



**IN THE EQUALITY COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No:EC14/2023

In the matter between:

ROVENDRANATH RABIKISSOON SEWPERSAD

First Complainant

YASMIN ADAMS

Second Complainant

AERO COACH LINES CC

Third Complainant

AERO TOWING CC

Fourth Complainant

RYKHANA RABIKISSOON

Fifth Complainant

RUSHDA RABIKISSOON

Sixth Complainant

RIAARD RABIKISSOON

Seventh Complainant

YAGYAH RABIKISSOON

Eight Complainant

RASHID RABIKISSOON

Ninth Complainant

and

STANDARD BANK OF SOUTH AFRICA (PTY) LTD	First Respondent
FIRST RAND BANK	Second Respondent
TRADEPORT 62 (PTY) LTD t/a AUCOR SOUTH AFRICA	Third Respondent
EILEEN MARGARET FEY N.O.	Fourth Respondent
PRICE WATERHOUSE COOPERS	Fifth Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Sixth Respondent
MASTER OF THE HIGH COURT, CAPE TOWN	Seventh Respondent
SHERIFF'S OFFICE, WYNBERG SOUTH	Eighth Respondent

**JUDGMENT IN POSTPONEMENT & CONDONATION APPLICATION
DELIVERED ELECTRONICALLY ON 09 DECEMBER 2024**

MANGCU-LOCKWOOD, J

A. INTRODUCTION

[1] This is an opposed application for *sine die* postponement of preliminary proceedings which were supposed to proceed on 25 and 26 November 2024, and for permission to file the complainants' heads of arguments, which are late, 14 days prior to the next set down date.

[2] In essence, the basis for the application is that the complainants lack the funding necessary to proceed with the matter at this stage. In this regard, the first complainant has deposed to an affidavit stating that counsel who drafted the complainants' replying papers and assisted them thus far is no longer available to assist with the matter, having withdrawn on 16 October 2024 due to his fee account not being settled. In addition, the first complainant states that his expectation was that, after payment of fees for the replying affidavit in the main matter, the next payment would be for preparation towards the hearing of the main matter. Instead, because of the decision of this Court to first hold a preliminary hearing for determination of certain defined preliminary issues, this doubled the cost of the anticipated fees in the matter. In the circumstances, the complainants seek postponement on a *sine die* basis.

[3] The application is vehemently opposed by all the respondents, who each delivered notices of intention to oppose, although only the first respondent delivered an answering affidavit. The applicant did not deliver a replying affidavit. In court, the opposition converged upon similar arguments as those raised in the first respondent's answering affidavit, although with some variation, which may be summarized as follows:

- a. Firstly, the main complaint relies on events that occurred almost twenty years ago, and given that the matter was instituted on 19 December 2023, it constitutes an unexplained and unreasonable delay. In those circumstances, the request for a *sine die* postponement, without a clear indication of when the heads of argument will be delivered, or when the necessary funding to continue with the litigation will be raised, constitutes an abuse of court process which is materially prejudicial to the respondents.
- b. Secondly, the respondents rely on the chronology leading to the matter being set down on 25 and 26 November 2024, which shows that this application

was not brought as soon as the circumstances which might justify it became known to the complainants.

- c. Thirdly, by the time the application was launched, the respondents' legal representatives had spent time preparing for the hearing, and their clients had incurred significant costs to be ready for the hearing. In the case of the first respondent, flight arrangements, accommodation and car hire had already been organized and paid for.
- d. Fourthly, the respondents point to what they refer to as an unexplained irony in the fact that the complainants managed to obtain legal assistance to prepare papers in this application, while those resources could more productively have been utilised to prepare for the hearing of the preliminary issues. They also point out that, given the apparent failure by the complainants to attempt to obtain *pro bono* legal assistance or local counsel, the contention that they will be left with no representation if the Court does not grant the postponement and condonation sought, is not made *bona fide*.
- e. The complainants' main claim is spurious and bears no prospects of success. Chief among the reasons is prescription.
- f. There is no tender for wasted costs that are to be occasioned by the postponement, to alleviate any prejudice to be suffered by the respondents.

B. THE RELEVANT LAW

[4] The legal principles applicable to an application for postponement are trite¹, as are those applicable in condonation applications². Neither application is there for the

¹ See summary of the principles in D E Van Loggerenberg *Superior Court Practice* Vol 2 at D1-552A and *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NmS).

² *Melane v Santam Insurance Co. Ltd.* 1962 (4) SA 531 (A) at 532B-E; *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC) at para 23.

asking. In either instance, an applicant seeks an indulgence, and must furnish a full and satisfactory explanation of the circumstances that gave rise to the application.

[5] The court has a discretion as to whether either application should be granted or refused, which must be exercised in a judicial manner, not capriciously or upon a wrong principle, but for substantial reasons.

[6] Factors which usually weigh with a court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.³

[7] When considering a postponement application, the court 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 is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed.⁴ All these factors will be weighed to determine whether it is in the interests of justice to grant the postponement. What is in the interests of justice is determined not only by what is in the interests of the immediate parties, but also by what is in the broader public interest.⁵

[8] 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

³ *Mulaudzi v Old Mutual Life Assurance company (SA) Limited* [2017] ZASCA 88; [2017] 3 All SA 520 (SCA); 2017 (6) SA 90 (SCA).

⁴ *National Police Service Union and Others v Minister of Safety and Security and Others* [2000] ZACC 15; 2000 (4) SA 1110; 2001 (8) BCLR 775 (CC) para 4.

⁵ *Psychological Society of South Africa v Qwelane and Others* (CCT226/16) [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) para 31.

was not so timeously made.⁶ A court will be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained; where the unreadiness to proceed is not due to delaying tactics; and where justice demands that the applicant should have further time to present his or her case.

[9] An application for postponement must be *bona fide* and not used simply as a tactical maneuver for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

[10] 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 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 – what the writers in *Erasmus* refer to as a balance of convenience.

[11] 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.⁷ That may include an order to pay the wasted costs of the respondent on the scale of attorney and client. It may also include an order directing such an applicant to pay the costs of his or her adversary before he or she is allowed to proceed with his action or defence in the action, as the case may be.⁸

[12] It has been held that a lack of funding is not a sufficient reason for a last-minute postponement application. A practitioner who has insufficient funding must withdraw or apply for a postponement in *good time*. If (s)he does not, (s)he must continue representing his clients at his or her own risk.⁹

⁶ *Greyvestein v Neethling* 1952 (1) SA 463 (C) at 467 F.

⁷ Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 453.

⁸ *Van Dyk v Conradie and Another* 1963 (2) SA 413 (C) at 418; *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E) at 314-315.

⁹ *S v Ndima* 1977 (3) SA 1095 (N) at 1097; *Ngcobo v Union & South West Africa Insurance Company Ltd* 1964 (1) SA 42 (D) at 44.

C. DISCUSSION

[13] Neither the complainants nor their legal representatives appeared in court on the set down date of 25 November 2024 for the preliminary hearing, or to move the application for postponement and condonation, with no explanation provided or enquiry made prior to the hearing date. Only the respondents' representatives - all of them - appeared in court. As a result, the application was heard in the absence of the complainants and their legal representatives.

[14] It should come as no surprise that the matter proceeded on the set down date of 25 November 2024, as previously scheduled. It need hardly be re-stated that applications for postponement and condonation are not there for the asking, and an applicant in such circumstances seeks an indulgence. That means the mere act of lodging the application did not grant the complainants the indulgences they sought.

[15] In circumstances where the complainants filed their application one court day prior to a hearing which was set down for two days, the default position, unless the parties were directed otherwise, was for the matter to proceed on the scheduled dates, even if only for the purposes of the hearing of the postponement and condonation applications. When and where else were these applications to be determined?

[16] The chronology in this regard is relevant. Two virtual Directions Meetings were held with the parties' legal representatives, on 16 and 27 August 2024. On 3 September 2024, the Court issued a directive, to the effect that the following issues, which arose from the respondents' answering papers as points *in limine*, were to be determined separately as preliminary issues: (i) misjoinder, (ii) prescription, and (iii) unreasonable delay. The same directive proposed alternative dates for the hearing of the preliminary issues, namely 14 October, or 24 and 25 November 2024.

[17] After some exchange of correspondence between the Court registrar and the parties, the date of 25 November 2024 was agreed. This was confirmed by email correspondence dated 18 September 2024 from the first respondent to the other parties, in which the complainants' attorneys were advised that, unless they indicated otherwise before the end of that week, *"we will assume that 25 November 2024 suits you and we will go ahead with our travel arrangements"*.

[18] On 20 September 2024, the complainants' attorneys recorded that they were experiencing some difficulty in obtaining instructions from their clients, and promised to revert by Friday, 27 September 2024. They did not revert, even when the first respondent's attorneys requested an update on 30 September 2024.

[19] One issue which received attention at the Directions Meeting of 27 August 2024 is the complainants' indication that the claims against the second, seventh (*"the Master"*) and eighth respondents would likely be withdrawn. In this respect, the complainants' legal representatives undertook to revert with notices of withdrawal. Because of the assurances given by the complainants' legal representatives that the claims would likely be withdrawn against those respondents, no directives were issued in respect of the preliminary issues raised by those parties. However, the complainants subsequently indicated that they would not be withdrawing the complaint against the Master. As a result, on 9 October 2024 the Court issued a further directive that the following issues were to be added to the preliminary issues previously delineated, namely (a) the complainants' failure to issue the notices contemplated in section 3 of the Institution of Legal Proceedings against Certain Organs of state Act 40 of 2002; and (b) whether the confirmatory affidavits filed by the complainants comply with the Justice of Peace and Commissioner of Oaths Act 16 of 1969.

[20] On 14 October 2024 the Court's registrar again confirmed the date of 25 November 2024 with the parties for hearing of the preliminary issues, with the addition of 26 November 2024 to accommodate the increased number of preliminary issues that was to be determined. On the same day, the parties agreed to a timetable for the

submission of heads of argument in preparation for the hearing date. In terms thereof, the respondents were to deliver their heads of argument by 8 November 2024, and the complainants were to deliver theirs by 15 November 2024.

[21] On 1 November 2024, the Court registrar once again confirmed with the parties *via* email that the hearing would proceed on 25 November and 26 November 2024. This was formally confirmed by the first respondent's attorneys, who delivered a formal notice of set down to that effect on 5 November 2024. On 8 November 2024 all the respondents delivered their heads of argument in respect of the preliminary issues, as previously agreed.

[22] On 12 November 2024, the complainants' attorneys addressed a letter to the Presiding Judge, requesting postponement of the hearing of the preliminary issues. After objections were noted by all the respondents, the Court directed, on 15 November 2024, that the complainants should bring a formal application, in accordance with the Uniform Rules, for the indulgences referred to and sought in the letter of 12 November 2024.

[23] The application was delivered on Thursday 21 November 2024. On 22 November 2024 the first, fourth and fifth respondent delivered notices of intention to oppose the application, whilst the Master's was delivered on the day of the hearing. The first respondent also delivered an answering affidavit on 22 November 2024.

[24] It remains unexplained why the complainants waited until 12 November 2024 – after all the parties had delivered their heads of argument in compliance with previously arranged timeframes – before notifying the respondents and the Court of their request for postponement. On the complainants' own version, they were aware by 16 October 2024 at the latest, when their counsel withdrew, that they would not be able to proceed with the matter due to lack of funding. There are no details given of what occurred after that date in relation to fundraising or procuring local counsel

instead of their Gauteng-based counsel or *pro bono* counsel. In this respect, the explanation given is not full or satisfactory.

[25] There is also no explanation for why the application was only brought on 18 November 2024 after the court directive inviting the application was issued on 15 November 2024, or before the issue of the directive. The application was brought on a Thursday, 18 November 2024, which effectively left one court day for the respondents to file opposing papers. This, in circumstances where the complainants knew that the application was to be opposed by all the respondents, since they had each made clear in response to the letter of 12 November 2024 that they were opposed to any request for postponement.

[26] Clearly, the application was not brought as soon as the circumstances which might have justified such an application became known to the complainants. And there is no explanation for that conduct.

[27] However, despite the delayed application for postponement and condonation, I am mindful that there is no evidence that the complainants seek the postponement as a delaying tactic. It remains undisputed that funding is their challenge. I have not found any evidence of *mala fide* motives for bringing the application, or that it is being used to obtain an advantage to which the complainants are not legitimately entitled.

[28] Furthermore, and without commenting on the prospects of the claim, the main matter concerns substantive issues relating to justice and fairness. That is one way of construing the complaint, comprising hundreds of pages, which was launched decades after the events complained about. The interests of justice demand that the complainants should have the matter properly ventilated, including by proper consideration of the preliminary issues. A proper ventilation of the matter is not only in the interests of the immediate parties, but also in the broader public interest.¹⁰

¹⁰ *Psychological Society of South Africa v Qwelane and Others* (CCT226/16) [2016] ZACC 48; 2017 (8) BCLR 1039 (CC) para 31.

[29] For those reasons, I am of the view that it is the complainants who will be more prejudicially and finally impacted, if postponement is not granted.

[30] In considering whether the prejudice visited upon the respondents can be fairly compensated by an appropriate order of costs or another ancillary mechanism,¹¹ I am alive to the fact that the reason for the request for postponement is lack of funding. But justice and fairness must work in favour of all the parties, not just in favour of the complainants. After all, it is not disputed that the prejudice suffered by the respondents is not only in the fact that the matter will not be expeditiously resolved, but in the wasted expenses incurred in preparation for the preliminary hearing.

[31] As a result, I am of the view that the complainants should bear the wasted costs of the postponement, on an attorney and own client basis. And given the manner in which the prejudicial conduct unfolded, and to prevent similar circumstances, the complainants should settle those costs before the preliminary proceedings are next set down.

D. ORDER

[32] In the circumstances, the following order is granted:

- a. The hearing of the preliminary proceedings is postponed *sine die*.
- b. The complainants are granted permission to deliver heads of arguments in the preliminary issues 14 days prior to the next set down date.
- c. The complainants are to pay the wasted costs of the postponed proceedings on an attorney and own client basis, and must settle those costs before the next set down date of the preliminary proceedings.

¹¹ Herbststein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 453.

N. MANGCU-LOCKWOOD
Judge of the High Court

APPEARANCES

For the complainants	:	No appearances
Instructed by	:	No appearances
For the first respondent	:	Adv S Khumalo SC Adv Y Peer
Instructed by	:	F Omar & L Mort Edward Nathan Sonnenbergs Inc.
For the fourth and fifth respondent	:	Adv M Bishop Adv E Cohen
Instructed by	:	K Rew & L M Doubell Webber Wentzel Attorneys
For the seventh respondent	:	Adv S Mahomed
Instructed by	:	S Appalsamy The State Attorney Cape Town