IN THE HIGH COURT OF NAMIBIA **CASE NO.: I 177/2010**

In the matter between:

NAMIBIA HEALTH PLAN	**FIRST APPLICANT/4TH DEFENDANT**
TIAAN SERFONTEIN	**SECOND APPLICANT/5TH DEFENDANT**

vs

Deidre Dawn Faith SCHROEDER	**FIRST RESPONDENT/PLAINTIFF**
THE REPUBLIKEIN NEWSPAPER	**2nd RESPONDENT/1ST DEFENDANT**
CHRIS JAKOBIE	**3RD RESPONDENT/2ND DEFENDANT**
RONELLE RADEMEYER	**4TH RESPONDENT/3RD DEFENDANT**

CORAM: GEIER AJ

Heard on: 2011.03.15

Delivered on: 2011.03.15

EX-TEMPORE JUDGEMENT:

GEIER A J.: [1] In this matter the 1st and 2nd applicants brought an application for the removal of bar on the 27th of August 2010.

[2] On the 30th of August 2010 a notice to oppose such application was filed by the 1st Respondent.

[3] The application was initially set down for hearing for the 10th of September 2010. It was on that date postponed for the first time to a date to be arranged with the Registrar.

[4] On 1 October 2010 an application for a date for the hearing of this matter was made, in response to which, the 1st respondent filed a 'Request for a Postponement', of the hearing of the matter which had been scheduled for the 13th of October 2010.

[5] The ground for requesting such postponement was for purposes of applying for legal assistance through the office of the Ombudsman.

[6] By way of a notice dated 18 October 2010, the hearing was then set down for Tuesday 23 November 2010.

[7] On that same date the 1st respondent filed a document, headed 'Trial Date allocated for 23 November 2010', in which she purportedly informed the applicants that the Ombudsman had replied to her request for Legal Aid and

that the matter should not proceed as per attached letter of the Ombudsman which indicated that the matter was under investigation and as a result of which the 1st respondent requested that the matter not be set down for 23 November 2010.

[8] On the 11th of November 2010 the 1st respondent also brought an 'Application in terms of Article 12' in which she gave notice that she intended to apply, in absentia, for the matter to be postponed sine die for the purpose of a fair hearing, giving notice also that an affidavit would be deposed to by her and which would be used in support of this application.

[9] It is to this affidavit that a physiological assessment report from Dr Juergen Hoffmann was annexed from which it appears that the 1st respondent was referred for an assessment for purposes of compiling a vocational expert report regarding her earning potential, pre-incident and post-incident.

[10] This report did in no manner indicate that the 1st respondent was unable to represent herself or that she would be unable to appear in person at any hearing.

[11] On the 23rd of November 2010 the matter was postponed once again to 15th March 2011.

[12] On 15 February 2011 undercover of a 'Filing Notice', the 1st respondent informed the applicants that 1st respondent's counsel will be Advocate Ephraim

Kasuto, who, however, would not be available on 15 March 2011 for the hearing of the above matter.

[13] Notice was also given that said counsel would enter a notice of representation ‘at his earliest convenience’ and that 1st respondent therefore requested a ‘convenient postponement’.

[14] No affidavit was annexed to such ‘filing notice’.

[15] It appears therefore that the first matter, which requires determination, today, is the renewed quest, on the part of the 1st respondent, in absentia, to have the hearing of this matter postponed again ‘conveniently’.

[16] It also appears immediately that the ‘filing notice’ which was given in this matter does not amount to a substantive application for postponement and that no explanation is offered what Mr Kasuto’s position currently is, or whether the services of alternative counsel were sought. There is also no explanation why Mr Kasuto was not able to, at least, file a notice of representation within the period of one month.

[17] Mr Barnard, who appeared on behalf of 1st and 2nd applicants, opposed this ‘application’.

[18] He agreed with the Court that the non-availability of counsel per se would not amount to a valid reason for a postponement. In this regard reference is

made to what the Supreme Court stated in *Atztec Granite Pty Limited v Green and Others* 2006(2) NR 399 (SC).

[19] Damaseb J P in a recent decision handed down in the unreported High Court case of *Vincent Hailulu v The Anti Corruption Commission & Five others* - case number I 2191/2009, delivered on 11 November 2010, stated at page 33 of his judgement that

> *" ... The principles for the consideration of a postponement 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 manoeuvre. 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 and the Courts 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. It must now be accepted as settled, that it is unacceptable to assume that as long as the opponents prejudice is satisfactorily met with an appropriate cost order nothing else matters."*

[20] It is indeed so in this matter that the 1st respondent gave timeous indication that the matter might again be postponed due to the non- availability of counsel, but it appears however that it should be of concern whether or not this renewed attempt, at securing a postponement, in a technically deficient manner, is *bona fide* and whether or not a further postponement is really in the interests of justice, or put otherwise, would do substantial justice between the parties herein.

[21] Relevant in this regard is that the 1st respondent quite competently was able to issue summons, to which particulars of claim, under the 1st respondents own hand, are annexed. It appears that the 1st respondent has some knowledge of the Rules of Court and that she was therefore able to draft an Application for Default Judgement in which she also discloses technical expertise in that she attacks the validity of the applicants' notice to defend as same was delivered allegedly without a valid resolution and power of attorney.

[22] The 1st respondent was also competent enough to file the Notice of Bar which has become the central point of focus of this application.

[23] It appears further that she also appeared in person, in Court, at the hearing of the 27th of August 2010.

[24] Finally it needs to be mentioned in regard to the 1st respondent's competence that she was also able to file a substantive application for a postponement on the 11th of November 2010.

[25] It must therefore be accepted that the 1st Respondent was acutely aware of the requirements of a substantive application, as a necessary vehicle for securing a further postponement, also on this latest occasion.

[26] Once the 1st and 2nd applicants however launched their Application for the Removal of Bar, the 1st respondents stance and *modus operandi* changed dramatically. All of a sudden she required legal assistance. This, of course, is her good right, but why, all of a sudden, her stance changed in this regard is not explained at all? Particularly and why she abandoned her quest to represent herself, once faced with a relatively simple interlocutory application, remains unclear.

[27] The upshot of such a change in attitude was that this stance resulted in a number of postponements since the matter was first postponed on the 10th of September 2010, which delayed the adjudication of a simple interlocutory application by some six months. This smacks of a tactical manoeuvre and impacts negatively, in my view, on the *bona fides* of the 1st respondent.

[28] Ultimately her stance brought about a situation where the main action could also not progress at all, until this interlocutory matter would have been disposed of.

[29] In such circumstances the question has to be asked whether or not a further postponement, - to some unknown date, - i e. until such time that

Applicant's counsel might become available - and might eventually deem it fit to enter his 'notice of representation' - at his so called 'earliest convenience', - would be in the interests of justice.

[30] The related question, which immediately arises, is whether or not this would be the type of postponement where the resultant prejudice could simply be cured by a cost order?

[31] I believe the answer to these questions must be answered in the negative.

[32] Even if I am wrong it is clear from Justice Damaseb's judgment that these factors are not the only considerations, which come into play.

[33] At paragraph 34 of the aforesaid judgment the following is stated:

> *"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 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:[1]

> *[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 criteria. 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 a 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 cost and length of litigation and to bring them to finality in a way that is least burdensome to the Court.*

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[1] *H A W Retailers CC t/a Ark Trading/ Coastal Hire CC & Another v Nikanor* unreported Judgement case number A151/2008 at paragraph 17 pages 13 to 14. - (This Judgement can also be found on the Superior Court Website)

I hope it does not reveal a of 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 the Judge is going to become free from an assigned case so that new case(s) are allocated to such judge with sufficient reading 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".

[34] His Lordship then continues to set out the factors, which a Court should take into account.

[35] In my view this is also the further area in which the 1st respondent's 'application' for a postponement falls short. All the above raised considerations apply to this case.

[36] Ultimately it is in the interests of justice, and so it would appear, also in the interest of all parties herein, that the issue of the applied for removal of bar be disposed of without further delay.

[37] This would either bring finality to the 1st respondent's application for Default Judgement or if granted would allow the applicants to plead their case. In both instances the litigation initiated by the 1st respondent would be advanced one stage nearer to completion.

[38] Finally Damaseb JP made it clear in paragraph 36 of his judgement that an applicant for a postponement also bears the onus and should make out a case on the papers, which the Applicant, here, has simply not done. A postponement, particularly a repeated request for a postponement, is not simply to be had for the asking, this is what the 1st respondent has done.

[39] In the result and taking into account all the abovementioned factors I exercise my discretion against the granting of a further postponement herein.

[40] This leaves the application for the removal of bar.

[41] The circumstances which led to the out- of- time filing of the 1st and 2nd applicant's plea were set out in an affidavit explaining, that, the late filing thereof, came about as a result of a mistaken calculation of the applicable Court days, which erroneously took into account a day as a public holiday when this clearly should not have been so.

[42] As a result of such miscalculation, and in the *bona fide,* but mistaken belief that sufficient time was left to file the 1st and 2nd applicant's plea, such plea was filed on the 21st of May 2010 instead of the 20th of May 2010.

[43] The application for removal of bar was also brought without undue delay and is *bona fide*.

[44] There simply was no reckless or intentional disregard of the rules of Court.

[45] What is more, it appears from such plea that the applicants have set out a number of *prima facie* defences to the 1st respondents claims. This appears for instance from paragraphs 6 to 13 of such plea.

[46] Ultimately and considering the aspect of prejudice it would appear that, should the relief sought not be granted, this would indeed allow the 1st respondent 'to snatch a technical advantage' which would have the effect of shutting the doors of the Court in the face of the applicants. Surely this cannot be in the interests of justice *in casu*. It appears therefore that the applicants have satisfied the requirements set out in the case of *TransNamib v Essjay Ventures Limited 1996 NR188 HC* at page 193 G – I, which also cites with approval what was stated by the Court in *Smith N O v Brummer N O and Another* 1954 (3) SA 352 (O) at page 358G.

[47] Mr Barnard also urged me to award the costs of the application for the removal of bar to the applicants as 1st respondents' opposition to the application was frivolous. I need to state that, in the circumstances of this matter, and as appears from the history set out above, that the 1st respondent never filed any substantive answering affidavits in response to the application for the removal of bar. Accordingly the grounds of the 1st respondents intended opposition were never disclosed to the Court and it therefore becomes speculative as to whether

or not any substantial grounds of opposition would ever have been disclosed. In such circumstances I decline to make the order prayed for.

[48] I therefore find that the application for the removal of bar must succeed and accordingly the following orders are made.

1. The 1st Respondent's application for a further postponement is dismissed with costs.

2. The notice of bar, dated 11th of May 2010, as delivered by 1st Respondent, is hereby removed and uplifted.

3. The 1st and 2nd Applicants, the 4th of and 5th Defendants in the main action instituted by 1st Respondent herein, are granted leave to deliver their plea within ten days of the granting of this order.

GEIER A J

ON BEHALF OF THE PLAINTIFF **ADV P. BARNARD**

Instructed by: **LORENTZANGULA INC**

ON BEHALF OF DEFENDANT