

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: I 143/2014

In the matter between:

FAIDA TRADING & CLEARING ENTERPRISES CC

APPLICANT

and

NEDBANK NAMIBIA LIMITED

RESPONDENT

Neutral citation: *Faida Trading & Clearing Enterprises CC v Nedbank Namibia Limited* (I 143/2014) [2016] NAHCNLD 100 (01 December 2016).

Coram: CHEDA J

Heard: 25.01; 20-24.06 & 18.11.2016

Delivered: 01 December 2016

Flynote: **Postponement** - A party that seeks a postponement must do so timeously and should show how it will suffer prejudice if the trial continues without its participation. The other party should also show that it will suffer prejudice, which prejudice cannot be cured by an order for wasted costs. The costs will not easily grant postponement without good cause. A party that does not mitigate its losses cannot recoup it from another party. Costs on any attorney-client scale can only be awarded if there are special circumstances.

Summary: Applicant was in the middle of a trial when the trial was postponed. During the postponement he was arrested and incarcerated and was not able to continue with the trial. He applied for a postponement which was opposed by respondent for the reason that he should have been brought by the police amongst other reasons. The opposition to the postponement was found to be unreasonable. Respondent asked for costs at a higher scale. Application is granted with costs at an ordinary scale.

ORDER

1. Application for condonation of non-compliance with the rules is granted.
2. The application for a postponement is granted.
3. The matter is postponed to the 09 February 2017 at 10h00 for the determination of a trial date.
4. Applicant must pay the costs of the application for postponement only on the ordinary scale.

JUDGMENT

CHEDA J:

[1] Applicant filed a notice of motion on the 16 November 2016 wherein it sought the following relief:

- a) condoning its non-compliance with the rules of this court;
- b) that the matter be postponed *sine die* to a date to be arranged with the managing Judge; and
- c) costs of suit (in the event of same being opposed)

[2] The brief background and genesis of this matter is outlined hereunder. Applicant instituted action proceedings against defendant on the 08 July 2014,

wherein it claimed an amount of US\$39, 300-00 plus interest and cost of suit. The action was defended and it proceeded to trial. The trial commenced on the 21 – 24 June 2016 and was postponed for the continuation of the trial to take place from the 21 – 23 November 2016.

[3] While awaiting the continuation of the trial, plaintiff's representative, Mr. Emmerly Bizimana was arrested and is presently incarcerated at Walvis Bay Police Station pending his bail application.

[4] At the time of the adjournment of this matter, he was still giving evidence in chief and was still under cross-examination which was to continue on the next hearing.

[5] Applicant's legal practitioner, Ms. Mugaviri submitted that as far back as the 02 November 2015, she advised respondent's legal practitioner of her client's inability to attend court on the 21 – 23 November 2016 due to his arrest and that she would seek a postponement of this matter on the 21 November 2016 to a date to be agreed to by both the legal practitioners and the court. This was opposed by respondent's legal practitioner, which opposition has led to her filing this application.

[6] Mr. Bizimana averred that he is still in detention, his mind is disturbed and will, therefore, not be in a position to give evidence, even if he would have been brought by the police. He also stated that he needed more time to further instruct his legal practitioner. Ms. Mugaviri submitted that she made several attempts to have this matter resolved with respondent's legal practitioners, but, to no avail. She further submitted that, applicant has nothing to gain by the said postponement and equally so, respondent will not suffer any prejudice.

[7] Advocate Sandra Miller for respondent vigorously opposed this application. Firstly she attacked applicant's legal practitioner for failing to comply with Rule 65 (5) (b) of the Rules of the High Court which reads:

“(5) In the notice referred to in subrule (4) the applicant must –
(b) set out a day, not less than five days after service thereof on the respondent, on or before which the respondent is required to notify the applicant in writing whether

the respondent intends to oppose the application, except that where the Government is the respondent, the time limit may not be less than 15 days.”

[8] It is her view that despite applicant’s knowledge as far back as the 04 November 2016 that respondent had indicated that it was going to oppose the application for postponement it did not serve it with a substantive application until the 16 November 2016. She further argued, that, applicant did not fully explain his reasons for the delay in instructing his legal practitioners to make an application for postponement timeously in terms of rules. It is for that reason that it should be dismissed.

[9] With regards to the grounds for postponement she submitted that, applicant’s averment that he is not in a proper frame of mind to attend court is tantamount to dictation of the court roll as this will lead to absurdity to say the least.

[10] As to whether or not respondent will be prejudiced it was her argument that respondent is a financial institution, governed by the strictest standards of governance wherein it is expected to report to its shareholders time and again. Further, that respondent’s witnesses have been subpoenaed and their travel expenses have already been paid for.

[11] As regards applicant’s desire to engage his legal team before continuing with his cross-examination, she submitted that he is not allowed to engage then at this stage.

[12] It is also her argument that applicant must bear the costs, including wasted and travel costs. She went on to argue that this application would have been heard on the 21 November 2016, which is the original set down date for the continuation of the trial. Therefore, the court should order applicant to pay wasted costs on a higher scale.

[13] Applicant in his founding affidavit averred that he complied with the rules regarding compliance and he stated as follows in paragraphs 4-6:

- “4. The reason I have brought this application at the last minute was due to the fact that I was under the impression and belief that the respondent’s practitioners would respond with a positive response after I informed them of the reason I sought the postponement. This was however not the case and led to me bringing this application on short notice.
5. Approximately one month ago, I was arrested in Walvis Bay and I have been incarcerated since that time. My legal practitioner of record only became aware of my situation on 2 November 2016, on which date, she immediately addressed correspondence to the respondent’s legal practitioners. The reason why she did not disclose the reason for my unavailability was because I requested her to keep the reason for my unavailability private. (emphasis added)
6. After it became clear that the respondent was unwilling to have the matter postponed, I instructed my legal practitioner to communicate with the respondent’s legal practitioners and inform them of the reason I would be unavailable, this was done on 10 November 2016. Even coupled with this information the respondent was unwilling to assist me in granting me an indulgence.” (my underlining)

[14] Application for condonation for non-compliance is at the discretion of the court. Applicant is enjoined to give a reasonable explanation regarding his failure to comply. In *casu*, it is not in dispute that he was under arrest and was in detention. He informed his legal practitioner of his arrest on the 02 November 2016 and they immediately commenced correspondence regarding the postponement. In my view applicant was very reasonable in informing his legal practitioner in time and they also engaged respondent at a fairly early stage.

[15] The reasons for their setting down this matter before the 21 November 2016 are two fold:

- a) when parties are engaged in negotiations on cannot pre-empt a failure in the negotiations by rushing to court for relief as it would be premature and unnecessarily increase costs; and
- b) letting the matter to proceed on the 21 November 2016 with full knowledge that applicant will not be available would certainly not have been proper as it would have resulted in the parties incurring unnecessary costs, which costs

would have been avoided if the respondents' legal practitioner had acted prudently.

[16] Applicant's explanation for seeking a postponement is indeed reasonable in my view. But, however, that is not the end of the matter. Applicant is required to go a step further by making the said application timeously in terms of the Rules of Court. This is a requirement.

[17] However, the court has a discretion to allow such a postponement which discretion must be exercised judicially, but, the court can then direct that applicant pay wasted costs before the commencement of the hearing. It therefore means that respondent's potential prejudice can be made good by an award of costs to its favour. This principle was laid down, in *Van Dyk v Conradie 1963 (2) SA 413 (c) at 418 and applied in Tarry & Co. Ltd v Matatiele Municipality 1965 (3) SA 131 (E) at 137*.

[18] It is a must that applicant must make the application timeously as soon as circumstances which might justify such an application become known to the applicant, see, *Greyvenstin v Neethling 1952 (1) SA 463 (c) at 467 F*. This is a discretion which will be largely influenced by the fundamental principles of fairness and justice, and the need to accord the applicant an opportunity to have his application placed before the court, hence the exercise of my discretion. Taking into account the above I condoned the non-compliance by applicant as circumstances surrounding his predicament so justify.

[19] The matter, which now calls for determination is whether or not the matter should be postponed on the basis of applicant's inability to attend.

[20] The general rule is that at any stage after set-down of a trial or opposed matter and on good cause shown either party can apply for a postponement of a matter. The *onus* rests on applicant to show on a balance of probabilities that he will suffer prejudice in the case, if it is not postponed. He must make it clear how he will be prejudiced.

[21] A bare allegation of prejudice is not sufficient, see, *Herbstein and Van Winsen, The Civil Practice of the High Court of SA, 5th ed. Vol I at 751-752*. The court in adopting that approach will also consider the prejudice that will be suffered by the respondent in the event of the postponement and that whether such postponement cannot be cured by an appropriate order of costs.

[22] In light of the above authorities, it is clear that the following are the requirements for such a postponement of a trial and will not be granted unless;

- a) plaintiff has made it timeously;
- b) where the postponement is caused or is occasioned by an event or circumstances which the plaintiff at the time of set down of the matter could have, and should have, foreseen; and
- c) where defendant will suffer by such postponement prejudice which cannot be met by an order as to costs.

[23] In this jurisdiction, the Supreme Court in *Myburgh Transport vs Botha t/a SA Truck Bodies 1991 (3) SA 310 (NM SC) at 314-315* laid down the following principles:

“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. ...

3. ...

4. ...

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)*.

6. 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. *Gryvenstein v Neethling 1952 (1) SA 463 (c)*. Where, however, fundamental fairness and justice justifies a postponement, the court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made. *Gryvenstein v Neethling (supra at 467F)*

7. An application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purpose 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 weight 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 actin, as the case may be. *Van Dyk v Conradie 1963 (2) SA 413 (c) at 418 and Tarry & Co. Ltd v Matatiele Municipality 1965 (3) SA 131 (E) at 137.*”

[24] Applicant was still giving evidence when the matter was postponed and this postponement was not of his own making, but, due to time constraint. This matter commenced as far back as 2014. It is clear that both parties desire that this matter be brought to finality as soon as it is practically possible.

[25] Applicant is presently in detention in Walvis Bay, a situation which he cannot do anything about, but, to apply for bail and there is no guarantee that it would be granted. The said bail was not granted and is unlikely to be determined before the 21 November 2016. During the parties’ submissions Advocate Sandra Miller advised

the court that she had information that he had been granted bail. In light of this, I advised Ms. Mugaviri to clarify and at the time of writing this judgment, she had not done so which can only lead me to conclude that he is still incarcerated.

[26] One of the requirements for postponement is that applicant should show some *bona fides* of his inability to attend a trial. In *casu* he is in custody in Walvis Bay, a distance of over 700± kilometre away from Oshakati High Court. This position was well known by respondent as far as back as of the 04 November 2016.

[27] Therefore, his genuineness cannot be reasonably questioned. Applicant has fully explained the reason, for his failure to attend, namely, his detention at Walvis Bay Police Station and his unstable state of mind due to his incarceration. His failure to attend is a physical impossibility. I don't see how, applicant could have been more candid than this. His excuse for not attending court cannot be viewed as a delaying tactic at all.

[28] The courts will generally be slow in refusing such a postponement. In as much as he did not timeously apply for a postponement, the determining consideration is that the need for fairness and justice justifies a postponement as long as it will not result in the postponement prejudicing respondent which cannot be cured with an appropriate order of costs.

[29] In light of applicant's explanation and the fact that it is physically impossible for him to attend trial on the 21 November 2016 as previously agreed and further compounded by the fact that he has been waiting for his day in court, it will be unreasonable to deprive him of that opportunity. Respondent was being unreasonable in refusing to agree to a postponement which would have saved costs.

Costs

[30] With regards to costs, the general rule is that a party that applies for a postponement must shoulder the costs of such application as it is the one that is craving for the court's indulgence. Therefore, applicant must be saddled with such costs. The question which the court needs to determine is at what scale this should be.

[31] Respondent has urged the court, to order applicant to pay costs at a higher scale. Our courts take a leaf from the celebrated case of *Nel v Waterberg Landbouwers Ko-operative Vereeniging 1946 AD 597* where Tindall JA, stated:

“[t]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”

[32] These courts do not grant such costs with easy and will only grant them on rare occasions, see, *Ebrahim v Excelsior Shopfitters and Future (Pty) Ltd (2) TPD 226* and *Mallingson v Tanner 1947 (4) SA 681 (T) at 686*. In light of this, the court will normally not order a litigant to pay the costs of another litigant on the basis of an attorney and client scale unless some special circumstances exist, see, *Van Dyk v Conradie 1963 (2) SA 413 (C) at 418* and *Pienaar v Bolond Bank 1986 (4) SA 102 (0) 116*.

[33] Such an award of costs as it is punitive can only be granted by reason of some special considerations arising either from the circumstances which gave rise to the action, or from the conduct of the losing party. Applicant was *bona fide* in his application as he is immobilised and is therefore not free to travel to court to prosecute his case. This is clear and one does not have to be a Rocket Scientist to see that.

[34] Respondent's attitude was unnecessarily obdurate, its legal practitioners were availed the facts pertaining to applicant's predicament, but, decided to forge ahead with its opposition and did not dewarn its witnesses that the circumstances surrounding the trial had materially changed. One assumes, may be wrongly that they were told of this physical impossibility on his part, but, ignored it in the hope that the expression of travel and accommodation expenses which they allege to have paid for this trip will find favour with the court and accordingly am twist it to its favour. It however, behaved as if it gained a rare opportunity to prevent the continuation of

the trial. These courts are courts of justice and are not a boxing ring where victory can be attained on technical points. Where one is poised to win it must do so in accordance with the laws pertaining to fairness not ambush and this was plaintiff's desire right from the start.

[35] In any case, this was his first "default" for lack of a proper term. In litigation, every party has a duty to mitigate its losses. A party that attempts to take advantage of the other in a matter where its opponent has been placed in a physical impossibility cannot expect the court to assist it in its nefarious exercise. A party who does not take reasonable steps to curb its losses cannot expect to re-coup them from another party's unfortunate circumstances. The present legal system is anchored on civilization and cannot be drawn back to the medieval ages of litigation practices. Law is dynamic and has undergone a paradigm shift in its development. Respondent was unreasonable and should be deprived of costs at a higher scale.

[36] Applicant was indeed in a difficult position. He should be allowed to prosecute his matter to finality whichever way it ends. In the result the following is the order of court:

Order:

1. Application for condonation of non-compliance with the rules is granted.
2. The application for a postponement is granted.
3. The matter is postponed to the 09 February 2017 at 10h00 for the determination of a trial date.
4. Applicant must pay the costs of the application for postponement only on the ordinary scale.

M Cheda
Judge

APPEARANCES

APPLICANT : G. Mugaviri
Of Mugaviri Attorneys, Oshakati

RESPONDENT: S. Miller
Of Shikongo Law Chambers, Windhoek