"SPECIAL INTEREST"
CASE NO.: I2191/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

VINSON HAILULU	**PLAINTIFF**
and	
THE ANTI-CORRUPTION COMMISSION	**1st DEFENDANT**
NAMIBIA FINANCIAL INSTITUTIONS UNION	**2nd DEFENDANT**
NATIONAL UNION OF NAMIBIAN WORKERS	**3rd DEFENDANT**
PAULUS KALOMHO NOA	**4th DEFENDANT**
EVILASTUS KAARONDA	**5th DEFENDANT**
ASNATH ZAMUEE	**6th DEFENDANT**

CORAM: DAMASEB, JP

Heard on: 2nd November 2010

Delivered on: 11th November 2010

JUDGMENT

DAMASEB, JP: [1] The present defamation action (Case No. I 2191/2009) was properly set down for trial but is now sought to be either stayed or postponed. It was commenced in the High Court on the 24th of June 2009. I am presently concerned with what costsorder should be made in respect of an abandoned application for its stay and, in the alternative, its postponement. The plaintiff wished to proceed with the trial on the set down dates but the defendants did not wish to. Although I am dealing with "applications" brought in relation to a pending "action", I will avoid the nomenclature of "applicants" and "respondents" when referring to the respective parties in the subject matter of this judgment. For convenience of exposition, I will refer to the 1st and 4th defendants as the "ACC defendants" and the 2nd, 3rd, 5th and 6th defendants as the "Trade Union defendants." [1]

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1 ACC refers to the Anti Corruption Commission created in terms of sec.2 of Act No.8 of 2003to investigate corrupt practices. The 4th

[2] After the defamation action was filed, notices of intention to defend were promptly filed by all defendants, requests for further particulars asked for and given, and the pleas filed.[2] The action was then set down for trial for the dates of 1 to the 10 November 2010. This was after, by notice to all defendants dated 19th March 2010[3], the legal practitioners of record of the plaintiff[4] applied for a trial date on the fixed roll in terms of Rule 39(2) read with Practice Directive 3 of 2006.

[3] On the 15th of March 2010, a Rule 37 Conference took place between the parties at the Offices of the plaintiff's legal practitioners of record. All defendants were duly represented. It was following that Rule 37 Conference that the plaintiff approached the Registrar to obtain a trial date. The dates having been duly allocated by the Registrar, the plaintiff, by notice to all defendants dated 9th of June 2010, set down the matter for trial for the dates 1 to the 10 November 2010.

[4] On 31st of May 2010 the plaintiff's legal practitioners of record filed a discovery affidavit on all defendants, signalling his intention to proceed to trial. On 25th October 2010 the ACC defendants filed their discovery affidavit and schedules and gave the plaintiff notice in terms of Rule 35(6), requiring the plaintiff to produce within 5 days and for inspection, copies of all

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defendant is its Director. 2nd and 3rd defendants are registered Trade Unions. The 5th defendant is the Secretary General of the 3rd defendant while the 6th defendant is the Secretary General of the 2nd defendant.

2 The pleas of the Union defendants were filed on 1 February 2010 without even as much as a hint that the defamation action ought to await the adjudication of the review application.

3 The notice is to the legal practitioners of record of all defendants.

4 Muluti Legal practitioners.

discovered documents. Needless to say, the Trade Union defendants had neither discovered nor asked the plaintiff for the production of documents at any stage.[5]

The genesis of the present stalemate

[5] The ACC defendants filed of record and delivered to the plaintiff an application on the afternoon of the 29th of October[6], seeking the following relief in respect of the present defamation action set down for trial already in June 2010 as I had shown previously:

> "1. Staying the defamation action instituted by 1st respondent in the High Court of Namibia against the 1st and 2nd applicants and 2nd to 5th respondents hereto pending the outcome of the review application presently pending between the applicants, 3rd respondent and 1st respondent under Case No. A 383/2008 with the costs of this application only in the event of and in respect of those of the respondents electing to oppose this application."

[6] On the same date the Trade Union defendants also filed an application seeking the stay of the defamation action, alternatively for a postponement thereof. In the alternative to their stay application the Trade Union defendants sought a postponement of the matter on different grounds to those said to justify stay- being an alleged misunderstanding between their instructing and instructed counsel - which, it is said, had the effect that should the trial proceed the Trade Union defendants would be without instructed counsel and therefore be prejudiced in the conduct of their defence of the defamation action.

Background to the stay and postponement applications

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5 That speaks volumes for their preparedness or otherwise for trial.

6 Being a Friday: The trial was to commence on Monday 1 November.

[7] The plaintiff in the present defamation action, Mr. Hailulu, has the following pending applications in the High Court arising from the same facts underpinning the defamation action:

1) A review application under Case No. A 383/2008;

2) Contempt of Court proceedings against the fourth defendant and the Prosecutor-General;

[8] The review application commenced as an urgent one in December 2008 to review and set aside decisions of the 1st defendant. Swanepoel J granted interim relief pending the finalization of the review application. For present purposes it is not necessary to go into the details of that.

[9] On the 15th of February 2010, the Prosecutor-General of Namibia served the plaintiff with a criminal summons arising from an investigation conducted by the 1st defendant against him and which investigation is the subject of the review application which he brought in December 2008. It was in order to preempt that prosecution that the plaintiff brought an urgent application for contempt against the fourth defendant and the Prosecutor-General, allegedly for being in contempt of the interim order granted by Swanepoel J. Van Niekerk J heard the contempt application and judgment remains reserved.

[10] The third defendant who had not opposed the review application since it was launched had now intimated its desire to do so and had filed a notice to oppose the review application and contemplates filing answering papers in opposition to the relief sought in the review application.

[11] The plaintiff opposes both the stay and the postponement applications. The ACC defendants seek the stay of the defamation action pending the finalization of the review application, but on grounds different to those advanced by the Trade Union defendants.

The attitude of the ACC defendants is that they do not oppose the postponement application sought by the Trade Union defendants.

[12] It is common cause that the ACC defendants gave their notice of the intended stay application on 25th of October 2010 and launched the formal application on the 29th of October. They seek the stay of the defamation action broadly on the following grounds:

1) The decision by the third defendant to join in the opposition to the review will lead to that defendant filing lengthy affidavits to deal with the factual background which will be relevant to the case of the ACC defendants in the defamation action;

2) The issues raised in the review are substantially the same as those raised in the defamation action and it will require determination of the same issues involving substantially the same questions of law and fact;

3) A decision vindicating the plaintiff's arrest would fundamentally impact the basis on which the plaintiff's claims of unlawful arrest and malicious prosecution are based.

4) If the plaintiff's arrest is found in the review application to be lawful, contrary to his suggestion otherwise, his *fama, dignitas* and reputation could not have been impaired.

5) They did not do anything towards the plaintiff that is per se defamatory and that, to the extent that his causes of action against the ACC defendants are predicated on statutory investigative powers - if such were found to have been lawful -the plaintiff would not have any valid claims in law against them.

6) It is the case of the ACC defendants that this Court can grant a stay if it is *"in the*

interest of justice" and if the balance of convenience favours the stay because:

(i) The affidavit evidence in the review application will be of relevance and can be used in the defamation action;

(ii) The stay sought is temporary and the review can be heard in the second term of next year.

(iii) There is a possibility that if the defamation action is not stayed pending the outcome of the review , two Courts may arrive at two different conclusions based on what are essentially the same factual issues /disputes and possible duplication on appeal.

The position of the Trade Union defendants

[13] In light of the fact the stay application was abandoned by the Trade Union defendants, it is unnecessary for me to dwell on the evidence advanced by the Trade Union defendants in support thereof, save to sate that the reasons they advance for the stay substantially overlap with those proffered by the ACC defendants.

[14] Mr. Evalistus Karoonda (5th defendant) deposed to the main affidavit in support of the applications for stay and postponement on behalf of the Trade Union defendants. Kaaronda emphasises under oath that the postponement application was brought only in the event that the stay was not granted. He states that on 13th October 2010 their legal practitioner of record[7] asked the ACC defendants' legal practitioner of record to consent to the stay of the defamation action pending the outcome of the review application, alternatively for its postponement.

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7 *Kangueehi Hengari and Kavendjii Inc* a firm of legal practitioners practising with a fidelity fund certificate and whose principals have the right of audience before this Court.

[15] It is common cause that that consent was given, although the ACC defendant's legal practitioner by letter informed the ACC defendants' legal practitioner of record that although they agree to a stay application, the ACC defendants were ready to proceed to trial and would make discovery in due course. It was only on the 20th of October that the plaintiff's legal practitioner of record were asked by that of the ACC defendants if their client would consent to a stay, alternatively a postponement, in the following terms:

> "1. First and foremost and having discussed the matter with the Government Attorneys who act on behalf of the First and Fourth Defendants, we are both in agreement that this would be the prudent course to follow at this juncture simply because the matter set down on the fixed roll is not really ready for trial. The reasons for this are simply the following: [8]
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> (a) Insofar as discovery is concerned it is evident that substantial discovery still needs to be made on the issues attendant to the matter in the action as aforesaid; [9]
>
> (b) a misunderstanding occurred when it came to the reservation of counsel in that we were under the impression that counsel acting on behalf of the second, third, fifth and sixth defendants was duly reserved for the matter which it recently transpired has not been the case. The predicament our clients find themselves in is that due to time constraints as well as the unavailability of alternative counsel, our clients will have problems in timeously securing the services of alternative counsel to conduct the trial.
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> 2. Secondly, we have now been instructed on behalf of NUNW to oppose the review application and for such purpose have since filed a Notice of Opposition. Be that as it may and having regard to the record filed therein it is apparent that the facts incidental to both the review and the action are basically the same and a decision in the review would in all probability also have an effect on the action as such. This is compounded by the fact that the review proceedings are conducted on paper whereas the trial action would be conducted on the basis of oral evidence. Consequently that which has been stated in

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8 Interestingly, the Government Attorney acting for the ACC defendants and to whom this letter was copied, in reply stated to the legal practitioner of record of the Trade Union defendants as follows: *"In so far as your letter however seems to create the perception that our clients stance on this issue is motivated by the same considerations as those of your clients, we need place on record that our clients' stance, (regarding the stay issue), is for the reasons set out below, and not for the reasons set out in paragraphs 1(a) and (b) of your letter."*

9 We are not told by whom.

the affidavit and the review could also be used in the trial proceedings. We kindly await your reply to reach us by close of business on Thursday, 21 October 2010, failing we shall proceed to draft the necessary application."(My underlining)

[16] The plaintiff was not impressed. The suggestion was rejected outright in a letter sent out the very next day. The plaintiff's legal practitioner of record stated:

"We accordingly place on record that we shall vigorously oppose any application for the "stay", or postponement of the defamation action. Should you wish to pursue the "stay "or postponement of the action, we kindly request you to file your substantive application for such relief without any delay." (My underlining)

[17] It is clear from this letter that the plaintiff was not interested in either a stay or postponement of the defamation action; that he intended to oppose the same andwished that the Trade Union defendants got on with it as a matter of urgency. There is then a hiatus between the 21st and the 26th of October, when the Trade Union defendants' legal practitioner wrote to that of the plaintiff stating their clients were not relying on the unavailability of specific counsel[10] as a ground for the postponement and that they had tried as many as nine counsel but that all were not available except advocate Corbett who could only assist with the preparation of the stay and postponement applications, but certainly not for the trial. Kaaronda adds:

"It is still our humble submission that the defamation case is not ready for trial in view of

10 Mr. Albert Strydom, a legal practitioner of this Court practising as an advocate without a fidelity fund certificate.

the review application and to this end a substantial application will be brought in his regard. Take further note that in view of the unavailability of Advocate Strydom, we have engaged Advocate Corbett to attend to this matter. Take further note that Adv. Corbett will only be available on Tuesday, 2 November 2010, in order to attend to the application herein. In order to avoid unnecessary costs being incurred by the parties, we urge your client to reconsider his position regarding a postponement of the defamation case." (My underlining)

[18] Kaaronda further states that settlement negotiations then commenced on 27 October at the initiative of the Trade Union defendants but that the same collapsed at noon on the 29th - hence the stay application, alternatively its postponement. According

to Kaaronda:

"Adv. Albert Strydom acted as counsel for the first, second and fourth applicants and myself. As such, he rendered legal advice to the applicants on an ad hoc basis pertaining to the prosecution of the defence of the defamation action. Adv. Strydom alsopersonally drafted various Court pleadings and other memoranda of advice incidental to the matter in question. As indicated in Adv. Strydom's supporting affidavit hereto, he contemplated and understood that he would also conduct the trial on behalf of the applicants. However, he was unaware at the time that an application had been made to the Registrar of this Honourable Court for the trial to be set down on the fixed roll for the period 1 November to 12 November 2010.There was a misunderstanding by the applicants' legal practitioners of record that Adv. Strydom's secretary had reserved him as such and that he would conduct the trial. In the meantime Adv. Strydom was reserved by Messrs Van der Merwe-Greeff Inc. in another matter which was also set down on the fixed roll in the case of E-Power Consulting and Construction (Pty) Ltd v J B Cooling and Refrigeration and which matter was set down by the Registrar from 25 October 2010 until 5 November 2010. This resulted in an overlap with regard to set down in this matter. The applicants' instructing counsel was unaware of the fact that Adv. Strydom had already been briefed in another matter but called Adv. Strydom approximately 6 weeks ago to enquire from him what his rates would be for the upcoming matter. Adv. Strydom gave him a quote for his fees, but do not think much of it and accepted that he had been duly reserved to conduct the trial.

I confirm that it has been impossible to obtain alternative counsel to conduct the trial, and should the trial proceed without counsel, I submit that the applicants will be severely

prejudiced in their conduct of the matter.[11] It is also relevant that Adv. Strydom has been dealing with this matter from the beginning and it would be impossible to obtain another counsel at short notice and also for that counsel to adequately prepare for the conduct of a matter which is extensive in nature.

In conclusion, it is submitted that: The applicants have fully set out the reasons for their non-preparedness and have explained why they are not prepared to proceed with the matter;

It is clear that the applicants were not able to obtain counsel on short notice for a trial for such an extended period. The applicants themselves did not contribute to the need for a postponement. There being a misunderstanding in the office of counsel sought to be instructed in the matter;

The application for postponement has been made timeously,[12] and as soon as it was practically possible after it became clear that the matter would not be settled. I pause to mention that this only became clear on Friday, 29 October 2010 at 15H00 when the applicant's instructing received a letter from the first respondent's legal practitioners". [My underlining]

Mr. Strydom's version

[19] In relevant part for purposes of this judgment, he states:

"It was at all times hereto contemplated and understood that I would in my capacity as legal counsel for and on behalf of the aforementioned defendants, also conduct the trial on their behalf. Unbeknown to me at the time an application for the set down of the trial on the fixed civil roll was made to the registrar of the High Court who thereupon allocated the 1st of November 2010 until the 12th of November 2010 on the fixed roll in the High Court of Namibia as the date of trial. Apparently, and being under the misunderstanding that my secretary duly reserved me as such, it was accepted by my instructing counsel that I would conduct the matter as aforesaid. Being unaware of the fact that I was not so reserved my instructing counsel called me approximately six weeks ago[13] to enquire from me what my rates would be for the upcoming matter. At that point in time I gave him a quote but did not think much of it and accepted that I have been duly reserved to conduct the trial.[14] Approximately one month prior to the commencement of the trial my instructing

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11 This shows that the deponent was kept informed about the predicament.

12 The evidence points in the opposite direction.

13 Mr. Strydom's affidavit in support of the present postponement application was sworn to on 29th October 2010.

14 The only inference naturally flowing is that the dates for which the matter were set down were discussed. If not, that raises even more serious questions about the diligence of both instructing and instructed counsel. Since I accept that the dates were discussed, how could it possibly be suggested that the conflicting booking was not realized at this point? And that raises the further question, why was the postponement application not brought at this early stage?

counsel, Mr. Clive Kavendjii, gave me a further call and requested times and dates from me as to when the parties could consult to prepare for trial. Simultaneously thereto it was also suggested that I be furnished with all the relevant documentation necessary for discovery purposes in order to render advice on the issue of discovery. At this time[15] I consulted my diary to ascertain for certain whenthe matter was due for trial in order to prepare a time schedule with regard to the preparation of the matter as such. It was then that I realized that I was not so reserved in order to conduct the trial and I consequently had to revert to my instructing counsel to break him the news. At the time the issue that was pivotal related to discovery as well as the fact that my availability to represent the clients could pose a problem."[16] (My underlining)

[20] Mr. Strydom also confirms that he spoke to several counsel to establish their availability and to replace him as instructed counsel for the Trade Union defendants.

[21] The plaintiff filed answering papers and opposed the relief in respect of both the stay and the postponement applications. I will for present purposes deal only with the evidence in respect of the postponement application except where the reference to the stay was intended by the plaintiff to impact on the postponement application.

[22] The plaintiff deposed to the main affidavit in opposition to both the stay and postponement applications. According to Hailulu, the Trade Union defendants' postponement application was served on his legal practitioners of record after hours at 17:30 on Friday the 29th of October with no business day's notice between such service and the date upon which the application was to be heard. The effect of the timing of the postponement application is stated by Hailulu in the following terms:

"8. It appears that the application was strategically withheld and delayed until, literally,

15 Which, on Mr. Strydom's own version, was a month before the hearing date.

16 In my view this is another stage at which the application for postponement should have been launched and the plaintiff immediately put on notice that he would be taking a risk to continue with trial preparation.

the very last minute. The attitude that prompted this tactical manoeuvre evidently was that I would oppose the application, and to such end prepare and depose to an answering affidavit over the weekend of the 30 and 31 October 2010.

9. The intended ramifications of this would be twofold:

9.1. Both my legal representatives and I would have to sacrifice time that we intended to spend on preparation for the trial, on issues relating to the two bulky and prolix applications. This would undermine and prejudice the fair presentation of my case to this Honourable Court.

9.2. My answering affidavit could, at best for me and at the earliest, be filed and served at 09h00 on Monday, 1 November 2010, the first day of the scheduled trial. No doubt, the defendants would then seek an opportunity to consider the answering papers and to respond thereto. Thereafter, the application would have to be head and adjudicated upon. This, according to the likely line of thinking by the defendants and their representatives, would cause such a delay in the commencement of the trial that the Honourable Presiding Judge is hoped to become inclined to postpone the proceedings." [My underlining]

[23] Hailulu pertinently takes issue with the following:

(i) since the necessity to apply for a stay was realized approximately one month prior to the commencement of the trial, why was the application for stay not launched then? He asks too, rhetorically, why then was plaintiff's attitude to such an application only sought on the 20th of October 2010?

(ii) why was the stay application not launched immediately after plaintiff's rejection of any such application on 21st October?

[24] As regards the alleged settlement negotiations, Hailulu states that such cannot suspend the duty to prepare for trial and that the particular settlement negotiations in this case- limited in scope as they were- could not have interfered with trial preparations. Hailulu further avers, contrary to Kaaronda's allegation otherwise in the founding affidavit - that, in truth, when regard

is had to the totality of the evidence, the Trade Union defendants' unpreparedness for trial is premised on their exclusive reliance on the availability of Adv Strydom.

[25] Mr. Muluti, plaintiff's legal practitioner of record, confirms that Adv Strydom's secretary was present with his diary when trial dates were given on the 2nd of June 2010 and that she confirmed then Mr. Strydom's availability and reserved him for the period 1 to 10 November 2010 for trial. [17] According to Hailulu, If Mr. Strydom became aware six weeks before the date the application was made that the trial was to proceed, it must follow that he was aware of the dates of trial.[18]

[26] Hailulu also alleges that to date none of the respondents in the review application filed any opposing papers and had even delayed the filing of the Rule 53 record on spurious grounds. Based on that he alleges that the respondents are engaging in delaying tactics to frustrate the hearing of the review application - and to make the

17 As part of the founding papers, there is no affidavit from Mr. Strydom's secretary to suggest otherwise.

18 I only need add: Mr. Strydom even gave a quote for his services. On what basis was such a quote given? He must have been given the number of dates for which the matter was set down to give a quote. Would he then not have asked when his services were required? If he did, he would then already at that stage have noticed the overlap with the conflicting brief.

defamation action dependent on the outcome of the review application would prejudice him. According to Hailulu, an application for the hearing date of the review application would at the earliest be made in June 2011 and that hearing dates thereof can realistically only be after 2012. He states that if made dependent on the outcome of the review, the presentation of his defamation action would suffer severe prejudice.

The stay applications

[27] When the applications for stay and postponement were filed of record, I had occasion to meet with counsel for the parties in chambers. At that stage the plaintiff had already filed answering papers in opposition to the applications for stay and postponement. The ACC defendants had at that stage not yet been served with the answering papers and were considering their position whether or not to file replying papers once they had seen the answering papers. The Trade Union defendants had equally not replied to the answering papers at that stage. I had stated to counsel in chambers that although open to persuasion, having seen only the founding papers and the answers thereto, my prima facie view was that I would not grant the stay but would favorably consider a postponement application and would impose a punitive costs order for the postponement that was to result. Armed with that information the parties left and the proceedings resumed on the 2nd November 2010. The applicants for stay and for postponement opted not to file any replying papers and sufficed by the pleadings as they stood.

[28] At the resumed hearing, the ACC defendants on the one hand, and the Trade Union defendants on the other, indicated that in view of the prima facie view expressed by the Court they were abandoning their applications for stay and were tendering costs on the ordinary scale. Mr. Barnard for the plaintiff thereupon urged the Court to impose a punitive costs order in respect of both the abandoned stay applications and the postponement application[19], essentially

19 Which I expressed the willingness to grant.

because of the very late stage at which both applications were brought. Mr. Barnard characterized these applications as tactical ploys intended to frustrate the plaintiff in the continuation of the trial. He submitted that he was seeking a special costs order on attorney - and - client scale and an order in respect of wasted costs for the trial, against both sets of defendants jointly and severally - the one paying the other to be absolved.

[29] Mr. Geier's attitude, on behalf of the ACC defendants, was that the position of the ACC defendants must be distinguished from that of the Trade Union defendants. He argued forcefully that the sins of the Trade Union defendants must not be visited on the ACC defendants as all his clients had done was to apply for a stay application[20].

The basis for the Court's prima facie view and its implications

[30] Both sets of defendants abandoned the stay application once it became known to them what the Court's prima facie view on the matter was. They were entitled to file replying papers, advance full argument and to receive the Court's considered judgment. They forwent that right in view of the Court's prima facie view. Significantly, they tendered the costs of the abandoned stay application. It is important for me to disclose what influenced my prima facie view : I took a dim view of the stay application because of its timing - brought as it was literally on the eve of trial. Applicants who have to stand or fall by their founding papers in my view made out no plausible case why the stay applications were brought so late in the day. Had the stay application, especially the one by the ACC defendants, been brought timeously - I must confess- there is an arguable case why a stay could , on the facts of this case, have been favorably considered. The prima facie view was therefore not actuated by the Court's rejection of the merits thereof, especially as far as the ACC defendants are concerned.

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20 Without seeking a postponement and being ready to proceed to trial if stay were not granted.

[31] The applicants for stay having abandoned it and tendered the costs of the opposition thereto, I am satisfied that the prejudice suffered by the plaintiff is sufficiently cured by a costs order on a party-and-party scale. I am not persuaded by the view advanced by Mr. Barnard for the plaintiff that the ACC defendants were complicit with the Trade Union defendants in devising a stratagem -via the stay application -to effectively achieve the postponement of the trial. It requires a lot of fertile imagination to come to such a conclusion. Besides, I have no reason not to accept Mr. Geier's submission from the Bar that the decision by the ACC defendants to seek a stay was that of instructed counsel who only got briefed at a very late stage in the proceedings when he took the view that he did - leading to the launching of the stay application at the time that it was[21] .

[32] I am not prepared to visit the proverbial sins of the Trade Union defendants on the ACC defendants. It is unsafe to assume that had the defendants, especially the ACC defendants, persisted with the stay application it was destined to fail simply because the Court had expressed a prima facie view against it. The interests of the administration of justice is advanced by it being possible for the Court to inform litigants of the tentative views it has- formed on the pleadings as they stand at a particular point in time- so that they assess their future course of conduct based on that: either to more lucidly elucidate their case in order to address the concerns expressed by the Court, or to abandon a particular trial strategy in order not to waste further time and costs. That should be encouraged, not condemned.

THE POSTPONEMENT APPLICATION

The law

21 "The authorities quoted establish, I suggest, that counsel has a complete discretion in the conduct of cases, whether civil or criminal": Morris, *Technique in Litigation,* 5th Ed at 36.

[33] The principles for the consideration of a postponement application are settled: 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. An application for postponement must be bona fide and must not be used as a tactical manouvre. A

Court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained and is not due to delaying tactics. The overriding consideration in the Court's exercise of the discretion whether or not to grant a postponement is the need to do *"substantial justice"* between the parties. The Court is principally concerned with one question: what is the prejudice to be suffered by the party adversely affected by the postponement and can it be cured by an appropriate order of costs?[22] It must now be accepted as settled that it is unacceptable to assume that as long as the opponent's prejudice is satisfactorily met with an appropriate costs order nothing else matters.

[34] In the litigation process, litigants and their legal practitioners have a duty not only towards each other but also towards the Court and the interests of the administration of justice. A litigant's duty is to avoid conduct that imposes a supererogatory cost burden on the opponent. The duty towards the Court and the interests of the administration of justice has two aspects to it: the first is the convenience of the judge assigned to hear the case and the second is the proper functioning and control over the Court roll. When an indulgence is sought from the Court, the litigants' duty towards the Court and the interests of the administration of justice was stated as follows by this Court:[23]

> "[17] The grant of an indulgence for failure to comply with Rules of Court or directions is in the discretion of the Court - to be exercised judicially. Lack of prejudice to the opposing party is an important consideration in assessing whether or not to grant condonation - but in this day and age it cannot be the sole criterion. In my view, the proper management of the roll of the Court so as to afford as many litigants as possible

22 *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 NR 171 (SC) at 174-5.

23 *HAW Retailers CC t/a Ark Trading Coastal Hire CC & Another v Tuyenikelao Nikanor t/a Natutungeni Pamwe Construction CC (unreported),* Case No. A 151/2008 at Para [17] pp.13-14.

> the opportunity to have their matters heard by the Court is an important consideration to be placed in the scale in the Court's exercise of the discretion whether or not to grant an indulgence.
>
> …...
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> It is a notorious fact that the roll of the High Court is overcrowded. Many matters deserving of placement on the roll do not receive Court time because the roll is overcrowded. Litigants and their legal advisors must therefore realize that it is important to take every measure reasonably possible and expedient to curtail the costs and length of litigation and to bring them to finality in a way that is least burdensome to the Court." (My underlining for emphasis).

[35] I hope it does not reveal a streak of immodesty for me to state that from the vantage point as head of this Court, I know that the Registrar invariably has files awaiting allocation to judges who might become free. It is important therefore for the Court administration to know in good time that a judge is going to become free from an assigned case - so that new case(s) are allocated to such judge with sufficient read - in time before the case is called. This reality can no longer be an irrelevant consideration in whether or not an indulgence should be granted or a party should be mulcted in costs, and to what extent.

[36] Granting a postponement is in the discretion of the Court. What is clear from high authority is the following:

(i) The applicant for postponement bears the *onus.* He must make out his case on the papers;

(ii) A postponement is not had for the asking;

(iii) An application for postponement must be brought as soon as the reason giving rise to it is known;

(iv) There must be a full and satisfactory explanation by the applicant seeking postponement of the reasons necessitating a postponement.

The *dramatis personae* in the postponement application

[37] The postponement application concerns only the plaintiff and the Trade Union defendants. I have already set out the evidence of either side in that regard. When I met the parties in

chambers on the 1st of November, I indicated that although disappointed by the lateness of the application, I did not think it just effectively to deny the Trade Union defendants legal representation by refusing a postponement but that I intended, unless persuaded otherwise, to cure the prejudice to the plaintiff by a punitive costs order. It was the duty of the Trade Union defendants to persuade me otherwise. For starters, they opted not to file replying papers while fully aware of my prima facie attitude. Therefore, the undisputed version that has been put up by Hailulu (plaintiff) is that Strydom's secretary was present at the Registrar's meeting on 2 June 2010 -with his diary- and confirmed his availability and reserved him accordingly. There could therefore have been no basis for a misunderstanding between instructing and instructed counsel. They both must be taken to have been aware of the dates. There is also no explanation whatsoever by Kaaronda why no attempt at a postponement application was made between the period 21 October and 26 October. Why were negotiation attempts initiated so late in the day? I am of course not privy to the details of the negotiations but one gets the feeling that - initiated as they were so late in the day - the settlement negotiations were a ruse to bolster the case for a postponement application.

[38] That said, this is the first postponement request made in respect of the defamation action- unjustified though it was in view of its timing. It is clear that Mr. Strydom was not available to do the trial because of overlapping bookings. Given the complexity of the matter I thought it would be prejudicial to the Trade Union defendants were they to proceed to trial without competent counsel. Refusing the postponement would not do substantial justice between the parties. For that reason I was prepared to grant a postponement. The issue that now remains between the plaintiff and the Trade Union defendants is the nature of the costs order, the Trade Union defendants having tendered to pay costs on the normal scale.

[39] As I have already shown, Mr. Barnard asks for a punitive costs order. Mr. Corbett for the Trade Union defendants opposes such an order suggesting that the operating cause for the postponement application is the unavailability of instructed counsel to represent the trade Union defendants at trial, due to a misunderstanding between Mr. Strydom and those instructing him; that every effort reasonably possible was made to find alternative counsel when the conflict in Mr. Strydom's diary was discovered and that the Trade Union defendants were not to blame for the fact that instructed counsel could not be available to do the trial.

HAS A CASE BEEN MADE OUT FOR A PUNITIVE COSTS ORDER?

The law

[40] Courts are reluctant to penalize a litigant on account of the reprehensible conduct of their legal practitioner.[24] In an appropriate case the Court will visit the legal practitioner's reprehensible conduct upon the litigant, and it should not be shy to do so. As was recognised in *Salojee:*

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered.
>
> A litigant, moreover who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it.
>
> If he relies on the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself" (at 141C-H).

[41] The Court has an inherent discretion to grant attorney-and-client costs when special circumstances are present arising from the reprehensible conduct[25] of a litigant which warrants such an order -and the Court considers it just that an innocent litigant adversely affected by

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24 *Salojee & Ano. v Minister of Community Development* 1965 (2) 135 at 140H; *R v Chetty,* 1943 AD 321.

25 *Van Dyk v Conradie* 1963 (2) SA 413 (C) at 418E-F; *Levinsohns Meat products (Edms) Bpk v Addisionele Landdros, Keimoes* 1981 (2) SA 562 (NC) at 570A-B; *Delfante v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C) at 233A-F; *Hamza* 1949 (1) SA 993; *Ridon v Van der Spuy and partners* 2002 (2) SA 121 (C).

such conduct is not put out of pocket in respect of the expense caused by such conduct. The Court must be satisfied that a party -and- party costs order will not sufficiently meet the expense incurred by the innocent litigant.[26] Where a party in the course of litigation does something for the sole purpose of gaining time, the Court may grant a punitive costs order as a mark of disapproval.[27] A punitive costs order is also justified where a party and or its legal practitioner engage(s) in deplorable conduct towards the Court.[28]

Insufficient and unsatisfactory explanation for unavailability of counsel

[42] The Trade Union defendants are represented by a firm of legal practitioners, the principals of which are admitted legal practitioners who have, and regularly exercise, the right of audience before this Court. In the founding papers there is no explanation whatsoever why none of them could not represent the Trade Union defendants at the trial. Either none of the legal practitioners from *Kangueehi Hengari & Kavendjii Inc* was available, or the matter was considered of such complexity to justify the services of instructed counsel specializing in trial advocacy. None of that is apparent from the papers.

[43] The statutorily sanctioned bifurcation of the practising profession no longer exists in Namibia.[29] In fact where there is a legal practitioner of record, the Court has to specifically

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26 Compare: *Nel Waterberg Landbouwers KO-operatieve Vereeniging,* 1946 AD 597 at 607. See also: *Mudzimu v Chinhoyi Municipality* 1986 (3) SA 140 (ZH) at 143D-I; *Ward v Sulzer* 1973 (3) SA 701 (A); *Buthelezi v Poorter* 1975 (4) SA 608 (W) at 619; *SA Druggists Ltd v Beecham Group plc* 1987 (4) SA 876 (T) at 882H-J.

27 Sass *v Berman* 1946 WLD 138; *Moshal Gevisser (Trademarks) Ltd v Midlands Paraffin* Co1977 (1) SA 64 (N) at 70D-H.

28 *Caluza v Minister of justice* 1969 (1) SA 251 (N); *Shell SA (Edms) Bpk v Voorsitter, Dorpraad van die Oranje-Vrystaat,* 1992 (1) SA 906 (O) at 919C-E: where the conduct of the attorney acting for a party was open to censure. Also as a mark of the Court's disapproval of some conduct that should be frowned upon: *Koetsier v SA* 1987 (4) SA 735 (W) at 741-745 (A); *Rhino Hotel & Resort (Pty) Ltd v Forbes* 2000 (1) SA 1180 (W).

29 *See Afshani & Another v Vaatz* 2007 NR (2) (SC) : It is said there:" [11] The two professions were 'fused' on 7 September 1995 when the Legal Practitioners Act of 1995 came into operation. The Act, among others, repeals the Admission of Advocates Act (Act 74 of 1964) and the Attorneys Act (Act 53 of 1979) as amended (s 94); provides that persons who have been practising as attorneys and advocates under the repealed statutes should be enrolled as legal practitioners under the Act (s 6); prescribes the qualifications for future admissions of legal practitioners G (ss 4 and 5); establishes one controlling body for all legal practitioners and compulsory membership thereof (ss 40 and 43); and, to bring other legislation in line with the new dispensation created by the Act, provides in a single sweeping section (s 92(1)) that: a reference in any other law to an advocate, a counsel or an attorney shall be construed as a reference to a legal practitioner."

In Para 13 it continues: "The Act also recognises the multiplicity of skills required in rendering a wide range of legal services to the public and, therefore, allows sufficient scope for diversity in legal practice among legal practitioners, eg those who practise law as notaries public (s 86), as conveyancers (s 87), in the service of a law centre or in the service of the State C (cf the definition of 'practise' in s 1), for

sanction costs in respect of disbursements to (additional) instructed

counsel[30]. The Rules of Court do however recognize that there is a place for forensic trial specialization. But whether or not its deployment is justified in a particular case is a matter for the Court and parties must satisfy the Court of the need therefor. Therefore, Kaaronda's assertion that no counsel could be found to conduct the trial for the Trade Union defendants does not satisfactorily explain why no one from the legal practitioners of record were not able to.

[44] Another circumstance that makes the Trade Union defendants' explanation so implausible is the failure to provide a coherent explanation for just how the alleged misunderstanding around Mr. Strydom's engagement occurred and just who was responsible for it. Failing a coherent, reasonable and satisfactory explanation by and on behalf of the Trade Union defendants as to why and when the misunderstanding occurred, I am compelled to accept, on the explanation placed before me by the plaintiff, that there could have been no misunderstanding because Mr. Strydom's secretary had confirmed his availability on 2 June. I agree with Mr. Barnard for the plaintiff that the remissness is relevant not so much to the question whether or not the indulgence should be granted - I made clear at the outset that I was going to grant it -but to the question whether or not the plaintiff should be awarded a special costs order.

Other deplorable conduct

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personal gain on their own account or in partnership either with (s 68) or without (s 67) fidelity fund certificates."

And: "[14] Exemption from holding a fidelity fund certificate may be granted to practitioners who practise for gain on their own account but who do not, in the conduct thereof, accept, receive or hold moneys for or on account of any other person - much as advocates have practised prior to the promulgation of the Act. Hence, although the legal professions have been fused into one, many legal practitioners voluntarily opted to structure the mode of their practices, within the permissible ambit of the Act, more or less along the same lines as advocates and attorneys have done before. Within the sphere of civil practice one nowadays finds legal practitioners who take instructions directly from clients but only attend to the more formal side of litigation and instruct other legal practitioners to attend to the forensic aspects thereof (the former sometimes referred to as 'instructing counsel'); those who do not take instructions directly from clients but only from other legal practitioners representing them and who mainly render services of a forensic nature (generally referred to as 'instructed counsel' or, informally, called 'advocates') and, lastly, those legal practitioners who take instructions directly from clients and who render both formal and forensic services in civil litigation to them. Although, de jure there may only be one legal profession, law is in reality practised by legal practitioners in a number of diverse styles under one regulatory and protective statutory umbrella."

30 The hackneyed "costs of one instructed and (as many) instructed counsel"!

[45] On 15th October 2010 the 3rd defendant filed a notice to oppose the review application. That review application we know was filed in December 2008. Why only at this stage it has to be opposed is not explained by Kaaronda- especially when it is done at such late stage which has implications for the continuation of a matter that had been properly set down so long ago. That it was done at this stage only in order to frustrate the trial, as suggested by the plaintiff, is not fanciful, in the absence of any (let alone satisfactory) explanation for the delay in opposing at an earlier stage.

[46] Kaaronda states under oath that the defamation action is not ready for trial. Again there is no explanation why he says the case in respect of which pleadings had closed, a Rule 37 Conference held and dates obtained from the Registrar, is not ready. It is clear from the record that the Trade Union defendants are the only parties to the defamation case who had not yet filed their discovery affidavits. We know from Mr. Strydom's affidavit that discovery was an issue that concerned him at the stage when-about six weeks before the trial- he was reminded of his involvement in the matter.

Application not brought timeously

[47] Another aspect of Kaaronda's affidavit crying out for an answer is why no application for postponement was brought when it became clear- at the very least on 21 October- that the plaintiff was not interested in either a stay or postponement of the defamation action. It is equally not at all explained why the Trade Union defendants' legal practitioner of record did not settle the papers for, at the very least, the postponement application at that stage if instructed counsel's availability was a problem. There is even no suggestion at all in Kaaronda's affidavit that Mr. Strydom was not available to draft the papers in respect of the stay or the postponement application when the alleged misunderstanding between him and instructing counsel became apparent. In any event, assuming that Mr. Strydom was not available, any

admitted legal practitioner with a modicum of experience ought to be able to draft a postponement application. The Trade Union defendants' legal practitioner of record should have done that: They did not and there is a complete absence of explanation why they could not. That is unacceptable!

[48] Kaaronda states that six weeks before the set down date, the legal practitioner of record of the Trade Union defendants called Mr. Strydom to secure his services for the trial. It requires no great imagination to infer that this was the time when both the Trade Union defendants and their legal practitioners of record considered trial preparations should start. Why did they not already prepare the necessary discovery affidavits? It is clear from the papers that failure to discover is one of the main reasons why the Trade Union defendants were not ready for trial. Did the Trade Union defendants' legal practitioner of record require the services of instructed counsel for that elementary task? May be they did. If they did there is no explanation by the Trade Union defendants- and they would have had to provide a very good explanation why.

[49] Another curious thing that emerges reading Kaaronda's affidavit alongside that of Mr. Strydom is this: If it was considered impossible for a new instructed counsel to get to grips with the case at such a late hour - why try at all to secure the services of one? Again, the inference that an attempt was being made to secure alternative counsel as a ruse to bolster the case for a postponement application, is irresistible.

[50] Contrary to Mr. Corbett's suggestion otherwise on the behalf of the Trade Union defendants, the application for postponement was not made at the earliest opportunity when it became clear that Mr. Strydom would not be available. The attempts to seek other counsel was not, in my view, bona fide because by the Trade Union defendants own version, such counsel could not get to grips with the case in order to prepare for trial. This is not simply a case, as

suggested by Mr. Corbett, where the litigant is not to blame for remissness: Dates were allocated and it stretches credulity that the Trade Union defendants could not have known of them and who the counsel was who would represent them at the trial and the problems being experienced with his retention.

Reprehensible conduct towards the Court and interests of the administration of justice

[51] Had the application for postponement been brought and been granted at the time the 'misunderstanding' occurred, the business of the Court would have been arranged differently: The judge assigned to the case would have been assigned other duties for that period in the knowledge that the matter would not proceed. That is not possible when an application for postponement is brought on the eleventh hour. The effect of what the Trade Union defendants did is to put to waste scarce judicial resources and in that way to place in disrepute the interests of the administration of justice.

[52] In sum, the Trade Union defendants are in breach of all duties owed by litigants as set out in paragraph 34 of this judgment. In the exercise of my discretion that merits a punitive costs order on the scale as between attorney-and--client, including the wasted costs related to preparation for instructed counsel's reservation for the aborted trial.

[53] In addition to all that I have said above, I rely on the following special circumstances to make a special costs order:

1. The Trade Union defendants' legal practitioner of record created a situation where at the very last minute it was realized that no instructed counsel was available to take the matter to trial;

2. The failure to have prepared for and to make discovery on behalf of the Trade Union defendants was in equal measure responsible for the Trade Union defendants' unpreparedness to proceed to trial. (It is clear from Mr. Strydom's affidavit that even if he was available, absence of discovery was a clear hurdle in the Trade Union defendants' preparedness for trial.)

3. When the legal practitioners of record discovered the conflicting engagement of Mr. Strydom (a fact which I must accept must have then become apparent to the Trade Union defendants) no effort was made to seek the views of the plaintiff on the need for the postponement - so that appropriate relief was sought if he did not agree - and if the application was disposed off whichever way unnecessary costs were not incurred by the plaintiff. Instead, the Trade Union defendants' legal practitioner of record chose not to write at all to the plaintiff's at the same time that the views of the ACC defendants were sought on 13 October in respect of the stay, alternatively postponement.

4. The timing of both the stay application and the postponement application had the consequence pointed out by the plaintiff: they were timed in such a way that on the dates set down for trial those applications would have to be heard and determined and the trial could not proceed as a result. Instead of preparing for trial over the weekend before which it was filed, the plaintiff was constrained to prepare opposing papers in respect of the two applications and to incur additional costs in so doing.

5. The plaintiff was ready at all times to proceed to trial. At no stage prior to 20 October was he given any indication that either a stay would be sought by the Trade Union defendants or a postponement in the alternative. The plaintiff prepared fully and even put counsel in funds to conduct the trial. A normal costs order on party -and-party scale does not sufficiently address the prejudice he has suffered.

[54] This is a case, even assuming that the Trade Union Defendants were not remiss but their legal practitioners of record were, where, according to the dicta in the *Salojee* case, there is a limit to which a litigant can escape the remissness of its legal practitioners.

[55] Even if I was satisfied (which I am not)[31] that the application for postponement was bona fide, considering that (i) the plaintiff was in no way culpable for the Trade Union defendants'

31 The Trade Union defendants bear the *onus.*

unpreparedness to proceed to trial; and (ii) the plaintiff had in genuine expectation that the trial would proceed on the appointed dates, incurred costs in the preparation for trial which through no fault of his had now become wasted, I am satisfied that he would be entitled to full recompense for being out of pocket.

[56] I am satisfied that in this case there are special considerations arising from the conduct of the Trade Union defendants and their legal practitioner of record, for the award of a punitive costs order. In the exercise of my discretion I propose to grant such an order.

The order

Part One:

[57] The trial of this defamation action is postponed to the second term of 2011 to a date to be arranged with the Registrar.

Part Two:

[58] The 1st to 6th defendants are ordered to pay plaintiff's wasted costs (including one instructing and one instructed counsel) on party-and-party scale in opposing the applications for stay of the defamation action. Such liability is jointly and severally- the one paying the other to be absolved.

Part Three:

[59] The 2nd, 3rd, 5th and 6th defendants, jointly and severally, the one paying the other to be

absolved, are ordered to pay all such costs as were reasonably wasted as a result of the postponement of the defamation action on the attorney- and -client scale. For the avoidance of doubt such costs-which shall include one instructed and instructing counsel- include the costs of opposing the postponement application , preparing for trial and costs incurred in respect of reservation of one instructed counsel.

DAMASEB, JP

ON BEHALF OF THE PLAINTIFFS: Adv Barnard

Instructed by: Muluti & Partners

ON BEHALF OF THE 1st AND 4th DEFENDANTS: Adv H Geier

Instructed by: Government-Attorneys

ON BEHALF OF THE 2nd, 3rd, 5th AND 6th DEFENDANTS: Adv A Corbett

Instructed by: Hengari, Kangueehi and Kavendjii Inc.