



REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 13125/06

In the matter between:

GEOFFREY CLIVE DAVIDSON

Applicant

and

TRUDIE ANNE DAVIDSON (born Tembe)

First Respondent

THE SHERIFF, WYNBERG SOUTH

Second Respondent

JUDGMENT HANDED DOWN THIS 15TH DAY OF MARCH 2007

RILEY, AJ:

1. Applicant brought an application in this court on the 4th December 2006 for an order staying the writ of execution issued out of this court on 13 October 2006 under Case Number 2772/98 and directing the first respondent to provide the applicant with the necessary bank statements indicating proof of payment since 1998 to 2004.
2. On 4 December 2006 the matter was postponed by agreement between the parties and Allie, J ordered that:

- "1. The matter is postponed to the semi-urgent roll of the Fourth Division of this Honourable Court on **Monday 12 March 2007 at 10h00** or soon thereafter as counsel for the parties may be heard.
 2. The writ of execution issued by the Registrar of this Court on **13 October 2005** under **Case No 2772/98** annexed thereto as '**A**' is stayed pending the finalisation of the matter.
 3. The first respondent shall file its Answering Affidavit on or before **Monday 22 December 2006**.
 4. The first respondent shall provide applicant with all her bank statements for the period from 1 June 1998 to 1 May 2004 on or before **Monday 22 December 2006**.
 5. The applicant shall file its Replying Affidavit, if any, on or before **Friday 26 January 2007**.
 6. The parties shall file their Heads of Argument in accordance with the Rules of this Honourable Court.
 7. Costs of the application shall stand over for later determination."
3. It is common cause that first respondent failed to file an Answering Affidavit by 22 December 2006 and further failed to provide applicant with her bank statements for the period 1 June 1998 to 1 May 2004 by 22 December 2006.
 4. On 12 March 2007, i.e. the date on which the main action was to be heard, first respondent, who was represented by Mr W Fisher, served on Mr B Atkins, applicant's counsel, at court, a Notice of Motion in terms of which first respondent sought the following relief:

- “1. *Condoning applicant's failure to conform to the Uniform Rules of Court relating to time-periods, service and form and hearing this matter as one of urgency.*
 2. *Postponing the main application under the above-named case number to a date to be determined by the above Honourable Court pending applicant filing her Answering Affidavits and Heads of Argument in the said main application.*
 3. *Granting applicant such further and/or alternative relief as this Honourable Court may deem fit.*
 4. *Costs in the event of opposition.”*
5. A perusal of the Notice of Motion shows that it is undated and no address is indicated as a service address in terms of the Rules of Court. The supporting affidavit of the first respondent is dated 12 March 2007 and the court was advised that it was prepared on the morning of 12 March 2007. Doubt is expressed whether there has been proper compliance with the provisions of Rule 12(a) and (b) of the Rules of Court.
6. During argument for the postponement of the main matter, Mr Fisher argued that the court should approach the first respondent's request for a postponement with sympathy. The thrust of his argument was that the reason for first respondent's unreadiness is due to the fact that she was unable to obtain the bank statements timeously. He conceded in argument that even though first respondent has attached

some of the bank statements required by applicant to her affidavit in support of her request for the postponement that there were several months and at least one year of bank statements outstanding.

7. The following is not disputed:

- 7.1 that first respondent's attorney had moved offices during December 2006 from Cape Town to Joostenbergvlakte;
- 7.2 that he had failed to notify applicant's attorney of this fact, nor did he provide applicant's attorney with a service address which was required in terms of the Rules of Court;
- 7.3 that applicant's attorney eventually managed to track down the first respondent's attorney and the latter then suggested that a round table conference be held between the two legal teams to discuss the matter;
- 7.4 the round table conference took place on 9 February 2007 and the applicant was represented by Ms Nasley Abrahams and Adv Atkins, whilst first respondent was represented by Mr Meyer and Adv Fisher.
- 7.5 At this meeting first respondent's legal team confirmed that they were aware that:
 - 7.5.1 the matter was due for hearing by this Honourable Court on 12 March 2007;

- 7.5.2 the first respondent was in breach of the terms of the order taken on 4 December 2006 in that first respondent had failed to supply applicant with her bank statements and that she failed to file an Answering Affidavit;
- 7.5.3 first respondent confirmed that she was in possession of copies of the relevant bank statements required by the applicant; and
- 7.5.4 first respondent's legal representatives further agreed that first respondent would file her answering affidavit on/before Thursday 15 February 2007.
- 7.6 first respondent and her legal representatives failed to make first respondent's bank account statements available to the applicant on 12 February 2007;
- 7.7 since 13 February 2007, applicant's attorney made repeated calls to the offices of the first respondent's attorney of record on virtually a daily basis;
- 7.8 first respondent has failed to make her bank statements available to the applicant, nor did first respondent's attorney of record return the telephone calls of applicant's attorney;
- 7.9 first respondent failed to file her answering affidavit in this matter on 15 February 2007 as she undertook to; and

7.10 despite repeated telephone calls on a daily basis by applicant's attorney to first respondent's attorney since 16 February 2007, first respondent failed to file her Answering Affidavit in this matter, nor has first respondent's attorney of record returned applicant's attorney's telephone calls.

8. Mr Atkins argued with reference to authority that first respondent should not have brought her application in this court and that the Maintenance Courts in terms of the Maintenance Act, No 99 of 1998, could provide her with more than adequate relief for her alleged problem. He argued that the first respondent should have exhausted all the resources and remedies available to her in the maintenance office of the Magistrate's Court and if she had exhausted all the remedies and was still not assisted in that court, that only then should she have approached this court.
9. Based on first respondent's conduct of this matter, Mr Atkins argued that this court should not grant a postponement, but rather grant applicant the relief sought in the Notice of Motion in the main action. He contended that if the court granted applicant the relief sought in the Notice of Motion that first respondent would not be denied her right to

be heard on the matter and that she could still approach the Maintenance Court for relief.

10. Mr Fisher was vigorously opposed to such a drastic intervention by this court and argued that first respondent was not precluded from approaching the High Court for the writ for the purpose of enforcing payment of a High Court maintenance order. He was adamant that first respondent had approached the correct forum for relief.
11. He argued that to refuse a postponement in these circumstances would be to deny the first respondent a hearing. He contended that no undue prejudice would be caused to applicant by the postponement and that whatever prejudice was suffered by applicant, could be remedied by an appropriate cost order.
12. The relevant legal principles, which find application when a court has to grant a postponement to a party, are clearly set out in the matter of Myburg Transport v Botha t/a SA Truck Bodies 1991(3) SA 31 (NMSC) at p 314F-J to p 315A-H and can be summarised as follows:
 - 12.1 The trial judge has a discretion as to whether an application for a postponement should be granted or refused.

- 12.2 The discretion must be exercised judicially and not be exercised capriciously or upon any wrong principle, but for substantial reasons.
- 12.3 A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case.
- 12.4 An application for a postponement must be made timeously, i.e. as soon as the circumstances which might justify an application became known to the applicant. A court may, considering principles of fundamental fairness and justice, justify a postponement even if the application was not timeously made.
- 12.5 An application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which applicant is not legitimately entitled.
- 12.6 Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a court will be exercised. The court will primarily consider whether any prejudice caused by a postponement to the adversary of the application for a

postponement can fairly be compensated by an appropriate orders of costs or any other ancillary mechanisms.

12.7 The court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.

12.8 Where the applicant for a postponement has not made his application timeously or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its discretion might allow the postponement, but direct the application in a suitable case to pay the wasted costs occasioned to such respondent on the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be.

13. After hearing argument, it is clear to me that the absence of the bank statements has affected both parties in the preparation of their respective cases. As a consequence, the main matter is not ripe for hearing.

14. The court has given careful consideration to the arguments presented and based on considerations of justice and fairness the court has decided to exercise its discretion in favour of the first respondent and accordingly condones first respondent's failure to conform with the Rules of the Court relating to the hearing of this matter as one of urgency and grants first respondent a postponement.
15. However, in considering the question of cost, the court has regard to the following: The court is not satisfied that first respondent has set out fully the reasons for her non-preparedness. What is of concern to the court is that first respondent's attorney has failed and refused to provide a reasonable explanation for the present state of affairs of this matter. First respondent has, either by her own conduct or through the conduct of her legal representatives, failed and neglected to put into place certain steps and/or mechanisms in anticipation of the fact that she would not be able to obtain the information required by applicant during the time periods agreed to by her. The court is unable to comprehend how first respondent could give the undertaking to provide the bank statements to applicant (i.e. at the round table conference) if she is presently still not in possession of all the bank statements.
16. What is of further concern, is the fact that first respondent's attorney failed and neglected to contact applicant's attorney at all to advise of

first respondent's dilemma. The court is not convinced by Mr Fisher's argument that the first respondent was waiting up until the last moment to obtain the bank statements. If the statements were not obtained and ^{not} provided in time, it would in any event have necessitated a request for a postponement and new timetables for filing of papers would have had to be worked out.


17. When the statements were not obtained on the date which had been agreed on at the round table conference, nothing prevented first respondent's attorney from addressing appropriate correspondence to applicant's attorney. First respondent's attorney also did not have the courtesy to contact applicant's attorney when it must have been obvious to him that first respondent would not be able to comply with Allie, J's order. It is common cause that first respondent's attorney had also failed to communicate to the applicant's attorney in advance the reasons for first respondent's failure to file answering affidavits on the main action, as this would clearly have the effect that she would not be able to proceed with the matter at all.
18. The court is satisfied that both first respondent and her attorney were grossly negligent in their conduct of the matter thus far. The court is satisfied that this is a suitable case where I can order that the first respondent pay the costs of the applicant on the scale of attorney and

client in respect of the application for a postponement. The court will not make an order that first respondent be directed to pay the costs of applicant before she is allowed to proceed with the defence of the action.

19. In the result, I make the following order:

- 19.1 The matter is postponed to the semi-urgent roll of the Fourth Division of this Honourable Court on **13 August 2007** at 10h00 or so soon thereafter as counsel may be heard.
- 19.2 The writ of execution issued by the Registrar of this Honourable Court on 13 October 2006 under Case No 2772/98 annexed hereto as "A" is stayed pending the finalisation of this matter.
- 19.3 The first respondent shall file its Answering Affidavit and provide the applicant with all her bank statements for the period from 1 June 1998 to 1 May 2004 on or before **16 May 2007**.
- 19.4 The applicant shall file its Replying Affidavit, if any, on or before **15 June 2007**.
- 19.5 The parties shall file their Heads of Argument in accordance with the Rules of this Honourable Court.

19.6 First respondent is ordered to pay the costs of the application for the postponement on the scale of attorney and client, such costs to be taxed.



RILEY, AJ