NOT REPORTABLE
11 SEPTEMBER 2007

IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 17088/05

In the matter between:

CHRISTOFFEL THEUNIS BOTHA Plaintiff

and

MINISTER OF SAFETY AND SECURITY Defendant

JUDGMENT

MURPHY J

1. This matter was allocated to me on 23 August 2007. Unfortunately I did not have an opportunity to peruse the file prior to the matter being called. It is a straightforward matter regarding the question of costs arising out of an agreed postponement. Nevertheless, I deemed it necessary to read the file and to consider a judgment of Satchwell J handed up by counsel before giving judgment. Moreover, counsel for the defendant made

certain remarks about this case being one of many cases that would need to be postponed because of administrative changes in the defendant's office. I accordingly deemed it prudent to reserve judgment.

2. On 23 May 2005, the plaintiff issued summons against the defendant for damages arising out of his alleged unlawful arrest and detention on 12 August 2004, as well as for the violation of certain of his rights during the alleged unlawful arrest and detention. He seeks damages in the amount of R500 000.

3. After the close of pleadings, on 16 November 2005, the attorneys for the plaintiff caused to be issued a notice of application for a trial date. The trial was initially set down for 27 November 2006. However, on 24 October 2006, the matter was removed from the roll and set down again for 23 August 2007. All the parties have thus had an ample opportunity to prepare for trial.

4. Prior to the first trial date, the plaintiff was compelled to deliver an application (set down for 27 October 2006) to compel discovery. Mr Kemp, who appeared for the plaintiff, submitted the application to compel showed the defendant was delaying the resolution of the dispute and a dilatory approach, is relevant to the present application for a punitive costs

order.

5. It is common cause that after several attempts to convene a pre-trial conference in terms of rule 37, the parties were only able to convene on 17 August 2007, that is 4 court days before the trial. Prior to this, almost 3 weeks before the trial, the plaintiff had prepared an agenda and numerous questions for the purposes of the pre-trial conference.

6. On the day of the pre-trial conference counsel for the defendants arrived and informed the plaintiff's representatives that he had only received the agenda that day and was not in a position to respond to the questions raised as he had received no instructions and in fact had only been briefed that morning. From this it is evident that at the time of the pre-trial conference it was unlikely that the defendant would be in a position to proceed to trial.

7. Earlier, about 2 weeks before the pre-trial conference, the defendant's attorney contacted the plaintiff's representatives and requested a postponement. The plaintiff was prepared to agree to a postponement provided costs were tendered on an attorney-client scale, such costs to include the costs of two counsel.

8. The defendant's attorney did not revert to the plaintiff and only when the roll was called on the morning of 23 August 2007 was a tender made of costs, but only on a party-party basis. Mr Kemp submitted on behalf of the plaintiff that the defendant's handling of the action and the preparations for trial fell considerably short and justified a punitive costs award. He contended that the defendants had ample time to prepare, were well aware of the trial date and their dilatoriness had caused considerable prejudice to the plaintiff who had traveled from Komatipoort together with his witnesses.

9. Counsel for the defendant readily conceded that the defendant was not in a position to proceed and that he had indeed received instructions at a late stage. The reasons for this, he explained, were that the defendant was in the process of centralising problems within the department with regard to a number of matters that were coming to court. He informed the court that there would be similar problems with other matters. Additionally, the present matter had been tasked between various persons within the department or the office of the State Attorney and this accounted for the failure to properly prepare. Moreover, the State Attorney had experienced difficulty in locating witnesses. He accepted that there was prejudice to the plaintiff but submitted that there had been no intention to cause prejudice in the sense that the prejudice had not

been caused wilfully or with *mala fides*. Furthermore, this was the first postponement and it should not be the court's attitude that a state of non-readiness necessarily justified costs on an attorney-client scale. He was compelled though to admit that there had been no indication given to the plaintiff prior to the day before set down that the defendant would not be in a position to proceed.

10. It is clear from the submissions made that the defendant is conducting this litigation without having adequately researched the merits of it. Being a government department, it is able to use taxpayer's money to gain a tactical advantage in relation to the plaintiff and does so perhaps in the hope that the plaintiff ultimately will be compelled to abandon the litigation. There is no direct evidence that this is in fact the case, though the defendant's lackadaisical attitude suggests it is unconcerned about the prejudice that it may be causing the plaintiff. Moreover, the defendant's failure to furnish counsel with proper instructions, as well as the failure to locate and consult with witnesses, has rendered both the pre-trial conference and the first day of trial a meaningless exercise. It is litigating this matter without the information required to determine whether litigation is either necessary or desirable.

11. While I accept that the defendant has most likely not acted wilfully or with

mala fides, it is abundantly clear that the persons employed by the defendant to handle this matter have acted with gross-incompetence, unprofessionally or recklessly. There is no requirement before ordering costs on an attorney and client scale that there be evidence of wilfull conduct. It is sufficient, in my opinion, that the behaviour of the defendant in the conduct of this trial be reprehensible and dilatory to the extent that it shows a disregard for the proper and professional conduct of the litigation.

11. Moreover, the defendant should be put on notice that the "centralising" of the problems relating to matters pending adjudication will not be considered adequate justification for delaying trials which result in prejudice to the other parties. Being an organ of state, the defendant is obliged in terms of section 195 of the Constitution to maintain a high standard of professional ethics, accountable public administration and to use public resources efficiently and effectively. Conducting litigation in this manner falls short of the constitutional standard and on that ground will invariably justify a punitive costs award.

12. On 23 August 2007 I postponed the matter *sine die*, but I repeat the order here for the sake of completeness.

13. In the result, the following orders are made:

1. The matter is postponed *sine die*.

2. The defendant is ordered to pay the wasted costs occasioned by the postponement on the scale of attorney and client, including the costs of employing two counsel.

3. The following persons are declared necessary witnesses for the purposes of this costs order:

   Fernando Inquaano

Christoffel T Botha (the plaintiff)
Piet van Dyk

JR MURPHY
JUDGE OF THE HIGH COURT

Date Heard: 23 August 2007
For the Applicant: Adv P Kemp SC, Pretoria
Instructed By:De Swardt Vögel Mahlafonya, Pretoria
For the Respondent:
Instructed By:The State Attorney