

SOUTH AFRICA / JUDGMENT

Karibuni Security Services CC v Matsepe NO and Others (1966/2012) [2020] ZANCHC 77 (30 October 2020) [2020] ZANCHC 77

COURT

Northern Cape High Court, Kimberley

BEFORE

Phatshoane

CASE / FILE NUMBER

1966/2012

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IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION, KIMBERLEY.

Not Reportable

Case No: 1966/2012

In the matter between:

KARIBUNI SECURITY SERVICES CC

APPLICANT

And

TSIU VINCENT MATSEPE NO

FIRST RESPONDENT

SIMONE LIESEL MAGARDIE NO

SECOND RESPONDENT

MOLELEKWA ASHWORTH TAU NO

THIRD RESPONDENT

OTTLIE ANTON NOORDMAN NO

FOURTH RESPONDENT

in re

TSIU VINCENT MATSEPE NO

FIRST PLAINTIFF

SIMONE LIESEL MAGARDIE NO

SECOND PLAINTIFF

MOLELEKWA ASHWORTH TAU NO

THIRD PLAINTIFF

OTTLIE ANTON NOORDMAN NO

FOURTH PLAINTIFF

KARIBUNI SECURITY SERVICES CC

DEFENDANT

Heard: 03 August 2020

Delivered: 30 October 2020

Judgment

Phatshoane ADJP

- [1] The parties agreed that the trial that was set down for 03 - 07 August 2020 be postponed sine die. The dichotomy is on the wasted costs occasioned thereby.
- [2] In the main action, Tsiu Vincent Matsepe NO, Simone Liesel Magardie NO, Molelekwa Ashworth Tau NO, and Ottlie Anton Noordman NO, (the first to the fourth plaintiffs) (“the liquidators”) instituted a claim against the applicant, Karibuni Security Services CC (the defendant) or (“Karibuni”), in excess of R9,5 million, allegedly paid by Canton to Karibuni in the period preceding Canton’s liquidation which they claim is impeachable on various grounds under the Insolvency Act, 24 of 1936, in that the various payments made by Canton to Karibuni were either intended to or had the effect of preferring one creditor over the others. Mr Motsamai Petrus Rantho (“Mr Rantho”) is the sole member of Karibuni. He was a major shareholder and director of Canton and was involved in the business of Canton when the alleged payments were made by Canton to the Karibuni. The pleadings in the action are in excess of 4000 pages. The issues are complex in nature.
- [3] Mr Adrian Barnett Horwitz, the attorney of record for Karibuni, intimates that Karibuni’s Kimberley and Johannesburg legal team had been preparing for the trial on the basis that it would proceed unimpeded on 03-07 August 2020 and that Mr Rantho would give evidence and be present to give instructions to counsel. He saw Mr Rantho on 16 July 2020 when he signed the affidavit in support of an application to furnish security for costs, which was brought by Karibuni against the liquidators in the same action, which was set down in this Court on 24 July 2020.

- [4] Mr Horwitz telephonically spoke to Mr Rantho on 21 July 2020 who informed him that he had tested positive for Covid19 and was medically recommended to be in self-isolation for a period of 14 days which would expire on the first day of the trial. Mr Horwitz did not foresee any major effect on the trial because the quarantine period would expire on 03 August 2020. He relayed this information to his instructing attorney but they continued with the preparation of the application for security for costs and the trial.
- [5] Mr Horwitz says on Friday 24 July 2020 after he and the liquidators' counsel had agreed on the terms of a consent order with regard to the security for costs he mentioned to the liquidators' counsel that he had "a problem since my client had COVID-19." Mr Horwitz attempted to call Mr Rantho on that date but was unsuccessful.
- [6] On Monday 27 July 2020 Mr Rantho's relative reported to Mr Horwitz that Mr Rantho's condition had deteriorated rapidly and was awaiting an ambulance to rush him to a hospital. Karibuni's Johannesburg attorneys, Cranko Karp & Associates, addressed a letter to the liquidators' attorneys, FJ Senekal Incorporated, formally notifying them of Mr Rantho's indisposition; suggesting that the matter be postponed sine die; and that the costs be costs in the cause.
- [7] On 29 July 2020, two court days before the trial, Dr Mynhardt confirmed that Mr Rantho had been admitted at a hospital and treated for COVID-19. Mr Horwitz dispatched a medical certificate to the liquidators' attorneys as proof. They agreed to a postponement on condition that Karibuni tender the wasted costs.
- [8] Mr Frederick Jacobus Senekal, the attorney of record for the liquidators, disputes that Mr Horwitz and Karibuni informed him that Mr Rantho had tested positive for COVID-19 on 21 July 2020, when it became known to them that Mr Rantho took ill and that in all probabilities the trial would not proceed. He intimated that had he been notified of this at the earliest opportunity he would have advised the liquidators to accede to a postponement and the attendant costs could have been avoided. The liquidators' legal team spent considerable amount of time and money preparing and consulting in earnest for the mammoth trial and should not be deprived of their wasted costs, Mr Senekal contended.
- [9] Mr Coetzee SC, for Karibuni and Mr Rantho, argued that where a person whose interest would be materially and adversely affected to the extent of approximately R 300 000.00 is absent through no fault of his or her own it would be inequitable to make a cost order against him or her without affording him or her a hearing. Mr Rantho and Karibuni are represented in this proceedings by Horwitz who briefed counsel to move an application for a postponement and to argue the issue of wasted costs.

- [10] It was further contended for Karibuni and Mr Rantho that where the cause for a postponement is a COVID-19 infection of a key witness a departure from the general rule, that the party for whose benefit the postponement has been granted must automatically be saddled with costs occasioned thereby, was necessary. Mr Coetzee urged, that regard being had to the unique circumstance of this case, that the appropriate order would be to reserve costs for later determination or that costs be costs in the cause.
- [11] Reduced to its essence, the issue arising for consideration is whether a belated disclosure by Karibuni of its main witness's indisposition should attract a wasted costs order against it for the trial that was set down on 03-07 August 2020.
- [12] Addleson J in *Van Standen v Union and South-West Africa Insurance Co Ltd* 1972 (1) SA 758 (E) considered wasted cost in the action that had been postponed by consent and the question of costs reserved where the plaintiff suddenly took ill. Having referred to *Hlongwane v Roux and van Gass*, N.O., 1948 (1) SA 62 (W); *Winter v Gluckmann*, 1931 W.L.D. 257; *Talekinsky v Masones*, 1931 W.L.D. 259; *Pillai v Pillay*, 1946 CPD 372, as well as certain passages at pp. 415 - 417 in *The Civil Practice of the Superior Courts in South Africa* by van Winsen and Thomas he stated:

“As appears from the last-cited work (at p. 416) the party at whose instance a postponement is obtained is usually ordered to pay the wasted costs; and that has also been ordered where the illness of a party necessitates a postponement, as in Talekinsky's case

and Winter's case, supra; or where the postponement is necessary because of the illness of a witness (Pillai's case, supra) or of counsel.”

- [13] Addleson J did not follow *Talekinsky v Masones* and *Winter v Gluckmann*. He found that there was no proper basis in equity or principle for holding that the plaintiff should pay the wasted costs of postponement which had been caused by the fault of neither of the parties.
- [14] The general rule is that the determination of costs are in the discretion of the Court.[1] The consideration of the issue of costs is a value judgment that involves an exercise of a judicial discretion taking into account the relevant circumstances of each case. As I see it, when an unfortunate event befalls a witness and therefore is unable to attend trial he or she cannot be blamed for the aborted proceedings. However, where the unpleasant event falls within the knowledge of the party long before the trial, as in this case, and remain undisclosed to the opponent, who is put to the trouble of preparing for the trial and incurring costs, a defaulting party seeking a postponement of a trial runs a risk of being held liable for the wasted costs.
- [15] An application for a postponement must be made timeously to obviate any resultant prejudice. There was no justification why the application for postponement was made on an urgent basis by Karibuni. In my view, the delay in bringing the application is a factor to be taken into account in determining liability for the payment of the wasted costs.

[16] Mr Horwitz knew on 21 July 2020 that Mr Rantho was indisposed but chose not to disclose this information to the Liquidators' legal team who had to prepare for an enormous trial. The legal team for the liquidators deny that there was a discussion on 24 July 2020, during which Mr Horwitz would have revealed to their counsel, Ms Sander, that Mr Rantho had tested positive for COVID-19. Insofar as there are disputes of fact on whether the liquidators legal team was informed of Mr Rantho's medical condition on 24 July 2020, this being motion proceedings, that aspect should be decided on the version of the liquidators.

[17] Mr Horwitz did not convey that Mr Rantho was sick to the liquidators' attorneys or forward a medical certificate to them. On 27 July 2020 Karibuni's Johannesburg attorneys, Cranco Karp, made an attempt to convey the following message to them:

"4. Late on Monday the 27 July 2020, our client was rushed to hospital by ambulance on suspicion that he had fallen victim to the COVID-19 Virus.

5. At the time of writing this letter we are still not fully aware of his exact condition and whether or not he will be able to be available at the hearing on Monday 3 August 2020.
6. Having regard to all the circumstances of this matter as they currently exists, we are of the view that it would be appropriate and expedient and for the benefit of all parties for the matter to be postponed sine die, costs to be costs in the cause." (My emphasis)

[18] The aforesaid correspondence of 27 July 2020 from Cranco Karp is less than frank and contradicts Mr Horwitz's statement that on 21 July 2020 Mr Rantho informed him that he contracted Coronavirus. The attorneys for Karibuni were remiss in not timeously and explicitly informing their opponent of the medical condition of their client. As already discussed, only two court days prior to the trial, Mr Horwitz informed the liquidators attorneys of Mr Rantho's indisposition. Under these circumstances the argument that an unfortunate event befell Mr Rantho and therefore Karibuni ought not to be blamed for the aborted trial and its concomitant wasted cost cannot avail Karibuni. In any event, on 30 July 2020, Karibuni's attorneys proposed to the liquidators' attorneys that costs be cost in the cause alternatively, they tendered taxed wasted costs incurred by the liquidators consequent upon the postponement of the trial limited to R100 000. The tender, as it were, suggests that Karibuni accepted the blame for the postponement.

[19] It follows that Karibuni should pay the wasted costs occasioned by the postponement. However, I am not persuaded that such costs ought to be on a punitive scale or should include costs for the employment of a senior counsel.

In the result I make the following order:

Order:

1. Karibuni Security Services CC, the applicant (the defendant in the action), is to pay the wasted costs occasioned by the postponement of the trial set down for 03-07 August 2020.

Phatshoane ADJP

APPEARANCES:

For the applicant/defendant: Adv WJ Coetzee SC

Instructed by Adrian B Horwitz & Associates.

For the first to fourth respondent/

first to fourth plaintiffs:

Adv D Preiz SC

Instructed by Hugo, Matthewson & oosthuizen Inc.

[1] Union Government (Minister of Railways and Harbours) v Heiberg 1919 AD 477 at 484 AD

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Prepared on 14 October 2026 · Esheria