



IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT. PRETORIA)

CASE NO: 32000/06

DATE: 2008-11-19

In the matter between:

KAREE ROADS (PTY) LIMITED

Applicant

And

STANDARD BANK SA LIMITED

1st Respondent

GEO COMPACTION DYNAMICS CC

2nd Respondent

LYNNCON CONSTRUCTION (PTY) LIMITED

3rd Respondent

J U D G M E N T

LEGODI J: Before me, it is an application for a postponement of the hearing of the main application. The application is being brought on the same day of the enrolment of the main action. In the main application, the applicant was granted an interim order in terms whereof the Standard Bank was prohibited from paying the second respondent an amount of R1 803 250 in terms of a guarantee in favour of the second respondent, pending finalisation of the main application. The interim order was granted on 3 October 2006 in an urgent motion court.

The answering affidavit in die main application was delivered on 12 June 2007. Subsequent thereto, an application for a joinder of Lynncon Construction (Pty) Limited as the third respondent was launched by the applicant.

As a further background, during or about July 2006 the applicant and the third respondent entered into a written agreement, (hereinafter referred to as the 'third agreement'), in terms whereof the applicant as a contractor undertook to do certain bulk excavations, including certain excavations and lateral support work for the third respondent regarding a project at Absa Highveld Gardens.

The applicant, on the other hand, approached the second respondent to tender on certain lateral support work to be done at the site, as a subcontractor to the applicant. The applicant accepted a quotation from the second respondent in the sum of R1 581 800, excluding VAT. On or about 11 July 2006 the applicant and the second respondent entered into an oral agreement in terms whereof the applicant was to arrange for a demand guarantee with Standard Bank in favour of the second respondent for the sum of R1 803 252, being R1 581 800 plus VAT. This guarantee was duly issued by Standard Bank on 15 August 2006. I deal with this guarantee later in the judgment.

On the 4 September 2006, the applicant made payment to the second respondent in the sum of R270 607,50, being R300 675 less 10% retention. This was referred to during the discussion as the first invoice.

On 18 August 2006 in what was referred to as second invoice, the second respondent demanded payment in the amount of R1 386 867 from the applicant.

This amount would have become due and payable on 18 September 2006, as the invoice, once submitted, was supposed to-be settled within 30 days.

On 29 September 2006 the third respondent queried the work done on site and in particular it was indicated that the required thickness of the retaining walls could not be achieved due to the excavation and lateral support work not being correctly done. Remember that excavation was to be done by the applicant, the second respondent was subcontracted to the applicant to do the lateral support work.

This complaint by the third respondent was brought to the attention of the second respondent by the applicant to whom the complaint was addressed. Based on the complaint, the second respondent was apparently told that he would not be paid on the second invoice. This then resulted in the second respondent demanding the guarantee in the sum of R1 803 252. I deal later in this judgment with the said demand.

This demand then led to the institution of an urgent application which was heard on 3 October 2006 when the interim order referred to earlier in this judgment, was made. On 2 June 2008, by agreement, the main application was removed from the roll. As on that day, the replying affidavit in the main application was not delivered yet. A notice of reinstatement of the main application was delivered by the second respondent on 9 October 2008, having set the matter down for hearing for 17 November 2008.

On 31 October 2008 the applicant in a letter to the second respondent's

attorneys requested a postponement of the main application pending the application to join the third respondent to the main application. On 7 November 2008 the second respondent indicated its unwillingness to have the main application postponed. On 13 November 2008 formal application for a postponement was delivered and set down for hearing on 17 November 2008.

Two applications are therefore before me, the main application and an application for a postponement. Before I can hear or deal with the main application, I have to make a decision on the application for a postponement.

The principle applicable in regard to consideration of an application for a postponement, can be summed up as follows: The court has a discretion as to whether an application for a postponement should be granted or refused. The court has a discretion to refuse a postponement even when wasted costs are tendered, or even when the parties have agreed to postpone the matter. The discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons.

An applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons. The applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. A court should be slow to refuse a postponement where the true reason for a party's nonpreparedness 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 granted. It must be made timeously as soon as the circumstances which

might justify such an application become known to the applicant.

Where, however, fundamental fairness and justice, justify a postponement, the court may in appropriate cases allow such an application for a postponement, even if the application was not timeously made.

Perhaps I must pause for a moment to deal with the delay in this matter, both with regard to the filing of an answering affidavit to the main application, the launching of a joinder application and lastly, the application for a postponement.

The refusal to pay the second respondent was as a result of the letter of 29 September 2006 in terms of which the work done by both the second respondent and the applicant was questioned by the third respondent, Lynncor Construction (Pty) Limited. The applicant, therefore, knew as in September 2006 that the third respondent's substantiation of his complaint about the work done was important and therefore one might be tempted to say that the joinder application should long have been launched.

However, the explanation by the applicant is that it tried to resolve the matter amicably with the third respondent on its complaint regarding the defective work. Although it was contended that the applicant had failed to produce documentary proof that it so attempted to resolve the matter amicably with the respondent, I have no reason to doubt that some sort of discussion must have ensued between the applicant and the third respondent. Remember, the applicant has an interest in the finalisation of the matter as the third respondent would not pay the applicant for its services. It was therefore in the best interest of the applicant to ensure

finalisation of the complaint by the third respondent.

The application for a joinder was launched only in October 2008. This was, of course, after a long time regard being had to the fact that a complaint by the third respondent regarding the defective work was raised in September 2006. This delay should, however, be seen in the light of the answering affidavit in the main application. The answering affidavit was only delivered in June 2007. Secondly, allegations made in the answering affidavit made it even more convinced that the third respondent has to be joined to the main application. The delay from June 2007 until October 2008 is also attributable to efforts taken to try and convince the respondent otherwise.

Similarly, the second respondent delayed in the delivery of its answering affidavit to the main application. This was despite the order which was made on 3 October 2006 in terms of which the second respondent was required to deliver its answering affidavit within 15 days from 3 October 2006. It too, that is, the second respondent, did not file the answering affidavit in time because it had hoped that the matter would be resolved after the applicant had agreed not to insist on the time limit set out in the order of the court, which was made on 3 October 2006.

Fundamental fairness and justice should therefore be found to justify the delay, although a too long delay should be of concern to this court.

An application for a postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled. Consideration of prejudice will ordinarily

constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised. The court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order for cost or any ancillary mechanism. The balance of convenience or inconvenience to both parties should be considered. The court should waive 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 granted.

The prospects of success on the merits are also a factor which has to be considered in an application for a postponement. This is what I am being asked to do in this matter, that is, the main application should be entertained on the merits without a reply to the allegations made in the answering affidavit, so it was contended on behalf of the second respondent.

Remember, three sets of affidavits are allowed in a motion proceeding, unless specifically excluded. An applicant is entitled to reply to the answering affidavit in a third affidavit referred to as a replying affidavit. The contention, as I understood it, is that whilst the applicant cleverly in its reply to the answering affidavit in the postponement application failed to deal with the allegations contained in the second respondent's answering affidavit in the main application, he should still be found to have given a clue what is intended to be alleged in such a reply in the main application.

This should be seen in the light of the further contention on behalf of the second respondent, that is, the applicant has no case on the fourth agreement,

being a guarantee in favour of the second respondent. This is said to be a matter between Standard Bank and the second respondent, which has nothing to do with any dispute between the applicant and the second respondent, or the third respondent. Their submission went further to say, the applicant and third respondent have no business of their own regarding the guarantee. As I understood their submission, once a demand is made on the guarantee, the Standard Bank was under obligation to pay. Whatever dispute might be there between the applicant and the second respondent or the third respondent or the three of them, cannot have a bearing on the second respondent's entitlement to the guarantee. I will return later to this submission.

The applicant in the present case is entitled to reply to the answering affidavit. The real issue, as I see it, in this regard is whether the applicant would be prejudiced in the conduct of its case if it was to be forced to proceed with the matter without reply to the answering affidavit in the main application. I understood the submission in this regard to be there can never be an answer or a reply to the second respondent's demand on the written guarantee and that therefore whatever evidence the applicant wishes to present in the form of replying affidavit and/or opposing affidavit by the third respondent, would not be relevant to the second respondent's entitlement in terms of the guarantee.

In dealing with all of this, one must have regard to the prospects of success on merit as a factor which has to be considered in an application for a postponement. I need to caution whatever I might express in this regard should not be seen as a final determination on the matter. I have been referred to a number of authorities dealing with one's entitlement to a payment on the basis of a

guarantee made in one's favour. I have had a look at these decisions, firstly, all the decisions were not dealing with an application for a postponement. Secondly, in all the cases I was referred to, there was no question of replying affidavit still outstanding. Decisions in those cases were made not on uncompleted set of evidence.

Coming back to the contention on behalf of the second respondent, I was asked to confine myself to a guarantee in determining whether or not there could ever be a defence to it. The first sentence of the guarantee reads as follows, this is in a letter addressed to the second respondent by Standard Bank,

"We, the Standard Bank of South Africa Limited, registration number 1962/000738/06 (The Bank) undertake to pay Geo Compaction Dynamic cc (The Beneficiary) the sum of R1 803 252 (Guaranteed Amount) on receipt of a first written demand for payment from Beneficiary stating that the amount is due and payable by Karee Roads (Pty) Limited 1994/008330/07 (The Principal) in terms of an agreement (The Agreement) between the principal and the beneficiary."

Two conditions are attached to this guarantee. First, there must be written demand for payment from the second respondent. Secondly, it must be stated in the written demand for payment that the amount is due and payable by the applicant in terms of the agreement between the applicant and the second respondent I need to emphasize "beneficiary stating that the amount is due and payable by Karee Roads (Pty) Limited 1994/008330/07 in terms of an agreement between the principal and the beneficiary."

Second respondent in the letter of 2 October 2006 made a demand for

payment in terms of the guarantee as follows,

"I, Eben Blom, being the sole member of Geo Compaction Dynamics cc hereby request payment of the sum of R1 803 252 which is due and payable by Karee Roads (Pty) Limited 1994/008330/07 (The Principal) in terms of the agreement between the principal and the beneficiary."

Here, it is conveyed to Standard Bank that the amount of R1 803 252 is due and payable in terms of the agreement between the second respondent and the applicant.

The second respondent sought to argue that there is no connection between the guarantee agreement, or fourth agreement, as it was referred to during the submission and that the agreement between the applicant and the second respondent. Remember, the fourth agreement is being seen as an agreement between the first and second respondent only, with no reference to the applicant. I cannot agree with this, again I need to be cautious how I express myself in this regard. I do not want an impression to be created that I am making a final finding.

The amount claimed on the basis of the written demand must be due and payable in terms of the relationship between the applicant and the second respondent. This, in my view, makes reference to both the applicant and the second respondent. For payment to be forthcoming in terms of the guarantee, the second respondent must be entitled to it.

Put it this way, can the second respondent be entitled to call on the guarantee in respect of amount which is not due and payable? I do not think so.

In this case it is common cause that on 2 October 2006, when the demand

for payment in the amount of R1 803 252 was made, only R1 386 867, as per the invoice of 18 August 2006, was due and payable. The applicant's submission that the second respondent as on 2 October 2006 was not entitled to the whole amount as claimed in the demand, in my view, cannot be construed as having no substance. Final determination in this regard must be deferred should a postponement be granted in this matter.

Presentation or submission of the first written demand for payment of the whole amount as indicated in the demand in the face of the knowledge that only R1 386 867 was due and payable, is seen as fraud entitling the applicant to obtain an interdict that the first respondent should not pay in terms of the guarantee. Indeed, if the second respondent was to be found to have known that at the time it submitted the demand and that it was cautious of the fact that much more less than the amount demanded was due and payable, a finding of fraud could be made against it. Again, this is an issue which should be deferred to be determined in the main application, should a postponement be granted in this matter.

I do not think that the papers, as they are before me, could justify a final finding on the issue of fraud. However, a concession by the second respondent that less than what was demanded was due and payable, cannot be seen as putting no substance to the applicant's allegation of fraud. This must be deferred to be fully ventilated in the main application.

Having said this, I do not think that it is necessary to go further in dealing with the rest of the submissions made. It suffices to say, it will not be in the best interest of justice to deal with the main application on merits, firstly, without the replying affidavit and, secondly; before application for a joinder is finalised. Whilst

on this point, I must say, third respondent appears to have been the cause of the dispute between the applicant and the second respondent.

The application for a joinder was delayed, I do not think that it could be seen as not having any relevance. This again would be deferred for ventilation in the application for joinder.

As I said earlier in this judgment, an application for a postponement seeks an indulgence. Generally when such indulgence is exercised in favour of an applicant for a postponement, the innocent party should be compensated by way of an order for cost in its favour. The request for a postponement, having been made on 31 October 2008, was only responded thereto on 7 November 2008. The suggestion was that this should justify the refusal of a cost order against the applicant occasioned by the postponement.

The applicant, however, only filed a substantive application for a postponement on 15 November 2008, this leaving the second respondent with not much time. As one would have expected, the second respondent having reacted to the application on 14 November 2008, the applicant only managed to file its replying affidavit on Monday, 17 November 2008, that is on the date of the hearing of the main application.

An order for cost is an exercise of discretion which has to be judicially exercised, having regard to what is fair to the parties. It is the pending application for a joinder that has caused the request for a postponement of the main application. This application for joinder was brought late by the applicant. This

should be seen as a further factor to be considered regarding cost.

The second respondent employed two counsel, senior and junior. The nature of the dispute in the matter, particularly the main application, is such that the second respondent would have been entitled to employ the services of two counsel.

ORDER

Consequently an order is hereby made as follows,

1. The application for a postponement is hereby granted.
2. The main application is postponed *sine die*.
3. The applicant to pay waste cost occasioned by the postponement, such cost to include cost of two counsel.

ON BEHALF OF APPLICANT: ADV P M VAN RYNEVELD

ON BEHALF OF THE RESPONDENT: ADV P G ROBINSON