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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

Case Number: 81157/2017

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

DATE: 24 MARCH 2021

**In the matter between:**

R D V[...] Plaintiff

And

I J D V[...] Defendant

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## JUDGMENT

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JANSE VAN NIEUWENHUIZEN J

- [1] This judgment pertains to the wasted costs of a four-day trial, that was occasioned by the insistence of the plaintiff, R d V[...] (hereinafter referred to as the plaintiff) to have the matter heard in open court.

### Introduction

- [2] As at the 12<sup>th</sup> day of March 2021 and according to the statistics released by the Department of Health, 51 110 South African citizens have tragically succumbed to the COVID 19 virus ("the virus") and according to the New York times, 2, 6 million people globally have died as a result of the virus.

- [3] The virus which originated in China during or about December 2019 has caused indescribable devastation worldwide and as appears from the numbers quoted above South Africa has not been spared.
- [4] The virus has had an impact on all spheres of life including the judiciary. In order to ensure the effective and safe running of the courts, the Judge President of this division, the Honourable Justice Mlambo issued a number of directives.
- [5] One of the methods to contain the spread of the virus is conducting court proceedings on a virtual platform. This method has the obvious benefit of limiting the chances of exposing oneself (that is, all persons whose appearance/presence is pertinent to said court proceedings, be it Judges, court staff, legal fraternity, witnesses, interested parties, media, etc.) unnecessarily to contracting the virus.
- [6] I pause to mention that this system is utilised by countries worldwide in an attempt to curtail the spread of the virus.

### **Facts**

- [7] This is a divorce action between the plaintiff, R d V[...] and the defendant, Mr I J d V[...] that was set down for a period of four days, from 9 March 2021 to 12 March 2021.
- [8] On Monday, 8 March 2021, the Acting Deputy Judge President, the Honourable Madam Justice Malopa-Sethosa allocated the hearing of the trial to this court.
- [9] I had due regard to the nature of the dispute, the number of witnesses that will testify and whether the matter was of public interest. Taking into account that the dispute being a divorce action is private of nature; that only one issue was in dispute, to wit whether the defendant loaned money to the plaintiff and that only the plaintiff and defendant will in all probability testify, I issued a directive that the matter will proceed on a virtual platform.

- [10] The aforesaid method has been utilised by this court since the inception of the pandemic, without any problems. This method of hearing ensures that issues in dispute are properly and safely ventilated.
- [11] The method is tried and tested. In a recent trial between *Baker & McKenzie Amsterdam N.V v GenCorp Investments (Pty) Ltd* (Case Number: 88431/2016), I realised that save for the obvious health benefits the mode of hearing offers, the opportunity to closely observe the demeanour of a witness was and is excellent.
- [12] A witness is on a screen right in front of the judge and much closer than is possible in “open” court. Each blink of an eye, a twitch of the mouth, whether the witness is looking sideways, down or directly into the camera is closely observed.
- [13] A further benefit is that the recording also includes visuals, which greatly assists afterwards if a Judge wants to make sure that an observation of the demeanour of the witness was correctly noted.
- [14] In view of the aforesaid, I had no hesitation to direct that the trial be conducted virtually. The hostility that is sometimes part and parcel of a divorce trial could also be circumvented by not exposing the parties to each other.
- [15] If I had any doubt that it would not be in the interest of justice that the matter proceed virtually, I would obviously not have issued the directive.
- [16] In compliance with the directive issued by this court a virtual court hearing was set up for Tuesday the 9<sup>th</sup> of March 2021.
- [17] At the inception of the trial, Mr Snyman SC, informed me that, notwithstanding this court’s directive, the parties have agreed to a trial in “open” court and the matter should proceed in “open” court.

- [18] Ms Van Niekerk, counsel for the defendant, informed me that although the parties had agreed prior to my directive that the matter should be heard in “open” court, the defendant has duly considered my directive and will comply therewith. The defendant was ready to proceed to trial.
- [19] If one has regard to the issue in dispute between the parties and the length of time it took the matter to come to trial, the defendant’s decision to abide by this court’s directive, was sensible.
- [20] The plaintiff instituted the divorce proceedings in November 2017, some four years ago, only claiming a decree of divorce and costs.
- [21] The defendant filed a counterclaim for the repayment of an alleged loan granted to the plaintiff in the amount of R 2 100 000, 00. The claim is defended by the plaintiff and one would have thought it would be in the best interests of both parties to proceed with the trial.
- [22] Costs had already been incurred in the preparation for the matter and as indicated *supra* the matter was set down for four days.
- [23] Upon becoming aware of the defendant’s decision to abide by the directive of this court, Mr Snyman informed me that the plaintiff insists that the matter be heard in “open” court.
- [24] In order to understand and consider the plaintiff’s decision, I requested Mr Snyman to provide an explanation for the plaintiff’s decision not to abide by the court’s directive.
- [25] Mr Snyman simply informed me that it was the plaintiff’s constitutional right to be heard in “open” court and that she insists on enforcing this right. Further probing to establish the real reason for the plaintiff’s insistence that matter proceed in open court did unfortunately not yield any results.
- [26] In order to curtail the exposure to the virus and still have a physical hearing, Ms van Niekerk proposed that the hearing proceeds in the defendant’s

attorney's conference room. This suggestion did not find favour with the plaintiff.

- [27] I was, understandably, perturbed by the plaintiff's attitude. Mr Snyman is an eminent, highly regarded senior counsel at the Pretoria Society of Advocates. He would no doubt have explained to the plaintiff that other constitutional rights must also be taken into account in view of the pandemic. The right to life and an environment that is safe comes to mind. One should also bear in mind that since the advent of the pandemic it was necessary to curtail several constitutional rights, for instance the right to freedom of movement, the right to engage in economic activity, to name a few.
- [28] One would furthermore have expected that a fair hearing of the dispute between the parties would have been the paramount consideration to be taken into account.
- [29] Whilst the plaintiff is not concerned with the risks involved in appearing in "open" court, her decision exposes her own legal team, the defendant and his legal team, myself, my secretary and other court personnel who will have to be in court, to the risk of contracting the virus. In weighing up the different competing interests, the plaintiff's stance can only be described as selfish.
- [30] In view of the plaintiff's steadfast insistence to be heard in "open" court, I referred the matter back to the Honourable Acting Deputy Justice President for reallocation. I, however, informed the parties that, whatever transpired during their meeting with the Acting Deputy Judge President, I am still available to attend to the trial.
- [31] It appears that another court was not available to hear the matter and that the matter had to be removed from the roll. On 11 March 2021, the parties were referred back to this court for an argument on the costs wasted as a result of the removal of the matter from the roll.

## **Submissions**

[32] Mr Snyman, with reference to *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as amicus Curiae) In re: Masetlha v President of South Africa and Another* 2008 (5) SA 31 (CC), firstly reiterated that the plaintiff has a constitutional right to have the matter heard in “open” court.

[33] Secondly, Mr Snyman submitted that the parties had agreed to a hearing in “open” court and that the defendant may not at this stage renege on the agreement.

[34] Ms van Niekerk made the following submissions with regard to the directives in the Consolidated Practices Directives issued by Judge President Mlambo in September 2020 titled “**JUDGE PRESIDENT’S CONSOLIDATED DIRECTIVE (18 SEPTEMBER 2020 CONSOLIDATED DIRECTIVE) IN RE: COURT OPERATIONS IN THE PRETORIA AND JOHANNESBURG HIGH COURTS DURING THE EXTENDED COVID-19 NATIONAL STATE OF DISASTER**”:

[34.1] “4.4 Subject to the stipulations set out below; matters that require oral evidence to be adduced may be conducted in open Court.

4.4.1 The parties must canvas their preferred mode of hearing in their practice note for the roll call sent to the DJP or ADJP.”

Ms Van Niekerk stated that the parties did indicate that their preferred mode of hearing would be “open” court.

[34.2] “4.4.2 If all Parties are in agreement on a preference for an open Court hearing, the Judge allocated to hear the matter shall, having considered the Parties’ canvassed views, nevertheless retain the discretion to pronounce on the mode of hearing.”

Ms Van Niekerk referred to this court’s directive that the mode of hearing will be virtual court.

[34.3]        *“4.4.3 Where the Judge holds the view that an open court hearing poses a risk of infection the Judge shall determine an appropriate alternative mode of hearing, which may include receiving evidence on affidavit or the utilisation of video conferencing.”* (own emphasis)

Ms Van Niekerk, once again, made reference to this court’s decision in terms of the Directive.

[34.4]        *“4.4.4 The Judge may, despite agreement or the absence thereof between the parties on an open Court hearing, on good cause shown that a virtual hearing will be inadequate to achieve a fair trial, order a wholly or partially open Court hearing, or, having regard to the provisions of paragraph 4.4.3 ... .”* (own emphasis)

Ms Van Niekerk pointed out that the defendant has abided by this Court’s directive and it was for the plaintiff to show good cause why a virtual hearing will be inadequate and will not achieve a fair trial. This, Ms Van Niekerk submits, the plaintiff has failed to do.

[35]        Further to paragraph 4.4.4 of the Consolidated Directive:

*“4.4.4        ... and where the considerations of the interests of justice are concerned, postpone the hearing until such time that an open Court hearing may become appropriate. If a matter is postponed for this reason the wasted costs, if any, shall be reserved for the ultimate trial Court to decide.”*

Ms Van Niekerk submitted that the court has not made a finding in accordance with this paragraph and that the defendant was, in accordance with the court’s directive, entitled to have the matter disposed of by the mode

of a virtual hearing. The interests of justice will, according to Ms Van Niekerk, be served by finalising the trial which has been pending for four years and in respect of which huge costs have been incurred by both parties.

- [36] In reply and when the court questioned the plaintiff's unreasonable attitude in insisting on her right to be heard in "open" court in the face of the deadly Covid 19 pandemic, Mr Snyman, to his credit, agreed that in the face of the pandemic, other factors and rights might also be taken into account and weighed up in considering the plaintiff's right to be heard in "open" Court.

### **Discussion**

- [37] In view of the directives contained in the Consolidated Directive of 18 September 2020, the plaintiff's stance that the parties had agreed to be heard in "open" court and the agreement must be adhered to, cannot be correct.
- [38] To the contrary, it is in the discretion of the Judge to whom the matter is allocated to decide which mode of hearing will in the circumstances be the most appropriate.
- [39] It was open to the plaintiff to show good cause why the mode of hearing directed by the court would not result in a fair hearing and would not be in the interests of justice. This the plaintiff has dismally failed to do.
- [40] The plaintiff chose not to take this court into her confidence and explain the reasons for her decision to reject the court's directive.
- [41] In the result, I cannot find *just cause* for the plaintiff's failure to abide by the directive of this court. The plaintiff's conduct is not only inexplicable, but also grossly unfair towards the defendant who wishes at all costs to finalise the matter.
- [42] Insofar as the court and court officials are concerned, I view the plaintiff's stance as unreasonable and selfish. The risk of contracting the virus when

one has to attend “open” court is self-evident. One is unnecessarily and constantly exposed to the risk of contracting the virus from the moment of leaving one’s motor vehicle. An “open” court proceeding entails a constant walking back and forth between chambers, utilising the lifts and passages and presiding in a court with the obvious risk of being exposed to the virus. The number of people in the court building including staff, cleaners, security, legal representatives and the general public increases the risk of exposure.

- [43] Four court days have been wasted due to the plaintiff’s conduct. Ms Van Niekerk submitted that the plaintiff should pay the costs wasted as a result of her unreasonable stance. I agree.
- [44] In considering an appropriate order, I take into account that the Acting Deputy Judge President directed on 10 March 2021 that the matter be removed from the roll and that the parties apply for a new trial date. It is unfortunate that the directive was not, due to a technical glitch, communicated to the defendant’s legal representatives on 10 March 2021. It appears the decision of the Acting Deputy Judge President only reached the defendant’s legal representatives on Thursday 11 March 2021.
- [45] Ms Van Niekerk indicated that until the directive came to the knowledge of the defendant, the defendant and his legal team, kept themselves available to proceed to trial, should such a direction have been issued by the Acting Deputy Judge President.
- [46] I am of the view that the plaintiff is not to be blamed for the technical glitch and although the matter was set down for four days, only two court days, to wit the 9<sup>th</sup> and 10<sup>th</sup> of March 2021 (the date on which the Acting Deputy Judge President’s formal notification was transmitted to the parties), were wasted as a result of her conduct. The order will in the result be limited to the wasted costs of two days.

## **ORDER**

[47] In the premises, I issue the following order:

The plaintiff is ordered to pay the wasted costs of the 9<sup>th</sup> and 10<sup>th</sup> of March 2021.

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**N. JANSE VAN NIEUWENHUIZEN**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**GAUTENG DIVISION, PRETORIA**

**DATE HEARD PER COVID19 DIRECTIVES:** 11 March 2021

(Virtual hearing.)

**DATE DELIVERED PER COVID19 DIRECTIVES:** 24 March 2021

**APPEARANCES**

*Counsel for the Plaintiff:*  
*Instructed by:*

Advocate M. Snyman SC  
Ronel De Villiers Inc.

*Counsel for the Defendant:*  
*Instructed by:*

Advocate N. van Niekerk  
Arthur Channon Attorneys