



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

APPEAL CASE NO: A185/2019

**FS HC CASE NO:1602, 1603, 1612, 1613, 1614, 1615, 1616,
1618, 1619, 1620, 1621, 1622, 1632, 1633, 1635, 1636/19**

In the matter between:

DYNLOG RENTAL (PTY) LTD & 5 OTHERS

1ST APPELLANT

[Registration No: 2007/033524/07]

BERNADETTE VAN DER BERG

2ND APPELLANT

[Identity number: [...]]

PHILIPUS CW VAN DER BERG

3RD APPELLANT

[Identity number: [...]]

BERNADETTE VAN DER BERG N.O.

4TH APPELLANT

[In her capacity as trustee of the

PHILBERG FAMILY TRUST, IT1194/06]

PHILIPUS CW VAN DER BERG N.O.

5TH APPELLANT

[In his capacity as trustee of the

PHILBERG FAMILY TRUST, IT1194/06]

THEO-NIEL McDONALD N.O.

6TH APPELLANT

[In his capacity as trustee of the

PHILBERG FAMILY TRUST, IT1194/06]

And

FIRST RAND BANK T/A WESBANK

RESPONDENT

CORAM: **MUSI, JP et MBHELE, DJP et MOLITSOANE J**

HEARD ON: **08 OCTOBER 2021**

JUDGMENT BY: **MBHELE, DJP**

DELIVERED ON: **03 DECEMBER 2021**

[1] This is an appeal from a single Judge of this division wherein he refused an application for a postponement. The appeal is with leave of the Supreme Court of appeal. The appellants unsuccessfully applied for a postponement in summary judgment applications. The refusal of the postponement led to the summary judgments being granted against them.

[2] The facts are largely common cause. The respondent entered into 16 instalment sale agreements (the agreements) with the first appellant in terms of which the first appellant purchased various vehicles. In addition to the aforementioned agreement the second and third appellants as well the 4th to 6th appellants, in their capacity as trustees of Philberg Family Trust, entered into a surety

agreement with the respondent wherein they bound themselves jointly and severally as sureties and co-principal debtors in *solidum* in favour of the respondent for punctual payment of all sums due or to be due to the respondent.

- [3] The first appellant fell in arrears in monthly instalments in relation to 16 agreements. During 18 and/ 19 March 2019 respondent sent default notices and cancellation letters to the first appellant. In most of the matters the cancellation notices and default notices were sent on the same day while in the other 2 the default notices were sent a day after the cancellation notices. Below is an example of the contents of the default notices in all 16 matters.

"We act on behalf of FIRSTRAND BANK LTD T/A WESBANK. A company with registration number 1929/001225/06, which is a Registered Credit Provider with National Credit Regulator Registration number NCRCP20 and VAT Registration Number 4210102051

1. You are herewith advised that **DYNLOG RENTAL PTY LTD** have failed to meet their obligations to FirstRand Bank Ltd t/a Wesbank in respect of the aforesaid account(s) wherein you bound yourself as surety and co-principal debtor for payment of all sums due or to become due by **DYNLOG RENTAL PTY LTD** to our client.
2. It is our instruction to request that you immediately pay the full arrears amount as indicated above. Payment can be made to WESBANK: FIRST NATIONAL BANK: ACCOUNT NO: [...]; BRANCH: 255005; YOUR REFERENCE: 85257583241.
3. The amount payable may include additional default charges and the reasonable costs incurred by our client in order to enforce the agreement while the arrear balance remains on the account.
4. Upon receipt of this notice, you may refer the matter to the Plaintiff, or his/her representative, KUTLWANO MOHALEROE at 051-5056600, to negotiate a payment plan that is acceptable to both you and our client, in order to bring your payments up to date.
5. Should you not respond to this notice within **ten (10) business days** from date of it being delivered to you or sent to you by registered mail, our client shall proceed with further legal action without further notice.
6. Furthermore, should you not conclude an acceptable arrangement to pay the arrear balance or should you not respond to this notice, our client may file the details of your default and their enforcement actions with a Credit Bureau within twenty (20) business days of this notice.

We trust that the abovementioned actions may not be necessary and look forward to receiving your response.”

- [4] On 9 and 10 April 2019 the respondent issued summons against the appellants for cancellation of agreements and the return of the vehicles described in the particulars of claim in each of the 16 case numbers. The respondent launched applications for summary judgment after the appellants filed notices of intention of defend.
- [5] The summary judgment applications were set down for hearing on 30 May 2019. On 30 May 2019 the appellants’ attorney moved an application from the bar seeking a postponement of the summary judgment applications on the basis that the arrears had been paid in full during the course of the week on which the matter was heard and that the agreements were not properly cancelled. The court a quo refused the application for postponement and granted summary judgments in favour of the respondent.
- [6] Aggrieved by the court order, the appellants approached the full court of this division on appeal.
- [7] The main basis upon which the appellants are assailing the judgment of the court a quo is that the court a quo erred in its exercise of discretion by refusing the appellants’ application for postponement, that the court a quo erred by not reasonably considering all relevant facts and principles applicable in postponement applications.
- [8] The record shows that after the court gave the respondents an opportunity to respond to the request by the Appellants’ Attorney the latter was not afforded an opportunity to reply to the submissions made by the respondent’s Attorney.
- [9] The court a quo gave the following reasons for the refusal of the application for postponement and granting of Summary Judgment applications: No formal application was brought in support of the

application for postponement, the application for postponement was not timeously made, the appellants' explanation for postponement was not properly placed before the court, prejudice to the respondent outweighed the applicant's prejudice by far.

[10] The court, further, found that the first appellant was in arrears with instalments whilst it continued to be in possession of the relevant vehicles which stood a risk of being damaged while in continuous use in the face of credit agreements that had been cancelled. This was not canvassed with the parties nor was it placed before the court prior to the judgments being granted. The court made a proposition to the respondent's attorney after the appellants' attorney moved an application for postponement. This is what the court said:

“Mr. Moruri, you got two choices: either I postpone the matter and you properly deal with opposed summary judgment application orders or I deliver judgment now in all 16 cases and they ask for leave to appeal, it goes to the Appeal Court and it takes you two years to get on the roll. In the meantime there is no finality. Do you still insist that I grant the orders that you apply for?”

[11] After the respondent's attorney responded that his instructions to apply for the summary judgments persist, the court granted the orders without affording the appellants' attorney an opportunity to respond.

[12] Postponements are not merely for the taking. They have to be properly motivated and substantiated. And when considering an application for a postponement a court has to exercise its discretion whether to grant the application. It is a discretion in the true or narrow sense – meaning that, so long as it is judicially exercised, another court cannot substitute its decision simply because it disagrees. The decision to postpone is primarily one for the first instance court to make.¹

¹ *Psychological Society of South Africa v Qwelane and Others* 2017 (8) BCLR 1039 (CC) at par. 30
National Police Service Union v Minister of Safety and Security [2000] ZACC 15; 2000 (4) SA 1110 (CC);
2001 (8) BCLR 775 (CC) at para 4 and *Lekolwane v Minister of Justice and Constitutional Development* [2006]
ZACC 19; 2007 (3) BCLR 280 (CC) at para 17.

[13] In **Erasmus, Superior Court Practice, Vol 2, pp D1-552A**, the following is said about postponements (footnotes omitted):

“The legal principles applicable to an application for the grant of a postponement by the court are as follows:

- (a) The court has a discretion as to whether an application for a postponement should be granted or refused. Thus, 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.
- (b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal.
- (c) An applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons, i.e. 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 non-preparedness 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.
- (d) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made.
- (e) An application for 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.
- (f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the

R v Zackey 1945 AD 505 at 510-11.

Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) at paras 83-9, citing *Ex parte Neethling* 1951 (4) SA 331 (A) at 335A-E and *Media Workers Association of South Africa v Press Corporation of South Africa Limited* [1992] ZASCA 149; 1992 (4) SA 791 (A) at 800E.

court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism.

(g) The balance of convenience or inconvenience to both parties should be considered: the court should weigh the 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.”

[14] I must bear the above principles in mind when considering this matter. In the current matter the proceedings were initiated after the first appellant failed to pay the monthly instalments in terms of the agreement and fell in arrears. The attorney for the appellants informed the court that the arrears were paid in full few days before the court appearance and that was not disputed by the respondents. The appellants sought postponement to place their case before court. They submitted that the first appellant’s default has been remedied by the payment of the arrears.

[15] The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court.²

[16] Discretion is the power or right to make official decisions using reason and judgment to choose from among acceptable alternatives.³ **Black's Law Dictionary** defines "judicial discretion" as the exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as matter of right.

² Lekolwane and Another v Minister of Justice and Constitutional Development 2007 (3) BCLR 280 (CC) at par. 17.

³ Legal- dictionary. The freedictionary.com/judicial.discretion.

- [17] The word "discretion" connotes necessarily an act of a judicial character, and, as used with reference to discretion exercised judicially, it implies the absence of a hard-and-fast rule, and it requires an actual exercise of judgment and a consideration of the facts and circumstances which are necessary to make a sound, fair and just determination, and a knowledge of the facts upon which the discretion may properly operate.⁴
- [18] I align myself with the above statement. It must be understood against the backdrop that the legislature cannot foresee every eventuality that may occur during court proceedings hence the power of judges to exercise discretion. The power of discretion is conferred upon judges to decide matters justly and fairly guided by the facts and unique circumstances of each case. Fairness demands of judges to make exceptions to standard processes where warranted.
- [19] It is well established that prejudice will play a dominant role in factors that the court must consider before granting a postponement. The court must consider the hardships that each party is likely to suffer should the postponement be refused or granted. No issues of prejudice were canvassed by the respondent before the court a quo exercised its discretion in its favour.⁵ The court a quo's finding that the respondent's prejudice far outweighed the first appellant's was based on extraneous factors which were not canvassed during the application for postponement.
- [20] I am unable to find that the court a quo exercised its discretion judiciously when it refused the postponement and granted the summary judgment orders. In exercising its discretion the court a

⁴ Corpus Juris Secundum, Vol. 27, p. 289

⁵ The court a quo did not give reasons for the refusal of the postponement. However, it did give reasons in its judgment refusing application for leave to appeal.

quo failed to consider all relevant factors, unique circumstances of this matter and all applicable principles.

[21] It was submitted before us that 3 of the vehicles were paid in full and that a considerable amount has been paid since the judgment was granted. In applying the principle of balance of convenience I am persuaded that the hardship that was likely to be suffered by the appellant upon refusal of postponement and subsequent granting of the summary judgment orders outweighs that of the respondent by far, regard being had that no objection was raised to the submission that the arrears were settled in full. The appeal ought to succeed. As regards to costs, there is no reason to depart from the general rule that the costs must follow the result.

[22] In the result the following order is made.

Order

1. The appeal is upheld with costs, the order of the court a quo is set aside and replaced with the following:
2. The application for postponement is granted
3. The appellants are granted leave to file their answering affidavit, if any, within 10 days of this order.
4. The respondents to pay costs including costs of counsel.

MBHELE, DJP

I concur

MUSI, JP

I concur

MOLITSOANE, J

Appearances:

For the Appellants:

Adv J. ELS
Instructed by
BLAIR ATTORNEYS
BLOEMFONTEIN

For the Respondent:

Adv. J.L OLIVIER
Instructed by
SYMINGTON & DEKOK INC
BLOEMFONTEIN