

**IN THE HIGH COURT OF LESOTHO**  
**(COMMERCIAL DIVISION)**

**HELD AT MASERU**

**CCT/0378/2015**

In the matter between:

**OVK BEDRYF BPK**

**PLAINTIFF**

**AND**

**MIN ZHU ENTERPRISES (PTY) LTD**

**T/A GOLF BISCUITS FACTORY**

**1<sup>ST</sup> DEFENDANT**

**XIAOHUA ZHANG**

**2<sup>ND</sup> DEFENDANT**

**Neutral Citation:** OVK Bedryf Bpk v Min Zhu Enterprises (Pty) Ltd & another  
[2022] LSHC 139 Com. (18<sup>TH</sup> AUGUST 2022)

**CORAM:**

**MOKHESI J**

**DATE OF HEARING:**

**19<sup>TH</sup> MAY 2022**

**DATE OF JUDGMENT:**

**18<sup>TH</sup> AUGUST 2022**

## **SUMMARY**

**DEBT RECOVERY-** *In an action for recovery of money for goods sold and delivered and where the defendant raises a special defence- the onus of proving the special defence is on the defendant- Postponement of proceedings- Principles applicable re-stated and applied.*

### **ANNOTATIONS:**

#### **STATUTES:**

*High Court Act 1980*

#### **CASES:**

*Dorbyl Vehicle Trading and Finance Company (Pty) Ltd v Mokheseng LAC  
(1995 – 1999)*

*Myburgh Transport v Botha t/a S.A Truck Bodies 1991 (3) SA 310*

*Pillay v Krishma and Another 1946 AD 946*

## JUDGMENT

### [1] **Introduction**

This is an action for recovery of purchase price for goods sold and delivered to the first defendant. The action against the 2<sup>nd</sup> defendant is based on his suretyship for the debt of the first defendant to the plaintiff. The plaintiff is claiming judgment against both defendants jointly and severally the one paying the other to be absolved as follows:

- a) Payment in the sum of M209,195.25 (Two Hundred and Nine Thousand One Hundred and Ninety-Five Maloti and Twenty Five Lisente);
- b) Interest on the aforesaid sum at the rate of 17.50% per annum calculated from 1<sup>st</sup> September 2015 to date of final payment;
- c) Costs of suit on attorney and client scale.

### [2] **Parties**

The plaintiff is a South African company duly registered and incorporated in terms of the laws of that country. It carries on its business at Ladybrand. The first defendant is a company duly registered and incorporated in terms of the laws of the Kingdom of Lesotho. The second defendant is a businessman who is a surety of the 1<sup>st</sup> defendant's debt to the plaintiff.

### [3] **Factual Background**

Initially the amount claimed was as reflected above, but on the 19 May 2022, Adv. P. R. Cronje, for the plaintiff made an application from the

bar to amend the amount and revise it downwards to M175,600.00. The application was granted. I revert to this aspect in due course. Desirous of buying goods from the plaintiff on credit, the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant applied for a Credit Facility from the plaintiff. The application was successful and among its terms it required the plaintiffs to settle the accounts monthly. The parties signed the agreement on the 30 August 2013. Suretyship was signed by the second defendant on 14 December 2011 binding himself, in terms of clause 3, in his personal capacity as surety and co-principal for the first defendant's indebtedness.

[4] In terms of clause 19 of the agreement a certificate of indebtedness signed by any of the company's directors, members of general management, secretary or manager: Client financing, or client financing manger, stating the amount, including interest and additional charges "shall for purposes of legal proceedings instituted against me [1<sup>st</sup> defendant] for the recovery of such amount, be *prima facie*, without necessity of proving the appointment of the signatory of such certificate." A certificate of Indebtedness was signed and issued on the 31 August 2015 setting out the extent of the 1<sup>st</sup> defendant' indebtedness. It was stated in that certificate that the 1<sup>st</sup> defendant owed an amount of R209,195.25 plus 17.5% per annum from 1 September 2015 until date of full and final payment.

[5] This matter served before my late sister Chaka-Makhooane J since 08 November 2016 when an interlocutory application for costs of the withdrawn application for summary judgment was argued. The Ruling was made on the 31 May 2018, and a date was set down for holding of a Pre-trial Conference to the 18 February 2019. The defendants were not represented in court on the date set for holding the PTC. Only the plaintiff was represented by Mr Fraser. It is recorded that there were

excuses tendered by the defendants for not being in court as scheduled. The court ordered that the matter proceed to trial. On 10 June 2016 the 1<sup>st</sup> defendant sought indulgence of the court to be given time to reconcile the documents reflecting invoices with its bank statements, and for that reason it asked for postponement of the matter. The court made a ruling postponing the matter “to allow the defendant to secure whatever assistance he seeks from the bank conditionally.” Importantly, in the same ruling the learned Judge registered her unhappiness “with the progress of the matter and in particular with the attitude of the defendant with regard to the pace it is setting.” The Court even went further to rule that the date on which the matter was postponed would be a date of hearing, whether or not defendant received the documents he sought. The matter was postponed to 16 September 2019.

- [6] It is not clear what happened on the 16 September 2019. What is clear is that on 25 September 2019 Ms Hlakametsa and Mr Potsane for the defendants were before court. The matter was further postponed to 22 October 2019 for mention. Parties did not appear before court on that date but instead on the 24 October 2019, on which date the matter was further postponed to 12 May 2020 for hearing. On the 12 May 2020, my sister Chaka-Makhooane J had unfortunately passed on. Commercial Court was without Judges since 2020 as Molete J had passed on during the same period; Commercial Court was only fully operational in November 2021. This was among the matters allocated to me. It was set down for hearing on the 28 April 2022 and on 19 May 2022. On the 28 April 2022 the matter did not proceed because Adv. Cronje for the plaintiff, had tested positive for Covid-19 and had to self-quarantine in the Republic of South Africa where he resides. The matter was postponed to the 19 May 2022. It must, however, be stated that proof of

Adv. Cronje's illness was provided by Mr Fraser who was representing the plaintiff on that day.

- [7] On the 19 May 2022, both Adv. Cronje for the plaintiff and Adv. Potsane for the defendants were present in court. Adv. Cronje had brought along the plaintiff's witnesses, but Adv. Potsane was alone, with no defendants' witnesses in attendance. Adv. Cronje referred to the request for further particulars for purposes of trial and responses exchanged by the parties. In the request filed by the plaintiff, the following clarity was sought:

*“1.1 Does the defendants admit that goods as described in invoice 10002893 on or about 7 October 2014 and invoice 10007641 on or about 8 October 2014 have been delivered to the first defendant?*

*1.2 It the defendants admit delivery was made, does the defendants admit that the invoice was paid in full?*

*1.3 If so, the plaintiff request proof of payment.*

*2.1 Does the defendants admit that goods as described in invoice 10140902 on or about 10 December 2014 have been delivered to the first defendant?*

*2.2 If the defendant admit delivery was made, does the defendants admit that the invoice was paid in full?*

*2.3 If so, the plaintiff request proof of payment.*

*3.1 ....”*

- [8] In reply the defendants said:

*“1.1 Defendants admit delivery and receipt of the goods.*

*1.2 The payment was made in full.*

*1.3 Refer to the spreadsheet, annexure “A” to plaintiff’s bundle of documents. Further there was cash payment, the acknowledgment of which got burnt with the business-golf biscuits factory.*

-2-

*“2.1 Defendants admit delivery and receipt of the goods.*

*2.2 The payment was made in full.*

*2.3 Refer to the spreadsheet, annexure “A” to plaintiff’s bundle of documents. Further there was cash payment, the acknowledgement of which got burnt with the business – golf biscuit factory.” (emphasis added)*

[9] A further request for further particulars for purpose of trial was filed by the defendants wherein the defendants wanted to know whether the plaintiff’s case was only based on invoices 10002893, 10007641 and 10140902; whether it is the plaintiff’s case that those invoices were not paid at all. The plaintiff’s answer to these questions was that its case was based on the balance due and owing on the account that the first defendant held with the plaintiff. The plaintiff further stated that “[i]n order to expedite the trial, the plaintiff will seek judgment for R175,600.00, being short payment of R30,000.00 on invoices 1000 2893 and 10007641 and no payment of M145,600.00 on invoice 10140902 together with interest since 15 August 2015 at 17,50% and costs.” The plaintiff further made it plain that the defendants bore the onus of proof of payment.

[10] This exchange, as is apparent, significantly narrowed down the parameters of the enquiry. The plaintiff is claiming a combined payment shortfall of M30,000.00 on invoices 10002893 and 10007641, and a full payment of M145,600.00 on invoice 10140902 plus interest. The defendants further acknowledge that annexure “A” which is a spreadsheet, reflect the payments it made for the goods delivered. In addition to the payments appearing in Annexure “A” the defendants state that cash payment was made, an acknowledgement of which got burnt when the 1<sup>st</sup> defendant’s business burnt down. This scenario should be kept in mind. I now turn to provide reasons for the rulings made on the 19 May 2022.

[11] On 19 May 2022 Mr Potsane, for the defendants, referred this court to the defendants’ plea in which they question jurisdiction of this court to entertain this matter. This issue had never been pursued in the previous appearances before my sister Chaka-Makhooane J as one would have expected Mr Potsane to have done at the first opportunity. I considered this to be opportunistic at best and a delaying tactic at worst. Mr Potsane requested that parties be given an opportunity to prepare written heads of argument addressing this issue of jurisdiction. I rejected that request and dismissed the point as being meritless. Essentially, the defendants were relying on clause 22.2 of the suretyship agreement that this court’s jurisdiction had been ousted. The said clause provides that:

*22.2 The SURETY hereby consents in terms of section 45 of the Magistrate’s Court Act, No. 32 of 1944, as amended, to the jurisdiction of the Magistrate’s Court of any district having the jurisdiction in terms of section 28 of the said Act, notwithstanding that the amount of the claim by COMPANY against the SURETY may exceed the jurisdiction of the Magistrate’s Court. Notwithstanding the aforesaid the COMPANY shall in its sole discretion, be*



*entitled to institute action against SURETY or the DEBTOR in any division of the Supreme Court of South Africa.*

- [12] The Court in **Dorbyl Vehicle Trading and Finance Company (Pty) Ltd v Mokheseng LAC (1995 – 1999)** the Court of Appeal had occasion to deal with terms similar the present case and rejected the same argument now being advanced in the present matter. The Court (at p. 403 A – F) said:

*“...The sums of money involved in the purchase of the bus were substantial and litigation would not normally be within the jurisdiction of the Magistrate’s Court. What this clause does is to disqualify the respondent (“the buyer”) from contesting the jurisdiction of the court of prime instance. The reference to the power of the seller to institute proceedings in the Supreme Court of South Africa does not limit the seller’s access to a superior Court in South Africa...[T]he parties agreed that the seller might resort to either inferior or the superior court....*

*If, of course, a litigant holding such consent from the other party sues in the Superior Court when it would have been reasonable to proceed in the inferior court, an award of costs on the inferior court scale may, in appropriate circumstances be made. (See Standard Bank of SA Ltd v Pretorius 1977 (4) SA 395 (T) at 396 – 398).”*

- [13] These views are applicable in the present case. After the court had dismissed this argument the focus turned to who bore the *onus* of proof. After much spirited debate, Mr Potsane, again, requested that the matter be postponed allowing both counsel to prepare written submissions on the matter. This request was turned down, and a ruling was issued that it was upon the defendants to proof that indeed they paid the full amount as alleged. The court then ordered that the defence witnesses take the

witness stand to prove the defendants' defence. As it turned out no defence witnesses took the witness stand because they were not in attendance. Mr Potsane, for the defendants, made two, but quite plainly, opportunistic and dilatory excuses. Firstly, he submitted that he did not bring his witnesses because he thought the plaintiff would lead evidence first to prove its case and then he would have applied for absolution from the instance. Secondly, after the first reason was rejected, he came up with the second. He stated, from the bar, that his client (2<sup>nd</sup> defendant) was out of the country due to illness and therefore prayed that the matter be postponed to a future date. The postponement was denied, and in doing so this court cited its reasons, among which was that, the matter had been dragging on for many years before this court (to be precise since 2015. Mr Potsane did not provide proof of the 2<sup>nd</sup> defendant's travel beyond the borders of the country nor of his supposed illness. He submitted that he could provide proof if the matter was adjourned.

[14] It is apposite to revisit the principles applicable to postponements. It is trite that postponements are not there for the mere asking. These principles were aptly re-stated in **Myburgh Transport v Botha t/a S.A Truck Bodies 1991 (3) SA 310** at pp 314 – 15, thus:

*“1. The trial judge has a discretion as to whether an application for postponement should be granted or refused (R v Zackey 1945 AD 505).*

*2. That discretion must be exercised judicially. It would not be exercised capriciously or upon any wrong principle but for substantial reasons (citations omitted).*

*3.....*

4.....

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 [citation omitted]*

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. 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 467F).*

7. *An application for postponement must always be bona fide and not used and not used simply as a tactical manoeuvre for the purpose 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 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 [citations omitted]*

9. *The court should weigh the prejudice which will be caused to the respondent in such 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.” [Citations omitted]*

[15] Applying these principles to the facts of the instant matter, it is without doubt that this matter has been lingering before this court for an inordinately long time, given that it is commercial dispute which deserves resolution within the shortest possible time. It will also be recalled that earlier in the judgment an allusion was made to the fact that my sister Chaka-Makhooane J has recorded her displeasure and disquiet at the attitude of the defence in expediting the matter. Regrettably the same attitude persisted even before me. It was quite clear that the defence counsel was prepared to argue the matter in a truncated fashion. From the outset it was not clear why the issue of jurisdiction of this court was not argued at first before Chaka-Makhooane J as it is a threshold issue. Be that as it may, the matter was scheduled to be heard over two days. On the first day Adv. Cronje was taken ill with Covid-19, but on the second day, instead of raising the issue of his client’s illness at the earliest opportunity, Mr Potsane, waited until all his tactical manoeuvres had come to a dead-end, only to raise the issue of the 2<sup>nd</sup> defendant’s illness.

[16] It was not explained when he fell ill nor when he left the country for supposed medical attention and why it was necessary that he sought it back in China and not in either Lesotho or South Africa. The prejudice which the plaintiff stands suffer and is always suffering is glaring, goods were supplied and consumed by the 1<sup>st</sup> defendant without paying for them in full. If the matter drags on for another year it would not be fair to the

plaintiff, especially in circumstances where the 2<sup>nd</sup> defendant's defence is that, while acknowledging that annexure "A" (spreadsheet) correctly depicts the payments he made. His only defence is that the amounts being claimed by the plaintiff were paid in full and some in cash. Even to the most untrained mind, it is not hard to fathom that there will always be an incentive on the part of the 2<sup>nd</sup> defendant that the matter keeps being unresolved. It is to the defendants' benefit and to the defendants' prejudice that the matter remains in limbo. Justice and fairness of this case demanded that it be finalized without any further delay.

[17] **Onus of Proof**

It is common cause that the 1<sup>st</sup> defendant had a credit facility with the plaintiff, in terms of which goods were requested and ferried from South Africa to Lesotho, at its request. It is also common ground that payments were made, and in terms of the spreadsheet (Annexure "A" ) which is regarded by the parties as the true reflection of the payments made, there is a shortfall of M30,000.00 on invoices 10002893 and 10007641 and no payment at all on invoice 10140902 to the tune of M145,600.00. The defendants' defence is that the amounts were paid in full and further cash payments were also made, the acknowledgement of which got burnt in the 1<sup>st</sup> defendant's business premises. The burden of proof in these circumstances is on the defendants to satisfy the Court that indeed payments were made in full and partly in cash. This is so because the defendants are raising a special defence. The approach was stated in **Pillay v Krishma and Another 1946 AD 946 at 951 – 2:**

*If one person claims something from another in a Court of Law, then he has to satisfy the court that he is entitled to it. But there is a second principle which must always be read with it: Where the person against whom the*

*claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant; for his defence, as being claimant; for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it...*

[18] It is on this basis that ruling was made that the defendants bore the onus of proving that payments were made in full. Perhaps at the risk of being repetitious, after the defence counsel's request for postponement was rejected and the 2<sup>nd</sup> defendant could not testify, the court proceeded to grant judgment in favour of the plaintiff. This was perfectly in order. Support for this approach is found in Rule 41 (I quote it as far as it is necessary for present purposes):

*41(1) If, when a trial is called, the plaintiff appears and the defendant does not appear, the plaintiff may prove his claim, and judgment shall be given accordingly, in so far as he has discharged such burden;*

*Provided that where the claim is for a liquidated amount or a liquidated demand no evidence shall be necessary unless the court otherwise orders.*

*(2)...*

*(3) If, when a trial is called, the defendant appears and the plaintiff does not appear, the defendant shall be entitled to an order granting absolution from the instance with costs, but he may lead evidence with a view to satisfying the Court that final judgment should be granted in his favour and the court, if so satisfied, may grant such judgment.*

*(4) The provisions of sub-rules (1) and (2) shall apply to a party making a counterclaim as if he were a plaintiff and the provisions of sub-rule (3) shall apply to any person against whom a counterclaim is made as if he were a defendant.*

[19] As already seen in **Pillay v Krishma and Another (above)**, for the fact that the defendants are raising a special defence, they are regarded as claimants (plaintiffs) and in the absence of the 2<sup>nd</sup> defendant when the trial was called, in terms of rule 41(3) the current plaintiff was entitled to judgment in its favour. The amounts claimed by the plaintiff are liquidated, and in terms of rule 41(1) it was not necessary for the plaintiff to lead evidence to prove the said amounts. In fact, as per Annexure “A” it is clear that the 1<sup>st</sup> defendant owes the amounts claimed.

[20] **Amendment from the bar**

Mr Cronje, for the plaintiff applied for condonation for non-observance of the rules and also applied for amendment of the summons as regards the amount claimed revising it downwards to M175,600.00. Mr Potsane, for the defendants, made much spirited objection to the procedure followed as he argued that the procedure followed. He argued that the plaintiff should have strictly followed Rule 33. His argument was that in the absence of a substantive application amendment, the defendants would be prejudiced as they would be denied a chance to contest their indebtedness to the plaintiff. I found the argument to be quite bizarre given that the plaintiff was revising the amounts claimed, downward. As to how this would have prejudiced the defendants was not readily fathomable. In fact, in terms of Rule 33(a) a party is free to apply to the trial court during the trial for an amendment of any pleading or document, before judgment. The predominating component of the decision whether or not to grant an amendment is prejudice which will be occasioned to the defendant. Ultimately the court’s duty is to do justice to the parties based on all the material. In terms of Rule 59 this court is made a master of its own procedure, as it is given a discretion in the interest of justice, to

condone non-compliance with the rules, and I therefore, found nothing untoward in the manner in which the amendment was raised.

[21] **Costs:**

In terms of the agreement, clause 16 thereof, the defendants have bound themselves to pay costs on attorney and client scale consequent to any legal proceedings to recover the amount owing.

[22] In the result:

Judgment is granted against the first and second defendants, jointly and severally, the one paying the other to be absolved, in the following terms:

(a) Payment in the sum of M175,600.00 (One Hundred and Seventy-Five Thousand and Six Hundred Maloti);

(b) Interest on the aforesaid sum at the rate of 17.50% per annum, calculated from 1<sup>st</sup> September 2015 to a date of final payment.

(c) Costs of suit on attorney and client scale.

---

**MOKHESI J**

**For the Plaintiff:            Adv. P. R. Croñje instructed by Webber Newdigate Attorneys**

**For the Defendants:        Adv. Potsane instructed by Nthontho Attorneys**



