Reportable: Yes / No
Circulate to Judges: Yes / No
Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape High Court, Kimberley)

Case no:	292/07
Date heard:	2009-09-11
Date delivered:	2009-09-18

In the matter of:

SAAMWERK SOUTWERKE (PTY) LTD **APPLICANT**

versus

MINISTER OF MINERAL AND ENERGY **FIRST RESPONDENT**

DIRECTOR-GENERAL: MINERAL AND ENERGY **SECOND RESPONDENT**

THE REGIONAL MANAGER: MINERAL AND ENERGY,
NORTHERN CAPE REGION **THIRD RESPONDENT**

SA SOUTWERKE (PTY) LTD **FOURTH RESPONDENT**

Coram: **MAJIEDT J**

REASONS FOR ORDER

MAJIEDT J:

1. The First, Second and Third Respondents had brought an urgent application for the postponement of the main application which has been referred for the hearing of oral evidence before Lacock J on 22, 23 and 25 September 2009. The Fourth Respondent

supported the application, while the Applicant opposed same. Ms Nkosi-Thomas appeared for the First, Second and Third Respondents, Mr. Pohl for the Fourth Respondent and Mr. Tredoux for the Applicant. I had refused the application with costs, same to be borne by all four Respondents jointly and severally, the one paying the others to be absolved. I had reserved the reasons for the order. These are they. For the sake of convenience I refer to the parties herein as they are cited in the main application.

2. The application was brought on a mere two days' notice. It was motivated on the following grounds:

2.1 That the Counsel engaged by the First, Second and Third Respondents (to whom I shall henceforth collectively refer as "*the DME*"), Ms Nkosi-Thomas, who is steeped in the matter, is no longer available on the trial dates set out in the preceding paragraph;

2.2 The ongoing criminal investigation concerning the alleged falsification or forgery of the mining permit forming the subject of the main application has not been completed as yet;

2.3 The Applicant's non-compliance with par. 5 of the order of Lacock J, relating to timeous discovery;

2.4 The Applicant's non-compliance with Rule 37.

3. The primary issue to be resolved in the main application concerns

the validity of a mining permit, MP 169/2004. It appears to be common cause between the parties that if this permit is found to be false or invalid, the Fourth Respondent would have no right to mine on a certain salt pan in the Gordonia District. The Applicant and the Fourth Respondent are in conflict concerning which one of them has the lawful right to mine on this particular salt pan.

4. The matter has a long and chequered history and it is necessary to set it out briefly to have a contextual understanding of my decision against the DME in refusing the application for postponement. The Applicant has, quite understandably, laid much emphasis in its answering affidavit on the previous conduct of the DME during the earlier proceedings herein.

4.1 The Applicant launched the main application during March 2007 to compel the DME to issue the Applicant's approved mining right and to set aside the Fourth Respondent's alleged mining right, purportedly issued under the contested mining permit.

4.2 The DME adopted a somewhat ambivalent attitude to the main application. It initially filed a notice to oppose which was subsequently withdrawn. Thereafter it filed a new notice to oppose.

4.3 The matter was enrolled for 23 May 2008 and on 14 May 2008 the DME for the first time filed an answering affidavit, completely out of time. The deponent on behalf of the DME (Mndaweni) stated that the DME would abide the decision of the Court and that this affidavit was being filed purely for the assistance of the Court. He also, however, pertinently stated that the relief sought in the Notice of Motion is opposed only to the extent that it entailed the Court usurping the statutory functions of the DME. The Applicant is correct that one can deduce from the stance adopted by the DME in the aforementioned answering affidavit in the main application that the DME did not place in issue any of the matters referred for oral evidence.

4.4 As a consequence of the late filing of the aforementioned answering affidavit by the DME in the main application, that matter was postponed *sine die,* so that the Applicant could file a reply thereto. The DME took the position at that stage that Fourth Respondent's mining permit was indeed valid and that the Applicant's mining right was approved erroneously. In October 2008 the Applicant filed a detailed replying affidavit, replying extensively to the DME's averments and furnishing compelling evidence by a handwriting expert to show that the Fourth Respondent's mining permit is indeed false. In this replying affidavit all the Respondents were invited to file a further set of affidavits to respond to the replying affidavit which was filed on 6 November 2008. None of the Respondents took up this invitation.

4.5 The Applicant was desirous of obtaining an early trial date, but was unsuccessful. It consequently brought an urgent interim application on 24 October 2008 for hearing on 7

November 2008. The objective of this urgent interim application was to interdict the Fourth Respondent's mining activities pending the resolution of the issues in the main application.

4.6 The urgent interim application was opposed by the Fourth Respondent and although DME filed a notice of opposition, it did not file any answering affidavits in the time allocated for it.

4.7 On 5 November 2008, i.e. two days prior to the date of hearing of the interim application, the DME again filed an affidavit out of time wherein it was indicated that the DME did not wish to oppose the interim application but wanted to be of assistance to the Court. On behalf of the DME it was stated in this affidavit that the DME was no longer certain about the correctness of its position adopted in the previous affidavit in the main application. It requested an opportunity to fully investigate the matters concerning the issuing of the permit on which the Fourth Respondent relied and which was the primary issue in the main application.

4.8 When the interim application was heard it appeared that the Applicant's replying papers were never served on the DME and the DME insisted that that matter be postponed so that the replying papers could be studied. The matter was then postponed to 1 December 2008 for this purpose.

4.9 On 1 December 2008 the DME had no legal representation whatsoever at the hearing. The matter came before me and I expressed my regret about DME's absence, particularly because it had undertaken to conduct a thorough investigation into the issuing of the disputed mining permit. The Applicant correctly emphasizes in its answering affidavit in the present proceedings that it was of serious concern that the DME was absent at the hearing on 1 December 2008, because the matter had been postponed to that date specifically at the DME's request. I dismissed the urgent interim application and furnished full reasons therefor.

4.10 Thereafter a date was obtained for the hearing of the main application, namely 5 June 2009. No further affidavits were filed by the parties and heads of argument and practice notes were filed in the normal course of events prior to the aforementioned court date. Suddenly and unexpectedly on 1 June 2009 the Third Respondent filed an affidavit of one Mr. PF Swart who had taken over the post of Regional Manager from Mr. Ndaweni (the previous deponent). It emerged from the affidavit of Mr. Swart that it was intended to be a follow-up to the previous affidavit. This affidavit is quite disappointing in that it contributes nothing new to the matter and it also appears therefrom that no detailed investigation was conducted into the validity or otherwise of the disputed mining permit as had been promised. Mr. Swart simply made the bold allegation that he had studied the records (which he did not annex to his affidavit) and that he is satisfied that the mining permit on which the Fourth Respondent relies, is indeed valid. The Applicant avers in his answering affidavit that Mr. Swart could not have made a reference to any records, because they had all been discovered and no such records were in any event attached in support of his contentions. The DME had thus vacillated between an acceptance of the validity of the disputed mining permit, to uncertainty thereon and then back again to the original stance.

4.11 The matter became before Lacock J who was not satisfied with this state of affairs and indicated that a number of limited issues ought to be referred for oral evidence, given the serious disputes of fact on the papers. The parties thereafter considered a draft order presented to them and it was agreed that the matter be referred for oral evidence on the dates agreed upon, namely 22, 23 and 25 September 2009. It is important to note that these particular dates were carefully considered and agreed upon taking into account the availability of the parties, their legal representatives and Lacock J who indicated that he preferred to hear the matter himself, since he was familiar with the papers which are quite voluminous, approximately 1000 pages in total. Of particular importance is to note that Ms Nkosi-Thomas, who was acting for the DME as she has done throughout these proceedings, pertinently indicated that the dates suited her, although she was involved in another matter from 14-18 September 2009 elsewhere.

With this background in mind, I now turn to a consideration of the grounds advanced in support of the application for postponement.

5. The point of departure is that a Court has a discretion, to be exercised judicially upon consideration of all the relevant facts, as to whether or not to grant a postponement. An overriding consideration would be the issue of prejudice to the respective parties. An applicant who seeks a postponement seeks an indulgence from the Court and must therefore show good and strong reasons for the postponement, i.e.an applicant must furnish a full and satisfactory explanation of the circumstances giving rise to such application.

   See generally in this regard:

   McCarthy Retail Ltd v Shortdistance Carriers CC 2001(3) SA 482 (SCA) at 494 D;

   National Police Service Union and others v Minister of Safety and Security and others 2000(4) SA 1110 (CC) at 1112 C-F.

6. An applicant who seeks the postponement of a matter must make such application timeously and as soon as the circumstances which might justify such an application become known to the applicant.

   See:

   National Police Service Union v Minister of Safety and Security, ***supra*** at 1112 E;

   Shilubana and others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as *amici curiae*) 2007(5) SA 620 (CC) at 624 B.

7. In **Lekolwane v Minister of Justice and Constitutional Development 2007(3) BCLR 280 (CC)** at par [17] the following factors were added for consideration as to whether to grant a

postponement or not, namely:

7.1 The broader public interest;

7.2 The prospects of success on the merits.

8. In **Myburgh Transport v Botha t/a SA Truck Bodies 1991(3) SA 310 (NmSC)** at 315 B-C, Mohamed AJA held as follows:

> *“A Court should be slow to refuse a postponement where the true reason for a party’s non-preparedness had 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.”*

9. On behalf of the Applicant Mr. Tredoux has contended that in truth and in fact the only reason for the application for postponement is the fact of Ms Nkosi-Thomas’s unavailability. There is substantial merit in Mr. Tredoux’s aforementioned contention. It appears from the founding affidavit deposed to by the State Attorney, Ms Gcilitshana, that Ms Nkosi-Thomas’s other matter which was set down for 14-18 September 2009 is going to run over into the dates set aside for the hearing before Lacock J in the main application. While that eventuality was unforeseen at the time when dates were arranged in concurrence with Ms Nkosi-Thomas, I am not persuaded that she is the only Counsel who, albeit being steeped in the matter having been engaged in it from the start, is able to conduct the case for the DME herein.

10. It appears that the other factors enumerated above in support of the application for postponement were added as an afterthought

and, as I shall show, do not *per se* constitute sufficient grounds for a postponement anyway. While the papers in the main application are voluminous (as I have stated it runs to some 1000 pages), the issues in my view are relatively straightforward. The Applicant has furnished an affidavit by a handwriting expert in which he sets out the investigations he has done into the disputed document (the mining permit) and his conclusion that it has indeed been falsified. The absence of an affidavit from a handwriting expert controverting that of the Applicant's handwriting expert is glaring. If another Counsel should take over the matter from Ms Nkosi-Thomas on behalf of the DME, all that would be required of him or her would be to test the correctness of the handwriting expert's conclusions and to cross-examine the witnesses who would be called by the respective parties before Lacock J. As a consequence I am of the view that the unavailability of Ms Nkosi-Thomas can certainly not be a ground for the postponement of the main application.

Generally speaking, the unavailability of a particular legal representative is not a good ground for granting a postponement.

See:

D'anos v Heylon Court (Pty) Ltd 1950(2) SA 40 (C);

Centirugo AG v Firestone (SA) Ltd 1969(3) SA 318 (T).

11. Moreover and in any event, there has been a substantial delay in bringing the application for postponement from the time that it became apparent that Ms Nkosi-Thomas would not be available to appear for the DME on the dates agreed upon. As early as 4 August 2009 the State Attorney became aware that Ms Nkosi-Thomas would not be available to appear in this matter. Certain

correspondence was exchanged with the attorneys acting for the Applicant, who made it very clear from the outset as early as 19 August 2009 that they would not agree to a postponement and that a substantive application would be required for the postponement. Notwithstanding this, the DME waited until 9 September 2009 to issue the application. During argument emphasis was placed on the fact that the date for the hearing before Lacock J is a matter of weeks away. It seems to me that this predicament was created by the DME itself in delaying its application for postponement for such an undue length of time.

12.1 The DME bemoans the fact that Applicant has failed to comply with the time periods set down by Lacock J in his order concerning discovery. In that order it was required of a party who intended to make use of documentation not already contained in the papers to make discovery within 30 days of the date of the order, i.e. 5 June 2009.

12.2 It is common cause that the Applicant's discovery was made out of time. The Applicant's explanation is that it was awaiting discovery by the DME, since the DME was conceivably the only party which had additional documentation to discover.

12.3 The Applicant explained further that it acted pro-actively by serving a Rule 35(1) and Rule 35(3) notice on the DME on 19 June 2009 to request certain specific documents in the DME's possession. The DME did not comply with this request in that a large portion of the documents requested were not discovered.

12.4 On 15 July 2009 Rule 35(3) and Rule 35(12) notices were served on the DME in respect of the outstanding documents. The DME thereafter discovered only certain documents and on 4 August 2009 the Applicant brought an application to compel the DME to discover the rest of the documents.

12.5 The matter was enrolled for hearing on 14 August 2009 and on that day it was postponed for a week until 21 August 2009 in order to give the DME sufficient opportunity to comply with the request. On 21 August 2009, absent any further discovery, Kgomo JP ordered the DME to comply with the discovery notice on or before 26 August 2009.

12.6 It is of considerable concern that, notwithstanding the aforementioned order, the DME has still not at the date of the hearing of the matter before me, complied with the order. The DME, advancing the Applicant's non-compliance with the order of Lacock J in respect of discovery, is therefore before this Court with unclean hands and is in fact in contempt of the order of Kgomo JP as aforementioned.

13.1 The DME complained of and advanced as a ground for postponement the Applicant's non-compliance with Rule 37. In para 6 of his order Lacock J envisaged that the parties would conduct a Rule 37 pre-trial conference not less than three weeks prior to the date of hearing at Kimberley, i.e. at the latest on 1 September 2009.

13.2 The Applicant explains that it once again acted pro-actively by enquiring from the parties in writing on 5 August 2009 as to suitable dates for the Rule 37 conference and it proposed the date of 31 August 2009.

13.3 By 13 August 2009 none of the Respondents had reacted to the aforementioned written request and on that date the Applicant served a Rule 37(2) notice on the Respondents to attend a Rule 37 conference at 09h30 on Monday 31 August 2009. The DME reacted to this notice by indicating in writing to the Applicant on 13 August 2009 that it would revert on the suitability of the date of 31 August 2009. As an aside it was also indicated on this date that the DME's Counsel was no longer available on the dates allocated for hearing in the main application.

13.4 On 19 August 2009 the Applicant's attorney again wrote to the State Attorney indicating *inter alia* that the Applicant is opposed to a postponement of the matter. The State Attorney replied thereto on 21 August 2009 stating that Counsel was definitely not available on the dates of hearing. Nothing was however mentioned in this letter of 21 August 2009 concerning the suitability of the proposed date for the Rule 37 conference, 31 August 2009.

13.5 On 24 August 2009 the Applicant's attorney served an agenda for the Rule 37 conference on the Respondents. The Fourth Respondent replied to this notice by suggesting 28 August 2009 as a suitable date. The DME replied through the State Attorney on 27 August 2009 to the effect that 2 and 3 September 2009 would suit their Counsel. It is significant to note that at this stage there was still no complaint from the State Attorney regarding the Rule 37 conference or the agenda.

13.6 In the meantime the Fourth Respondent and the Applicant reached a suitable arrangement regarding the Rule 37 conference.

13.7 On 2 September 2009 the State Attorney wrote to the Applicant's attorney seeking a postponement of the matter and tendering costs. The State Attorney also raised for the first time complaints and objections regarding the Rule 37 notice and the proposed agenda. One of the complaints was that the Rule 37 notice amounted to an interrogatory concerning the DME's case and was tantamount to a request for further particulars for trial. A further complaint was that this Rule 37 notice was not delivered not later than 10 days prior to the pre-trial conference as envisaged in Rule 37(4). The Applicant's attorney responded in full on 3 September 2009 to these complaints.

13.8 Consequently and based on the aforementioned sequence of events, I am satisfied that the ground advanced in respect of the Rule 37 notice is a red herring and conceals the true reason for the application for postponement, namely Counsel's unavailability. If indeed the DME had a valid complaint regarding the nature of the Rule 37 notice in that it amounted to an interrogatory, the obvious solution was to simply say so in the reply.

14. Lastly there is the matter of the so-called ongoing criminal investigation. As indicated in this judgment, despite an undertaking contained in an affidavit to conduct detailed

investigation, the DME has palpably failed to have such an investigation conducted. With regard to the so-called criminal investigation which is ongoing, the Applicant's attorney states under oath that he had made contact with the officer in charge of that investigation, who indicated that in turn the SAPS was awaiting the outcome of the hearing of oral evidence before Lacock J to ascertain whether any credibility findings are made. It seems to me to be a catch 22-situation. In any event this criminal investigation has been dragging for more than two years already. Nothing tangible has emerged from it thus far. This is not a situation where there are concurrent civil and criminal proceedings pending concerning the same subject-matter. This is merely a criminal investigation and therefore no criminal proceedings are pending. The present matter therefore has to be distinguished from those cases where a civil action ought to be stayed because there are concurrent criminal proceedings pending.

See in this regard:

Erasmus, Superior Court Practice at B1-306 C.

15. For the abovementioned reasons and given the DME's history of tardiness in the matter as detailed above, I took the view that the interests of justice demand that the matter proceed on the dates as allocated before Lacock J. It is known and the Applicant has alluded thereto in its answering affidavit, that a date for this hearing will probably only be obtained sometime in the course of the first term of 2010. Given the history of this matter and the averments contained in the Applicant's handwriting expert's affidavit, a postponement of the main application would be to the serious detriment of the Applicant and would not serve the

interests of justice. I had consequently issued the order as set out in the opening paragraph of this judgment.

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FOR THE PLAINTIFF	:	ADV JC TREDOUX
INSTRUCTED BY	:	HAARHOFFS INC.
FOR RESPONDENTS 1, 2 AND 3	:	ADV L NKOSI-THOMAS
INSTRUCTED BY	:	STATE ATTORNEY
FOR RESPONDENT 4:	:	ADV L POHL
INSTRUCTED BY	:	DUNCAN & ROTHMAN ATTORNEYS