

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

Case Number: 17399/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED: YES / NO
DATE	SIGNATURE

In the matter between:

L[...] **M[...]** **T[...]**

Applicant

And

A[...] **W[...]** **T[...]**

Respondent

In re:

L[...] **M[...]** **T[...]**

Plaintiff

And

A[...] **W[...]** **T[...]**

Defendant

Delivered: This judgment was prepared and authored by the Judge whose name is reflected 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 hand-down is deemed to be **18 December 2024**.*

REASONS FOR JUDGMENT

MANAMELA AJ

Introduction

[1] The courts normally take the view that “*justice delayed is justice denied*” and everyone is entitled to a speedy trial. This matter was set down for trial on 21 October 2024 and the trial could not proceed.

[2] Some four days before the trial date, on Friday 18 October 2024, I received an application for postponement of the trial *sine die*, together with a request for a further contribution towards the applicant’s legal costs in terms of rule 43(6) of the Uniform Rules of Court in the amount of R250 000.00 as well as a punitive cost order against the respondent on attorney and client scale.

[3] The postponement application is opposed.

Factual Background

[4] The applicant, L[...] M[...] T[...], is the plaintiff in divorce action and A[...] W[...] T[...] is the defendant, the respondent herein.

[5] The applicant and the respondent were married to each other in of community of property.

[6] Summons for divorce were issued on 20 July 2020.

[7] An order in terms of rule 43 was granted on 6 May 2021. In terms of this order, the respondent was ordered to pay maintenance amount of R50 000.00 to the minor children and the applicant, a contribution towards the applicant's legal fees in the amount of R10 000.00 payable in two equal instalments.

[8] Following the respondent's refusal to agree to a postponement of the trial, despite several requests by the applicant, the applicant filed this application for postponement.

[9] Having heard counsels arguments, I made out the following order –

- “1. That the trial in the main action is postponed sine die. The Applicant is ordered to apply for a trial date within 10 (ten) days hereof.
2. That the Respondent is ordered to contribute an amount of R100 000.00 (One Hundred Thousand Rand) towards the Applicant's legal costs. The aforementioned amount is payable in two equal instalments with the first instalment being payable on or before 31 October 2024 and the second instalment being payable on or before 30 November 2024; and
3. That the Respondent is liable for the costs of this application for postponement on a party and party scale B”.

[10] On 29 October 2024, I received a request for reasons from the respondent which I would set out herein below.

Reasons for Postponement

[11] The application for the postponement revolved around the death of the applicant's mother, the conflicting dates between the trial date and the date set for throwing of the applicant's mother's ashes and her mental fitness to stand trial.

[12] Firstly, the applicant's mother passed on 13 September 2024. The applicant could not attend her mother's memorial service, held in South Africa due to financial constraints as she now resided in the United Kingdom. The applicant states that her mother's wishes as set-out in her Last Will was for her ashes to be spread at Charles Bridge in Prague.

[13] The applicant and her family set date for spreading of her mother's ashes at Charles Bridge in Prague as the 21-25 October 2024, which date coincided with the date set for trial. It is evident that the applicant, as alleged, did not realise that the date set coincides with the date set for trial.

[14] The applicant further contents that she is not emotionally ready to participate meaningfully at trial as a result of the loss of her mother. The applicant attaches her mother's death certificate as well her flight ticket to Prague as proof of her attendance to the family event.

[15] Furthermore, the applicant stated in her founding affidavit that when she realized the conflicting dates she immediately instructed her attorneys of record to request a postponement from the respondent. The first correspondence was issued on 4 October 2024.

[16] The respondent rejected the proposed postponement request on the basis that the applicant delayed the matter since 2021 when she obtained an order in terms of rule 43. The respondent further contents that the applicant failed to attach any medical certificate to confirm her alleged condition.

[17] The respondent's attorneys in reply to the proposed postponement stated that –

“Given the extensive time that has passed and the limited issues that the court had to deal with, we believe that that there is no valid justification for a postponement, and we will request that the court proceeds with the hearing as set down”

[18] Counsel for the respondent further argued that the request for postponement could have been entertained if the applicant provided a medical certificate to confirm her emotional state, at least when the first request for postponement was made. In the answering affidavit, the respondent argues that the applicant could have asked for a virtual trial.

[19] The respondent argues against the postponement further that the applicant's requests were clouded with threats made by the applicant, including punitive cost order *de bonis propriis* against the respondent's attorneys.

[20] The respondent contends that he is prejudiced financially by the delays in finalizing the divorce action, and that the applicant's financial position has since improved. The respondent further argues that children are majors now and are self-supporting and therefore it would be unjust to delay this trial.

Issue of Determination

[21] What I had to decide on was whether a postponement is justifiable and whether further cost contribution in terms of rule 43(6) may be granted.

Legal Principles to be considered for postponement of trial

[22] It is trite law that the court has a discretion in considering an application for postponement of trial. It is trite law that postponements are merely not there for the asking. Where a party seeks an indulgence of the court, he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interests of justice in having the matter finalised. This means, the party seeking postponement must proffer good and strong reasons therefore and that the applicant must give full and satisfactory explanation of the circumstances that give rise to the application. The application itself must be bona fide and must not be used as a tactical endeavour to obtain an advantage to which the applicant is not entitled".¹

[23] The basis for granting a postponement was considered by Plaskett J in *Persadh v General Motors SA (Pty) Ltd*², Plaskett J, as follows:

¹ *Wibbelink and Another v The Unknown Individuals entering and/or Trespassing and/or Settling and/or Building on the Immovable Property Known as Portion [...] of ERF [...] Jan Niemand Park and Others* [2022] ZAGPPHC 642 (31 August 2022).

² 2006 (1) SA 455 (SE) at para 13.

- a. First, as that party seeks an indulgence, he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised³;
- b. second, the court is entrusted with a discretion as to whether to grant or refuse the indulgence⁴;
- c. third, 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 case⁵;
- d. fourth, the prejudice that the parties may or may not suffer must be considered; and,
- e. fifth, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.

[24] In *Erasmus, Superior Court Practice*⁶, the following is said about postponements (footnotes omitted):

“The legal principles applicable to an application for the grant of a postponement by the court are as follows:

- (a) The court has a discretion as to whether an application for a postponement should be granted or refused. Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered or even when the parties have agreed to postpone the matter.
- (b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal.
- (c) An applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons, i.e. the applicant must furnish a full and

³*Anglin v Burchell* [2010] ZAECHGHC 79 (22 September 2010).

⁴*Peterson v S* [2021] ZAWCHC 154 (11 August 2021).

⁵*Daniel v PRASA* [2019] ZAGPJHC 139 (9 May 2019).

⁶ Vol 2, pp D1-552A.

satisfactory explanation of the circumstances that give rise to the application. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case.

(d) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made.

(e) An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

(f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism.

(g) The balance of convenience or inconvenience to both parties should be considered: the court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not."

[25] From the applicant's affidavit it is only fair to accept that she suffered emotional turmoil as a result the passing of her mother. I find that she could clearly not participate meaningfully at trial if it is proceeded with regardless of the issues of contention between the parties. It would not be necessary to show a medical certificate to prove this. I find that the applicant is not emotional prepared to participate meaningful in her own trial, whilst grieving her mother's death and this would generally be the case for anyone. Her emotional state may affect her performance during cross-examination. It goes without saying that loss of a parent would result in enormous pain and should carry more weight. I find this concerning that there is no amount of justification than the loss of a loved one.

[26] The respondent seems to suffer no more than financial prejudice that he has exaggerate since the divorce action has stated, as he apparently tries to 'switch off the tap' on the applicant.

[27] If one considers the extent prejudice suffered by either party, I find that the balance of inconvenience suffered by the applicant outweighs the prejudice which will be caused to the respondent if this application for postponement is not granted.

Contribution towards Legal Costs

[28] The applicant seeks a further cost contribution amount of R250 000.00 after being awarded an amount of R10 000.00 under rule 43 Order. Rule 43(6) allows for a variation of an earlier rule 43 order. The applicant contends that the request is based on the financial disparities between the parties as well as the increased legal costs incurred whilst enforcing the respondent's rule 43 maintenance obligations. This amount is also sought to cover fees anticipated until the date of trial. The applicant further contends that she would not have a fair access to legal representation, as compared to the respondent, if she is not granted a further contribution towards legal costs.

[29] The respondent contends that at the time he fell into arrears with Rule 43 maintenance order, he had financial constraints, and had paid approximately R2 000 000.00 since 1 June 2021 to date. The respondent does not provide any details relating to financial constraints except to give a bare denial around allegations of financial cruelty. It is evident that the respondent simply wants to close the tap on the applicant. It is apparent that the respondent also refers to the costs herein as wasted when arguing against the R250 000.00 sought by the applicant, instead of costs awarded in terms of rule 43(6).

[30] I have considered that the respondent was a breadwinner during the substance of the marriage, and that he remains financially stronger than the applicant. The applicant's age is also limiting towards her chances to economic recovery, albeit that it is apparent that she is now working. The applicant disclosed that she had already incurred over R300 000.00 in legal fees which is supported by a

statement of account. Part of the fees incurred were evidently caused by the respondent's failure to comply with the maintenance obligations under rule 43. Two writs of execution were issued the respondent to compel payment of the arrear amounts.

[31] In light of these, the court has taken a dim view against the financial evasiveness on the part of the respondent and in considering rule 43(6), it is not necessary for an applicant to prove "material change in circumstances" to obtain a further contribution towards costs. What is required where a further contribution towards legal costs are sought, is to show that the previous contribution ordered by the court is now inadequate, which I find to be the case. It is on that basis that an estimated amount of R100 000.00 for further legal costs contribution is justifiable. An order made in terms of rule 43 is not appealable in terms of section 16(3) of the Superior Courts Act 10 of 2013.

Costs

[32] A postponement is usually accompanied by wasted costs tender by the party seeking a postponement. It is trial law that the party seeking postponement must also tender for wasted costs. The parties are generally aware that in awarding costs this court has a discretion, which must be exercised judicially.

[33] The applicant seeks costs for postponement on an attorney and client scale against the respondent.

[34] I had consideration to the principles laid in *Erasmus v Grunow*⁷ where the court held as follows:

"The law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties."

⁷ 1980 (2) SA 793 (O) at 797.

[35] It is important to note that the court assess success based on the substance of the judgment rather than its mere form.

[36] The award of the costs is a matter wholly within the discretion of the court. The discretion of the court may either be an award or deprivation of cost order against the party that is entitled to the cost order based on factors such as the conduct during litigation, excessive, unnecessary or unreasonable demands, in some cases misconduct or unnecessary procedural step. I find it unnecessary that the respondent decided not to accommodate the applicant when approached for postponement. It is at that state, in response, that the respondent could have conceded and demanded a tender for wasted costs against the applicant. In exercising this discretion, it is important to give consideration of the facts in the matter, fairness to both sides.

[37] In that regard, I am of the view that the award of costs against the respondent is justifiable.

Conclusion

[38] Thus, I have taken note of the issues to be decided at trial, namely that, whether the children are dependent or not, as well as the quantum of maintenance payable in respect of the dependent children, the appointment of a receiver and liquidator, and the reason for the breakdown of the marriage.

[39] In my consideration, I have found that the applicant would have to be emotionally present to participate meaningfully in the proceedings.

[40] I could not find that the applicant was not playing open cards, as alleged by the respondent.

[41] It is on the above basis that the order granted is granted.

P N MANAMELA

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHHANNESBURG**

Date of hearing: 10 September 2024

Judgment delivered: 18 December 2024

APPEARANCES:

Counsel for the Applicant: Adv. A PILLAY

Attorneys for the Applicant: HJW Attorneys

Attorneys for the Respondent: Natasha Lynch Attorneys