OTJOSONDU MINERALS (PTY) LTD -vs- HOCHLAND INVESTMENTS COMPANY (PTY) LTD. FA 5/93

1993/09/06.

Coram: Strydom JP et Hannah J and Muller AJ

APPEAL:

Appeal only against refusal of postponements by Court a quo - Such not always a "judgment" tfr "order" which is appealable - An application for postponement must be bona fide and must contain a full explanation for such postponement - Court on appeal can only interfere in limited instances with exercise of discretion of Court a quo.

CASE NO.

IN THE HIGH COURT OF NAMIBIA

OTJOSONDU MINERALS (PTY) LTD. APPELLANT

HOCHLAND INVESTMENTS COMPANY (PTY) LTD. RESPONDENT

CORAM: **STRYDOM, J.P.** et **HANNAH, J,** et **MULLER, A.J.**

Heard on: 1993/09/06 Delivered

on: 1993/09/06

JUDGMENT

STRYDOM. J.P.: This is an appeal to the Full Bench of the High Court of Namibia from a refusal by O'Linn, J. to grant the appellant's application for a postponement in the Court a quo. After having heard argument we dismissed the appeal and indicated that we would furnish our reasons later. What follows are those reasons.

On the 12th November, 1992 the appellant filed an urgent application by Notice of Motion wherein it claimed a declaratory order to have a sale agreement, entered into between itself and the appellant on the 22 May, 1992, declared lawfully cancelled. Certain other restraining orders were also claimed but these do not play any part in this appeal.

In terms of the founding affidavit by one Fritz Roth Vorster, a director of the respondent, the respondent company is the holder of certain mineral rights in Namibia. These rights were sold by written agreement to the appellant. It is alleged that the appellant did not comply with all its obligations arising out of the agreement, inter alia that it did not pay the purchase price of R500 000,00 on signing of the agreement, with the result that the respondent cancelled the agreement as it was entitled to in terms of clause 8 thereof. The launching of the application became necessary because the appellant, notwithstanding the cancellation of the agreement, continued to act as if it were still the holder of rights in respect of the mineral grant.

In its answering affidavit the appellant denied any breach of the contract and through its managing director, one N.F.E. Lotterie, stated that it was clearly understood by all parties that the amount of R500 000,00 would only be paid after the respondent had complied with certain obligations. These terms did not form part of the written agreement between the parties and a counter application was launched by appellant to rectify the written agreement so as to reflect the true intention of the parties.

The matter came before O'Linn, J, on the 20 November, 1992 when by agreement it was referred for the hearing of oral evidence regarding the cancellation of the agreement and the appellant's counterclaim for rectification. One of the orders made by the Learned Judge was that the parties should make discovery of all documents relating to the issues

within 20 days of the 20th November, 1992.

Because of the urgency of the matter the registrar of the Court was requested to provide the earliest available date for the hearing of the evidence. (See para. 1 of the order). The urgency, so it seems to me, was brought about by the fact that after cancellation of the agreement the respondent had entered into an agreement with another company whereby the latter was given certain prospecting rights as well as the option to buy the mineral grant.

By agreement between all the parties the matter was set down for hearing on the 26th February, 1993. However, at the start of the hearing a substantive application was launched by the appellant for a postponement. The grounds for the postponement are set out in an affidavit by Mr Aggenbach, the attorney for appellant. This application was served on the respondent shortly before the hearing was due to start. Respondent opposed the application and Mr Marais, the attorney for the respondent, gave oral evidence. I will deal more fully with the application and evidence given there lateron. After the application for the postponement was refused and there was then no appearance for the appellant, the Court granted the order as set out in the respondent's Notice of Motion.

The appeal before us was solely against the Court a quo's refusal of the application for postponement. This is clear from the wording of the notice of appeal and also formed the basis on which Mr Botes, on behalf of the appellant.

presented argument to the Court. Because the appeal was only launched against the refusal of the postponement and did not address the order made by the Court a quo in terms of respondent's Notice of Motion, Mr Mendelow, on behalf of the respondent, argued in limine that the Court has no jurisdiction to hear the appeal as the refusal to postpone was not a judgment or order against which an appeal would lie in terms of the provisions of Section 18(2) of the High Court Act, Act 16 of 1990. With reference to cases such as Dickinson and Another v Fisher's Executors, 1914 A.D. 424; Tropical (Commercial and Industrial) Ltd v Plywood Products Ltd.. 1956 (1) SA 339 (AD) and the recent decision in Zweni v Minister of Law and Order. 1993 (1) SA 523 (AD), Counsel argued that the refusal to postpone was not a judgment or order as these words are understood and interpreted by the Courts.

Mr Botes on the other hand submitted that in the circumstances there was nothing wrong with the eventual order given by the Court a quo and whereby the relief claimed by the respondent in terms of Notice of Motion was granted. There was therefore no basis to appeal against the order made by the Court. Hence the appeal lay against the Court's refusal to postpone the matter at the request of the appellant. It was further argued by Counsel that the refusal to postpone resulted in the order being made against the appellant. Therefore if the appeal against the refusal succeeded it would follow that the Court would also set aside the order. In this regard Mr Botes referred the Court to the order made in Myburgh Transport v Botha t/a S.A.

Truck Bodies. 1991 (3) S.A. 310 (NmSC).

The High Court's powers to hear appeals are set out in the High Court Act, Act 16 of 1990 as follows:

> "16 The High Court shall .....
> ..... have power:
>
> (1).....
> (2).....
> (c) subject to the provisions of this Act or any other law, to hear appeals from judgments or orders of a single judge of the High Court;"

and

> 18(2) An appeal from any judgment or order of the High Court shall lie -
>
> (a) in the case of a single judge sitting as a court of first instance -
>
> (i) to the full Court as of right, and no leave to appeal shall be required." (my underlining)

Appeals therefore lie against judgments or orders of a judge sitting in first instance. What constitutes a judgment or order has been dealt with in various cases, the latest being Zweni's case, supra, where the following was stated at p. 532 J to 533 B:

> "A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first

> instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings (Van Streepen & Germs (Pty) Ltd. v Transvaal Provincial Administration, 1987 (4) SA 569 (A) at 586 I - 587 B; Marsay v Dillev, 1992 (3) SA 944 (A) at 962 A - F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Fraber Enthoven (Pty) Ltd. v Receiver of Revenue and Another. 1992 (4) SA 202 (A) at 214 D - G)".

A refusal to postpone a case does in my opinion not always contain the three attributes as laid down in Zweni' s case or the other cases referred to. An application for a postponement can be renewed during the same trial or proceedings and nothing precludes the same Court from then allowing it. A refusal also generally does not have the effect of disposing of at least a substantial or any portion of the relief claimed in the main proceedings and nor can it be said to be definitive of the rights of the parties. However I would not wish to state categorically that every refusal of a postponement cannot be a judgment or an order against which there lies no appeal. In each instance the Court will have to look at the surrounding circumstances and the facts pertaining to each application.

I therefore do not agree with Mr Botes that the refusal of a **postponement** is so **closely** interwoven with the ensuing relief granted by the Court in the main action that a successful appeal against the refusal will result in the

setting aside of that final order or judgment given by the Court. That cannot be in the circumstances of the present case. The asking of a postponement is not for the having but is an indulgence craved from the Court. An applicant for a postponement cannot accept that a postponement will be granted and, wherever possible, he must be prepared to meet that eventuality. In the instant case the appellant, after refusal of its application to postpone, then withdrew from the trial. That notwithstanding the fact that Prinsloo, a director of the applicant company, and who was also a deponent to one of the opposing affidavits filed, could testify to the very issue which was before the Court, namely the rectification of the contract. He was also the person who was present when the contract was signed in Johannesburg. At that stage Lotterie was at Stellenbosch.

The fact that the Court, after its refusal of the application to postpone, continued with the case with the appellant unrepresented and without having the benefit of appellant's evidence, was in this case not due to the refusal but due to appellant's choice not to be represented and not to present its case.

In my opinion the appellant's appeal against the refusal only illustrates, in the circumstances of this case, the fallacy of Mr Botes' argument. Even if the Court could entertain the appeal against the postponement only, and even if it were successful, it would not have altered the legal position between the parties as there was no appeal against the main order made by the Court which would therefore still

stand. I agree with Mr Mendelow that in order to bring the appeal within the confines of the Act the appellant should have appealed against the main order made by the Court a quo on the ground that the Court did not exercise a judicial discretion when it refused its application for a postponement. The Myburgh-case, supra, does not support Mr Botes' argument because a reading thereof shows, in my opinion, that the appeal was brought against the main judgment.

However if I am wrong in the conclusion to which I have come I am satisfied that there is no basis on which the Court of Appeal can interfere with the discretion exercised by the Judge a quo.

The basis on which the application for a postponement was launched appears from an affidavit made by Mr Aggenbach, the attorney for the appellant. As part of the background it must be accepted that the trial date of the 26 February, 1993 was arranged by agreement between all the parties. The application for a postponement was further served on the respondent's attorneys on the morning of the 26 February at 9h30.

Mr Aggenbach stated in his affidavit that whilst out of town he phoned his offices on 22 February to find out what arrangements were made with witnesses to prepare for the trial. He was then informed by his secretary that Lotterie had instructed her to approach the respondents for a postponement of the trial for 21 days. Aggenbach then tried

to get hold of either Prinsloo or Lotterie, both directors of the appellant, but was unsuccessful. A letter was then sent to respondent's attorneys on the 23 February asking for a postponement. No reasons were set out why appellant sought a postponement.

In a letter dated 24 February respondent's attorney informed the attorney of the appellants that they regarded the request as unjustifiable and frivolous and would oppose any application. He further pointed out that the trial date was arranged by mutual agreement on the 20 November, 1992. He also stated that they had basically finalised their preparation for trial and that any postponement would severely financially prejudice his client and that it would also result in certain contractual arrangements being jeopardised.

Aggenbach was only able to reach Lotterie on the night of the 24 February at about 22h00, when he informed him of the attitude of the respondent. Lotterie, who was then in Johannesburg, stated that he was under great pressure as he was busy with a reverse takeover of another Company. He however undertook to fly back to Cape Town on the 25th February to collect his passport at his home in Stellenbosch, and, as there were no flights from Cape Town to Windhoek on a Thursday, he would drive up in his car to Windhoek.

Further attempts were made by Aggenbach on the 25 February to obtain a postponement but this was equally unsuccessful.

When Aggenbach phoned Lotterie's wife at 15h00 on the
25 February Lotterie had not yet returned from Johannesburg and Mrs Lotterie doubted that Mr Lotterie would be fit to drive up to Windhoek during the night of 25 February.

When Aggenbach arrived at his office on the morning of the
26 February he found a copy of a medical certificate by a Dr H.A. Visagie of Stellenbosch who had apparently seen Lotterie the previous day. Aggenbach then phoned Lotterie who confirmed this. According to the certificate Lotterie was suffering from "Hipertensie en Uitputting sindroom" and was advised not to undertake the journey to Windhoek and to go on sick leave till 20/3/1993.

Confronted with this application Marais, respondent's attorney, gave evidence. Marais testified that although the Court had ordered discovery of documents to be made within 20 days of the Court order of the 20 November, 1992, the appellant's discovery was only served on their Windhoek correspondents on the 24 February, 1993. The respondent was ready to proceed with the trial with three of its witnesses, from South Africa, present in Court.

Marais testified that he became aware of the proposed postponement when a Mr van Wyk of appellant' s attorneys phoned him on the morning of the 24 February. During the telephonic discussion Marais was informed that appellant's witnesses were involved in some other urgent business and would therefore not be available on Friday. According to Marais he was surprised that a postponement was asked on

account of Lotterie's absence as the other director, Prinsloo, was mainly involved in the negotiations of the agreement, he at all material times having been present at the discussions. To the knowledge of the Respondent Lotterie at no point in time had been involved in the actual negotiation of the contract. Marais further stated that at no stage was any explanation given why Prinsloo could not attend the trial.

On the facts set out above this Court must decide whether the Judge a quo exercised a judicial discretion in refusing the application for a postponement. The legal principles applicable in an appeal such as this are succinctly stated in the Myburgh-case supra at 314 F to 315 J, namely:

> "1. The trial Judge has a discretion as to whether an application for a postponement should be granted or refused (R v Zackev 1945 AD 505)

(3) That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (R v Zackey (supra); Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398 - 9; Joshua v Joshua 1961(1) SA 455 (GW) at 457 D.)

(4) 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 the members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.

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 has 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. (Prinsloo v Saaiman 1984(2) SA 56 (0); cf Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another 1975 (4) SA 1 (T) at 8E - G; Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152.)

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. Madnitsky v Rosenberg (supra at 398 - 9).

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. Greyvenstein v Neethling 1952(1) SA 463 (C). 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. Greyvenstein v Neethling (supra at 467 F).

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

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 of costs or any other ancillary mechanisms. (Herbstein and Van Winsen The Civil Practice of the Superior Courts in South Africa 3rd ed. at 453.)

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.

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 a 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. Van Dvk v Conradie and Another 1963 (2) SA 413 (C) at 418; Tarry & Co Ltd v Matatiele Municipality 1965 (3) SA 131 (E) at 137."

Regarding the bona fides of the appellant's application Mr Botes was asked whether he could point out one act of preparation by the appellant to show that it was preparing to go to trial on the 26th but for the illness of Lotterie which, as was pointed out, only became apparent late on the 25th. Mr Botes candidly admitted that he could not point out any such act. In fact everything pointed the other way. At a very late stage his attorney had problems to contact him. There is no indication that at this very late stage any advocate had been briefed to prepare and appear at the trial. Discovery was only made on 24 February, 1993 and was some two months late. Lotterie did not even take the precaution of booking flights for himself or any of his witnesses to come to Windhoek for the trial. He himself would have had to drive by car to Windhoek through the night of the 25/26 February, if he wanted to attend the trial. In regard to other witnesses such as Prinsloo, nothing is said and from the fact that Prinsloo was not called as a witness the Court can safely accept that he was not available in Windhoek to testify.

Against this background the explanation given by the appellant for the postponement of the matter is of importance. Initially no reasons were given. See Annexure "JA 1". Then, according to the evidence of Marais, he was telephonically informed on the 24 February by van Wyk of the

office of the appellant's attorneys that his clients were busy with other urgent work and could not attend Court on the 26th. This was never refuted by the appellant. The arrival thereafter, on the morning of the 26th, of the medical certificate cannot explain away the lack of preparedness of the appellant. This is even more so if regard is had to the evidence of Marais as to the role played by Prinsloo during the negotiations of the contract. No attempt was made to explain why Prinsloo, or any other witness, could not attend Court and if need be, be ready and prepared to give evidence. In the words of Madnitsky v Rosenberg (supra at 398 - 9) it cannot, in my opinion, be said that the true reason for the appellant's non-preparedness has been fully explained.

In the circumstances I am of the opinion that the application for a postponement was not bona fide and the medical certificate did not alter the situation. Even if Lotterie was able to drive through the night to Windhoek the total lack of preparedness to continue with the trial would have left him with no other choice but to try and postpone the matter.

Does justice demand that the case should, notwithstanding the foregoing, have been postponed? I do not think so. The matter was brought on an urgent basis. An early date was obtained for the hearing by agreement of all the parties. To this must be added the lack of bona fides on the part of appellant which in my opinion was not dispelled by the medical certificate. The possibility of prejudice to the

respondent as stated in Marais' letter, Annexure "JA 3", and which can also be gathered from the affidavits filed in the main application, was not refuted by appellant. The onus to show that any prejudice suffered by the Respondent as a result of the postponement can be compensated by an appropriate order as to costs rested on the appellant. (See Richardson's Woolwasheries Ltd. v Minister of Agriculture, 1971 (4) SA 62 (E.C.D.) at 68 D)

Sitting as a Court of Appeal I am not persuaded that the Judge a quo's refusal to postpone the matter should be set aside. In Pretorius v Herbert 1966(3) SA 298 (T) at 302 Trollip, J, as he then was stated:

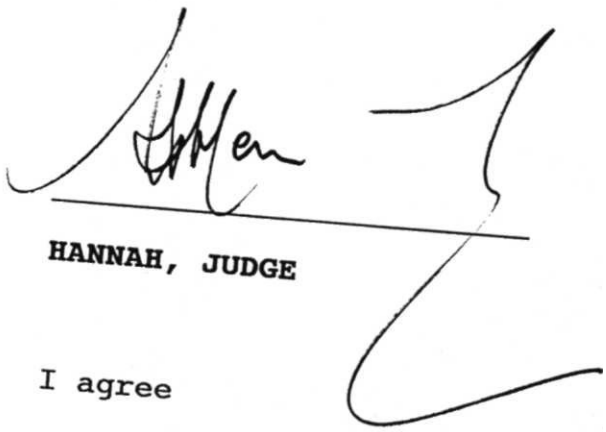
> "there must be some grounds on which a court, acting reasonably, could have come to the particular conclusion; if there are such grounds then their sufficiency to warrant that conclusion is a matter entirely for the trial court's discretion, and the Court on appeal cannot interfere, even if it would itself have made a different order." (See further Prinsloo v Saaiman, 1984(2) SA 56 (0)).

In my opinion the Court a quo had more than sufficient grounds to refuse the application. It follows that the appeal must be dismissed. As to the order of costs, both Counsel were agreed that this should be on a scale as between attorney and client as was previously agreed between the parties.

In the result the appeal is dismissed with costs, such costs to be on a scale as between attorney and client.

STRYDOM, JUDGE PRESIDENT

I agree



HANNAH, JUDGE

I agree

MULLER, ACTING JUDGE

FOR APPELLANT: ADV. L.C. BOTES

Instructed by: P.F. Koep Co.

FOR RESPONDENT: ADV. MENDELOW (S.C.)

Instructed by: Lorentz & Bone