent to bring out its report. A new revised report will not be necessary.
- (e) It lastly argues that the respondent is simply employing delaying tactics to frustrate its claim. To this end the applicant relies on the history of the matter.

[22] In light of these facts the application for postponement stands to be determined.

[23] The principles relating to applications for postponement are trite. Every application stands to be decided in light of the specific facts and circumstances relevant to that application. The general principles applicable to applications for postponement were succinctly summarised in **Myburgh Transport v Botha t/a S A Truck Bodies** 1991 (3) SA 310 (NmS). But the general principles need to be qualified. A litigant is not necessarily 'responsible' for the case not proceeding merely because he or she applies for a postponement. In certain circumstances a litigant could be forced to apply for a postponement as a result of the conduct of an opponent. **Sublime Technologies (Pty) Ltd v Jonker and Another** 2010 (2) SA 522 (SCA) par [3] at 524H - 525A.

- [24] The facts relevant and pertinent to this matter show that the respondent will be prejudiced in the conduct of its case if the postponement is not granted. The facts also show that this situation was brought about by the applicant's conduct.
- [25] As stated, the applicant applied to court on motion for payment of the amount of R47,858,346.51 of which R18,340,388.89 is subtracted, therefore R29,517,957.62 for services rendered to the respondent. In motion proceedings the affidavits serve a dual purpose; it constitutes both the pleading as well as the evidence in support thereof. See **Transnet Ltd v Rubenstein** 2006 (1) SA 591 (SCA) par [28] at 600; **Absa Bank Ltd v Kernsig 17 (Pty) Ltd** 2011 (4) SA 492 (SCA) par [23] at 499.
- [26] *In casu* and until the very least the 7th of June 2013, the applicants claim was premised on the services rendered as set out in its founding affidavit. To this end the founding affidavit also served as the 'statement of the evidence to be given in chief by such party' on behalf of the applicant as per Ebrahim J's order. The summaries of expert witnesses that the applicant intends to call does not take the matter further. The notice of motion still provides for judgment in this amount and the amount is supported by annexure "L" to the founding affidavit.
- [27] On the 7 June 2013 annexure "N" was included in the pre-trial bundle. It is described in the index as "MNK Revised Tax Invoice".

It is dated 16 May 2013, the same date as annexures “REP1” and “REP2” which are appended to the replying affidavit in these proceedings. Annexures “REP 1” and “REP 2” were documents supplied to the applicant containing variable options regarding calculations varying from R24 million to R33 million. These documents were supplied by way of electronic communication (email) 2 days prior to the follow-up meeting. It does not in any manner resemble annexure “N”. It did not include claims for the years 2006, 2007 or 2008. With regards to these documents, the applicant recorded that it was still considering whether it wanted to amend its claim, but that it would amount to either the one or other of these amounts. It did not amend to this effect.

[28] What does appear is that annexure “N” was not produced prior to its inclusion in the trial bundle. It was not made available prior to or during the follow-up meeting on 29 May 2013. Save for including it in the bundle, the respondent’s attention was not drawn to the existence of the document. This is common cause.

[29] During the meeting the applicant indicated that it would do certain calculations, but it explicitly disavowed any intention to amend or not. It indicated that it would consider whether it would amend. It obviously did so at its own peril. The aspect of an amendment was specifically raised during the meeting and the respondent pointed out that a further affidavit would probably be necessary or at least an amendment of the notice of motion. The respondent enquired whether the applicant would be ready for trial or whether its case

would be ripe in light of the repeated reference to the lateness of the PWC report. The applicant was adamant that it would proceed. It did not say anything about annexure “N” and its intention to pursue a claim on a revised invoice or, for that matter, for at least R9 million in excess of the amount as confirmed to be owing in the motion.

- [30] The respondent did not jump to conclusions at the mere production of annexure “N”. It sought clarification from the applicant as to whether it was correct in inferring that the new invoice substituted the previous invoice i.e. that the applicant now claimed the amount in annexure “N”. It meant an increase in the amount claimed of R9 million. When this was confirmed it consulted its experts and sought instructions which culminated in the present application.
- [31] There can be no dispute that the compilation of annexure “N” differs vastly from the invoice which has to date been preferred and attested to under oath by the applicant. Not only has certain months been included for which were not claimed previously, but some of the amounts claimed has also substantially changed.
- [32] It is not clear why said invoice was not brought to the respondent’s attention pertinently, more so if its date bears any significance.

- [33] The importance of timeous discovery and or production of documents likewise do not need debate. See **BST Kombuise (Edms) Bpk v Abrams** 1978 (4) SA 182 (T).
- [34] I am satisfied that the respondent is justified in its application for postponement. There is no merit in the contention that this application is merely delaying tactics. The respondent has been confronted with an increased claim on an invoice which has been confirmed under oath in these proceedings, will form the basis of the applicant's evidence, but which, at least in part regarding the claims for months not previously claimed, has not formed the subject of the applicant's evidence in the motion to date. The applicant intends to canvass the evidence and then move for an order that the notice of motion be amended. The applicant can present its case as it deems fit, but the document has come to the respondent's notice; it affects its preparation for the trial and it obviously needs time to consider the amended invoice, the months now included in the claim and the documents pertaining thereto; to consult with its experts who have already compiled a forensic report regarding the existing claim [annexure "L"] and to consider whether any other documents must be called for and so forth. The fact that the amendment stems from aspects that appeared from the meeting between the parties, if for a moment the dispute regarding such agreement relating to savings be left aside, does not to my mind assist the applicant.

[35] The respondent was entitled to prepare the case it had to meet based on the 'pleadings' and 'evidence in affidavits' already disclosed to it. It did so and cannot be prejudiced by having to proceed to hearing of evidence on aspects included in the claim of which it received notice, at the very best for applicant, two court days prior to the first trial day. The respondent cannot be held responsible for the applicant's decision to revise and escalate its claim, nor for the manner in which the applicant decided to go about its case. To allow the matter to proceed in these circumstances, bearing in mind the order granted by Ebrahim, J regarding the qualification of the right to present evidence if the evidence in chief is set out in a statement, it would be tantamount to the court sanctioning trial by ambush. The respondent would, at the very least, have to conduct cross examination of the applicant's witnesses. To do so it says it must be afforded an opportunity to have its experts consider the months added to the claim. This is not an unreasonable request in light of the circumstances of this matter and has been brought about solely by the applicant's late inclusion of claims for months that never formed part of its claim before. The interests of justice dictate that the matter must be postponed.

[36] The applicant argues that the respondent has all the documents it may require regarding the months included in the new invoice. I was referred to the index of documents as well as the PWC report in support of this contention. Neither the index, nor report, however confirms the same. The PWC report also clearly qualifies that the report is restricted to the months claimed for in the Invoice

(annexure “L”). There existed a dispute beforehand regarding whether all the documents have in fact been supplied. That dispute however is not the reason for the application for postponement, or at least not the primary ground. Had it been, as already stated, the applicant may have had merit with its objection to the application only having been issued on the morning of the first trial day.

[37] In order to facilitate the proceedings, bearing in mind the parties continued dispute regarding the supply and receipt of documents and in order to alleviate any possible disputes and uncertainty, I fashioned the order to regulate the supply of a schedule by the respondent to the applicant detailing the specific documents it requires in light of the amended invoice. The applicant is ordered to supply the documents requested, even if it had previously supplied it. This was in light of the accommodating undertaking on behalf of the applicant by its representative, which is commendable. Should any disputes arise, the parties are of course entitled to exhaust their remedies.

[38] The court order will also protect the applicant’s rights. Provision is made that the respondent delivers the revised report of PWC within two months from date of receipt of the documents to be supplied by the applicant. The transcription of the meeting, envisaged by paragraph 11 of Lekale J.’s order, shows that the previous meeting did not yield the required results. It is in both parties interest that the meeting should take place after report of PWC has been delivered, and that the matters provided for in

paragraph 5 of the court order must be dealt with adequately. The parties were granted leave to approach the registrar to allocate preferential court dates if such is available.

[39] The parties were *ad idem* that should the application for postponement be dismissed, then it also follows that the wasted cost of the 11th, 12th and 14th June 2013 should be borne by the respondent. The same situation was initially argued to be applicable if the application should succeed, but Mr Moutloun later recorded that he was labouring under the impression that it related to the costs to be decided should costs be reserved. In light of the consequences of a cost order I allowed Mr Moutloun to address the matter of cost further.

[40] I am satisfied that the applicant is liable for the wasted cost as result of the postponement. The parties agreed on the manner to ventilate the application and as result the first three trial days were taken up by preparing and answering to the application. The arguments in the application lasted the whole of the third trial day. Applicant's counsel was reserved, as was applicant's representative for the days that have been wasted.

[41] This is not a matter where another court will be in a better position to judge liability for wasted cost. All the facts pertinent to that question have been adequately addressed, as it should have been, in the interlocutory application. The application was, to my

mind, necessitated by the applicant's conduct. The applicant's conduct was the cause for the matter not being able to continue and as such is responsible to pay the respondent's costs wasted as result thereof. Had it informed the respondent during the first meeting or thereafter of its intention, the wasted costs would have been limited to a vast extent.

[42] In light of the afore-mentioned I am satisfied that the application needs to be postponed *sine die*, as was ordered with the ancillary relief referred to. The applicant should pay the respondent's wasted costs, occasioned by the postponement, which costs include costs of the 11th, 12th and 14th June 2013 as well as the cost occasioned by the employment of 2 counsel.

[43] In the result I made the following order:

1. The application is postponed *sine die*.
2. The respondent is ordered, within five days of this order to deliver to the applicant a schedule containing a full description of documents required as result of recalculation of the amount claimed in annexure "N" in the applicant's court bundle.

3. The applicant must supply the documents requested by the respondent, referred to in paragraph 2 above, within five days, whether it has previously been supplied, or not.
4. The respondent must supply its PWC report, with any revisions, within two months from receipt of the documents referred to in paragraph 3.
5. The parties must, within fifteen days of receipt of the report referred to in paragraph 4, convene and attend a meeting with the parties' auditors or experts in order to determine:
 - 5.1 Aspects pertaining to the compilation of the applicant's claim which are not in dispute.
 - 5.2 Aspects pertaining to the compilation of the applicant's claim which are in dispute.
 - 5.3 Amounts, if any, which the parties and/or their auditors or experts are *ad idem* about bear relevance to the applicant's claim.
6. Parties are granted leave to approach the Court for preference trial dates.
7. The applicant is ordered to pay the wasted costs, as result of the postponement, including costs of 11, 12 and 14 June 2013, including costs occasioned by 2 counsel.

N. SNELLENBURG, AJ

On behalf of the applicant:

Mr Ike Moutloung
On instruction of:
Peyper Sesele Attorneys
BLOEMFONTEIN

On behalf of the respondent:

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Assisted by Adv JW Edeling
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