

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

Case No: I 14/2012

In the matter between:

OLIVIA NDIKUWALALYE KATUMBE

PLAINTIFF

and

ARON KAIYAMO

DEFENDANT

Neutral citation: *Katumbe v Kaiyamo* (I 14-2012) [2014] NAHCMD 21 (28 January 2014)

Coram: VAN NIEKERK J

Heard: 21, 30 November 2012; 2 April 2013; 27, 28 May 2013; 14 August 2013; 7, 8 November 2013

Delivered: 8 November 2013

Flynote: **Practice** – Application for postponement – On third occasion that defendant allegedly ill and applied for postponement of trial the Court required that written application under oath be made including an affidavit by a medical doctor - Defendant did not comply but filed application supported only by affidavit by his legal practitioner and attaching medical certificate – Application inadequate – Prejudice suffered by plaintiff not curable by an order for costs - Application refused – Judgment granted for plaintiff and counterclaim dismissed with costs.

REASONS FOR JUDGMENT

VAN NIEKERK J:

[1] On 8 November 2013 I refused the defendant's application for postponement of the partly heard trial between the parties. I also gave judgment for the plaintiff as prayed in her particulars of claim and dismissed the defendant's counterclaim with costs.

[2] The defendant, who was legally represented during the trial, was not at Court when the abovementioned proceedings took place. Subsequently, acting in person, he requested reasons for my decision, which reasons I now provide.

[3] The plaintiff sued the defendant for breach of contract by failing to purchase on her behalf and deliver to her a motor vehicle for the price of N\$36 000 as agreed. She claimed restitution of the full purchase price paid over to the defendant, plus interest at 20% per annum from date of judgment to date of payment and costs of suit.

[4] The defendant's denied the existence of any such contract and claims that in fact he lent to the plaintiff a sum of N\$30 000 and that the loan was repayable within 30 days, plus interest thereon in the staggering sum of N\$10 000. The defendant further alleged that the plaintiff repaid only N\$29 000 and that she still owed him N\$11 000, payment of which he claimed in his counterclaim, plus interest thereon and costs. The claim for payment of the N\$10 000 in interest was abandoned before the trial started, which meant that the defendant's capital claim was reduced to payment of N\$1 000.

[5] The case was initially set down on three occasions on the civil floating roll. The first set down was during the week of 24 - 28 September 2012. On 24 September 2012 the matter stood down until 26 September 2012 for the trial to commence. When the matter was called the defendant's counsel informed the Court that she received a fax from the defendant the previous day that the defendant was ill. She handed in two faxed documents which are certificates of indisposition signed by Dr B Serebe of Ondangwa. The defendant is a public servant and the said certificates were obviously completed for purposes of applying for sick leave. The first certificate dated 21 September 2012 indicated that the defendant had been under treatment of the doctor from 19 - 21 September 2012 for acute gastritis and that he is unable to perform his official duties and that it is essential for his recovery that he should be granted sick leave for the period 19 – 24 September 2012, with a follow up to be done on 24 September 2012. On 24 September 2012 the same doctor gave a certificate in the same form, stating that the defendant now suffers from severe hypertension and should be granted sick leave from 25 – 28 September 2012.

[6] I accepted the faxed documents at the time and postponed the matter for trial (with costs awarded against the defendant) on the civil floating roll for the week 15 – 19 October 2012. However, I indicated to defendant's counsel that should there in future be any medical reason for her client's absence, I would expect an affidavit by the doctor to be filed.

[7] On 15 October 2012 the matter was called. The Court specifically enquired from defendant's counsel whether the defendant was well. She affirmed that he was and that he was present. The matter stood down and the parties were informed that they would have to wait for their turn in the roll. On 16 October 2012 defendant's counsel placed a medical certificate by Dr W E Weder who practices in Katutura, Windhoek, on the court file. This certificate was dated 15 October 2012. It indicated that the defendant was examined on 15 October 2012 and that he was unfit for work for the

period 15 – 19 October 2012 because of dyspepsia, which was being investigated further. On 17 October 2012 the matter was called again in order for the trial to commence. The defendant's counsel then informed the Court that the defendant was present at court on 15 October 2012, but apparently felt unwell afterwards and visited the doctor. She handed in a further medical certificate by Dr Weder dated 16 October 2012 stating that he again examined the defendant on 16 October 2012 and providing the same information as before, but also indicating that the defendant has appears to be acute gout pain. In neither of the certificates did the doctor indicate whether he was basing his diagnosis on his own knowledge or merely on reports by the defendant. However, based on certain other documents provided, I was satisfied that the doctor had ordered certain tests to be done.

[8] The Court reminded counsel of the requirement of an affidavit, but she indicated that her client, as she put it, 'does not want to hear my instruction with regard to the affidavit.' Counsel for the plaintiff complained because her client had to wait for three days for the trial to commence while the defendant already knew on 15 October that the doctor considered him unfit for the week. She prayed for an appropriate costs order. The Court also pointed out that the legal costs probably exceeded the plaintiff's claim and requested the parties to consider the possibility of settlement. It was also indicated that the defendant was abandoning his claim for interest on the money allegedly lent and advanced to the plaintiff, thereby reducing his counterclaim to a mere N\$1 000. As prospects for a settlement seemed favourable and the matter was relatively new and perhaps against my better judgment, I indulged the defendant by not insisting on an affidavit. The matter was postponed for trial to 19 – 23 November 2012 on the civil floating roll, the defendant having to pay the plaintiff's wasted costs.

[9] On 21 November 2012 the trial commenced and the plaintiff testified in support of her case. While she was being cross-examined, an issue came up which required

the matter to be postponed to 30 November 2012 for a status hearing to determine the way forward. It is not necessary to mention the details, except to state that the case was subsequently postponed on a number of occasions for various reasons as a result of problems experienced by either the plaintiff or the defendant.

[10] The last occasion on which the matter was set to continue for trial was on 7 and 8 November 2013 (a Thursday and Friday) on the fixed roll so that the hearing of evidence and argument could be finalized. On 7 November 2013 just before 10h00 counsel for the defendant informed me in Chambers that he received notice from his client that he was ill and could not travel from Ondangwa to Windhoek and attend the trial. He indicated that he had a faxed medical certificate in his possession which indicates that the defendant is suffering from gastritis and hypertension. I reminded counsel that I had in the past indicated that I expect the doctor to make an affidavit in this regard. Although the defendant was no longer represented by the same counsel as before, counsel indicated that he was aware of this requirement. I indicated that also expected a proper application for a postponement under oath. Counsel requested time until the following day to file the application. This was granted with the agreement of then counsel for the plaintiff.

[11] The matter was then called in open Court and the gist of the discussion placed on record. I again emphasised the need for a proper application for postponement under oath and indicated that one of my concerns was that the fact that the defendant has also on two previous occasions at very short notice allegedly become ill for just about the period that the matter was set down for trial. For reasons not relevant here, the Court also ordered the plaintiff's counsel to seek leave by way of affidavit to withdraw as counsel for the plaintiff. The matter was then postponed to the next day for both counsel to prepare and file their applications.

[12] On 8 November 2013, I granted the plaintiff's counsel leave to withdraw as her representative. She had already on a previous occasion been warned by the Court

that she would not be granted a further postponement to obtain other counsel if she had not put her counsel in funds in time.

[13] I then heard the defendant's application for postponement. In spite of requiring a day to prepare the application it was supported only by a very brief affidavit by the defendant's counsel in which, apart from the contents of paragraph 6, he stated nothing which he had not already conveyed in Chambers

2. The content of this affidavit falls within my personal knowledge unless otherwise articulated.
3. I am the legal representative of the defendant in this matter.
4. On the 6th November 2013 at around 17:30 I received a telephone call from the Defendant informing me that he is unable to travel to Windhoek due to medical reasons.
5. In the morning of the 7th November 2013, the Defendant faxed me a medical report indicating that he is medically unfit to perform any official duties for the period 6th – 8th November 2013. See attached medical report "CGN1".
6. I personally spoke to Dr Pedro F. Rodriguez Armas on the 7th November 2013 and he confirmed that the defendant suffers from a chronic condition of hypertension.
7. As a result of the reason mentioned above, I am not in a position on behalf of the defendant to proceed with the matter on the 7th and 8th November 2013.
8. Accordingly I pray for the matter to be postponed in the defendant's absence to a date suitable to this honourable court.'

[14] The attached medical certificate stated that the defendant has been under the doctor's care for medical investigation and treatment on 6 November 2013. It further stated that the patient 'possibly' suffers from gastritis and hypertension.

[15] During argument I indicated to defendant's counsel that I am not satisfied with the application, *inter alia*, because it is based on hearsay. I particularly stressed the fact that there are no affidavits by the defendant and the doctor. There is no explanation whatsoever why an affidavit by the defendant was not filed. Counsel orally explained that he only spoke to the doctor on the phone because the latter was travelling. This explanation itself should have been under oath with sufficient detail for the Court to properly assess the doctor's availability to depose to a meaningful affidavit which would be of use to the Court. However, even if I were to accept this explanation from the bar, several questions arise. The doctor stated in the certificate that the plaintiff 'possibly' suffers from the conditions mentioned, which is not the same as saying that the defendant chronically suffers from hypertension. In any event, if the defendant does suffer chronically from this condition and as he has already been booked off before because of this condition, resulting in the trial having to be postponed, why did the defendant not take care in advance to ensure that he is fit for the last two days specially set aside for the conclusion of the trial?

[16] It seems to me that the defendant took a rather cavalier approach to the matter. The defendant knew very well from previous proceedings that the Court required an affidavit by the doctor, yet he appeared to be wholly unconcerned about this. His previous counsel stated as much on a previous occasion. After having been informed of the Court's requirement on previous occasions, he should already have requested an affidavit when he consulted the doctor on 6 November 2012.

[17] I must also say that the fact that the defendant always presented with alleged stomach problems and/or hypertension just when the trial is about to take place raises suspicion about his *bona fides*. As indicated in Court on 7 November 2012,

this was part of the reason why I requested a proper application for postponement, which it is trite, should include a full explanation setting out all the reasons for requesting what is an indulgence. Such an explanation should logically have included information about the symptoms, when he started feeling ill, what he did about it, what treatment he received, etc. It is also relevant to know whether he in fact informed the doctor that he was supposed to be in attendance at the High Court for a civil matter which has already been postponed several times, including two postponements due to the defendant's health complaints. If the doctor was indeed aware of the importance of the defendant's attendance at the proceedings, this might conceivably have influenced his assessment of whether the defendant was after all fit to travel and to attend the proceedings with the benefit of medical treatment.

[18] In *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 NR 170 (SC) the Supreme Court set out the legal principles when considering an appeal against a refusal to grant a postponement. The principles relevant for purposes of this case are:

- '1. The trial Judge has a discretion as to whether an application for a postponement should be granted or refused (*R v Zackey* 1945 AD 505).
2. That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (*R v Zackey* (*supra*); *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-9; *Joshua v Joshua* 1961 (1) SA 455 (GW) at 457D.)
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5. A Court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case. *Madnitsky v Rosenberg* (*supra* at 398-9).

.....

7. An application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.
8. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms. (Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 453.)
9. The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.
10. Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be. *Van Dyk v Conradie and Another* 1963 (2) SA 413 (C) at 418; *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E) at 137.'

[19] In *Hailulu v Anti-Corruption Commission* 2011 (1) NR 363 (HC) these principles were applied, but the Court also stated (at 375D-376D):

'[33]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 [in *HAW Retailers CC t/a Ark Trading Coastal Hire CC & Another v Tuyenikelao Nikanor t/a Natutungeni Pamwe Construction CC* (case No A151/2008, Damaseb JP, 4 October 2010) in para [17] at 13 – 14]:

'[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 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.

...

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 realise 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.' [Own emphasis added.]

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[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.'

[20] I bear the principles set out in the above-mentioned cases in mind in my assessment of the defendant's application. Apart from the deficiencies in the defendant's application as discussed above, I bear in mind that the plaintiff was yet again prejudiced by the fact that she had to use her leave days and travel from Oshakati for the trial in vain. From previous proceedings in the matter and the fact that she was unable to put her lawyers in funds it was quite clear that she was struggling financially as she does not earn a large salary as a nurse. Although the defendant's lawyer tendered the plaintiff's wasted costs caused by the postponement, this would not have helped much, because she was appearing in person. Added to this was the prejudice caused by a further delay in the case.

[21] For all the above reasons I was not inclined to again take a lenient view of the defendant's failure to disregard the Court's clear directions by presenting a half-baked application for postponement. I accordingly refused it.

[22] The plaintiff then closed her case. Defendant's counsel then requested an adjournment until later in the morning to prepare an application for absolution from the instance. Time was granted and later informally extended upon further request. When the proceedings re-commenced, counsel for the defendant informed the Court that he had considered the record, but that there were in his view no grounds for an application for absolution. In my view this concession was properly made. The defendant's case was then closed. Defendant's counsel did not seek to persuade me to find against the plaintiff. I thereupon gave judgment for the plaintiff and dismissed the defendant's counterclaim.

[23] Although the written request for reasons concentrates on the refusal of the application for postponement, I shall briefly set out my reasons for the judgment on the merits in so far as these may be required.

[24] The plaintiff was the only witness who testified in support of her claim. She testified that she wanted to buy a second hand car. Her cousin referred her to the defendant, who apparently conducted a part time business of trading in such cars which he purchased in South Africa and then imported into Namibia. The parties first had telephonic contact during which she told him of the kind of vehicle that she wanted. They agreed on a purchase price of N\$36 000, which would include the costs of importation and transport to Namibia. She met him in about middle September 2010 and handed over the sum of N\$3 500 in cash, as this was required by the defendant as a 'reservation fee' for the vehicle. About three weeks later she paid him another amount of N\$3 500 to facilitate the release of the vehicle from the port of Durban. She also requested a receipt for the payments she made. The defendant said it would be faxed to him from South Africa and that he would provide it to her later. This was their last meeting. After this they communicated only by phone or via sms.

[25] At a later stage the plaintiff was requested to pay over N\$8 000 to the defendant for the vehicle to be transported by truck from Durban to the Botswana border and to be driven from there to Namibia. As she was on study leave and writing examinations, she did not want to be bothered by requests for further interim payments. She therefore transferred N\$29 000, being the balance of the purchase price into the defendant's bank account.

[26] Later a certain Tebogo called her from South Africa to say that he was at the Botswana border, but that there was a problem with the vehicle's VIN number. The plaintiff contacted the defendant about this report. He said that the problem would be sorted out. He also informed her that he had transferred the N\$8 000 to the dealer in South Africa and that he would transfer the balance of the price only when the vehicle has crossed the Namibian border. It later transpired that the problem with the VIN number could not be solved and the defendant promised to deliver another vehicle, which did not happen. She kept trying to make contact with the defendant, but he was always busy or ill (which has a familiar ring to it) or making other excuses. He claimed to have received a fax from the dealer with all the car's details on it, but said that the details were not clear. However, she never received the car or a refund of her money and after trying in vain to resolve the matter with the defendant, she approached her lawyers to institute action. She also adamantly denied the allegations in the defendant's counterclaim.

[27] Although the plaintiff became somewhat confused when she was cross-examined on the details of her cell phone account which she tried to use as support for her evidence about contact between herself and the defendant, she generally made a good impression on me as a witness. I believed her. She obviously is a rather trusting sort of person, but she also understandably felt reassured by the fact that the defendant came with a recommendation by her

cousin. As the defendant did not present any evidence to the contrary or prove his counterclaim, I gave judgment for the plaintiff and dismissed the counterclaim.

_____ (signed on original) _____

K van Niekerk

Judge

APPEARANCE:

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For the plaintiff:

In person

For the defendant:

Ms N Sikongo

of Nambahu and Uanivi Attorneys

And later Mr C G Nambahu

of Nambahu Associates