

SOUTH AFRICA / JUDGMENT

A.J.B v I.B (115/2019) [2021]

ZAFSHC 165 (19 August 2021)

[2021] ZAFSHC 165

COURT

Free State High Court, Bloemfontein

BEFORE

G.J.M. Wright

CASE / FILE NUMBER

115/2019

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IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case no: 115/2019

In the matter between:

A.B.J Plaintiff

and

I.B Defendant

CORAM: WRIGHT AJ

HEARD ON: 13 AUGUST 2021

DELIVERED ON: 19 AUGUST 2021

INTRODUCTION

- [1] The parties are embroiled in divorce litigation. As per usual in matrimonial disputes, tensions run high and the smallest of issues between the parties may turn into a bitter dispute. The last thing which the parties and their respective legal teams thus needed in the process was for one of the attorneys to test positive for Covid-19. Even more so since it created a situation where the trial, duly set down for three trial days, was postponed.

- [2] Even though the postponement itself was dealt with fairly comfortably by the parties (as far as I could gather), the costs occasioned by the postponement became a bone of contention. The parties indicated that the matter is to be postponed to trial dates later in this term, but that they are unable to reach consensus on the issue of costs. Costs were argued and need to be dealt with.[1]

CAUSE OF POSTPONEMENT

- [3] On the morning of the first day of trial counsel alerted to the fact that the Plaintiff's attorney suspected that he might be ill with the virus as he was feeling unwell. The matter stood down for him to be tested. Around midday the news came in that he tested positive. The matter stood down further for the parties to negotiate a possible settlement, alternatively, the terms of a postponement.
- [4] To aggravate matters, the ill-fated attorney's senior associate who worked closely with him on the case, needed to isolate immediately as they had been in close contact with each other two days earlier. Counsel negotiated the situation with the assistance of a candidate attorney, supplemented by telephonic instructions from the attorney.
- [5] I was informed that serious attempts were made to settle the matter and that the Plaintiff had made a tender relating to certain issues.[2] When the parties could not reach each other in an agreement on the terms of a divorce, they conceded to a postponement of the trial but could not find common ground as far as the liability for the costs was concerned.[3]

PARTIES' CONTENTIONS

(a) PLAINTIFF

- [6] Counsel for the Plaintiff submitted that in the circumstances no cost order should be made (thus, essentially that each party should pay his or her own costs occasioned by the postponement). In the alternative, that the issue of costs should stand over for later adjudication by the trial court, in the light of the tender made by the Plaintiff and the contents of the negotiations between the parties.
- [7] The first contention was presented on the basis that it is not disputed that the Plaintiff's attorney tested positive for Covid-19 and that his senior associate also needed to isolate. It was also not disputed that a portion of the first day of trial was spend on bona fide attempts to settle the action. It was submitted that equity and fairness scream against the Plaintiff having to pay the costs of the postponement. In this regard counsel relied on principles stated in the unreported case of Sequiera v Mandla Bricks and Blocks.[4] In that matter one of the defendants was diagnosed with Covid-19 some time prior to the trial dates. The requested for a postponement was made at a late stage. In paragraph 9 of the judgement Davis J states (correctly in my view) that the "proper approach, in the exercise of a court's discretion, is not to follow a general rule blindly (for that would not be the exercise of a discretion at all) but to have regards to all the facts as well as consideration of fairness to both parties in determining liability for wasted costs". Reference was also made to the

general view that “ . . . the applicant for postponement is ordered to pay the wasted costs if the illness of a party or a witness . . . necessitates postponement”.^[5]

- [8] In the Sequiera matter the defendants were ordered to pay the costs occasioned by the postponement, jointly and severally. The costs order resulted

primarily from the late request for a postponement. In the present matter the attorney attested positive on the first day of trial and the postponement could not be requested earlier.

- [9] Counsel’s second suggestion relating to the adjudication of the cost issue essentially turned on the contention that it will in all probability become clearer during the trial on what basis the Plaintiff made a tender and that it may well then be found that the Defendant should have accepted it.

(b) DEFENDANT

- [10] Counsel for the Defendant was adamant that they do not even consider the possibility of having costs stand over for adjudication by the trial court and that the costs of the postponement should be carried by the Plaintiff. As basis for this submission, counsel stressed the following points:

- (i) The trial court will not be in a better position to adjudicate the costs issue as I am privy to facts and circumstances peculiar to the postponement;

(ii) This is not a commercial matter where only monetary interests are involved; (iii) Many of the disputes

between the parties relate to the minor children;^[6]

(iv) The mere fact that the tender made by the Plaintiff was rejected by the Defendant will not result in a situation where, when the trial court becomes privy to the contents thereof, the Defendant will be held liable for the costs of the postponement.

- [11] The Defendant’s counsel further stated that, after it became evident that the parties were unable to settle the matter, two days were still left of the original three reserved for the trial. If not for the unavailability of the Plaintiff’s attorney, the trial could have commenced on the second trial date.^[7]

- [12] Counsel also submitted that an attorney relates his or her client’s instructions to counsel. This may be done even without the instructing attorney being present at court. In as far as the Plaintiff’s attorney would have been unable to attend court and should a candidate attorney have had to stand in, the situation would only have been to the Plaintiff’s detriment and/or inconvenience. The postponement was solely for the Plaintiff’s benefit: to have his attorney present at court. The Defendant was ready to proceed with the trial and was present at court, and so was her expert witness.^[8]

[13] In response to submissions made on behalf of the Defendant, counsel for the Plaintiff stressed that the interests of the parties' minor children are at stake in the divorce action. Considering the contents of, and recommendations in, the reports of the experts appointed by the parties, the issues relating to the care and contact of the parties' daughter are complex and multi-faceted. It necessitates the presence and hands-on availability of an experienced attorney.[9]

GENERAL PRINCIPLES RELATING TO THE COSTS OF A POSTPONEMENT

[14] A party seeking a postponement essentially requests an indulgence. The indulgent nature of the request does not change simply because an opposing party agrees to the postponement or does not object to it. This is but one of the reasons why the party on whose request a postponement takes place is generally expected to pay any costs occasioned thereby.[10] In casu, the Defendant agreed that the matter may be postponed. Or at least, when she and her legal representatives received the request for a postponement, they did not object thereto. This did not mean of course that they accepted that each party should pay his or her own costs.

[15] Considerations of fairness also fall to be considered at the adjudication of liability for costs of a postponement. In so far as a cost order should be fair to both parties, the matter should thus be viewed from the vantage points of both parties.[11]

[16] In the matter of *Sublime Technologies (Pty) Ltd v Jonker and Another* 2010 (2) SA 522 (SCA) the Supreme Court of Appeal stated that:

"When a trial court is likely to be in a better position than the court hearing the application for postponement, to ascertain the facts and to decide who should be liable for the costs of a postponement, it is a salutary rule that costs should be reserved for later determination."[12]

[17] Another guiding principle has on occasion been stated as follows:

"The question in essence is whether at the stage when the postponement is sought all the relevant considerations are before the Court to enable it to make a just and equitable decision in the exercise of its judicial discretion on the question of the wasted costs."[13]

SHOULD THE ISSUES RELATING TO COSTS BE RESERVED FOR ADJUDICATION BY THE TRIAL COURT?

[18] Most, if not all, the facts relevant to the postponement and the consideration of costs have been placed before me.[14] The following facts grounding the request for a postponement are common cause between the parties:

- (i) It is not the fault of either the Plaintiff or the Defendant that the matter cannot proceed;
- (ii) The illness of the Plaintiff's attorney was unforeseen and only became apparent during the first day of trial;

(iii) A large portion of the disputes between the parties relate to the best interests of the parties' two minor children;

(iv) Earnest attempts were made by both parties to settle the matter and/or curtail issues in dispute.

[19] It is difficult to speculate as to how the contents of the tender may influence any decision relating to the costs for the postponement. Should one assume that the tender, once accepted, would have put an end to all disputes between the parties, it would still have been necessary to lead evidence in the divorce action, especially relating to the interests of the minor children. The expert reports in the court file highlight the fact that it may have been necessary to lead the evidence of one or more experts (albeit briefly) – if not called by the parties themselves, then at the instance of the court. There simply appears too many issues relevant to the children that in my view need clarification and/or amplification. Too put it simply: acceptance of the tender would not necessarily have prevented a situation where evidence needed to be lead and/or challenged and instructions needed to be given.

[20] In this regard trial court will not be in a better position to evaluate the issue of costs. The issue of costs stands to be adjudicated now and should not stand over for later adjudication by the trial court.

SHOULD THE PLAINTIFF BE HELD LIABLE FOR THE COSTS OCCASIONED BY THE POSTPONEMENT?

[21] It is of importance for both parties that the divorce be concluded as soon as possible. And this includes the related relief (care of, and contact with, the minor children, any accrual in the parties' estates and maintenance). In this regard, the postponement presents not only as an inconvenience for the parties, but as an undesired delay. Both parties desire the divorce proceedings to be finalised. It is not in the interests of justice or fairness that (especially) the parties' minor children be subjected to the dark clouds created by acrimonious divorce litigation hanging over their lives longer than necessary.

[22] A request for costs is always fact specific. The very facts of a specific case will very seldom repeat itself in exactly the same way or fashion. Principles expressed in other cases present as guidelines and an indication of how other courts have dealt with postponements and the costs occasioned thereby, not as hard and fast rules. The question as to what is fair to parties follows from a value-judgment made by a particular presiding officer and his or her view of the weight to be attached to the relevant facts and circumstances.

[23] Counsel correctly pointed out that the current pandemic creates situations unlike any seen before: everyone is at risk of contracting Covid-19 at any relevant time. Legal practitioners come into contact with a number of people on any given day and can only take so many precautions. It is almost inevitable that an attorney, for example, will come into contact with an infected person, causing him or her to become infected in turn. This can occur some period of time prior to an important court date or shortly before. Even the best laid plans

may have to be changed at a moment's notice and the possibility of a last-minute postponement now always loom somewhere in the

background.

- [24] Trials, customarily playing out within the lines of set rules of order and structure, are easy victims for unexpected, undesired, and unpreventable events throwing into turmoil. The pandemic forced all within the legal community, especially those primarily dedicating themselves to litigation, to adapt to a changing world by having to rely on technology and creative solutions to ensure cases can proceed forward in the best way possible. More and more often those involved with trials need to accept that they cannot control their world as well as was previously thought possible, and legal representatives can no longer as easily anticipate how events will unfold. The best laid plans sometimes need to be changed or adapted at a moment's notice within a framework of practices that have been followed for years.[15]
- [25] Counsel for the Plaintiff correctly described a trial as a dynamic process, often with the need for instant communication between client, attorney and counsel, and instructions to be relayed in real time. As convenient as telephonic communications may be, it does not equate to the presence of an attorney at court who becomes steeped in the trial atmosphere, hear and see witnesses, able to give instructions to counsel quickly and efficiently. This process benefits the specific party involved.[16] The flipside of the coin is that any disruption in the process, for whatever reason,[17] is then detrimental to the specific party.
- [26] The Plaintiff's attorney cannot be blamed for his illness and inability to be present at court for the purposes of the trial. Similarly, the situation relating to his senior associate is not anyone's fault. However, it is the Plaintiff who would have benefitted from their presence and inputs. This is a burden he will have to carry alone. The Defendant would not have benefitted from the presence of the Plaintiff's attorney. But she is prejudiced by the postponement in as far as the trial, which she and her legal team have been preparing for, is not proceeding due to a situation not of her doing. The only way to alleviate her prejudice, in as far as this may be done in the circumstances, is by way of an order of costs. In the circumstances it cannot be expected of the Defendant to carry her own costs occasioned by the postponement.[18]
- [27] The pandemic will continue to shape our lives for the foreseeable future, affecting the ways in which we interact with each other and within certain situations. And situations akin to the one which affected the Plaintiff and his attorney, will occur again in other matters. No general rule can ever be laid down as to how to deal with such a situation. And it is almost impossible to provide a list of factors and circumstances which should, or should not, be considered when faced with a Covid-19 related situation. The best any presiding officer can do in the circumstances is to call it as he or she sees it (costs being a discretionary issue).

[28] The issues relating to costs were argued during the morning of a second trial day. This of necessity caused counsel to become entitled to fees for such an appearance. Such entitlement to my mind follows from the postponement and the failure to come to an agreement on the issue of the costs occasioned thereby and need not be mentioned specifically in any order.

ORDER

[29] In the premises I make the following order:

1. The Plaintiff is to pay the costs occasioned by the postponement of the trial on 10 August 2021.

G.J.M. WRIGHT, AJ

On behalf of Plaintiff: Adv. W. Van Aswegen

Instructed by: Honey Attorneys

Bloemfontein

On behalf of Defendant: Adv. R. Van der Merwe

Instructed by: Phatshoane Henney Attorneys

- [1] The trial was duly postponed, with this judgment relating to the costs issue reserved.
- [2] Due to obvious ethical dilemmas, the contents of the tender and the negotiations were correctly not revealed to me.
- [3] I inferred from submissions made by Defendant's counsel that, although the Defendant agreed to the postponement, it was not necessarily accepted that the trial could not have proceeded in the absence of the Plaintiff's attorney.
- [4] The full citation is *George Antonio Gonsalves Sequiera v Mandla Bricks and Blocks CC and 7 Others*, Case no. 31395/2019, judgment of the Gauteng Division, Pretoria, delivered on 24 November 2020.
- [5] *Erasmus: Superior Court Practice*, at D1-559; *Cape Law Society v Feldman* 1979 (1) SA 930 (E) at 934 A; *Manong & Associates v City of Cape Town* 2011 (2) SA 90 (SCA) at [95] and [96].
- [6] I point out that it is trite that courts are reluctant to penalise a particular party with costs in cases where both parties were pursuing their view of the best interests of a minor child. This differs from the accepted principle in other cases where costs generally follow the result.
- [7] In response, Plaintiff's counsel intimated that this may not necessarily have been the case. I assume that this involves

facts

and/or issues not shared with the Court at this stage.

- [8] Counsel for the Plaintiff assured me that the same goes for the Plaintiff: both the Plaintiff and his expert witness were ready and available to proceed with the trial on the second day.
- [9] In as far as Plaintiff's counsel put a different spin on the role played by an attorney during a trial, I shall deal with those submissions herein later.
- [10] Cape Law Society v Feldman 1979 (1) SA 933 (ECD) at 932 D; Manong & Associates v City of Cape Town 2011 (2) SA 90 (SCA) at paragraphs [95] and [96].
- [11] Grobbelaar v Snyman 1975 (1) SA 568 (OPD) at 571 A.
- [12] At paragraph 4.
- [13] Cape Law Society v Feldman 1979 (1) SA 933 (ECD) at 933 E.
- [14] Except in respect of the contents of the tender made by the Plaintiff (which was rejected by the Defendant).
- [15] So, for example, some firms of attorneys have designated attorneys attending to divorces cases, dealing with their clients closely over months, especially when trial dates are approaching. When one of those attorneys become ill, it may not be so easy for someone to fill in at short notice and still present the client with the personal attention previously possible and/or preferred.
- [16] This may not necessarily be the case in matters where the disputes between the parties are clearly defined and few surprises will occur. Not so for cases involving children and divergent viewpoints on their best interests. Experience has shown that such cases often revolve around the details of specific incidents, conduct and occurrences, creating a situation where even a thorough pre-trial consultation may not be sufficient and/or adequate.
- [17] For example the absence or non-availability of an attorney.
- [18] Often referred to as "wasted" costs.

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