Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case no: AR 285/22

In the matter between:

SOUTH AFRICAN SECURITISATION PROGRAMME (RF) LIMITED
(REG NO: 1991/002706/06) **FIRST APPELLANT**

FINTECH UNDERWRITING (PTY) LIMITED
(REG NO: 2002/025400/07) **SECOND APPELLANT**

and

HEARTBEAT BUSINESS ENTERPRISE (PTY) LIMITED
(REG NO: 2014/260875/07) **FIRST RESPONDENT**

NATASHA CHUNDER
(ID NO: […]) **SECOND RESPONDENT**

VISHAL SURENDRA MAHARAJ
(ID NO: […]) **THIRD RESPONDENT**

ORDER

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1 The appeal is upheld;

2 The respondents' attorney, Ms Ashika Maharaj of Ashika Maharaj and Associates, is directed to pay the costs of the appeal *de bonis propriis.*

3 The orders of the learned magistrate granted on 4 July 2022 in the Magistrate's Court, Durban under case number 10152/2021 are set aside and replaced with the following orders:

(a) The trial is adjourned *sine die*;

(b) The second and third defendants are directed to pay the costs of the adjournment, including the costs of counsel on brief, on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved.

JUDGMENT

Shapiro AJ (Henriques J concurring)

Introduction

[1] This is an appeal against an order of the learned Magistrate, Ms Mpontshana, who dismissed the appellants' claim in rather novel and somewhat unfortunate circumstances.

[2] The appellants were the plaintiffs in an action instituted in 2017 against the respondents, as defendants, in the KwaZulu-Natal High Court. The action was transferred to the magistrate's court by agreement between the parties.

[3] The appellants' cause of action was based on a rental agreement concluded between Smart Finance (Pty) Ltd and the first respondent, with the second and third respondents being cited in their capacities as sureties. Smart Finance ceded its right, title, and interest to the claims against the respondents to the appellants, who sued the respondents for payment of R132,807.97 plus interest and costs arising out of the alleged failure of the first respondent to make rental payments that were due.

[4] Apart from raising certain preliminary points, the plea delivered by the respondents in January 2018 consisted of bare denials. For what follows it is necessary to record that the respondents[1] were represented by the same firm of attorneys throughout the course of this matter.

[5] The action was set down for trial in the court below on 4 July 2022.

[6] At the end of the week preceding the trial, the parties agreed between themselves that the matter would be adjourned. However, the learned magistrate presiding refused to adjourn the trial, and required an application for an adjournment to be made. The court below refused an application by the respondents to adjourn the action and then refused a similar application by the appellants. The effect of that refusal was that the appellants were not able to run the trial and closed their case without leading evidence, allowing the respondents an opportunity to seek the dismissal of the action, with costs. The learned magistrate granted that order, and it is against that order that this appeal lies.

Factual background leading to the dismissal of the appellants' claim

[7] The events of 4 July 2022 and the court below's attitude to them must be placed in their proper factual and procedural context.

[8] In the leadup to a judicial pre-trial conference, which was held on 29 June 2022, the appellants' attorneys tried, without success, to engage with the respondents' attorneys about convening a pre-trial conference and dealing with the issues that should

[1] By the time of the trial in 2022, the first respondent had been placed in liquidation.

be canvassed at such a conference.

[9] At the pre-trial conference the matter was certified as ready for trial at the appellants' instance. However, either at the pre-trial or later the same day, the respondents' attorneys indicated their intention to amend the respondents' plea on the basis that the bare denials were "not sustainable".[2] The respondents tendered to pay the wasted costs of any adjournment.

[10] Given what they saw as the probability that the matter would be adjourned to permit the respondents to effect amendments to their plea, and being reluctant to incur the costs of flying down their legal representatives and witnesses from Johannesburg if the trial was not going to run, the appellants agreed to the adjournment.

[11] The appellants' attorneys attempted to deliver a Notice of Removal on Friday 1 July 2022, but the clerk of the court refused to accept it and indicated that adjournments were sparingly granted by the court after a matter had been certified as ready for trial.

[12] The appellants' attorneys notified the respondents' attorneys about this and received the following reply:

'Dear Madam…Historically the Courts do not intervene in a consent order. We are persuaded that the trial will be adjourned as we intend amending our client's plea'.[3]

[13] Both parties then appeared before the court below on 4 July 2022, with the appellants represented by local counsel who had been briefed to attend to the adjournment, and who was not briefed to run the trial. Both parties assumed that the matter would be adjourned with the respondents being directed to pay the costs, because of their agreement in this regard.

[14] The court below saw things somewhat differently - a view in line with the

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[2] This explanation was confirmed by the respondents' attorney, Ms A Maharaj, when she made submissions to the court below when seeking an adjournment of the trial.

[3] Given the conduct of the respondents' attorney on 4 July 2022, this advice is important.

provisions of Rule 31 of the Magistrate's Court Rules.[4] I will return to this presently.

[15] When the court below refused to grant an adjournment by consent, it called upon the respondents' attorney to then make application for such adjournment.

[16] During that application, the respondents' attorney referred to an email sent by the appellants' attorneys on 30 June 2021,[5] calling upon the second and third respondents to deliver the notice of intention to amend their plea within ten days.

[17] The respondents' attorney stated that she thought that she had come on record for the respondents "around 2020" and "the plea was already done then, but when my colleague raised it at the pre-trial, we were alerted to the fact that the plea was not a substantial plea".

[18] In answer to a question from the learned magistrate, the respondents' attorney confirmed that she accepted instructions in the matter when there were already "papers in place" and that she had advised the respondents to amend the plea when she came on record, but that they were not in a financial position to give those instructions.

[19] The appellants' counsel pointed out to the court, and correctly so, that this was not correct, and that the respondents' attorney had not only been on record for the respondents since 2018 but had signed the plea in the first place.

[20] Understandably, the court did not appreciate being misled, and the absence of a cogent explanation about why the plea still had not been amended by the end of June 2022, no doubt influenced the court to refuse the respondents' application to adjourn.

[21] In argument before us, the respondents' attorney submitted that the appellants' counsel had opposed her application for an adjournment which was one of the reasons why she then "was instructed" to oppose the appellants' application which they were

[4] Amended with effect from 1 February 2022.
[5] Almost a year before the pre-trial conference.

compelled to bring.

[22] This too is incorrect. The record makes clear that the appellants' counsel submitted to the learned magistrate that she could not "in good conscience argue against the adjournment". All that she did was point out inconsistencies in the respondents' attorney's submissions that, on the face of it, appeared calculated to create a misleading impression of the history of the matter.

[23] The court below refused the respondents' application and delivered a detailed *ex tempore* judgment. After that, the learned magistrate made clear that the matter would not be adjourned, which led the appellants' counsel to ask that the matter stand down so that she could obtain instructions, ahead of a fresh application for adjournment, this time at the instance of the appellants.

[24] I have set out this chronology in detail, given the view that I take of the subsequent conduct of the respondents' attorneys in ultimately arguing that the appellants' claim should be dismissed with costs.

[25] In argument before us, the respondents' attorney stated that during the brief stand down, she obtained instructions from her clients to oppose the appellants' application for an adjournment.

[26] The respondents' attorney made the submission in her own defence and to demonstrate that she did no more than act on instructions.

[27] This cannot be so. Firstly, there was no cause for the appellants' application to be opposed because their counsel had done the same to the respondents. This did not happen. Secondly, the instructions to oppose the appellants' application could only have come after the respondents' attorney had told the second and third respondents what had happened and what the current state of play was. What she could not have done was tell her clients that their application for an adjournment had been opposed by the

appellants. So, what was discussed and what led to the instructions to oppose the appellants' application?

[28] The respondents' attorney must have told the second and third respondents that their application for an adjournment had been refused, and that the court was obviously unwilling to countenance the adjournment of the matter. In circumstances where the respondents' attorney knew that the appellants did not have their witnesses present and were not in a position to run the trial, she must have told her clients this and then must have sought specific instructions about whether to oppose the application - instructions that the second and third respondents no doubt gave with alacrity.

[29] When pressed on this during argument of the appeal, the respondents' attorney stated that she was obliged to act in the interests of her clients. Stripped to its core, what the respondents' attorney was submitting was that she saw an opportunity to "snatch a bargain" and no doubt then advised her clients accordingly.

[30] Consistent with this strategy, the respondents' attorney not only opposed the appellants' application for an adjournment but then went further and argued that their claim should be dismissed with costs, because that they were not ready to run the trial.

[31] Without irony, the respondents' attorney accused the appellants' counsel of "speaking with a forked tongue" and then proceeded to submit that the appellants should have "entertained a very real possibility that the [respondents] would act [dis]ingenuously" and that the appellants should have adopted the view that "irrespective of the nonsense that the [respondents are] doing, I am going to be present and ready to proceed. That was not done".[6]

[32] The respondents' attorney then made the startling submission that the respondents had "attended court this morning with its pants down and faced the

[6] This submission must be seen in the light of the email sent by Ms. Maharaj on Friday 1 July 2022. It was Ms. Maharaj who put the appellants' attorneys at ease that the adjournment would be granted regardless of the clerk of the court's comments.

consequence. Now the plaintiff has its pants down and must so too face the consequence".

[33] It was on this basis, according to the respondents' attorney, that the appellants were not entitled to the court's sympathy and that it was therefore legitimate for the court below to dismiss the appellants' claim.

[34] As I recorded above, this is exactly what the court below did and why ultimately the appeal served before us.

Does Rule 31(1) permit parties to adjourn an action by consent at any stage?

[35] Rule 31(1)(*a*) does contemplate the trial of an action being adjourned by consent of the parties or by the court. However, the right of the parties to secure an adjournment by consent is qualified by the provisions of Rule 31(1)(*b*)(i) and Rule 31(4).

[36] In terms of the former, if parties have agreed to adjourn proceedings, the plaintiff is obliged to deliver a notice of that agreement with the clerk of the court at least 15 days prior to the date of the hearing (so that other cases can be scheduled on the trial role). In terms of the latter, and where an action has been certified trial-ready and a trial date has been allocated or arranged at a pre-trial conference, a party seeking an adjournment shall file a notice with the clerk of the court at least 15 days prior to the allocated or arranged trial date requesting the allocation of another trial date. Neither party complied timeously with these Rules.

[37] The appellants have argued that the court below erred in finding that it was vested with a discretion to refuse an adjournment by consent between the parties and have submitted that the wording of Rule 31(1)(*a*) unequivocally makes provision for a trial being adjourned merely by the parties acting in agreement and without the consent of the court.

[38] Ms *Lombard*, who represented the appellants in the appeal, argued that the time

limits contained in Rules 31(1)(*b*)(i) and 31(4) were advisory at best and that nothing in the Rule could be read as fettering the parties' right to have a matter adjourned as long as they consented to it – at any stage of the proceedings.

[39] I disagree. Whilst the Rule does contemplate an adjournment by consent effectively being binding on a court, that entitlement only arises if the parties act timeously and deliver the requisite notice no less than 15 days before the date of the trial. That this is a peremptory requirement is demonstrated not only by the use of the word "shall" both in Rule 31(1)(*b*)(i) and Rule 31(4) but also the context and purpose of the requirement.[7]

[40] There are reasonable and understandable policy considerations for this kind of time limit: judicial resources are constrained, and the consequence of a last-minute adjournment is that other parties will not be accommodated on the trial roll because of the legitimate anticipation that a matter set down will proceed.[8]

[41] Taken to its logical conclusion, the appellants' argument means that a court would never be entitled to refuse an adjournment if the parties, between themselves, had agreed one. This is contrary to the court's obligation to ensure the speedy and efficient administration of justice and to guard against the abuse of its process. More specifically, the interpretation advanced by the appellants would mean the parties were absolved from compliance with the requirements of Rule 31 and that the word "shall" in the Rule should be interpreted to read as "may".

[42] It is a settled principle of law that the legislature does not enact superfluous or nugatory provision,[9]and the express wording of Rule 31 does not permit the interpretation advanced by the appellants.

[43] In this case, the action had been certified as trial ready at the instance of the

[7] *Waymark and Others v Meeg Bank Ltd* 2003 (4) SA 114 (TkH) paras 15 and 16.
[8] As the Constitutional Court considered in *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at 76A-B.
[9] cf *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA) para 19.

appellants. This meant that the party seeking the adjournment was obliged to deliver a notice in terms of Rule 31(4), something that neither party did.

[44] In my view, the court below was correct in refusing to "rubber stamp" the parties' agreement and to require an application to be made for an adjournment of the trial.

[45] It follows that the appellants first ground of appeal must fail.

Did the court below exercise its discretion judicially in refusing to adjourn the trial?

[46] The next question to be considered is whether, in requiring that an application be made, the court below misdirected itself in then refusing both applications for adjournment.

[47] The legal principles applicable both to an application for the grant of an adjournment by the court and to an appeal court's right to set aside any such decision were set out by Mahomed AJA in *Myburgh Transport v Botha t/a S A Truck Bodies*,[10]a decision referred to with approval by the Constitutional Court in *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae).*[11]

[48] The relevant legal principles as set out in *Myburgh* and referred to by the court below, are as follows:

‘(1) The trial Judge has a discretion as to whether an application for a postponement should be granted or refused…

(2) That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons…

(3) An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if members of the Court of appeal had been sitting as a trial Court they would have

[10] *Myburgh Transport v Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmS) at 314F-315J.

[11] *Shilubana and Others v Nwamitwa (National Movement of Rural Women and Commission for Gender Equality as Amici Curiae*) 2007 (5) SA 620 (CC) para 11.

exercised their discretion differently.

(4) An appeal Court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles.…

(5) 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.…

(6) 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.… Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made.…

(7) An application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.

(8) 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 to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order for costs or any other ancillary mechanisms.…

(9) 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.

(10) Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he 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 the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as

the case may be….'.

[49] I agree with the sentiments expressed by the court below when dealing with the respondents' application for an adjournment.

[50] Vague submissions of amending a plea four years after it was delivered initially, and where it was delivered by the same attorney who continued to represent the respondents were entirely unsatisfactory grounds for seeking an adjournment. The application smacked of dilatoriness, even if costs were being tendered.

[51] Quite obviously, a properly set out defence (to the extent that one existed) would have been helpful both to the court and to the appellants, and one can understand the perhaps resigned pragmatism of the appellants in agreeing to an adjournment so that the respondents' defence could finally be set out in proper detail.

[52] Given the non-responses by the respondents to the appellants' Request for Further Particulars, the hope was perhaps a vain one, but it was understandable.

[53] It was at this point that the appellants' pragmatism collided with judicial reality. Surrendering to the assumption that an adjournment would be granted, the appellants elected not to incur the costs of having their witnesses and properly briefed legal representatives at court. However, the appellants' assumption was dangerous and did not consider the potential that the court could refuse the respondents' application for an adjournment.

[54] I accept that the matter had been set down for trial for the first time, but the appellants placed themselves in an invidious position by proceeding as if the adjournment was guaranteed.

[55] Notwithstanding the court below legitimately being critical of the appellants, in my view, it misdirected itself materially by treating the appellants and the respondents

equally.

[56] The appellants had done everything that they could to bring the matter to trial, even as late as the previous week where the matter had been certified over the obstruction of the respondents and their attorneys.

[57] Whilst the respondents certainly had acted in an obstructive and dilatory fashion, the same could not be said for the appellants.

[58] In tarring them with the same brush, the court below reached a decision which, in my view, could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. The court below misdirected itself as to the facts, in failing to distinguish between the parties and failing to assign blame where it properly belonged.

[59] The appellants explained why their legal representatives and witnesses were not available. In the circumstances of the case, the explanation was reasonable.

[60] The consequence of the court below’s decision to refuse the appellants' application for an adjournment was that the respondents, who patently were not in a position to run the trial and whose defence was described by their own attorney as "unsustainable", ended up with a final judgment in their favour, and a dismissal of the appellants' claim with costs.

[61] It seems to me that the effect of the court below's judgment was fundamentally unfair and was not in the interests of justice. In those circumstances, I consider that we can intervene on appeal and set the court below's decision aside.

[62] In this respect, the appeal must succeed.

Who should pay the costs of the appeal?

[63] The appellants have sought an order that the respondents be directed to pay the costs of the appeal.

[64] Although the respondents did not participate in the appeal at all, and did not deliver Heads of Argument, we nevertheless required their attorney to ensure that there was an appearance at the appeal to make submissions about the costs of the appeal.

[65] The Constitutional Court recently has been obliged to consider the consequences of a failure by legal representatives to act in accordance with their ethical obligations and when orders *de bonis propriis* are appropriate.[12]

[66] Complaining that the applicants' legal representatives in that case "abysmally failed in their duty to represent their clients in the manner required by their professional rules",[13] the court held that a *de bonis propriis* costs order would only be appropriate where the individuals concerned acted inappropriately and in an egregious manner and where the conduct complained of and in respect of which the court's displeasure was to be marked was that of the legal representative and was not attributable to the litigants.

[67] Referring to jurisprudence from the United Kingdom and Canada, the court reminded us that counsel's professional duties are to both their client and the court. Whilst there ought to be no conflict between these duties, it was axiomatic that the duty to the court was the overriding one. Similarly, counsel's duty was "to do right by their clients and right by the court…In this context, 'right' includes taking all legal points deserving of consideration and not taking points not so deserving. The reason is simple. Counsel must assist the court in doing justice according to law".[14]

[68] By any metric, the respondents' attorney failed to do right by the court and failed abysmally to represent her clients in the manner required by her professional rules and ethical obligations.

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[12] *Ex Parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* [2023] ZACC 34.
[13] *Ibid* para 97.
[14] *Ibid* paras 106-107.

[69] The respondents' attorney did the opposite of assisting the court in doing justice according to law. She attempted to mislead the court, as she attempted to mislead us on appeal. Her clients patently were not able to advance their defence, and the trial was being adjourned because of their conduct (or lack thereof). It was therefore entirely unacceptable for the respondents' attorney to advise her clients, or to act in such a way, that they took advantage of the situation that arose.

[70] I have already found that the respondents' attorney could not have been reporting any actions by the appellants' counsel in opposing the respondents' application to adjourn the trial. There was frankly no need for the respondents' attorney to contact her clients and to obtain instructions. She had instructions already – to seek the adjournment of the trial and to tender the costs on the attorney and own client scale. If she did in fact contact her clients, it was because she saw an opportunity. If she sought a specific instruction, it was arising out of a plan that she conceived.

[71] Worse, the respondents' attorney aggressively attacked the appellants' attorneys and suggested that they should be held to account for not anticipating the respondents' misconduct. The submissions were cynical and opportunistic, especially where it was the respondents' attorney herself who had told them not to be concerned about the refusal of the clerk to accept the late notice and that the trial would be adjourned.

[72] The respondents' attorney had an ethical obligation to the court which, in this case, meant supporting the application for the adjournment and not taking any steps to profit from the court's attitude to an adjournment. It meant advising her clients that it was not appropriate to oppose the application or to seek the dismissal of the appellants' claim.

[73] Instead, and as was confirmed in argument before us,[15] the respondents'

[15] By Ms Maharaj arguing that she acted in her clients' interests when opposing the application and arguing for the dismissal of the appellants' claim

attorney saw an opportunity to "take the gap" and to benefit her clients.[16] This inappropriate and egregious decision was the genesis of the dismissal of the appellants' claim and of this appeal – and there must be consequences that attach to it.

[74] In my view, the conduct of the respondents' attorney was so serious that it warrants the imposition of a *de bonis propriis* costs order in respect of the appeal. The respondents' attorney failed in her responsibility to maintain the high standards that are ultimately the guarantee of legitimacy of our legal system.[17] She is responsible for the advice she gave to her clients and the way she executed her strategy. She cannot hide behind her clients in this regard or the "acting on instructions" fig leaf.

[75] This court is obliged to follow the timely direction of the Constitutional Court and to hold legal practitioners to account when they fail in their ethical and professional duties.

[76] In the circumstances, the following orders will issue:

1 The appeal is upheld;

2 The respondents' attorney, Ms Ashika Maharaj of Ashika Maharaj and Associates, is directed to pay the costs of the appeal *de bonis propriis*.

3 The orders of the learned magistrate granted on 4 July 2022 in the Magistrate's Court, Durban under case number 10152/2021 are set aside and replaced with the following orders:

> '(a) The trial is adjourned *sine die*;
>
> (b) The second and third respondents are directed to pay the costs of the adjournment, including the costs of counsel on brief, on the scale as between attorney and client, jointly and severally, the one paying the other to be absolved.'

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[16] Even at the appeal, the respondents' attorney showed no contrition and instead sought to blame not only her clients but her opposition.

[17] *Ex Parte Minister of Home Affairs* para 101.

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SHAPIRO AJ

I agree,

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HENRIQUES J

JUDGMENT RESERVED: 10 NOVEMBER 2023

JUDGMENT HANDED DOWN: 17 NOVEMBER 2023

Appearances:

For appellants: Ms N Lombard

Instructed by: KWA Attorneys

Ref: Mrs L Kriel/ec/MAT13881

Care of Martin Law Inc

41 Westville Road, Westville

For respondents: Ms A Maharaj

Instructed by: Ashika Maharaj & Associates

Suite 250, 2nd Floor, Mansion House

12 Joe Slovo Street, Durban

Ref: AMAH032/17