

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **83094/2018**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED:

DATE: 07 JUNE 2024

SIGNATURE

In the matter between:

A[...] S[...] N.O

First Applicant

DAVID RALPH MANLEY N.O

Second Applicant

J[...] S[...] N.O

Third Applicant

A[...] S[...]

Fourth Applicant

DAVID RALPH MANLEY

Fifth Applicant

and

M[...] S[...]

Respondent

In re:

M[...] S[...]

Plaintiff

and

A[...] S[...] N.O

First Defendant

DAVID RALPH MANLEY N.O

Second Defendant

J[...] S[...] N.O

Third Defendant

A[...] S[...]

Fourth Defendant

DAVID RALPH MANLEY

Fifth Defendant

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 07 June 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The first to fifth applicants [applicants] bring this substantive application against the respondent personally for wasted costs, including travelling and accommodation costs of the second applicant on a punitive scale in circumstances when they, as defendants in the main action, were unable to defend the action nor prosecute their counterclaim at trial because the matter was not properly placed on the trial roll for the 17 March 2022, as anticipated.

[2] The parties Counsel tried to enrol the matter as the applicants stated in the founding papers that:

“18. The Applicants’ advocates then endeavoured to have the matter enrolled at the later stage, even if such enrolment would only serve the purpose for allowing for a cost argument to be heard, there and then, but that was unfortunately not possible.”

[3] In light of the wasted costs incurred as a consequence of the non-enrolment the applicants have launched this application stating that their intention is to “-rectify the clear injustice, in circumstances where the respondent and her team failed to do their work, resulting in the Applicants being grossly out of pocket through no fault of their own.” The applicants stating further that the costs incurred by them were entirely wasted, all of which were as a result of the respondents’ attorney’s failure to pay attention to the enrolment of the matter and that it is the respondents’ attorney’s duty and responsibility to ensure that the matter was correctly enrolled on the trial roll. It appears for this reason, that the applicants now wish to hold, not the respondent’s attorney liable for its omission, but the respondent personally on a punitive scale.

[4] It is common cause that the trial is set down for hearing in November this year yet again and both Counsel in argument stated that the trial Court would not be precluded from hearing argument pertaining to the cost relief sought in this application.

WASTED COSTS

[5] The general rule is that where a party is responsible for a case not proceeding on the day it is set down for the hearing, that party must pay the costs which are wasted.¹ The “general rule” only applies to the party who was at fault or in default.²

¹ AC Cilliers Law of Costs (Service Issue 17), para 8.11: HJ Erasmus, Superior Courts Practice, B1-306D-E (Service 28-33).

² **Burger v Kotze and Another** 1970 (4) SA 302 (W) at 304E-F.

[6] Furthermore when a trial court is likely to be in a better position than the court hearing this application to ascertain the facts it is a salutary rule that costs should be reserved for a later determination. This salutary rule normally applies in circumstances when a court is seized in hearing a postponement as a result of a fault or a default which has occurred forcing the matter to be postponed on the date of the hearing. This is not the situation in the present application.

[7] The reason for the matter not proceeding is common cause. Both parties were forced into a postponement as matter was not placed on the trial roll. Both parties were ready to proceed and acted on the mistaken belief that the matter had been enrolled for the 17 March 2022. The mistaken belief was created by the respondents' attorney's office who thought the Registrar had allocated a trial date for the 17 March 2022 and in consequence, had served a notice of set down.

COST AWARDS GENERALLY AND THE FACTS

[8] The basic rule governing awards of costs is the rule that such costs are at the discretion of the Court. Such discretionary powers are wide and as such, a Court should have regard to all considerations that may have a bearing on the overriding objective of doing justice between the parties. Implicit in that statement is that even though a party would otherwise regard it as being justifiable of indemnification of costs incurred, justice may require that costs should not automatically follow. In applying the principles and guidelines to determine a just outcome, it is prudent at this stage to deal with the facts giving rise to the main action and the underlying reason for the mistaken belief both parties acted on.

[9] On 27 August 2015, the fourth applicant and the respondent were divorced. The decree of divorce incorporated a settlement agreement which not only determined reciprocal obligations between the fourth applicant and the respondent, but T[...] Trust (I[...]) [Trust] of which, the first and third applicants are trustees.

[10] The main action is brought by the respondent who requires the repayment of a loan amount of R 700,000.00 which she paid to the Trust pursuant to the terms of the settlement. In the alternative to the repayment of the R 700,000.00 from the Trust, the respondent seeks the payment from the fourth and fifth applicants in their personal capacities for damages suffered as a result of a false misrepresentation. The applicants filed a counter claim.

[11] Procedurally the main action was set down for trial for the first time on the 20 April 2021. Both parties were ready to proceed with the trial however, due to the non-availability of Judges and a roll that was “*crowded out*”, the matter could not proceed and a new date had to be obtained. Counsel for the applicants confirmed that as the situation was out of the parties control, each party bore their own costs at that stage.

[12] On 27 October 2021, a practice directive was issued by the Deputy Judge President [DJP] headed “*Management of Crowded Out Matters*” [the directive]. The purpose of the directive was to invite litigants whose matter had been “*crowded out*” between the period of March 2020 to June 2021, to apply for preferential re-allocation. This appeared to be the situation the parties found themselves in at the relevant time. As will appear it is not disputed that the respondent’s attorney followed the directive.

[13] The applicants contend that the matter did not appear on the roll on 17 March 2022 because the respondent’s attorney never in fact received confirmation from the DJP that a preferential court date had been obtained and that the respondent’s attorney had rather acted on an assumption before confirming a date for hearing with the Registrar before serving the notice of set down.

[14] The chronology, the respondent’s attorney complied with the directive and drafted a letter to apply for the re-allocation of the trial. The letter was dated 10 November 2021. The letter is headed “*Crowded Out Matter, M[...] S[...] v A[...] S[...] and Fourth Others, Case No. 83094/2018*”. The content of the letter refers to the directive for crowded out matters of 27 October 2021, confirming the

understanding that crowded out matters would receive preference in re-allocation. The pertinent issue and directive is at paragraph 11 thereof which states that: *“Plaintiff’s attorney should upload the required statement on or before 19 November 2021 and invite the correct profile being r[...] failing which the crowded out matters will not be allocated trial dates”*.

[15] The respondent’s attorney confirms compliance of the directive and that it was in compliance of the allocation of a preferential trial date as incorrectly assumed by the applicants.

[16] The Court was directed to the audit trail on CaseLines which clearly indicated that the respondents’ attorney invited the correct profile as stipulated in the directive. The steps taken in compliance of the directive are not in dispute nor that the deponent’s secretary Ms De Kok noticed in early January 2022 that the matter was allocated for trial on the 17 March 2022. These relevant allegations were merely noted in reply, and not placed in dispute.

[17] In amplification, the respondents’ attorney confirmed that he did not receive a response to the uploaded letter of the 10 November directly from the DJP, but accepted that the allocation of the trial date on CaseLines was in response to the letter. This too, was not placed in dispute on the papers. The applicants stating at paragraph 16.3: *“It is irrelevant that a date appeared on CaseLines. It was always incumbent upon the respondent’s attorney to ensure that the trial date (should be trial date - own emphasis) which appeared on CaseLines was indeed correct, and the respondent’s attorney was still compelled to enrol the matter correctly on the civil trial court roll in accordance with the prescriptions of the practice directive.”*

[18] It appears that the directive was silent on whether the respondent had to also enrol the matter on the according to the civil trial practice directive as well. The directive however was clear to secure an allocation the “ *Plaintiff’s attorney should upload the required statement on or before 19 November 2021 and invite the correct profile being r[...] failing which the crowded out matters will not be allocated trial dates*”. This is not in dispute and was done. It appears reasonable that any date allocation which followed on caselines after such compliance could

reasonably be the date as per the directive. The directive is silent on the manner of confirmation from the office of the DJP.

[19] The mistaken belief and the reason for the assumption explained. Logically the fault not falling squarely on the respondent's attorney. A Court administrative mishap too, appears plausible from the audit trail on caselines. Both parties incurred costs in preparation for the trial which are wasted, a risk in litigation which does not automatically translate into the right to claim indemnification of costs wasted as a direct result thereof. It was not as if the matter was postponed solely as the behest and actions of the respondent or her attorney. The mistake was common to both them and notwithstanding the respondent's attorney complying with the directive both parties were left wanting. The frustration of yet again not being able to go to trial yet understandable. To ease the frustration is the fact that the matter has been set down this year.

[20] Lastly, had this application been argued as a postponement delaying the trial then any costs wasted as a result of these circumstance would properly be regarded as being costs in the action.³ However, the applicant is not seeking alternative relief and the question is whether to prevent an injustice whether this Court should assist by granting an order which the trial Court can take into consideration. The answer in this case must surely be yes.

[21] The applicants have on the papers not demonstrated that they are entitled to the wasted costs as prayed for on the papers and as such the punitive scale request need not be entertained.

In this regard, the following order:

1. The wasted costs occasioned on the 17 March 2022 to be costs in the cause.
2. Each party to bear their own costs occasioned by this application.

³

Khan v Rural Licensing Board 1964 (4) SA 181 (N) 187.

**L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

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Matter heard:	04 June 2024
Date of judgment:	07 June 2024