



Case Title:

DEVELOPMENT BANK OF NAMIBIA
LIMITED

PLAINTIFF

and

PROFESSIONAL DRILLING SOLUTIONS CC

T/A ENVIRO DRILL

1ST DEFENDANT

ENWEE VAN BLERK

2ND DEFENDANT

SHAFIISHUNA SAM NUJOMA

3RD DEFENDANT

Case No:

HC-MD-CIV-ACT-CON-2019/00282

Division of Court:

High Court, Main Division

Heard on: 5 November 2021

Delivered: 30 November 2021

Heard before: Honourable Mr. Justice Oosthuizen

Neutral citation: *Development Bank of Namibia Limited vs Professional Drilling Solutions CC t/a Enviro Drill* (HC-MD-CIV-ACT-CON-2019/00282) [2021] NAHCMD 556 (30 November 2021)

THE ORDER

Having heard **Adv. C. van Zyl**, counsel for the plaintiff and **Mr. B. Viljoen**, counsel for the 1st and 2nd defendants, and **Mr. Murorua**, counsel for the 3rd defendant:

1. IT IS ORDERED THAT:

1. 1. Third Defendant shall pay the wasted taxed costs occasioned to the Plaintiff and 1st and 2nd Defendants.

- 2.
3. 2. The wasted costs is limited to two trial days, being 21 and 22 September 2021, as well as the reasonable travelling costs occasioned to 1st and 2nd Defendants' from Swakopmund to Windhoek and back.
- 4.
5. 3. The wasted costs for opposing 3rd Defendant's application is included in the wasted costs for the two trial days.
- 6.
7. 4. The matter is remains set down from 19 - 29 April 2022 at 10:00 on the Action Fixed Roll.

OOSTHUIZEN J:

Introduction

[1] When a matter is set down for trial and it does not proceed for whatever reason, the court is tasked with making a determination on the issue of costs, in cases where the parties cannot reach a compromise.

[2] This is exactly the very reason the Court is asked to make a determination.

Background

[3] The trial in this matter was set down from 20 – 24 September 2021.

[4] On Friday, 17 September 2021 a hearing notice was issued postponing commencement of the trial to 21 September 2021.

[5] On the morning of 21 September 2021, this Court was informed that the Legal Practitioner for the 3rd Defendant is not feeling well and was at the hospital.

[6] The Court being unaware of the circumstances or extent of the 3rd Defendant's Legal Practitioner's illness and in the absence of the 3rd Defendant's Legal Practitioner arranging another colleague who was fully apprised with the medical condition of the 3rd Defendant's Legal Practitioner, the Court issued the following order:

'1. The case is postponed to 22/09/2021 at 09:30 on the Action Floating Roll hearing (Reason: Absence of Mr. Kasper for 3rd defendant). 2. Either one of MSSRS MURORUA or KURTZ shall personally appear before Court with an original medical certificate explaining the absence of Mr. Kasper on 21/09/2021 and when the medical symptoms causing his absence presented. The legal practitioner appearing shall in addition have the trial diary of Mr. Kasper for 2022 ready and available.'

[7] The matter proceeded on the 22nd of September 2021, to where the Plaintiff and the 1st and 2nd Defendants had the opportunity to peruse the medical certificate presented to the Court on the preceding day after the court order was issued. The 3rd Defendant's Mr. Murorua attended to court on the 22nd of September 2021 and who could not provide the court with any of the information required in terms of order 2 of the court order dated 21 September 2021. Plaintiff and 1st and 2nd Defendants were not satisfied with the facts presented to them on this day and indicated that they would persist in a formal application of condonation to be filed in order to consider whether or not Plaintiff and 1st and 2nd Defendants would persist with the issue of wasted costs.

[8] The following observations are worth noting – the 3rd Defendant himself was not in attendance on 21 September 2021 and 22 September 2021; and the 3rd Defendant did not tender wasted costs to the Plaintiff and 1st and 2nd Defendants and noted from Mr. Murorua submissions on 22nd of September 2021 that costs should not be tendered at all since this was a counsel who found himself in circumstances beyond his control.

The relevant law

[9] The *locus classicus* *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 NR 170 (SC) regulates applications for postponements, 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.)

....

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.'

[10] It is common cause that Plaintiff, 1st and 2nd Defendants was ready to proceed with trial on 21 September 2021. Also, common cause that the parties requested 10 trial dates in their pre-trial report. It is also common cause that the sudden illness of an instructed legal practitioner causing a delay and/or postponement of a case, is but one of a possible plurality of hazards which come with litigation.

Determination

[11] The Court has sympathy for the circumstances the 3rd Defendant's Legal Practitioner found

himself in on the morning of 21 September 2021.

[12] But, when exercising its discretion, the Court cannot turn a blind eye to the wasted costs of the parties that were affected by the postponement and the vacation of the trial dates. The Plaintiff and 1st and 2nd Defendant had prepared for the trial, the 1st and 2nd Defendant's Legal Practitioner had to travel from Swakopmund to attend this trial.

[13] The 3rd Defendant at the hearing of the arguments in respect of this application on 5 November 2021 made the concession that he would tender the taxed wasted costs for one day of the Plaintiff and 1st and 2nd Defendant.

[14] The court takes cognisance of the fact that the circumstances prompting the postponement were not self-created, malicious or mala fide actions by the 3rd Defendant or his legal practitioner but the Court recognises that there were wasted costs occasioned which need to be dealt with.

[15] In the premises the following orders are made:

[15.1] Third Defendant shall pay the wasted taxed costs occasioned to the Plaintiff and 1st and 2nd Defendants.

[15.2] The wasted costs is limited to two trial days, being 21 and 22 September 2021, as well as the reasonable travelling costs occasioned to 1st and 2nd Defendants' from Swakopmund to Windhoek and back.

[15.3] The wasted costs for opposing 3rd Defendant's application is included in the wasted costs for the two trial days.

[15.4] The matter is remains set down from 19 - 29 April 2022 at 10:00 on the Action Fixed Roll.

	Note to the parties:
GH Oosthuizen Judge	None
Counsel:	

Plaintiff:	1ST & 2ND Defendants:
Advocate C. Van Zyl Instructed by Francois Erasmus & Partners Windhoek	Mr. B. Viljoen Of Viljoen & Associates Windhoek
	3RD Defendant:
	Mr. Murorua Of Murorua, Kurtz & Kasper Incorporated Windhoek