

KOOVERJIE J

- [1] I have been seized with a matter where I am required to make a determination as to whether the parties are entitled to costs arising out of the postponement of this matter.
- [2] It is not in dispute that the matter has to be postponed due to the fact that the recent discovery of certain photographs may in all probability constitute material evidence. I have noted that the applicant (the defendant in the trial) sought this postponement and had done so justifiably. The applicant seeks costs for such postponement but request a costs order on an attorney and client scale.
- [3] The applicant further sought the attorney and client costs in respect of this postponement application as well.
- [4] The respondent, on the other hand, sought that the costs stand over, alternatively that the costs be reserved.
- [5] It is known to the parties that in awarding costs this court has a discretion which should be exercised judicially upon the consideration of the facts in the matter and that, in essence, a decision be made where fairness to both sides should be considered. This requires me to consider the circumstances that has led to the postponement, the conduct of the parties and any other factor which may have a bearing on the issues of costs and accordingly make an order which is fair¹.

A POSTPONEMENT OF THE TRIAL COSTS

¹ Erasmus Superior Court Practice 2nd Edition, Vol 2, pages D5-5 – D5-26

- [6] It is necessary, firstly, to deal with the postponement of the trial proceedings. In my view, it is inevitable that the respondent should pay the wasted costs pertaining to the postponement of the trial. The respondent has furnished the photographs at the eleventh hour. It is due to this new evidence which justifies the postponement.
- [7] The late discovery of the photographs was not due to any delaying tactics on the part of the respondent (being the plaintiff in the trial). Neither was evidence to the contrary put before me to demonstrate a contrary finding. *Ex facie* the correspondence it appears that these photographs were in the respondent's daughter's possession and she had brought them to the attention of her father around 5 May 2022.
- [8] It is no doubt that the matter has to be postponed as both parties will require time to assess and consider the relevance of the new evidentiary material. Furthermore, it has been noted that various experts are involved in the matter and would have to defer thereto. It is envisaged that the experts may possibly file further supplementary summaries on their opinions.
- [9] Consequently, it is not only the applicant (the defendant in the trial) and the respondent (the plaintiff in the trial) who will need the indulgence to consider the photographs.
- [10] I have been advised that the photographs appear to show a condition of the wound at various stages after the initial surgery. I have also been advised that the evidential value of the photographs would have to be considered, particularly as to when and how the photographs were taken.

[11] I am, however, not amenable to grant a punitive costs order. Recklessness on the part of the respondent or that the respondent withheld these photographs intentionally or with a purpose to delay the trial proceedings has not been established.

[12] In my consideration I have also noted that there was no adverse or dilatory conduct on the part of the respondent regarding the trial proceedings prior to this discovery issue.

B COSTS OF THE POSTPONEMENT APPLICATION

[13] The second issue as to whether the respondent should bear the costs of the postponement application and moreso on an attorney and client basis. I am of the view, firstly, that the respondent's conduct justifies that it bears the costs of the postponement application.

[14] I particularly state so for the following reasons:

- (i) it appears that the photographs had come to light around 5 May 2022;
- (ii) on 6 May 2022 the attorney for the applicants requested a postponement setting out the importance of the said evidence. In its correspondence ("TB1") it requested that the matter be postponed *sine die* and that the respondent bears the wasted costs of the postponement and which costs would include but not be limited to the costs of counsel and the preparation and reservation fees of Dr Vlok;
- (iii) in the said letter, the respondent was further advised that there is no agreement for a postponement, then the postponement application would be prepared and filed. In such circumstances seek punitive costs against the respondent;
- (iv) on the same day, 6 May 2022, the response from the respondent is as follows:

“We do not agree to a postponement of the matter based on the suggested grounds. We confirm that the photo and the discussion only came into our possession very recently and was shared with you within hours of receiving same.

We confirm that the plaintiff shall call the author of the photographs and lead evidence in this regard. The plaintiff denies any prejudice caused to the plaintiff accordingly.”

At that stage three other photographs were also discovered;

- (v) the applicant argued that due to the respondent's conduct in refusing to agree to the postponement, a punitive costs order was warranted;
- (vi) it was also pointed out that the invitation to have the matter postponed and the respondent pay the costs on a party and party scale was on the table until Monday, 9 May 2022;
- (vii) indulgence was extended until 14:00 on Monday, 9 May 2022, for the parties to amicably argue to the postponement on the aforesaid terms;
- (viii) it was only upon the parties being unable to resolve the matter, that the applicant persisted with the punitive costs order. I have noted that the postponement application was filed on Saturday, 7 May 2022, and an answering affidavit only came to light on Monday morning, on 9 May 2022;
- (ix) it was reiterated that due to the respondent's conduct in not acceding to the postponement from the outset, the unnecessary costs of the postponement was incurred;
- (x) I have further taken cognisance the correspondence between the parties' instructing attorneys on Sunday evening, 8 May 2022, where, once again, the applicant requested that the matter be postponed and that the respondent bears the wasted costs on a party and party basis;
- (xi) I am further mindful that the respondent's attorneys had (in response to Annexure 'TB1') agreed to the postponement on Sunday 8 May 2022 but suggested that costs

be argued at a later stage. The applicant, in reply, persisted with costs on a party and party scale;

- (xii) The applicant explained at length that there was no justification for the respondents' dilatory attitude regarding the postponement. It was apparent that the matter had to be postponed and it was only fair that the party, causing the postponement, should bear the costs.

[15] I agree with these contentions. It cannot be gainsaid that the cause of instituting a formal postponement application was due to the respondent failing to agree to a postponement from the outset. The postponement application could have been avoided. Common sense indicated that a postponement was inevitable.

[16] During the hearing, the respondent persisted that, at best, no order as to costs should be made. It was explained that this award is justified in light of the applicant not being *bona fide* with the court. Apparently, in a conversation between counsel for the applicant and the respondent in their chambers, the applicant's counsel was advised of the source of the photographs. However, in Annexure 'TB1', the response is misleading. Such non-disclosure impacts on the consideration for costs.

[17] Having regard to the said contention, I am still of the view that the respondent should bear the costs incurred relating to the postponement application for the reasons outlined above.

- [18] On the issue of whether a punitive costs order is justified, there are a plethora of leading authorities which have provided guidance on when such costs are justified². I do not deem it necessary to extrapolate the authoritative principles as the parties are well versed with them.
- [19] It has been enunciated that our courts would not order a litigant to pay the costs of another litigant on an attorney and client scale unless some special grounds are present such as dishonesty or fraud or the motives that have been vexatious, reckless or malicious or that the party has acted unreasonably in its conduct in the litigation or that its conduct was in some way irreprehensible. The punitive scale is an extraordinary one and should be applied for in exceptional circumstances.
- [20] I am further mindful that ultimately it is the respondent who is being prejudiced. His legal team may have been of the view that they acted in his best interests, however, at the end of the day, it was not so, more particularly, in causing the postponement application to be prepared and instituted. Hence in my consideration of what is “fair between the parties”, I am not inclined to order a punitive costs order.
- [21] In the premises, therefore, I make the following order, that:
1. the trial set down for 9 May 2022 is postponed *sine die*;
 2. the plaintiff pays the wasted costs of the trial occasioned by the postponement on a party and party scale;
 3. the plaintiff pays the costs of the postponement application on a party and party scale.

² This include Pubic Protector v South African Reserve Bank 2019 (6) SA 253 CC



H KOOVERJIE**JUDGE OF THE HIGH COURT**Appearances:

Counsel for the plaintiff/respondent:

Adv S Joubert (SC)

Instructed by:

Kriek Wassenaar en Venter Inc

Counsel for the defendant/applicant:

Adv E Botha

Instructed by:

MacRobert Inc

Date heard:

9 May 2022

Date of Judgment:

12 May 2022