

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 55908/18

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

A handwritten signature in black ink, appearing to read 'E van der Schyff'.

Date: 15 June 2022 E van der Schyff

In the matter between:

S SIMONS

PLAINTIFF / APPLICANT

and

D DE RUIG

FIRST DEFENDANT / RESPONDENT

T DE RUIG

SECOND DEFENDANT / RESPONDENT

JUDGMENT

Van der Schyff J

[1] This matter was allocated to me solely for purposes of determining an appropriate costs order after the parties agreed that the matter be postponed. The parties are embroiled in litigation and the matter was postponed three times previously,

although the postponements were not due to the fault of either of the parties. The matter was again set down for hearing on 9 June 2022. The plaintiff filed a substantive postponement application on 8 June 2022. She is in hospital and for that reason the trial could not commence. The parties agreed to a postponement prior to the matter being allocated to me, but they could not reach an agreement pertaining to the wasted costs.

- [2] The applicant seeks that the costs of the postponement be costs in the cause, alternatively reserved for determination by the trial court. The respondents seek that the applicant be ordered to pay the wasted costs.
- [3] The founding affidavit was attested to by the applicant's attorney of record, Mr. Buskin. A confirmatory affidavit by the plaintiff and medical certificate were filed. Mr. Buskin explains that the application is brought on behalf of the applicant who has been admitted to hospital for emergency medical treatment of kidney stones. The applicant saw a doctor on Saturday 4 June 2022 and was required to return for further medical tests on 5 June 2022. She was unexpectedly admitted to hospital on 7 June 2022. On 7 June 2022 she informed her attorney that she would endeavour to attend trial. She stated that, if necessary, she would discharge herself from hospital to attend court. She still contended during the afternoon of 7 June 2022 that she would be able to attend court pending the outcome of medical tests which was expected on 8 June 2022. However, during the afternoon of 8 June 2022 it became apparent that the applicant would not be able to attend court on 9 June 2022 and 10 June 2022 as she had been admitted to hospital indefinitely. The applicant's attorney first communicated to the respondents' attorney that a postponement would be sought on 8 June 2022 at 12h44.
- [4] The applicant's attorney avers that the postponement application was made as timeously as possible given the unexpected nature of the circumstances, and given the applicant's initial instructions not to seek a postponement. It is stated that the postponement application is *bona fide* and that it is not the intention of the applicant to delay the proceedings any further. Mr. Buskin submits that any prejudice suffered by the respondents can be 'suitably compensated by means of an appropriate costs

order', but also submits that costs ought to be costs in the cause or reserved for the trial court to determine.

- [5] When the matter was argued, applicant's counsel stressed that the postponement was not due to any party's fault. The postponement was caused by unforeseen circumstances, and as soon as the applicant granted instruction to that effect, the need to postpone the matter was communicated to the respondents' legal team. Counsel referred me to the decision in *Van Staden v Union and South-West Africa Insurance Co Ltd*¹ where the court declined to order the eventually successful plaintiff to pay the costs of a postponement necessitated by his illness on the ground that it was not due to the fault of either party. Counsel also referred me to *Grobbelaar v Snyman*² where the court pointed out that it is not only the fault or default of the parties but also considerations of fairness to both parties that should be taken into account in determining liability for wasted costs.
- [6] Counsel for the respondents, on the other hand, submitted that according to what he coined the 'modern approach' the applicant is to pay the wasted costs because her illness necessitated a postponement. He substantiated this proposition by referring me to *Cape Law Society v Feldman*,³ *Manong and Associates (Pty) Ltd v City of Cape Town*,⁴ *Sequeira v Mandla Blocks CC and Others*⁵ and *AJB v AB*.⁶ He further submitted that wasted costs could have been curtailed if the applicant timeously instructed her attorney to seek a postponement when she fell ill.
- [7] Counsel for the respondents submitted that there is no need to reserve the costs as the trial court would not be in a better position than this court to ascertain the facts and to determine who is liable for the costs. I agree that all the relevant

¹ 1972 (1) SA 758 (E).

² 1975 (1) SA 568 (O).

³ 1979 (1) SA 930 (E).

⁴ 2011 (2) SA 90 (SCA).

⁵ (31395/2019) [2020] ZAGPPHC 695 (24 November 2020).

⁶ (115/2019) [2021] ZAFSHC 165 (19 August 2021).

considerations are before me to enable me to make a just and equitable decision on the question of the wasted costs.⁷

- [8] I accept that the applicant's illness was unforeseen and that the postponement application is *bona fide* and not occasioned by any intention to delay the finalisation of the matter. It would be profoundly unfair to continue with a trial if any party is admitted to hospital with kidney stones and unable to attend trial. The rights of the applicant, as plaintiff, are thus safeguarded by the postponement and to that extent the applicant benefitted from the postponement.⁸ As a consequence of safeguarding the applicant's rights, the respondents are however, prejudiced. Their attorney and counsel prepared for trial and availed themselves for the trial dates unaware of any looming postponement. To this extent the applicant's attorney correctly stated in the founding affidavit that any prejudice suffered by the respondents could be suitably compensated by an appropriate costs order. I fail to see, however, how an order that the wasted costs be costs in the cause, could 'suitably compensate' the respondents by 'placing [them] in a potentially vulnerable position of having to pay the costs of postponement if [they] should lose the main case'.⁹

ORDER

In the result, the following order is granted:

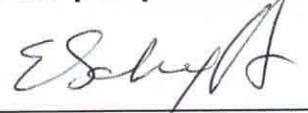
⁷ See *Sublime Technologies (Pty) Ltd v Jonker and Another* 2010 (2) SA 522 (SCA) and *Cape Law Society v Feldman*, *supra*, 933 E.

⁸ *Grobbelaar v Snyman*, *supra*, 571A-C – 'Billikheidsoorwegings geld ook by die bepaling van aanspreeklikheid vir betaling van verkwiste koste, en aangesien 'n kostebevel in wese billik teenoor albei partye moet wees, behoort die aangeleentheid vanuit die oogpunte van beide partye beoordeel te word. Die teenwoordigheid van die verweerder by die verhoor van die saak, was nie die eiser se verantwoordelikheid nie. Hy moes net sorg dat hy en sy getuies daar teenwoordig en slaggereed is. Dit het hy gedoen. Dit is klaarblyklik van groot belang vir 'n eiser dat sy vordering so spoedig moontlik bereg word. Omdat die verweerder in die onderhawige geval egter onskuldiglik afwesig was, kon eiser nie met die verhoor van sy eis voortgaan ten nadele van die verweerder nie en moes die verhoor noodgedwonge *sine die* uitgestel word.

Tot daardie belangrike mate is die verweerder se regte deur die uitstel van die saak beskerm en is hy daardeur bevoordeel, maar is die eiser daardeur tot dieselfde mate benadeel. Om vir die eiser nog verder te benadeel deur hom in die gevaar te stel om, indien hy uiteindelik in die geding die onderspit delf, die verkwiste koste van die uitstel ook nog te moet dra, is om die regverdig-gebalanseerde skaal van billikheid met die skawende juk van onbillikheid te vervang.'

⁹ *Cape Law Society v Feldman*, *supra*, 934B-C.

1. The applicant is to pay the wasted costs occasioned by the postponement.



E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Adv. D Block
Instructed by:	RH Lawyers Inc.
For the respondent:	Adv. L Hollander
Instructed by:	TWB – TUGENDHAFT WAPNICK
Date of the hearing:	9 June 2022
Date of judgment:	15 June 2022