

SOUTH AFRICA / JUDGMENT

Rectron (Pty) Ltd v Kara Smit Rekenaardienste CC (21420/04) [2005] ZAGPHC 48 (25 April 2005) [2005] ZAGPHC 48

COURT

High Courts - Gauteng

BEFORE

NM Poswa

CASE / FILE NUMBER

21420/04

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IN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) CASE NO: 21420/04 REPORTABLE DATE: 25/04/2005 RECTRON (PTY) LTD APPLICANT and KARA SMIT REKENAARDIENSTE CC RESPONDENT JUDGMENT POSWA

FACTS: [1] This is an application for the winding up of the respondent and it came before me on Thursday, 24 February, 2005. [2] It is common cause that (a) the applicant and the respondent entered into a written agreement, whose terms are set out in annexure "P3" to the applicant's founding affidavit; (b) the respondent would, in terms of the agreement, become the applicant's dealer and the applicant would supply the respondent with certain goods related to, inter alia, the business of "hardware, software [and] network implementations"; (c) the respondent was permitted to make payment, for goods supplied by the applicant, by cheque; (d) "no cheques [would] be issued in payment unless there [were] sufficient funds"; (e) in the event of a breach by the respondent of any terms and conditions of the agreement, the applicant would be entitled to "institute any action in either the Magistrate's Court or High Court at its sole discretion." (f) during March and April, 2004 the applicant sold and delivered certain goods to the respondent; (g) although the parties disagreed on the interpretation of annexure "P4", that document contains the list of goods sold and delivered by the applicant, disagreement being on how to calculate the total amount due for payment by the respondent; (h) the respondent fell in arrears in its payments for goods sold and delivered by respondent; (i) her arrangement was made between the applicant and the respondent in terms whereof the respondent would settle the arrears in four cheques, three of which would be postdated; (j) pursuant to that arrangement, the respondent furnished the applicant with four cheques dated (i) 18 March, 2004, for R20, 000. 00; (ii) 14 June, 2004, for R48, 755.00; (iii) 4 July, 2004, for R48, 755. 96; (iv) 4 August, 2004, for R48, 755. 96; the total whereof I have calculated to be R166, 266. 92; (k) the respondent's first two cheques were duly met but the respondent stopped payment of the third cheque; (l) the respondent gave as its reason for stopping payment the fact that the applicant had enlisted it to some credit-watch institution, i.e. "Credit Sure"; the

applicant says it reported to "Credit Guarantee" and not "Credit Sure," which makes no difference to the issues herein;[m] the respondent seemingly became aware of such reporting when it could no longer make purchases of items it required for the business because its name appeared in the list of defaulting debtors, which is kept by what the respondent calls "Credit Sure,"[n] the respondent regarded this act on the applicant's part as one of hostility and not in keeping with the spirit of the arrangement I have referred to, between it and the applicant, that resulted in the making of the four Cheques.[3] The applicant's attitude is that the respondent has, for whatever reason, failed to pay an amount that was due, thus breaching the terms of the contract contained in annexure "P3". It explained, further, that it reported to "Credit Guard," its insurer, in terms of an agreement with the latter, which permits the applicant to enter into any arrangement with a debtor, subject to the applicant reporting such arrangement to "Credit Guard." The applicant thought that "Credit Sure" might have picked up the report from "Credit Guard," in the course of their own relationship as credit-watch institutions.[4] I have omitted a lot of detail that is not necessary for purposes of giving the background against which this application arose. Suffice to say that this dispute came to me as an opposed application for liquidation of the respondent. With the impression it had in mind, before this explanation by the applicant, in the latter's replying affidavit, the respondent stopped payment of the third cheque, for R48755.96. That action resulted in this application. It appears to be the applicant's attitude that the respondent's stoppage of payment of the cheque(s) delivered in consequence of the arrangement that resulted in the issuing of the postdated cheques contravenes the terms of Annexure "P3." Consequently, it resorted to the provisions of that earlier, the main, agreement, part of which reads: "The customer hereby declares that no cheques will be issued in payment unless there are sufficient funds and that such funds will remain available in order that all cheque payments will be honoured and under no circumstances will any cheque be stopped. (Emphasis added). Because para 18-7 of P3 reads; "18.7 The supplier shall have the right to institute any action in either the relevant Magistrate's Court or the High Court at its sole discretion," the applicant chose to apply for the respondent's sequestration. It justifies its application in the founding affidavit of one Pramod Otham, who says, inter alia, the following, in para 28; "Although the Applicant has obtained the right, title and interest in and to the Respondent's claim against its debtors, it is favorable (sic) that the Respondent be liquidated." [5] The application is opposed. [6] Mr. Gradidge informed me, in chambers, that there was no appearance for the respondent, and that he had been informed that the respondent's attorneys of record had withdrawn as its attorneys. There was no notice of withdrawal in both the court file and his brief. I requested him to make investigations about this report of withdrawal by the attorneys concerned, before the hearing commenced, as there would be problems without a written notice of withdrawal in terms of the Rules. [7] When the matter was later called, Mr. Gradidge still had no information of substance. After a further stand-down, he brought a "NOTICE OF WITHDRAWAL AS ATTORNEYS," dated 18 February, 2005, by the respondent's attorneys of record, received by the correspondent attorneys of the applicant's attorneys on Monday, 21 February,

2005. The notice did not bear the Registrar's date stamp. It reflected that it had been addressed to the Registrar and the applicant's attorneys. It did not mention that it had been addressed to the respondent, let alone being received by the respondent.[8] Mr. Gradidge argued that I could and should make a provisional order granting the application, in the form of a rule nisi. No harm would be done to the applicant, so he argued, because it would return to Court, if it so desired, to show cause why the provisional order should not be confirmed.[9] I informed Mr. Gradidge that, besides that "notice" appearing not to have been issued by the Registrar, it also clearly omitted mention of the respondent. In the circumstances, I declined to make an order in the applicant's favour, in the form suggested by Mr. Gradidge or in any form whatsoever. Consequently, Mr. Gradidge applied for a postponement and asked that the respondent be ordered to pay costs occasioned by its default.[10] As I told Mr. Gradidge, in light of apparent non-compliance, by the respondent's attorneys of record, with Rule 16(4), I was not inclined to award costs against the respondent but against the respondent's attorneys of record.[11] At his request, I granted Mr. Gradidge a stand down to enable him to obtain some written information about the rumoured withdrawal. He returned and handed up a faxed copy of a "NOTICE OF WITHDRAWAL AS ATTORNEYS," signed by the respondent's attorneys of record on 18 February, 2005. It is stated in that notice that it was received (by the applicant's attorneys) on (Monday) 21 February, 2005. It does not bear the Registrar's stamp and it never reached the court file. For reference purposes, the name of "Mr. Marne Stevenson" is given. In all other material respects, this document is a replica of the one earlier handed up by Mr. Gradidge.[12] The second document did not appear, to me, to alter the factual and legal positions from what they had, hitherto, appeared to be. As it was already late in the day, I ordered that the application be postponed to the next morning, 25 February, 2005. I also arranged that Mr. Morne Stevenson, the attorney reflected in the "notice" as the person to deal with for reference purposes and with whom Mr. Gradidge or the applicant's attorneys had had communication about what had transpired concerning the withdrawal by the respondent's attorneys, be notified to attend Court the next day. He was to show cause why the respondent's attorneys were not to be ordered to pay costs *de bonis propriis*. Mr. Stevenson was duly informed and he attended Court the next morning, Friday, 25 February, 2005.[13] Before attending Court, however, Mr. Stevenson wrote me a letter, on the same day, Thursday, 24 February, 2005, in which he explained, *inter alia*, that he had advised "Mr. Marius Smit, the husband of the sole member of the respondent, [to] be present at Court to confirm the content of this letter [written to me by Mr. Stevenson]." That letter, to which is attached a copy of the same "notice of withdrawal," drew attention to the Registrar's date stamp on the face of the attached copy. It is dated 21 February, 2005. The letter also stated that Mr. Marius Smit had given the respondent's attorneys instructions "to withdraw as attorneys of record." The "notice" attached to Mr. Stevenson's letter is the third version of the "notice of withdrawal." [14] I permitted Mr. Stevenson to appear as "counsel" for the respondent's erstwhile attorneys on the question of who should be ordered to pay costs. That was after he had conceded, from the Bar, and had confirmed by reference to the letter, that the notice was not in compliance with Rule 16(4)(a), to the respondent. Because

I accepted Mr. Stevenson's statement that his firm of attorneys had received "instructions" from Mr. Smit, to withdraw as the respondent's attorneys, I did not find the need to hear Mr. Smit, to confirm what Mr. Stevenson had told me. I must mention that, during the course of the morning, the original of the notice of withdrawal as the respondent's attorneys of record - which original bore bearing the Registrar's stamp - had surfaced. That was after I had instructed the Registrar's office to hunt for it. The original confirmed that the notice had, indeed, beentimeously filed, on Monday, 21February,2005.[15] The main issue here is, in my view, whether the notice complied withRule 16(4). I have already stated that Mr. Stevenson conceded that, to the extent that it reflected that it was not served on the respondent, the notice did not comply. The further question is whether I should have granted the provisional order argued for by Mr. Gradidge, in which event there have been no need for postponement of the application.8[16]Inmy view, the question as to whether to proceed with this application ornot, in the respondent's absence, raises the further question of the right of access to courts (s. 34 of the Constitution, Act 108 of 1996). In respect of this right, Yacoob,Jsaid the following, when delivering the judgment, of the Court, in the case ofDe Beer NO v North -Central Local Council and South-Central Local Council and Others (Umhlatusana Civic Association Intervening)[2001] ZACC 9;2002 (1) SA 429(CC), para. [1], at 433H;"Section 34 of our Constitution promises a fair hearing to anyone involved in a justifiable dispute that can be resolved by the application of law."He then went on to elaborate as follows, in para. [11], at 439G-440B;"This s. 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as aprerequisite to an order being made against anyoneis fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before themarealways fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution, courts must interpret legislationand Rules of Court,whereitis reasonably possible to do so, in a way that would render the proceedings fair. Itisacrucial aspect of the rule of law that court orders should not be made without affording the other sideareasonable opportunity to state their (sic) case.That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of Courts make provision for this." (Emphasis added).See also:D.F Scott (EP) (PTY) L TD v Golden Valley Supermarket2002(6)SA 297(SCA)at301G, para. [9], where Harms JA says;"Rules of Court are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right."9[17] I think that Plasket,Jsums this point up aptly, inPremier Freight(Pty)Ltdv Breathetex Corporation (Pty) Ltd2003(6)SA 190(SECLD), at 193H-I,where he states;"The founding constitutional values must also be borne in mind. The founding constitutional value of the rule of law, enshrined in s. 1 (c), and the right to access to court[s], entrenched in s. 34 of the Constitution, encapsulate a commitmentbythe State to make available to the public for the resolution of disputes courts that function according to fair procedures."[18] Rule 16 of the Uniform Rules of Court sets out the law with regard torepresentation of parties in civil proceedings in the

High Court. Sub-rule 16 (4) deals pertinently with the situation in which the parties find themselves in this case. With regard to the case where an attorney ceases to act for his or her client, the following is stated; "(4)(a) Where an attorney acting in any proceedings for a party ceases to act, he shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom he acted may be given by registered post. (b) After such notice, unless the party represented, within 10 days after the notice, himself notifies all other parties of a new address for service as contemplated in subrule (2), it shall not be necessary to serve any documents upon such party unless the court otherwise orders: Provided that any of the other parties may, before receipt of the notice of his new address for service of documents, serve any documents upon the party who was formerly represented. (c) The notice to the registrar shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them. (d) The notice to the party formerly represented shall inform the said party of the provisions of paragraph (b)."

[Emphasis added].¹⁰ This is sub-section 16(4) as it is after being updated in Service 20, 2004, in Erasmus "Supreme Court Practice," B1-120. I have highlighted the words "deliver notice thereof to such party," in (a), to emphasise that the client also has to be notified of the withdrawal. I have similarly highlighted the words "and the date on which and the manner in which the notice was sent to them," in (4)(c). Finally, I have also highlighted the words "shall inform the said party of the provisions of paragraph (b)" in (4)(d).¹⁹

In *Transorient Freight v Eurocargo Co-ordinators* 1984 (3) SA 542 (W), at 545 F-546 C, Flemming, J, as he then was, said; "It is important that practitioners do realise that Rule 16(4) requires more than a notice of withdrawal with freely chosen content. The document to be filed by the Registrar must not only state that the attorney is withdrawing. It must state: (a) who the 'parties' are who were notified of the withdrawal; (b) when each 'party' was notified of the withdrawal; (c) how each notification was 'sent'; and (d) reflect the contents of the original notification or notifications to parties, generally probably by way of attaching a copy of the document which was - clearly at a stage prior to the signing of the notice now under consideration - 'sent'. A registration slip, requiring assumptions, inferences and guesswork, is not mentioned by the Rule as a substitute. Whether the notice to the Registrar can or should properly state an address which will henceforth be an address for service will depend upon the facts of the case Failure to comply with the very explicit requirements of a notice of withdrawal to the Registrar may then, on the lines which I have indicated, render an attorney liable to pay some compensation to the opposite party. The position of an attorney clearly creates obligations not only towards his own client but also towards the Court and to some extent to the opposite party. However, the interests to be guarded over by the Courts cannot be made dependent upon the degree of activity of individual parties in respect of claims for compensation. It may well become appropriate merely to order an attorney whose failure to comply with Rule 16 (4) causes costs of additional service or postponements, to pay such costs *de bonis propriis*."

[20] It is not necessary for me to restate what Flemming, J so eloquently stated. I need only add that, when the right of access to courts is kept in mind, it becomes evident that a party that engages the services of an attorney or an advocate, at

great expense where that is not done through the Legal Aid Board or some other public service body, does so to ensure that its interests are adequately placed before the court. The court must, at all times, receive representation from the party's legal representatives before it makes any order that will or may have an impact on the rights of such party. This, in my view, is precisely what Yacoob, J meant in *DeBeer* (supra), when he said; "It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their (sic) case." Where the party is legally represented that "reasonable opportunity" is afforded to it through its legal representative, until the latter's mandate has been appropriately terminated.[21] In this regard, Mr. Gradidge drew my attention to the case of *De Wet v Western Bank*, 1979(2)SA, 1031(AD), where the following appears at 1038B-G; "Counsel for the appellants referred in the first instance, to the fact that, in withdrawing as attorney for the appellants, Lebos had failed to comply with the provisions of Rule 16(4) in at least two respects. This is common cause. The formal notification to the Registrar did not specify the date when, the parties to whom, and the manner in which notification was sent to all parties concerned, and it was not accompanied by a copy of last-mentioned notification. It was, accordingly, contended that the proceedings before Van Reenen J were irregular and that the judgments against the appellants had been erroneously sought and granted. In my view there is no substance whatever in this contention. The appellants cannot avail themselves of the fact that their attorney had not complied with all the requirements of Rule 16(4). There is no question of any irregularity on the part of the respondent. At the stage when Lebos withdrew as the appellants' attorney, the case had already been set down for hearing on 16 August 1979 in accordance with the Rules of Court, and there was no need for the respondent to serve any further notices or documents on the appellants in connection with the resumed hearing. As far as the trial court was concerned the Rules of Court had been fully complied with and the notice of trial had been duly given. When the case was called before Van Reenen J neither the appellants nor their legal representative were present in Court, and, in the circumstances, the respondent's counsel was fully entitled to apply for an order of absolution from the instance with costs in terms of Rule 39(3) in respect of the appellants' claims and to move for judgment against the appellants under Rule 39(1) on the counterclaim. The fact that the appellants had not been advised timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common law, but it is not a circumstance on which the appellants can effectively rely for the purpose of an application under the provisions of Rule 42(1)(a). "[22] Mr. Gradidge argued that what is stated in *Flemming J, in Transocean Freight v Eurocargo Co-ordinators*, (supra), earlier quoted herein, is in conflict with this passage. I agree with Mr. Gradidge that there is, definitely, conflict between the two judgments. It is evident that *Flemming J's* attention was not drawn to the *De Wet* decision, because he says nothing about it. I must say that I am of the view that *Flemming J's* interpretation of Rule 16(4) is more convincing. It seems to me that the intention of the legislature was to protect lay persons from being abandoned by unscrupulous attorneys, as, unfortunately, such attorneys surface from time to time, although they are in the

minority in the attorneys' profession. It would seem, to me, that the best way to determine whether an attorney who withdraws as the attorney of record has informed his or her client of his or her intention to withdraw and that he or she has done so timeously, is to compel the attorney to write that down in the notice and give details as to when and how he or she delivered it to his or her erstwhile client.[23] In the light, however, of what was recently stated in *Jayiya v MEC for Welfare, Eastern Cape Provincial Government*, [2003] 2 All SA 223 (SCA), and in a number of Supreme Court of Appeal decisions (*Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), at paras. [25-26]; *Blaawberg Meat Wholesalers v Anglo Dutch Meats (Exports)* 2004 (3) SA 160, paras. 20, 167J-168D; *Sv Kgafela* 2003 (5) SA 339 (SCA), at 341A-D, para. [3]; (SC)), and in *Ex parte Minister of Safety and Security, in re S v Walters* [2002] ZACC 6; 2002 (4) SA 613 (CC), at 646F-H, para. [61] and para. [12], 624G-625C), however, I am bound to follow the judgment in *De Wet* (supra), unless I think it is distinguishable. I think it is distinguishable, as I now set out to demonstrate.[24] When the Appellate Division, as it then was before 1994, gave its decision, it did not have the Constitution as a basis on which to interpret Rule 16(4). I now have to consider the implications of the provisions of the Constitution on whether or not an order may be made against a party who is in default, after he or she becomes timeously aware of the date set down, but in respect of which the attorney's notice of withdrawal does not indicate that the party had been notified of such withdrawal, as prescribed in Rule 16(4)(a) and (d). I am of the view that s 34 of the Constitution, Act 108 of 1996 and the remarks by Yacoob, *Jin De Beer NO v North Central Local Council and Others* (Umhlathuzana Civic Association intervening), (supra) make the distinction.[25] I could not accede to the applicant's request that a provisional order favour be made in its favour. Once made, that order would place the applicant at an advantage that it would have earned simply because the respondent was not present to try and persuade the Court to accept its own view of the dispute. The order would hang over the respondent's head, with all the risks that go with that kind of burden. It would already be faced with, effectively, a *rule nisi*, to show cause why the provisional order should not be made final. It would have to act within imposed time frames with non-compliance therewith resulting in the provisioned order becoming final without the respondent having had opportunity to contest the application for insolvency. This is not as speculative as it may be thought when it is borne in mind that the applicant appears to have relied on the provisions of the initial agreement, in respect of the respondent's conduct that is based on the subsequent agreement. It may well be that, when the application is argued, the existence of a second agreement in spite of the first agreement countenancing no other agreement, would call for determination of the extent to which the applicant could rely on the first agreement, in the circumstances. In any event, Mr. Gradidge would not have argued for this order to be made if it was not to benefit his client, the applicant, and only the applicant.[26] No order of that nature should, in my view, be made in the absence of the party against whom it is to be made, without evidence as to why the latter party is in default, especially where, as is the case here, it is mentioned that that party's legal representatives have, somehow but informally, communicated that they no longer represent the party concerned.[27] Consequently, I informed Mr. Gradidge that I would not

grant his request for a provisional order and that I also did not think that the respondent should pay costs occasioned by the postponement, as argued by him. The application was then postponed to enable Mr. Stevenson to show cause why I should not order the respondent's attorneys of record to pay costs, *de bonis propriis*. They had not, after all, notified the Court of their rumoured withdrawal as the respondent's attorneys and they had not even attended court to orally report that position. I took it upon myself to arrange for Mr. Stevenson's attendance.[28] I permitted Mr. Stevenson to give explanation from the Bar, after he duly attended Court. His explanation can be summed up as follows: (a) He conceded that the notice is not in compliance with Rule 16(4), to the extent that it was not sent to the respondent; (b) The reason for not sending a copy of the notice to the applicant was that Mr. Smit, the respondent's sole proprietor's partner ("my *eggenoot*" according to para 2.1 of the proprietor's, Mrs. Annanda Smit's, Opposing Affidavit) had informed Mr. Stevenson that the respondent was no longer opposing the application; at a time when the proprietor was already aware of the date of set down for the hearing of the application; (c) It was an oversight, on his own part, not to have complied with Rule 16(4), nonetheless, but such oversight did not justify an order of costs against him or the firm of attorneys for which he worked. For reasons that Mr. Stevenson was totally unable to explain, he submitted that the respondent should be ordered to pay costs of the postponement.[29] Having heard Mr. Stevenson, I am satisfied that the respondent's attorneys of record failed to comply with the provisions of Rule 16(4) for, *inter alia*, reasons given by Mr. Stevenson. COSTS 16[30] Having conceded that the notice of withdrawal is defective, in that it was not delivered to the respondent Mr. Stevenson, nevertheless, argued, as I have already stated, that an order for payment of costs, *de bonis propriis*, should not be made against him or his firm of attorneys. He submitted that he had not acted *mala fide*, negligently or unreasonably in not sending the notice to the respondent. He pointed to a portion in the respondent's affidavit(s) that showed that Mr. Smit had frequently been used by the respondent as its agent in transacting with the applicant. Consequently, he submitted that he was justified in dealing with Mr. Smit and in accepting from him the instructions to withdraw.[31] Indeed, in the letter I have referred to, Mr. Stevenson wrote; "I did not see it necessary to forward a copy of the Notice of Withdrawal to the respondent as I received instructions to withdraw directly from the respondent. I did, however, confirm with the respondent that these instructions were duly carried out." [Emphasis added.] In the light of his own presentation and submissions before me, Mr. Stevenson's highlighted portions are incorrect. Such "instructions" were not "directly from the respondent" but from Mr. Smit. [32] It is evident that Mr. Stevenson either does not know the provisions of Rule 16(4) or does not take them seriously. Sub-rule 16(4)(a) requires that the notice of withdrawal be delivered to the erstwhile client. Sub-rule 16(4)(d) specifically prescribes that "the notice to the party formerly represented shall inform the said party of the provisions of paragraph (b)." The notice in this case does comply with that instruction but it was not delivered to the respondent or, for that matter, to Mr. Smit, whom Mr. Peterson regarded the respondent's representative or agent. In any event, I do not think that it was the intention of the legislature that proof of compliance with the provisions of Rule 16(4) be sought outside the

notice, itself. Even so, neither Mr. Stevenson's oral assertions before me nor the letter he wrote contained information that could cure the defect in the notice.^[33] Whilst I accept that Mr. Stevenson was, not actuated by malice when deciding not to forward the notice to the respondent or, for that matter, Ms Smit, I cannot but feel that he, to say the least, acted unreasonably, if not negligently.^[34] When I put the question to him, as to who should pay the applicant's costs, if not the attorneys, Mr. Stevenson hesitated before saying the respondent should. He had difficulty answering the question as to what the respondent's conduct was that had caused the postponement. Let me emphasise that the cause of the postponement was that I could not make any order against the respondent when, on the only available evidence, even if only prima facie evidence, in the form of the then unstamped notice, the respondent had not been notified of the attorneys' withdrawal. When the original notice surfaced, its only difference was that it had the Registrar's stamp, which the earlier document did not have.^[35] The applicant was forced to ask for a postponement because I refused to give it judgment by default, having been informed that it appeared that the respondent's attorneys had withdrawn and it being clear that the notice of withdrawal had not been delivered to the respondent. The attorneys did not as much as bring Ms. Smit to Court, for her to come and confirm the alleged withdrawal of opposition, neither did they obtain an affidavit from her to that effect. It does not appear that Mr. Stevenson ever considered these options because he brought, instead, Mr. Smit, who is neither the respondent nor, contrary to what Mr. Stevenson said, the respondent's agent. I did not give Mr. Smit an opportunity to give evidence, in the light of the fact that it was not being suggested that he had been lawfully mandated to represent the respondent in respect of the alleged decision by the respondent not to oppose the application.^[36] Having been informed by Mr. Smit that the respondent was withdrawing its opposition to the application, Mr. Stevenson did not file a notice of withdrawal of opposition thereto. He clearly had opportunity to do so, because he had time to file the defective notice of withdrawal by the respondent's attorneys of record.^[37] If one applies the so-called "usual rule" that a party that seeks and obtains a postponement pays the costs occasioned by such postponement (*Van Rooyen v Naude* 1929 OPD 122-3, a decision discussed in numerous subsequent decisions and applied in many of them), the applicant would have to pay costs occasioned by the postponement. That would, surely, be unjust. Fairness to both sides in an action is a major consideration when the question of costs is being determined. (*Gelb v Hankins*, 1960(3) SA 687 (AD), at 694). As Coleman, J said in *Burger v Kotze and Another* 1970(4) SA 302 (W), at 304 E-F: "I do not think it is correct to state as a general rule that the wasted costs are to be paid by the party who seeks a postponement." See also, *Van Staden v Union and SWA Insurance Co, Ltd* 1972(1) SA 758 (E).

^[38] Awarding costs *de bonis propriis* against a legal representative is a rare occurrence and is not to be lightly resorted to. It is undesirable to make legal practice, especially for attorneys, equivalent to a quagmire or a landmine-infested territory. Courts should not, however, hesitate to award such costs in appropriate circumstances and thus protect parties who are not responsible for wasted costs from facing costs unfairly. With litigation so unreasonably costly, in my view, an award of costs on a party is often terminal to the

party's action. In any event, it makes a huge dent in any party's financial resources and would, on the facts of this case, in all probability, have crippled the respondent or Ms. Smit, unjustifiably. It would have cost the respondent's attorneys very little and, in any event, no more than it cost them to file the notice of withdrawal as attorneys of record, for them to file, instead, a notice of withdrawal of opposition, with a tender by the respondent to pay costs occasioned thereby.[39] An attorney guilty of sufficiently reprehensible conduct or who displays unreasonable, reckless or negligent conduct in the handling of his or her client's affairs or case renders himself or herself open to an award of costs *de bonis propriis* against him or her. *Jenkins v F.J.J de Souza and Co. (Pvt)* 1968 (4) SA 559(R); *Nkosi v Caledonian Insurance Co.* 1961 (4) SA 649(N), at 663C-D; *Machumela v Santam Insurance Co. Ltd* 1977 (1) SA 660 (AD); *Washaya v Washaya* 1990 (4) SA 419 (Z.H.), at 45G-I; *Khan v Mzovuyo Investments (Pty) Ltd* 1991 (3) SA 47 (Tk), at 48G-I. Fleming J's warning in *Transorient* (supra) should be added to the many voices that warn of the danger of such conduct on the part of legal practitioners.[40] The case was postponed *sine die*, and the respondent's erstwhile attorneys (and not Mr. Stevenson personally) was ordered to pay costs occasioned by the postponement, *de bonis propriis*. [41] In the course of my preparation of this judgment and after the case had been postponed, I came across the case of *Take and Save Trading, CC v Standard Bank of SA Ltd*, 2004 (4) SA 1 (SCA), where Harms JA says the following, at 4H-5B; "One of the oldest tricks in the book is the practice of some practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right." [42] It appears to me that this statement is so wide that it could be said to include every situation where an attorney withdraws at the last moment on account of termination of his or her mandate at the last moment. This, according to Mr. Stevenson, is what happened in the present case. Talking for myself, I must say I am not in a position to agree that, "more often than not," clients "terminate" their mandates "at the suggestion of the practitioner(s)." I have no reason to doubt the integrity of "practitioners," i.e. attorneys, as a branch of the legal profession. Even if what the learned judge of appeal has observed is general practice, I have sufficient evidence in the present instance to know that that is not the case here. Mr. Stevenson brought Mr. Smit, who, according to him, would have assured me that the notice of withdrawal was genuine. The idea was to assure me that it was unnecessary to postpone the application, the very opposite of what Harms, JA's has experienced. I have already stated that I refused to make an order against the respondent because of my interpretation of the right of access to courts and the remarks by Yacoob, J in *De Beer* (supra), in that regard. [43] Both Rule 16(4) and Harms, JA remarks appear to leave me with the ultimate discretion, even in circumstances where the notice of withdrawal is faultless. In Rule 16(4)(b), referring to a notice of withdrawal that has been

delivered to all parties concerned, including the erstwhile client, it is stated that "it shall not be necessary to serve any documents upon such party [the erstwhile client of the withdrawing attorney] unless the court otherwise orders ... " (Emphasis added.)²¹ [44] It is, therefore, contemplated that a Court, which is seized with a scenario where the notice of withdrawal is perfect and where the party whose attorney has withdrawn fails to notify other parties of a new address for service, may still order that there be service of documents on such party in any other appropriate manner. Harms, JA, himself, qualifies his statement by making it clear that it is only "in suitable cases" that a postponement may be refused where the party whose attorney has withdrawn, after the case has been set down for a hearing, is in default. [45] I am of the view, in any event, that Harms, JA's remarks are obiter. He was not dealing with Rule 16(4). That was a case where, in the court a quo, as Harms, JA puts it, "the defendants' legal team withdrew without proffering any reason." The defendants then applied for a postponement. In grudgingly granting the postponement, the learned judge, PC Combrinck, J, "expressed in no uncertain terms that he thought that there was little merit in two aspects of the defendants' case and that the postponement ... amounted to an exercise in futility ... When the matter was again enrolled, the defendants, now represented by another counsel applied by way of notice of motion, for the Judge to recuse himself. He refused the application and the subsequent one for leave to appeal met the same fate. This Court eventually granted leave. 3A-4A. The question of the entitlement or otherwise of a party, whose legal representative withdraws at the last minute, to a postponement was dealt with in *Take and Save Trading CC (supra)*, the context of deciding whether or not PC Combrinck, J was entitled to say what he said about the genuineness of the application for a postponement. [46] Finally, concerning Harms, JA's views, as expressed in that case, I must point out that he does refer to "Everyone [being] entitled to a fair trial and [that] that includes the right to a hearing before an impartial adjudicator." He goes on to say; "This common law right is now constitutionally²² entrenched." It is clear, however, that he makes those remarks in the context of an application for recusal for he says: "Present a reasonable apprehension of bias, the judicial officer is duty bound to recuse himself." 4B. The authorities he cites, in Footnotes 1 and 2, including *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999(4) SA 147 (CC), relate to the question of recusal. [47] In conclusion, I re-iterate that the respondent's attorneys of record are ordered to pay, *de bonis propriis*, the costs of the postponement, which postponement was occasioned by their failure to deliver their notice of withdrawal as the respondent's attorneys to the respondent, in terms of Rule 16(4)(a), (c) and (d). J NM. POSWA JUDGE OF THE HIGH COURT_ _--HEARD ON: 24 January 2005 FOR THE APPLICANT: Adv B Gradidge INSTRUCTED BY: MESSRS Kramer & Viljoen C/o Attorneys FOR THE RESPONDENT: Adv M Stevenson INSTRUCTED BY: MESSRS Van Huyssteens C/o Attorneys DATE OF JUDGMENT: 25 April 2005

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 21420/04REPORTABLE DATE: 25/04/2005RECTRON (PTY) LTD APPLICANT

and

KARA SMIT REKENAARDIENSTE CC

RESPONDENT

JUDGMENT

POSWA

J

FACTS:

[1] This is an application for the winding up of the respondent and it came before me on Thursday, 24 February, 2005.

[2] It is common cause that

(a) the applicant and the respondent entered into a written agreement, whose terms are set out in annexure "P3" to the applicant's founding affidavit;

(b) the respondent would, in terms of the agreement, become the applicant's dealer and the applicant would supply the respondent

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with certain goods related to,

inter alia,

the business of "har

dware, software [and] network implementations";

(c) the respondent was permitted to make payment, for goods supplied by the applicant, by cheque;

(d)

"no cheques [would] be issued i

n payment unless there [were]

sufficient funds";

(e) in the event of a breach by the respondent of any terms and

conditions of the agreement, the applicant would be entitled to "institute any action in either the Magistrate's Court or High Court at its sole discretion."

(f) during March and April, 2004 the applicant sold and delivered

certain goods to the respondent;

(g) although the parties disagreed on the interpretation of annexure

"P4", that document contains the list of goods sold and delivered by the applicant, disagreement being on how to calculate the total amount due for payment by the respondent;

"P4",

that document contains the list of goods sold and delivered by the applicant, disagreement

being on how to calculate the

total amount due for payment by the respondent;

(h) the respondent fell in arrears in its payments for goods sold and

delivered by respondent;

(i)

her arrangement was made between the applicant and the

respondent in terms whereof the respondent would settle the arrears in four cheques, three of which would be postdated;

(j)

pursuant to that arrangement, the respondent furnished the applicant with four cheques dated

3(i) 18 March, 2004, for R20, 000. 00;

(ii) 14 June, 2004, for R48, 755.00;

(iii) 4 July, 2004, for R48, 755. 96; (iv) 4 August, 2004, for R48, 755. 96;

the total whereof I have calculated to be R166, 266. 92;

(k) the respondent's

first two cheques were duly met

but the

respondent stopped payment of the third cheque;

(I) the respondent gave as its reason for stopping payment the fact

that the applicant had enlisted it to some credit-watch institution, i.e. "Credit Sure"; the applicant says it reported to "Credit Guarantee" and not "Credit Sure," which makes no difference to the issues herein;

that the applicant had enlisted it to some credit-watch institution, i.e. "Credit Sure"; the applicant says it reported to "Credit Guarantee" and not "Credit Su

re," which makes no difference

to the issues herein;

[m] the respondent seemingly became aware of such reporting when it

could no longer make purchases of items it required for the business because its name appeared in the list of defaulting debtors, which is kept by what the respondent calls "Credit Sure,"

[n] the respondent regarded this act on the applicant's part as one of

hostility and not in keeping with the spirit of the arrangement I have referred to, between it and the applicant, that resulted in the making of the four Cheques.

[3] The applicant's attitude is that the respondent has, for whatever reason,

failed to pay an amount that was due, thus breaching the terms of the contract contained in annexure "P3". It explained, further, that it reported to "Credit Guard," its insurer, in terms of an agreement with the latter, which permits the applicant to enter into any arrangement with a debtor,

failed to pay an amount that was due, thus breaching the terms of the contract contained in annexure

"P3".

It

explained, further, that it re

ported to "Credit Guard," its insurer, in terms of an agreement with the latter, which permits the applicant to enter into any arrangement with a debtor,

4

subject to the applicant reporting such arrangement to "Credit Guard." The applicant thought that "Credit Sure" might have picked up the report from "Credit Guard," in the course of their own relationship as credit-watch institutions.

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eir own relationship as credit-

watch institutions.

[4] I have omitted a lot of detail t

hat is not necessary for purpose

s of giving

the background against which this application arose. Suffice to say that this dispute came to me as an opposed application for liquidation of the respondent. With the impression it had in mind, before this explanation by the applicant, in the latter's replying affidavit, the respondent stopped payment of the third cheque, for R48755.96. That action resulted in this application. It appears to be the applicant's attitude that the respondent's stoppage of payment of the cheque(s) delivered in consequence of the arrangement that resulted in the issuing of the postdated cheques contravenes the terms of Annexure "P3." Consequently, it resorted to the provisions of that earlier, the main, agreement, part of which reads:

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"P3."

Consequently, it resorted to the provisions of that earlier, the main, agreement, part of which reads:

"The customer hereby declares that no cheques will be issued in payment unless there are sufficient funds and that such funds will remain available in order that all cheque payments will be honoured and under no circumstances will any cheque be stopped. (Emphasis added).

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under no circumstances

will any

cheque be stopped. (Emphasis added).

Because para 18-7 of P3 reads;

"18.7 The supplier shall have the right to institute any action in either the relevant Magistrate's Court or the High Court at its sole discretion,"

the applicant chose to apply for the respondent's sequestration. It justifies its application in the founding affidavit of one Pramod Otham, who says, inter alia, the following, in para 28;

the applicant chose to apply for the respondent's sequestration. It justifies its application in the founding affidavit of one Pramod Otham, who says,

the following, in para 28;

"Although the Applicant has obtained the right, title and interest in and to the Respondent's claim against its debtors, it is favorable (sic) that the Respondent be liquidated."

[5] The application is opposed.

[6] Mr. Gradidge informed me, in chambers, that there was no appearance for

the respondent, and that he had been informed that the respondent's

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attorneys of record had withdrawn as its attorneys. There was no notice of withdrawal in both the court file and his brief. I requested him to make investigations about this report of withdrawal by the attorneys concerned, before the hearing commenced, as there would be problems without a written notice of withdrawal in terms of the Rules.

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ere would be problems without

a written notice of withdrawal in terms of the Rules.

[7] When the matter was later called, Mr. Gradidge still had no information of substance. After a further stand-down, he brought a "NOTICE OF WITHDRAWAL AS ATTORNEYS," dated 18 February, 2005, by the respondent's attorneys of record, received by the correspondent attorneys of the applicant's attorneys on Monday, 21 February,

2005. The notice did not bear the Registrar's date stamp. It reflected that it had been addressed to the Registrar and the applicant's attorneys. It did not mention that it had been addressed to the respondent, let alone being received by the respondent.

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had been addressed to the Registrar and the applicant's attorneys. It did not mention that it had been addressed to the respondent, let alone being received by the respondent.

[8] Mr. Gradidge argued that I could

and should make a provisional

order

granting the application, in the form of a rule nisi. No harm would be done to the applicant, so he argued, because it would return to Court, if it so desired, to show cause why the provisional order should not be confirmed.

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not be confirmed.

confirmed.

[9] I informed Mr. Gradidge that, besides that "notice" appearing not to have

been issued by the Registrar, it also clearly omitted mention of the respondent. In the circumstances, I declined to make an order in the applicant's favour, in the form suggested by Mr. Gradidge or in any form whatsoever. Consequently, Mr. Gradidge applied for a postponement and asked that the respondent be ordered to pay costs occasioned by its default.

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idge applied for a postponement

and asked that the respondent be ordered to pay costs occasioned by its default.

[10] As I told Mr. Gradidge, in light of apparent non-compliance, by the respondent's attorneys of record, with Rule 16(4), I was not inclined to

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the respondent

,

s attorneys of record, with Rule 16(4), I was not inclined to

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award costs against the respondent but against the respondent's attorneys of record.

[11] At his request, I granted Mr. Gradidge a stand down to enable him to obtain some written information about the rumoured withdrawal. He returned and handed up a faxed copy of a "NOTICE OF WITHDRAWAL AS ATTORNEYS," signed by the respondent's attorneys of record on 18 February, 2005. It is stated in that notice that it was received (by the applicant's attorneys) on (Monday) 21 February, 2005. It does not bear the Registrar's stamp and it never reached the court file. For reference purposes, the name of "Mr. Marne Stevenson" is given. In all other material respects, this document is a replica of the one earlier handed up by Mr. Gradidge.

[11]

At his request, I granted Mr. Gradidge a stand down to enable him to obtain some written information about the rumoured withdrawal. He returned and handed up a faxed copy of a "NOTICE OF WITHDRAWAL AS ATTORNEYS," signed by the respondent's attorneys of record on 18 February, 2005. It is stated in that notice that it was received

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Marne Stevenson" is given. In al

In other material respects, this document is a replica of the one earlier handed up by Mr. Gradidge.

[12] The second document did not appear, to me, to alter the factual and legal positions from what they had, hitherto, appeared to be. As it was already late in the day, I ordered that the application be postponed to the next morning, 25 February, 2005. I also

arranged that Mr. Morne Steve

nson, the attorney reflected in the "notice" as the person to deal with for reference purposes and with whom Mr. Gradidge or the applicant's attorneys had had communication about what had transpired concerning the withdrawal by the respondent's attorneys, be notified to attend Court the next day. He was to show cause why the respondent's attorneys were not to be ordered to pay costs

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Mr. Stevenson was duly informed and he attended Court t

he next morning, Friday, 25 Febr

uary, 2005.

[13] Before attending Court, however, Mr. Stevenson wrote me a letter, on the same day, Thursday, 24 February, 2005, in which he explained, inter alia, that he had advised "Mr. Marius Smit, the husband of the sole member of the respondent, [to] be present at Court to confirm the content of this letter

[13] Before attending Court, however, Mr. Stevenson wrote me a letter, on the same day, Thursday, 24 February, 2005, in which he explained,

that he had advised "Mr. Marius Smit, the husband of the sole member of the respondent, [to] be present at Court to confirm the content of this letter

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[written to me by Mr. Stevenson]." That letter, to which is attached a copy of the same "notice of withdrawal," drew attention to the Registrar's date stamp on the face of the attached copy. It is dated 21 February, 2005. The letter also stated that Mr. Marius Smit had given the respondent's attorneys instructions "to withdraw as attorneys of record." The "notice" attached to Mr. Stevenson's letter is the third version of the "notice of withdrawal."

[written to me

Mr. Stevenson]." That letter, to which is attached a

copy

of the same "notice of withdrawal," drew attention to the Registrar's date stamp on the face of the attached copy. It is dated 21 February, 2005. The letter also stated that Mr. Marius Smit had given the respondent's attorneys instructions "to withdraw as attorneys of record." The "notice" attached to Mr. Stevenson's letter is the third version of the "notice of withdrawal."

[14] I permitted Mr. Stevenson to appear as "counsel" for the respondent's

erstwhile attorneys on the question of who should be ordered to pay costs. That was after he had conceded, from the Bar, and had confirmed by reference to the letter, that the notice was not in compliance with Rule 16(4)(a), to the respondent. Because I accepted Mr. Stevenson's statement that his firm of attorneys had received "instructions" from Mr. Smit, to withdraw as the respondent's attorneys, I did not find the need to hear Mr. Smit, to confirm what Mr. Stevenson had told me. I must mention that, during the course of the morning, the original of the notice of withdrawal as the respondent's attorneys of record - which original bore bearing the Registrar's stamp - had surfaced. That was after I had instructed the Registrar's office to hunt for it. The original confirmed that the notice had, indeed, beentimeously filed, on Monday, 21February,2005.

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[15] The main issue here is, in my view, whether the notice complied with Rule 16(4). I have already stated that Mr. Stevenson conceded that, to the extent that it reflected that it was not served on the respondent, the notice did not comply. The further question is whether I should have granted the provisional order argued for by Mr. Gradidge, in which event there have been no need for postponement of the application.

[15] The main issue here is, in my view, whether the notice complied with

Rule 16(4). I have already stated that Mr. Stevenson conceded that, to the extent that it reflected that it was not s

erved on the respondent, the notice did not comply. The further question is whether I should have granted the provisional order argued for by Mr. Gradidge, in which event there have been no need for postponement of the application.

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[16]

In

my view, the question as to whether to proceed with this application or

not, in the respondent's absence, raises the further question of the right of access to courts (s. 34 of the Constitution, Act 108 of 1996). In respect of this right, Yacoob, J said the following, when delivering the judgment, of the Court, in the case of *De Beer NO v North -Central Local Council and South-Central Local Council and Others (Umhlathuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429(CC), para. [1], at 433H;

not, in the respondent's absence, raises the further question of the right of access to courts (s. 34 of the Constitution, Act 108 of 1996). In respect of this right, Yacoob,

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De Beer NO v North -Central Local Council

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and Others (Umhlathuzana Civic Association Intervening)

[2001] ZACC 9; 2002 (1) SA 429(CC), para. [1], at 433H;

[2001] ZACC 9

2002 (1) SA 429

"Section 34 of our Constitution promises a fair hearing to anyone involved in a justifiable dispute that can be resolved by the application of law."

He then went on to elaborate as follows, in para. [11], at 439G-440B;

"This s. 34 fair hearing right affirms the rule of law, which is a founding value of our Constitution. The right to a fair hearing before a court lies at the heart of the rule of law. A fair hearing before a court as a prerequisite to an order being made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution, courts must interpret legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule

of law that court orders should not be made without affording the other side a reasonable opportunity to state their (sic) case. That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of Courts make provision for this." (Emphasis added).

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That reasonable opportunity can usually only be given by ensuring that reasonable steps are taken to bring the hearing to the attention of the person affected. Rules of Courts make provision for this." (Emphasis added).

See also:

D.

F Scott (EP) (PTY) LTD v Golden Valley Supermarket 2002

2002

(6)

SA 297

(SCA)

at

301

G, para. [9], where Harms JA says;

"Rules of Court are designed to ensure a fair hearing and should be interpreted in such a way as to advance, and not reduce, the scope of the entrenched fair trial right."

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[17] I think that Plasket,
sums this point up aptly, in

Premier Freight

(Pty)

Ltd

v Breathetex Corporation (Pty) Lt

d2003

2003

SA 190(SECLD), at 193H-I,

where he states;

"The founding constitutional values must also be borne in mind. The founding constitutional value of the rule of law, enshrined in s. 1 (c), and the right to access to court[s], entrenched in s. 34 of the Constitution, encapsulate a commitment by the State to make available to the public for the resolution of disputes courts that function according to fair procedures."

"The founding constitutional values must also be borne in mind. The founding constitutional value of the rule of law, enshrined in s. 1 (c), and the right to access to court[s], entrenched in s. 34 of the Constitution, encapsulate a commitment

the State to make available to the public for the resolution of disputes courts that function according to fair procedures."

[18] Rule 16 of the Uniform Rules of Court sets out the law with regard to

representation of parties in civil proceedings in the High Court. Sub-rule 16 (4) deals pertinently with the situation in which the parties find themselves in this case. With regard to the case where an attorney ceases to act for his or her client, the following is stated;

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find themselves in this case. With regard to the case where an attorney ceases to act for his or her client, the following is stated;

"(4)(a) Where an attorney acting in any proceedings for a party ceases

so to act, he shall forthwith deliver notice thereof to such party, the registrar and all other parties: Provided that notice to the party for whom he acted may be given by registered post.

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such

party,

the registrar and all other parties: Provided that notice to the party for whom he acted

may be given by registered post.

(b) After such notice, unless the party represented, within 10 days after the notice, himself notifies all other parties of a new address for service as contemplated in subrule (2), it shall not be necessary to serve any documents upon such party unless the court otherwise orders: Provided that any of the other parties may, before receipt of the notice of his new address for service of documents, serve any documents upon the party who was formerly represented.

(b) After such notice, unless the part

y represented, within 10 days a

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(c) The notice to the registrar shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them.

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and the date on which and the manner in which

h the

notice was sent to them.

(d) The notice to the party formerly represented

shall inform the said party of the provisions of paragraph (b).

"

[Emphasis added].

10

This is sub-section 16(4) as it is after being updated in Service 20, 2004, in Erasmus "Supreme Court Practice," B1-120. I have highlighted the words "deliver notice thereof to such party," in (a), to emphasise that the client also has to be notified of the withdrawal. I have similarly highlighted the words "and the date on which and the manner in which the notice was sent to them," in (4)(c). Finally, I have also highlighted the words "shall inform the said party of the provisions of paragraph (b)" in (4)(d).

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inform the said party of the provisions of paragraph (b)" in (4)(d).

[19] In

Transorient Freight v Eurocargo Co-ordinators

1984 (3)

SA

542

(W

), at

545F

- 546C,

Flemming,

J,

as he then was, said;

"It is important that practitioners do realise that Rule 16(4) requires more than a notice of withdrawal with freely chosen content. The document to be filed by the Registrar must not only state that the attorney is withdrawing. It must state:

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tioners do realise that Rule 16

(4) requires more than a notice of withdrawal with freely chosen

content. The document to be file

d by the Registrar must not only state that the attorney is withdrawing. It must state:

(a) who the 'parties' are who were notified of the withdrawal;

(b) when each 'party' was notified of the withdrawal;

(c) how each notification was 'sent'; and

(d) reflect the contents of the o

iginal notification or notifica

tions to

parties, generally probably by way of attaching a copy of the document which was - clearly at a stage prior to the signing of the notice now under consideration - 'sent'.

A registration slip, requiring assumptions, inferences and guesswork, is not mentioned by the Rule as a substitute. Whether the notice to the Registrar can or should properly state an address which will henceforth be an address for service will depend upon the facts of the case Failure to comply with the very explicit requirements of a notice of withdrawal to the Registrar may then, on the lines which I have indicated, render an attorney liable to pay some compensation to the opposite party. The position of an attorney clearly creates obligations not only towards his own client but also towards the Court and to some extent to the opposite party. However, the interests to be guarded over by the Courts cannot be made dependent upon the degree of activity of individual parties in respect of claims for compensation. It may well become appropriate *mero motu* to order an

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to order an

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attorney whose failure to comply with

Rule 16 (4) causes costs of ad

ditional service or postponements, to pay such costs

de bonis propriis. "

[20]

It is not necessary for me to restate what Flemming,

so elo

quently

stated. I need only add that, when the right of access to courts is kept in mind, it becomes evident that a party that engages the services of an attorney or an advocate, at great expense where that is not done through the Legal Aid Board or some other public service body, does so to ensure that its interests are adequately placed before the court. The court must, at all times, receive representation from the party's legal representatives before it makes any order that will or may have an impact on the rights of such party. This, in my view, is precisely what Yacoob, I meant in DeBeer (supra), when he said; "It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their (sic) case." Where the party is legally represented that "reasonable opportunity" is afforded to it through its legal representative, until the latter's mandate has been appropriately terminated.

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its

legal representative, until the latter's mandate has been appropriately terminated.

[21]

In this regard, Mr. Gradidge drew my attention to the case of

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e W

et v

Western Bank,

1979(2)

SA, 1031

(AD), where the following appears at

1038B-G;

"Counsel for the appellants referred in the first instance, to the fact that, in withdrawing as attorney for the appellants, Lebos had failed to comply with the provisions of Rule 16(4) in at least two respects. This is common cause. The formal notification to the Registrar did not specify the date when, the parties to whom, and the manner in which notification was sent to all parties concerned, and it was not accompanied by a copy of last-mentioned notification. It was, accordingly, contended that the proceedings before Van Reenen J were irregular and that the judgments against the appellants had been erroneously sought and granted. In my view there is no substance whatever in this contention. The appellants cannot avail themselves of the fact that their attorney had not

"Counsel for the appell

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my

view there is no substance whatever in this contention. The appellants cannot avail themselves of the fact that their attorney had not

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complied with all the requirements of Rule 16(4). There is no question of any irregularity on the part of the respondent. At the stage when Lebos withdrew as the appellants' attorney, the case had already been set down for hearing on 16 August 1979 in accordance with the Rules of Court, and there was no need for the respondent to serve any further notices or documents on the appellants in connection with the resumed hearing. As far as the trial court was concerned the Rules of Court had been fully complied with and the notice of trial had been duly given. When the case was called before Van Reenen J neither the appellants nor their legal representative were present in Court, and, in the circumstances, the respondent's counsel was fully entitled to apply for an order of absolution from the instance with costs in terms of Rule 39(3) in respect of the appellants' claims and to move for judgment against the appellants under Rule 39(1) on the counterclaim. The fact that the appellants had not been advised timeously of the withdrawal of their attorney is, of course, a factor to be taken into account in considering whether good cause has been shown for the rescission of the judgments under the common law, but it is not a circumstance on which the appellants can effectively rely for the purpose of an application under the provisions of Rule 42(1)(a). "

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of

Rule

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39(3)

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he appellants can effectively rely for the purpose of an application under the provisions of Rule 42(1)(a). "

[22] Mr. Gradidge argued that what is stated Fleming J, in

Transorient

FreightvEurocargo Co-ordinators,(supra), earlier quoted herein, is in conflict with this passage. I agree with Mr. Gradidge that there is, definitely, conflict between the two judgments. It is evident thatFlemmingJ's attention was not drawn to theDe Wet decision,because he says nothing about it. I must say that I am of the view that Fleming J's interpretation of Rule s16(4) is more convincing. It seems to me that the intention of the legislature was to protect lay persons from being abandoned by unscrupulous attorneys, as, unfortunately, such attorneys surface from time to time, although they are in the minority in the attorneys' profession. It would seem, to me, that the bestwayto determine whether an attorney who withdraws as the attorney of record has informed his or her client of his or her intention to withdraw and that he or she has done so timeously, is to compel the attorney to write that

Freight

v

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J3

down in the notice and give details as to when and how he or she delivered it to his or her erstwhile client.

[23]

In the light, however, of what was recently stated in *Jayiya v MEC for Welfare, Eastern Cape Provincial Government*, [2003]

[2003]

2 All SA 223(SCA), and in a number of Supreme Court of Appeal decisions (*Afrox Healthcare Bpk v Strydom* 2002

21

(SCA), at paras.

[25-26].

{Headnote}:

Blaawberg Meat Wholesalers v Anglo Dutch Meats (Exports) 2004 2004

(3)

SA 160, paras. 20, 167J-168D;

S

v Kgafela 2003

(5)

339

(SCA), at 341A

-

D,

para.

[3]

;

(SC))

, and in

Ex parte Minister of Safety and Security,

in re

S v Walters

[2002] ZACC 6;2002 (4) SA

[2002] ZACC 6

2002 (4) SA

613(CC), at 646F-H, para. [61]

and para. [12], 624G-625C), however, I am bound to follow the judgment in

De

W

et

(supra),

unless

I

think it is distinguishable.

think it is distinguishable, as I now set out to demonstrate.

[24]

When the Appellate Division, as it then was before 1994, gave its decision, it did not have the Constitution as a basis on which to interpret Rule 16(4).

now have to consider the implications of the provisions of the Constitution on whether or not an order may be made against

party who is in default, after he or she b

ecomes timeously aware of the d

ate set down, but in respect which the attorney's notice of

withdrawal

does not indicate that the party had been notified

of such withdrawal, as prescribed in Rule 16(4)(a) and (d). I am of the view that s34 of the Constitution, Act 108 of 1996 and the remarks by Yacoob,

in

De Beer NO v North Central Local Council and Others (Umhlatuzana Civic Association intervening), (supra)

make the distinction.

[25]I couldnot accede to the applicant's request that a provisional order favour be made in its favour. Once made, that order would place the applicant at an advantage that it would have earned simply because the respondent was not present to try and persuade the Court to accept its

[25]

I could

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14

own view of the dispute. The order would hang over the respondent's head, with all the risks that go with that kind of burden. It would already be faced with, effectively, *arule nisi*, to show cause why the provisional order should not be made final. It would have to act within imposed time frames with non-compliance therewith resulting in the provisioned order becoming final without the respondent having had opportunity to contest the application for insolvency. This is not as speculative as it may be thought when it is borne in mind that the applicant appears to have relied on the provisions of the initial agreement, in respect of the respondent's conduct that is based on the subsequent agreement. It may well be that, when the application is argued, the existence of a second agreement in spite of the first agreement countenancing no other agreement, would call for determination of the extent to which the applicant could rely on the first agreement, in the circumstances. In any event, Mr. Gradidge would not have argued for this order to be made if it was not to benefit his client, the applicant, and only the applicant.

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of the first agreement, in the circumstances. In any event, Mr. Gradidge would not have argued for this order to be made if it was not to benefit his client, the applicant, and only the applicant.

[26] No order of that nature should, in my

view, be made in the absence

of the

party against whom it is to be made, without evidence as to why the latter party is in default, especially where, as is the case here, it is mentioned that that party's legal representatives have, somehow but informally, communicated that they no longer represent the party concerned.

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latter party is in default, especially where, as is the case here, it is mentioned that that party's legal representatives have, somehow but informally, communicated that they no longer represent the party concerned.

[27] Consequently, I informed Mr. Gradidge that I would not grant his request for a provisional order and that I also did not think that the respondent should pay costs occasioned by the postponement, as argued by him. The application was then postponed to enable Mr. Stevenson to show cause why I should not order the respondent's attorneys of record to pay costs, *de bonis propriis*. They had not, after all, notified the Court of their rumoured withdrawal as the respondent's attorneys and they had not even

[27] Consequently, I informed Mr. Gradidge

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They had not, after all

, notified the Court of their rumoured withdrawal as the respondent's attorneys and they had not even

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attended court to orally report their

position. I took it upon myself

to arrange for Mr. Stevenson's attendance.

[28] I permitted Mr. Stevenson to give explanation from the Bar, after he duly

attended Court. His explanation can be summed up as follows:

(a) He conceded that the notice is not in compliance with Rule 16(4), to

the extent that it was not sent to the respondent;

(b) The reason for not sending a copy of the notice to the applicant

was that Mr. Smit, the respondent's sole proprietor's partner ("my eggenoot" according to para 2.1 of the proprietor's, Mrs. Annanda Smit's, Opposing Affidavit) had informed Mr. Stevenson that the respondent was no longer opposing the application; at a time when the proprietor was already aware of the date of set down for the hearing of the application;

(c) It was an oversight, on his own part, not to have complied with Rule

16(4), nonetheless, but such oversight did not justify an order of costs against him or the firm of attorneys for which he worked.

For reasons that Mr. Stevenson was totally unable to explain, he submitted that the respondent should be ordered to pay costs of the postponement.

[29] Having heard Mr. Stevenson, I am satisfied that the respondent's attorneys of record failed to comply with the provisions of Rule 16(4) for, inter alia, reasons given by Mr. Stevenson.

[29] Having heard Mr. Stevenson, I am satisfied that the respondent's attorneys of record failed to comply with the provisions of Rule 16(4) for,

reasons given by Mr. Stevenson.

COSTS

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[30] Having conceded that the notice of withdrawal is defective, in that it was

not delivered to the respondent Mr. Stevenson, nevertheless, argued, as I have already stated, that an order for payment of costs,

de bonis propriis,

should not be made against him or his firm of attorneys. He submitted that he had not acted mala fide,

negligently or unreasonably in not sending the notice to the respondent. He pointed to a portion in the respondent's affidavit(s) that showed that Mr. Smit had frequently been used by the respondent as its agent in transacting with the applicant. Consequently, he submitted that he was justified in dealing with Mr. Smit and in accepting from him the instructions to withdraw.

[31] Indeed, in the letter I have referred to, Mr. Stevenson wrote;

"I did not see it necessary to forward a copy of the Notice of Withdrawal to the respondent as I received instructions to withdraw directly from the respondent. I did, however, confirm with the respondent that these instructions were duly carried

"I did not see it necessary to forward a copy of the Notice of Withdrawal

to the respondent as I received instructions to withdraw directly from the respondent.

I did, however,

confirm with the respondent that

his

instructions were

duly carried

out." [Emphasis added.]

In the light of his own presentation and submissions before me, Mr.

Stevenson's highlighted portions are incorrect. Such "instructions" were not "directly from the respondent" but from Mr. Smit.

[32] It is evident that Mr. Stevenson either does not know the provisions of Rule 16(4) or does not take them seriously. Sub-rule 16(4)(a) requires that the notice of withdrawal be delivered to the erstwhile client. Sub-rule 16(4)

(d) specifically prescribes that "the notice to the party formerly represented shall inform the said pa

rtly of the provisions of parag

raph (b)." The notice in this case does comply with that instruction but it was not

delivered to the respondent or, for that matter, to Mr. Smit, whom Mr. Perterson regarded the respondent's representative or agent. In any event, I do not think that it was the intention of the legislature that proof of compliance with the provisions of Rule 16(4) be sought outside the notice, itself. Even so, neither Mr. Stevenson's oral assertions before me nor the

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letter he wrote contained inf

ormation that could cure the de

fect in the notice.

[33] Whilst I accept that Mr. Stevenson was, not actuated by malice when deciding not to forward the notice to the respondent or, for that matter, Ms Smit, I cannot but feel that he, to say the least, acted unreasonably, if not negligently.

[34] When I put the question to him, as to who should pay the applicant's costs, if not the attorneys, Mr. Stevenson hesitated before saying the respondent should. He had difficulty answering the question as to what the respondent's conduct was that had caused the postponement. Let me emphasise that the cause of the postponement was that I could not make any order against the respondent when, on the only available evidence, even if only prima facie evidence, in the form of the then unstamped notice, the respondent had not been notified of the attorneys' withdrawal. When the original notice surfaced, its only difference was that it had the Registrar's stamp, which the earlier document did not have.

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evidence, in the form of the then unstamped notice, the respondent had not been notified of the attorneys' withdrawal. When the original notice surfaced, its only difference was that it had the Registrar's stamp, which the earlier document did not have.

[35] The applicant was forced to ask for a postponement because I refused to

give it judgment by default, having been informed that it appeared that the respondent's attorneys had withdrawn and it being clear that the notice of withdrawal had not been delivered to the respondent. The attorneys did not as much as bring Ms. Smit to Court, for her to come and confirm the alleged withdrawal of opposition, neither did they obtain an affidavit from her to that effect. It does not appear that Mr. Stevenson ever considered these options because he brought, instead, Mr. Smit, who is neither the respondent nor, contrary to what Mr. Stevenson said, the respondent's agent. I did not give Mr. Smit an opportunity to give evidence, in the light of the fact that it was not being suggested that he had been lawfully

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that Mr. Stevenson ever consid

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mandated to represent the resp

ondent in respect of the allege

d decision by the respondent not to oppose the application.

[36] Having been informed by Mr. Smit that the respondent was withdrawing its

opposition to the application, Mr. Stevenson did not file a notice of withdrawal of opposition thereto. He clearly had opportunity to do so, because he had time to file the defective notice of withdrawal by the respondent's attorneys of record.

[37] If one applies the so-called "usual rule" that a party that seeks and obtains

a postponement pays the costs occasioned by such postponement (Van Rooyen v Naude 1929 OPD 122-3, a decision discussed in numerous subsequent decisions and applied in many of them), the applicant would have to pay costs occasioned by the postponement. That would, surely, be unjust. Fairness to both sides in an action is a major consideration when the question of costs is being determined. (Gelb v Hankins, 1960(3) SA 687 (AD), at 694). As Coleman, J said in Burger v Kotze and Another 1970(4) SA 302 (W), at 304E-F.

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SA 687 (AD), at 694). As Coleman, J said in

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"I do not think it is correct to state as a ge

neral rule that the wasted costs

are to be paid by the party who seeks a postponement."

See also,

Van Staden v Union and

SWA

Insurance Co, Ltd

1972

(1) SA 758(E).

[38] Awarding costs *de bonis propriis* against a legal representative is a rare occurrence and is not to be lightly resorted to. It is undesirable to make legal practice, especially for attorneys, equivalent to a quagmire or a landmine-infested territory. Courts should not, however, hesitate to award such costs in appropriate circumstances and thus protect parties who are not responsible for wasted costs from facing costs unfairly. With litigation so unreasonably costly, in my view, an award of costs on a party is often terminal to the party's action. In any event, it makes a huge dent in any

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party's financial resources and would, on the facts of this case, in all probability, have crippled the respondent or Ms. Smit, unjustifiably. It would have cost the respondent's attorneys very little and, in any event, no more than it cost them to file the notice of withdrawal as attorneys of record, for them to file, instead, a notice of withdrawal of opposition, with a tender by the respondent to pay costs occasioned thereby.

[39] An attorney guilty of sufficiently reprehensible conduct or who displays unreasonable, reckless or negligent conduct in the handling of his or her client's affairs or case renders himself or herself open to an award of costs *de bonis propriis* against him or her. *Jenkins v F.J.J de Souza and Co. (Pvt)* 1968 (4) SA 559(R); *Nkosi v Caledonian Insurance Co.* 1961 (4) SA 649(N), at 663C-D; *Machumela v Santam Insurance Co. Ltd* 1977 (1) SA 660 (AD); *Washaya v Washaya* 1990 (4) SA 419 (Z.H.), at 45G-I; *Khan v Mzovuyo Investments (Pty) Ltd* 1991 (3) SA 47 (Tk), at 48G-I. Flemming J's warning in *Transorient* (supra) should be added to the many voices that warn of the danger of such conduct on the part of legal practitioners.

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Jenkins v F.

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J de Souza and Co. (Pvt)

1968 (4)

559

(R); Nkosi v Caledonian Insurance

Co.1961

1961

(4)

SA 649(N), at 663C-D; Machumela v Santam Insurance

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Lt

d 1977(1) SA 660 (AD); Washaya v Washaya1990

1990

419

(Z.H.), at 45G-I

; Kh

an v Mzovuyo Investments (Pty) Lt

d

1991 (3)

47

(Tk

), at 48G-I

Flemming J's warning in

Transorient (supra)

should be added to the many voices that warn of the danger of such conduct on the part of legal practitioners.

[40] The case was postponed

sine die,

and the respondent's

erstwhile

attorneys (and not Mr. Stevenson personally) was ordered to pay costs occasioned by the postponement,

[41] In the course of my preparation of this judgment and after the case had

been postponed, I came across the case of *Take and Save Trading, CC v Standard Bank of SA Ltd*, 2004(4) SA 1 (SCA), where Harms JA says the following, at 4H-5B;

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CC

v Standard Bank

SA Ltd,

2004(4) SA 1 (SCA), where Harms JA says the following, at 4H-5B;

"One of the oldest tricks in the book is the practice of some practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate (more often than not at the suggestion of the practitioner), to force the court to grant a postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure

"One of the oldest tricks in the book is the practice of some practitioners, whenever the shoe pinches, to withdraw from the case (and more often than not to reappear at a later stage), or of clients to terminate the mandate

(more often than not at the suggestion of the practitioner), to force the court to grant a

postponement because the party is then unrepresented. Judicial officers have a duty to the court system, their colleagues, the public and the parties to ensure

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that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of right."

that this abuse is curbed by, in suitable cases, refusing a postponement. Mere withdrawal by a practitioner or the mere termination of a mandate does not, contrary to popular belief, entitle a party to a postponement as of

right."

[42] It appears to me that this statement is so wide that it could be said to

include every situation where an attorney withdraws at the last moment on account of termination of his or her mandate at the last moment. This, according to Mr. Stevenson, is what happened in the present case. Talking for myself, I must say I am not in a position to agree that, "more often than not," clients "terminate" their mandates "at the suggestion of the practitioner(s)." I have no reason to doubt the integrity of "practitioners," i.e. attorneys, as a branch of the legal profession. Even if what the learned judge of appeal has observed is general practice, I have sufficient evidence in the present instance to know that that is not the case here. Mr. Stevenson brought Mr. Smit, who, according to him, would have assured me that the notice of withdrawal was genuine. The idea was to assure me that it was unnecessary to postpone the application, the very opposite of what Harms, JA's has experienced. I have already stated that I refused to make an order against the respondent because of my interpretation of the right of access to courts and the remarks by Yacoob, J in De Beer (supra), in that regard.

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De Beer (supra),

in that regard.

[43] Both Rule 16(4) and Harms, JA remarks appear to leave me with the

ultimate discretion, even in circumstances where the notice of withdrawal is faultless. In Rule 16(4)(b), referring to a notice of withdrawal that has been delivered to all parties concerned, including the erstwhile client, it is stated that

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client, it is stated that

"it shall not be necessary to serve any documents upon such party [the erstwhile client of the withdrawing attorney] unless the court otherwise orders ... " (Emphasis added.)

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client of the withdrawing attorney]

unless the court otherwise orders ... "

(Emphasis added.)

[44] It is, therefore, contemplated that a Court, which is seized with a scenario

where the notice of withdrawal is perfect and where the party whose attorney has withdrawn fails to notify other parties of a new address for service, may still order that there be service of documents on such party in any other appropriate manner. Harms, JA, himself, qualifies his statement by making it clear that it is only "in suitable cases" that a postponement may be refused where the party whose attorney has withdrawn, after the case has been set down for a hearing, is in default.

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after the case has been set down for a hearing, is in default.

[45] I am of the view, in any event, that Harms, JA's remarks are

obiter.

He

was not dealing with Rule 16(4). That was a case where, in the court quo, as Harms, JA puts it, "the defendants' legal team withdrew without proffering any reason." The defendants then applied for a postponement. In grudgingly granting the postponement, the learned judge, PC Combrinck, J,

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"expressed in no uncertain terms that he thought that there was little merit in two aspects of the defendants' case and that the postponement ... amounted to an exercise in futility ... When the matter was again enrolled, the defendants, now represented by another counsel applied by way of notice of motion, for the Judge to recuse himself. He refused the application and the subsequent one for leave to appeal met the same fate. This Court eventually granted leave. 3A-4A.

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4A.

The question of the entitlement or otherwise of a party, whose legal

representative withdraws at the last minute, to a postponement was dealt with in *Take and Save Trading CC* (supra), the context of deciding whether or not PC Combrinck, J was entitled to say what he said about the genuineness of the application for a postponement.

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CC (supra), the context of deciding whether or not PC Combrinck, J was entitled to say what he said about the genuineness of the application for a postponement.

[46] Finally, concerning Harms, JA's views, as expressed in that case, I must

point out that he does refer to "Everyone [being] entitled to a fair trial and [that] that includes the right to a hearing before an impartial adjudicator." He goes on to say; "This common law right is now constitutionally

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entrenched." It is clear, however, that he makes those remarks in the context of an application for recusal for he says:

"Present a reasonable apprehension of bias, the judicial officer is duty bound to recuse himself." 4B

The authorities he cites, in Footnotes 1 and 2, including President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1999(4) SA 147 (CC), relate to the question of recusal.

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[47] In conclusion, I re-iterate that the respondent's attorneys of record are

ordered to pay, *de bonis propriis*, the costs of the postponement, which postponement was occasioned by their failure to deliver their notice of withdrawal as the respondent's attorneys to the respondent, in terms of Rule 16(4)(a), (c) and (d) .

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J NM. POSWA JUDGE OF THE HIGH COURT

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COURT

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HEARD ON: 24 January 2005

FOR THE APPLICANT: Adv B GradidgeINSTRUCTED BY: MESSRS Kramer

&

Viljoen C/o Attorneys FOR THE RESPONDENT: Adv M Stevenson

INSTRUCTED BY: MESSRS Van Huyssteens C/o Attorneys DATE OF JUDGMENT: 25 April 2005

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