



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 5900/2008

In the matter between:

PRELLER PLEIN APTEEK

Applicant

and

BERNADETTE MARION HESKETH

Respondent

HEARD ON: 18 APRIL 2017

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 25 MAY 2017

[1] This partly heard complex medical negligence matter was scheduled as a special allocation commencing on the 18th to 21 April 2017. A day prior to the hearing, **Dr Leon Wagner (Forensic Pathologist)** assisting the applicant took ill and was admitted to the Intensive Care Unit at Mediclinic Bloemfontein

with acute renal failure. It was confirmed by submitting a medical certificate from Dr van der Merwe (Cardiologist) at the same hospital. This information was communicated to the legal team of the respondent who were still in Gauteng at the time. They were also alerted to the fact that due to his central role in their case particularly at this stage of the trial they will be seeking a postponement of the proceedings. In any event the legal team of the respondent proceeded to Bloemfontein to attend the hearing.

- [2] The parties agreed with each other that the matter be postponed to enable Dr Leon Wagner to recuperate alternatively that the applicant acquire the services of another expert. The only issue of disagreement and to be decided upon remained the wasted costs of the day of two (2) counsel and an expert namely Dr Herman Edeling (Neurosurgeon) based in Johannesburg.

- [3] Mr Benade, on behalf of the applicant, submitted that the legal representative of the respondent were aware as early as **13H00 pm** on the **17th April** that the postponement of the matter was unavoidable and therefore a definite eventuality. This postponement was occasioned by no deliberate act on the part of the applicant but by an **“Act of God”**. Lastly, that the matter against the applicant may be dismissed, given the many versions that are contained in the medico legal reports.

- [4] It was submitted on behalf of the respondent by Mr Joubert that even though the discretion to order a party to pay the costs lies with me, I must exercise such discretion in a judicial manner. I agree with his submission in this regard. He was of the view that

the postponement benefited the applicant and that as such must be liable to pay the wasted costs. The costs that he was asking for were only limited to one (1) day and not subsequent days.

- [5] It is indeed correct that it is discretionary to award costs against any party involved in litigation. However such discretion must be exercised judicially pertinently to achieve fairness and justice to all parties. It is not all the time that the party requesting a postponement will be made to pay the wasted costs, but surrounding circumstances need to be carefully examined in adjudication of that aspect.
- [6] I was referred to the decided case of **Grobbelaar v Snyman 1975 (1) SA 568 (O)** and beseeched to follow it. I disagree with Mr Joubert that I am bound by that decision and that it can only be persuasive to me. However the facts in that matter are on the opposite end of the facts in this matter. The court found there that the defendant should have ensured that the witnesses and himself are present in court on the trial date. He failed to take adequate measures to be able to attend the hearing. It had been raining for some time and foreseeable that it might pose a hindrance to leave his farm. In this matter it was an emergency and could not have been foreseen that Dr Leon Wagner will have to be admitted at the hospital.
- [7] In **Cape Law Society v Feldman 1979 (1) SA 979 (E)**, the court emphasized that all relevant considerations must be made available before the court to achieve a just and equitable decision in exercising its judicial discretion. The legal representatives of

the plaintiff were informed of the incapacity of Dr Leon Wagner while they were still in Gauteng. Strangely they made the fruitless trip to Bloemfontein patently conscious that there is a zero chance of the matter proceeding on the 18th April. They are the proverbial authors of their own misfortune. They did not act in the best interests of the respondent on this aspect and should have realised the unnecessary costs they are incurring by continuing with the trip to court.

[8] There is no culpability on the part of the applicant that the matter could not proceed as scheduled. It was beyond their control. I am therefore not convinced that I can exercise my discretion to the extent that the applicant should be ordered to pay the wasted costs. It will be unjust and inequitable to do so.

[9] Accordingly, I make the following order:

1. The matter is postponed to the **16th to 20th October 2017**.
2. Each party to pay its own costs.

M. A. MATHEBULA, J

On behalf of applicant:
Instructed by:

Adv H.J. Benade
Symington & De Kok
Bloemfontein

On behalf of respondent: Adv S Joubert SC with
Adv H Bothma
Instructed by: Bezuidenhout Inc.
Bloemfontein