IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – PORT ELIZABETH

Case no: 364/2013
Date Heard: 10/03/2014
Date delivered: 13/03/2014

In the matter between:

HI-LINE INVESTMENTS (PTY) LTD **PLAINTIFF**

And

ABRAHAM JACOB LAMPRECHT **1ST DEFENDANT**

MARINDA LAMPRECHT **2ND DEFENDANT**

HEIN SWANEPOEL **3RD DEFENDANT**

JUDGMENT

SMITH J:

[1] When the matter came before me on 10 March 2014 the parties had already agreed to a postponement, and had consulted the Registrar with regard to a trial date. I accordingly postponed the matter for trial to the 23rd of April 2014. The parties could however not reach agreement on the issue of costs, and Mr *Buchanan SC,* who appeared for the plaintiff, contended that the third defendant ("the defendant") should be ordered to pay the wasted costs occasioned by the postponement on the attorney and client scale, while Mr *Dyke*, for the defendant, argued that the question of costs should stand over for decision by the trial Court. It was common cause that the postponement was occasioned by the fact that the defendant was constrained to effect substantial amendments to his plea and also to file a counter claim, following admissions

which he had made at the pre-trial conference. Those pleadings were only filed on the day of the trial. After hearing argument in this regard, I reserved my judgment on the issue of costs.

[2] The circumstances which led to the postponement are briefly as follows. The plaintiff's civil action against the defendant is based on a deed of suretyship in terms of which the latter had bound himself as surety and co-principal debtor in respect of a loan in the amount of R10 274 000, which the plaintiff had lent and advanced to the principal debtor. The plaintiff's claim, in the sum of R12 150 700, include interest on the loan amount, calculated up to the 31st of July 2012.

[3] In his plea the defendant admitted having concluded the agreement, as well as the contents thereof. He, however, denied that the amount of R10 274 000 had ever been advanced by the plaintiff to the principal debtor. He furthermore asserted that he had been induced to conclude the suretyship agreement as a result of a deliberate misrepresentation by the plaintiff. The alleged misrepresentation was to the effect that the loan would be advanced to the principal debtor to enable it to discharge its loan account liabilities towards shareholders and directors; when in fact the plaintiff was aware that the money would be advanced to a different entity, namely Lamprecht Properties CC, and that the money would be used by the latter to pay its creditors.

[4] At the Rule 37 conference, which was held on 27 February 2014, the defendant, however, admitted that the loan amount had in fact been advanced and paid to the principal debtor. The plaintiff contended as a result that, in the light of this admission, the defendant's defences were no longer sustainable in

law. It furthermore advised the defendant that it would formulate a special case for adjudication and forward it to the defendant for consideration. The plaintiff thereafter duly filed a Rule 33(4) notice (on 28 February 2014), giving notice of its intention to apply, at the hearing of the matter, for the separation of the issue relating to whether, in the light of the admissions made at the pre-trial conference, it was still open to the defendant to advance the defences set out in his plea.

[5] At 15H20 on Friday, 7 March 2014, the defendant gave notice to the plaintiff that he would apply for the matter to be postponed to enable him to amend his plea and file a counterclaim. In his affidavit in support of the application for a postponement the defendant averred that at the time he instructed his attorney to oppose the application for summary judgment and draft his plea, he had been under the impression that the suretyship was in respect of monies still to be advanced to the principal debtor; when in fact the money had already been paid to the latter. This understanding did, however, not accord with the objective facts. He averred, in addition, that he had only recently been told by the first defendant that the plaintiff, represented by one Van Eeden, and the first defendant had agreed that the loan money would not be used to settle loan accounts, but would be used by Lamprecht Property CC to pay that entity's debts.

[6] The proposed amended plea and counterclaim, which had been foreshadowed in the application for a postponement, were eventually only filed at lunch-time on the day of the trial. In terms thereof the defendant pleads, *inter alia*, that the suretyship agreement did not accurately reflect what the parties had intended to record. He also claims rectification of the agreement.

[7] Mr *Buchanan* argued that the postponement was caused solely by the defendant's failure to file the amended plea timeously, and he should therefore be held liable for the wasted costs occasioned by the postponement. He argued furthermore that the degrees of lateness of the application for a postponement and the filing of the amended plea constitute special circumstances justifying a costs award on the attorney and client scale.

[8] The usual rule is that where a postponement has become necessary because of the fault or default of one of the parties, the party at fault must pay the wasted costs occasioned by the postponement. (*Burger v Coetzee 1974 SA 302 (W)* at 304-305). Where, however, the postponement became necessary as a result of blameworthy conduct on the part of both parties, the court may refuse to make an order as to the wasted costs occasioned by the postponement. (*Pullen v Robert Williams & Co* 1941 (1) PH F32 (T).

[9] Mr *Dyke* argued that the issue of costs should stand over for determination by the trial Court. He submitted that that Court will be in a better position to adjudicate the *bona fides* of the defendant's amended plea and counter-claim. I do not agree. The question as to which party should be held liable for the wasted costs has nothing to do with the merits of the case. My only concern here is whether or not either party's conduct was the cause of the postponement. I am thus in as good a position as the trial Court to decide that issue.

[10] Mr *Dyke* argued furthermore that the plaintiff was equally to be blamed for the postponement because he had failed to note an exception to the defendant's plea. He contended that if the plaintiff had complained about the

sustainability of the defences set out in the defendant's plea at an earlier stage, some agreement would have been reached with regard to the conduct of the matter, and the wasted costs could thus have been prevented. In my view this argument is untenable. The sustainability of the defendant's defences only came into question when the admission regarding the payment of the loan amount to the principal debtor was made at the pre-trial conference on 27 February 2014. Up until that stage, the defences set out in the defendant's plea, while arguably being vague and embarrassing, were certainly sustainable. I am therefore of the view that the plaintiff is not blameworthy, and that the postponement was solely necessitated by the fact that the defendant was compelled to amend his plea and to file a counterclaim. There are therefore, in my view, no circumstances present in this matter which could justify a departure from the usual rule.

[11] The only issue that now remains for consideration is whether or not the defendant should be ordered to pay the wasted costs on the attorney and client scale. An order for a party to pay costs on the attorney and client scale is unusual and drastic, and should only be made if good reasons exist. Whether or not sufficient grounds for such an order exist, depends on the circumstances of each particular case. (*Van Dyk v Conradie and Another 1963 (2) SA 413 (C)).*

[12] The purpose of such an order was explained as follows in *Nel v LandBouwers Ko-Operatieve Vereeneging 1946 AD 597,* at 607:

> "The true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of

> pocket in respect of the expense caused to him by the litigation. Theoretically a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in a party and party bill.

[13] In *Tarry and Co Ltd v Matatiele Municipality 1965 (3) 131 (E)* a postponement had been necessitated by the fact that the plaintiff had failed to serve its discovery affidavit timeously, with the result that the defendant did not have sufficient time to copy the disclosed documents. As a result the court ordered the plaintiff to pay the defendant's costs on the attorney and client scale. Kannemeyer AJ (as he then was) explained the reason for that drastic order as follows (at page 137E-F):

> "This matter was set down for trial to-day and could easily have gone on to-day without any embarrassment to anyone had there been compliance with the Rules by the plaintiff, and if not a strict compliance had there been some reaction to the defendant's repeated request for discovery. Coupled with that I am faced with the fact that the defendant has presumably, and there is nothing to suggest otherwise, had to have available here to-day witnesses from out of Grahamstown because there was no consent to a postponement and therefore that additional cost has been placed upon the defendant, and this coupled with the delay which has now been caused in my view puts this case into a special category.

[14] And in *Ferreira v Endley 1966 (3) SA 361 (ECD)* the court held that the unexplained conduct of the plaintiff in failing to file his affidavit timeously and in a complete form, amounted to negligence of a high degree, and consequently ordered the plaintiff to pay the wasted costs occasioned by the postponement on the attorney and client scale.

[15] I am not convinced that there are sufficient grounds for such a drastic costs order in this matter. In my view, the facts in this case are clearly distinguishable from those in *Tarry & Co* and *Ferreira* (supra). In both those cases the learned judges were particularly critical of the defaulting parties'

conduct, in respect of which no explanations had been proffered. Kannemeyer AJ had the following to say in this regard in *Tarry & Co (supra),* at 137B-C):

> **"**I am impressed in this case by the fact that the plaintiff knew that the defendant was pressing for its rights and until the last moment disregarded those rights and then was unwilling to agree to a postponement. I am conscious of the fact that there is no explanation before me for this serious delay."

[16] The defendant in this case did provide an explanation for the circumstances under which his original plea was formulated and the events which had convinced him to amend his plea and file a counterclaim. While that explanation is not sufficient to justify departure from the usual rule to the effect that the party at fault must pay the wasted costs occasioned by the postponement, I have no reason at this stage to doubt its *bona fides*. In addition, it appears that it had become clear to both parties, after the admissions were made by the defendant at the Rule 37 conference, that if indeed the matter were to proceed, it would only have been on the basis of the discrete issue formulated in the plaintiff's Rule 33(4) notice. Under these circumstances I am satisfied that costs awarded on the party and party scale would be sufficient to ensure that the plaintiff will be not out of pocket in respect of expenses incurred by it.

[17] In the result the third defendant is ordered to pay the wasted costs occasioned by the postponement on the party and party scale.

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J.E SMITH
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff	:	Advocate Buchanan SC
Attorney for the Plaintiff	:	Padgens 18 Castle Hill Central Port Elizabeth Ref: R. H Parker/djs/VAN
Counsel for the Defendant	:	Advocate Dyke
Assisted by	:	Advocate Smith
Attorneys for the Defendant	:	Fredericks Inc. 109 Westview Drive Mill Park Port Elizabeth Ref: Fredericks
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