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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, PRETORIA**

Case no: 89670/18

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: 01 MARCH 2023

SIGNATURE:

In the matter between:

PLAINTIFF

THANDAZANI ZULU

And

DEFENDANT

ROAD ACCIDENT FUND

JUDGMENT ON A POSTPONEMENT

MOGOTSI AJ

Introduction

[1] This matter was set down for trial on the 24th February 2023. Instead of proceeding with a trial, the Defendant moved an application for a postponement *sine die* as he wishes to apply for the rescission of a struck out order which was granted against

him on the 8th March 2022. The Plaintiff opposed the application and also wanted to be awarded costs on attorney and client scale. For the sake of convenience, the defendant in the main action shall be referred to as the Applicant in this matter and the Plaintiff as the Respondent.

[2] In the main action, the Respondent is claiming for payment of damages in an amount of R10m in terms of section 17 of the Road Accident Fund Act 56 of 1996. He was involved in a motor vehicle accident on the 29th August 2015 in Kwazulu-Natal.

[3] The Applicant was initially defended by a panel of Attorneys who withdrew following the departure of the panel of attorneys' system. Subsequent to that, the file was not attended to until the Respondent served the Applicant with a court order dated 16th August 2021. The Applicant failed to comply with that court order resulting in his plea being struck out on the 8th March 2022.

[4] The Respondent indicated to the court that he wanted to proceed with the trial but he would give the Applicant chance to address the court on a substantive application for a postponement.

[5] The Applicant moved an application for a postponement and his grounds were that:

(a) He got appointed by the RAF only two days before the 24th February 2023 (trial date).

(b) His general approach to these matters, is to start by considering a settlement before litigation. However, in this matter he could not do so because of the following “**serious**” and “**crucial**” discrepancies:

(i) In the proceedings the Plaintiff is referred to as Thandazani Zulu while throughout the hospital records he is (in 16 instances) referred to as Sibusiso Buthelezi not Thandazani Zulu.

(ii) The papers are not consistent on whether the Plaintiff was the pedestrian, the driver of the insured motor vehicle or a passenger.

(iii) The amount of the damages demanded by the respondent is so substantial that it is not fair and reasonable.

(iv) The Plaintiff's date of birth in the hospital records and the affidavit is not the same.

(v) Although the Respondent is alleging that the hospital staff did not write his correct personal details, there is no confirmatory affidavit to that effect.

(vi) Instead, the Respondent filled what is marked "statement affidavit" which is briefly a police form completed with hand writing. Some numbers written on top of others and not eligible and it reads as follows;

"I Zulu Thanadazani Id no 9[...] like to state that on the 29/08/2015; I was involved in the accident and take me to the hospital.

*In the hospital they use the wrong date of birth. I was born on 198/9(it is not clear if it is 8 or 9) 2-08-03 not 1995-08-03 and name are Zulu Nondzani not Buthelezi
That's all I like to state"*

Some numbers are written on top of others. It is not clear as to who may have done that because the cancelling is not initialled. It is difficult to make out what is written there. The document is dated 7/6/2016. The SAPS date stamp is 2016-07-06.

(vii) Now that the Applicant is on record, he undertakes to fast track the matter.

(viii) The applicant says he has a reasonable suspicion that the claim is fraudulent and as a result he has referred it to the relevant section for investigation.

[6] He as a result of the above stated grounds the applicant approached the Respondent with a request to have the matter removed from the roll so that the issues raised could be ventilated fully.

[7] The Respondent is not amenable to a postponement, as a result the Applicant came to court and he prays for;

“1. Condonation of the late filing of the application

2. Postponement of the trial set down for the 24th February 2023 under the above case number.

3. Costs in the event the application is not successfully opposed.

4. Further and/or alternative relief”.

[8] The Respondent contended that the application for a postponement should be dismissed with punitive costs as the applicant is merely playing delaying tactics. He has been seized with this matter for years and he chose to put it in the shelf and disregard the rules and practice directives of this court. The discrepancies were addressed in an affidavit dated 7th June 2016 marked “**Annexure Z2**”. Furthermore, the Plaintiff is in court, he has travelled from Kwa- Zulu Natal. He may be called to testify. The Plaintiff cannot be blamed for having suffered from injuries which caused him a memory lapse.

[7] Of significance is that the applicants defence was struck down on the 8/3/2022 as a result of non-compliance with a TIC order dated 4/08/2021. Furthermore, it is the defendants conduct throughout the country to disregard the court rules, orders and practice directives.

[8] The issue in this application is whether it will be in the interest of justice or not to allow the applicant to proceed and obtain judgment on an undefended basis with the kind of the discrepancies on the papers before court.

As it stands the main trial has to determine the merits and the quantum of damages (future loss of earnings and future medical expense).

[9] In Erasmus, Superior Court Practice, Vol 2, pp D1-552A, the following is said about postponements (footnotes omitted):

“The legal principles applicable to an application for the grant of a postponement by the court are as follows:

(a) The court has a discretion as to whether an application for a postponement should be granted or refused. Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered or even when the parties have agreed to postpone the matter.

(b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal.

(c) An applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons, i e the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. 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.

(d) 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. If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made.

(e) 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.

(f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism.

(g) The balance of convenience or inconvenience to both parties should be considered: 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] Generally motion proceedings are decided on papers. Viva voce evidence may be allowed in exceptional cases. The affidavit statement does not say that the Plaintiff

suffered from a memory loss as argued by the Respondent. The inaccuracies *ex facie* the hospital records and the affidavit prompted the court to give the applicant a hearing *albeit* he was not properly before the court. It occurred that the Applicant had informed the Respondent about his intention to bring a substantial application for a postponement and the Respondent was not amenable. With the Applicant having a reputation of ignoring court processes, the attitude of the Respondent may not necessarily be faulted. That is how the Applicant decided to approach this court on the day of the trial and informally addressed the court from the bar. This conduct must be discouraged.

[11] The discrepancies are quite glaring so much that it would have been wrong for anyone to assume that the court would proceed and grant an order on the face of such documents. Having already noticed the discrepancies in the trial bundle, the court accorded the applicant a hearing.

[12] The trial bundle refers to two different plaintiffs with two different dates of birth. It is also not clear whether the Plaintiff was a pedestrian, a passenger or a driver of the insured motor vehicle.

[13] There is prejudice in that the Plaintiff travelled from Kwazulu-Natal for the trial. The counsel for the Respondent had prepared and set aside today's date and that comes with costs. The Respondent has neglected the matter for some time. The notice of motion seeking a postponement was uploaded on case lines on the 24/02/2023 that is on the date of the trial. The Respondent did not have reasonable time to reply. Clearly, the rules were once more flouted thus causing further prejudice.

[14] In arguing for a refusal of a postponement, the Respondent said the applicant has laid his bed and that he must now lie on it. The same approach is relevant in so far as the Respondent being aware that there are discrepancies regarding the identity of the Plaintiff as well as his position or role in the accident and not following the correct procedure to remedy the defects. The Respondent seems to have taken comfort in the fact that the Applicant's plea was struck –off. If there is no fraud committed in this

matter, then it could be a question of cut and pastes which went awfully wrong. It is difficult to follow the Respondent's argument which seems to suggest that if the matter was not defended court would in any event ignore the discrepancies.

[15] It is my well-considered view that backlog cases cannot be an excuse for failing to adhere to the Court's rules and it is also, wrong and reprehensible for the applicant to have ignored the Court's rules, practice directives and orders. However, the court makes a finding that the discrepancies raised by the Applicant cannot just be brushed aside.

[16] The nature of the issues raised by the applicant is such that it is in the interest of justice that the court hears from both sides. A mere calling of a person to come and testify as the Respondents counsel wanted to do would not have assisted. It would just have been evidence of self-corroboration which would not even have been tested because the Applicant would not be on record.

[17] If no settlement is reached, the merits and quantum of this matter will have to be fully ventilated for a well informed decision to be reached. The court makes a finding that this application for a postponement is made with a bona *fide* intention. Even if it can be arguable that the application was not made timeously, fundamental, fairness and justice justify a postponement. Given the circumstances of this case, justice demands that the applicant cautiously be given time for the purpose of presenting his case.

[18] The non-compliance with this court's rules and the below par preparation on both sides is relevant in determining the costs. The Responded argued that there is no guarantee that the responded will ever respect the order of this court as the tendency is "just to shove the court orders in their drawers" and "carry on with their live". He argued that punitive costs should be awarded against the applicant.

[19] In the matter between the *Public Protector v South African Reserve Bank 2019 (6) SA 253 (CC)* at para.8 Mogoeng CJ noted that '[c]osts on an attorney and client

scale are to be awarded where there is fraudulent, dishonest, vexatious conduct and conduct that amounts to an abuse of court process'. The majority judgment was not read to differ with this. In the minority judgment Khampepe J and Theron J further noted that 'a punitive costs order is justified where the conduct concerned is "extraordinary" and worthy of a courts rebuke. 'Both judgments referred to *Plastic Convertors Association of SA on behalf of members' v National Union of Metalworkers of SA ILJ 2815 (LAC) at para 46*, in which the Labour Appeal Court, stated 'The scale of attorney and client is an extraordinary one which should be reserved for cases where it can be found that a litigant conducted itself in a clear and indubitably vexatious and reprehensible manner. Such an award is exceptional and is intended to be very punitive and indicative of extreme opprobrium.'

As much as the Respondent argued that the applicant has occasioned this postponement by failing to adhere to a court order, the practice directives and the relevant rules, his papers equally so are not in order. There is a confusion about the identity of the Plaintiff and the material aspects of his claim, so much so that the Applicant argues that he has reason to suspect "fraud". The pleadings were not amended. If fraud is established it would not be fair to award costs to such a litigant.

[20] The Applicant was just appointed two days before a trial date and he seems to be having a sense of urgency. He may not have filed an application for rescission of the court's order but he within two days of having been appointed got into contact with the Respondent and informed him of his decision to make a substantive application for a postponement. He however omitted to upload the application on case lines. He has openly undertaken to expedite the matter. The Road Accident Fund may be known for not acting timeously or in some instances not even attending to their matters but still, cases should be individualised in accordance with their merits. A blanket approach that the organisation is known country wide for their laxity may not assist as it cannot always be in the interest of justice.

[21] It is on this basis that I conclude that costs should be reserved until the correct Plaintiff, if there is any, has been identified. Under the circumstances, the question is whether costs at a punitive scale prayed for by the Respondent is fair or not.

Conclusion

I make a finding that there are compelling reasons for this matter to be postponed so that the applicant can file a recession of the order which struck his defence down. There is a suspicion of fraud, it would be fair to reserve the issue of costs until the legitimacy of the claim has been ascertained.

In the result I make the following order:

Order

- (a) The late filing of this application is condoned,
- (b) The trial of this action is postponed *sine die*.
- (c) The applicant is directed to deliver the application for rescission of the striking out order within 10 days of the order failing which the respondent would be entitled to re-enrol the matter for a default judgment.
- (d) Costs reserved.

**D.D. MOGOTSI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

APPEARANCES

DATE OF HEARING: 24TH FEBRUARY 2023

DATE OF THE RULING: 1ST MARCH 2023 (25&26 FEBRUARY 2023 WAS A WEEKEND)

**FOR THE APPLICANT: ADV. MEHLAPE
INSTRUCTED BY THE STATE ATTORNEY)
FOR THE RESPONDED: ADV.SHILENGE
(INSTRUCTED BY MARISANA MASHEDI INC.)**