

SOUTH AFRICA / JUDGMENT

McWilliams v McWilliams and Others (3145/2015) [2020] ZAECPEHC 28 (3 August 2020)

[2020] ZAECPEHC 28

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

M Makaula

CASE / FILE NUMBER

3145/2015

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IN THE HIGH COURT OF

SOUTH AFRICA

EASTERN

CAPE LOCAL DIVISION – PORT ELIZABETH

Case

No: 3145/2015

Reportable/Not

Reportable

In

the matter between:

JENNIFER

ANNE McWILLIAMS (born CROSSBY)

Plaintiff

and

GARRY

SHAUN McWILLIAMS

Respondent/First

Defendant

GARRY

SHAUN McWILLIAMS N.O. in his capacity as Trustee
for

the time being of the COLLETT GARRY TRUST

(Registration

No. TM760)

Second

Defendant

DARYL

BRUCE McWILLIAMS N.O. in his capacity as Trustee

(Registration
No. TM760)
Third
Defendant
MARK
ADRIAAN BAKKER N.O. in his capacity as Trustee
(Registration
No. TM760)
Fourth
Defendant
for
the time being of the G S McWILLIAMS TRUST
(Registration
No.
TM5955)
Fifth
Defendant
(Registration
No. TM5955)
Sixth
Defendant
(Registration
No. TM5955)
Seventh
Defendant
for
the time being of the GARRY McWILLIAMS FAMILY TRUST
(Registration
No.
IT1711/98)
Eight
Defendant
DAVID
HONEYBALL N.O. in his capacity as Trustee
for
the time being of the GARRY McWILLIAMS FAMILY TRUST
(Registration
No.
IT1711/98)
Ninth
Defendant
GAVIN
CHARLTON HARVEY N.O. in his capacity as Trustee
(Registration
No. IT1711/98)
Tenth
Defendant
for
the time being of the MID TRUST
(Registration
No. IT541/95)

Eleventh
Defendant
CRAIG
CULLINGWORTH N.O. in his capacity as Trustee
(Registration
No.
IT541/95)
Twelfth
Defendant
(Registration
No.
IT541/95
Thirteenth
Defendant
for
the time being of the BMI TRUST
(Registration
No. TM4482)
Fourteenth
Defendant
(Registration
No. TM4482)
Fifteenth
Defendant
(Registration
No. TM4482)
Sixteenth
Defendant
THE
MASTER OF THE HIGH COURT OF SOUTH AFRICA –
EASTERN
CAPE
DIVISION
Seventeenth
Defendant
NEDGROUP
TRUST LTD
(In
its capacity as trustee for the time being of the
CHRISTIM
TRUST)
Eighteenth
Defendant
MOHAMED
SALEEM KHAN N.O.
In
his capacity as Trustee for the time being of the
HIGHWAY
TRUST (Registration No. IT000040/2019)
Nineteenth
Defendant

STANLEY
WEINSTEIN N.O.
HIGHWAY
TRUST (Registration No. IT000040/2019
Twentieth
Defendant
ROSEBANK
LTD
HIGHWAY
TRUST, a Trust established under the laws
of
the British Virgin
Islands)
Twenty-First
Defendant

REASONS FOR JUDGMENT

MAKAULA J:

A.

Introduction:

- [1] This is an application for a postponement. The trial is scheduled to resume on 5 August 2020 until the end of term. The plaintiff (applicant herein) launched the application on my directive on 15 July
2020. That was after an exchange of correspondence wherein the proposal for the postponement was mooted. It became clear from the correspondence that the first defendant (first respondent herein) and the second to twenty first defendants (second to twenty first respondents herein) opposed the postponement. Realising that, I issued a directive that a substantive application be brought hence this application.
- [2] The trial started before me on 5 August 2019. The opening address of the plaintiff endured until 7 August 2019. The opening address by the defendants started on 7 August 2019 to 8 August 2019. In effect the opening addresses spanned over a period of three days. On 13 August 2019 the plaintiff started with her first witness Mr Allan Greyling who is a chartered accountant and qualified as an expert in his field. He submitted two expert reports. His first report is sixty five pages and his second report constitutes fifty three pages. The annexures to his reports start from page 123 to 309.

- [3] His evidence referred to his reports, annexures and further cross-referenced to numerous other trial files which form part of the discovered documents. The discovered documents constitutes eighty six lever arch files. His evidence in chief, cross-examination and re-examination ended on 22 August 2019 (i.e. it took eight days). His evidence was contained in four lever arch files. The plaintiff avers that there are eight more lever arch files which have been filed since the matter was postponed. That is as a result of the applications to compel compliance with subpoenas served on Mr David Honeyball, Mr Stephen Burges and the South African Reserve Bank.

B. Reasons for the Postponement:

- [4] I should mention upfront that the parties are ad idem that the matter cannot proceed in an open court due to the COVID-19 pandemic. The plaintiff's main reasons for the postponement are as follows:
- (i) The alternative of a virtual hearing is not feasible or desirable.
 - (ii) That the Rule 43(6) application that the plaintiff brought has yet to be determined by this court and thus she has no funds to brief counsel and experts for the resumed hearing.
- [5] In substantiation, the plaintiff gave a detailed explanation why she did not believe that the trial may continue virtually. I shall not deal with all that which is raised by the plaintiff in this regard. Neither would I deal extensively with the reasons advanced by the defendants why they wish the matter to proceed virtually.
- [6] The plaintiff states that she intends to call the following expert witnesses who are advanced in age and live in different cities:
- 6.1 Hilton Greenbaum, a chartered accountant and a forensic accounting expert who is currently aged 69, who resides in Cape Town;
 - 6.2 Charles van Staden, an exchange control expert who is currently aged 69, and resides in Johannesburg.
 - 6.3 Laurika Buckley, a handwriting expert and who resides in Johannesburg.
 - 6.4 Willem Boshoff, an actuary and who resides in Cape Town.
- [7] Plaintiff avers that her lead counsel, who is 78 years old, and the above expert witnesses mentioned in preceding paragraph fall into a high risk category in circumstances of their being exposed to the COVID-19 virus.
- [8] The plaintiff alleges that the logistics of having trial files available to all these witnesses at various venues and the costs of doing so are prohibitive. Furthermore, the logistics of ensuring that the court's, the parties' and the trial bundles in various venues are updated will be a mammoth task resulting in delays as the documents would be made available to the various venues, so submits the plaintiff. She further makes the point that during the trial in August 2019, expert witnesses had to be consulted regarding the documentation determined

during the trial, after hours or during the day when the matter was postponed because of the late delivery of the documents. She contends that it would be very difficult in circumstances where the experts are not present for consultation and would result in intermittent postponements. Furthermore, she state that there is a plethora of documentation which would have to be referred to during the proceedings.

- [9] In her quest for the postponement, the plaintiff raises many other issues, like the conduct of the defendants from the inception of these proceedings, her health condition which prohibits her to travel regularly to Cape Town to consult, prospects of success and prejudice to her.
- [10] The first defendant, on the other hand, argues that he will be prejudiced by the postponement of the trial highlighting his health, his intention to marry, his estranged relationship with his children who at the moment residing with the plaintiff and finances. I shall not delve in that respect. He further deals with the background to the litigation between the parties and the never ending discovery and related applications he and the trust defendants are subjected to by the plaintiff.
- [11] The first defendant and the trust defendants are of the view that a virtual hearing is going to be cost effective and workable in the prevailing circumstances. In summary the defendants aver that a virtual hearing has become a new norm, nothing is exceptional about this trial.
- [12] Mr Whelan deposed to the answering affidavit on behalf of the trust defendants. In his affidavit, he sets out, in summary, that the plaintiff in her application in terms of Rule 43(6) did not indicate that she intended to have the matter postponed on 05 August 2020 despite that she filed two further affidavits in June 2020 in the middle of the lockdown. The defendants intimate that the intention of the plaintiff in so doing was to mislead the court in the hope that the plaintiff would be ordered to pay R7.5 million sought for her past legal fees and/or disbursements. The trust defendants postulate that the application is fatally defective in that the plaintiff does not address the prejudice the defendants were likely to suffer if the matter is postponed.
- [13] The trust defendants contend that the impossibility to hold a virtual hearing alleged by the plaintiff is a gross exaggeration because documents referred to in the opening address by the plaintiff's counsel must make up the core documents which she wishes to deploy in support of her case. They submit that those documents will, on a liberal estimate, probably not exceed five lever arch files. It is disingenuous for the plaintiff to assert that the reports of expert witnesses are a mere summary because each report filed is very detailed, discussing as they do minute details through large volumes

of documents and copying the same as annexures, so submit the trust defendants.

- [14] The trust defendants dispute that the health of the plaintiff would preclude her from travelling to Cape Town. They further dispute that load shedding would disrupt a virtual hearing of the matter. The trust defendants offer R50 000.00 per day towards the hiring of a venue where virtual hearing may be held.

C.

Analysis:

- [15] Rule 41 of the Uniform Rules of Court deals with applications for postponement of matters. The principles applicable to postponements have become trite law. The parties have in their heads of argument touched on those principles and I need not burden the judgment by rehashing them. What remains is for me to decide, based on the circumstances of this matter, whether it is in the interests of justice to accede to the postponement. In so doing, I shall have regard to what Mokgoro J said in *National Police Service Union v Minister of Safety and Security*[1] that:

“ . . . The postponement of a matter set down for hearing on a particular date cannot be claimed as of right.[2] An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory,[3] whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the Court to determine whether it is in the interests of justice to grant the postponement”. (Footnotes omitted)

- [16] I have had the benefit of proceeding with this matter as reflected as above. During the testimony of Mr Greyling, counsel from both sides kept referring him to documents which were contained in all the eighty six files at the time. When Mr Greyling was testifying, his evidence did not only hinge on the documents referred to in the opening address of the plaintiff nor to his reports and annexures. His evidence in cross-referenced many of the trial bundles. I had all those files surrounding me on the bench as I was proceeding with the matter. I had to sit with a court official next to me throughout the proceedings because was unable to identify the documents which were referred to. Counsel themselves had to have people assisting with the identification of files and documents. Based on the manner in which the documents were

vastly referred to when Mr Greyling testified, I do not agree with the contention by the trust defendants that experts would be allowed to collate their files and produce limited file bundles. That is not feasible based on how the trial was conducted. It would not be possible for me to have a person assisting me with files in the virtual hearing due to the COVID-19 pandemic protocols.

- [17] Counsel, Mr Greyling and myself required continual assistance in the management of the trial files. During the proceedings documents were constantly filed in various trial bundles as they were made available by the parties. I further agree with the submission made by the plaintiff that supplementation of trial bundles may be necessary in the midst of the testimony of witnesses. Mr Greyling during the trial was requested to provide certain documents which he relied on when he compiled his reports. Such documentation led to the updating of trial files.
- [18] The plaintiff makes the point that at the trial in August 2019, expert witnesses had to be consulted regarding the documentation delivered during the trial, after hours or during the days when the matter was postponed because of the late delivery of documents. The plaintiff states, based on that experience, that it will be very difficult in circumstances where experts are not present for consultation and that may result in lengthier intermittent postponements. These concerns have not been denied by the trust defendants. I further agree with the submission that it would not be easy for the court, legal representatives and witnesses if original documents were to be required for access and inspection.
- [19] Having had regard to the above factors, I am of the view that a virtual hearing of the matter would not be convenient to the court[4] and in the interest of justice, hence the order I made.

M MAKAULA

Judge of the High Court

Appearances:

Counsel for the Plaintiff:

Adv P Hodes (SC)

Adv T Dicker (SC)

Instructed by:

Catto Neethling Wiid Inc

Cape Town

c/o Greyvensteins Attorneys

Port Elizabeth

For the Respondent/First Defendant:

Mr Garry McWilliams

(In person)

Counsel for Second to Sixteenth Trust Defendant's:

and Eighteen to Twenty-First Trust Defendant's:

Adv L Kuschke (SC) and

Adv J Bernstein

Instructed by: Bowman Gilfillan

c/o Pagdens

Date of Hearing: 29 July 2020

Order Delivered: 29 July 2020

Reasons

Available: 03 August 2020

[1] 2000 (4) SA 1110 (CC) at page 1112 para 4.

[4] Murphy v SA Railways & Hardware and Another (III) 1946 NPD 642 at 643; McCarthy Retail Ltd v Short Distance Carriers CC, 2001

(3) SA 482 (SCA) at para 32.

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