

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

Case No: 191/2018

Date heard: 27 May 2019

Date delivered: 2 July 2019

REPORTABLE/NOT REPORTABLE

In the matter between:

BRAD DAVID DAVEY

Applicant/Defendant

AND

ELIZABETH CATHARINA DAVEY (born De Swardt)

Respondent/Plaintiff

JUDGMENT

Goosen J:

- [1] Two applications served before the court. The first concerned an application to compel the defendant to furnish a reply to a request for trial particulars. The second concerned the postponement of the trial.

- [2] In respect of the application to compel the defendant conceded the relief and tendered costs. Mr *Buchanan* SC, who appeared for the respondent/plaintiff, therefore moved only for an order for costs in that application.
- [3] In relation to the postponement application the only issue to be determined concerns the costs of the application. The parties agreed that the trial be postponed *sine die*. The applicant, who is the defendant in the divorce action, contends that the costs of the application should be reserved for determination by the trial court. The respondent, on the other hand, contended that the applicant pays the costs occasioned by the postponement.
- [4] The principal basis upon which the applicant moved for a postponement of the trial concerns his current work/professional commitments. The applicant resides in Perth, Australia. He is employed as a Legal and Risk Officer for CIMIC, an engineering, construction, mining and services company. According to the applicant his employment is demanding and requires extensive travel internationally.
- [5] In consequence of these professional demands, and given the limited time available to him, so he alleges, he has been unable to meaningfully consult with his attorney and counsel, or to provide instructions timeously to permit preparation for trial. These exigencies have resulted in the applicant being unable to respond fully and timeously to a request for trial particulars or to make further discovery as requested in terms of Rule 35(3).
- [6] While the applicant explains the reasons for admitted delays he nevertheless asserts that he has attempted to co-operate fully with requests for documents

and information relating to his business entities and assets. To this end he instructed his auditor to make available all documents as may be required by the respondent. Despite this, he states the respondent has indicated that she is prejudiced in her trial preparation because of the applicant's failure to properly discover and disclose his assets and liabilities.

- [7] In relation to immediate pre-trial preparation the applicant points out that neither party has yet filed expert notices or reports in terms of Rule 36(9). He takes the view that since the trial will concern questions as to the quantum of the accrual in the parties' respective estates and maintenance, it will be necessary to present expert evidence. It is his intention to qualify three experts.
- [8] The respondent disputes the fact that the applicant's work and professional commitments are such as to render it difficult to prepare for trial. She points out that the applicant is entitled, in terms of his contract of employment, to periods of leave which he could have used to facilitate preparation and attendance at the trial. She further challenges the extent of his work and travel commitments, pointing out that he has on several occasions travelled for personal or vacation reasons.
- [9] The respondent denies that the applicant has made every attempt to co-operate in regard to access to information and documents. In support hereof she alleges that her forensic auditor, Honeyball, has not been able to determine the extent and value of the applicant's estate. She points also to the need to launch an application to compel the production of further particulars.

[10] As indicated above the parties reached agreement as to the postponement of the trial. This no doubt reflects the fact, as evidenced by the papers, that leaving aside responsibility, neither party was able to proceed. Ms *Morgan*, for the applicant, argued that the costs should at best, be reserved for determination by the trial court. However, in the light of the opposition to the postponement application, it was submitted that the respondent should be ordered to pay the costs.

[11] This latter argument was premised on the assertion that the respondent had acted unreasonably in not agreeing to the postponement and insisting upon a substantive application. This had the effect of unnecessarily increased costs.

[12] Mr *Buchanan* SC, for the respondent, submitted that there was nothing unreasonable in the approach adopted. A party is entitled to require the party seeking a postponement to set out in a substantive application, the reasons therefore. In the event the basis relied upon was in any event open to doubt. Furthermore, the applicant did not, as is usual in such matters, tender the wasted costs occasioned by the postponement.

[13] The general rule is that the party whose conduct gives rise to a postponement of a matter must pay the costs occasioned thereby. In ***Sublime Technologies (Pty) Ltd v Jonker and Another***¹ it was held that:

“[3] With regard to costs occasioned by a postponement, the general rule is that the party which is responsible for a case not proceeding on the day set down for hearing must ordinarily pay

¹ 2010 (2) SA 522 (SCA) at par [3]

the wasted costs. It is important to bear in mind, however, that a litigant is not necessarily 'responsible' for the case not proceeding merely because he or she applies for a postponement. In certain circumstances, a litigant may be forced to apply for a postponement as a result of the conduct of an opponent, eg through inadequate discovery, a late amendment or any number of other reasons. The 'normal rule' only applies to 'the party who was at fault or in default'."

[14] It is also usually the case that the party seeking the indulgence of a postponement will be ordered to pay the costs even if the circumstances necessitating it are beyond his/her control.² The essential basis upon which the applicant seeks a postponement is, as set out above, founded upon his inability to prepare for trial. It is that "*inability*" which has given rise to delays in effecting discovery and in the responses to requests for trial particulars. It is common cause that notice of the enrolment for trial was given on 11 December 2018. Notwithstanding the alleged difficulties in making himself available to instruct his attorney and counsel and attend at the trial, the request for a postponement was only raised at a pre-trial conference held on 15 April 2019.

[15] Whilst there has, in the intervening period between the pre-trial conference and the trial date, been an exchange of further requests for trial particulars and the like the true state of affairs is that the applicant is not prepared for trial. Indeed the essence of the applicant's application is to be found in the statement made by his attorney in the founding affidavit that:

² See *Westbrook v Genref Ltd* 1997 (4) SA 218 (DCLD) at 221I-222H

“It has eventuated (sic) that the Defendant is not available to come to South Africa on or prior to the date of trial, being 27 May 2019.”

[16] These, in my view, are not the sort of circumstances which would require that the costs ought not to be paid by the applicant. The applicant in his founding papers³ takes the view that the trial court will be better placed to decide the question of costs and that they should therefore be reserved. I fail to see why that is so. The circumstances giving rise to the need for a postponement are fully addressed in the papers. I did not understand it to be suggested that what may arise in consequence of the postponement may in due course provide a basis upon which the costs ought to be awarded.

[17] The request to reserve the costs was based on the assertion that the circumstances of this case are unusual in that the applicant has made a contribution towards the respondent's costs and it is unclear what costs would be wasted on account of the postponement.

[18] The argument as to the determination of wasted costs is without merit. It is for the Taxing Master to determine what costs, if any, are indeed wasted. The fact that these costs, and their extent, is not known at this stage is not a reason to reserve the determination of liability for such costs. Nor can it be a reason to reserve such determination since the trial court will also not know what, if any,

³ The founding affidavit was deposed to by the applicant's attorney and no confirmatory affidavit was filed save in reply. Although Mr Buchanan rightly pointed to the fact that such practice has been deprecated, it is not necessary to deal with the issue.

costs are wasted. That will only be determined on taxation when the parties can make representations to the Taxing Master.

[19] The fact that the applicant has made a contribution towards the respondent's costs is also not a reason to reserve the determination of liability for costs. At best, it may be relevant to determining whether the party who has made a contribution should be ordered to pay costs. As I understood the argument, as it developed, this was the basis upon which the contribution was raised.

[20] It was submitted that an order directing the applicant to pay the wasted costs occasioned by the postponement would result in "*duplication*" in the light of the contribution already made. The argument proceeded along the lines that since the contribution was premised upon certain preparatory work being done which has not been done there will be funds available to cover the costs of the postponement.

[21] I fail to see the logic in the argument. A contribution towards costs is premised upon an established need for such contribution and a reasonable estimate of what would be required to bring the matter to trial. It does not relate to a party's liability for costs. In any event, what is to be decided is liability for wasted costs for which no provision was made in the contribution.

[22] The applicant shifted his stance from that set out in the founding affidavit. Whereas he had initially sought the reservation of the costs this was altered to a request for the respondent to pay the costs of the application. The basis for

this was said to be the respondent's unreasonable refusal to agree to a postponement. I have already touched upon this aspect.

[23] It is not inherently unreasonable to insist that a party who seeks a postponement should bring an application to that effect. In my view the fact that the respondent subsequently agreed to the postponement while confining the dispute to one of costs does not, *ipso facto*, justify a costs order against the respondent.

[24] For the reasons I have set out above there is no circumstance present which warrants an order other than that which is usually made. Considerations of fairness, taking into account the circumstances in which the postponement was sought, require that the applicant pay the costs occasioned by the postponement.

[25] In the result I make the following orders:

In respect of the application to compel

1. The costs of the application shall be paid by the applicant/defendant.

In respect of the application for postponement

2. The trial set down for 27 May 2019 is postponed *sine die*.
 3. The applicant/defendant is ordered to pay the costs of the application and the wasted costs occasioned by the postponement for the trial.
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G.G GOOSEN

JUDGE OF THE HIGH COURT

Obo the Applicant/Defendant:

Adv M. Morgan

Instructed by:

*BDLS Attorneys, 2nd Avenue, Newton Park,
Port Elizabeth*

Ref: A Gomes

Tel: (041) 373 9693

Email: Angelique@bdlsattorneys.co.za

Obo the Respondent/Plaintiff:

Adv R.G Buchanan SC

Instructed by:

*Schoeman Oosthuizen Inc. 167 Cape Road,
Mill Park, Port Elizabeth*

Ref: JS Oosthuizen

Tel: (041) 373 6878

Email: oosthass@iafrica.com