NOT REPORTABLE

CASE NO.: A 285/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

J C BEERWINKEL t/a J C BUILDERS **APPLICANT**

and

DR ANIBAL DA CUNHA DO REGO **RESPONDENT**

CORAM: **HENNING, AJ**

Heard on: 11 October 2010

Delivered on: 19 October 2010

JUDGMENT

HENNING, AJ:

[1] The parties resorted to alternative dispute resolution - arbitration. The arbitrator made an award in favour of the applicant. In this application the applicant seeks to have the award

made an order of Court. The respondent opposes the relief applied for. It is the manner in which the respondent has been conducting his case which requires closer examination.

[2] The arbitrator made his award on 8 December 2008. On 12 August 2009 the applicant applied for the arbitrator's award to be made an order of Court. The respondent obtained leave from the applicant to file his answering affidavit by 10 December 2009. This was not done. In the meantime this matter was enrolled for hearing on the opposed motion floating roll of 11 to 15 October 2010. On 17 September 2010 heads of argument by the applicant's counsel was filed. On 24 September 2010 the respondent filed its "opposing affidavit." It was not accompanied by a notice of motion. The applicant responded with a rule 30 application and, probably activated by it, the respondent on 7 October 2010 (one clear Court day before the hearing), filed a notice of motion and affidavit, applying for condonation for the late filing of his answering affidavit and for a postponement. No heads of argument were filed on his behalf.

[3] The reason for the late filing of the answering affidavit is in essence that the respondent insisted on the services of a particular counsel, irrespective of the consequences. In the affidavit accompanying the notice of motion of 7 October 2010 the respondent states:

"22. Unbeknown to counsel and myself at the time, in early December 2009 counsel became involved in the highly published election application which resulted in him not being able at all to finalize my answering affidavit in time. This situation was furthermore compounded by the fact that due to the inherent urgency of an application of such nature counsel remained wholly engaged until the 3rd of March 2010 in that particular case. Counsel spoke to my attorney on the 25th of January 2010 and conveyed his predicament. Be that as it may no date was set for the matter to be heard and it was anticipated that counsel would be able to attend to the matter shortly.

23. However counsel gave my attorney a second call on the 15th of February 2010 wherein he again conveyed his predicament and time constraints to deal with the matter and during which he suggested the appointment of alternative counsel. However and after having consulted with me in this regard I was of the view that counsel should be retained due to his knowledge of the matter and the advice earlier rendered by him which was duly researched at the time.

24. What made matters worse for counsel is the fact

that shortly after delivery of the judgment on the 4th of March 2010 in the election application the matter was taken on appeal which appeal was set down for trial at the end of May 2010. Together with other Court commitments as well as preparation for the election appeal counsel was again not able to attend to this matter. Attendant to this counsel called my attorney to indicate and explain his predicament and conveyed his problem to attend to the matter at that time. This

was conveyed to me by my attorney, Mr Boltmann but on my insistence it was resolved that counsel should remain on the matter. I respectfully refer to the confirmatory affidavit of Mr Boltmann filed evenly herewith."

The respondent then refers to the busy schedule of the particular counsel and he concludes on this issue:

"*26. I must point out that counsel again called my attorney in August to consider the appointment of alternative counsel due to his tight schedule. He stated that he would finalise the affidavit but it would lead to a postponement of the case and he stated that he would be more comfortable if another counsel could take over the matter for such purpose. However and despite several attempts to secure the services of alternative counsel to argue the postponement and condonation application, my attorney as well as counsel were unable to secure the services of such counsel*".

The last statement constitutes the expression of a conclusion without a factual basis.

[4] Whether a client is entitled to insist on the services of a particular counsel has often been considered by different Courts in many cases. Significantly, the matter of *Ecker v. Dean* 1939 SWA 22 has become a *locus classicus.* In *Centirugo A.G v. Firestone (S.A.) Ltd,* 1969 (3) SA 318 (T) at 320 F-321 A the following was said:

"Then there is a case of Ecker v. Dean, 1939 S.W.A. 22, in which Van Den Heever, J., as he then was, had to face a problem strikingly similar in some respects to the present one. Because of illness, the counsel of the defendant's choice was unavailable to appear for it in an action in which he had been briefed, and a postponement was sought on that ground. The learned Judge said at p. 23:

'The respondent finds herself in the superior position. She has a procedural right and it seems to me that before that right can be disturbed the applicant would have to show good cause.'

On the following page of his judgment Van Den Heever, J., said:

'It has not been shown to me that it is an absolute impossibility for Mr. Ecker to have been represented in these proceedings; and it has not been shown to me that even under the disabilities under which Mr. Kritzinger finds himself, Ecker will not be adequately represented. '

Mr. Kritzinger was the counsel who was being considered to replace the one who was not available. The judgment proceeds:

'All that is shown is that there is the possibility that Mr. Ecker may not be as effectively represented as he would wish

owing to the peculiar position in which Mr. Kritzinger finds himself. Now it seems to me a litigant cannot say: 'I insist upon selecting my counsel; I insist upon having counsel from the local bar,' and because of that insistence deprive the other side of procedural rights which are his due. As has been said, we have nothing to show that there is any impossibility in obtaining counsel from elsewhere.'

And then later his Lordship says:

'I have come to the conclusion, therefore, that no sufficient grounds have been shown for disturbing the respondent in her procedural right, and I am confirmed in that view if I take into consideration the public interest. There is the ordinary canon of expediency that there should be an end to litigation. Apart from that, in this particular case the public interest is more directly affected in that the Administration has repeatedly to procure a Judge from outside, and for these reasons the application must be refused. '

Those passages would seem to suggest that even when a respondent can point to no prejudice, his procedural right to have his case heard on the appointed day will prevail in the absence of greater hardship to the applicant than was shown in that case or than has been shown in the case before us. It is, however, not

necessary to decide whether that is so before us."

In the Cape *D'anos v. Heylon Court (Pty) Ltd* was decided in 1949 and is reported - 1950 (1) SA 324 (C). It was held at 335 -356 that

> "*the non-availability of counsel cannot be allowed to thwart the bringing before the Court of the matter in issue. In all but the rarest of cases, other suitable counsel will be available. The test is not the convenience of counsel; it is the reasonable convenience of the parties - and by that I mean both parties - and the requirement of getting through the Court's work which must be the dominate considerations. The availability of counsel is a subsidiary consideration. A party's predilection for a particular counsel to take his case can, in my view, seldom, if indeed ever, be regarded as a decisive objection to a date of set down which is in all other respects reasonable and acceptable to both parties.*"

The judgment was confirmed on appeal - 1950 (2) SA 40 (C) at 43-44. In the Supreme Court of Namibia the following was said:

> "*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, have a preference for a*

particular legal representative and that particular counsel is not available."[1]

The respondent's insistence on the services of a particular counsel was therefore in law erroneous.

[5] The Courts in this country have repeatedly stressed the importance of conducting litigation in terms of the rules. This has been done in many reported judgments and no doubt on an and almost daily basis during debate in Court. Only two of the reported judgments will be mentioned, the first an early case in the existence of this Court as now constituted *(Swanepoel v. Marais and Others,* 1992 NR 1) and the second a recent as yet unreported judgment of the Supreme Court *(Rally for Democracy and Progress and Others v. Electoral Commission of Namibia and Others, Case No SA 6/2010).* In the *Swanepoel* case this Court at 2 J-3 A stated:

> "*The Rules of Court are an important element in the machinery of justice. Failure to observe such Rules can lead not only to the inconvenience of immediate litigants and of the Courts but also to the inconvenience of other litigants whose cases are delayed thereby. It is essential for the proper application of the law that the Rules of Court, which have been designed for that purpose, be compliedwith. Practice and procedure in the Courts can be completely*

1 Aztec Granite (Pty) Ltd v. Green and Others, 2006 (2) N R 399 at 403 A-B. The Court relied on *DAnos v Heylon Court (Pty) Ltd* 1950 (1) SA 324 (C) at 335; *Ecker v. Dean* 1939 SWA 22; *Centirugo A G v. Firestone (SA) Ltd* 1969 (3) SA 318 (T); S *v. Kuzatjike* 1992 NR 70 (HC) at 72J-73E; Herbstein & Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4 ed 1997 at 668.

dislocated by non-compliance".[2]

In the *Rally for Democracy and Progress* case at 32 footnote 61 the Supreme Court endorsed the following:

> "*The Rules of Court constitute the procedural machinery of the Court and they are intended to expedite the business of the Courts. Consequently they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible.*"

[6] In the *Ondjava* judgment, *supra,* the Supreme Court stated at page 7 in respect of an appeal which had lapsed that

> "*they should have brought an application for condonation and reinstatement without delay*
>
> .....
>
> "

The Supreme Court referred to *Rennie v. Kamby Farms (Pty) Ltd,* 1989 (2) SA 124 (A) at 129 G and *Ferreira v. Ntshingila,* 1990 (4) SA 271 (A) at 281 D-E and the authorities cited therein. In this Court similar observations were made - *Dimensions Properties and Contractors CC v. Municipal Council of Windhoek,* 2007 (1) NR 288 at 292 D-F and *Vaatz: In re Schweiger v. Gamikaub (Pty) Ltd,* 2006

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2 A comprehensive overview of the case law on condonation of non-compliance with the Rules of Court is contained in *Ondjava Construction CC and Others v. H.A.W. Retailers t/a Ark Trading,* Case No SA 6/2009, Supreme Court, as yet unreported.

(1) NR 161 at 163 I.

[7] The respondent ignored the above-mentioned prescription. The respondent further failed to comply with Practice Directive 26(1) which stipulates that

> "*there shall be not less than five days between the date of service, or delivery of notice, of an interlocutory application and the date of set down*".

This aspect was not addressed by the respondent. It has already been mentioned that the respondent failed to file heads of argument, and he did not apply for condonation.

[8] With regard to the principles applicable to a matter of this nature, both parties referred to *Myburgh Transport v. Botha t/a SA Truck Bodies* 1991 NR 170 at 174 E to 175 H. Reference is *inter alia* made to the wide discretion of the Court of first instance. More recently, in *McCarthy Retail Ltd v. Shortdistance*

Carriers CC, 2001 (3) SA 482 (SCA) at 494 par. 28 it was said:

> "*[28] A party opposing an application to postpone an appeal has a procedural right that the appeal should proceed on the appointed day. It is also in the public interest that there should be an end to litigation. Accordingly, in order for an applicant for a postponement to succeed, he must show a* '*good and strong reason*' *for the grant of such relief: Centirugo AG v Firestone SA (Pty) Ltd 1969 (3) SA 318 (T) at 320C-321B. The more detailed principles governing the grant*

and refusal of postponements have recently been summarized by the Constitutional Court in National Police Service Union and Others v Minister of Safety and Security and Others 2000 (4) SA 1110 (CC) at 1112C-F as follows:

> *'The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether*

there is prejudice to any of the parties and whether the application is opposed.' "

The Court further said at 495 pars. 31 to 32:

"*[31] The application for postponement falls short on all counts. There is not even a serious attempt to provide a 'full and satisfactory explanation' for the owner's unpreparedness or the lateness of the application* "

"*[32] The interests of other litigants and the convenience of the Court are also important. The record and heads have been read by five judges, variously months or weeks before the appeal date. The fact that this case was placed on the roll meant that another case had to wait for the following term and if a postponement is granted this consequence will extend into succeeding terms.*"

[9] In *National Coalition for Gay and Lesbian Equality and Others v. Minister of Home Affairs and Others,* 1999 (3) SA 173 (C) at 181 G-H the Court observed:

"*Much as this Court would have wished to have the views of government before it, it cannot condone the disdain with which the respondents have treated their obligations to the Court.*"

An application for a postponement was refused. On appeal the Constitutional Court referred *inter alia* to the *Myburgh* case and refused to interfere with the trial Court's conclusion - 2000 (2) SA 1

(CC) at 12 H to 14 G and 14 footnote 10.

[10] On behalf of the respondent the award of the arbitrator was sought to be challenged on the basis of alleged irregularities and the absence of a fair hearing in terms of Article 12 (1) (a) of the Constitution, and he relied heavily on *Vidavsky v. Body Corporate of Sunhill Villas,* 2005 (5) SA 200 (SCA) in which it was held (207 E-F) that the absence of proper notice of a hearing in arbitration proceedings constitutes a fatal flaw. The applicant disputed the correctness of these contentions and referred to cases such as *Lufuno Mpaphuli and Associates (Pty) Ltd* v. *Andrews and Another,* 2009 (4) SA 529 (CC) - in which it was *inter alia* held (591 pars 213 and 214) that the South African equivalent of Article 12 (1) (a) of the Constitution has no direct application to private arbitrations - and *Bantry Construction Services (Pty) Ltd v. Raydin Investments (Pty) Ltd,* 2009 (3) SA 533 (SCA). In this case a party (the respondent) applied for an arbitration's award to be made an order of Court. The unsuccessful arbitration litigant (the appellant) opposed the relief because of alleged gross irregularities or misconduct by the arbitrator. He failed before the High Court and again on appeal. On appeal it was said (541 I to 542 B):

> "*Suffice it to state that once again a litigant has fundamentally misconceived the nature of its relief. The parties here had waived the right to have their dispute relitigated or reconsidered. Given the nature of Bantry's*

opposition, it was for it to challenge the award by invoking the statutory review provisions of s 33 (1) of the Act. It ill-behoved Bantry to adopt the passive attitude that it did. It ought instead to have taken the initiative and applied to Court to have the award set aside within six weeks of the publication of the award or alternatively to have launched a proper counter-application for such an order. Had that been done then the arbitrator could have entered the fray and defended himself against the allegations leveled by Bantry, instead of it falling to Raydin to do so on his behalf - a most invidious position for any litigant."

[11] The issue of the prospects of appeal has not been fully ventilated. Because of the lateness of the application for condonation, the applicant did not file an answering affidavit and the applicant's heads of argument did not deal with the new situation. The respondent failed to file heads of argument. It is accordingly not practical nor prudent to express a final opinion on this issue.

[12] In the *Vaatz* case, *supra,* reference was made to *Darries v. Sheriff, Magistrate's Court, Wynberg and Another,* 1998 (3) SA 34 (SCA). At 41 A of this judgment it was said:

"*Where non-observance of the Rules has been flagrant and gross an application for condonation should not be granted, whatever the prospects of success might be.*

See Ferreira v. Ntshingila 1990 (4) SA 271 (A) at 281J - 282A; Moraliswani v. Mamili (supra at 10F); Rennie v. Kamby Farms (Pty) Ltd (supra at 131H); Blumenthal and Another v. Thompson NO and Another 1994 (2) SA 118 (A) at 121 I - 122 B."

The Court in the *Vaatz* case adopted (168 par 20) the same approach.

[13] In *Khunou and Others v. M Fihrer and Son (Pty) Ltd and Others,* 1982 (3) SA 353 (W) at 355 H the reason for the existence of a discretion was stated as follows:

"*Of course the Rules of Court, like any set of rules, cannot in their very nature provide for every procedural situation that a*rises. *They are not exhaustive and moreover are sometimes not appropriate to specific cases. Accordingly the Superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and, if needs be, the Rules of Court, according to the circumstances. This power is enshrined in s 43 of the Supreme Court Act 59 of 1959.*"

[14] How should a discretion be exercised? Sometimes it is thought that a discretion is simply a choice between two or more eventualities This it is not. The exercise of a discretion is the

application of the legal rule to an individual case. The case is not directly covered by the rule, it is left to the entity who applies the rule to concretise it to the individual case. Professor William Friedmann, *Legal Theory,* 5th ed, 435 refers to a note by Plowden on the case *Eyston v. Studd* in 1574 containing this:

> "*And in order to form a right judgment when the letter of a statute is restrained, and when enlarged, by equity, it is a good way, when you peruse a statute,* ***to suppose that the lawmaker is present, and that you have asked him the question you want to know touching the equity; then you must give yourself an answer as you imagine he would have done, if he had been present, ….*** *And if the lawmaker would have followed the equity, notwithstanding the words of the law you may safely do the like...."(Emphasis supplied).*

Friedmann says at 435:

> "*This is an almost verbal anticipation of the language used in the Swiss Civil Code of 1907.*"

Article 1 (2) of the Swiss Civil Code provides:

> " *If no prescription can be found in the legislation* ***- the Judge should apply the rule which he would have enacted as legislator.*****"** *(Free translation, emphasis supplied).*

[15] The Friedmann method has the advantage that it based on rationality. It moves away from what German jurisprudence calls "*Gefuhlsjurisprudenz*", the father of which was said to be the lawyer Bartolus who apparently decided on emotion or feeling and then sent his assistant Tigrinus to look for authority. That the exercise of a discretion is not an emotional dispensation or a toss of a coin, is indicated by the authorities mentioned in the *Myburgh* case at 174 I dealing with the criteria for the review of a discretionary exercise. The Friedmann method does not completely eliminate a subjective element but introduces a predominantly rational approach in a sense similar to the officious bystander test for determining a tacit term in contract. Applying the Friedmann test, the rule-giver would probably have said the facts of this case fall short of "good cause" in terms of rule 27 (3), or on the second criterion that an application for postponement which is so fundamentally defective in so many ways has to fail.

[16] In the result the respondent's application for condonation and for a postponement is refused. On this basis the facts in the founding affidavit are not in dispute and must be accepted -*O'Linn v. Minister of Agriculture, Water and Forestry,* 2008 (2)
NR 793 at 795 F-G.

The following order is granted:

A. That the respondent's application for a postponement dated 7 October 2010 is dismissed with costs.

B 1. That the arbitration award annexed to the affidavit of J C Beerwinkel (and as annexure "JC 1" thereto), be made an order of Court in terms of section 31 of the Arbitration Act, No. 42 of 1965.

2. That judgment be entered into in favour of applicant against the respondent in the amount of the aforesaid arbitration award and as follows:

2.1. Payment in the amount of N$112,883.55;

2.2. Payment of interest at the minimum lending rate charged by commercial banks to their clients plus 2% on the following amounts and as from the dates as set out hereafter;

2.2.1 On the amount of N$72,285.90 as from 25 May 2000 to date of payment;

2.2.2 On the amount of N$40,597.15 as from 25 July 2000 to date of payment.

2.3. That the counterclaim of the respondent be dismissed;

2.4. Payment of the following costs:

2.4.1. Applicant's costs of the arbitration proceedings in the arbitration between applicant and the respondent to be taxed;

2.4.2. The costs of the arbitrator, Mr W H van Zijl in the amount of N$18,869.00 as set out in annexure "JC 15" to the affidavit of the applicant.

3. That, for purposes of the execution of the judgment on

interest as set out in paragraph 2.2 above - and the issuing of any process to effect such execution - the delivery of an affidavit to the registrar of any representative of a commercial bank in Namibia setting out the minimum lending rates which such bank charged to its clients at all relevant times as from those dates set out in paragraph 2.2.1 and 2.2.2, shall constitute sufficient proof of such interest rates.

4. That the respondent pay the costs of this application.

5. That the costs referred to in A and B 4 above, include the fees of one instructed and one instructing legal practitioner.

HENNING, AJ

ON BEHALF OF APPLICANT: Adv. R. Totermeyer SC
instructed by
Dr. Weder, Kauta & Hoveka Inc

ON BEHALF OF RESPONDENT Adv. J.A.N. Strydom
instructed by G F Kopplinger
Legal Practitioners