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REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
DATE	SIGNATURE

Case No.: 2022/21885

In the matter between:

P[...] K[...]

Plaintiff

and

L[...] S[...] K[...] (previously M[...])

Defendant

REASONS

Gilbert AJ:

1. The plaintiff husband sued the defendant wife for divorce. At the time of institution of action there were two minor children born of the marriage, which was

in community of property. The one child had since become a major although still dependent.

2. The defendant opposed the divorce proceedings, delivering a plea and counterclaim. The plaintiff replicated and pleaded to the counterclaim.

3. The parties subsequently concluded a settlement agreement, while both were still represented, on 7 June 2024. The defendant, still represented, through her then attorneys, on 26 July 2024 delivered a notice of withdrawal of her intention to defend the action and also of her plea and her counterclaim.

4. Consequently, the plaintiff enrolled the action as an unopposed divorce for hearing on 25 October 2024.

5. On or around 14 October 2024 the defendant changed attorneys and on 21 October 2024 launched an application seeking a postponement of the divorce proceedings.

6. By the time the divorce action came before me on the unopposed roll for 25 October 2024, the plaintiff had not had an opportunity to deliver an answering affidavit to the postponement application. By agreement, I postponed the divorce action to 14 November 2024 and so afforded the parties an opportunity to deliver answering and replying affidavits in the postponement application. They did so and on 14 November 2024 I heard the postponement application on an opposed basis.

7. Having heard the postponement application, I granted an order on 14 November 2024 refusing the postponement and that the defendant as the applicant for postponement pay the costs, on an opposed basis, including the costs of counsel on scale B.

8. I stated that my reasons would follow.

9. After having refused the postponement, the defendant's attorney who appeared on behalf of the defendant in the postponement application informed the

court that he had no instructions in relation to the divorce action itself and so asked, and was permitted, to excuse himself.

10. Ms Carstens for the plaintiff then moved for the divorce on an unopposed basis, incorporating the settlement agreement and parenting plan that had been signed by the parties on 7 June 2024. I proceeded to grant an order in those terms.

11. These then are my reasons for refusing the postponement.

12. The principles relating to postponement are well established. The legal principles, and some of the authorities, have been summarised in the oft-cited *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS) at 314, 315.

13. A judge has a discretion as to whether to grant or refuse an application for a postponement. This discretion must be judicially exercised.¹

14. As to the exercise of the 'judicial discretion', the court in *Rex v Zackey* 1945 AD 505 at 513 quoted with approval Jessel, M.R., in *In re Taylor* (4 Ch. D. 157), who said that it was a discretion "*to be exercised on judicial grounds, not capriciously but for substantial reasons*".²

15. As said by Mokgoro J in *National Police Service Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC) at 1112C-F, the postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the court, and so must show there is good cause for the postponement. The court in exercising the discretion whether to postpone the matter will take into account a number of factors, including (but not limited to) whether the application has been timeously made, whether the explanation given by the applicant for postponement

¹ *Isaacs & Others v University of the Western Cape* 1974 (2) SA 409 (C) at 412H; *Momentum Life Assurers Ltd v Thirion* [2002] 2 All SA 62 (C), para 16.

² See also *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398, 399.

is full and satisfactory, whether there is prejudice to any of the parties (the consideration of which is ordinarily a dominant feature of the exercise of the discretion)³ and whether the application is opposed.

16. All these and other relevant factors will be weighed by the court to determine whether it is in the interests of justice to grant the postponement.⁴

17. What is in the interests of justice is to be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before the court finalised without undue delay.⁵

18. It is for the applicant for postponement to place before the court sufficient evidence of such factors that the court is to take this into consideration when exercising its discretion whether it is in the interest of justice to grant the postponement. An absence thereof will *inter alia* impact on the *bona fides* of the applicant in seeking the postponement, and so whether to grant the postponement.⁶

19. For it to be in the interests of justice to grant a postponement requires that there is a legitimate purpose to be gained by postponing the matter. That in turn entails an engagement with whether that which the applicant for postponement seeks to achieve by way of a postponement is *bona fide* and has at least some prospects of success.⁷ It is pointless, and so would not be in the interests of justice, to postpone a matter if the purpose of the postponement cannot be achieved. Whether this consideration is distinct from, or subsumed, into the requirement that

³ *Myburgh Transport* above, at 315F.

⁴ *National Police Service Union* above at 1112F.

⁵ *National Police Service Union* above at 1112G.

⁶ *Madnitsky* above at 399, whether the absence of evidence weighed on the court in refusing the postponement.

⁷ Analogously to the prospects of success in the an appeal being an important factor whether the court will reinstate an appeal (*National Police Service Union* above at 1113F), or whether the court will grant condonation in relation to an appeal (*Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10E-F).

the application for postponement must be *bona fide* made by the applicant⁸ need not be decided.

20. In the present instance, the defendant's stated purpose of the postponement, as appeared from the amended relief that the defendant sought in her postponement application, was to afford her an opportunity to launch proceedings to set aside the settlement agreement, to retract her withdrawal of her defence and counterclaim and to refer the divorce action to a family advocate for an investigation into the best interests of the minor child and for a full report.

21. Should it be so that there is a basis to vitiate the settlement agreement concluded on 7 June 2024, and which resulted in her subsequent withdrawal in July 2024 of her defence and counterclaim, it would then follow that the court cannot grant a divorce order on the basis of that settlement agreement. The divorce action will have to continue by way of trial, where during the course thereof *inter alia* the efficacy of the impugned settlement agreement can be determined.⁹

22. It is therefore necessary to have regard to the averments made, and evidence adduced, by the defendant in her affidavits in support of her attack on the settlement agreement that she admits that she did sign at the plaintiff's attorneys' office on 7 June 2024, to see whether there are at least some prospects that the settlement agreement will be vitiated. If not, then there is no purpose in the postponement.

23. The evidence adduced by the defendant in her founding affidavit is that:

"18.4 Save to mention that the settlement agreement was signed at the offices of the plaintiff's attorneys and without the defendant being accompanied by her attorneys, the plaintiff further raised a concern that, she was coerced into signing the settlement agreement upon her arrival at the

⁸ *Myburgh Transport* above, at 315E.

⁹ In what manner that will unfold, such as whether by way of the some or other distinct proceedings as the defendant appears to have envisaged, or by way of an amendment of the pleadings, or otherwise, is not something I need consider given the outcome of the divorce action.

plaintiff's attorneys as she had raised concerns that she did not understand and/or agree with the terms of the settlement.

18.5 *The settlement agreement was never explained to her."*

24. The defendant does not go beyond this in describing the circumstances as to why she did not voluntarily conclude the settlement agreement, together with the parenting plan that was signed at the same time.

25. The plaintiff in paragraph 45 of his answering affidavit, supported by a confirmatory affidavit by his attorney who attended upon the defendant when she signed the documents in the plaintiff's attorneys' office on 7 June 2024, sets out a contrary version, seeking to demonstrate that the defendant was fully aware of what she was signing and that there was no coercion or the like in relation to the conclusion of the settlement agreement.

26. The defendant in her replying affidavit does not go any further in explaining the circumstances as to why she says she was coerced, other than stating as follows:

"25. *The Applicant in the founding affidavit clearly states that when the settlement agreement was signed, the Applicant was at the offices of the Respondent's attorneys and was coerced and made to sign the agreement [in] the absence of her attorneys and without the settlement agreement being explained to her.*

26. *From the above allegation, it is clear that there was duress and undue influence. The Applicant need not verbatim state that there was undue influence in the execution of the settlement agreement.*

27. *The fact that she was alone, with the legal representative of the Respondent, and was made to sign the settlement agreement without same being explained to her is enough to raise an eyebrow, especially if the court has due consideration to the one sidedness of the agreement.*

28. *No person in his/her right mind would agree to the terms of this settlement agreement.*

29. *There is no evidence before this court that speaks against the allegation by the Applicant regarding coercion, in fact, if the court is to*

consider the circumstantial evidence, then it becomes blatantly clear that the Applicant did not sign the settlement agreement out of her own volition.”

27. The last averment is incorrect as a contrary factual version was advanced by the plaintiff's attorney (who would also have personal knowledge), as appears above.

28. I specifically raised with Mr Sethole, who appeared for the defendant in arguing the postponement application, whether it sufficed for the defendant simply to assert, albeit under oath, that she was coerced without providing some detail of how that coercion came about. I invited Mr Sethole to refer me to the affidavits where such detail may be found.

29. Mr Sethole submitted that the defendant's election not to adduce any details at this stage is because that evidence will be adduced in due course at the subsequent proceedings to set aside the settlement agreement if the postponement is granted. I raised my concern with this submission in that sufficient detail should be placed before the court to enable the court to decide whether the postponement is *bona fide* made, which includes whether there is at least some prospect that the court may subsequently find that the settlement agreement is to be vitiated.

30. Mr Sethole submitted that all that was necessary for the defendant to state at this stage was that she was coerced, and that in addition the contents of the document was not explained to her.

31. Assuming in the defendant's favour that the agreement was not explained to her by the plaintiff's attorney before she signed the documents at his offices on 7 June 2024, it is not axiomatic that there was coercion because the documents were not explained to her before signature. Documents are often not explained to the signatory thereof, and the failure to have done so does not mean that the signatory was coerced into signing the documents.

32. I raised with Mr Sethole whether in law the proposition was sound that, coercion apart, because a document was not explained to a person, that person

was not bound by what he or she had signed. Mr Sethole, correctly so, conceded that this was not a general proposition of law, and whether a person could avoid a document signed by him or her because the document had not been explained to him or her depended on the circumstances.

33. Nowhere in the defendant's affidavits does it appear why facts are such that the settlement agreement and parenting plan would have had to be explained to her by the plaintiff's attorney before she signed them. Ms Carstens for the plaintiff in resisting the postponement application pointed out that no averment is made in the defendant's affidavits that she is illiterate or that could not read or understand the contents of the documents or that she was labouring under any particular set of circumstances that precluded her from being able to read, understand and appreciate the documents that she signed. This is even without considering the contrary factual version placed before the court by the plaintiff's attorney under oath.

34. Ms Carstens also argued with reference to the chronology of events why it cannot be said that the application for postponement was advanced in good faith on the basis that the defendant did not know what she was signing when she signed the settlement agreement on 7 June 2024.

35. This chronology is with reference to temporaneous documents. This chronology is as follows.

36. The defendant did oppose the divorce proceedings from the outset, delivering a plea and counterclaim. Although there was a change of attorneys shortly before the matter was heard on the unopposed roll on 25 October 2024, throughout the proceedings the defendant has been represented by attorneys. At no stage then did the defendant do anything whilst not being represented in relation to the divorce proceedings. This included when she signed the documents at the plaintiff's attorneys' office on 7 June 2024, although her attorneys were not present at the time.

37. On 22 November 2022, a settlement meeting was held between the parties and their legal representatives and where the terms of a potential settlement were considered. What is important is not what may have been offered, discussed, accepted or rejected at that meeting, but rather that the parties at all times litigated at arm's length with their own legal representation, including at settlement discussions.

38. The plaintiff engaged, and paid for, a medical expert in the form of a counselling psychologist Dr Duchen who interviewed the children and provided input in relation to a parenting plan.

39. Both children, during the interview, expressed satisfaction with the current arrangements in place in relation to them. That arrangement, and which would make its way into the signed settlement agreement and parenting plan, is that the minor child would continue to have primary residency with her father, the plaintiff, and during the week the child's aunt will look after her. There is no serious factual challenge to the fact that the plaintiff, as the father, has looked after the children for the last twelve years since he and the defendant separated. There is also no serious challenge that for the last three years the minor child has stayed with her aunt during the week. There is no indication on the papers that this *de facto* arrangement had proven unsatisfactory or problematic. It is therefore not surprising that the children expressed satisfaction to Dr Duchen with that arrangement.

40. By the time that Dr Duchen interviewed the children in November 2023 the other child had become a major.

41. Dr Duchen accordingly put together a draft parenting plan reflecting the current situation and which expressed the minor child's expressed wish to reside with her maternal aunt during the week and with her father over weekends, and to see her mother wherever possible.

42. Dr Duchen on 5 November 2023 in an email made this draft parenting plan available to the plaintiff's attorneys and specifically in that email expressed a desire

to consult with the defendant mother, even if via WhatsApp if the defendant could not travel to Johannesburg.

43. What would then occur is that the plaintiff would make available monies to the defendant through her attorneys to enable her to travel to Johannesburg to consult with Dr Duchen.

44. The defendant then did attend upon Dr Duchen, and which resulted in agreement being reached on the parenting plan. This appears in the papers in an email from Dr Duchen on 16 November 2023 to the parties confirming that she has now met with the defendant and incorporated her input into the proposed parenting plan.

45. In the circumstances, and in the absence of any evidence to the contrary, it was clear that the parenting plan which forms part of the overall settlement between the parties and of divorce order sought by the plaintiff is a product of engagement by an expert with both parties, both at all times legally represented, as well as with the children.

46. The defendant in her affidavits in the postponement application expresses dissatisfaction with the terms of the settlement agreement and parenting plan, particularly that she did not appreciate what she was signing by way of the settlement agreement and parenting plan on 7 June 2024 when she did so at the plaintiff's attorney's office. These assertions ring hollow in the context of the parties' engagement with Dr Duchen.

47. To continue with the chronology, the plaintiff's attorneys on 25 April 2024 addressed an email to the defendant's then attorneys enquiring as to the conclusion of the settlement agreement and parenting plan that had previously been made available and seeking that the matter be advanced to bring finality to the parties. The defendant's then attorneys responded later that day per email stating that they had furnished the defendant with a copy of the draft settlement agreement and parenting plan for her consideration and signature, but that as the defendant was in Mpumalanga, due to lack of financial resources she could not travel to Gauteng to

sign the documents. The defendants' then attorneys' response continued that arrangements would be made for the original documents to be signed by their client and couriered to Johannesburg, and then to be delivered to the plaintiff's attorney's office for the plaintiff's signature.

48. It is clear from this email that the defendant's erstwhile attorneys played an active role in dealing with the defendant as their then client in relation to both the draft settlement agreement and the parenting plan.

49. On 2 May 2024, the plaintiff's attorneys addressed an email to the defendant's attorneys informing them that the plaintiff was prepared to contribute to the defendant's costs to travel from Mpumalanga to Johannesburg in order for the documents to be signed at a mutually suitable date at the plaintiff's attorney's offices.

50. Pursuant thereto the defendant attended upon the plaintiff's attorney's offices on 7 June 2024 and signed the settlement agreement and parenting plan.

51. It is in the context of these undisputed facts, based upon contemporaneous documents, that the defendant's contentions are to be considered that she was coerced into signing the documents at the plaintiff's attorney's offices and that the document was not explained to her.

52. I have already dealt with the absence of any evidence to support her assertions. To the contrary, the chronology as set out above demonstrates that the defendant at all times was represented by attorneys, who knew that their client would be attending upon the plaintiff's attorney's offices to sign the documents that had already been made available to her by her attorneys previously. This included *inter alia* the parenting plan which was the product of engagement with the expert, Dr Duchon.

53. The defendant's attorneys were aware that the defendant would be attending at the offices of the plaintiff's attorneys to sign the documents. The election of the defendant to attend at the offices of the plaintiff's attorneys to sign the document

without her attorneys being present is her own election and cannot redound to the detriment of the plaintiff. Nor can that give rise to an obligation on the part of the plaintiff's attorneys to explain the documents to her before she signed them.

54. There is no indication that that which she signed at the plaintiff's attorney's office was anything other than what had been made available to her erstwhile attorneys by at least April 2024, which had been furnished to her by her then attorneys and where specific arrangements had been made with her then attorneys to attend to sign those documents at the plaintiff's attorneys' office.

55. The defendant's attorney explains in his founding affidavit¹⁰ that his offices first engaged with the defendant on 9 October 2024 because the defendant had been unable to make further contact with her then attorneys and so wished to change attorneys. The defendant's attorney explained that it was during these consultations that the defendant expressed dissatisfaction with the settlement agreement that had been concluded and consequent whereupon the present application for postponement would be launched on 21 October 2024, some eleven days later and four days before the divorce action was to be heard on the unopposed roll on 25 October 2024.

56. What is not explained in the defendant's affidavits is when she came to the realisation that the settlement agreement she had signed on 7 June 2024 was something she did not intend agreeing to. The defendant states that she has been in possession of the settlement agreement since she signed it on 7 June 2024. The WhatsApp messages addressed to her then attorneys and attached to her affidavits show that already in September 2024 she was dissatisfied with the settlement agreement that she had signed and sought that her then attorneys revisit the settlement agreement. But she does not explain how and why this dissatisfaction with the documents that she had signed had come about.

¹⁰ The defendant herself not being the deponent to the founding and replying affidavits but instead signing a confirmatory affidavit is not entirely satisfactory given that the crucial evidence in relation to challenging the efficacy of the settlement agreement is hers, and not that of her present attorney who has no personal knowledge at all.

57. Mr Sethole emphasised on defendant's behalf, and as asserted in the defendant's affidavits, that the settlement agreement is one-sided and unfair, sufficiently so that it must cast serious doubt whether she entered into the settlement agreement voluntarily.

58. The terms of the settlement agreement and the accompanying parenting plan are not such that this line of argument carries any real weight.

59. Insofar as the interests of the children are concerned regarding the terms of the settlement agreement, those are, as set out above, the product of consensus reached through an expert psychologist. The arrangement in respect of the minor child is endorsed by the family advocate. The plaintiff is afforded primary residence. The defendant states that her living conditions are not conducive to raise minor children. This has been the prevailing situation for the last twelve years, and in respect of which no substantiated concern has arisen. The plaintiff is to maintain the children given the defendant's admitted financial inability to do so. The settlement agreement provides that the defendant has flexible contact rights with her children and without giving up any parental rights and responsibilities. There is nothing in relation to what is provided for the children in the signed settlement agreement and parenting plan that is such cause for concern that there must be doubt that the agreements had been voluntarily entered into.

60. Quite correctly, Mr Sethole pointed out that an important factor to be taken into account are the interests of the children. Apart from the common law recognising that the court is the upper guardian for all minor children, section 28 of the Constitution expressly provides *inter alia* for a child's best interests to be of paramount importance in every matter concerning the child. Section 9 of the Children's Act, 2004 provides that "*[i]n all matters concerning the care, protection and well-being of a child the standard that the child's best interests is of paramount importance, must be applied*".

61. From what I have set out above the interests of the children are advanced rather than prejudiced by the grant of the divorce given the finality that it brings and

by retaining the position that has prevailed for many years and with which the children, as well as the expert psychologist, are satisfied. One of the reasons that the defendant sought a postponement was to enable the family advocate to investigate and provide a full report. The family advocate has endorsed the settlement agreement with accompanying period plan and there is no evidence why an investigation is required. Should it be that the interests of the children require a change to that which is provided for in the settlement agreement and parenting plan, there are forums at which this can be subsequently addressed, if necessary.

62. As to the terms of the settlement agreement in relation to the patrimonial consequences for the defendant, the submission on behalf of the defendant is that those terms are unfair as the defendant effectively gives up her half share of the joint estate and waives spousal maintenance from the plaintiff in return for a lump sum payment to her of R200 000.00. Again, in my view, there is nothing so one-sided to these terms that is demonstrative of the settlement agreement not having been voluntarily entered into by the defendant. There is no indication in the papers that any spousal maintenance has been place over the last twelve years since the parties separated or that the defendant contributed to the joint estate over that period. Again, the defendant was represented throughout by attorneys including in negotiations surrounding in particular the patrimonial consequences of the divorce.

63. Should what the defendant assert be correct – that she did not intend entering into what she contends is such a one-sided settlement agreement - that would have been indicative of serious failings on the part of her erstwhile attorneys in their representation of her throughout the divorce proceedings over the course of more than two years. Those attorneys represented the defendant in delivering her plea and counterclaim, in settlement negotiations, in liaising with her in relation to the conclusion of the settlement agreement and parenting plan and then the signature thereof at the plaintiff's attorneys' office and then in her subsequent withdrawal of her defence and counterclaim. But there is a conspicuous paucity of any evidence or detail in this regard. The most that is said in the affidavits is a single sentence by the defendant's attorney that he attempted to contact the defendant's erstwhile attorneys so obtain copies of the record but with no success.

64. The defendant has not adduced sufficient evidence or provided sufficient detail to demonstrate that her postponement application is *bona fide* and that she has any prospects of persuading a subsequent court, if the postponement was granted, that the settlement agreement is to be vitiated.

65. Ms Carstens for the plaintiff submitted that a postponement would be prejudicial to the plaintiff in that the plaintiff, as well as the defendant and the minor children, require finality and that a postponement would not achieve that. The parties have been separated for at least the last twelve years and where the situation in relation to the children has been prevailing for many years. The granting of the divorce order on the terms as sought by the plaintiff does not disrupt the status quo but brings finality to the parties.

66. Although the matter came before me on 25 October 2024 on what was the unopposed divorce roll, the defendant was afforded an opportunity to present her case for postponement, including by way of two sets of affidavits in the form of her founding and replying affidavit in her postponement application. To achieve this, I with the agreement of the parties adjourned the matter to 14 November 2024 at which I would hear the parties and determine whether the postponement should be granted. This instead of me refusing on 25 October 2024 to entertain any opposition in the unopposed divorce court, whether by the plaintiff to the belated postponement application or by the defendant to the divorce action itself. The defendant therefore was afforded an adequate opportunity to adduce evidence in support of and to persuade the court that the matter would be postponed. In any event, Mr Sethole did not specify the nature of some or other evidence that the defendant intended to include in her affidavits but which she had not.¹¹

67. The defendant did not tender any costs arising from the postponement, whether on an unopposed basis or otherwise. Mr Sethole stated that this was because the defendant was unable to pay any costs. That this is so is supported by

¹¹ Although Mr Sethole did state in preparing the affidavits in the postponement application the decision had been made not to include the evidence but to rather adduce it in the subsequent challenge itself, what the nature of that evidence would be beyond what was provided for in the affidavits was not disclosed.

the evidence on the affidavits. Ms Carstens for the plaintiff submitted that finality needed to be brought to the continual incurring of legal costs, especially where the defendant self-admittedly was not in a position to tender and pay any costs in relation to the divorce proceedings including in respect of those arising from the belated postponement. The usual salve of the applicant for postponement in seeking an indulgence paying the costs of the other party is therefore not available. That the parties would be prejudiced by the perpetuation of divorce proceedings with the legal costs attendant thereupon in these circumstances is a factor to be taken into account.

68. As appears from the cited authorities, a factor to be taken into account is the administration of justice. Should the postponement be granted, it will be many months if not years before the divorce proceedings would be finalised on an opposed basis. It is not in the interests of justice, in my view, to postpone the divorce action for such a long period where there is no substantiation to the defendant's challenge to the settlement agreement.

69. It is because a postponement would not have been in the interests of justice that I on 14 November 2024 in the exercise of my discretion refused the postponement, and then proceeded to grant the divorce on an unopposed basis, incorporating the terms of the settlement agreement and parenting plan.

70. As the plaintiff successfully resisted the postponement application, he is entitled to his costs on the postponement. Mr Sethole's submission that the financial inability of the defendant to pay any costs motivated why there should rather be no order as to costs does not in the exercise of my discretion on costs weigh sufficiently to deprive the plaintiff of his costs as the successful party.

71. As to the scale of costs on the postponement application on scale B, Ms Carstens submitted that given her level of mid-seniority, that the application was opposed and as affidavits had to be filed and argument prepared in truncated periods in relation to a belated postponement application, that such a scale was appropriate. I agreed and so awarded the costs of counsel on that scale.

Gilbert AJ

Date of hearing: 25 October 2024 and
14 November 2024

Date of order: 14 November 2024.

Date of reasons: 18 November 2024

Counsel for the plaintiff: Ms T Carstens

Instructed by: Ellis Coll Attorneys, Johannesburg

Counsel for the defendant: Mr E Sethole (Attorney)

Instructed by: E S & Associates Inc, Edenvale