

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2022-013143

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

.....
SIGNATURE

13 JANUARY 2025

In the matter between :

THE STANDARD BANK OF SOUTH AFRICA LIMITED

Applicant

and

KHEWIJA ENGINEERING & CONSTRUCTION (PTY) LTD

First Respondent

LAVEHELESENI ELISAH DLADLA

Second Respondent

THEMBA MABUZA

Third Respondent

KHEWIJA ASSETS AND VEHICLES (PTY) LIMITED

Fourth Respondent

KHEWIJA HOLDINGS (PTY) LIMITED

Fifth Respondent

JESPER MOLLEBEAK LARSEN

Sixth Respondent

REASONS

WANLESS J

Introduction

[1] This matter has suffered several unfortunate delays due to, *inter alia*, various administrative errors and other shortcomings. These reasons will not be burdened unnecessarily by dealing therewith.

[2] Ultimately, the Respondents have requested reasons for the orders made by this Court on the 12th of March 2024 whereby, in the Unopposed Motion Court, an application by the Respondents for a postponement of the matter was dismissed (with costs) and judgment in respect of the Applicant's monetary claims was granted in favour of the Applicant (with costs).

[3] The history of this matter is common cause between the parties. In the premises, these reasons will not be burdened unnecessarily by setting out the lengthy history of this matter (going back as far as November 2022).

[4] In this regard, it is important to note that, at the time of providing these reasons, transcripts of the proceedings before this Court on the 6th and 12th of March 2024, in the Unopposed Motion Court, have now both been uploaded onto Caselines. In the premises, these reasons should be read as if the contents thereof are incorporated herein.

Reasons for the order refusing the application by the Respondents on 12 March 2024 for a postponement.

[5] An application by the Respondents for a postponement of the matter *sine die* was served upon the Applicant during the course of the afternoon of the 11th of March 2024 (*the day before the hearing on the 12th of March 2024*). The relief sought by the Respondents (*as set out in the Respondents' Notice of Motion*) was that the application be postponed *sine die* and that the costs be costs in the cause, *alternatively*, the Respondents pay the costs, jointly and severally, occasioned by the postponement. No answering affidavit was filed by the Respondents and the Respondents sought no order in respect thereof. At the date of this Court providing these reasons the Respondents have not filed an answering affidavit or taken any steps to secure an order from this Court that they be granted leave to do so.

[6] In this application for a postponement of the application *sine die* the Respondents relied principally (*if not solely*) upon "*prejudice*", by submitting that in the event of this Court declining to postpone the application and granting judgment in favour of the Applicant the Respondents would be prejudiced. It was further submitted that a postponement of the matter *sine die* would not prejudice the Applicant as the Applicant is "*a large financial institution*".

[7] The principles to be applied to every application for the postponement of a matter (*to be decided by a court when exercising its discretion judicially and applying those principles to the accepted facts*) are fairly trite. In the exercise of its discretion this Court dismissed the application (*with costs on the scale of attorney and own client*) having considered the principles set out hereunder and having applied those principles to the particular facts (*and history*) of the matter before this Court as at the 12th of March 2024.

[8] The general underlying principle in relation to applications for a postponement is that the postponement of a matter cannot be claimed as a right since the applicant in an application for a postponement seeks an indulgence from the court.

[9] This principle was considered by the Constitutional Court in the matter of *National Police Service Union and Others 2000 (4) SA 1110 (CC) at, inter alia, 1112C – G*, where it was held that a postponement will not be granted unless the court is satisfied that it is in the interests of justice to do so. In order to do this, an applicant must show good cause for the interference with the other party's procedural right to proceed with the matter and the generally accepted doctrine of "*finality*". (*At 1112D; Persadh v General Motors SA 2006 (1) SA 455 (SE) at 459F*).

[10] It was further held by the Constitutional Court that what is in the "*interests of justice*" will be determined not only by what is in the interests of the parties themselves but also by what, in the opinion of the court, is in the public interest (*at 1112G*).

[11] A court has a discretion (*See paragraph [7] ibid*) as to whether to grant or refuse the indulgence (*Persadh at 459F*) and in exercising its discretion must ensure fairness, justice and efficiency in judicial proceedings (*Legal Practice Council v Kleynhans 2024 JDR 3341 (WCC) at page 10, paragraph 20*). In order to do so, a court should take into account a number of factors.

[12] These factors include, but are not limited to, the following (*National Police Service Union at 1112E – F*), namely:

12.1 whether the application has been timeously made (*See also Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NmS) at, inter alia, 315C – E*).

12.2 whether the explanation given by the applicant for postponement is full and satisfactory and a compelling justification supported by evidence under oath supporting the necessity for delaying the matter, is given (*Legal Practice Council v Kleynhans 2024 JDR 3341 (WCC) at page 10, paragraph 20*).

12.3 whether there is prejudice to any of the parties and whether the application is opposed (*Persadh v General Motors SA 2006 (1) SA 455 (SE) at 459G*).

[13] It is also well-established that an application for a postponement must always be *bona fide* and must not be used simply as a tactical manoeuvre for the purpose of the applicant obtaining an advantage to which the applicant is not legitimately entitled or as a delaying tactic (*Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NmS) at 315C – E*).

[14] Usually, the party seeking the postponement or who is responsible therefor, will be ordered to pay the costs occasioned by the postponement (*Persadh v General Motors SA 2006 (1) SA 455 (SE) at 459G*). In the event of the application being refused the trite principles in respect of costs will apply.

Application of the aforesaid principles to the facts of the present matter.

[15] The application by the Respondents for the postponement of the application *sine die* was, in the exercise of this Court's discretion and based on the facts of the matter, dismissed by this Court for the following reasons, namely:

15.1 the application was not brought timeously. It was brought on the afternoon of the 11th of March 2024 and the matter had been postponed by this Court from the 6th of March 2024 to the 12th of March 2024;

15.2 the application was not brought *bona fide* but simply as a delaying tactic. On the 6th of March 2024 the Third Respondent requested a postponement on the basis that the Respondents wished to instruct new attorneys and to be allowed a final attempt to settle the monetary claims of the Applicant. Most importantly, at the hearing on the 6th of March 2024, the Third Respondent stated that the Respondents had no defence to the claims of the Applicant but sought a postponement to attempt to settle the matter with the Applicant. However, in the Founding Affidavit deposed to by the Third Respondent in the application for the postponement of the matter *sine die*, it is stated, *inter alia*, that the reason for the postponement is for the Respondents' latest attorneys to familiarise themselves with what is described as a "*complex matter*" and for the Respondents to oppose the application (*which could only mean the filing of an answering affidavit*). At the same time, this Founding Affidavit failed to disclose the nature and grounds of any opposition to the relief sought by the Applicant;

15.3 in addition to the facts as set out above the history of this matter contains numerous instances where the Respondents have engineered delays to avoid the finalisation of the application (*despite the Respondents having no defence whatsoever to the claims against them by the Applicant as this Court was informed by the Third Respondent*);

15.4 the so-called "*explanation*" given by the Applicant for postponement is far from full and satisfactory. The application for a further postponement does not satisfy the requirement of providing compelling justification, supported by evidence under oath, which supports the necessity for delaying the matter further. This flies in

the face of the doctrine of finality (*Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae) 2008 (2) SA 472 (CC) at pages 478 – 479; paragraph [31]*);

15.5 the Applicant's reliance upon "*prejudice*" (See paragraph [6] *ibid*) is misconstrued. The fact that the sums involved are substantial does not mean that the Respondents will be prejudiced to a greater extent than the prejudice which the Applicant would have suffered had the matter been postponed *sine die*. A further delay in the finalisation of the matter, particularly in light of the fact that the application was served upon the Respondents during November 2022; the fact that the Respondents have failed, to date, to file an answering affidavit and the fact that the Respondents have no defence whatsoever to the claims by the Applicant, would have been highly prejudicial to the Applicant. A costs order (*even on a punitive scale*) in respect of the postponement of the matter on the 12th of March 2024 would have done very little (*if anything*) to cure the prejudice suffered by the Applicant. This is particularly so when regard is had to the substantial amounts owing by the Respondents to the Applicant in the present matter;

15.6 the Respondents failed to provide a full and satisfactory explanation or compelling justification in the application which would have enabled this Court to exercise its discretion in favour of the Respondents and grant the relief sought by them;

15.7 the application is *mala fides* and an abuse of process. On the facts of the present matter, it is clear that it is nothing more than a delaying tactic. In addition thereto, it appears that the First Respondent is no stranger to the utilisation of these tactics (*Van der Steen NO and Another v Khewija Engineering Construction (Pty) Ltd 2022 JDR 2899 (GJ)*) Hence, it would not have been in the public interest (See paragraph 10 *ibid*) if this Court had, on the facts before this Court, granted a postponement of the application *sine die* thereby further delaying the finalisation of the matter (*particularly where the Respondents have no defence to the Applicant's claim for payment*).

Reasons for the granting of the order on 12 March 2024 in terms of which the Respondents are liable to pay certain amounts to the Applicant

[16] Once this Court had dismissed the application for a postponement, there was, as at the 12th of March 2024, no *de facto* opposition to the relief sought by the Applicant. In this regard, there was no answering affidavit from the Respondents, despite the Respondents having had ample time and having been granted ample opportunities, to file same.. The Respondents had also failed to institute any interlocutory applications (*such as, for example, an interlocutory application for the extension of time limits and/or a condonation application for the late filing of an answering affidavit*) in respect thereof. Moreover, as dealt with above, the Third Respondent had advised this Court,

when he appeared before this Court on the 6th of March 2024, that the Respondents had no defence to the monetary claims of the Applicant.

[17] This Court was satisfied that the application papers were in order and made out a case for the relief sought. In the premises, it granted the order that it did.

Costs

[18] In the exercise by this Court of its general discretion in respect of costs the award of costs on the scale of attorney and own client was justified. Furthermore, costs on a punitive scale are provided for in the agreements entered into between the parties, *alternatively*, justified by the conduct of the Respondents.

Conclusion

[19] The foregoing constitute the reasons as to why this Court dismissed the application for the postponement of the matter and granted the order whereby the Respondents are to pay to the Applicant certain amounts.


BC WANLESS
Judge of the High Court
Gauteng Division, Johannesburg

Hearing: 12 March 2024
Judgment (*Ex Tempore*): 12 March 2024
Written Reasons: 13 January 2025

Appearances:

For Applicant: C Gordon
Instructed by Martin Weir-Smith Inc.

For Respondents: N Loopoo
Instructed by Andraos and Hatchett Inc