REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 43167/2010

DATE:15/11/2011

REPORTABLE

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

In the matter between:

SHER, ALAN IVOR Applicant

and

LAZARUS, MICHEL First Respondent

NORTHERN MANOR INVESTMENTS (PTY) LTD Second Respondent

J U D G M E N T

KGOMO, J:

[1] In this application, the first respondent is applying for leave or opportunity to file an answering affidavit to an application launched by the applicant for postponement of an application he (first respondent) launched on 3 November 2011, set down for 8 November 2011, for certain specified paragraphs of the applicant's replying affidavit together with the annexures thereto, to be struck out from the record of these proceedings;

alternative to the above;

That the first respondent be granted leave to file a further affidavit in reply to the said replying affidavit, in order to deal with the new matters raised therein. He also asked for the costs thereof.

THE FACTS

[2] The parties herein have exchanged pleadings up to the stage where the applicant filed a replying affidavit on 19 July 2011. He also filed a formal application for the condonation of the late filing thereof on 20 July 2011.

[3] On Wednesday 2 November 2011 the first respondent filed a supplementary affidavit to his answering affidavit. The filing of this supplementary affidavit followed the enrolment of the matter for hearing on 23 August 2011 upon which date the first respondent sought a postponement of the matter for purposes of filing the supplementary affidavit.

[4] The application was granted and the costs were reserved when this ruling was made by the court on 26 August 2011.

APPLICANT'S VERSION OF SUBSEQUENT EVENTS

[5] According to the applicant, on 1 September 2011 he addressed a letter to the first respondent in terms whereof, among others, the former placed the latter on terms to take whatever steps he deemed necessary by no later than 9 September 2011, failing which they (applicants) would re-enrol the matter for hearing. This letter confirmed to the first respondent the applicant's receipt of notices in terms of Rule 35 from the former and which they allegedly responded to and complied with. It further confirmed that the applicants afforded the first respondent an opportunity to inspect the documents sought in terms of those two notices. The applicant also confirmed that the first respondent had requested a further inspection of the same documents. He had tendered such inspection at a date and time nominated by the latter provided 24 hour notice was given to the applicants. It was reiterated that such inspection should have taken place by the abovementioned cut-off date of 9 September 2011. The applicant also referred to informal requests for a variety of documents by the first respondent on 13 and 16 May 2011 and reminded the latter that if he wished to inspect them, he should follow prescribed procedures but see to it that such inspection had been done by 9 September 2011.

[6] It is common cause that an inspection of documents by the first respondent pursuant to the above was made around 9 and 14 September 2011.

[7] On 22 September 2011 the first respondent's attorneys, CK Friedlander Attorneys, wrote to the Applicant asking for an indulgence from the applicant to file the supplementary affidavit as soon as possible. In his response thereto dated 3 October 2011 the applicant mentioned the following among others:

> "*1. … we afford your client 15 (fifteen) days from 23 September 2011 being the date referred to in paragraph 7 of your letter to file the supplementary affidavit which means the due date will be 14 October 2011.*
>
> *2. We shall thereafter require 10 (ten) days to file a reply, if we deem it necessary, which will make the reply due on 28 October 2011.*
>
> *Thereafter we shall set the matter down to be heard so that it will be finalised this year.*"

[8] The first respondent responded through his attorneys on 20 October 2008 that his supplementary affidavit (will) be prepared and filed by 28 October 2011 subject to counsel's availability.

[9] Applicant replied on 27 October 2011 in which the first respondent was warned that:

> "*… if your affidavit is not in our office by 3 p.m. on the 28 October 2011 we will immediately thereafter enrol this matter for hearing.*"

[10] It is common cause that the said supplementary affidavit was not filed by the first respondent on 28 October 2011. On 1 November 2011 the applicant enrolled the matter for hearing on 8 November 2011.

[11] On 2 November 2011 at 16h07 a copy of the first respondent's supplementary affidavit was filed. According to the applicant, this affidavit contained a number of new issues to which he was entitled to or had a right to reply to. In terms of the Rules, he had 10 days to file a reply to that supplementary answering affidavit.

[12] Obviously the requisite period to reply could not be accommodated within the period between its receipt (2 November 2011) and the date of hearing, being 8 November 2011.

[13] To compound matters, the first respondent's the notice to strike out dated 3 November 2011 was filed together with a further replying affidavit on the same date at 15h10 – some 3 hours after the court roll had already closed for the hearing of 8 November 2011.

[14] According to the applicant, these two affidavits or sets of papers were not paginated and ran into some 70 to 80 pages.

[15] It is also common cause that the above state of affairs falls foul of the South Gauteng High Court Practice Manual.

[16] It is on the above grounds that on 4 November 2011 the applicant addressed a letter to the first respondent notifying him that he was seeking a postponement and that the latter should pay for such a postponement.

[17] On the same day at about 15h28 a response was received from the first respondent in which the latter agrees that the applicant is entitled to a postponement but not to an order of costs.

[18] Upon realising that the issue of the costs to accompany the postponement was not going to be resolved, the applicant brought the formal application for a postponement with costs against the first Respondent on attorney and client scale on 7 November 2011.

[19] The applicant submitted that due to the fact that he struggled for two (2) months to get a supplementary affidavit from the first respondent coupled with the latter's recalcitrance to offer costs for the indulgence he was seeking, he had no option but to enrol the matter for hearing. He averred further that the punitive costs were called for as a redress for the first respondent's unnecessary and continued or continuous delay in filing his affidavits after he (applicant) bent backwards to accommodate him, even allowing or suffering cut-off dates to pass without repercussions to the first respondent.

FIRST RESPONDENT'S VERSION

[20] The first respondent's averments, submissions and arguments are that after filing his supplementary affidavit on 2 November 2011 the applicant, well knowing that he (applicant) would most likely amend his replying affidavit, proceeded to set the matter down for hearing on 8 November 2011.

[21] At the applicant's request he, on 4 November 2011 agreed to have the matter postponed on 8 November 2011 for him (applicant) to amend his replying affidavit accordingly. It was on this basis that the first respondent proposed on 4 November 2011 that the costs of the postponement be reserved as this course would save counsel having to appear and representations could be properly made at a hearing in due course as to who was the cause of the postponement and that a later court would also be better placed to determine if the applicant was actually required or necessitated to make any consequential amendments to his replying affidavit.

[22] According to the first respondent the launching of the formal application for postponement with punitive costs on 7 November 2011 was a bolt from the blue. He only became aware of it the morning of the hearing on 8 November 2011.

[23] In the circumstances, so argued the first respondent, there was simply no need to bring the postponement application as a postponement was already agreed to.

[24] The first respondent also denies being to blame for the 2½ months it took when the parties exchanged letters as set out in the applicant's *exposé* above. He thus asks for an opportunity to deal fully with the applicant's allegations justifying the punitive costs sought.

[25] First respondent submits and argues that the applicant will be suffering no prejudice as a postponement have already been consented to and that on the contrary, he will suffer prejudice if he is unable to respond properly to the postponement application.

[26] Counsel for the first respondent handed in at the hearing hereof an affidavit by the first respondent in which he substantiates his case for a chance or opportunity to file an answering affidavit in this application for a postponement by the applicant. He emphasis and reiterates therein that it is his firm belief that this application:

> "*… has been necessitated as a direct consequence of t he applicant and his attorney unnecessarily and prematurely setting the main application down for hearing on 8 November 2011 when the matter is not ripe for hearing and that it is the applicant who should in fact pay the costs of the application.*"

[27] He stated further that he only saw this application for postponement at his counsel's chambers in Sandton on 8 November 2011 at 12h30 after he was only alerted by fax of its existence when in court. According to him, his correspondence attorneys, Krishnee Pillay Attorneys received the application

at 15h00 on 7 November 2011 but did not alert him to its existence immediately.

[28] He stated further that when they perused the applicant's affidavit, they realised that it did not fully and accurately deal with the circumstances surrounding the set down of the matter or main application for 8 November 2011 or deal with various other relevant matters incidental thereto. He suggests that the applicant has been unfairly selective in his disclosure of the correspondence between the parties over the past 2 to 3 months and of the facts leading up to the set down of the main application on 8 November 2011. According to him further, there were other relevant written and oral communications between the parties which have been omitted in the application. In addition, there are, according to him, circumstances falling outside the knowledge of the applicant which are required to be disclosed and which will have an impact on the postponement application, especially on an order of costs, if any, to accompany it. He further states that in order that he be able to fully state his case in answer, he will have to consult and obtain full particulars from his Cape Town attorneys who corresponded on his behalf with the applicant's attorneys over the past few months. He will also have to obtain confirmatory affidavits from them regarding what transpired between his attorneys and applicant's attorneys. He will also have to peruse all his files and papers pertaining to the main application and the substantial correspondence which as passed between the parties in the main application. He also needs to consult with one Mr Greenfield, a handwriting expert he has instructed in this matter.

WHAT IS BEFORE THIS COURT NOW

[29] The first respondent has certainly come up with an impressive "*to-do*" list in reply to a simple issue of whether the postponement which is common cause between the parties, should be accompanied by a punitive costs order against him. While I agree that the lead up to this application is material and relevant to explain who was to blame for the delaying of the finalisation of this matter, it is my considered view and finding that most of the details he talks about in his affidavit are not closely related to the issue in dispute here. The common cause correspondence that has been quoted and attached to the application are in my view sufficient to helping this Court arrive at a decision. Certainly one's handwriting expert's evidence may be relevant to the trial of the main action, not an interlocutory application for a postponement, which, worse still, is not opposed.

[30] Justice delayed is justice denied. It is clear from the papers filed in this case that there is a lot of dilatoriness in the conduct of proceedings.

[31] The first respondent acknowledged the applicant's letter of 1 September 2011 wherein he was given a cut-off date of 9 September 2011 to do whatever he needed to do but be certain his supplementary affidavit was filed by that date. This was accompanied by a clear warning that should this deadline pass the main matter will be enrolled. At this stage the first

respondent had already been allowed to inspect the documents he needed to inspect.

[32] The first respondent, through his Cape Town attorneys, asked for an indulgence on 22 September 2011 to file the affidavit late. That was long after the 9 September 2011 cut-off deadline had passed. The applicant relented and gave him 15 days calculated from 23 September 2011 to do the necessary. The new cut-off date was 14 October 2011, with the applicant's deadline to respond being 28 October 2011. Again this indulgence was granted accompanied by the threat to set the matter down should the deadlines pass without the first respondent complying. Instead, the first respondent waited until 20 October 2011 before granting himself a new deadline of 28 October 2011. The applicant bent backwards again and allowed him that latitude, again with the proviso that should he not have filed the supplementary affidavit by 15h00 on 28 October 2011, he will:

> "*… immediately thereafter enrol this matter for hearing …*"

[33] All the above was done through correspondence which is common cause.

[34] Upon realising that the applicant has indeed executed his threat and enrolled the matter on 1 November 2011 for hearing on 8 November 2011, the first respondent went to work : He promptly served a supplementary affidavit which the applicant says contained new matters and thus needed to be

responded to. And the period in terms of the Rules for a response is 10 days. There was only 6 days to the date of hearing. To add insult to injury, on 3 November 2011 he (first respondent) served the applicant with a notice to strike out and a further replying affidavit, 3 hours after the court rolls have closed.

[35] The above were, in my considered view, premeditated and conscious steps by the first respondent to force a postponement of the hearing of the main matter on 8 November 2011. The applicant had no option but to broach the subject of a postponement to which the first respondent promptly agreed or consented to. However, he was not prepared to tender costs.

[36] The general rule when postponements are sought is that he who asks for an indulgence must pay or tender the costs. In this case the applicant started the talk of a postponement. However, the cause and source of the need for a postponement is the first respondent.

[37] He (first respondent) caused a protraction of this simple matter by refusing to tender costs. It is my considered view and finding that the odds are heavily stacked against the first respondent. On the facts and probabilities he should be ordered to pay the costs occasioned by the postponement. When this matter was earlier postponed by my sister, Mayat J on 26 August 2011 she ordered that costs be costs in the cause. The parties were mistaken to state that costs were reserved.

[38] The only question to be answered is whether the costs should be on a party and party scale or an attorney and client scale.

[39] In awarding costs the court has a discretion to be exercised judiciously upon a consideration of the facts of each case. That decision is a matter of fairness to both sides.

See: *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055F-G.

Jonker v Schultz 2002 (2) SA 360 (O) at 364A-H.

[40] The court is expected to take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be in the discretion of the court. No hard and fast rules have been set for compliance and conformity by the court unless there are special circumstances.

See: *Fripp v Gibbon & Co* 1913 AD 354 at 364.

[41] The applicant has asked for costs on attorney and client scale.

[42] Attorney and client costs are those costs which the attorney is entitled to recover from his client in respect of disbursements made on behalf of the client and for professional services rendered by him to his client. They are

normally payable by the client whatever the outcome of the case and do not depend upon any award of costs by the court.

[43] As against the above, party and party costs are those costs which the winner of legal proceedings can properly ask of his opponent. The purpose thereof was clearly set out in *Die Voorsitter van die Dorpsraad van Schweizer-Reneke v Van Zyl* 1968 (1) SA 344 (T) at 345 as follows:

> "*As uitgangspunt is dit nodig om in gedagte te hou dat ons te doen het met 'n kosterekening tussen party en party en dat in the algemeen gesproke die breë opset van so 'n kosterekening is om die party aan wie koste toegestaan is ten volle te vergoed vir kosts en uitgawes redelikerwys deur hom aangegaan en volgens die oordeel van die takseermeester nodig en gepas om reg te laat geskied of om die regte van die partye te beskerm.*"

[44] There are rules of practice which courts follow in exercising their discretions in the award of costs, namely:

44.1 The general rule is that the successful party is entitled to his costs;

44.2 Where a successful application is made for the grant of an indulgence the general rule is that costs do not follow the event;

44.3 In determining who is the successful party the court looks to the substance of the judgment and not merely its form;

44.4 The court has the power to deprive a successful party of portion or all of his costs and, in a proper case, to order him to pay portion or all of the costs of the unsuccessful party;

44.5 The court may order the losing party to pay the costs of the successful party on an attorney and client scale basis; and

44.6 The court may order an unsuccessful party, suing or being sued in a representative capacity, to pay costs *de bonis propriis*.

[45] Attorney and client costs are only awarded under extraordinary circumstances or where they are part of the parties' agreement. For a party to be saddled with an order of costs on attorney and client scale, such a party should have acted clearly *mala fide* and/or misconducted itself in one way or another during the litigation process. Such a party would have been capricious, brazen and cow-boyish in its approach to attract such an order.

[46] In our present case, it is my finding and view that the first respondent was somewhat indolent in dealing with request and time frames. He did not act with the requisite diligence and alertness or timeously. However, his conduct in my view had not crossed the line between the basis for an award of party and party costs and one on attorney and client scale.

[47] It is thus my finding that this order of postponement should be accompanied by an order of costs on a party and party scale.

ORDER

[48] Due to delay in the typing of cases that was occasioned by the indisposition of the only judgments typist at this Court, I only read out the order in this judgment to the parties on 15 November 2011.

[49] That order as handed down forms part of this judgment.

[50] After listening to submissions and argument from both sides, perusing the papers filed of record, comparing and contrasting the authorities relevant hereto and considering the matter:

50.1 It is hereby ordered that the applicant's/plaintiff's application for the amendment of his particulars of claim dated 11 April 2011 be and is hereby dismissed with costs;

50.2 The application for the postponement of this matter is granted. It is postponed sine die.

50.3 The applicants/plaintiff are ordered to pay the costs of the application, which costs shall include the costs incurred by the respondents/defendants in opposing the application in terms of Uniform Rule 28 on 11 July 2011.

_____

N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

COUNSEL FOR THE APPLICANTS	ADV A P HARTOG
INSTRUCTED BY	YOUNG-DAVIS INC ROSEBANK, JOHANNESBURG TEL NO: (011) 994 6000
COUNSEL FOR THE RESPONDENTS	ADV ADRIAN JACOBS
INSTRUCTED BY	JACOBS MOODIE LITIGATION INC and MCGREGOR STANFORD KRUGER ATTORNEYS
DATE OF ARGUMENT	9 NOVEMBER 2011
DATE OF JUDGMENT	15 NOVEMBER 2011