

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING: APPLICATION FOR POSTPONEMENT

CASE NO: HC-MD-CIV-ACT-OTH-2016/03013

In the matter between:

SARAI ELFRIEA UATEMA

FIRST PLAINTIFF

FRANK GARERE DIMITRY UATAMA

SECOND PLAINTIFF

and

OTTO ZAPKE

FIRST DEFENDANT

ALBERT ZAPKE

SECOND DEFENDANT

VERITAS BOARD OF EXECUTORS

THIRD DEFENDANT

MASTER OF THE HIGH COURT

FOURTH DEFENDANT

Neutral citation: *Uatema v Zapke* (HC-MD-CIV-ACT-OTH-2016/03013) [2019]
NAHCMD 276 (05 August 2019)

Coram: **Prinsloo J**

Heard: 05 August 2019

Delivered: 05 August 2019

Reasons: 06 August 2019

ORDER

1. Application for condonation is refused.
 2. Application for postponement is refused.
 3. Cost to stand over to main action.
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RULING

PRINSLOO J

The application

[1] The matter before me has been set down for trial for the week of 05 to 09 August 2019. An application for a postponement of the trial, on notice of motion was filed at 7h55 on the morning of 05 August 2019, whereas the trial was scheduled to commence at 10h00.

[2] In support of the application, a founding affidavit was deposed to by Mr Muharukua, the partner of Mr Swartbooi in the firm Swartbooi and Muharukua Attorneys. Mr Muharukua stated in the founding affidavit that Mr Swartbooi's mother sadly passed away during 24 to 25 July 2019, which caused Mr Swartbooi to be on compassionate leave and as a result Mr Muharukua was enjoined to depose to the founding affidavit, even though he is not the legal practitioner seized with the matter.

[3] The basis for the application for postponement in this matter is two-fold. On the one hand it is the passing of Mr Swartbooi's mother and his inadvertent absence from the office and secondly the fact that Adv Boesak, who was briefed to conduct the trial on behalf of the plaintiffs, returned the brief, for reason unrelated to payment. I must interpose at this juncture to point out that the appointment of both Mr Swartbooi and Adv Boesak was done at the instance of the Legal Aid Directorate.

[4] Mr Muharukua further stated that after consultation with the Legal Aid Directorate on the appointment of alternative counsel, Mr Swartbooi briefed Adv Rukoro. Adv Rukoro apparently also returned the brief stating that the trial date did not correspond with his diary. Subsequently Mr Muharukua apparently spoke to Adv Rukoro who indicated that he will accept the brief if alternative trial dates were arranged.

[5] Mr Muharukua stated that he was unable to depose to specifics relating to the withdrawal of Adv Boesak and the further consultation with the Legal Aid Directorate, as it was dealt with by Mr Swartbooi personally. He was also unable to give clarity on the filing of further pleadings, specifically relating to the expert witness.

[6] Mr Muharukua submitted that the circumstances setout are sufficient for the court to condone the non-compliance with the Rules of Court and to grant a postponement with new trial dates.

[7] Mr Botes, acting on behalf of the Defendants, opposed the application for postponement and argued that the plaintiffs are currently holding the defendants hostage as the matter is not moving forward. He further argued that the application filed on behalf of the plaintiffs seeking a postponement and condonation for the non-compliance with the Rules of Court is defective as it does not give a full, detailed and accurate explanation for the non-compliance, nor does it address the requirement of prospects of success of the application. He argued that the application is extremely generalized by not providing specifics of when Adv Boesak returned the brief and why other counsel could not be obtained. Mr Botes submitted that ultimately the discretion in

granting the postponement or not lies in the hands of the court, which discretion should be exercised judicially but submitted that should the court grant the postponement, it should include a special cost order.

[8] After hearing the parties it was clear that the court could not make a fair and just decision unless the court was in possession of the specific dates relating the withdrawal of Adv Boesak. I therefore requested Mr Muharukua to provide the court with the date when Adv Boesak returned his brief to Mr Swartbooi. The matter therefor stood down to enable him to obtain the necessary information.

[9] Upon resumption Mr Muharukua informed the court that he could not obtain the file and thus contacted Adv Boesak. He could determine from their conversation that Mr Swartbooi was informed on 12 June 2019 via e-mail of Adv Boesak's withdrawal. Apparently Mr Swartbooi hereafter engaged the Legal Aid Directorate where after Adv Rukoro was instructed, however Adv Rukoro returned the brief on 17 July 2019 because of his unavailability on the dates set for trial, being 05 to 09 August 2019. Mr Muharukua argued that the date of 12 June 2019 should not be of such importance as Mr Swartbooi clearly acted to ensure that the matter proceed as scheduled by approaching the Legal Aid Directorate again for the appointment of new counsel.

[10] In reply to the further submissions Mr Botes argued that Mr Swartbooi should have, at the very least, after becoming aware of Adv Boesak's withdrawal, informed the court and the opposing party that there was a possibility that the matter may not proceed on the set down date. Especially as he was aware of the possibility that there can be protracted negotiations regarding the new counsel's fees. This was however not done. In conclusion Mr Botes again reiterated the defendants' opposition to the further postponement.

The legal principles applicable to an application for postponement

[11] The granting of a postponement is in the discretion of the court. What has crystalized during the years is the following:¹

- (a) The applicant requesting for a postponement bears the onus. He must make out his case on the papers.
- (b) A postponement is not had for the asking.
- (c) An application for postponement must be brought as soon as the reason giving rise to it is known.
- (d) There must be a full and satisfactory explanation by the applicant seeking postponement of the reasons necessitating a postponement.

[12] With the aforesaid in mind this court will have regard to *Myburgh Transport v Botha t/a SA Truck Bodies*² as the *locus classicus* governing postponement applications wherein the Supreme Court outlined the relevant principles³. These principles can be paraphrased in the following terms⁴:

- (a) The trial judge has a discretion as to whether to grant or refuse an application for a postponement;
- (a) That discretion should be exercised judicially and not capriciously, whimsically or on a wrong principle;
- (b) 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 dilatory tactics on his or her part and where the demands of justice show that that party should have further time for the purpose of presenting his or her case;

¹ *Hailulu v Anti-Corruption Commission and Others* 2011 (1) NR 363 (HC) para 36.

² 1991 NR 170 (SC).

³ *Ibid* at 174D-175H.

⁴ *TransNamib Holdings Limited v Tjivikua* (HC-MD-LAB-MOT-GEN-2018/00079) [2019] NAHCMD19 (21 June 2019) para 9.

- (c) An application for a postponement must be made timeously, as soon as the circumstances call for the need to make the application become known to the applicant. Where the demands of justice and fairness however, call for the granting of a postponement, the court may grant such application even if it was not timeously made;
- (d) An application for a postponement must be *bona fide* and not resorted to as a tactical manoeuvre geared to gaining an advantage to which the applicant is not entitled;
- (e) Considerations of prejudice will ordinarily play a pivotal part in the direction the court's discretion will be exercised. In this regard, the court should consider whether prejudice suffered by the respondent cannot be cured or compensated by an appropriate order for costs;
- (f) The court should weigh the prejudice that will be occasioned to the respondent if the application is granted, against the prejudice that the applicant will suffer if the application is not granted;
- (g) Where the application has not been timeously made, or the applicant is otherwise to blame for the procedure adopted, but justice nevertheless calls for postponement to be granted in the peculiar circumstances, the court may, in its discretion, allow the postponement but direct the applicant to pay the wasted costs occasioned by the postponement on the scale between attorney and client. In this regard, the court may even order the applicant to make good on the costs order even before the applicant prosecutes the matter further.

Application of the legal principles to the facts

[13] Right from the onset I must point out that in spite of Mr Muharukua's best efforts in arguing for a postponement with the information at his disposal, he was unable to give the court a full and satisfactory explanation for the non-compliance with the Rules of Court, more specifically rule 96 (3) and to some extent rule 96 (4). Mr Muharukua also had difficulty in setting out the reasons necessitating a postponement as he was

unable to depose to the details and the dates relating to Adv Boesak's withdrawal as instructed counsel.

[14] As pointed out earlier in this ruling the onus was on the plaintiffs to make out a case as to why the application for postponement should be granted. On first glance it might appear that the reasons advanced are reasonable and should suffice in order to persuade the court to grant the application, however at closer inspection it is clear that the founding affidavit is lacking specifics and is vague in many respects.

[15] From the papers before me it would appear that the main reason for the application for postponement is Mr Swartbooi's bereavement in the family and him being on compassionate leave. However, if one has consideration of the discussion that will follow hereafter in respect of the history of the matter and the two months preceding the trial date it will become clear that Mr Swartbooi's family tragedy appears to be a secondary reason for the application for the postponement.

[16] With that I must interpose and say that this court expresses her condolences to Mr Swartbooi in this difficult time and this court does not stand unsympathetic thereto but if instructed counsel was ready and available to proceed on 05 August 2019 there would have been no need to deal with an application for postponement. In spite of Mr Swartbooi's absence, a legal practitioner from his firm could stand in to assist counsel during the trial, but this is not the case as there is no instructed counsel on board in this matter at this stage. Therefore even if Mr Swartbooi's personal circumstance is left out of the equation the plaintiffs would still not be able to proceed with the hearing of this matter.

[17] For this reason it is necessary not to consider the application in isolation. It is important to have regard to the history of this matter from the first time that it was set down for trial.

Brief Judicial Case Management history

[18] It is significant to note that the hearing date of 05 to 09 August 2019 is the third time that the matter was set down for hearing.

[19] The matter was already postponed twice previously at the instance of the plaintiff. During a status hearing on 17 April 2018 the matter was set down for the first time for trial for the period 23 to 26 October 2018. On 19 October 2018 Mr Swartbooi filed a notice of motion applying for a postponement of the trial. The reason advanced at the time was that Adv Boesak accepted his brief and instructions from Legal Aid but certain fees were still being negotiated with the Legal Aid Directorate. In addition thereto Adv Boesak had to be given the opportunity to properly peruse the brief and consult with the witnesses.

[20] This application was not opposed by the defendants and the matter was, after due consideration by this court, postponed to 21 to 25 January 2019 for trial and the matter was enrolled on the fixed roll on the request of the parties.

[21] On 18 January 2019 Mr Swartbooi filed a status report with the view of seeking a further postponement of the matter. Mr Swartbooi stated in the status report that although Adv Boesak's appointment was approved on 19 October 2018, his appointment was only confirmed on 9 January 2019 as it transpired there was no firm agreement reached between counsel and the Legal Aid Directorate Officials.

[22] It was further advanced in the status report that various issues needed further consideration and the experts for the parties were not available during the week that the matter was set down.

[23] As the defendant's expert was also out of the country during that week and the defendants wanted him to be present during the plaintiffs' case the parties agreed to the

postponement. On 28 January 2019 the matter was then postponed for trial to this week, ie 5 to 9 August 2019, again on the fixed roll. After 28 January 2019 the parties engaged in settlement negotiations up until 9 May 2019 when the court was informed that the negotiations did not succeed and the trial date was confirmed and the parties were directed to attend Roll Call on 02 August 2019 at 08h30. During roll call no appearance was made on behalf of the plaintiffs.

[24] It is clear from the brief history as set out above that there seems to be a pattern emerging on the part of the plaintiffs as similar reasons were advanced through out in support of their applications for postponement. Each time there appeared to be an issue in respect of the appointed counsel.

[25] This time around the appointed counsel already gave notice of his withdrawal via email to Mr Swartbooi on 12 June 2019. In spite of the extended delays in the appointment of Adv Boesak (19 October 2018 to 09 January 2019) Mr Swartbooi did not bring the new state of affairs to the attention of the court. Given the previous delays it would have been apposite to approach the court in chambers and inform the court and opposing party of the difficulty that might affect the upcoming trial. However, when Adv Rukoro returned the brief on 17 July 2019 I would have expected Mr Swartbooi to immediately lodge an application for postponement. At the time Mr Swartbooi was still able to in compliance with rule 96 (3) which provides that when a matter has been set down for hearing a party may, on good cause shown, apply to the judge not less than 10 court days before the date of hearing to have the set down changed or set aside.

[26] It might be that counsel thought that the filing of a status report explaining his predicament was premature during June 2019 when Adv Boesak returned his brief, however a status report and an application for postponement would not be premature but essential when Adv Rukoro returned his brief. At that stage Mr Swartbooi had 12 court days left before the trial was due to commence in order to bring an application for postponement. However this was not done and a postponement was only sought on the morning of the trial, placing not only the court but also the opposing party at a

disadvantage. To say that a status report was filed on 31 July 2019 and that a chamber meeting was sought on 02 August 2019 is not much of assistance and it is not clear what counsel want the court to do with this in the face of the non-compliance with rule 96 (3).

[27] In the *Levon Namibia (Pty) LTD v Nedbank Namibia Limited*⁵ Smuts JA restated the necessity of compliance with the Rules in timeously bringing an application for postponement as follows:

[52] It is not clear what the plaintiff's practitioner expected the court to do in the face of a failure to explain the non-compliance with the pre-trial order and to bring a postponement application timeously in terms of rule 96(3) or at all (coupled with an application to condone non-compliance with the sub-rule).

[53] Rule 96(3) is clear, requiring in mandatory terms that a postponement application is to be made ten days before a scheduled hearing. Its purpose is plain and is to ensure that cases proceed on their assigned dates in furtherance of the fundamental principles of judicial case management to ensure the expeditious resolution of disputes. This is buttressed by practice direction 62(5) published by the Judge President under rule 3(3) of the High Court rules. This practice direction provides:

"The High Court pursues a 100% clearance rate policy, and in pursuit of the policy, the court must, unless there are compelling reasons to adjourn or vacate, apply a strict non-adjournment or non-vacation policy on matters set down for trial or hearing."

[28] The application before me is the third application for postponement for a trial that should have already commenced in October 2018. A further postponement would not be in accord with the overriding principles and objectives of the Rules of Court.

[29] If the application for postponement was only because of the personal circumstances of Mr Swartbooi and Mr Swartbooi was the counsel conducting the trial then obviously this court would have taken a different stance in considering the

⁵ (SA 31/2017) [2019] NASC (2 August 2019).

application for postponement. However, as can be clearly seen from the papers before me that is a contributing factor to the application for postponement and not the main reason. The plaintiffs do not have their house in order and would not have been able to proceed with the trial.

[30] Vacating the date would cause inconvenience not only to the court but would also cause substantial prejudice to the opposing party as there are no trial dates available for this year and as a result this matter would have to be adjourned until 2020. This action was already instituted on 15 September 2016 and as we speak this matter is one month shy of three years on the roll already without having gone to trial.

[31] The plaintiffs who are the *dominus litis* and who should endeavor to take the matter to trial as soon as is reasonably have been the cause of the delay since the matter was set down for trial the first time.

[32] In conclusion I must also remark that there was no tender for cost in this matter but I am of the opinion that the prejudice that will be suffered cannot be mitigated by a cost order alone.

[33] Therefore in light of the aforementioned discussion this court cannot grant any further indulgences in this matter and my order is as follows:

- (a) Application for condonation is refused;
- (b) Application for postponement is refused.
- (c) Cost to stand over to main action.

PLAINTIFF: Adv Botes (with him Mr S Horn)
Instructed by De Klerk Horn & Coetzee Inc.

DEFENDANT: Mr Muharukua
For Swartbooi & Muharukua Attorneys