

SOUTH AFRICA / JUDGMENT

S.Y v A.D (24406/2016) [2024]

ZAWCHC 28 (6 February 2024)

[2024] ZAWCHC 28

COURT

Western Cape High Court, Cape Town

BEFORE

Adhikari AJ

CASE / FILE NUMBER

24406/2016

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IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE HIGH
COURT, CAPE TOWN)

Case

No: 24406/2016

In the matter between:

S[...]
A[...] Y[...]
Plaintiff/Respondent
versus
A[...]
V[...] D[...]
Defendant/Applicant

Coram:

Adhikari AJ

Heard:

6 February 2024

Delivered:

6 February 2024

JUDGMENT

DELIVERED ON 6 FEBRUARY 2024

ADHIKARI, AJ

- [1] This is an opposed application for the postponement of a trial in a divorce action. The divorce action was instituted during or about 2016. It appears from the pleadings and the practice notes filed by the parties that the issues which remain in dispute include the valuation of the joint estate for the purposes of division thereof, the defendant's claim for rehabilitative maintenance and the extent of the plaintiff's contribution to the maintenance of the minor child born of the marriage. The determination of these disputed issues requires evidence to be led regarding, inter alia, the financial circumstances of the plaintiff ('Mr Y[...]').
- [2] The defendant ('Ms D[...]',), on the morning of 5 February 2024 delivered a substantive application seeking the postponement of the trial sine die, with Mr Y[...] to pay the wasted costs of the postponement. Ms D[...] contends that Mr Y[...] has failed to make full discovery of all documents relevant to his financial position and that consequently the matter is not trial ready.
- [3] Mr Y[...] opposes the postponement and contends that the matter is trial ready. Mr Y[...] did not deliver an answering affidavit in the postponement application. At the commencement of proceedings on 6 February 2024, Ms Korf who appeared on behalf of Mr Y[...] confirmed that Mr Y[...] did not intend to deliver an answering affidavit and that she would proceed to argue against the postponement based on the papers filed of record.

Legal principles relevant to postponement

- [4] It is trite that the trial judge has a discretion as to whether an application for a postponement should be granted or refused. The discretion must be exercised judicially, for substantial reasons and should not be exercised capriciously or upon any wrong principle. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion will be exercised. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, is not due to delaying tactics and where justice demands that the party should have further time for the purpose of presenting its case. An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.
- [5] 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. The court may in an appropriate case allow an application for postponement even if the application was not

timeously made, where fundamental fairness and justice justifies a postponement. The court should weigh the prejudice which will be caused to the respondent if the postponement is granted against the prejudice which will be caused to the applicant if it is not. What the court has to consider is whether any prejudice caused by a postponement can fairly be compensated by an appropriate order for costs or any other ancillary mechanisms.

[6] Where the applicant for a postponement has not made the application timeously, or is otherwise to blame with respect to the procedure which has been followed, but the interests of justice nevertheless justify 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 by the postponement.

The merits of the postponement application

[7] It appears from the record that the trial was previously set down for hearing on 22 August 2023.

[8] Ms D[...]’s attorneys delivered a notice in terms of Rule 35(3) dated 20 July 2023 calling on Mr Y[...] to discover, inter alia, all bank statements in respect of any accounts held by him at any financial or banking institutions. In response, Mr Y[...] deposed to an affidavit dated 16 August 2023, in which he stated that he holds an account at Bidvest Bank and a credit card account at First National Bank Private Wealth with an account number ending in 5000.

[9] However, the day before the hearing (that is at approximately 16h30 on 21 August 2023) Mr Y[...]’s attorney addressed correspondence to Ms D[...]’s attorney annexing further bank statements that had not previously been discovered. On examination of these further bank statements it became apparent to Ms D[...]’s attorney that Mr Y[...] in fact held an account with First National Bank (‘FNB’) which had not previously been disclosed,

that is a FNB Private Wealth current account (‘the FNB Private Wealth current account’), with an account number ending in 6957.

[10] It bears emphasis that the fact that Mr Y[...] has this further FNB account was not pertinently drawn to the attention of Ms D[...]’s attorney in the correspondence addressed by Mr Y[...]’s attorney on 21 August 2023. Ms D[...]’s attorney only became aware of the existence of this further bank account when he examined the statements annexed to the correspondence that had been sent to him.

[11] It is contended in the affidavit in support of the postponement application that five out of the sixty-seven statements in respect of the FNB Private Wealth current account were made available to Ms Dreyer’s attorneys on the day of the last hearing, that is on 22 August 2023. Consequently Ms D[...]’s attorneys during December 2023 directed a subpoena to FNB to obtain all of the bank statements in respect of the FNB Private Wealth current account. FNB provided the statements on 11 January 2024. The delay in issuing the subpoena is not

explained in the affidavit in support of the postponement application. However, it is apparent that the FNB Private Wealth current account statements have never been discovered by Mr Y[...].

[12] It is contended in the affidavit in support of the postponement application that an analysis of the FNB Private Wealth current account statements reveals that:

[12.1] Mr Y[...] has made payments totalling R190 567.00 into an investment account despite the fact that he had stated in his affidavit dated 16 August 2023 that he did not have any investments held at any institutions.

[12.2] Mr Y[...] has made payments totalling R296 504.70 into what appears to be a pension fund despite the fact that he has to date not disclosed that he has any pension benefits.

[12.3] The payment reference in respect of the payments into what appears to be a pension fund refers to “Magtape Credit Citibank Sidwell Ar Pension” however, Mr Y[...] has never disclosed that he holds an account with Citibank.

[12.4] Mr Y[...] has been making payments to the Overstrand Municipality in respect of an undisclosed immovable property.

[12.5] Mr Y[...] has received numerous unexplained payments from foreign bank accounts, despite the fact that he stated in his affidavit dated 16 August 2023 that he has no income in South Africa other than a salary of \$4 000.00 per month that he earns from his employment as a chef on a cruise ship.

[13] These contentions are not in dispute as Mr Y[...] has elected not to deliver an answering affidavit.

[14] On 12 January 2024 Ms D[...]’s attorney drew the aforementioned issues to the attention of Mr Y[...]’s

attorney and called on Mr Y[...] to, inter alia, make full discovery of his financial circumstances. In addition, Ms D[...]’s attorney requested that Mr Y[...] sign a document granting his consent for Ms D[...]’s attorneys to obtain documents from his employer relating to his income and employment benefits (‘the consent form’). Ms D[...]’s attorney further advised that unless the requests were complied with by 18 January 2024, a postponement of the trial would be sought.

[15] On 23 January 2024 Mr Y[...]’s attorney responded, in essence, denying that his client had failed to make full discovery of his financial circumstances. The explanation provided by Mr Y[...]’s attorney for the discrepancies between his client’s statements on oath and the content of the bank statements received under subpoena is unsatisfactory to say the least. No attempt is made to explain the apparent payments into an investment account, the payments to the Overstrand Municipality are not explained and the various foreign currency payments are not explained. A garbled explanation is given with respect to the payments made into the Citibank account. In addition, it appears that Mr Y[...] refused to sign the consent form.

- [16] Further correspondence was exchanged between the respective attorneys which did not advance the matter, save that on 31 January 2024 Mr Y[...]’s attorney provided the signed consent form to Ms D[...]’s attorney. Ms D[...]’s attorneys had understandably not had sufficient time prior to the hearing date of 6 February 2024 to obtain documents from Mr Y[...]’s employer given that the signed consent form was only provided on 31 January 2024.
- [17] Ms D[...]’s contention that that Mr Y[...] has failed to make full disclosure of his financial situation appears to be well founded. Further, it is apparent that Mr Y[...] sought to mislead both Ms D[...] and the court in his affidavit of 16 August 2023, when he stated on oath that he only has two bank accounts. It is now not in dispute that he has at least one other bank account (that is the FNB Private Wealth current account) and it appears from the bank statements that have been subpoenaed that he has another bank account held with Citibank.
- [18] Mr Y[...] has elected not to respond to the serious allegations made against him in the affidavit in support of the postponement application. He has failed to give any explanation on oath for the discrepancies between what he has previously stated on oath and what appears ex facie the bank statements that have been subpoenaed. In the absence of any explanation from Mr Y [...], I can only conclude that he has been dishonest with this court and has in fact lied on oath in an attempt to hide his true financial circumstances from both Ms D[...] and the court.
- [19] Ms Korf suggested in argument that there is no need for a postponement as these discrepancies are matters which can be dealt with under cross-examination and that the parties have agreed to the appointment of a receiver who can be vested with the necessary powers to determine the nature and extent of the assets in the joint estate and to make a decision as to the division of the joint estate.
- [20] It appears from the evidence before me, in particular, Mr Y[...]’s previous statements on oath and the content of the bank statements obtained under subpoena, that not only has Mr Y[...] has failed to make full discovery in respect of his financial circumstances but that he has a propensity for dishonesty when it comes to disclosure of his financial circumstances.
- [21] However, because Mr Y[...] is employed abroad and appears to have made payments into undisclosed foreign bank accounts and received payments from undisclosed sources including foreign bank accounts, Ms D[...] is, at this stage, largely dependent on Mr Y[...] making full and frank disclosure of the full extent of his financial circumstances. In addition, without full discovery having been made in respect of Mr Y[...]’s financial circumstances the court seized with the divorce action will not be in a position to determine the appropriate valuation of the joint estate for the purposes of division thereof, or to determine the quantum of Ms D[...]’s claim for rehabilitative maintenance, if any, or to determine the quantum of Mr Y[...]’s contribution to the maintenance of the minor child. This is manifestly not in the interests of justice.

- [22] As Mr Ferreira who appeared for Ms D[...] correctly submitted, in the absence of proper discovery it is difficult to see how Mr Y[...]’s evidence could be effectively challenged on cross-examination at the trial. Presumably Mr Y[...] would simply deny (as he has done to date) the existence of additional financial resources that he has failed to disclose. Without proper discovery there would be no basis on which to challenge his testimony in this regard. For this reason Mr Ferreira correctly in my view submitted that a forensic audit would be necessary. This is one of the purposes for which a postponement is sought.
- [23] As regards Ms Korf’s suggestion that all of these difficulties would be obviated by the appointment of a receiver, the same issues of concern arise, in particular given that it appears that Mr Y[...] has financial assets held offshore which he has failed and in fact refused to disclose. The receiver would be in no better position than the court is in in the absence of the results of a forensic audit to determine the extent of Mr Y[...]’s undisclosed assets.
- [24] It was submitted on behalf of Ms D[...] that the matter ought to be postponed and referred back to the pre-trial roll, and that she intends to:
- [24.1] Bring a further application to compel Mr Y[...] to make full discovery based on the information which appears from the bank statements received under subpoena;
- [24.2] Appoint an expert to conduct a forensic audit to determine the true extent of Mr Y[...]’s financial position;
- [24.3] Request further particulars for trial; and
- [24.4] If necessary, seek to amend her plea.
- [25] In light of Mr Y[...]’s conduct to date, I am satisfied that the matter is not trial ready and that a referral back to the pre-trial roll would be the most appropriate course of action so that the matter can be properly case managed.
- [26] Although the application for postponement has been made rather late in the day, I am satisfied that the need for a postponement has been fully explained and that it is in the interests of justice for the matter to be postponed to allow Ms D[...] sufficient time to properly conduct her defence. Consequently, I am satisfied that the postponement is not a delaying tactic.
- [27] Mr Y[...] was timeously warned of Ms D[...]’s concerns regarding the content of the bank statements and of her intention to seek a postponement if he did not provide all of the documents which he is required to discover. Ms Korf submitted that Mr Y[...] is able to provide answers to the apparent discrepancies that appear from the bank statements as compared to his version under oath, however, Mr Y[...] elected not to place any explanation before this court on affidavit.

I must thus accept that there is no explanation for his conduct. Ms Korf suggested that the matter be referred to oral evidence, however, there is no basis for me to do so given that there is no factual dispute capable of referral to oral evidence in that Mr Y[...] elected to oppose the postponement application without filing any answering papers.

[28] If Mr Y[...] had timeously provided this apparent explanation for the discrepancies that appear from the bank statements, there would have been no need for this postponement application to have been brought in the first place. In the circumstances, any prejudice occasioned by the postponement could have been avoided if Mr Y[...] had provided the aforesaid explanation timeously or indeed if he had made full and proper discovery as he ought to have done. He chose not to do so and must live with the consequences of his election.

[29] For these reasons I am satisfied that the matter is not trial ready and ought to be postponed. I am of the view that it would

be appropriate to direct that the matter be removed from the trial roll and for the parties to re-enrol the matter on the pre-trial roll as soon as reasonably possible so that the further conduct of the matter can be regulated in an orderly fashion under the direction of a case management judge.

[30] As to the issue of costs, I am mindful of the fact that this is the second postponement sought by Ms D[...] and that the postponement has been made at a late stage. There is no explanation as to why Ms D[...]’s attorneys, having been alerted to the existence of the FNB Private Wealth current account in August 2023, waited until December 2023 to subpoena the bank statements. Although the postponement application was not timeously made, for the reasons already addressed I am satisfied that considerations of fairness and justice nonetheless justify the granting of a postponement. I am satisfied that Ms D[...] was compelled to bring this postponement application as a consequence of Mr Y[...]’s lack of full and frank disclosure. Consequently, I am of the view that this is an appropriate matter in which each party should pay their own costs.

In the result I make the following order:

1. The trial is postponed sine die.
2. The parties are directed to approach the Registrar of the Court to re-enrol the matter on the pre-trial roll at the earliest available date.
3. Each party shall pay their own costs in respect of the postponement application.

ADHIKARI, AJ

APPEARANCES:

Applicant's Counsel:

Adv F Ferreira

Instructed by:

Webster Attorneys

Respondents' Counsel:

Adv A Korf

Instructed by:

Malan Lourens Viljoen

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