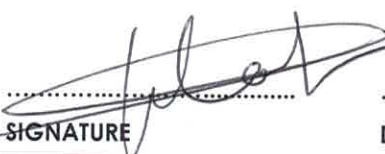


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2013/32424

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	22 NOV 2019 DATE

In the matter between:

ENGEN PETROLEUM LIMITED

Applicant

and

**WEBREF TRADING NO. 31 CC t/a
ELM STREET SERVICE STATION**

First Respondent

BLEND JEFFREY

Second Respondent

REASONS FOR ORDER

MATOJANE J

Introduction

[1] The above matter was set down for hearing on 10 October 2019. On 4 October 2019 the respondents' attorney of record, Barry Aaron & Associates ('Barry Aaron') withdrew as attorney of record. The new attorney of record was approached on 7 October 2019 to represent the respondents.

[2] The new attorney of record, Marques Soares Fontes Attorneys, applied for postponement of the hearing to enable it to consult with the representative of the first respondent, Mr Wolmer, who was indisposed on 8-9 October 2019 for the Jewish festival of Yom Kippur.

[3] Mr Marques, the new attorney of record, stated in his affidavit supporting the application for postponement that he needs the postponement to obtain a full set of the papers, familiarise himself with the matter, take instructions, brief counsel and prepare for the hearing. The respondents tendered to pay the wasted costs, which would be occasioned by the delay.

[4] The application was opposed by the applicant and, after the hearing of argument, I refused the application for a postponement. The respondent's attorney and counsel withdrew after that, at which point judgment was granted in favour of the applicant, and the respondent's counterclaim was dismissed with costs. The respondents have requested written reasons for my order. These are my reasons.

Background facts

[5] It is necessary to set out in some detail the background to this matter, and in doing so I will start by referring to an apposite statement by the court in *Vollenhoven v Hoenson & Mills* 1970 (2) SA 368 (C) where the following was stated at 373A-B:

'It is in the public interest that litigation should be disposed of as speedily as possible. There is such a thing as the tyranny of litigation, and in many cases, it cannot be said that the mere offer of paying wasted costs would adequately compensate a respondent for any inconvenience suffered as a result of the granting of a postponement.'

[6] Five years ago, the applicant applied for an order evicting the first respondent from commercial property. It alleged that the first respondent was in unlawful occupation since the lease permitting it to occupy the property had been validly

cancelled. The first respondent has not contested the validity of the cancellation of the lease.

[7] On 14 February 2014, the parties concluded a settlement agreement which was subject to a suspensive condition. The suspensive condition was not fulfilled and the proceedings re-commenced.

[8] On 3 April 2014, the first respondent filed a document headed 'Notice of Motion – Second Counter Application' together with an affidavit. In terms of Part A of this 'Counter Application', the first respondent sought an order declaring that the litigation between the parties had become settled. Part B invoked constitutional relief.

[9] The applicant formally sought case management, pursuant to which Mr Justice Spilg was appointed as the responsible judge. The applicant launched an interlocutory application for further and better discovery and various other relief aimed at preventing any further delay.

[10] An opposed hearing before Judge Spilg took place and on 3 July 2017. Judge Spilg made the following order:

1. The application by Webref under 33(4) is dismissed.
2. Paragraph 63 of Webref's answering affidavit cum founding affidavit to its second counter-application ("Webref's affidavit") is struck out and if Webref intends to raise any other matter contemplated in para 63 then:
 - a. It must bring an application for condonation to do so with a supporting affidavit and setting out the relevant issues it wishes to introduce and the evidence upon which it relies in compliance with rule 6;
 - b. The application must be delivered by no later than 1 August 2017.
3. Paragraphs 56 and 61 of Webref's affidavit are struck out, and Webref is afforded until 1 August to deliver a supplementary affidavit which sets out precisely what allegations in the founding and confirmatory affidavits of Engen it takes issue with and the evidence upon which it relies. Engen will be entitled to deliver a supplementary reply within 10 (ten) days of service.
4. Engen shall produce the documents tendered on written request by Webref's attorneys, and which are identified in Annexures BT1.1 to BT1.10 and BT2.

5. Webref's rule 35(12) application is dismissed.
6. Webref is to pay the party and party costs of each of the application to which these orders relate.

[11] The applicant filed an answering affidavit in respect of the counterclaim in June 2014. The respondents have taken no steps to provide their answering papers, nor have they taken any steps to apply for condonation as contemplated in the order. The first respondent remains in unlawful occupation.

[12] On 24 July 2017, the respondents applied for leave to appeal the interlocutory ruling of Judge Spilg. The application was dismissed with costs.

[13] On 29 August 2018, the respondents applied for the recusal of Judge Spilg. The application was heard on 7 September 2018. Counsel for the respondents was not briefed timeously to argue the merits of the application, and the application was struck from the roll. The issue of was postponed to 19 October 2019 for the respondents and their attorney, Barry Aaron, to show cause why a punitive order should not be granted against the respondents, and why costs *de bonis propriis* should not be granted against Barry Aaron.

[14] On 19 October 2019, Judge Spilg ordered Barry Aaron to pay the wasted costs occasioned on 7 September 2018 *de bonis propriis*. The respondents nevertheless retained the services of Barry Aaron, and no subsequent steps were taken in the matter since.

[15] On 30 May 2019, the applicant duly filed its heads of argument, practice note, the chronology of events, and list of authorities. On the same day, Aaron acknowledged receipt of the documents and recorded that '*this matter is not yet ripe for hearing (but, of course, you client is free to deliver heads whenever it chooses)*'.

[16] On 27 June 2019, the attorneys for the applicant advised the respondents' attorney that should its heads of argument not be delivered within five days of receipt of the letter, the applicant would proceed in terms of Practice Directive 9.8.2, read with sub-paragraphs 9 and 12 thereof.

[17] In response, on 3 July 2019, the respondents' attorney informed the applicant's attorney that he would be departing on a trip abroad and would only attend to the matter upon his return on 16 July 2019.

Analysis

[18] The legal requirement for a postponement was authoritatively set out as follows in *National Police Services Union and Others v Minister of Safety and Security and Others* 2000 (4) SA 1110 (CC) at 1112C-F:

'The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the Court to determine whether it is in the interests of justice to grant the postponement.'

[19] The application for postponement states that Mr Wolmer was indisposed for two days during the Jewish religious holiday. The respondents knew at all times that the matter was enrolled for hearing on 10 October 2019. There is no explanation as to why their heads of argument and practice note were not filed timeously. In all previous interlocutory applications, the respondents briefed counsel, and yet they fail to explain whether counsel was to be briefed to argue the merits of the main application. There is further no explanation as to why their attorney, Barry Aaron, withdrew from the record without tendering any explanation.

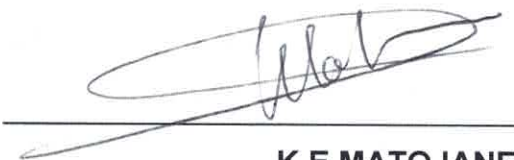
[20] Even if the respondents' attorney did not withdraw as an attorney of record on 4 October 2019, the respondents did not comply with the order of Judge Spilg and did not take any steps to prepare for the hearing. The conclusion is, to my mind,

inescapable that the application for a postponement is nothing but a delaying tactic, serving to continue with the tyranny of litigation alluded to above, which can never be in the interests of justice.

[21] In the result, no case has been made out upon which I could exercise my discretion in favour of the respondents in respect of the postponement of the main application. The application for a postponement is nothing but a delaying tactic to enable the first respondent to remain in unlawful occupation of the property. It is on this basis that the application for the postponement was dismissed with costs and default judgment granted.

Order:

1. The application for the postponement is refused.



K E MATOJANE

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	10 October 2019
Date of order:	10 October 2019
Date of judgment:	22 November 2019

Appearances:

Counsel for the Applicant:	Adv. C van der Spuy
Instructing Attorneys:	Lanham-Love Attorneys
Counsel for the Respondents:	Adv. Wessels
Instructing Attorneys:	Marques Soares Fontes Attorneys