

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

Reportable: NO

Of interest to other Judges: NO

Circulate to Magistrates: NO

Case no: **87/2023**

In the matter between:

N[...] C[...] L[...]

Plaintiff

(Respondent in the application for postponement)

And

P[...] A[...] L[...]

Defendant

(Applicant in the application for postponement)

Coram: DAFFUE J

Heard: 08 OCTOBER 2024

Delivered: 15 OCTOBER 2024

This judgment was handed down electronically by circulation to the parties' representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 15 OCTOBER 2024.

Summary: The defendant in a divorce action applied for a postponement at the eleventh hour. The application was granted. A previous postponement was necessitated because of his erstwhile attorney's withdrawal as attorney of record. The court considered the reasons for postponement, the lateness of the application, the history of the litigation, as well as the reasonableness of the plaintiff's opposition

of the application. It held that there was no reason to deviate from the general rule in respect of an award of costs. The defendant, seeking an indulgence, was ordered to pay the costs of the application, including the plaintiff's costs of opposition thereof, as well as the wasted costs occasioned by the postponement.

ORDER

1. The defendant shall pay the costs of the application for postponement, including the plaintiff's costs of opposition, as well as all wasted costs in respect of the divorce action, the counsel's fees to be taxed in accordance with scale B.

JUDGMENT

Daffue J

Introduction

[1] On 8 October 2024 I had to adjudicate an opposed application for postponement of a divorce trial set down for hearing on 8 and 9 October 2024. After considering the application and the parties' oral submissions, I made the following order:

- '1. The divorce trial is postponed for hearing on 28 and 29 January 2025.
2. Notice shall be given by the defendant of any amendment that he may be advised to seek, such notice to be given within 10 days hereof and in the event of opposition the defendant shall ensure that the application for amendment be set down for hearing as soon as possible.
3. Judgment is reserved in respect of the costs of the application for postponement and the wasted costs occasioned thereby.
4. Reasons shall follow in due course and will be sent electronically to the parties.'

Litigation history

[2] The parties hereto, a wife and a husband, are embroiled in divorce proceedings. The wife, being the plaintiff, issued summons on 11 January 2023. She seeks a decree divorce, division of the joint estate, primary care of their two sons (the one became a major recently and the other is 13 years old), subject to the defendant's right to access which was carefully set out in the particulars of claim, maintenance for the children and costs of suit.

[3] On 6 April 2023 the defendant filed his plea and counterclaim. He accepts that a decree of divorce and division of the joint estate should be granted. However, he insists to be the primary caregiver of the children, subject to the plaintiff's right to access. Finally, costs of suit are sought. On 4 May 2023 the plaintiff filed her plea to the counterclaim. The pleadings became closed.

[4] Both parties filed requests for further particulars and responded thereto. A pre-trial meeting was held and the minutes thereof were filed on 19 February 2024. On 18 March 2024 the matter was certified trial-ready whereupon the plaintiff's attorneys set the matter down for hearing on 18 and 19 June 2024. At that stage Blair Attorneys were still the defendant's attorneys of record.

[5] On 18 June 2024 the divorce trial was postponed to 8 and 9 October 2024, defendant to pay the costs occasioned by the postponement. The matter was eventually allocated to me. When I received the file by the end of September 2024 I was unaware that Blair Attorneys had withdrawn and that new attorneys had substituted them. There is no indication in the court file that Blair Attorneys had withdrawn. On 3 October 2024 the defendant's new attorneys filed a notice, indicating their status as the defendant's new attorneys. This document was apparently emailed to the plaintiff's attorneys on 27 September 2024.

[6] On 30 September 2024 my secretary sent an email to Honey and Partners and Blair Attorneys on my instructions. Within a few minutes thereafter Ms Van Aardt of Honey Attorneys informed my secretary of Blair Attorneys' withdrawal and the identity of the defendant's new attorney, where after the email was also sent to the address provided. At that stage there was no record in the court file of the aforesaid

withdrawal and the substitution. I do not deem it necessary to quote the contents of the email, but confirm that I sought clarity as to the primary care dispute. I also gave instructions to both parties pertaining to the evidence required to adjudicate the maintenance dispute.

[7] Plaintiff's attorney presented the information required, but the defendant's new attorney informed my secretary that he came on record on 27 September 2024 and would not be available for the hearing due to his commitments as a JSC commissioner. Also, the attorney was still awaiting the 'full record of papers'. He reported that the plaintiff's attorneys insisted on a substantive application for postponement, but that he 'was unable to do so' due to his JSC commitments. He mentioned that he would be conducting the trial on behalf of the defendant should the parties fail to settle. Finally, he requested the court to 'consider postponing the matter.' I requested my secretary to respond, indicating that in the absence of a formal application for postponement, or an agreement in that regard, I may well be inclined to insist that the matter be heard and adjudicated.

[8] The application for postponement was indeed filed during the afternoon of 7 October 2024, the day before the first day of the hearing. The plaintiff filed an answering affidavit early the next morning. Adv P Modise, the defendant's counsel, indicated that he had instructions to argue the matter without filing a replying affidavit.

The reasons for postponement

[9] The following reasons were advanced by the defendant:

- a. after he was advised of the trial dates, he informed the plaintiff's attorney that he would not be available because he was scheduled to attend an arbitration hearing on 8 October 2024;
- b. his former attorney withdrew and the current attorney came on record on 27 September 2024, where after he informed the plaintiff's attorney that he would not be able to attend the trial on 8 and 9 October 2024;

c. the reason advanced and communicated to the plaintiff's attorney was that the defendant's 'lead attorney' would be attending the Judicial Services Commission interviews;

d. upon consultation with the new attorney it was discovered that the defendant's instructions were not incorporated in the pleadings and that an amendment was required to enable the defendant to adequately place his defence, which apparently has something to do with the best interests of the children, before the court; and

e. it also appeared to the defendant that he would have to file a supplementary discovery affidavit.

[10] Although it appears as if the defendant is of the view that the care and contact rights to the children have not been appropriately dealt with in the pleadings, he failed to explain the nature of the proposed amendment. The defendant sought costs of the application in his notice of motion, but his counsel submitted during argument that it would be appropriate for costs to be reserved for adjudication during the hearing. The defendant insisted that he could not be blamed for the indulgence sought.

Evaluation of the parties' contentions

[11] The only outstanding issue to be adjudicated is the costs of the application for postponement and the wasted trial costs occasioned by it. In order to consider this, it is important to deal with the applicable principles. I shall do so herein.

[12] I set out the defendant's reasons for the postponement above. The plaintiff filed an opposing affidavit, confirmed under oath by her attorney. She indicated that Blair Attorneys withdrew as the defendant's attorneys of record on 14 June 2024, just four days before the matter was to be heard on 18 and 19 June 2024. This caused the postponement. According to the plaintiff their one child is still a minor and it would be in his interest to finalise the divorce proceedings. The application for postponement was vehemently opposed. Adv HJ van der Merwe submitted that the

defendant caused the first postponement and was now seeking a further postponement at the eleventh hour. He did nothing since June 2024 till the end of September 2024 to obtain the services of a new legal representative and/or to inform the plaintiff's attorney that he could not arrange a postponement of the arbitration hearing. Alternatively, and if the court was prepared to grant a postponement, he submitted that the defendant, who failed to tender the costs of the postponement whilst he was seeking an indulgence, should be ordered to pay the costs of the opposed application as well as all wasted costs occasioned by the postponement. He concluded that there is no reason why another court should later be saddled with the adjudication of the costs of a postponement.

[13] *Ex facie* the emails presented by the plaintiff attached to the opposing affidavit, the defendant had been informed of the new trial dates as early as 19 June 2024. The defendant, who initially mentioned that the divorce proceedings could be postponed to the end of September or during October 2024, all of a sudden recorded the next day a clash of dates. He did not mention anything about an arbitration hearing during the previous two days. He was told immediately that the divorce matter would not be postponed again and that he needed to seek a postponement of the arbitration hearing.

[14] Postponements are not there for the taking. Applications in this regard shall be made timeously and it is expected of the applicant for postponement to explain their predicament fully and satisfactorily. The Constitutional Court held as follows in *Lekolwane and Another v Minister of Justice*:¹

'The postponement of a matter set down for hearing on a particular date cannot be claimed as a right. An applicant for a postponement seeks an indulgence from the court. A postponement will not be granted, unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must ordinarily show that there is good cause for the postponement. Whether a postponement will be granted is therefore in the discretion of the court. In exercising that discretion, this Court takes into account a number of

¹ [2006] ZACC 19; 2007 (3) BCLR 280 (CC) para 17.

factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties, whether the application is opposed and the broader public interest. All these factors, to the extent appropriate, together with the prospects of success on the merits of the matter, will be weighed by the court to determine whether it is in the interests of justice to grant the application.’

[15] My initial *prima facie* view was to dismiss the application for postponement, bearing in mind the concise issues in dispute and the fact that the divorce trial would have to be postponed a second time because of the defendant’s ill-preparedness. I refer in this regard to *Magistrate Pangarker v Botha and Another*.² On the previous occasion the defendant did not even attend the proceedings, claiming to be outside the province. The court proceedings apparently do not concern him. He claims that his work-related issues take precedence over the divorce proceedings. I find it difficult to understand why the defendant waited till the last moment to obtain the services of a new attorney. He is clearly not a man of straw. He is a Chief Director *ex facie* his emails. I also find it unacceptable that the defendant’s ‘lead attorney’ could take on the instructions whilst knowing that he was unavailable to assist his client during the forthcoming trial due to his JSC commitments. The defendant’s vagueness in respect of the intended amendment has not escaped my attention. It does not impress me. The parties’ only minor son is 13 years old. It is clear that each of the parties insists on his primary care, but both of them are satisfied to allow the non-custodial party sufficient contact rights.

[16] Eventually and notwithstanding the aforesaid authorities and my own personal view that the defendant is guilty of kicking for touch a second time, I decided to exercise my discretion in granting a postponement. The main reason for my conclusion is the defendant’s agreement to a postponement to dates during the first term in 2025. The prejudice to be suffered by the plaintiff and/or the parties’ child appears to be minimal. As requested by me, the parties obtained new trial dates, to

² 2015 (1) SA 503 (SCA) paras 22 to 38.

wit 28 and 29 January 2025. The divorce matter will hopefully be finalised in three months' time.

[17] A postponement will allow the defendant to amend his pleadings to which the plaintiff may respond if so advised. In order to ensure that the matter will be trial-ready in January next year, I made an appropriate order pertaining to the intended amendment.

Conclusion

[18] The applicant sought and obtained a postponement. I am satisfied that the plaintiff and/or her attorney cannot be blamed for the predicament in which the defendant found himself. I do not believe that he was really *bona fide* in seeking a postponement, but for purposes hereof I am prepared to accept that he may want to amend his pleadings and that the amendment may be relevant to the dispute between the parties. The general rule is that an applicant, as the defendant *in casu*, who seeks an indulgence should pay the costs of reasonable opposition and all further costs that can reasonably be regarded as wasted costs. The application was brought on the first day of the divorce trial. There is no reason why the defendant shall not be ordered to pay not only the costs of the opposed application for postponement, but the wasted costs consequent upon the postponement, including the appearance costs on 8 October 2024. The fees of plaintiff's counsel on scale B shall be included in such costs. If I did not request my secretary to communicate with the parties, the defendant would probably not even consider filing a formal application for postponement. The plaintiff was ready to proceed on trial and responded appropriately as directed in the emails referred to above. Neither she, nor her attorney, is to be blamed. The plaintiff's opposition of the application for postponement was reasonable.

[19] Consequently, there is no reason not to follow the general rule. Costs shall be awarded in favour of the plaintiff.

Order

[20] The following order is made:

1. The defendant shall pay the costs of the application for postponement, including the plaintiff's costs of opposition, as well as all wasted costs in respect of the divorce action, the counsel's fees to be taxed in accordance with scale B.

DAFFUE J

Appearances

For Plaintiff (Respondent in the application for postponement): Adv HJ Van der Merwe

Instructed by: Honey Attorneys
BLOEMFONTEIN

For Defendant (Applicant in the application for postponement): Adv P Modise

Instructed by: Marumoagae Attorneys Inc
c/o Moruri Attorneys Inc
BLOEMFONTEIN