

Reportable:	<u>YES</u> / NO
Circulate to Judges:	<u>YES</u> / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No:	1678/2016
Date Heard:	30 / 11 / 2018
Date Available:	22 / 02 / 2019

In the matter between:-

PENTECOSTAL CHRISTIAN MISSION

Applicant

And

**DESMOND SMITH
KINGDOM WORTH MINISTRIES**

First Respondent
Second Respondent

Coram: Coetzee, AJ

REASONS FOR JUDGMENT

COETZEE, AJ

1.

When this matter was called on Friday, 30 November 2018, Mr. Eilert, who appeared for the respondents, handed up an application for the postponement of the application. After hearing argument I refused the application for a postponement and made a further order in terms of the notice of motion. The terms are as referred to in paragraph 2 *infra*. I indicated that reasons for the order would be given if requested. I have now been so requested and my reasons are set out hereunder.

2.

On 9 September 2016, Matlapeng, AJ made the following order:-

1. *That the 1st, alternatively the 2nd, alternatively the 1st and 2nd RESPONDENTS or any other person through them are interdicted from utilising the property known as Erf 29799, Kimberley situated at the corner of Saint Pauls and Flower Streets in Kimberley (herein after the Property) as well as any permanent or temporary building/structure on the Property for purposes of conducting church sermons and/or services;*
2. *That the 1st, alternatively the 2nd, alternatively the 1st and 2nd RESPONDENTS or any other person through them are interdicted from entering upon the Property without prior obtained authorisation from the APPLICANT;*
3. *That the 1st, alternatively the 2nd, alternatively the 1st and 2nd RESPONDENTS or any other person through them are interdicted from interfering in any way with the activities of the APPLICANT on the Property;*
4. *That the 1st, alternatively the 2nd, alternatively the 1st and 2nd RESPONDENTS or any other person through them are interdicted from preventing the personnel or members of the APPLICANT or any other person from entering*

upon the Property in order to conduct, attend or partake in the aforementioned activities;

- 5. That the 1st, alternatively the 2nd, alternatively the 1st and 2nd RESPONDENTS or any other person through them are interdicted from threatening, intimidating or victimising any of the personnel or members of the APPLICANT or any other person for conducting, attending or participating in the activities of the APPLICANT;*
- 6. That the 1st, alternatively the 2nd, alternatively the 1st and 2nd RESPONDENTS are to pay the costs of this application jointly and severally, the one paying the other to be absolved."*

3.

This order was served on the respondents on 30 September 2016.

4.

On 28 November 2016 the applicant launched a contempt of court application against the respondent which application was set down for hearing on 19 December 2016 and which application was postponed to the opposed motion roll for hearing on 16 March 2017. This postponement was as a result of the first respondent appearing in person on 19 December 2017.

5.

On 16 March 2017 the contempt application was postponed to 30 May 2017 and the respondents were ordered to bring an application for the rescission of the order made by Matlapeng, AJ. The Respondents were also ordered to apply for condonation for the late filing of their opposing papers to the main application.

6.

On 30 May 2017 three applications, to wit:-

- 5.1 applicant's contempt application;
- 5.2 Respondents' application for condonation; and
- 5.3 Respondents' application for the rescission of the order granted on 9 September 2016

served before Williams, J, who, on 1 November 2017, issued the following order:-

"a(1) The order of Matlapeng AJ dated 9 September 2016 under case no 1678/2016 is rescinded and set aside.

(b) The respondent in the rescission application, the Pentecostal Christian Mission, is to pay the costs of the application.

2(a) The application for contempt of court is dismissed.

(b) Each party is to pay its own costs including the costs of the application for condonation.

7.

What transpired, between 1 November 2017 and 30 November 2019, when I heard the main application, is set out in the founding affidavits attached to an application for postponement deposed to on 30 November 2018 by the respondent's attorney, Mr Mario Williams, of record ("Mr Williams") and the first respondent.

8.

On 23 January 2018, the applicant's attorneys, in a letter marked "urgent" remarked as follows:

"The above matter under case number 1678/2016 and the order granted by Judge Williams on 1 November 2017 has reference.

1. *In terms of the order, the order of Matlapeng, AJ, dated 9 September 2016 was rescinded and set aside;*
2. *The main reason for the rescission order was that Judge Williams was of the view, that your client's was not aware of the application and accordingly did not have the opportunity to oppose same.*
3. *The effect of the order of Judge Williams dated 1 November 2017, accordingly was that eventhough (sic) the order of Matlapeng, AJ was rescinded, that our client's Application dated 4 August 2016, with the relief as per paragraphs 1, 2, 3, 4, 5, 6 and 7 still remains before the Court.*
4. *In terms of the Uniforms Rule of Court your client's Opposing Affidavit was due within 15 days. We calculated that the affidavit should have been filed by 22 November 2017.*
5. *To date hereof we have not received any Opposing Affidavit, which is now 2 months late. Our instructions are not to condone the late filing of the said affidavit.*
6. *Our further instructions are to approach the Court for an opposed date, to argue the application."*

(my underlining)

9.

The Respondents did not respond to this letter, nor was an application for condonation prepared. The reason advanced for not taking any further steps is that Adv Schreuder (respondents' council) was of the

view that it was not necessary to file opposing papers as Williams J already pronounced on the merits of the application. As Adv Schreuder's view was patently incorrect and, although Mr Williams doubted the correctness thereof, discussed Adv Schreuder's view with the first respondent, who instructed Mr Williams to accept Adv Schreuder's advice.

10.

On 22 March 2018 the main application was set down for hearing on 1 June 2018 on which date the matter was, by agreement, removed from the roll. By agreement between the parties' attorneys, applicant's attorneys enrolled the main applications for hearing on 30 November 2018. On 24 August 2018 the applicant served and filed the notice of enrolment.

11.

On receipt of the Notice of Enrolment, Mr Williams merely attached a copy thereof to a letter dated 30 August 2018 addressed to Adv Schreuder, who, on 16 October 2018, informed Mr Williams that he would no longer act for the respondents.

12.

The principles applicable when a party seeks a postponement can be summarized as follows:

- a) The applicant seeking an indulgence must show good cause for the interference with the respondent's procedural right to proceed his action or application to finality;¹
- b) The court is entrusted with a discretion as to whether to grant or refuse the indulgence;²
- c) A court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case;³
- d) A court must consider the prejudice that the parties may or may not suffer.⁴

13.

In applying the above principles to the present case, I am of the view that it is necessary to balance the procedural right of the applicant to proceed with his application to finality against the right of the respondents to properly present their case.

14.

In balancing these two opposing rights the following factors should be considered:

¹ *Gentiruco v Firestone SA (Pty) Ltd* 1969 (3) SA 318 (T) at 320E; *Ecker v Dean*, 1939 SWA 22 where Van Heerden said the following on 23 "She has a procedural right and it seems to me that before that can be disturbed the applicant would have to show good cause"

² *Isaacs v University of the Western Cape* 1974 (2) SA 409 (C) at 411H. also reported as [1974] 2 all SA 478 (C)

³ *Western Bank Ltd v Lester & Mclean and others* 1976 (3) SA 457 (SE) at 460A also reported as [1976] 3 all SA 241 (SE)

⁴ *Burger v Kotze* 1970 (4) SA 302 (W), 305D-G

- (a) The cause for not being in a position to proceed; and
- (b) Whether the demands of justice warrants a postponement.

15.

The respondents offered only one explanation for their default being Adv Schreuder's advice based on his misconceived interpretation of the effect of the judgment of Williams, J.

16.

Notwithstanding Mr Williams's doubt in the correctness of the advice, and the specific reference, by the applicant's attorney to the correct interpretation of the effect of the order, the respondents opted to accept Adv. Schreuder's advice.

17.

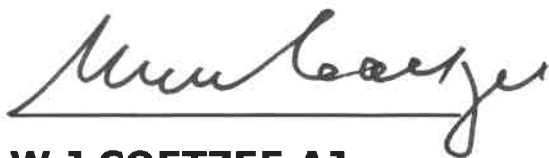
I am of the view that the respondents' failure to pursue an application for condonation based on the misconception of the effect of the order made by Williams, J, cannot be viewed as just or good cause for their default.⁵

19.

The respondents did not advance any argument nor deposed to any fact or facts warranting a conclusion that justice demands a postponement and thereby ousted my discretion.

⁵ Absa Bank Limited v Mošworthty & Another [2017] JOL 37247 (ECP) para 4.

**I THEREFOR DISMISSED THE APPLICATION FOR
POSTPONEMENT AND ORDERED AS I DID.**

A handwritten signature in black ink, appearing to read 'W J Coetzee', written over a horizontal line.

W J COETZEE AJ

For the Applicant: Adv. D Olivier (Haarhoffs)

For the Respondent: Adv A Eilert (Rick Ismael Attorneys)