



**IN THE SPECIAL TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF  
THE SPECIAL INVESTIGATIONS UNIT AND  
SPECIAL TRIBUNALS ACT 74 OF 1996**

**(REPUBLIC OF SOUTH AFRICA)**

CASE NUMBER: MP03/2021

In the matter between:

Special Investigating Unit

Applicant/ Plaintiff

and

Zeelwa Trading PTY (LTD)

Respondent/ First Defendant

Mpumalanga Department of Social Development

Second Defendant

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**REASONS FOR THE ORDER POSTPONING THE TRIAL**

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**Summary** – review of the contract the second defendant awarded to the first defendant for the procurement of Personal Protective Equipment supplies.

Application for a postponement of the trial to compel witnesses to file witness statements and secure their attendance at the trial by way of subpoena.

**MODIBA J:**

[1] The Special Investigation Unit (SIU) seeks a postponement of the trial scheduled for 13 to 17 June 2022 in order to secure witness statements and the attendance of two of its witnesses for the purpose of testifying at the trial. In the action, the SIU seeks to review and set aside several contracts the second defendant awarded to Zeelwa Trading (Zeelwa) to supply Personal Protective Equipment to it. It alleges lack of compliance with the applicable constitutional, statutory and regulatory provisions. Zeelwa is the only party opposing both the action and the present application.

[2] Erasmus<sup>1</sup> summarises the applicable principles with reference to the applicable authorities are set out below:

- “(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.
- (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 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

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<sup>1</sup> Superior Courts Practice, RS 17, 2021, D1-555

respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.”

[3] Given that the SIU seeks a postponement for the purpose of securing evidence, it has to also satisfy the Tribunal that the evidence of these witnesses is relevant, material and available.

[4] The SIU contends that it meets all the above requirements. It has tendered the costs of the indulgence on the party and party scale. Zeelwa denies that the SIU has met the above requirements. In the event that the Tribunal finds that the SIU makes out a case for the postponement, it was contended on behalf of Zeelwa that it should be awarded costs on the attorney and client scale.

[5] There is no basis on which to find that the application is not *bona fide*. The SIU has displayed an undisputed intention to proceed with the action. It issued summons on 14 December 2021. The first case management meeting between the parties was held on 2 February 2022, where in addition to an agreement in respect of dates for filing pleadings and the required documents for trial preparation purposes, the trial dates were agreed and directives accordingly issued. Pleadings closed at the end of March 2022. The parties have made discovery. The SIU's witness statements were due on 26 April 2022. The respondent's were due on 10 May 2022.

[6] Although the SIU has explained the difficulties it has encountered in securing the evidence of its witnesses, given that its witness statements were due on 26 April 2022, it has not provided a full explanation for the delay in filing the statements. It appears that it only awakened to the difficulties in obtaining the witnesses statements on the eve of the trial, almost two months after the statements were due. If it intended to meet the Tribunal's directive to file the witness statements on time, it would have become aware earlier that these witnesses had become recalcitrant and would have taken the necessary compelling measures to obtain the statements and secure their attendance at the trial.

[7] The respondent is not standing before the Tribunal with clean hands. It lay supine for almost two months when the SIU witness statements were overdue. It proceeded to file its witness statements unaware of the evidence of the SIU witnesses. It offered no explanation why it did not bring an application to compel. The effect of its opposition to the present application is to non-suit the SIU as the latter will not be able to prove its case without the two witnesses.

[8] The Constitutional Court has warned courts be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power.<sup>2</sup> In *Tasima*, the Constitutional Court further stated that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of a court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and propriety before overlooking a late review (in this case, compliance with Tribunal's directives).

[9] In the light of the respondent's own supine conduct, as well as the fact that baring the outstanding issues that are subject to this application, the necessary trial preparations have been undertaken, justice and equity would not be served to non-suit the SIU. The only outstanding matters for the trial to run are those that gave rise to this application. The evidence of these witnesses is material, relevant and available. The witnesses are employed by the State. The SIU does not only intend to established its case on the basis of the applicable Treasury Regulations as was contended on behalf of Zeelwa, the witnesses will also testify regarding the context and reasons for applying the relevant Treasury Regulations.

[9] The respondent complains of being prejudiced by these proceedings as it mainly trades with the state. It further complains of the travelling and accommodation costs it incurred to attend the trial at the seat of the Tribunal in Johannesburg. This prejudice would have been abated if it did not lie supine at the face of the SIU's non-compliance with Tribunal Directives.

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<sup>2</sup> See *State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd* 2018 (2) SA 23 (CC) at paragraphs 47 to 52 as well as *Khumalo and v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC) (2014) and *Department of Transport and Others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) (2017 (1) BCLR 1; [2016] ZACC 39) (*Tasima*) in para 142 referenced in these paragraphs in *Gijima*.

[9] Under these circumstances, it is judicious to keep the question of costs reserved in order to determine the scale of costs at the trial having regard to all the circumstances of the case.

[10] In the premises, the following order is made:

**ORDER**

1. The order made on 13 June 2022 postponing the trial to a date to be arranged with the parties' legal representatives is confirmed.
2. The scale of costs stands over for determination at the trial.

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**JUDGE L.T. MODIBA**  
**PRESIDENT OF THE SPECIAL TRIBUNAL**

**APPEARANCES**

Counsel for the applicant: Adv. S Zimema

Attorney for the applicant: Ms S. Zondi, State Attorney, Pretoria

Attorney for 1<sup>st</sup> respondent: Mr D. Mashego, Dima Mashego Attorneys

**Date of hearing:** 13 June 2022

**Date of reasons were furnished:** 15 June 2022