**THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, JOHANNESBURG**

CASE NUMBER: 340/2020

(1) REPORTABLE: N0
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

**[1]** **20/02/2024** _____

[2] DATE SIGNATURE

In the matter between:

**VHULAHANI: ISAAC MPHO** **First Plaintiff**

**ADV MATODZI OSCAR MUDIMELI** **Second Plaintiff**

**RAVHURA: THANZI** **Third Plaintiff**

and

**STEEL KING CENTRE (PTY) LTD** **First Defendant**

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| **ORGANIC SYNTHESIS (PTY) LTD** | **Second Defendant** |
| **KIT KAT GROUP (PTY) LTD** | **Third Defendant** |

and

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| **ORGANIC SYNTHESIS (PTY) LTD** | **Second Third Party** |
| **STEEL KING CENTRE (PTY) LTD** | **Third Third Party** |
| **RAVHURA: TSHIANEO NANCY** | **Fifth Third Party** |
| **ORGANIC SYNTHESIS (PTY) LTD** | **Sixth Third Party** |
| **STEEL KING CENTRE (PTY) LTD** | **Seventh Third Party** |

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**JUDGMENT**

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**Delivered:** This judgment was prepared and authored by the Judge whose name is reflected and is handed down in court and electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be 20 February 2024

BOKAKO AJ

INTRODUCTION

1. This is an action for damages brought by plaintiffs in Section 61 of Consumer Protection Act No. 68 of 2008, alternatively in terms of delictual claim against the defendants as the result of the death of Muelelwa Portia Ramoft. In July 2019, the late Muelelwa Portia Ramofi bought a Flaz Canned Heat gel from the third defendant's store (Kit Kat Cash and Carry) situated at Kit Kat Plaza No. 327 W F Nkomo Street (Church Street), Pretoria West. On the 04th of August 2019 at Pretoria Showground 205 Soutter Street, Pretoria West, Gauteng Province, an incident occurred when the deceased was lighting the gel to warm up the food that she was selling at the said time and place, and the gel exploded and burned the deceased.

2. The deceased, during the incident, sustained severe bodily injuries, which resulted in her death on the 14th of August 2019. The central claim is of Liability in terms of the Consumer Protection Act 68 of 2008 in that the injuries suffered by the deceased were allegedly caused as a consequence of the supply of unsafe goods, a product failure, defect, or hazard in the goods with inadequate instructions or warnings.

3. The Defendants allegedly distributed the gel, which was "not approved by the SABS." Due care was not taken during the packaging and distribution, resulting in "the gel being defective." The consumer was "not provided with adequate instructions on how to use the gel," and the retailer and "consumer was not provided with facts, nature and potential risk of using the gel." The retailer and consumer were not provided with information "on how the gel can cause fire or explode and how much can be prevented". They were not provided with a data sheet and an alleged failure to do a "quality check after it received the gel from the second defendant" and before it distributed the gel.

4. This matter has been set down for trial on Monday, the 19th of February 2024, for nine days. At the beginning of the trial, the Plaintiffs objected to the notices filed by the 1st and the 2nd defendant about the defendant's expert evidence, contending that the defendants are non-compliant in terms of rule 36(9)(a) and (b) in that they filed their expert notice and summary late, which is contrary to the rules. The Plaintiff further argued that the defendants required the leave of this Court to cure their failure to timeously comply with the provisions of rule 36(9). The defendant opposed the objection and submissions made by the plaintiff in that the plaintiff`s contention was legally incompetent. This Court will not repeat what was submitted by both parties.

5. A letter dated the 30th of November 2023, from the defendants advised the plaintiffs that they could not prove their claims based on the CPA and delictual claims without expert evidence. It also showed that failure of the plaintiffs to file said notices would result in the matter becoming postponed. The Plaintiff's response, dated the 02nd of December 2023, indicated that "in respect to the expert's witnesses, the plaintiffs at this stage don't intend to appoint any witness. However, the rights of the plaintiffs are reserved."

6. The other letter dated the 08th of January 2024, from the defendants further advised the plaintiffs that parties have reserved senior legal teams for a trial of long duration, and a reservation of nine days has also been made for preparations. Further emphasized that they believe the plaintiffs cannot financially make good any cost order that may be granted against them should he fail to decide his preparedness.

7. The defendants had severe concerns regarding the trial's preparedness and readiness. The Plaintiff took no heed of the call.

8. As alleged by the defendant, expert notices and evidence on the issue were raised in one of the pre-trial conferences, and all parties shared respective correspondence.

9. Having heard all parties, this Court believes that the Plaintiff and its legal representative were responsible for taking heed of the call to reconsider their position and act accordingly in expediting the matter towards trial and adjudication.

10. This Court ruled by rejecting the objection raised by the Plaintiff to be meritless. It must be emphasized that every litigant has a responsibility towards their client in that they must come prepared for trial to counter the expert evidence adduced by their opponents. The Plaintiff over-emphasized the time issue without proper factual analysis.

11. Upon the Court's ruling, the Plaintiff brought an application for postponement. The issue then adjudicates the application for postponement as contended by the Plaintiff to employ expert witnesses and file necessary reports. The defendants did not oppose the said application. Therefore, there is no need for the court to emphasize the principles of postponement over.

12. The main point of contention was the issue of costs, which I will deal with later. In *Mokhethi and another v MEC for Health, Gauteng* 2014 (1) S.A. 93 (GSJ) at paragraph [20], it was correctly ruled that it is trite law that the rules regarding expert notices are to be complied with. It is not for the defendant to wait and see if the Plaintiff will call expert testimony before the defendant decides whether or not its case demands the calling of expert testimony to its benefit. *In casu* this court does not find fault in the defendant`s action.

13. I turn now to the basic general principles applicable to a postponement. It is trite that before or on the day of the hearing, any party may apply on notice for

a postponement. Such an application can sometimes be made on affidavit. It may also be made from the Bar. The granting of such an application is like an indulgence, and that indulgence is not to be had for the asking. Therefore, a party applying for a postponement must show good cause for interfering with the other party's procedural right to proceed. (See GENTRIUCO AG. v FIRESTONE SA (Pty) LTD 1969 (3) SA 318 (T)). The broad meaning of good cause and the correct approach to applications of this nature was explained in SMITH N.O. v BRUMMER N.O. AND ANOTHER 1954 (3) SA 352 (O) at 357H-358C:

14. I am alive to the principle that a court should be slow to refuse a postponement where the valid reason for the party's non-preparedness has been fully explained, where his un-readiness to proceed is not due to delaying tactics. Justice demands that he/she have more time to present his/her case.

15. A postponement is an indulgence purely within the discretion of the Court.[1] This discretion must be exercised judicially.[2] It should not be exercised impulsively or upon wrong principles but for substantive reasons.[3] In *Shilubana and others v Nwamitwa and others,*[4] the Constitutional Court held that the party applying for postponement must show good cause that one should be granted, and the factors to be taken into account include: *"whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the* application *is opposed."*[5] *In casu* the defendants were amenable to the postponement.

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1 Lekolwane and Another v Minister of Justice and Constitutional Development 2007 (3) BCLR 280 (CC) at para 17 p284

2 Erasmus, Superior Court Practice, Vol 2, pp D1-552A,

3 Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398

4 Shilubana and others v Nwamitwa and others 2007 (9) BCLR 919 (CC)

5 Shilubana and others v Nwamitwa and others 2007 (9) BCLR 919 (CC) at 922 para E ll 12

16. In Lekolwane *and Another v Minister of Justice and Constitutional Development*[6] the Constitutional Court held that the overarching approach of a court faced with an application for postponement is to balance the parties' conflicting interests.[7]

17. Applying these principles to this application, it is necessary to assess whether the Plaintiff has discharged the onus, demonstrating good cause for the postponement, bonafide intentions, and is not for delay. It I do find that, is in the interests of justice that the trial be postponed to ensure the proper ventilation of the issues between the parties.

18. I bear these principles in mind when considering the submissions in this application. Counsel for the Plaintiff based his application for postponement on the need to source expert witnesses.

19. Given the complexity of the matter, expert witnesses take on a pivotal role, illuminating complex issues and lending their expertise to the pursuit of justice. This Court knows an expert witness has specialized knowledge, skills, or experience in a particular field. As contended by all parties, expert witnesses provide valuable insights and analyses that aid the Court in understanding intricate technical, scientific, or specialized subjects; their contribution is vital. Also, the Plaintiff correctly submitted that expert witnesses assist the Court by explaining complex concepts or technical matters in an understandable manner. Therefore, it is imperative that they be granted an opportunity to source some experts. They will need time to select and appoint an expert witness relevant to their case's subject matter.

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[6] Lekolwane and Another v Minister of Justice and Constitutional Development 2007 (3) BCLR 280 (CC)

[7] Lekolwane and Another v Minister of Justice and Constitutional Development 2007 (3) BCLR 280 (CC) p284

20. This Court can grant the postponement. Considering that expert witnesses play a pivotal role in shedding light on intricate subjects that might otherwise remain enigmatic to the Court. Experts, with their informed opinions, guide the legal process toward a more comprehensive and just outcome. The Plaintiff did not intentionally or recklessly disregard the basic Rules of this Court, and I also believe that the application for a postponement is bona fide and was not made with the intent to delay the matter.

21. The Court finds that this application for a postponement was made with a bona *fide* intention. Even if it can be arguable that the application was not made timely, fundamental fairness and justice justify a postponement. Given the circumstances of this case, justice demands that the plaintiffs cautiously be given time to present their case.

22. I find compelling reasons to postpone this matter so the Plaintiff can file relevant expert notices.

23. The below-par preparation by the Plaintiff is relevant in determining the costs. The defendants argued that there was no guarantee that the Plaintiff would respect this Court's order. They claimed that punitive costs should be awarded against the Plaintiff. In persuasive to the court, defendants were emphatic on a strict condition in that the Plaintiff can only set the matter down on condition that he pays all costs on an attorney and client scale prior adjudication of the matter.

24. In the matter between the *Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC) at para.8* Mogoeng CJ noted that '[c]osts on an attorney and client scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process.' The majority judgment was not read to differ from this. In the minority

judgment, Khampepe J and Theron J further noted that a punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a court's rebuke. 'Both judgments referred to *Plastic Convertors Association of S.A. on behalf of members' v National Union of Metalworkers of SA ILJ 2815 (LAC) at para 46*, in which the Labour Appeal Court stated, 'The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an exceptional award is intended to be very punitive and indicative of extreme opprobrium."

25. In re: *Alluvial Creek Ltd*[8] It was said that:

'. . .Some people enter into litigation with the most upright of purpose and a most firm belief in the justice of their cause, and yet [t]hose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear. . .'[9]

26. I believe that these proceedings are not vexatious in the sense set out above and must not attract a punitive costs order.

27. As submitted by the Plaintiff, the right of access to courts is essential in a constitutional democracy under the rule of law and precisely so in terms of section 34 of the Constitution, 1996: "Everyone has the right to have any dispute that the application of law can resolve decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

28. Courts may also not be held hostage by the reliance on section 34 of the Constitution. Litigation and access to courts are constitutional rights that may not be trampled and ridiculed; they must be conducted with the utmost decorum and respect for the rule of law.

[8] In re: *Alluvial Creek Ltd* 1929 CPD 532.
[9] Ibid at 535.

29. Courts are loath to grant orders that have no practical effect or result. It is self-evident that futile orders lead to a waste of overstretched judicial resources *concerning S.A. Metal Group vs. The International Trade Administration Commission*[10]

30. It is known to the parties that in awarding costs, this Court has discretion that should be exercised judicially upon considering the facts in the matter and that, in essence, a decision should be made where fairness to both sides should be considered.

31. In light of the plaintiffs' conduct, it would be unfair and unjust to apportion a burden of the costs of this action to the defendants. Accordingly, this Court will order that the plaintiffs pay the defendants the costs occasioned by the postponement.

32. The defendants asked for punitive costs against the Plaintiff and cited numerous conducts worthy of this Court's sanction. Rubberstamping punitive costs will unreasonably worsen the financial position of plaintiffs, given their claim, which is based on loss of support. Such will be contrary to this constitutional ideal.

33. Even though courts have discretion to make cost orders and are not bound by what parties submit, punitive costs are impractical and should not be granted in this context.

**ORDER**

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[10]. *S.A. Metal Group (Proprietary) Limited v The International Trade Administration Commission* (267/2016) [2017] ZASCA 14 (the 17th of March 2017).

34. As a result, I make the following order:

34.1 The matter has been postponed sine die.

34.2 The plaintiffs are to pay the defendants the costs occasioned by the postponement, including costs for the three defendants' counsels on Party and party scale.

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**T BOKAKO**

***Acting Judge of the High Court***

***Gauteng Local Division, Johannesburg***

**APPEARANCES**

**DATE OF HEARING : 19 FEBRUARY 2024**

**DATE OF JUDGMENT : 20 FEBRUARY 2024**

**COUNSEL FOR PLAINTIFF : ADV MAKUYA UB**

**COUNSEL FOR THE 1ST DEFENDANT : ADV D MILLS SC**

**COUNSEL FOR THE 2ND DEFENDANT : ADV GF HEYNS SC**

**COUNSEL FOR THE 3RD DEFENDANT : ADV N LOUW**