CASE NO. SA 4/2005

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

AZTEC GRANITE (PTY) LTD **APPELLANT**

And

ANDREW STANLEY GREEN **FIRST RESPONDENT**
ROBERT FRANCIS EDGAR BROWN **SECOND RESPONDENT**
KELGRAN AFRICA (PTY) LTD **THIRD RESPONDENT**

CORAM: SHIVUTE, C.J *et* O'LINN, A.J.A *et* CHOMBA, A.J.A.

Heard on: 2005/10/12
Delivered on: 2006/02/01

APPEAL JUDGMENT

O'LINN, AJA.: On 12th October 2005, Aztec Granite (Pty) Ltd., appeared before this Court through its legal practitioner, Mr Verwey, of the firm Theunissen, Louw and Partners, to apply for the postponement of its appeal against a judgment given in the High Court on 4 February 2005 in favour of the respondents in this matter.

Mr Frank SC, instructed by Lorentz & Bone, legal practitioners for respondents, appeared before us for the respondents.

The brief history of this appeal is as follows:

Judgment was given in the court *a quo* in favour of the present respondents in an application brought by them against the present appellant.

After the noting of an appeal by the appellant, the appeal was duly set down by the Registrar of this Court on 20th May 2005 for hearing on 12th October 2005.

It was only on the 11th October, one day prior to the date set down for the hearing of the appeal, that a substantive written application was filed with the Registrar for a postponement of the appeal, based on the founding affidavit of a Mr Verwey, a partner in the firm Theunissen, Louw and Partners.

The said written application was also only served on respondents on that date.

No heads of argument had been served by applicant/appellant on either the merits of the appeal or the application for postponement. By contrast, heads of argument on behalf of respondents on the merits of the appeal had already been filed on the 28th September and served on appellant. Written heads of argument on behalf of the respondents in regard to the application for postponement were only filed on the 12th October, before the commencement of the hearing on that day. There was no supporting affidavit from the appellant/applicant and also none from any of the partners of Verwey in the firm Theunissen, Louw and Partners.

Mr Verwey had also failed to file any written heads of argument in regard to the application for postponement.

The aforesaid negligent acts and omissions by appellant's instructing legal representatives continued, notwithstanding early warnings by Lorentz & Bone, instructing legal practitioners of the respondents. In a letter dated 22 September 2005, Mr Wohlers stated:

> "I refer to your letter dated 30th September 2005 as well as its annexure, the contents of which I note.
>
> As I indicated to you telephonically, my client would be strongly opposed to a postponement of this appeal, to the extent that we may be requested to agree to same.
>
> My client's opposition to the postponement of the appeal is based on the fact that any delay in finalising this matter is at the peril and to the prejudice of my client, who can not retake possession of the quarry that is – in terms of the appealed court order – unlawfully occupied by your client. Whilst your client remains in unlawful occupation of the quarry, my client is practically not in a position to comply with various obligations in terms of the *Minerals Act, 1992* and the conditions of the mining claim, and your client is well aware thereof.
>
> It is in this regard that my client also takes strong exception to the fact that whilst your client was for more than 4 months of the date of this appeal, he has taken no steps to arrange alternative counsel of (*sic*)– even worse – has not informed us as legal practitioners for the respondent in this appeal of the non-availability of counsel. I am certain that arrangements could have been made four months ago as to a date suitable for both parties and the Supreme Court. To approach the Registrar less than four weeks prior to the appeal is completely unacceptable in view of the prejudice suffered by my client.
>
> I confirm that my instructions are to oppose any postponement of the appeal and my counsel will file heads of argument."

In the course of Mr Verwey's oral argument, he objected to the appearance of the instructing legal practitioners Lorentz and Bone and their instructed

counsel Mr Frank, on the ground that no power of attorney was filed by Lorentz & Bone.

Mr Frank conceded that no power of attorney had been filed but argued that it could have been filed in due course if alerted to the fact by the appellant.

Mr Verwey also failed to give any reasonable explanation why this objection was only made at the hearing. It appears that this was an obvious attempt to enforce a postponement of the appeal, which postponement the applicant/appellant required for completely different reasons throughout the period from at least the end of June, when appellant's counsel, Mr Smuts, told appellant's instructing attorneys that he was not available to appear for appellant to argue the appeal, until the 12th October, the date allocated for the hearing of the appeal.

It is obvious that such power of attorney is an important requirement of the Rules of Court. The failure to file it was obviously due to the negligence of the instructing legal practitioners of the respondents and they cannot be absolved from all blame because the appellant/applicant's legal practitioner waited until the last moment to raise the objection.

The appellant's case for a postponement is without substance, except for the point raised belatedly, relating to the failure of the instructing legal practitioners of respondent to file powers of attorney.

The case as presented by Mr Verwey was marred by inconsistent and even untrue statements and an attitude towards litigation in the Supreme Court which should not be tolerated by this Court.

I will attempt to summarise the reasons for my abovestated comment:

(i) In a letter by Mr Verwey to the Registrar of the Supreme Court dated 15 September 2005, Mr Verwey *inter alia* states:

> "We regret to inform you that neither Adv D F Smuts, SC who was the instructed counsel in the Supreme Court nor we as the appellant's Legal Practitioners of record are available on the above date for the hearing of this matter".

The Registrar had notified the instructing legal practitioners of both sides already on 20th May 2005 of the dates of set down for the hearing on 12th October 2005.

According to Mr Verwey, Advocate Smuts SC advised him at the end of June 2005 when approached by Mr Verwey, that he was not available to act for the appellant in the appeal. Mr Verwey does not suggest that he had already briefed Adv. Smuts before the end of June to act for the appellant in the appeal. It was thus not a question of Adv. Smuts being reserved when the appeal was noted, and then saying at the end of June that he was no longer available, but rather that he was only approached at the end of June by the instructing attorneys and at that stage told them that he was not available.

One can understand that Mr Smuts was unavailable, but not why the instructing legal practitioners, were not available as stated in their aforesaid letter. No reasons were given as to why Theunissen, Louw and partners, the instructing legal practitioners, were not available as alleged.

(ii) The letter continues:

> "We were unable to make alternative arrangements in order for this appeal to proceed on the allocated date and wish to assure you that our above request is not made lightly. The aforesaid also forms part of the reason for the delay in making the current request to you".

The statement that "we were unable to make alternative arrangements" is contradicted in the letter by Verwey to Lorentz & Bone dated 22 September 2005 in which it is stated:

> "We further wish to advise that Adv Smuts, SC has been our counsel in this matter from the start and our client and we did not see our way open to instruct another counsel. We have no other option but to obtain a new, suitable trial date".

In paragraph 20 of Verwey's founding affidavit in the application for postponement he reiterates:

> "Appellant and we as his legal practitioners did not consider it an option to instruct another counsel in this matter…"

The allegation in the letter to the Registrar referred to above that "we were unable to make other arrangements," thus appears to be false.

The clear fact is that the instructing attorneys made no effort whatever to obtain another counsel during the whole of the period from the end of June – 12 October 2005.

(iii) In his aforesaid founding affidavit Mr Verwey further stated:

> "I did not at the time, (i.e. when informed by Mr. Smuts at the end of June) approach the Registrar to obtain another date as I knew from a previous experience that he does not assign new dates for appeals in the above Honourable Court if the reason to requesting another date is the unavailability of counsel".

If this is so, the question arises why Mr Verwey did apply, but only did so on 15th September. After all, if he didn't apply earlier because of the alleged known attitude of the Registrar, why did he apply on the 15th of September, almost 2½ months after being informed of Mr Smuts's unavailability.

The reason for not applying earlier, is thus non-sensical.

Furthermore, the allegation about the alleged attitude of the Registrar is extremely vague. Surely if an applicant's case was that applicant was unable to find suitable counsel and was in that sense unable to make alternative arrangements, notwithstanding diligent efforts, the Registrar may have taken a different view and so would the Court.

In any event, after the allocation of the appeal date, the applicant for a postponement was required to lodge an application on affidavit to the Supreme Court itself for a postponement, as soon as possible after it

was established that a postponement would be necessary and that the parties were unable to agree on such postponement.

It also follows that prior to such a step, reasonable efforts must be made to obtain the consent of the respondent for such a postponement. Mr Verwey failed to take such steps. It is trite law that a Court will be extremely reluctant to grant a postponement of an appeal, when the sole reason is that an applicant and/or the applicant's instructing legal practitioners, has a preference for a particular legal representative and that particular counsel is not available.[1]

(iv) Mr Verwey stated in paragraph 10 of his founding affidavit that–

> "I hoped that Adv Smuts SC, might later become available, circumstances change and matters are settled and intended to confirm his unavailability or not at the beginning of September when the appellant's heads of argument could still be filed in time for the hearing of the appeal, should he become available, or when I could inform respondents more than a month in advance that we intended to ask for a postponement of the hearing of the appeal (*sic*)".

When Mr Verwey was however asked in the course of his *viva voce* argument whether he had in fact approached Mr Smuts to ascertain whether he had in the meantime become available, Mr Verwey answered that <u>he had not done so</u>.

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[1] *D'Anos v Heylon Court (Pty) Ltd* 1950 (1) SA 324 (C) at 335.
Ecker v Dean, 1939 SWA 22.
Centingo AG v Firestone (SA) Ltd 1969 (3) SA 318 (T)
S v Kuzatjike 1992 NR 70 HC at 72J-73E.
Herbstein v Winsen: The Civil Practice of the Supreme Court of South Africa, 4th ed at 668.

In paragraph 15 of his affidavit Mr Verwey nevertheless stated that "Adv Smuts SC remains unavailable".

Mr Verwey's conduct in this regard and his explanation is once again totally inexcusable, if not shocking.

(v) As a purported excuse for some of his neglect, Mr Verwey states in paragraph 12 that:

> "Notwithstanding the above, during the evening of 3 September 2005 I was the driver of a motor vehicle which was involved in an accident with another vehicle or vehicles. One of the passengers of the vehicle of which I was the driver was killed instantly and I sustained a concussion, another head injury and several other bruises. I did not go to the office during the week of 5th September 2005 and only went to the office for short periods from 15 September 2005."

In paragraph 17 he states:

> "I intended to inform the respondents at an earlier stage, but due to unforeseen circumstances beyond my control, I failed to do so".

Mr Verwey did not say until when he only went to the office for short periods. Mr Verwey also did not say what were the "unforeseen circumstances". Although he should have elaborated on the "unforeseen circumstances", I will assume in his favour that he meant the accident as described in paragraph 12 of his affidavit. When I put to Mr Verwey in the course of his oral argument, why he did not alert his senior co-partners in the firm of Theunissen, Louw and Partners and why he did not ask them to take the necessary steps which he was unable to

take because of the accident and/or the "unforeseen circumstances", he replied that he did not consider doing so because he was a full partner and the case had been allocated to him and consequently he was responsible for taking the necessary steps.

Mr Verwey apparently did not consider that the firm Theunissen, Louw and Partners had been appointed by the appellant as its attorneys and/or instructing counsel and as such had at least a joint responsibility with Mr Verwey not only to act in the interests of their client, but to do so in accordance with the Rules of Court.

Again Mr Verwey's excuse is non-sensical. He certainly had no right to keep the Court and the respondents "hostage", to his own negligent and even deliberate acts and omissions.

(vi) Mr Verwey stated in paragraph 11 of his affidavit:

> "I was also instructed by Mr Cornelius Abram Smit, the Managing Director of the Appellant, on several occasions during July and August 2005 that he, on behalf of the appellant, and the respondents were involved in negotiations, talks regarding the subject matter of the appeal as well as the opposition or not of the appeal by same or all of the respondents, as I understood it, and that they were fairly close to a settlement (*sic*)."

Mr Verwey uses this allegation in his affidavit as one of the reasons for his conduct.

As correctly pointed out by Mr Frank – this is pure hearsay as no affidavit was submitted by Mr Smit. Mr Wohlers, the respondents instructing legal practitioner said in his replying affidavit, that he was "totally unaware" of such alleged "settlement negotiations".

Mr Wohlers also correctly pointed out that Mr Verwey did not indicate that he was actually instructed by his client not to proceed with the steps necessary for the hearing of the appeal.

It must be noted that Mr Verwey, in his letter to Lorentz & Bone, the instructing legal practitioners of the respondents, did not mention any "settlement negotiations".

The vague, unsupported and hearsay allegations made by Mr Verwey in this regard, appear to be, as Mr Frank contended, "an afterthought and a mere ruse so as to attempt to disguise the fact that the real motivation was the unavailability of Mr Smuts SC".

Mr Frank also correctly pointed out in his argument before us that no allegation is made in Mr Verwey's founding affidavit that the appellant has any reasonable prospects of success on appeal. This is another defect in the application.

In all the circumstances it seems to me that the negligent acts and omissions in the application for postponement far outweigh the negligence of the instructing legal practitioners of the respondents when considering the reasons why the appeal could not be heard on the allocated date.

Mr Frank has argued originally for the appeal to be struck off the roll with a special costs order, whereas Mr Verwey has argued for the appeal to be postponed and costs to be costs in the cause.

It seems to me that on the facts and circumstances discussed herein, the negligent acts and omissions by the legal practitioners of the appellant, by far outweigh those of the respondents in regard to the reasons why the appeal on the merits could not be heard on the allocated date.

If the appeal is merely postponed, the respondents will be severely prejudiced, as contended by Mr Frank and his instructing legal practitioners.

In my respectful view, an order that the appeal should be struck off the roll is the only appropriate order in this appeal.

As far as the cost order is concerned, I have seriously considered whether or not a special order of costs should not be made, namely that the costs should be paid *de bonis propriis* by the legal practitioners of the appellant.

Were it not for the negligence of the instructing legal practitioner of the respondents in failing to file the powers of attorney as provided for in Rule 5(4)(b) read with Rule 11 of the Supreme Court rules, I would not have hesitated in making such an order.

Mr Frank has conceded in his supplementary heads of argument that: “As it is a requirement of the Rules of Court that a formal power of attorney by the

respondents must be field and this was not done, no costs order should accompany the striking order".

I agree with this contention. Consequently I have decided that no order of costs should be made in this case.

In conclusion I must warn that this Court will in future have to consider to issue orders for costs to be paid *de bonis propriis* by legal practitioners, because of the vast increase in recent years of appeals that had to be postponed or even struck off the roll by this Court, because of negligent acts or omissions by legal practitioners.

In the result, I propose the following order:

1. The application for postponement of the appeal is refused.
2. The appeal is struck off the roll.
3. No order is made as to costs.

O'LINN, A.J.A.

I agree

SHIVUTE, C.J.

I agree

CHOMBA, A.J.A.

ON BEHALF OF THE APPELLANT	**Mr C J Verwey**
Instructed by:	**Theunissen, Louw & Partners**
ON BEHALF OF RESPONDENTS	**Mr T J Frank SC**
Instructed by:	**Lorentz & Bone**