

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

CASE NUMBER: 10781/2019

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

DATE: 27 AUGUST 2021

In the matter between: -

BCG STAINLESS STEEL SERVICE CC

Applicant

(REGISTRATION NUMBER: [...])

and

BRITS, MARINDA

First respondent

(IDENTITY NUMBER: 6[...])

BRITS, WILLEM JACOBUS

Second

respondent

(IDENTITY NUMBER: 5[...])

JUDGMENT

DELIVERED: This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and publication on CaseLines. The date and time for hand-down is deemed to be 10h00 on 27 August 2021.

F. BEZUIDENHOUT AJ:

INTRODUCTION

[1] The parties in this application for payment, agreed to a postponement of the hearing. The applicant contends that the respondents are liable to pay the costs occasioned by the postponement. The respondents disagree. I am called upon to determine this issue.

CHRONOLOGY OF EVENTS

[2] The applicant instituted the application for payment on the 22nd of March 2019. On the 5th of April 2019 the respondents filed an intention to oppose. They were represented by attorneys.

[3] On the 30th of April 2019 the respondents served an answering affidavit in opposition to the relief claimed by the applicant. The applicant served a replying affidavit on the 26th of July 2019.

[4] On the 4th of November 2019 heads of argument were prepared on behalf of the applicant. The respondents failed to file their heads of argument and as a result, the applicant applied for a hearing date on the 14th of December 2020.

[5] On the 16th of March 2021, the applicant instituted an application and applied for an order compelling the respondents to file their heads of argument. On the 14th of April 2021, the respondents filed their heads of argument.

[6] On the 3rd of August 2021 the respondents were invited to a pre-hearing conference. The pre-hearing conference was held on the 13th of August 2021 and a joint practice note was filed.

[7] On the 17th of August 2021, the respondents' attorneys of record withdrew by way of notice.

[8] On the 18th of August 2021, after the court had allocated this matter for hearing to the 24th of August 2021, the court was informed that the respondents were unable to attend the hearing as their presence was required in a criminal matter linked to the civil proceedings. The respondents were accommodated and the hearing was moved to the 25th of August 2021.

[9] On Sunday morning, the 22nd of August 2021, the first respondent addressed e-mail correspondence to my Registrar, advising that she has no legal representation due to finances, that she attempted to install Microsoft Teams without success and that she does not have access to CaseLines. The first respondent advised further that she had an appointment with Legal Aid on the 25th of August 2021 and that they required hard copies of the papers filed in this matter. Subsequently, the first respondent was given access to CaseLines and advised to physically attend at the High Court building where she would be assisted with access to Microsoft Teams in order to attend the virtual hearing.

APPLICANT'S SUBMISSIONS

[10] Ms Lipshitz, appearing on behalf of the applicant, submitted that the respondents should pay the applicant's costs occasioned by the postponement for the following reasons: -

[a] Although the respondents admitted liability to claims 1 and 2 of the application as far back as the 30th of April 2019, they have failed to make any tender towards settling this debt, thereby forcing the applicant to come to court in respect of all of the claims;

[b] The respondents lacks *bona fides*;

[c] The set-down was served as far back as June 2021;

[d] The respondents' attorneys withdrew a week before the hearing but notwithstanding, the respondents failed to act timeously and to make the necessary arrangements for legal representation;

[e] The postponement was occasioned by no fault of the applicant;

[f] The postponement, without an order for costs in its favour, would leave the applicant out of pocket.

RESPONDENTS' SUBMISSIONS

[11] Both the first and second respondents were present and addressed the court.

[12] The first respondent, Mrs Brits, informed the court that their former attorneys of record advised them of the hearing date two weeks before. However, a week before the hearing of the matter, the attorneys required a deposit, which the respondents were unable to pay. As a result, the attorneys withdrew.

[13] Mrs Brits confirmed that she had consulted with Legal Aid and that they are yet to advise her whether they are prepared to take on the matter. She also indicated that she intended to approach the *pro bono* organisation for legal representation. Mrs Brits stated that they have no legal knowledge and therefore required someone with the requisite expertise to present their case in court.

[14] On the issue of admitting liability to two of the applicant's claims, the respondents advised the court that they have made certain proposals to settle the debt in instalments, but have not received any response. They indicated that they have attempted to sell their immovable property, but that the proceeds of the sale would not be sufficient to settle their indebtedness to the applicant. Mrs Brits stated that they have been informed by the bank that foreclosure proceedings are imminent due to the respondents' breach of the mortgage loan agreement.

[15] Ultimately, the respondents submitted that if they were ordered to pay the costs of the postponement, they would have to somehow make arrangements to settle it by way of monthly payment.

THE LAW ON POSTPONEMENTS

[16] A postponement is usually accompanied by wasted costs which the court is called upon to award to one or other of the parties. The award is a matter wholly within the discretion of the court, but it is a judicial discretion which must be exercised on grounds upon which a reasonable person could have come to the conclusion arrived at.

[17] Firstly, it is trite that a party who applies for a postponement, seeks an indulgence.¹ Once a postponement has been granted at the behest of one party, the prejudice that the other party may suffer as a result of the postponement, must be considered when determining the issue of costs.

[18] The usual rule is that the party who is responsible for the postponement must pay the wasted costs.²

[19] Considerations of prejudice will ordinarily constitute a dominant component of the total structure in terms of which the discretion of a court will be exercised. What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms.³

[20] In *Erasmus v Grunow*⁴ the court held as follows: -

“The law contemplates that he should take into consideration the circumstances of each case, carefully weighing the various issues in the case, the conduct of the parties and any other circumstances which may have a bearing upon the question of costs and then make such order as to costs as would be fair and just between the parties.”

[21] In *Myburgh Transport v Botha t/a SA Truck Bodies*,⁵ the court stated that an

¹ *Centriugo AG v Firestone (SA) Ltd* 1969 (3) SA 318 (T) at 320E.

² *Burger v Kotze and Another* 1970 (4) SA 302 (W) at 305D - G.

³ Herbstein & Van Winsen: *The Civil Practice of the Superior Courts in South Africa* (5th edition) p 756.

⁴ 1980 (2) SA 793 (O) at 797.

application for a postponement must be made timeously as soon as the circumstances which might justify such an application become known to the applicant.⁶ Such an application for a postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.

FINDING

[22] Although I have not been called upon to consider whether a postponement should be granted, the reason for the postponement becomes equally relevant when determining what costs order would be justified under the circumstances.

[23] In this matter the respondents knew for almost a week before the hearing that they would have to apply for a postponement, but failed to inform the applicant of the position which would have helped to save some of the wasted costs.

[24] The respondents require alternative legal representation. The applicant recognised this need and accommodated the respondents. The fact that the respondents' former attorneys withdrew at the eleventh hour due to them not having been placed in funds and the fact that Legal Aid first has to consider the merits of the respondents' case before taking it on, are eventualities that occurred due to no fault of the applicant. The applicant was ready to proceed and finalise the hearing. The respondents were not.

[25] In the circumstances, I find that the applicant is entitled to be compensated for its wasted costs.

[26] Ms Lipshitz referred me to a draft order that has been uploaded onto CaseLines, which also includes prayers to facilitate the service of all further notices on the respondents via e-mail. The order that I intend to make provides for this.

⁵ 1991 (3) SA 310 (NMS).

⁶ See also *Greyvenstein v Neethling* 1952 (1) SA 463 (C).

ORDER

I make the following order: -

[1] The application is postponed *sine die*;

[2] Until the respondents have appointed new attorneys of record, service of all further notices in this matter will be effected on the respondents via e-mail as follows: -

[a] First respondent: marinda83@icloud.com;

[b] Second respondent: britswillie5@gmail.com;

[3] The first respondent shall provide the applicant's attorneys with an alternative Gmail-address within 5 (five) days from date of this order, failing which the applicant shall be entitled to effect service on the first respondent at the email address referred to in paragraph 2[a].

[4] The respondents shall pay the applicant's wasted costs occasioned by the postponement, jointly and severally, the one paying the other to be absolved.

F BEZUIDENHOUT

**ACTING JUDGE OF
THE HIGH COURT**

DATE OF HEARING: 25 August 2021

DATE OF JUDGMENT: 27 August 2021

APPEARANCES:

On behalf of applicant:

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On behalf of respondents:

In person.