

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 48677/2016

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

Date: 8 November 2021 E van der Schyff

In the matter between:

H J H VAN DER HOVEN

PLAINTIFF/APPLICANT

And

D J VAN DER WESTHUIZEN

DEFENDANT/RESPONDENT

JUDGMENT

Van der Schyff J

- [1] This application for default judgment was enrolled on the unopposed court roll of 1 November 2021, but due to the fact that 1 November 2021 was declared a public holiday, all unopposed applications set down for hearing on that date were rolled over to be heard on Friday 5 November 2021. On 4 November 2021, the respondent

filed an application for postponement. This judgment deals with the application for postponement. To avoid confusion, the parties are forthwith referred to as in the main action.

- [2] The defendant seeks an order postponing the application for default judgment *sine die*, and to be granted leave to file an application for the upliftment of the notice of bar as contemplated by Rule 27 of the Uniform Rules of Court by no later than 28 February 2022, failing which the plaintiff may re-enrol the matter on the unopposed roll.

Chronology

- [3] The chronology of the events is as follows:
- i. On 20 July 2016 the plaintiff served a combined summons on the defendant seeking payment of the amount of R1 350 000,00. The cause of action was based on breach of an oral contract;
 - ii. The defendant filed an exception (stating) on the ground that the plaintiff's particulars of claim failed to disclose a cause of action and (seeking the claim) a dismissal of the claim with costs, on 4 August 2016;
 - iii. The exception was upheld by Thlapi J, on 12 October 2017;
 - iv. The plaintiff successfully applied for leave to appeal and on 16 October 2020 the judgment of the court a quo was set aside;
 - v. A notice of bar was served on the defendant on 11 December 2020;
 - vi. The defendant was barred from filing a plea by 5 February 2021;
 - vii. On 10 May 2021 the application for default judgment was served;
 - viii. The Registrar referred the application for default judgment to open court;
 - ix. The plaintiff served a notice of set down on the defendant's attorneys of record on 16 September 2021, the matter was set down for 1 November 2021 and rolled over to 5 November 2021;
 - x. The defendant filed the postponement application on 4 November 2021.

Application for postponement

[4] The affidavit filed in support of the postponement application contains a police date stamp of 4 November 2021, but the date written in manuscript is 4 October 2021. The plaintiff took issue with this contradiction and counsel for the defendant submitted that it was merely an oversight.

[5] The defendant states in the affidavit that:

- i. He intends to oppose the application for default judgment and defend the main action;
- ii. He was advised by his new attorney that the notice of bar must first be uplifted before being entitled to file a plea;
- iii. He provided his erstwhile attorney with 'various documentation' for the purpose of preparing a defence. Many of these were originals and are crucial for purposes of formulating a defence to the main action;
- iv. He struggled during 2020 to make contact with his erstwhile attorney and received a letter from the Legal Practice Council (LPC), dated 28 October 2020, informing him that his erstwhile attorney had been suspended. He was subsequently informed that the attorney was struck from the roll, and that his matters would be distributed to other attorneys. Despite substantial effort he has not been able to establish the whereabouts of the files and the documentation handed to his erstwhile attorney. In the result he does not have access to various crucial documentation that he requires to prepare his defence. He enlisted the services of one Ms. Pretorius to liaise with the LPC to obtain the files. He instructed the correspondents appointed by his erstwhile attorneys to continue as his attorneys of record. The correspondent however passed away on 5 October 2020.¹

¹ In a letter dated 25 October 2021 the averment is made that the correspondent passed away in 2021. In the affidavit it is stated that he passed away just before the appeal was heard. The appeal was heard in 2020.

[6] The defendant's affidavit contains numerous vague and unsubstantiated statements:

- i. The defendant makes an unsubstantiated statement that the effects of the Covid-19 pandemic and the National lockdown severely impeded his ability to obtain all documentation from the LPC, without explaining how his attempts were foiled;
- ii. The defendant fails to explain clearly what attempts were made to communicate with the LPC and to obtain the files;
- iii. The defendant fails to explain the delay that occurred between being provided with copies of the pleadings and notices under cover of a letter dated 29 January 2021, to date;
- iv. The defendant fails to state the nature of the documentation that he requires to formulate a plea – this is significant in light of the particulars of claim reflecting that the cause of action is an oral contract concluded between the parties during 2008 in terms of which the plaintiff paid an amount of R1 350 000.00 to the defendant.

[7] The time line put forward by the defendant does not make sense. Of importance is the fact that the defendant states that the correspondent attorneys were instructed to continue as his attorneys of record as they were already in possession of some of the necessary documentation that could assist in moving the matter forward, subsequent to him being informed that his erstwhile attorney was suspended. The letter informing of the erstwhile attorney's suspension is dated 28 October 2020. The correspondent attorney, however, passed away on 5 October 2020 and the firm filed a notice of withdrawal (which although indicated to be attached to the affidavit, was not attached). On these facts it is plainly impossible that the defendant approached the correspondent after being informed of his erstwhile attorneys' suspension.

[8] In the letter received from the LPC dated 28 October 2020, the applicant is informed that he must complete the attached indemnity form and return it to the LPC. It is only in an email dated 30 June 2021 that the LPC is provided with the signed indemnity form. Ms. Pretorius only provided her mandate and fee agreement to the

LPC in an email dated 2 July 2021, and then only because she was reminded by the LPC's representative that she forgot to attach same in an email dated 1 July 2021. The attachments do not support the contention made in the affidavit that the applicant failed to obtain the files because of the tardiness of the LPC, or because of Covid-19.

- [9] Despite stating in the affidavit that he purports to demonstrate that a *bona fide* defence and substantial reason exists for opposing default judgment, the defendant fails to fulfil his undertaking and accordingly, no *bona fide* defence against the plaintiff's claim has been set forth.

- [10] The defendant surmises that the plaintiff would not suffer any prejudice if the application is postponed. I am unable to align myself with this line of argument. The cause of action arose in 2008. The claim is based on an oral agreement. The plaintiff has already been prejudiced in that evidence regarding an transaction that occurred in 2008, will have to be presented. In light of the fact that the defendant failed to disclose any defence, the prejudice the plaintiff will suffer, cannot be remedied by merely a costs order. The defendant has had ample time and opportunity, in a period extending into more than 5 years since the summons came to his knowledge, to get his house in order, but failed to do so.

- [11] The court is obviously hesitant to close the doors of the court to the defendant's face, at this stage of the proceedings. However, there is a significant difference between stating the defence and explaining that the necessary documentary proof is still to be located because of the events that interfered with the running of the case, and not stating the defence but merely relying on a belief - 'that if I am able to obtain all of my relevant documents which I had previously furnished to my erstwhile attorney of record, I would in all likelihood be in a position to successfully oppose (and even have the Plaintiff's claim dismissed), as the Plaintiff's claim is in essence based on restitution of a payment allegedly made by the Plaintiff to me, in the amount of R1 350 000.00, however no proof of such payment has been presented to the Honourable Court'.

- [12] The defendant does not deny that payment has been received, or explain that a different agreement was concluded between the parties than what is averred in the particulars of claim.

ORDER

In the result, the following order is made:

1. The application for postponement is dismissed.
2. The respondent is to pay the costs of the application for postponement.


E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email. The date for hand-down is deemed to be 8 November 2021.

Counsel for the applicant:	Adv. C.J. Welgemoed
Instructed by:	Tim du Toit & Co Inc.
For the respondent:	Adv. A van Wyk
Instructed by:	Charmaine Pretorius Attorneys at Law
Date of the hearing:	5 November 2021
Date of judgment:	8 November 2021