



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

REPUBLIC OF SOUTH AFRICA

CASE NO: 11987/2020

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
	DATE: 14 FEBRUARY 2023
	SIGNATURE:

In the matter between:

TUHF LIMITED

Plaintiff

And

266 BREE STREET JOHANNESBURG (PTY) LTD

First Defendant

10 FIFE AVENUE BEREA (PTY) LIMITED

Second Defendant

28 ESSELEN STREET HILLBROW CC

Third Defendant

**68 WOLMARANS STREET JOHANNESBURG (PTY)
LTD**

Fourth Defendant

HILLBROW CONSOLIDATED INVESTMENT CC

Fifth Defendant

MARK MORRIS FARBER

Sixth Defendant

***Delivered:** By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 14 February 2023.*

JUDGMENT

SENYATSI J:

- [1] This is an application for the postponement of the trial by the 2nd to 6th defendants. The first defendant, the principal debtor, is in business rescue and the business rescue practitioner, Mr Kgaboesele has put together a Business Rescue plan which was adopted by all concerned on 2 February 2023.
- [2] In terms of the business plan, the property (Metro Centre) forming the security of the plaintiff, will be sold. Thereafter, the costs of the business rescue process plus related costs will be paid and the plaintiff will then receive dividends from the net proceeds of sale. The business rescue practitioner is no longer not participating in this litigation.
- [3] The application is brought and based on two principle grounds. viz:

- (a) The intervening adoption of the business rescue plan and possible impact the dividend payable to the plaintiff will have on the defence by the 2nd to 6th defendants;
- (b) possible compromise relating to the claim by the plaintiff to the principal debtor which, once achieved, will according to the defendants' impact on their liability to the plaintiff in respect of the suretyship agreements concerned.

[4] The controversy which the parties are fighting about is whether there are good grounds in law and facts to grant the postponement applied for. The defendants contend, through Mr Hollander that the facts upon which the application is premised, justify the postponement application. Mr Botha SC on behalf of the plaintiff contends that the application should be refused.

[5] In order to deal with the quibble by the parties, it is appropriate to consider the principles applicable in the application for postponement which are in fact trite in our law.

[6] In *Insurance and Banking Staff Association and Others v SA Mutual Life Assurance Society*¹, Jajbhay J restated the approach as follows:

“[44] In an application for postponement the legal principles established in the High Court over the years apply equally in practice in the Labour Courts for the purpose of the present application, the following principles apply:

¹ (2000) 21 IJL 386 (LC)

- (a) The trial judge has a discretion as to whether an application for postponement should be granted or refused. (R v Zackey 1945 AD 505; Myburg Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (Nm))
- (b) That discretion must at all times be exercised judicially. It should not be exercised capriciously or upon wrong principles, but for substantial reasons (R v Zackey; Myburg Transport; Joshua v Joshua 1961 (1) SA 455 (G) at 457 D);
- (c) The trial judge must reach a decision after properly directing his/her attention to all relevant facts and principles (Prinsloo v Saaiman 1984 (4) SA 56 (O));
- (d) An application for postponement must be made timeously, as seen as the circumstances which might justify an application become known to the applicant. However, in cases where fundamental fairness and justice justify a postponement the court may in appropriate cases allow such an application for postponement, even though the application was not timeously made (Myburg Transport; Greyvenstein v Neethling 1952 (1) SA 463 (C)).
- (e) The 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 a Court will be exercised. What the court has primarily to consider is whether any prejudice caused by a postponement by an appropriate order of costs or any other ancillary mechanisms. (Herbstein & Van Winsen: The Civil Practice of Superior Court in SA (3 ed) at 453; Myburg Transport).
- (g) The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement in such an

application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.”

(h) Where the applicant for a postponement has not made the application timeously, or otherwise to blame with respect to the procedure which the applicant has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on a scale of attorney and client. Such an applicant might even be directed to pay the costs of the adversary before the applicant is allowed to proceed with the action defences in the action (*Van Dyk v Conradie & Another* 1963 (2) SA 413 (C));

[7] In *National Police Service Union and Others*² it was held as follows:

“...the question is whether it is in the interests of justice for a postponement to be granted by court. A postponement cannot be claimed as of right. The party applying for postponement must therefore show good cause that one should be granted.”

[8] In *Lekolwane and Another v Minister of Justice and Constitutional Development*³, the court stated that factors to be considered in the postponement application are the following:

(a) the broader public interest;

(b) the prospects of success on the merits

² 2000 (4) SA 1110 (CC); (2001 (8) BCLR 775) at para [4]

³ 2007 (3) BCLR 280 (CC) in para [17]

- (c) the reason for the lateness;
- (d) the conduct of counsel;
- (e) the costs involved in the postponement;
- (f) the potential prejudice to the other interested parties;
- (g) the consequences of not granting a postponement; and
- (h) the scope of the issues that ultimately must be decided.⁴

[9] In *Shilubana and Others v Nwamitwa*⁵ the court stated that a standard way to mitigate prejudice to the other parties is for the party asking for the courts indulgence to postpone a hearing – particularly one requested at the last minute – to offer, or be ordered, to pay the costs of the postponement.

[10] I now deal with the factual matrix of this matter. The plaintiff issued summons in an action proceeding to claim repayment of the full balance of money lent and advanced to the first defendant on account of the alleged various breaches which included default in repayment. The quantum claimed was R21 635 989 plus interest at 15,5% per annum (or such other prescribed rate as may be applicable from time to time in terms of the Interest Act) from the date of payment of each advance to the first defendant or its nominee until date of final payment.

[11] Cited in the action are sureties who are all related entities controlled by the sixth defendant Mr Faber, who is a director shareholder of all of them.

⁴ Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 399

⁵ Supra at para [12]

- [12] Various defences have been raised to the claims and this culminated in the plaintiff amending its particulars of claim on 24 May 2022. The amendment was not opposed and of course, the defendants were entitled to file their amendment of the plea from that date until today, which they did not do.
- [13] The pleadings were closed and the matter was certified trial ready. The trial commenced for the week of 9 to 13 May 2022. Two witnesses for the plaintiff testified and on the fourth day, the presiding officer became indisposed due to ill health and the matter was postponed sine die.
- [14] During the hearing of the matter in 2022, the defendants were represented by a different Counsel. The main difference raised by the defendants was a dispute regarding the calculation of the amount owed.
- [15] The litigation was overtaken by events. The first defendant was placed by its director, Mr Faber, in business rescue as a result of which two business rescue practitioners were appointed separately and resigned one after the other for reasons not important in this judgment.
- [16] Consequently, the original Counsel and the legal representatives of the defendants withdrew after the first respondent was placed in business rescue and Mr Hollander and the new instructing attorneys were on record to represent the second to sixth defendants.
- [17] Even after the appointment of new Counsel, the plea was not amended in accordance with the amended particulars of claim. The defendants claim they could not do it because they wanted the former business rescue practitioners

to lead the amendment process. This argument is not persuasive because as the controlling mind of all the entities that are related and giving suretyships to the plaintiff, the consideration to amend the plea after the amendment of the particulars of claim, was within the control of all the defendants who were at all times legally represented.

[18] When regard is had to the merits of the claim as amended, I am not persuaded that the disposal of Metro Centre as part of the business rescue plan, would make a significant difference to the quantum claimed against the sureties. This is so given the provision of clause 10 of the suretyship agreement in terms of which sureties have renounced all the legal benefits of sureties such as (no continuation)

[19] The application for postponement is, in the circumstances an attempt by the defendants to delay the speedy resolution to this matter. It should be remembered that since the loan was disbursed, not a single payment was made by the first defendant. This is so despite the defence raised by the defendants that the repayment was only to commence during July 2019. The only payment made, would have been the amount kept in the escrow account following this court's order during August 2022 by agreement between the parties that the business rescue practitioner pays the amount to be kept in an interest bearing account pending the finalisation of the action. It is therefore my view that any further delays in adjudicating this matter will not be in the interest of justice to all parties involved in the litigation.

[20] I am fortified by the view I hold on not delaying the hearing of this matter because the current business rescue practitioner, Mr Kgoboesele states in his

affidavit filed of record that he would abide by the decision of the court on the determination of the quantum of the claim. Although it has been suggested on behalf of the defendants that once the Metro Centre is sold and the nett proceeds of sale are paid to the plaintiff, there would be a significant reduction of the claim against them and that reduction will not alter whether or not they are liable as sureties of the first defendants to the plaintiff.

[21] More importantly, the defendants have not offered to mitigate the prejudice the plaintiff will suffer as a consequence of the postponement of the hearing. No offer as to the costs of postponement was made and instead, it is argued on their behalf that the cost of postponement should be the costs in the trial. This line of submission does not address the prejudice to be suffered by the Plaintiff consequent to the postponement being granted. It therefore finds no factual and legal basis.

[22] The previous postponement application by the defendant has factual and legal basis because of the new legal representatives and new counsel wanting to familiarise themselves with the papers and the record.

[23] The business rescue plan adopted on 3 February 2023 will have no bearing on the defences by the defendant. They are free and have been as such since the particulars of claim was amended on 24 April 2022. Accordingly, there is no merit for the court to exercise its discretion and postpone the hearing.

[24] It is also trite that the liability of surety in business rescue cases where the plan was adopted and compromised the main claim. The Court in *Van Zyl v*

*Auto Commodities (Pty) Ltd*⁶ stated that a claim that surety may be released in the event that a business plan is adopted could be dismissed based on the construction of the deed of suretyship itself: even were one to assume that the implementation of the business rescue plan had effect of discharging the surety from liability.

[25] Section 154(1) of the Companies Act of 2008 deals with the discharge of debts and claims against the company whose business rescue plan has been adopted. It is permissible under subsection for a business rescue plan to provide that if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it. This provision covers the company itself as in the first defendant and does not include guarantors of the company's debts to creditors. This is the same with regards to sureties of the company's debts to creditors. It follows therefore that the implementation of the business plan that was adopted, will provide insulation to the sureties against the creditors of the company.

[26] In the instant case, each deed of suretyship provides in clause 2 as follows:

"2. All admissions of liability by the Debtor shall be binding on the surety and the Creditor may without thereby prejudicing any of its rights in terms of this suretyship, release sureties and/or other sureties, give time to or compound or make any arrangement with the Debtor and/or grant to the Debtor or to any other Surety any latitude or indulgence." It follows therefore that any release of the sureties can be done in terms of the clause of the deed of suretyship

⁶ 2021 (5) SA 171 (SCA) at paras [10][45][46]

and nothing else. Any compromise that takes place through the adopted business rescue plan is therefore excluded.”

[27] Having considered the merits of the postponement application, the background of the litigation and the law, I am not persuaded that it is the interest of justice and the parties concerned that a further postponement should be granted.

ORDER

[28] The following order is made

(a) The application for postponement of the hearing is refused;

(b) The second to sixth defendants are ordered to pay the costs of the application, jointly and severally the one paying the other to be absolved.

**ML SENYATSI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

DATE APPLICATION HEARD: 13 February 2023

DATE JUDGMENT DELIVERED: 14 February 2023

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APPEARANCES

Counsel for the Plaintiff: Adv AC Botha SC

Adv E Eksteen

Instructed by: Schindlers Attorneys

Counsel for the First to Sixth
Defendant:

Adv L Hollander

Instructed by:

Swartz Weil Van De Merwe Greenberg Inc