

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK**

**RULING**

CASE NO.: HC-MD-CIV-ACT-DEL-2018/03632

In the matter between:

**CAPX FINANCE NAMIBIA (PTY)LTD**

**PLAINTIFF/APPLICANT**

and

**ONAMAGONGWA TRADING ENTERPRISES CC**

**DEFENDANT/RESPONDENT**

**Neutral Citation:** *Capx Finance Namibia (Pty) Ltd v Onamagongwa Trading Enterprises CC* (HC-MD-CIV-ACT-DEL-2018/03632) [2020] NAHCMD 31 (30 January 2020)

**Coram:** RAKOW, AJ

**Heard:** 29 January 2020

**Delivered:** 30 January 2020

**Reasons:** 30 January 2020

**Flynote:** Practice – Trial – Postponement – Parties do not have automatic right to postponement – Must be done at the earliest opportunity – Principles regarding applications for postponements reiterated.

Costs – Scale of costs – Plaintiff seeking postponement at last minute due to non-availability of key witness – Court of the view to grant postponement and costs in the interest of justice – Court awarding costs of postponement against defendants on attorney and client scale.

**Summary:** The matter appeared for roll call on 24 January 2020 as a matter set down for trial for the week commencing 27 January 2020 to 31 January 2020 when the legal representative for the Plaintiff filed a status report on 23 January 2020, indicating that they were experiencing difficulties in serving a key witness with the subpoena to come and testify at the upcoming trial. She is an instrumental witness and they therefore indicated that they intend to seek a postponement of the matter for at least three months to allow them to trace the said witness and to subpoena her. The matter however proceeded to be set down for trial and as the Plaintiff filed the application, the court attached time lines to the filing of these affidavits, which was not strictly complied with, which then necessitated the bringing of further condonation applications. On the morning of 29 January 2020, the application for postponement was eventually argued.

Counsel for the Plaintiff/Applicant She stated that she commenced with trial preparation during November 2019 and realized that the Plaintiff had not yet filed the subpoena for a key witness who is to testify in the upcoming trial. The address they had for the witness was one that they obtained from a deed search from a previous case brought against Ratu Trading CC. The Deputy Sheriff attempted to serve the subpoena on 5 December 2019 but advised on 9 December 2019, that same could not be served because a full address had to be provided. The Deputy Sheriff was again contacted and requested to return the subpoena but this was not done before 18 December 2019. After obtaining a new address and instructing the said subpoena to be served by the Deputy Sherriff, the offices of the Plaintiff/Applicant's counsel was advised that the subpoena was not served, although they made two attempts to serve the said subpoena on 17 and 20 January 2020. Upon receiving this information, Ms Schickerling realized that there is no possibility of serving the subpoena in time.

In essence, the Defendant argued that the Plaintiff failed to place before the court any justification to be allowed a postponement. The Defendant was of the view that the legal representative was grossly negligent and if successful, the court should consider a punitive cost order to be metered out at least to include the days on which work was done on this matter in preparation of court.

Held – The court in most instances would avoid imposing a sanction that would be drastic and exclude the litigant from airing the real issues in dispute and not ‘so-to-speak, shut the doors of the court to a litigant’. In applying the principles applicable, the court came to the conclusion to grant the postponement application and to include in such an order a cost order.

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### **ORDER**

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- a) The late filing of the Applicant/Plaintiff and the defendant/respondents affidavits are hereby condoned.
- b) Application for postponement is granted.
- c) The Applicant/Plaintiff to pay wasted costs occasioned by the postponement.
- d) The wasted costs occasioned by the postponement will be taxed on the scale as between attorney and own client.
- e) The Respondent/Defendant to pay the costs of this application.
- f) The matter is postponed to 11 March 2020 at 14h15 before Justice Tommasi in order for the Managing Judge to assign a new trial date to the matter.
- g) Parties to file a joint case status report on or before 5 March 2020.

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### **RULING**

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RAKOW, AJ:

Introduction

[1] The Applicant/Plaintiff in this matter is Capx Finance (Pty) Ltd, a company with limited liability duly incorporated in terms of the laws of the Republic of South Africa. The Respondent/Defendant in this matter is Onamagongwa Trading Enterprises CC, a close corporation duly registered and incorporated in terms of the company laws of Namibia.

[2] The Plaintiff's case is that the Defendant, represented by Martin Ipinge, completed an Irrevocable Payment Undertaking, in which he confirmed and admitted that he is liable for payment of an invoice issued by the Plaintiff's client, Ratu Trading CC for the amount of N\$876 300.00.

[3] The Plaintiff initially issued summons against the Defendant on 10 September 2018 and the matter became defended on 21 September 2019. It went through all the stages of case management, including an application for summary judgement from the side of the Plaintiff, which was abandoned and a referral for court connected mediation, which failed to resolve the matter. Save for an application during July 2019 for condoning the late filing of the witness statement for the Plaintiff and that of the Defendant, the matter seemed to keep within the time lines set out in the various case management court orders.

[4] On 6 September 2019 the parties filed a joint pre-trial conference report, which was made an order of court on 11 September 2019. It was the terms of this order that the parties agreed what the issues will be that needs to be determined in the upcoming trial as well as that the Plaintiff will call as witness, Althea Walker, and the Defendant, Martin Ipinge, and that a certain Inge Kunoee Zamunai will be called by subpoena to testify. The matter was then set down for trial for the period 27 – 31 January 2020 on the floating roll on 16 September 2020.

[5] The matter was scheduled for roll call on 24 January 2020, to allow it to be assigned to a trial judge who will then be hearing the matter as from 27 January 2020. The legal representative for the Plaintiff filed a status report on 23 January 2020, indicating that they were experiencing difficulties in serving Inge Kunoee Zamunai with the subpoena to come and testify at the upcoming trial. She is an instrumental witness

and they therefore indicated that they intend to seek a postponement of the matter for at least three months to allow them to trace the said witness and to subpoena her. The court on 24 January 2020 ordered that the matter remains set down for trial on 27 January 2020.

[6] The Plaintiff filed an application for postponement on the afternoon of 26 January 2020 and with the appearance of the parties on 27 January 2020, the court postponed the matter to 29 January 2020, to allow Mr. Kwala to file an opposing affidavit and Ms. Schickerling, a replying affidavit, should she wish to do so. The court attached timelines to the filing of these affidavits, which was not strictly complied with, which then necessitated the bringing of further condonation applications. On the morning of 29 January 2020, Ms. Delpont appeared for the Applicant/Plaintiff in this matter, with specific instructions to argue the application before court.

#### The reasons for seeking the postponement

[7] Ms. Schickerling deposed to the supporting affidavit for the application from the Applicant/Plaintiff herself. In this she explains in detail what transpired regarding the efforts made by her and her firm to subpoena Inge Kunoee Zamunai. She stated that she commenced with trial preparation during November 2019 and realized that the Plaintiff had not yet filed the subpoena for Inge Kunoee Zamunai, who is to testify in the upcoming trial. She then instructed her secretary to draft and upload the said subpoena to be issued. The address they had for the witness was one that they obtained from a deed search from a previous case brought against Ratu Trading CC. Upon having the subpoena issued, the secretary delivered the original document to the Deputy Sherriff for service.

[8] The Deputy Sheriff attempted to serve the subpoena on 5 December 2019 but advised their office on 9 December 2019, after enquiry by them, that same could not be served because a full address had to be provided. The Deputy Sheriff was requested to return the subpoena for amendment but indicated that it was already returned to the offices of Ms. Schickerling. Their offices however only received a return of non-service

without the subpoena. The Deputy Sheriff was again contacted and requested to return the subpoena but this was not done before their offices closed on 18 December 2019.

[9] Upon the re-opening of the offices on 14 January 2020, the practitioner again endeavored to obtain the correct address for service and on 17 January 2020, they were provided with the street name and number for Erf 160, Hochland Park, which was the given address for Inge Kunoee Zamunai. The subpoena was re-printed, issued and delivered to the Deputy Sheriff who informed them that they were struggling to get hold of the witness. On 21 January 2020, the secretary of Ms. Schickerling contacted the Deputy Sheriff dealing with the matter and was advised that the subpoena was not served, although they made two attempts to serve the said subpoena on 17 and 20 January 2020.

[10] Upon receiving this information, Ms. Schickerling realized that there is no possibility of serving the subpoena in time and contacted Mr. Kwala, explaining her position to him and alerting him to the possibility that the matter might be postponed due to the non-service of the subpoena on Inge Kunoee Zamunai. He indicated that a postponement must be requested from court. They proceeded and discussed the cost implications of such a postponement as the Plaintiff was offering to pay for wasted costs but could not come to an agreement.

[11] On 23 January 2020, Ms. Schickerling received a letter from Mr. Kwala indicating that they no longer agree to postpone the matter as they were misled as there was no indication of calling a witness by subpoena in the case management report filed during April 2019. She responded to this letter and pointed out that the pre-trial report specifically provide for such a witness and that report formed part of the pre-trial order made by court during September 2019.

#### Opposing the application

[12] The affidavit of Martin Ipinge was used as support in opposing the application brought by the applicant. Mr. Ipinge is the sole member of the Defendant and therefore

duly authorized to act on behalf of the Defendant/Respondent. His objection to the application can be summarized as follows:

- a) The Plaintiff is not forthcoming with the truth as to what happened between 16 September and 30 October 2019 as well as 1 November to 5 December 2019.
- b) Ms. Schickerling was negligent in the manner that she dealt with the matter in that she attended to the matter hopelessly too late and did not provide a street name and address on the initial subpoena. She in essence did not comply with the rules of this court.
- c) She should have brought the application earlier, at least by the week of 14 January 2020. She failed to comply with the provisions of rule 96(3) of the High Court Rules. She further only filed the application because she was advised to do so by the Managing Judge who dealt with the matter on roll call.

[13] In essence, it is argued that the Plaintiff failed to place before the court any justification to be allowed a postponement. The legal representative was grossly negligent and if successful, the court should consider a punitive cost order to be metered out *de bonis propriis*, at least to include the days on which work was done on this matter in preparation of court. It seems however that the *de bonis propriis* cost order request was abandoned during arguments.

#### Applying the law

[14] During the arguments before court, the legal representative of the Plaintiff, Ms Schickerling, was criticized for deposing the founding affidavit in this matter. Mr. Kwala referred to the matter of *Nikodemus Mumbandja v Nehale*<sup>1</sup> wherein Cheda J said the following:

'In an application of this nature, a founding affidavit should be deposed to by the applicant himself or in his absence by someone who can swear positively to the facts. In casu, the first

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<sup>1</sup> (I 126/2014) [2016] NAHCNLD 84 (07 October 2016).

founding affidavit was deposed to by the legal practitioner who then went on to state that applicant failed to attend mediation due to the fact that he had other prior travel arrangements and also that he failed to comply with a court order regarding the filing of a replying affidavit due to the fact that he was attending a workshop. All this, came to the legal practitioner's knowledge through her client.'

[15] In this instance, the court however feels that the legal practitioner for the Plaintiff, Ms. Schickerling, was the person with first hand facts regarding the reasons for seeking the postponement and wish to express similar views than the ones held by Masuku AJ as he then was in *IA Bell Equipment Co Namibia (Pty) Ltd v ES Smith Concreted Industries CC*<sup>2</sup> wherein he stated the following:

'There is one matter that I find myself in duty bound to raise as a caution to legal practitioners and it is this. In this matter, Ms. Petherbridge filed the affidavit in support of the application for condonation, which in the circumstances, was the proper thing to do as no other person may have been able to tender an explanation in this matter as she is the one who personally handled the file. She then proceeded to prepare the heads of argument and to actually argue the application herself. I am of the view that in such cases, it is wise to secure another practitioner, who will bring an independent, impartial and dispassionate view to the matter. Personally arguing a matter in which you have an interest and are a witness does not bode well, particularly where your actions as an attorney in handling a matter, are placed under intense scrutiny. Someone else not intimately connected with the case is invariably better placed to plead your case as you may understandably be tongue-tied, thinking about the consequences in prospect. The conflict of your duty to the court on the one hand, and the personal attachment to the matter and the possibly adverse consequences make it a risky affair. It is akin to riding two horses at the same time. At the end, the rider is likely to fall off both of them and be injured or worse, be disfigured in the process.'

[14] When considering the application before court, it is necessary to refer to the view held by Smuts, JA in *Levon Namibia (Pty) Ltd v Nedbank Namibia Limited*<sup>3</sup> restating the necessity of compliance with the rules in timeously bringing an application for postponement as follows:

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<sup>2</sup> (I1860/2014)[2015] NAHCMD 68 (23 March 2015) at 35.

<sup>3</sup> (SA 31/2017) [2019] NASC (2 August 2019).



[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."

[15] In *Luhl v Solsquare Energy (Pty) Ltd*,<sup>4</sup> Muller AJ summarized the challenge that the court experience with the managing of the civil trial roll as follows:

'The management of the civil trial roll is a difficult enough task as it is. The Court's difficulties are compounded when legal practitioners seek to ignore court orders which they have willingly undertaken to abide by and then seek a postponement at the last available opportunity. The Courts and legal practitioners should be aware that judicial time especially for a civil trial is limited.

If this matter were to be postponed it would not only mean that the case would remain on the roll without being finalised. It would also mean that the time allocated to this case could have been allocated to another case for hearing.'

[16] This remains the challenge when an application for postponement is considered and also the essence of the matter currently for court, as the parties clearly agreed on the way forward during their pre-trial report, which was subsequently incorporated in a pre-trial order. Resources were availed for the matter to proceed during the week of 27

<sup>4</sup> (I 2512-2013) [2016] NAHCMD 237 (16 August 2016).

January 2020, which could have been allocated to other matters. This is, however, only one of a number of factors to consider.

[16] Without a doubt, the leading case as to what needs to be considered when deciding on whether to grant a postponement or not in our jurisdiction must be *Myburgh Transport v Botha t/a SA Truck Bodies*.<sup>5</sup> This case is seen as the *locus classicus* governing postponement applications and in this case, the Supreme Court outlined the relevant principles to be considered.<sup>6</sup> The formulation used in this case has been quoted in a number of cases in this jurisdiction like *Wal-Mart Stores Incorporated v The Chairperson of the Namibian Competition Commission and others*<sup>7</sup> and was duly adapted to find application even in criminal matters.<sup>8</sup>

[17] In *TransNamib Holdings Limited v Tjivikua*, these principles were paraphrased in the following terms by Masuku, J:<sup>9</sup>

- (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;
- (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;

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<sup>5</sup> 1991 NR 170 (SC).

<sup>6</sup> *Ibid* at 174D-175H.

<sup>7</sup> (A 61/2011) [2011] NAHC 165 (15 June 2011).

<sup>8</sup> *S v Conradie* (CC20/2013)[2015]NAHCMD 101 (27 April 2015).

<sup>9</sup> (HC-MD-LAB-MOT-GEN-2018/00079) [2019] NAHCMD19. (21 June 2019) para 9.

(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. '

[18] It is further true that the court in most instances would avoid imposing a sanction that would be drastic and exclude the litigant from airing the real issues in dispute and not 'so-to-speak, shut the doors of the court to a litigant'.<sup>10</sup> In applying the above principles, the court came to the conclusion to grant the postponement application and to include in such an order a cost order as contemplated under (g) above.

### Costs

[19] The Applicant/Plaintiff from the start offered to carry the wasted costs. The parties could however not reach an agreement as to what the extent of the cost order should be. It was argued by the Defendant/Respondent that the wasted costs should include costs necessitated for the preparation for trial as well as the 'reservation' costs of the legal practitioner, Mr. Kwala, for the trial period. If it is understood correctly, the request was for costs on the scale of attorney own client.

[20] In *Katjaimo v Katjaimo and Others*,<sup>11</sup> Damaseb DCJ (with Maritz JA and Hoff AJA concurring) said the following with regard to determining the extent of a costs order where the legal practitioner was in some way negligent:

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<sup>10</sup> *Namhila v Johannes* (1330/2011)[2013] NAHCMD 50 (28 January 2013).

<sup>11</sup> (SA 36/2013) [2014] NASC 25 (12 December 2014) at 36-37.

'Given the unpreparedness and inexcusable delay on the part of the appellant, this is a case in which it is not appropriate for the court to make a costs order on the customary party and party scale. The respondents in this appeal in no way contributed to the scenario as it has unfolded and it would be unjust if they were not fully indemnified in their costs. Attorney and own client costs are awarded sparingly and only if party and party costs will not adequately indemnify the innocent party in respect of the costs incurred as a result of the opponent's nonfeasance or malfeasance. I am satisfied that in the present case party and party costs would not be an adequate recompense to the respondents for the costs they have incurred in opposing the ill-fated appeal and the related interlocutory applications.

[37] The negligence and remissness of a legal practitioner are only to be visited on the litigant where he or she contributed thereto in some way, was aware of the steps that need to be taken in furtherance of the prompt conduct of the case, or through inaction contributed to the matter stalling and thus impeding the speedy finalisation of a contested matter. The following dictum by Steyn CJ in *Salojee and Another NNO v Minister of Community Development* [12] has been cited with approval by our courts:

' . . . 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. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court.'

[21] In *Ongwediva Town Council v Shithigona*,<sup>12</sup> Cheda J said the following:

'The issue then is, did respondents conduct justify an order of punitive costs against them. The general rule of such costs is that the court does not normally order a litigant to pay the costs of another litigant on an attorney and client basis unless some special grounds are present.'

[22] In determining an appropriate cost order in this matter, the court took into account that although the legal practitioner already started her preparation for trial in November 2019, the subpoena was only issued on 5 December 2019. Further, when her office was informed that the address on the subpoena is not sufficient, her office did nothing to further the matter until it closed on 18 December 2019. When the offices re-opened on 14 January 2020, the matter of the subpoena also did not get any attention until 17

<sup>12</sup> (HC-NLD-CIV-MOT-GEN-2017/00017) NAHCNLD 78 (06 August 2018).

January 2020. The Plaintiff/Applicant further did not approach the court at the earliest opportunity with an application to postpone the matter when she realized that the possibility of the matter not proceeding was a reality, but waited till she was instructed to do so by the managing judge dealing with roll call matters on 24 January 2020 and then only filed the application on 26 January 2020.

[23] In the result, I therefore make the following order:

- (a) The late filing of the Applicant/Plaintiff and the Respondent/Defendant affidavits are hereby condoned
- (b) Application for postponement is granted.
- (c) The Applicant/Plaintiff to pay wasted costs occasioned by the postponement.
- (d) The wasted costs occasioned by the postponement will be taxed on the scale as between attorney and own client.
- (e) The Respondent/Defendant to pay the costs of this application.
- (f) The matter is postponed to 11 March 2020 at 14h15 before Justice Tommasi in order for the Managing Judge to assign a new trial date to the matter.
- (g) Parties to file a joint case status report on or before 5 March 2020

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E RAKOW

Acting Judge

APPEARANCES:

For the Applicant:

A Delport

Instructed by Etzold-Duvenhage, Windhoek

For the Respondent:

F Kwala

Of Kwala & Co. Inc