CASE NO.: (P) A 139/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LUCIANA CHRISTIAN Applicant

and

METROPOLITAN LIFE NAMIBIA First Respondent

RETIREMENT ANNUITY FUND

METROPOLITAN LIFE NAMIBIA LTD Second Respondent

CORAM: PARKER, J

Heard on**:** 2006 November 6

Delivered on**:** 2006 November 9

RULING

PARKER, J:

[1] This is an application by the respondents, i.e. applicants in the present application. For the avoidance of confusion, I will continue to refer to them as respondents and the applicant as applicant. The application is brought by notice of motion for an order in the following terms:

(1) that the matter (i.e. the main application filed in the Court by the applicant on 10 May 2006) be postponed to a date to be arranged with the Registrar;

(2) that the Applicant be ordered to pay the costs of this application, alternatively, that the costs of such postponement stand over for argument;

(3) further and/or alternative relief.

Mr. Murorua represents the applicant and Mr. Heathcote the respondents.

[2] I need not dwell too much on the first prayer. In his submission, Mr. Murorua conceded that the respondents have made out a case for the granting of the order prayed for. Indeed, on the papers, I am satisfied that the respondents explained fully why in their view the matter could not proceed (on 6 November 2006). Consequently, the respondents' application should succeed. The result is that the question that remains to be determined is the issue of costs, that is, which party should be ordered to pay costs of this application.

[3] The respondents have prayed in the alternative with regard to costs, namely, that the applicant be ordered to pay costs of this application, or alternatively that the issue of costs should stand over for argument. I am minded to determine the issue now: there are sufficient facts before me upon which to exercise my discretion, and I see no reason for postponing a decision.

[4] Mr. Heathcote argued that the applicant had been warned that in all probability an application for postponement would in the circumstances be granted and, therefore, the applicant should agree postponement without the necessity of bringing a formal application to the Court, and that if the applicant had adopted a reasonable attitude the respondents would not have found it necessary to bring this application. For this reason, he submitted, the applicant should be ordered to pay the costs of this application.

[5] Mr. Murorua, on the other hand, argued that the applicant should be awarded costs because the usual rule is that the party at whose instance the postponement is obtained must pay the wasted costs.[1] Apart from relying on the general rule, which undoubtedly supports the applicant's position, Mr. Murorua argued further thus: by being given a trial date by the Registrar, the applicant had acquired a procedural right and if the Court, in the exercise of its discretion, grants the respondents' application, which, in effect, would take away that right, then the respondents who applied to the

[1] *Persadh and Another v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at 459. Cf. *Burger v Kotze and Another* 1970 (4) SA 302 (W) at 304 E-G.

Court to take away that right, so to speak, must be ordered to pay costs. Mr. Heathcote's response was simply this: the applicant cannot insist on a right and gain from it if such right was obtained improperly.

[6] In my opinion, the above-mentioned usual rule being a general rule is open to qualifications: there may be *rationes* for not awarding costs in accordance with the general rule.[2] And whether or not there is a reason or reasons for not applying the usual rule will depend principally on the facts and circumstances of the particular case. In this connection, the principal facts and circumstances, which I keep in view, are the following:

(1) The respondents' application to strike out and their application for condonation for the late filing of the respondents' answering affidavit remain undetermined by this Court.

(2) There has been a misreading or misunderstanding, common to both parties, of the Judge-President's Practice Direction regarding set down and trial dates of cases during the 'transitional period' between 2006 and 2007.

(3) There has been a failure on the part of the Registrar to respond to the various important and critical enquiries addressed to him by the respondents' legal practitioners of record.

[2] See *Burger v Kotze*, *supra*, *loc cit;* Cilliers, *Law of Costs*, 3rd ed., 1997: p 8.11-8.12.

(4) The applicant's representative was informed that the granting of a postponement was a likely result if an application for same was made by the respondents, and yet he persisted in his refusal to agree a postponement to a date in the First Term of 2007. But, counsel for the applicant, without contest, conceded in the hearing of this application that the respondents have made out a case for a postponement. Why this costly belated concession, if one may ask?

(5) There is the Registrar's inadvertence in not carefully scrutinizing the applicant's notice for a trial date (dated 14 August 2006), which was defective, and his allocation of a trial date based on the defective notice, making the allocation a nullity. And yet the applicant's representative insists that as far as the applicant is concerned, the Registrar duly allocated a trial date for the hearing of the matter.

(6) There is the absence of agreement concerning the allocated trial date.

(7) The respondents averred that since there was no agreement concerning the trial date, they were unable to obtain the services of counsel of their choice. But they do not say whether they tried, but failed, to obtain the services of another counsel.

(8) Due allowance must be given to the fact that the applicant and her representative are not legal practitioners, even if the latter was misguided in his comprehension of the relationship between the Rules of Court and the Judge-President's Practice Directives and the applicability of the Practice Directives so long as they are not offensive of the Rules.

[7] Having considered factors (1) to (8) in the next preceding paragraph against the backdrop of all the circumstances of the case, I do not see the scales favouring the position of either the applicant or the respondents. In *Klein v Klein*,[3] the Court found that each of the parties contributed to the need for postponement of the trial. Consequently, the Court regarded it just and fair that each party should pay its wasted costs. Besides, the conduct of the Registrar also contributed in some way to the present situation, resulting in an application for postponement. That being the case, a fair solution of the issue of costs is to make no order as to costs instead of ordering that the wasted costs be made costs in the cause.[4] Relying on these authorities, I come to the reasonable conclusion that it would be just and fair that each party should bear its own wasted costs.

[8] In the result, I make the following order:

(1) the matter is postponed to a date to be arranged with the Registrar; and

(2) there shall be no order as to costs.

[3] 1993 (2) SA 648 (B) at 654 A-B.
[4] *Braz v Alfonso* 1998 (1) SA 573 (SCA) 581 A-B.

PARKER, J

ON BEHALF OF THE APPLICANT	Mr. L. Murorua
Instructed by:	Murorua & Associates
ON BEHALF OF THE RESPONDENTS	Adv. R. Heathcote
Instructed by:	Van der Merwe-Greef Inc.