



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

In the matter between:
1743/2018

Case No:

MINSHAN AFRICA HOLDINGS (PTY) LTD

Plaintiff

and

AFRICAN SKYS (PTY) LTD

Defendant

Coram: Bands AJ
Date heard: 9 September 2022
Delivered: 13 September 2022

JUDGMENT

BANDS AJ:

[1] This matter came before me on the civil trial roll and concerns the question of wasted costs occasioned by the postponement of the trial matter.

[2] The civil trial roll in Gqeberha is a running roll, with the result that, once a trial commences, it will continue until such time that it has finalised. Implicit in the manner in which the running roll operates, is that where a matter is set down for example on a Tuesday, such as in the present instance, such trial may only commence later in the week.¹

[3] Another feature of the civil trial roll in the division, is that where a practitioner is engaged in a civil trial, and such trial clashes with a brief which the practitioner holds to appear in Supreme Court of Appeal, the trial in the division of this court will stand down until the day following the practitioner's appearance in such court.² This matter, having been set down on the trial roll for Tuesday, 6 September 2022, stood down with leave of the court until Friday, 9 September 2022, at 14h15, to accommodate respective appearances by both practitioners holding briefs herein, in the Supreme Court of Appeal. The relevance of the date and time of the hearing becomes more apparent below.

[4] Following the allocation of the file to me, I was advised on the afternoon of Monday, 5 September 2022, that the respective parties had agreed to the postponement of the matter and that the only issue which arose between the parties was in respect of the wasted costs occasioned by the postponement.

[5] Until such time as the matter came before me on the date of the hearing, no further documentation was placed before me.

¹ Should the trial not have been finalised by the end of the session for which the presiding judge has been appointed to hear civil matters, a case will, of necessity, have to be postponed for finalisation at a later date.

² Rule 5 of the Joint Rule of Practice for the High Courts of the Eastern Cape Province.

[6] I was advised from the bar by Mr Beyleveld SC, who appeared on behalf of the plaintiff, that the plaintiff's main witness, who is ordinarily resident in China, was unable to attend the hearing of the matter in person, given that the area in which he resides, Mianyang City, is presently subject to a covid-19 lockdown, with concomitant travel restrictions having been imposed, limiting travel in and out of the City.³ I was further advised, in an effort to avoid a postponement, the plaintiff's attorney of record had written to the defendant's attorney of record on Friday, 2 September 2022, to request that the witness in question be permitted to give evidence via a virtual platform, which request was not acceded to by the defendant. As a consequence of the aforesaid, the plaintiff requested a postponement of the matter. At no stage was the court called upon by the plaintiff to determine the mode of hearing, the court being the final arbiter in such instances where the parties are unable to reach agreement.

[7] As proof of the lockdown, a document headed "*NOTARIAL CERTIFICATE*", to which a document in Mandarin was attached, was handed up by Mr Beyleveld SC. The said documents were marked as exhibit "A". The content of the notarial certificate bears repetition herein:

"NOTARIAL CERTIFICATE

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³ The Covid-19 global pandemic was caused as a result of a severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2). The aetiology; effects; and global containment strategies, inclusive of flight restrictions and imposed lockdowns, were not only widely documented as from December 2019, when the novel virus was first identified from an outbreak in Wuhan, China, but were felt by all around the world.

Applicant: YAN Lirong, male, born on April 21, 1988, ID card No.: 510703198804210710, passport No.: E21495505.

Issue under notarization: Home Quarantine Notice.

This is to certify that the original Home Quarantine Notice issued by Daomingsi Community Neighbourhood Committee of Puming Road of High-tech Zone of Mianyang City to YAN Lirong on September 9, 2022 conforms to the foregoing copy, and the original is authentic.

*Zhongxin Notary Office
Mianyang City, Sichuan Province (Seal)
The People's Republic of China
Notary: PU Ying (Signature)
September 9, 2022"*

[8] Immediately apparent from the notarial certificate is that the home quarantine notice was issued on 9 September 2022, same being the date on which the matter had been rolled to for the hearing of argument. Moreover, the notarial certificate does little to assist the court in determining the date on which the lockdown commenced, it being silent in this respect. The plaintiff's counsel was unable to shed any light on this aspect other than to state that the plaintiff's attorney of record had become aware of the witness's unavailability, for the aforesaid reasons, on Friday, 2 September 2022; alternatively, a day or two prior thereto.

[9] The plaintiff's attitude was that the postponement had not been necessitated by any blameworthy conduct on its behalf, firstly, because the situation was akin to a *vis maior* and secondly, the matter could have, and should have, proceeded on the basis that the witness be allowed to testify via a virtual platform.

[10] It was accordingly contended on behalf of the plaintiff that the issue of costs ought to be reserved for determination by the trial court. In substantiation of the aforesaid, Mr Beyleveld SC argued that it may transpire that there are circumstances which would absolve the plaintiff from paying the wasted costs occasioned by the postponement, for example if the trial court was of the view that the evidence to be led by the plaintiff's witness was of such a limited nature that the defendant's refusal to accede to the request to allow his evidence via a virtual platform was unreasonable.

[11] Mr Neppen, appearing on behalf of the defendant, on the other hand, contended that this was an appropriate matter for the award of costs in favour of the defendant.

[12] Two further documents were handed up from the bar on behalf of the defendant, both being copies of emails between the parties' respective attorneys of record. On the morning of 6 September 2022, the defendant's attorney of record, in an email addressed to the plaintiff's attorney of record, recorded *inter alia*:

"Your client's request for a postponement of the matter refers.

For our client to properly consider its position in relation to the aspect of costs, can you please provide us with a full explanation of why your witness is unable to attend court this week. Please also provide us with confirmation that your client had booked a flight for its witness to fly to South Africa and a copy of his visa."

- [13] On 7 September 2022, and in response to the aforesaid email, the plaintiff's attorney of record advised that "*we have forwarded your email to our client and await the requested information from client.*"
- [14] Thereafter, at 12h41 on 9 September 2022, approximately an hour and half prior to the hearing of argument, the plaintiff's attorney of record forwarded annexure "A" to the defendant's attorney of record under cover of an email which stated little more than "[p]lease see attached documentation for your attention".
- [15] I enquired from the plaintiff's counsel as to what I should make of the plaintiff's failure to provide confirmation of the witness's visa and/or flight to South Africa, to which he responded that in all likelihood, the witness would not have been able to book a flight or obtain a visa, in light of the travel restrictions.
- [16] There is no evidence before me from which to ascertain (i) the date upon which the lockdown and travel restrictions were implemented; (ii) the date upon which it ought to have reasonably become known to the plaintiff's witness that he would be unable to travel to South Africa to give evidence at the trial; (iii) why the witness's inability to travel to South Africa was only communicated to the plaintiff's attorney of record less than one week prior to the trial; and (iv) what steps, if any, were taken by the plaintiff to secure its witness's attendance at trial prior to becoming aware of the lockdown and travel restrictions.

[17] Presumably, had the lockdown and travel restrictions been implemented shortly before Friday, 2 September 2022, the plaintiff's witness would already have taken steps to procure flights and a visa timeously. It is inconceivable that a prudent litigant would have left international travel arrangements for the weekend before the trial. On the other hand, and in the event that the lockdown and the travel restrictions had been implemented some time before Friday, 2 September 2022, the unavailability of the plaintiff's witness ought to have been communicated to the defendant's legal representatives timeously in order to properly explore the possibility of hearing evidence via a virtual platform; alternatively, to mitigate the wasted costs of the trial date.

[18] In the said circumstances, and in the absence of any further explanation on behalf of the plaintiff, I am unable to find that the plaintiff's conduct lacked blameworthiness to the extent contended on its behalf.

[19] The general rule is that a party whose conduct gives rise to the postponement of a matter must pay the wasted costs occasioned thereby.⁴

[20] In *Sublime Technologies (Pty) Ltd v Jonker and Another*,⁵ it was held at paragraph [3] as follows:

⁴ See *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1996] ZACC 27; 1996 (2) SA 621 (CC); 1996 (4) BCLR 441 (CC) at para 3; *Abbott v Von Theleman* 1997 (2) SA 848 (C) at 854B; and *Mahlangu v De Jager* 1996 (3) SA 235 (LCC) at 246C-E.

⁵ 2010 (2) SA 522 (SCA).

“With regard to costs occasioned by a postponement, the general rule is that the party which is responsible for a case not proceeding on the day set down for hearing must ordinarily pay the wasted costs...”

[21] Even if the circumstances necessitating a postponement are beyond a litigant’s control, it is often the case that the party seeking the indulgence will be ordered to pay the wasted costs.⁶ In *Westbrook v Genrief Ltd*, Broom DJP stated as follows at 222E-H:

“One must see the situation as one in which, although there was no fault on the part of the defendant, it is nevertheless a case in which the plaintiff was ready to proceed, and one in which the plaintiff is being prejudiced by the delay. I’m inclined to exercise my discretion in the plaintiff’s favour. If the ultimate order depended on the ultimate result in the litigation, then that would mean that in all such cases where there had been no fault, but an unforeseeable flooding of a river, or heart attack killing a witness, or whatever, the costs would not be reserved, but would follow the event, ie be costs in the cause. That would, in my judgment, not be the proper approach. What I’m saying is that it would not be proper in all cases in which an adjournment was necessary, but there was no fault of the parties, that costs should be reserved... it is being said many times that litigation is a hazardous enterprise that should not be taken upon lightly, and a situation such as this where a party’s witness dies the day before trial is, in my judgment, one of the hazards of litigation.”

[22] What is clear is that the award of costs remains an issue within the discretion of the court.

[23] In the event that I am incorrect in my assessment of the plaintiff’s conduct containing an element of blameworthiness, I am nevertheless of the view, for reasons akin to those enunciated in *Westbrook v Genrief Ltd*, that there is no reason why the defendant ought to be out of pocket in respect of the

⁶ *Westbrook v Genrief Ltd* 1997 (4) SA 218 (D & CLD); *Davey v Davey* (191/2019) [2019] ZAECPEHC 44 (2 July 2019).

postponement of the matter. The defendant is ready to proceed to trial and ought not to be prejudiced by the unavailability of the plaintiff's witness, such unavailability only having been communicated to the defendant a few short days prior to trial and having been provided with what the plaintiff contends to be supporting documentation of its witness's unavailability, one and a half hours prior to the hearing of the matter.

[24] In the result, the following order shall issue:

1. The trial is postponed *sine die*.
2. The plaintiff is ordered to pay the defendant's wasted costs occasioned by the postponement.

I BANDS

ACTING JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: Adv Beyleveld SC
Instructed by: TN & Associates
137 Water Road, Walmer, Gqeberha

For defendant: Adv Nepgen
Instructed by: Joubert Galpin Searle
173 Cape Rd, Glendinningvale, Gqeberha