REPUBLIC OF SOUTH AFRICA

HIGH COURT OF SOUTH AFRICA, GAUTENG LOCAL DIVISION

CASE NO: 2014/14425

DELETE WHICHEVER IS NOT APPLICABLE

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

_____ _____
DATE SIGNATURE

In the matter between:

EVELYN NOMSOMBUKO MKONDO Plaintiff

And

MEC FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT Defendant

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J U D G M E N T

MASHILE J:

[1] This matter was referred to this court with specific instructions – to decide whether or not it should be postponed *sine die*s to afford the Defendant adequate time to prepare himself. Needless to add that in the event that the court declines a

postponement, it will refer the matter beck to roll call for allocation. Conversely, if the court grants the postponement, further questions that require adjudication are, who of the two should bear the costs of the delay and at which scale.

[2] The court heard arguments of the parties on Thursday and thereafter stood the matter down to Friday, 5 June 2015, for judgment. When the parties reassembled in court the next day , it transpired that the Plaintiff had additional evidence, a letter from the State Attorney to the Defendant setting out why the State Attorney's mandate was terminated, which she thought could possibly have an influence on the outcome of the case. The court considered the contents of the letter and gave an order and assured the parties that it would deal with the contents of the letter in the reasons that it would give subsequently. These are the reasons.

[3] The Plaintiff instituted these proceedings against the Defendant in her representative capacity as the mother and natural guardian of her minor daughter, Margaret Lovey Mkondo, whose date of birth is 23 November 2003. Without delving into the intricacies of the Plaintiff's claim against the Defendant, it should suffice to state that it is for an amount of R21 500 000.00 made up of various headings.

[4] I shall deal with the issues in the order in which they arise in paragraph 1 above. First, however, a brief background of the facts is necessary to put the matter in its proper perspective. Accordingly, the facts from which the application for postponement arose are that The Defendant has recently been experiencing a steady growth of medical negligence litigation against him.

[5] Generally and traditionally, the State Attorney acts as a legal representative of virtually all organs of States. These days, however, the trend is that the State Attorney can brief independent attorneys when it is overcrowded with matters or does not have the requisite skill to handle a particular case.

[6] Like most matters that emanate from the State, the State Attorney was the legal representative for the Defendant in the instant case until his mandate was de facto terminated on 28 May 2015 albeit that legally it remained on record until 3 June 2015. Technically therefore the Defendant was represented by two legal teams between 28 May and 3 June 2015.

[7] Although the Defendant appointed the current attorneys on 28 May 2015, it was not until 1 June 2015 that the present attorneys were notified of their instructions. They therefore could not come on record prior to the State Attorney's withdrawal as attorneys of record. The State Attorney withdrew as attorneys of record on 3 June 2015.

[8] The current attorneys could not formally brief their Counsel as their instructions have until the hearing of this application remained insufficient in that neither the State Attorney, their erstwhile attorneys, nor the Defendant himself had supplied them with a full file pertaining to this case. In this regard there is evidence to corroborate this in the form of letters dated 1, 2 and 3 June 2015 addressed to Mr Sethunya of the State Attorney copying Ms Ratshibvumo, the deponent to the affidavit in support of this postponement application.

[9] The essence of the contents of all three letters is similar in that they all request the State Attorney to withdraw and furnish them with a complete file so that they could place themselves on record. Mr Sethunya only replied late on 3 June 2015 and acknowledged that the State Attorney's mandate had indeed been terminated. Counsel for the Defendant obtained the inadequate brief late on 3 June 2015.

[10] Upon perusal of their papers, she noted that several crucial documents, which she would need for proper preparation of the case, were not part of her brief. She bluntly advised them that she would not be ready to argue the case on their behalf

on 4 June 2015 as to do so could be tinkering on the edge of professional negligence. She ultimately accepted the brief on the understanding that she would move for a postponement so that she could assess the status of the case and call for the missing papers.

[11] When the matter served before this court on 4 June 2015, Counsel for the Defendant had just settled the Defendant's affidavit in support of the application for postponement. Such affidavit was prepared in order to comply with the minute of the parties dated 29 August 2014 wherein it was agreed that the Defendant would prepare a substantive application when it needed to move a postponement at any stage. The reasons for the postponement are largely as set out hereinabove.

[12] It is inexorable to enquire why the Defendant does not deal with the reasons for the termination of the mandate of the State Attorney in greater detail in his affidavit in support of the application for the postponement. Counsel for the Defendant intimated that the Defendant has recently incurred huge sums of money as a result of the State Attorney's laxity when dealing with his matters and that this has come at an enormous cost to the tax payer especially as the claims are normally massive.

[13] In the whole though, the relationship between the State Attorney and the Defendant is that of an attorney and client. Whatever differences the parties may have should be regarded as privileged. If so privileged, it is of necessity outside any party's reach unless immunity has been specifically waived. For that reason, the Defendant was justifiably disinclined to disclose the full detail of the relationship between the Defendant and the State Attorney.

[14] Fundamental to an application for a postponement is the consideration of prejudice that the other party to the proceedings, the Plaintiff in this case, may suffer as a result of the postponement if it is granted. In the second place, the application

must be bona fide and supported by valid reasons. Generally, courts tend to lean in favour of granting indulgence provided the reasons furnished in support of such application are not flimsy. See the unreported case of **Bells Bank Number One (Pty) Ltd v The National Union of Mine Workers** (Case No: C144/2008) delivered in April 2012 by Van Voore AJ.

[15] Also pertinent is the case of **Erasmus NO v Commission for Conciliation Mediation & Arbitration & others [2012] JOL 28408 (LC)** where Swanepoel AJ stated at paragraphs 58 and 59:

> "[58] It is trite that the granting of an application for postponement is not a right but an indulgence granted by the CCMA or the court in the exercise of a judicial discretion.
>
> [59] An application for postponement must be bona fide and not used simply as a technical manoeuvre for the purpose of obtaining an unfair advantage over the opposing party."

[16] In **Magistrate Pangarker v Botha and Another** 2015 (1) SA 503 (SCA), the court refused a further postponement after the matter had been delayed on three occasions the basis being that the other party to the proceedings was being prejudiced.

[17] In the same breath as the **Erasmus** case *supra* is the case of **Take and Save Trading CC & Others v Standard Bank of SA Ltd** 2004 (4) SA 1 (SCA), a case to which this court was referred, where it was stated:

> "A supine approach towards litigation by judicial officers is now justifiable either in terms of the fair trial requirement or in the context of resources. One of the oldest tricks in the book is the practice of some legal 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 a 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."

[18] The Plaintiff contended firstly, that the affidavit filed in support of the application for postponement is not worthy of consideration because it does not make a case for postponement at all and secondly, albeit not in so many words, that the withdrawal of the Defendant's attorneys was nothing but a gambit to force the court to postpone the matter as he would be unrepresented. In this regard the court was referred to the case of **Take and Save** *supra* where the court warns about this kind of practice and states that it should not be countenanced by courts.

[19] Counsel for the Plaintiff pointed out to the dates on which the Defendant instructed the present attorneys and purportedly terminated the mandate of the State Attorney to act on his behalf. A momentary look at the dates suggests that the Defendant instructed the present attorneys on 28 may 2015 and yet he only withdrew his mandate of the State Attorney on 3 June 2015. The Plaintiff argued that this does not make sense and is fraught with tricks to force a postponement as envisaged in Take and Save Trading CC *supra* the practice of which should be discouraged.

[20] I turn to consider the Plaintiff's contention that the affidavit in support of the application does not make a case for postponement. I was advised by both parties that the Deputy Judge President extended an invitation to the Plaintiff to file an answering affidavit, which the Plaintiff declined as she believed that there was no case to answer. This of course means that the affidavit in support of the application stands as evidence which is not opposed.

[21] It is appropriate that I should at this stage mention that the Plaintiff made an application that in view of the dearth of information in the affidavit of the Defendant, it was necessary that the court should allow the deponent to the founding affidavit, Ms Ratshibvumo, to give viva voce evidence. The court refused this application and promised to furnish its reasons when dealing with this judgment.

[22] The first reason is that generally motion proceedings are decided on papers. Viva voce evidence is only allowed in exceptionally deserving cases. The Plaintiff did not persuade this court that it was in the interest of justice to allow Ms Ratshibvumo to testify. In the second place, the Plaintiff was afforded an opportunity to answer to the affidavit and she rejected it.

[23] The application to obtain further viva voce evidence from Ms Rtshibvumo was nothing but an attempt to salvage a lost opportunity that the Plaintiff missed when she was invited to file an answering affidavit. Needless to state that had she done so, she would have alluded to the paucity of detail in the affidavit. The Defendant would have replied and there would not have been a need for this application. For that reason, the Plaintiff made her bed and must lie on it.

[24] The next question to consider is whether or not the reasons given by the Defendant are sufficiently cogent to be accepted for purposes of granting the postponement. I do not believe that the reasons given to justify the postponement are flimsy. It is common knowledge that cases concerning medical negligence against the Departments of Health in various provinces have been mounting. Concomitant with the increase in the litigation is the cost of running such cases on the public purse.

[25] It is also a known fact that recently the relationship between the State Attorney and the Department of Health in various provinces has taken a strain. The tension in the relationship between the parties is caused, correctly or incorrectly, the belief or perception that the State Attorney is not necessarily acting in the best interest of the Defendant. The Defendant did allude to this problem albeit with restraint understandably in view of the privilege that exists between the two parties.

[26] The further evidence in the form of an undated letter from the State Attorney received by Plaintiff's attorneys on 5 June 2005, which the Plaintiff read to this court on 5 June 2015, is confirmation that the relationship between the State Attorney and the Defendant is not the most ideal. I do not deem it necessary to traverse the reasons for the deteriorating relations between the two parties in view of such relationship being governed by privilege.

[27] The Defendant wrote a letter on 28 May 2015 instructing the current attorneys to take over the matter from the State Attorney. However, that letter according to Ms Ratshibvumo only reached the attorneys on 1 June 2015. The Defendant had at that stage still not informed the State Attorney that it had withdrawn its mandate.

[28] What is significant is that the letter once delivered to the attorneys triggered three letters all of which were calling upon the State Attorney to supply the file. Those letters were dated 1, 2 and 3 June 2015. No reply to those letters was forthcoming until late on 3 June 2015 when the matter was to be before this court the next day.

[29] This court is reasonably satisfied that the reasons furnished for the postponement are manifestly distinguishable from the case of **Bells Bank Number One (Pty) Ltd** *supra* in that they are persuasive. It is also clearly different from the **Take and Save Trading CC** case *supra* because while the Defendant in this case also terminated his attorneys' mandate, he immediately appointed other attorneys to act on his behalf. The Defendant did not come to court on his own to tell this court that he could not proceed as he has had problems with his erstwhile attorneys.

[30] It is worth pointing out, as Counsel for the Defendant did, that while this postponement retards the process of finalizing the case, unlike in the **Pangarker** case *supra*, it cannot be said that he is abusing the process as it is the first time that he is requesting for an indulgence.

[31] Finally, I turn to determine whether, the postponement, if granted, will prejudice the Plaintiff. The Defendant was the first to admit that there is no question that the postponement will to some degree prejudice the Plaintiff. For that reason, he was ready and willing to tender costs occasioned by the postponement. The prejudice that the Plaintiff will suffer, in my opinion, is engulfed by the other reasons in support for a postponement besides, the Defendant has offered to pay the costs of the Plaintiff.

[32] This represents an opportune moment to discuss the scale at which costs must be awarded if the application succeeds. The Defendant has passionately argued that such costs should be those as at the scale between party and party while the Plaintiff asserted that the court should award punitive costs.

[33] I disagree with the approach of the Defendant. The Defendant has for a while been aware that some of his cases were not getting the attention that they deserved from the State Attorney. He should therefore have taken curative and/or anticipatory measures to ensure that matters handled by the State Attorney did not escape his eye. It is his laxity that led to the late detection of the problem hence this application for postponement. It is for that reason that he must be saddled with the payment of costs of the Plaintiff at the attorney client scale.

[34] In the circumstances, the application for postponement of the case succeeds and I make the following order:

1. The case is postponed *sine dies*;
2. The Defendant will pay the costs of the Plaintiff including those of two Counsel as at the scale between attorney and client.

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B. A. MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the Plaintiff: Adv G. Strydom SC with Adv A. Viljoen
Instructed by: Mokoduo Inc

Counsel for the Defendant: Adv Manaka
Instructed by: Ngcebetsha Madlanga Inc

Argument took place on: 4 June 2015
Order granted on: 5 June 2015
Judgment/Reasons given: 8 June 2015