REPUBLIC OF SOUTH AFRICA

NORTH GAUTENG HIGH COURT
PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case no:820/2013

In the matter between: 5/8/2014

ROBERT STEPHEN TIMOTHY PRITCHARD **APPLICANT**

AND

SHEILA SUZANNE PRITCHARD **RESPONDENT**

In re

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

..... 07/08/2014

SHEILA SUZANNE PRITCHARD **PLAINTIFF**

AND

ROBERT STEPHEN TIMOTHY PRITCHARD **1ST DEFENDANT**
THE MASTER OF THE HIGH COURT **2ND DEFENDANT**

JUDGMENT

BAQWA J

[1] This is an application for postponement of this matter which was set down for trial.

[2] The applicant, Robert Pritchard is the son of the late Frank Pritchard who is also an executor in the latter's estate.

[3] Respondent, Sheila Pritchard is the applicant's aunt who is also a sister to the late Frank Pritchard (Pritchard Senior).

[3] It is not necessary for me to give a detailed account of the background to this case as the parties are **au fait** with the contents of the papers which have been filed regarding this application.

[4] I am merely going to give a brief synopsis of the facts which led to the present application.

[5] In April 2007 Pritchard Senior executed a will in terms of which he bequeathed his estate to the applicant and the respondent. During September 2010 he further executed a first codicil to the will in terms of which he gave and bequeathed an amount of R1 million as a pre legacy to the respondent.

[6] During April 2011 Pritchard Senior underwent a coronary by-pass operation and he was by then eighty eight years old. Shortly thereafter, he suffered a large brain haemorrhage which impacted his health and mental capacity.

[7] Before Pritchard Senior passed away on 10 February 2012, he executed a further will on 14 January 2012 in terms of which he bequeathed his entire estate to the applicant. Applicant was appointed as executor by the Master of the High Court in terms of that will on 20 April 2012.

[8] The respondent instituted an action on 9 January 2013 in which she seeks an order declaring the will executed on 14 January 2012 to be null and void and an order declaring the will of 2007 to be declared valid and of full force and effect.

[9] The action by the respondent was set down for hearing on 4 November 2013 but on that day applicant brought an application for a postponement. One of the submissions by the applicant at that hearing was that the matter could possibly be resolved through mediation.

[10] The application for postponement was subsequently resolved by agreement between the parties in the following terms:

10.1. The matter was postponed to the first available preferential date which the registrar was able to allocate.

10.2. The applicant was ordered to pay the wasted costs occasioned by the postponement.

10.3. The applicant and the respondent were ordered to undergo a mediation process before an agreed mediator as soon as possible.

[11] After a number of developments which included both parties changing the sets of attorneys who were representing them, the matter was again set down for hearing on 4 August 2014. It is at this point that I now have to adjudicate upon the application for postponement.

[12] Applicant was represented by Lorna Ferguson attorneys as at 4 November 2013 and thereafter by Mohammed Randera Associates Attorneys. He avers that the latter firm became conflicted in the case after which they withdrew as attorneys of record whereupon applicant reverted back to attorneys Lorna Ferguson as his legal representatives. He has however withdrawn his mandate from those attorneys and is currently represented by attorneys Emma Nel who received instructions on 28 July 2014.

[13] Upon receipt of instructions from applicant, Emma Nel attorneys advised attorneys for the respondent that due to the late instructions and the fact that they did not have the relevant documents pertaining to the trial they were requesting that the matter be postponed and that they were tendering wasted costs.

[14] By email of 31 July attorneys Glynis Emeric indicated that their client was not prepared to agree to a postponement and that any application in that regard would be vigorously opposed.

The law

[15] The principles which I have to apply in applications of this nature are succinctly set out in **The Civil Practice of the High Courts-Herbstein and Van Winsen page 755** where it is stated as follows:

*"(1)The trial Judge has a discretion as to whether an application for a postponement should be granted or refused (**R v Zackey 1945 AD 505**)*

*(2) That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons **R v Zackey (supra); Madnitsky v Rosenberg 1949 (2) SA 392(A) at 398-9; Joshua v Joshua 1961 (1) SA 455 (GW) at 457 D)**...*

(5) 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.

Madnitsky v Rosenberg (Supra at 389-9)

(6) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application became known to the applicant.

Greyvenstein v Neethling 1952 91) SA 463 (C)

Where, however, fundamental fairness and justice justifies a postponement, the court may in an appropriate case allow such an application, even if the application was not timeously made.

***Greyvenstein v Neethling (Supra at 467F).**"*

[16] **In casu**, respondent submits that applicant is employing a delaying tactic which he successfully employed on 4 November 2013. Counsel for the respondent employs the "kyk weer" analogy from television to illustrate the dilatoriness of applicant's application. On the contrary, counsel for the applicant Ms Breytenbach submits that there is no dilatory behaviour on the part of applicant and that whilst the facts on which the present application is based may be similar, they are not the same.

[17] I have had to examine these contesting submissions in order to determine an appropriate decision. I have done so with particular reference to the letter annexure RPI dated 29 July 2014 addressed to the applicant by Lorna Ferguson Attorneys. That letter discusses the failure of the applicant to attend an appointment which has been set for 8 July 2014 and at which applicant ought to have given further instructions and signed certain documents. The content of the documents to be signed would have virtually denuded applicant not only financially but also of whatever he would potentially benefit from the estate in question. This seems to have frightened applicant to a point where he avoided making contact with Mrs Ferguson and sought to instruct a new set of attorneys.

The letter (RPI) on the other hand indicates that applicant did not totally avoid making contact with the law firm concerned. He had stayed in contact with other individuals who were working with Mrs Ferguson on the case.

Further, besides the seemingly exorbitant fees charged, the content of the letter refers to issues regarding preparation for trial such as discovery, notice of substitution of Attorneys of record, and a request for a pre-trial meeting with Johnny Kaplan and Glynis Emeric, respondent's new attorney.

[18] The Ferguson letter does not to me indicate a litigant who had taken a lackadaisical or supine approach to the present litigation. Rather, it indicates a litigant who had entrusted the conduct of his case to an attorney who was willing to act on his behalf albeit on rather unusual terms.

[19] This to me explains the true reason for the party's non-preparedness and his unreadiness to proceed. The uncanny similarity with the events of 4 November 2013 do not detract from the fact that the letter of 29 July did introduce an **actus novus interveniens**. The new attorney instructed by him

acted timeously as soon as the new circumstances came to light, to convey applicant's desire for a postponement to the respondent's attorneys.

[20] Another factor which bears consideration is the prejudice which will be caused to the respondent if the postponement is granted against the prejudice which will be caused to the applicant if it is not.

Nelson Mandela Metropolitan Municipality v Greyvenouw CC 2004(2) SA 81 (E) at 90-91

It has been suggested in the papers before me that there may be a depletion of the estate that is occurring in the interim. This would be prejudicial to the parties if that is the case but insufficient evidence was tendered for me to make a definitive finding in this regard. Before I gave this judgment respondent sought to hand in further evidence in this regard which was justifiably objected to by the applicant and I rule that accepting that document is refused. In any event if depletion is occurring I am certain that respondent's legal representatives know what to do.

[21] Needless to say, a postponement does cause the respondent a measure of prejudice by preventing her to have her day in court having done the necessary preparations. I accordingly intend to make an appropriate costs order in this regard.

[22] Before making the order, I deem it appropriate to make reference to the dictum of Harms JA in the case of **Take and Save Trading CC v Standard Bank of SA Ltd 2004(4) SA 1 SCA at 4-5** where he says:

"A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources. One of the oldest tricks in the book is the practice of some legal practitioners, whenever

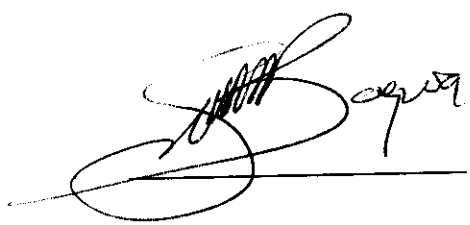
the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right."

I trust that applicant will take note that the courts are fully aware of these or stratagems or shenanigans and that he should not fall into that trap in future.

[23] In the result, having considered the evidence, the law and the submissions by counsel I have come to the conclusion that the following is an appropriate order:

23.1. The above matter is postponed to the first available preferential date which the registrar is able to allocate.

23.2. The applicant is to pay the wasted costs occasioned by the postponement on an attorney and client scale which shall include the costs of employment of one counsel.



S.A.M BAQWA

(JUDGE OF THE HIGH COURT)

Counsel for the applicant:	Adv N Breytenbach
Instructed by:	Emma Nel Attorneys
Counsel for the respondent:	Adv J.L Kaplan
Instructed by:	Macartney Attorneys