IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

CASE NO. 1134/2005 **DATE: 9 SEPTEMBER 2010**

In the matter between

SCOTT ANGLIN **Applicant**

And

BARRY GRANT BURCHEL **Respondent**

REASONS FOR JUDGEMENT

MAGEZA AJ:

1. This matter came before me by way of Motion Proceedings on the 9th of September with Applicant seeking an order, *inter alia*, that:

> " The trial in the action instituted in the above Honourable Court under case number 1134/2005, between the present Respondent (as Plaintiff) and the present Applicant (as Defendant), which trial is enrolled for hearing in the above Honourable Court on the 27th of September 2010, be postponed, to a date to be arranged by the Registrar of the above Honourable Court..."

The further order related to the matter of Costs.

2. Respondent in turn opposed the Application and brought a Counter

Application for a separation of the merits and *quantum* in terms of Rule 33(4) of the Rules of this Court.

3. After hearing argument from Mr *Cole* (for Applicant) and Mr *Goosen* SC (for Respondent), I granted the Application for the postponement and dismissed the Counter Application for separation in terms of the aforegoing rules of Court. I further ordered that costs in the application be costs in the main action.

Background

For purposes of contextualising the Application, it is helpful to briefly set out some of the history of the matter.

4. Applicant (Defendant in the main matter) is a citizen of the United States of America and a businessman based in San Antonio, Texas.

5. The Respondent (Plaintiff) is the owner of Frontier Safaris, a game farm catering for visiting hunting groups primarily from the United States of America, and is a South African with farms situate in Alicedale within the jurisdiction of this Court.

6. For a period commencing in 2002, the parties were friends and business associates with the Defendant frequently visiting South Africa and engaging in business with the Plaintiff. It is common cause that they concluded agreements, during this period, wherein different properties were purchased. Their relationship later came apart as a result of one or more business related disagreement/s. From the papers before me, it is clear that they have since at least

2005, become involved in protracted legal disputes, some of which have since become resolved.

The Judgement of Acting Justice Crouse

7. Out of a total 5 (five) claims brought by Plaintiff (Respondent) in 2005 against the Defendant (Applicant), 4 (four) have since been resolved and the only outstanding matter impeding resolution of all disputes between the erstwhile friends, is the defamation claim which is part – heard. Acting Judge Crouse is currently seized with the matter and has already handed down on 30 April 2010, a lengthy and illuminating judgement on the choice of law issue, argued as a point *in limine* before her by the parties - See *Burchell v Anglin, 2010 (3) SA 48 (ECG).*

8. The ruling, from what I make of the judgement, was necessitated by the Defendant's argument that publication of the allegedly defamatory content had been made to one Cabelas (and his employees), Plaintiff's American booking agent who sold hunting packages for Plaintiff. That this had been communicated – published- and received in the United States and that therefore, that is where the matter fell to be determined. I also understand that in line with Defendant's argument outlined above, his position is generally that justification exists in American law which would, according to American law, render his conduct nugatory.
The damages claimed are in the sum of R11 834 945, 16.

9. A perusal of Acting Judge Crouse's earlier judgement reveals that she heard evidence, including that of experts, on the choice of law

issue over a period of 29 Court days. Argument alone was presented over another 3 Court days. This gives an indication of how intractable the issues between the parties were and how they might so remain in the future.

10. It is common cause between the parties that Acting Judge Crouse is seized with the matter. It is without doubt apparent that extensive evidence was presented and the judgement makes it abundantly clear that continuation before her will facilitate more seamless proceedings and curtail the duration that a new Judge would need.

11. The Court then found in favour of the Defendant, pronouncing (at paragraph 130) that:

> "Thus, in my judgement, the factors connecting the delict and the parties with Nebraska are sufficiently strong to make it substantially more appropriate to displace the law of South Africa as the applicable law on this substantive matter. I therefore find that, for the just disposal of claim 5 the *lex causae* is the law of Nebraska, subject thereto that it passes our constitutional threshold test. This decision does not mean that the law of Nebraska is applicable in the quantification of damages. This decision is also left open for decision after argument at the subsequent trial (my underlining)."

Process leading to set down .

12. It is also common cause between the parties that on the 11th February 2010 (prior to judgement being handed down by Crouse AJ), the parties approached the office of the former Judge President and were advised that in light of the presiding Judge's Acting capacity, the matter could only be enrolled outside of term time ie during recess.

13. The dates covering 27 September to 8 October 2010 were then, at best, mooted as suitable at least to Plaintiff and Acting Judge Crouse. Defendant's attorney Mr Brody, vehemently disputes the contention that such dates were available and suitable to Defendant. In other words, although the dates were mooted, he contests the proposition that these dates were agreed to at the Judge President's chambers as suitable.

14. Mr Parker of Pagdens, representing the Plaintiff, then wrote a brief letter to Defendants attorney, Mr Brody, stating the following:

> "1. As you are aware, the Judge President insists that this matter be heard in recess.
>
> 2. We are available to deal with the matter during September recess, commencing 27 September and ending 7 October 2010.
>
> 3. Kindly advise as soon as possible whether or not we may set the matter down for hearing during this period."

15. Mr Brody responded by way of a letter dated 3rd March advising that Defendant had 'commitments' until the middle of December 2010, and that the matter would have to be heard some time during 2011. He followed this missive up with a letter dated 12 March 2010 advising that any attempt to set the matter down during the September recess would be met with an application for a

postponement.

16. On the 17th March Mr Parker then wrote back to say:

"1. the Judge President insists that the matter be heard during recess;

2. Plaintiff, is entitled to have the matter brought to finality and it is unacceptable that the matter be delayed for a further year;

3. the defendant has not specified exactly why he cannot attend the hearing during the period 27 September to 8 October 2010;

4. Acting Judge Crouse is available during the September recess;

5. the date is suitable to all concerned, with the exception of the defendant who has unspecified 'commitments';

6. under the circumstances, the matter would be set down for trial during the period 27 September to 8 October 2010".

17. The matter was then set down by Plaintiff by way of Notice delivered to Defendants attorneys on the 18 March 2010.

18. Mr Brody then sent a further letter on the 23 March re-stating Defendants inability to attend the hearing on the dates proposed and that Defendants witnesses would also be unavailable.

Applicant's basis for the postponement.

18. Applicant's basis for the application to postpone the matter is founded on this that from the outset, the Plaintiff was appraised of the fact that Defendant would not be ready for a continuation of the trial within the current year. That, until at least the middle of December 2010, he had 'commitments' and the earliest he would be ready is from February 2011 onwards.

19. That the trial action is not ripe for hearing in this that Applicant has, in the American Courts been engaged in a process of obtaining documentation relevant to the trial from Cabelas. These efforts by the Defendant appear to have commenced in May of 2007 but that despite a Subpoena issued under the authority of a Texas Court, Cabelas had continuously failed to co-operate.

20. That in 2009 the Defendant had again approached a United States Court for the district of Nebraska, requesting an Order for discovery of all relevant documents in the matter between the parties. A copy of the resultant Order is annexed to Defendant's (Applicant's) papers and it is dated the 17 June 2010, signed by "Cheryl R Zwart – United States Magistrate Judge." He avers that this Order has led to 'a large number of documents from Cabelas' being obtained.

21. It is further stated by Mr Brody, that on the 17 July 2010, Defendant received a compact disc from Cabelas containing electronic copies in excess of 50 000 pages on a PDF format. These are in an unarranged and disorderly format. It will require an inordinate amount of time to sort out the documents. More importantly, so the Applicant says, these documents are "clearly discoverable in the present action between the parties and will have to be made available to the Respondent". He states that "I am instructed that many emails between Respondent and Cabelas' offices have for the first time been disclosed".

22. Applicant contends that "Throughout the litigation between the parties discovery has been an ongoing issue. Numerous Rule 35(3)

Notice have been filed and it has always been apparent that there has been insufficient discovery on the part of the Respondent."

23. According to Applicant these documents are relevant in the present proceedings. They in his assessment thereof, go to the heart of respondent's main claim. In other words they are vital to the preparation and presentation of his defence at the trial.

Respondent's reply.

Respondent in reply posits the following:

24. After setting out the process outlined in obtaining the recess dates from the office of the Judge President, Respondent makes the point that in the letters exchanged in the run up to setting down the matter, "No reasons for the Defendant's alleged unavailability were furnished".

25. There is then reference by Respondent to what he terms 'harassment and intimidation' allegedly on the part of Defendant directed at Respondent. I do not propose to go into any detail thereon.

26. Respondent then states at paragraph 30 of his papers that, "Clearly the defendant is using as a ruse and an excuse his ongoing litigation with Cabelas in an attempt to justify a postponement of the trial."

27. Respondent then proceeds to deal with the matter of Separation of merits and quantum.

28. Now, it is settled law that the granting of a postponement in an appropriate case by a Court is an indulgence and is at the Court's discretion.

The aforegoing principle is expanded upon in *Isaacs and others v University of Western Cape* 1974(2) SA 409 (C) at 411H as follows:

> "It is clear that an appellant who seeks a postponement must satisfy the Court that it should grant him such indulgence. Despite this fact a Court will be slow to refuse a postponement because of the consequences which may ensue. However, a party who seeks this form of relief should fully explain the true reason for his non-preparedness".

In *Madnitsky v Rosenberg* 1949(2) SA 392 AD at 399, the Court stated:

> "No doubt a court should be slow to refuse to grant 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."

For an applicant to succeed they would, at the very least, have to show that they would suffer some material prejudice in the presentation of their case were the postponement to be denied.

29. The Court in *Persadh and Another v General Motors South Africa*

(Pty) Ltd 2006(1) SA 455 (SE) at 459E-G – a decision of this Division- outlined the law as follows:

> "The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the parties may or may not suffer must be considered; fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs." – per Plasket J.

30. I have applied my mind to the arguments herein for and on behalf of both parties. The Applicant's case is that Respondent, in the first place, was aware right at the time that these dates were mooted in February that he would not be ready to proceed. His argument is that despite this being the position, his view is that Respondent elected to forge on regardless and arranged that the matter be set down for trial. A perusal of the letters exchanged between the attorneys representing the two parties does not even allude to telephonic or other more considered discussions around the suitability of the said dates. Secondly, Applicant views the documentation secured in July in the United States from Cabelas as relevant and central to the dispute between the parties. He argues that he needs time to discover the same once the same is

reorganised by his lawyers in America.

31. One of the overriding features of this case is that it is a part-heard trial in South Africa and the *lex loci delicti* is the United States. The outcome of which, at least in so far as the merits are concerned, is to be tried according to the defamation law of the United States. It appears to me to be premature for any of the parties to argue with certainty regarding whether or not the documentation secured from Cabelas will be relevant in the trial or not. My view is that on the papers before me, I have no basis to come to such a conclusion. Such a view on the part of this Court might in these circumstances result in serious prejudice to the Applicant in the future conduct of his case.

32. It has to also be borne in mind that the parties have been conducting lengthy litigation proceedings against one another with claims and counterclaims. These proceedings are ongoing. There is nothing that appears to be a ruse for purposes of delay in the conduct of the Applicant. I do not view the conduct of Applicant in doing all it can to secure documentary evidence from Cabelas, as Respondent's booking agent, in order to meet the Respondent's case as a fishing expedition and an attempt to unduly delay these proceedings. It is quite evident from the papers that his efforts to secure the relevant documentation commenced as far back as 2007. Cabelas is central to the dispute both in regard to the publication of the alleged defamatory content and the possible consequential damages.

33. Finally, where there are unique and exceptional factors evident and

associated with a particular case, it may be so that such ought to guide the presiding Judge in assessing possible prejudice to either of the parties.

The following collective considerations do somewhat set the present matter apart from routine defamation trials. These are characteristics which, in my view, are of such a nature that they require a Court presiding particularly on an application for a postponement to have acute regard to the possible prejudice that can be visited the respective litigants in the event of an adverse order.

33.1 The parties are resident in different parts of the world and each conducts a sole proprietor business, the one in the United States and the other in South Africa.

33.2 The matter is already part-heard and the presiding Judge has ruled the *lex causae* as based on the law of the United States.

33.3 That American law will thus be the applicable law and that its content must be proved as a matter of fact.

33.4 That this will no doubt require expert witnesses from the United States to be called to testify to this end.

33.5 The period between the 27 September and 8 October will according to the parties not, in any event, be sufficient to complete the trial in all its material respects.

33.6 That an opportunity has availed itself in terms of which the Judge President is willing to assist in having the matter enrolled in normal term time and as early as February 2011.

In the result, the Application for a postponement was granted.

I ordered that Costs be Costs in the main action.

Separation of merits and quantum

34. The Respondent brought a Counter application for the separation of the merits and quantum in terms of Rule 33(4) of this Court's Rules.

35. The grant or refusal of such an Application rests on whether such an Order would, in the disposal of the matter, lend convenience to the Court and the parties. A Court engaged with such a request must to the best of its ability gauge the extent of the advantages and/or disadvantages which would result from the granting of such an Order.

36. I have already pointed out that this is a part-heard matter and Acting Justice Crouse is engaged with the same. In her Judgement referred to above, she has intimated that her ruling in favour of Nebraska on the choice of law issue does not mean that the said legal jurisdiction is to be looked to in the quantification of damages. Clearly the learned Judge anticipates that that question will still need to be argued before her – see paragraph 11 of my reasons herein.

37. In the premises, it appears to me that the Rule 33(4) application must be brought before Acting Justice Crouse.

I therefore dismissed the Counter-Application.

I further ordered that Costs be Costs in the main action.

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MAGEZA AJ

22nd September 2010

APPEARANCE FOR APPLICANT - MR S. H. COLE

ATTORNEYS FOR APPLICANT - WHEELDON RUSHMERE

APPEARANCE FOR RESPONDENT - MR G. GOOSEN SC

ATTORNEYS FOR RESPONDENT - PAGDENS INC