

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 5949/2009

In the matter between:-

ADRIAAN HENDRIK ODENDAAL

Applicant

and

HSIN-HUIE PLASTIC CC

Respondent

In re:

In the matter between:-

HSIN-HUIE PLASTIC CC

Plaintiff

and

ADRIAAN HENDRIK ODENDAAL

Defendant

HEARD ON: 21 NOVEMBER 2012

JUDGMENT BY: THAMAGE, AJ

DELIVERED ON: 29 NOVEMBER 2012

[1] This is an opposed application for a postponement of a trial scheduled for 20, 21 and 23 November 2012.

[2] Applicant is Adriaan Hendrik Odendaal, a major male attorney and the defendant in the main action.

- [3] Respondent is Hsin-Huie Plastic CC, a close corporation duly registered as such with registered address situated 38 Bitterbessiebos Street, Pellissier, Bloemfontein and plaintiff in the main case.
- [4] For the sake of convenience I will refer to respondent as plaintiff and applicant as defendant.
- [5] On the morning of 20 November 2012 (first day of trial) both counsel for the plaintiff and defendant approached me in chambers wherein they indicated that they are still busy with documents pertaining to this application for postponement and that the matter be rolled over to the following day, i.e. 21 November 2012 at 14h00, which request I granted .
- [6] The founding affidavit was thus filed on the afternoon of 20 November 2012, the opposing affidavit filed on the morning of 21 November 2012, as well as the replying affidavits. Both counsels filed their heads of argument minutes before the matter commenced at 14h00.

- [7] After both counsels had argued their cases, it was already 16h05 and both counsel submitted that the matter should be postponed *sine die* and the judgment in respect of costs should be reserved.
- [8] It is clear from the above submission that plaintiff had abandoned his opposition towards a postponement, a point which was also highlighted during his argument. It was also clear that even if the court would refuse postponement, there remained only one day for trial namely 23 November 2012.
- [9] For just and fair adjudication of costs, it is imperative that I consider the submissions made by counsel, heads of argument and the affidavit filed of record.
- [10] Defendant's main argument towards a request for postponement is as follows:
- 10.1 That the matter was not ready for trial as the plaintiff did not make the defendant aware of all the documentary evidence available. The plaintiff had a duty to put documents in proper order for the benefit of both parties and the court. The plaintiff failed to do that

or had partially performed. The provisions of Rule 35 of Uniform Rules are peremptory.

10.2 He further argued that the submission by the plaintiff that reason for applying for postponement due to the fact that defendant wants to amend his plea so as to file a special plea, is without merits and should be rejected; that the defendant in his plea did indicate a plea of prescription and if plaintiff was not pleased with the phrasing thereof, he ought to have filed an exception.

10.3 The plaintiff in his papers never alleged any prejudice that may be occasioned by a postponement.

[11] Plaintiff, on the other hand, argued as follows:

11.1 That defendant was served with unsigned discovery affidavit and consented to same. He never complained about that even during the Rule 37 conference.

11.2 That if the document is not properly discovered, the plaintiff will not be able to use the document, which scenario will then be to the detriment of the plaintiff.

11.3 Plaintiff however stated that the only document that the defendant was not aware of up until 30 October, was

the Rule 36(9)(a) and (b). He further state that the information which is contained therein, even the interpretation thereof, does not necessarily need an expert; anyone can interpret the document.

[12] In **SHILUBANA AND OTHERS v NWAMITWA AND OTHERS** 2007 (9) BCLR 919 (CC) at 922 paragraph E line 12 the Constitutional Court held that:

“A postponement cannot be claimed as of right.”

The party applying for postponement must therefore show good cause that one should be granted. The factors to be taken into account include:

“whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.”

See **SHILUBANA AND OTHERS v NWAMITWA AND OTHERS**, *supra*.

[13] The Constitution Court went further and stated as follows on page 922 paragraph F line 11:

“In *Lekolwane and Another v Minister of Justice and Constitutional Development* this Court added the following factors to be considered in granting a postponement: (1) the broader public interest; and (2) the prospects of success on the merits. The following factors could non-exhaustively be added to the above: the reason for the lateness of the application if not timeously made; the conduct of counsel; the costs involved in the postponement; the potential prejudice to other interested parties; the consequences of not granting a postponement; and the scope of the issues that ultimately must be decided.”

[14] The reasons for making the late application for postponement of the matter *in casu*, as indicated by the applicant, is that they received the Rule 36(9) well out of time and their endeavour to discuss the question of postponement of the matter due to plaintiff's late discovery, could not bear fruits, hence the application in terms of Rule 27.

[15] From the plaintiff's answering affidavit and from the plaintiff's counsel's argument and for the reason that the only trial day

left was one out of three days allocated, I was also of the view that the postponement is inevitable. The prayer that the matter should be postponed *sine die* was thus granted.

- [16] What remains now is the issue of costs. A standard way to mitigate prejudice to the other parties, is for the court's indulgence to postpone a hearing, particularly one requested at the last minute, is to offer or to be ordered to pay the costs of the postponement. See **A G PETZETAKIS INTERNATIONAL HOLDINGS LIMITED v PETZETAKIS AFRICA (PTY) LTD** 2012 (5) SA 515 at 519.

- [17] The scenario in this matter is more of a vicious circle. Plaintiff served and filed Rule 36(9)(a) out of time. The expert evidence is intended to prove ownership of the plaintiff on machinery and equipment allegedly burned by fire. The issue of plaintiff's ownership of the said machinery and equipment is denied and is placed in dispute by the defendant. It is of cardinal importance that the defendant fully and adequately prepares his defence. Defendant further stated that he needs time to can get also his expert witness to can peruse the affidavit and if need be contradict

the plaintiff's expert. Plaintiff, on the other side, state that defendant was at all material times in possession of the draft and that the evidence of expert contained on the affidavit is not *per se* expert evidence, a lay person will and can be able to interpret same. This argument is surprising because plaintiff used the provision of Rule 36(9)(a) and (b).

[18] Plaintiff, on the other hand, had made late discovery and some other documents were not properly discovered. They were put on a joint bundle without being discovered, i.e. documents from page 100 to 110. He argued that the trial would have proceeded and defendant would have objected on the production of the document(s). These would in anyway result in the matter being postponed to afford defendant time to peruse the document and prepare his defence.

[19] The plaintiff's argument that the case of the late discovery is not a real issue and that the real issue is that defendant intends amending his plea so as to plead special plea of prescription, has no merits and speculative. Defendant is requesting court to order costs against plaintiff *viz* wasted

costs, as well as costs of this application. Plaintiff is requesting court to order costs against defendant, alternatively each party to pay its own costs.

[20] Defendant is the one who came to court and requested court's indulgence. Usually the party requesting indulgence has to pay costs. At the same time plaintiff contributed to this application being made. Both parties are equally at fault. The court has a discretion in awarding costs, which discretion is to be exercised judicially.

[21] The trial action was postponed *sine die* already and the following order as to costs is made:

21.1 Costs for the trial action: Each party to pay his own costs.

21.2 Costs for this application: Each party to pay his own costs.

S.J. THAMAGE, AJ

On behalf of applicant (defendant):

Adv J.G Gilliland
Instructed by:
Bezuidenhouts Inc
BLOEMFONTEIN

On behalf of respondent (plaintiffs):

Adv J.J. F Hefer
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

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