

IN THE HIGH COURT OF SOUTH AFRICA /ie
(TRANSCAAL PROVINCIAL DIVISION)

DATE: 10 October 2008

CASE NO: 18887/08

In the matter between:

CARRIM (PTY) LTD

Applicant

versus

THE HON MR JUSTICE BOSIELO

Respondent

JUDGMENT

NGOEPE JP

[1] This is an application in terms of Section 25 of the Supreme Court Act 59 of 1959 for leave to sue the respondent, a serving judge of this Division, for an outstanding amount of money, allegedly for goods sold and delivered.

[2] The amount claimed in the Notice of Motion is R304,501-92. The founding papers were served on the respondent on the 23rd April 2008 personally, by the then Acting Judge President of this Division, Hon Deputy Judge President P M Mojaelo. No opposing affidavit was filed by the respondent, and also, no notice to oppose the application was delivered. Consequently, after the applicant had sought and obtained a date for the hearing of the matter, the applicant proceeded to set it down without serving the notice of set down on the respondent. At the hearing of the application on 7 October 2008, Adv Kgoroadira appeared before court on behalf of the respondent. She asked for a postponement of the matter, so that the respondent could file some opposing papers. The application was vehemently opposed. The court was told that opposing papers had not been delivered because there was a settlement negotiation in progress. The court was told that the respondent would dispute certain items on the statement.

[3] The biggest problem for the court was when told that the respondent would not dispute that he was indebted to the applicant at all, but that he owed less. In such a case, the court cannot refuse leave; the dispute about the amount would fall to be resolved by the trial court.

[4] As already said, the application for postponement was vehemently opposed by counsel for the applicant. The court was taken through a lengthy exchange of letters and telephone communications on both sides dating back nearly two years. It was submitted that all these indicated that the respondent had been given more than enough time to take appropriate steps to show that he was either not indebted to the applicant at all, or that he was indebted to a lesser amount.

[5] The truth is that, in the event of the necessary consent being given, the respondent would, at the appropriate time and forum, still be able to asset whatever payments respondent says he has to date made, or to dispute whatever items he queries. On respondent's given version, there would be an amount which the respondent would be owing anyway. Also, the consent would be no bar to settlement negotiations. The granting of the application would not prevent the continuing or resumption of negotiations.

[6] The court finds itself in a situation where it simply has no grounds to grant the postponement. Counsel for the respondent indicated to the court that, in the event of the postponement being refused, she would not be in a position to make any submissions on the merits.

[7] The court is concerned that given the position of the respondent, and the paucity of reasons for a postponement, a wrong impression may be created that the postponement is granted simply because the respondent is a judge of this court. It is an impression which no doubt the respondent himself would not like to be created.

[8] This application has been before court for a very long time. Firstly, it came as an informal application, seeking to secure the consent without the need to initiate formal court proceedings. When this did not work for the applicant, a formal application was lodged and as said earlier, served on the respondent in April this year. There is also the question of possible prescription looming. This court would not want to find itself embroiled in possible accusations and counter-accusations as to who could be responsible for prescription.

[9] For all the above reasons, the court is not able to accede to a request for a postponement.

[10] As said earlier, no submissions were to be made on the merits in the event of the application for postponement being refused. It follows that the relief sought must therefore be granted.

[11] As far as the costs are concerned, and given the fact that this is still an on-going litigation, the court is of the view that costs should be costs in the main action. In the circumstances the following order is made:

- (a) Leave is hereby granted to the Applicant to institute civil action against the Respondent for payment of the amount of R304,501-92 together with interest thereon *a tempora morae*, together with costs, for goods allegedly sold and delivered by the Applicant to the Respondent.

**B M NGOEPE
JUDGE PRESIDENT
HIGH COURT OF SOUTH AFRICA,
TRANSVAAL PROVINCIAL DIVISION**

Heard on 7 October 2008

Representation for the applicant

Counsel: Adv Cilliers

Instructed by Cilliers & Reynders Inc

Representation for first respondent

Counsel Adv Kgoroadira

Instructed by Mothuloe Attorneys