

SOUTH AFRICA / JUDGMENT

Pule v Health Professions Council of South Africa (Reasons) (JS465/19) [2025] ZALCJHB 280 (12 February 2025) [2025] ZALCJHB 280

COURT

Labour Court Johannesburg

BEFORE

M T M Phehane

CASE / FILE NUMBER

JS465/19

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS465/19

In the matter between

RAMOSEBI PAUL PULE

Applicant/Plaintiff

and

HEALTH PROFESSIONS COUNCIL OF

SOUTH AFRICA

Respondent/Defendant

Heard: 6 February 2025

Delivered: 6 February 2025

Reasons:

12 February 2025

REASONS FOR ORDER

PHEHANE, J

[1] On 6 February 2025, this Court issued the following order pursuant to hearing oral argument for and against the postponement of the matter:

‘1. The matter is postponed sine die.

2. There is no order as to costs.’

[2] Brief reasons for the order follow below.

Application for postponement

[3] The parties are referred to as cited in the main action.

[4] The trial was set down for hearing over two days, 6 and 7 February 2025. At the commencement of the proceedings on 6 February 2025, the respondent moved an application for the postponement of the trial due to the unavailability of its material and only witness, Dr. Munyadzima Kwindi.

[5] Dr. Kwindi is currently a pastor. He is a former employee of the respondent and was the immediate supervisor of the applicant concerning the issues in the dispute before this Court.

[6] On 31 January 2025, the respondent served Dr. Kwindi with a subpoena to appear before this Court on 6 and 7 February 2025 to testify on behalf of the respondent regarding the circumstances that led to the termination of the applicant's employment, including his role as the applicant's immediate supervisor during the applicant's probationary period, and the various performance assessments that he conducted in relation to the applicant. Further, Dr. Kwindi was required to bring any necessary and relevant documentation to Court.

[7] On 3 February 2025, the applicant's attorney of record sent e-mail correspondence to Dr. Kwindi, confirming that he had been served with the subpoena and in which e-mail the pleadings and evidence bundle were attached for his consideration and he was asked to confirm when he was available to attend a preparatory meeting with the applicant's attorneys.

[8] On the same date, 3 February 2025, Dr. Kwindi replied to the aforesaid e-mail indicating that he was not in a position to honour the subpoena due to prior arrangements relating to his role as a pastor, being that one of his church members had lost her mother and the funeral was to take place on 7 February 2025, in Lusikisiki in the Eastern Cape. In this email, Dr. Kwindi confirmed that the travel arrangements had already been finalised on 27 January 2025 and he attached a travel itinerary in this regard. The travel itinerary indicates that he departs from Johannesburg to Mthatha on 6 February 2025 at 12h25 and returns to Johannesburg on 8 February

2025. In addition, Dr. Kwindi deposed to an affidavit explaining the aforesaid circumstances and attached an annual calendar wherein he marked the dates that he was not available. In his affidavit, Dr. Kwindi stated that he would make himself available on a future date to assist

the court for the purposes of attending the trial thereafter. On 4 February 2025, the respondent's attorney of record dispatched communication to the applicant's attorney of record in which it advised that Dr. Kwinda informed them on 3 February 2025 that he would not be able to attend the court proceedings on 6 and 7 February 2025, due to a prior commitment on those days in his capacity as a pastor. In light thereof, the respondent's attorney sought confirmation from the applicant's attorney as to whether they would be amenable to postponing the trial to accommodate Dr. Kwinda's availability.

- [9] Mr. Navsa submitted that once the respondent became aware of Dr. Kwinda's unavailability, it immediately appraised the applicant of this and suggested an agreement to postpone the matter, however, this suggestion was rejected by the applicant's attorney and the applicant indicated that the respondent must bring an application for postponement.
- [10] Mr. Navsa further submitted that Rule 33 of the Rules of this Court[1] indicates that no trial should commence where any issue or consideration exists to the knowledge of any parties' representative that would interfere with the completion of the trial. To this end, he submits that the non-availability of its material witness will interfere with the completion of the trial. He further submitted that if the postponement is not granted, the respondent will be deprived of an opportunity to present its evidence to the Court, the consequences being an unfair trial.
- [11] The respondent relies on the matter of Insurance & Banking Staff Association and Others v SA Mutual Life Assurance Society[2] (Insurance Banking Staff Association) which held that prejudice is an important factor to consider in an application for postponement. The respondent contends that its material and relevant witness is unavailable and therefore, the prejudice to the respondent would be greater if the trial is not postponed.
- [12] The respondent also relies on Oudekraal Estates (Pty) Ltd v City of Cape Town and Others[3] in which the Supreme Court of Appeal found that finality of a dispute is paramount however justice is better. Therefore, the respondent

submits that it is in the interest of justice that the trial be postponed to enable its witness to give evidence at the trial.

- [13] The applicant opposes the application on the basis that the Labour Relations Act[4] espouses the speedy resolution of disputes – that this present dispute is almost eight years old and must be finalised. It was submitted on behalf of the applicant that the affidavit by Dr. Kwinda is not supported by a confirmatory affidavit “to prove there is indeed a death” and that the itinerary submitted by him “does not show that there is a death, it only shows that there is a trip”.

[14] It is further submitted on behalf of the applicant that it is unknown whether Dr. Kwindi will be available to attend Court proceedings in future as it cannot be determined when death will strike again. Therefore, the applicant submits that it is not in the interest of justice to grant the postponement as this will delay the finalisation of the matter. In the circumstances, the applicant submits that this Court should refuse postponement the trial should proceed.

Evaluation

[15] In *Myburgh Transport V Botha t/a SA Truck Bodies*[5], the Court laid down the following principles relating to the determination of a postponement application:

- ‘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 457D.)
3. An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if the members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.
4. An appeal Court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles. (*Prinsloo v Saaiman* 1984 (2) SA 56 (O); cf *Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another* 1975 (4) SA 1 (T) at 8E - G; *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152.)
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 398 - 9).
6. An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. *Greyvenstein v Neethling* 1952 (1) SA 463 (C). Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement, even if the application was not so timeously made. *Greyvenstein v Neethling* (supra at 467F).

7. An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.
 8. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms. (Herbstein and Van Winsen *The Civil Practice of the Superior Courts in South Africa* 3rd ed at 453.)
 9. The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.
 10. Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be. *Van Dyk v Conradie and Another* 1963 (2) SA 413 (C) at 418; *Tarry & Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E) at 137”.
- [16] Although no substantive application for postponement was launched by the respondent, it had prepared a bundle of documents pertaining to the postponement application that was moved from the bar with the prior knowledge of the applicant. Immediately when the respondent was aware that its main witness would not be available on 6 and 7 February for the purposes of attending this trial, it informed the applicant and sought a postponement by agreement. The applicant was not amenable to a postponement. It has not been explained to this Court by the legal representative for the applicant as to why postponement was refused when it was approached to consider postponement by agreement, as early as the respondent became aware that its witness would not be available. The basis upon which the applicant opposes postponement as submitted by its legal representative during the proceedings in court hinges on Dr. Kwindi’s

affidavit not being supported by evidence to prove that there has been a death. It is unclear who the applicant expects to have deposed to a confirmatory affidavit “to prove that there has been a death”. The bereaved family members are not parties to this dispute and requiring them to depose to a confirmatory affidavit to “prove that there has been a death” is unnecessary. I find that the respondent’s request for postponement is bona fide. That the travel arrangements were made prior to Dr. Kwindi being subpoenaed is not disputed. Dr. Kwindi complied with the subpoena by being present in Court on 6 February 2025 at 10h00. His unavailability during the

trial on 6 February 2025 for the purposes

of boarding a flight that departs at 12h25 would most certainly interfere with the completion of the trial in circumstances where

there is only one witness for either party.

[17] Rule 33 of the Rules of this Court provides that no trial should commence where an issue would arise that would interfere with the completion of the trial. The unavailability of Dr. Kwinda is such an issue.

[18] Dr. Kwinda's unavailability was communicated to the applicant timely and it is the applicant that was not amenable to agree to a postponement, without any explanation.

[19] The prejudice to the respondent should postponement be refused far outweighs the prejudice to the applicant should postponement be granted. Dr. Kwinda has undertaken to make himself available to attend the trial proceedings in future.

[20] In order to afford both parties a fair trial, it is in the interests of justice that the trial be postponed.

Costs

[21] The applicant contends that should this Court grant postponement, then in that instance, the applicant moves for an order that the respondent should be ordered to pay the costs occasioned by the postponement due to the applicant being unemployed for many years and the delay in finalising the matter.

[22] The respondent submits that it did not tender the costs occasioned by the postponement because it had informed the applicant timely that its witness could not comply with the subpoena and would not be available and in those circumstances, the respondent expected an agreement on postponement.

[23] I am satisfied that the application for postponement is bona fide and an attempt to reach agreement on postponement was timely made. In the circumstances, I issued the aforesaid order in relation

to costs.

[24] I have taken into consideration that the matter dates back a few years - any party may approach the Registrar to re-enrol the matter as contemplated in Rule 44 in order that the matter be heard and disposed of.

M. T. M. Phehane

Judge of the Labour Court of South Africa

[1] Rules Regulating the Conduct of the Proceedings of the Labour Court, published under GN 4775a in GG 50608 of 3 May 2024.

[2] (2000) 21 ILJ 386 LC at para 44.

[3] 2010

(1) SA 333 (SCA) at para 80.

[4] Act 66 of 1995, as amended.

[5] 1991 (3) SA 310 (NmS) at 314F – H In Insurance Banking Staff Association fn 1 supra, this Court state stated at para 13, that these legal principle, stablISHED in the High Court over the years in respect of postponement apply to the practice in the Labour Court.

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Prepared on 12 October 2026 · Esheria