

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – PORT ELIZABETH**

Case No.: 2328/2013

In the matter between:

MINISTER OF POLICE

Applicant

and

CHARLES OPPONG KYEKYEKU

First Respondent

RICHMAN MATHELEZI TEMBANI

Second Respondent

JUDGMENT

REVELAS J:

[1] This is an application for the postponement of a trial set down for 16 October 2018. The application is opposed by the first respondent, but not by the second respondent.

[2] The trial in question concerns a claim for damages brought by the respondents as plaintiffs, arising out of their alleged unlawful arrest, detention and continued detention. Claims that were brought for alleged malicious prosecution and assault are no longer pursued by them. The arrest in question was carried out in 2011 and the action was instituted almost three years later in 2013.

[3] The postponement is sought by virtue of the investigating officer's unavailability to give evidence in respect of the alleged unlawful, continued arrest. The investigating officer, Warrant Officer Hoffman, has since the beginning of the year been deployed to South Sudan on a peace-keeping mission. She is only likely to return to South Africa in June next year and would thus be out of the country on the trial date.

[4] The first respondent does not dispute that Hoffman is an essential and material witness in the case to be advanced by the applicant. The opposition to the postponement is premised on the objections raised by the first respondent as set out below.

[5] The first respondent accused the applicant of being dilatory.

[6] Mr West, on behalf of the first respondent argued that there has been a substantial delay between the date on which the cause of action arose and the trial date. A postponement, if granted, adversely

affects the memories of witnesses and has a negative impact on the first respondent's prosecution of his claim against the applicant. Mr West stressed that the first respondent had set the matter down for allocation of a trial date a long time ago and notified the applicant's attorney thereof as early as 21 April 2017, and that since 25 August 2017 all parties knew what the trial date was.

[7] The first respondent also cast aspersions on the reason for Hoffman's unavailability, i.e. her alleged presence in South Sudan on the trial date. According to Mr West, the applicant could have secured the attendance of Hoffman since police officers are "ferried back and forth from their deployment every 2 months". Presently there is no evidence that this might be the case.

[8] The applicant clearly furnished a satisfactory explanation of the circumstances that gave rise to the application for postponement. The first respondent is not able to – and did not dispute – that Hoffman is an essential witness to the applicant's case. Without her the applicant would have no prospects of refuting the respondents' claim for continued detention.

[9] The applicant's attorney only became aware of Hoffman's unavailability on 4 July 2018. That could not have been foreseen by the applicant's attorney. Once the applicant's attorney realised this,

he acted expeditiously by seeking a postponement by agreement. It was refused.

[10] The first respondent's challenge to the reason for Hoffman's absence on the trial day is unconvincing. The first respondent's suggestion that Hoffman could be 'ferried' back to South Africa for the trial, and that could be arranged, is impractical and could turn out to be very inconvenient for many other persons not involved in the trial. The aforesaid assumption of first respondent is in any event not premised on proper evidence.

[11] It is trite that in exercising their discretion when deciding whether or not to grant a postponement, courts take into account considerations of prejudice¹, convenience and inconvenience to the parties, and whether a postponement would be in the interests of justice².

[12] Should a postponement be refused in the circumstances of this case, the applicant would clearly be unduly prejudiced, because the applicant would not be able to lead essential evidence and lose his case by default. The only prejudice to be suffered by the first respondent is a further delay of the proceedings which would be less

¹ The National Bank of SA Ltd v Assigned Estate Lentin and Tobias 1924 SWA 84.

² Grootboom v National Prosecuting Authority 2014 (2) SA 68 (CC) at 75H-76C.

substantial than his own delay in the prosecution of his delictual claim for damages, which was the most substantial delay in this matter.

Costs

[13] The applicant gave the first respondent ample notice of the postponement and motivated by cogent reasons. He nonetheless persisted with his opposition, instead of opting for the less costly route. There is therefore no reason why a costs order should then be made against the applicant who made expeditious efforts not to incur such costs. However, the normal rule that costs should follow the result, ought not to apply. There may be future developments with regard to securing Hofmann's evidence. Bearing such considerations in mind, it would be prudent to reserve the costs of the postponement for determination by the trial court.

[14] In the circumstances the following order is made:

1. The trial set down for 16 October 2018 is hereby postponed
sine die.
2. The costs of the application for postponement is reserved for
determination by the trial court.

E REVELAS

Judge of the High Court

Appearances:

For the Applicant: Adv M Beneke instructed by The State Attorney,
Port Elizabeth

For the First Respondent: Mr West instructed by BDLS Attorneys, Port
Elizabeth

Date heard: 20 September 2018

Date delivered: 21 September 2018