

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No. **38700/2016**

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

26 July 2022

THE MINISTER OF POLICE

Applicant

and

DZIVA WINSTON

Respondent

In re:

DZIVA WINSTON

Plaintiff

and

THE MINISTER OF POLICE

Defendant

JUDGMENT ON POSTPONEMENT

RETIEF AJ:

This matter has been heard via MS Teams and disposed of in terms of the directives of the Judge President of this Division. The order was handed down on

the date of hearing being the 3rd June 2022, the written judgment is accordingly hereby, as requested, published and distributed electronically.

[1] The applicant seeks a postponement of the trial which was set down for the 31 May 2022, together with ancillary relief. The ancillary relief appears to be Judicial authority to launch an application to rescind a striking out order of the applicant's defence granted on the 20 August 2019 final interdictory relief ordering the respondent's attorney to file a power of attorney in terms of rule 7.

[2] I intend to deal with the request for postponement first and shall thereafter deal with the ancillary relief in the order as prayed for, save for the aspect of costs.

PROCEDURAL BACKGROUND TO APPLICATION FOR POSTPONEMENT

[3] The respondent instituted action against the applicant for the recovery of damages suffered and legal costs incurred subsequent upon his alleged unlawful and wrongful arrest and detention on the 9 October 2015 by members of the South African Police Services ("SAPS") who, at the time, were allegedly in the employ of the applicant.

[4] The trial was set down for adjudication on the Monday of the 31st May 2022. At the calling of the trial roll, the respondent's Counsel informed both the Court and the applicant for the first time that he had delivered an application, in which it simultaneously sought an order of separation in terms of rule 33(4) and leave in terms of rule 38(2) for a the respondent's evidence to be tendered by way

of an affidavit ("the application"). The affidavit to be tendered was indeed the founding affidavit in support of the application.

[5] The respondent intended moving the application prior to the commencement of the matter being heard before the Trial Court. The applicant on the other hand, did not receive formal notice of the application prior to the date of the hearing but, on the date of the hearing and during roll call.

[6] The applicant's position, *supra*, too, is to be considered against the backdrop of the applicant's attorney and Counsel only having received access to all the relevant documents filed and duly uploaded onto Caselines for trial purposes, on the morning of the trial.

[7] Delayed access occurred as a direct result of the respondent's attorneys failure to provide the applicant's legal team with access to Caselines, notwithstanding numerous requests to do so and in direct contrast to his own compliance affidavit deposed to of the 11 April 2022. The respondent remained silent on this aspect.

[8] The request for a postponement was now brought as a direct result of the application. The applicant who know sought the postponement was granted an opportunity to file a substantive application for postponement. The hearing of the application was remanded to Friday the 3rd June 2022 thereby allowing both parties time to exchange affidavits in the event of opposition.

[9] The Court gave direction for the exchange of affidavits as follows: the applicant was directed to deliver its application for postponement by 16h30 on 1st June 2022, and the respondent to serve it's answer by 2nd June 2022. The purpose

of the direction was to ensure that by the 3 June 2022 the application for the postponement was properly before Court. For allocation to a Judge on the 3rd June 2022.

[10] Although the parties achieved just that, by the time the application was heard before me, the respondent's Counsel nonetheless informed me that his attorney only received unsigned affidavit copy of the applicants papers on the 1st June 2022 and thereafter, a signed copy was ultimately delivered on 2nd June 2022 at 16h14. The respondent's Counsel initially wished to take the point of delay by stating that the application for postponement was "dead on arrival". However, what the respondent's Counsel failed to inform me was that already on the day before the trial, 30th May 2022, his own attorney became aware, when attempting to serve the unsigned copy of the pre-trial minute of the 27th May 2022, that an emergency situation existed at the applicant attorney's building rendering the service of the final pre-trial minute impossible.

[11] It later transpired that the emergency was indeed a fire in the SALU building in which the State Attorneys' offices were situated. The building was evacuated as it was declared unsafe to occupy. The pre-trial minute of the 27th May 2022 only signed by the respondent ("the minute") was then served on the applicant *via* e-mail in the afternoon of the 30th May 2022.

[12] The fire, according to the applicant's Counsel logistically caused unforeseen delays in the State Attorneys Offices, such delays including the ability to serve documents, access to files, to documents, to information, the ability to print and scanning facilities. A factor for consideration in the delay of the applicant's ability to serve its signed paper's on the 1st June 2022 by 16h30.

[13] From the facts it appeared that a delay was anticipated by both parties and not unreasonable under the present unforeseen circumstances. Furthermore, the respondent had insight into the founding papers, albeit not signed by the 1st June 2022 as the applicant had e-mailed an unsigned copy thereof in the interim. The respondent therefore had an insight into the content of the evidence to be relied upon in support of the application for postponement on the 1st June 2022. Notwithstanding the unforeseen delay, the respondent was able to prepare and deliver its answering affidavit opposing the postponement on the 2 June 2022, the same day on which the applicant finally delivered their signed founding affidavit.

[14] The intended papers for argument was before Court on the 3rd June 2022. Having regard to all, the respondent's Counsel aptly did not take the point of delay any further nor did he expand on it further in his in argument. He rather conceded that he raised the point of delay merely to bring it to my attention. The application for postponement was adjudicated on all the papers filed by the 3rd June 2022.

RELEVANT ANTICIPATED PROCEDURAL STEPS

[15] Although the applicant's Counsel in argument made a meal of the pre-trial minutes uploaded onto Caselines by the respondent's attorney in that, the pre-trial minute of the 20 October 2019 was missing and the remaining uploaded pre-trial minutes were not signed jointly by the parties, such details became irrelevant. The only relevance of the uploaded pre-trial minutes, for purposes of the postponement and costs, lay in the consideration of what procedural steps could have been anticipated, whether agreed to or not, by both parties on the date of trial. The following relevant procedural steps *vis n vis* all the uploaded pre-trial minutes, could have been anticipated by both the parties:

- 15.1 The applicant's recorded intention to bring a rescission application of the order to strike out the applicant's defence ("*striking out order*"). The reason to rescind is foreshadowed by the pre-trial minute of the 7 December 2020 in which the applicant's record that they wished to investigate the how the order to compel discovery in terms of rule 35(7), was granted. The applicant's intention to rescind was further recorded in the last pre-trial minute held on the 27 May 2022 signed by the respondent. Although anticipated, the applicant had not filed an application to rescind the striking out order before or on the date of trial.
- 15.2 The respondent's intention to separate the issues in terms of rule 33(4). Although an agreement between the parties to separate the issues, aforesaid, remains in dispute, the respondent's intention was recorded and brought to the applicant's attention, albeit for the first time, with the delivery of the unsigned pre-trial minute in the afternoon of the 30th May 2022. The respondent did not deliver a formal application before the trial date.
- 15.3 That respondent's intention to tender his evidence by way of an affidavit in terms of rule 38(2) was anticipated, albeit for the first time, with the delivery of the unsigned minute in the afternoon of the 30th May 2022. Any agreement thereto remained in dispute. No version under oath was provided to the applicants for consideration, whether for purposes of raising an objection nor for trial preparation. From the application, it appeared that the respondent wished to rely on his founding affidavit in support of the application as his

evidence before the Trial Court. The respondent did not deliver a formal application before the trial date.

[16] In argument, the applicant's Counsel contended that the applicant wished to oppose the application.

[17] The applicant's Counsel contended further that it had always been the applicant's intention to proceed with the rescission application of the striking out order as echoed in the pre-trial minutes, however, but for the application, no tactical advantage on the pleadings as they stood, triggered the necessity.

[18] In consequence, the application was the trigger for the necessity of the applicant's request for a postponement and ancillary relief, including Judicial consent to bring a rescission application.

[19] In fact, so the applicant's Counsel argued, the applicant, *inter alia*, relied on the fact that the respondent would give *viva voce* evidence at trial in order that his version could be tested under cross-examination. This, notwithstanding the fact that applicant could not put a version to Court or to the respondent.

[20] The applicant's Counsel argued that the respondent appeared erroneously to proceed to trial with the application on the premise of a default basis. Nothing was further than the truth, as the applicant on the morning of the trial before notice of the application was ready to proceed to trial on the pleadings as they stood.

[21] Conversely the respondent's Counsel gave no assurances that the respondent was ready to proceed to trial without seeking the relief in the application. No formal withdrawal of the application was tendered.

[22] Having regard to all the facts, it therefore appeared that a postponement was inevitable, a postponement was an anticipated possibility for both parties prior to the date of hearing and the postponement was only requested on the date of hearing due to the delivery of the application at such a late stage.

[23] Against this backdrop, I now turn to the general principles applying to postponements.

GENERAL PRINCIPLES APPLYING TO POSTPONEMENTS

[24] If a *bona fide* reason is furnished for a postponement by the applicant, and there is a point to such postponement and if the respondent will not be unduly prejudiced by such postponement, such an application should be granted.

[25] In *Erasmus, Superior Court Practice, Vol.2, page D1-552A*, 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) The discretion must be exercised in the 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 judiciously, or that it has been influenced by wrong principles or a misdirection of 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, is the decision granted or refusing a postponement may be set aside on appeal.

- c) *An applicant for a postponement seeks an indulgence. The applicant must show strong reasons, ie. the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. A court should be slow to refuse a postponement where the true reasons for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delay 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 timeously, as soon as the circumstances which might justify such an application become known to the applicant. If, however, fundamental fairness and justice justifies a postponement the court may in an appropriate case allow such an application for postponement even if the application was not 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 in 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.”*

[26] Considering these principles and the sudden change in the trial landscape by the relief sought in the application, the consideration of fairness dictates that the possibility of the trial not proceeding, at all, was apparent.

[27] The applicants reason for the postponement was not due to its unreadiness to proceed but due to an untimely application brought by the respondent.

[28] The trial was only set down for 1 (one) day and the respondent too, must have anticipated that the applicant who was entitled to oppose the application may have required time to file opposing papers. At best, but for the application, the day set aside for trial, by agreement, would have been consumed by arguing the application itself.

[29] Under the circumstances a postponement should not be refused and no prejudice, on the procedural facts presented itself.

[30] The applicant should succeed with prayer 1.

[31] I now turn to deal with the remaining relief sought by the applicant.

RECISSION OF THE STRIKING OUT ORDER

[32] The applicant too, sought Judicial credence for it to bring a rescission application of the striking out order granted by Munzhelele AJ on the 20 August 2019 in which, the applicant's defence was struck. The striking out order was obtained in terms of Rule 35(7) for the applicant's failure to discover in terms of Rule 35(1) (order to compel). The applicant contending that the order to compel and subsequent striking out order was obtained without its notice. This is notwithstanding proof of service by the respondent.

[33] The reason for the rescission however compelling is for the Court, at the time the application to rescind is brought, to decide.

[34] Furthermore, no basis for the applicant seeking Judicial authority to launch an application for rescission was clear from papers nor was such basis expanded in argument. The only plausible reason could be that the applicant hoped, in this way, to rely on a Court order as its authority to launch the application for rescission, in circumstances when time constraints from date of becoming aware of such order, was a bar. The applicant is not entitled to such authority and must bring the application on its own merit.

[35] In consequence, prayer 2 must fail.

RELIEF IN RESPECT OF RULE 7

[36] The relief sought in prayer 4 by the applicant's is framed as final interdictory relief in circumstances when a rule 7 notice had been delivered on the 2 June 2022.

[37] The respondent has responded to the notice and filed a special power of attorney referred to as annexure "W19" to its opposing papers.

[38] In circumstances where the applicant is not satisfied with the response to the rule 7 notice, the applicant is not without remedy in terms of the uniform rules.

[39] The applicant too, did set out grounds to sustain final interdictory relief and in consequence prayer 4 must fail.

COSTS

[40] The only other outstanding aspect is costs. The applicant in prayer 2 sought costs as against the respondent in circumstances of opposition. The applicant in argument now sought costs in the cause.

[41] The respondent who brought the untimely application did not tender costs but sought costs against the applicant.

[42] In exercising my discretion and considering all the circumstances it appears fair to both parties that costs be awarded in the cause.

And so, I make the following order:

1. The matter is postponed *sine die*;
2. Costs to be costs in the cause.

L.A. RETIEF
Acting Judge of the High
Court, Pretoria

Appearances:

Counsel for Applicant: Advocate M. Bothma
079 717 0616

Counsel for Respondent: Advocate FM Masweneng

Date matter heard: 3 June 2022

Date of Judgment: 3 June 2022

Reasons requested: 21 June 2022

Reasons supplied: 26 July 2022