Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case No. : 6499/2012

In the matter of:

ARNOLD BOTHA Applicant

versus

MAGISTRATE M PANGARKER
(Acting Magistrate of the Regional Court for the Regional Division of the Western Cape, held at Cape Town) First Respondent
CHRISTINA MAGDALENA SUSANNA BOTHA Second Respondent

JUDGMENT DELIVERED ON TUESDAY, 29 JANUARY 2013

GOLIATH, J et CLOETE AJ:

[1] This is a review application in which the applicant, duly represented by Mr Derris, seeks an order reviewing and setting aside the divorce proceedings that took place on 8 March 2012 and 9 March 2012 together with the judgment issued by first respondent on 9 March 2012, save for the decree of divorce itself which the applicant and second respondent are agreed must remain of full force and effect. The main grounds on which the application is based is that the magistrate continued with applicant's trial, finalized the divorce and issued an order in his absence on 9 March 2012. Applicant contends that the aforesaid conduct of the magistrate

violated his right to be heard and his right to legal representation as enshrined in the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"). Consequently, it is argued, when the matter was so proceeded with, the court denied the applicant the right to a fair trial. It was initially argued that the magistrate was biased, but applicant correctly conceded that there is no basis for this submission since the record of the proceedings does not support this contention.

[2] It is common cause that the applicant was represented by various legal representatives in his divorce proceedings. Mr Arnold Vermaak represented applicant in 2009. Applicant was unhappy with the service provided and after an exchange of words terminated his mandate. In December 2010 Mr Jennings came on record and the matter was set down for trial on 12 August 2011. It appears that Mr Jennings was in fact interdicted from practicing at the time and applicant terminated his mandate. On 12 August 2011 applicant appeared without legal representation and the matter was postponed until 21 October 2011.

[3] Applicant approached the law society for *pro bono* legal assistance and Mr Gert Etzebeth was appointed on 21 October 2011. Mr Etzebeth was not available due to prior commitments and the matter was postponed until 15 December 2011. Applicant and Mr Etzebeth had a disagreement surrounding an amendment of the summons. Without applicant's knowledge Mr Etzebeth served a notice of withdrawal as attorneys of record on second respondent and the Cape Law Society. On 15 December 2011 applicant appeared at court without legal representation. On this day the matter was postponed until 8 and 9 March 2012 and applicant was ordered to pay the wasted costs occasioned by the postponement. The first respondent ordered that this would be a final postponement for legal representation and trial. Thereafter the applicant again approached the Law Society for *pro bono* legal assistance and Ms Carnietta Davidson was appointed. Ms Davidson represented the applicant at the pre-trial conference held on 22 February 2012. Applicant had issues with the manner in which the pre-trial conference was conducted and Ms Davidson subsequently withdrew as his legal representative on 24 February 2012.

[4] On 28 February 2012 applicant acquired the services of Mr Derris who indicated that he would not be available on 8 and 9 March 2012 due to prior commitments in the Constitutional Court. On 28 February 2012 Mr Derris addressed a letter to first and second respondents advising of his non availability and requesting a postponement and suggested that the parties see the first respondent in chambers prior to 5 March 2012 to discuss the matter further, with the intention of finding an amicable solution to this issue. Mr Derris confirmed that he had been made aware of the long history of the matter and recorded that he would commit himself to represent the applicant at trial on the earliest available date as well as to treat the matter with preference. He also conveyed the applicant's apologies for the further delay, stating that:

> "**He *[i.e. the applicant]* further advised that since the withdrawal of Carnietta Davidson on 24 February 2012, has he *[sic]* taken immediate steps to secure alternative legal representation, and attended at numerous attorneys' offices, literally begging for help... In the circumstances, do we seek this Court's urgent indulgence, and allow Mr Botha to be legally represented at the trial at the Court's earliest alternative date.**"

[5] The first respondent responded to the request in an email dated 29 February 2012 and advised that she will only see all the parties together by prior arrangement. However, she concluded the email as follows:

> "**The matter cannot be enrolled for an earlier date *[i.e. prior to 8 March 2012]* to deal with a potential postponement by Mr Botha or Mr Derris on his behalf as I am in court every day, in various Regional Courts, as well as my colleague, Mr Yuill**".

[6] On 28 February 2012, second respondent indicated her refusal to indulge the applicant any further and refused to agree to a further postponement. Second respondent proposed that applicant find an attorney who is available on 8 March 2012. Consequently Mr Derris's proposal was rejected.

[7] On 8 March 2012 the applicant attended court without legal representation armed with an application for the recusal of first respondent, which was alluded to by Ms Davidson in her withdrawal letter dated 24 February 2012. Applicant cited various grounds for his application, and indicated in paragraph 3 that he wishes to have legal representation at his trial. Reference is made to the attempts made by Mr Derris to have the matter postponed. Applicant expressed the view that it would be in the interest of justice if the matter is postponed for a short period. The record of the proceedings reflects that the magistrate briefly referred to the issue of a postponement.

Hof:	**"Wat ek wil weet, Mnr Botha, ek weet daar is iets oor 'n uitstel. Mnr Derris, volgens u, is nie hier nie".**
Mnr Botha:	**"Dit is reg, ja",**
Hof:	**"Goed. Daar is ook, en ek weet nie of dit is wat u vir die Hof wil laat weet nie, daar is ook 'n brief wat hy gestuur het per epos om te sê hy is in Johannesburg of wat ook al die situasie is".**
Mnr Botha:	**Ja. Dit is soos die laaste gedeelte, aanhangsel ja".**
Hof:	**Wat die Hof wil weet Mnr Botha, aansoek vir my ontrekking wat u self geteken het. Doen u dit self vanoggend?"**
Mnr Botha:	**Ek en die prokureur doen dit. Ons twee saam doen dit".**
Hof:	**Ja, maar die prokureur is nie vandag hier nie".**

Record: page 465 line 25 – page 466 line 12

The record further reflects that the applicant had no intention to argue the application for recusal. He insisted that he was instructed by his attorney to merely read the application into the record and thereafter leave the court.

> **"Ek gaan dit nie argumenteer vanmôre in die hof nie. Wat ek net gaan doen is ek gaan net hierdie aansoek vir u vra om dit te lees fisies persoonlik in die hofleer in en dan moet ek gevra word, vir u**

vra om my te verskoon van die hof verrigtinge omdat ek nie verteenwoordiging het van 'n prokureur vanmôre nie, want hy is nie beskikbaar nie".

Record: page 466 line 15

[8] The magistrate continued to explain the court procedure to the applicant and the applicant responds as follows:

"Ek wil net vir u sê dit is vir my moeilik om te verstaan, maar ek hoor wat u vir my sê".

Record: page 474 line 9

[9] The applicant proceeded to read the application into the record, which included all correspondence relating to the request for a postponement. After reading the application in the record the applicant requested to be excused. The magistrate adopted the view that she would not interfere with the instructions given to the applicant by his attorney. The magistrate thereafter proceeded to advise the applicant of the procedures regarding the application for recusal as well as the negative consequences should he absent himself during the proceedings. The magistrate subsequently excused him and left the decision in his hands as to whether he would like to remain present or remain as an observer. The applicant then left the court.

[10] The court then continued to hear the application for recusal in the absence of the applicant. The application was eventually refused with costs. At the hearing of the application for recusal in the absence of the applicant the magistrate dealt with the issue regarding the postponement and raised the following with the second respondent's counsel:-

"The way I understand it, one of the grounds for the recusal of the court is that I... refused the request by Mr Derris for a postponement of the matter, be it via this letter sent per email or whatever the case is..."

"... the fact that this case *[i.e. referring to the application]* could not be enrolled for an earlier date due to the court rolls, ... was there any formal application or papers served on your attorney, ... to place the matter on either my court roll or Mr Yuill's court roll, so that there could be a request for a postponement of the trial date of today".

Record: page 513 line 20 – 514 line 1-5

[11] Second respondent's counsel responds that they have received no further communication from Mr Derris and added:

"...a party wishing to obtain a postponement and it not being by agreement then the rules are very clear. You bring a formal application either on a day prior to the hearing, or on the day of the hearing, ... in all documentation which has been exchanged, there is no indication of a refusal by yourself of a postponement and there could not have been a refusal of a postponement because there has not been a formal application before the court".

Record: page 515 line 13-25
page 516 line 1 - 2

"... given that he knew there was opposition, once you know that it is not going to be a postponement by agreement, then you bring your application. You do not try to make an appointment to see the presiding officer in chambers".

Record: page 517 line 16 - 22

[12] In her judgment the learned magistrate found that there was no application or request for a postponement by Mr Botha during his appearance at court on 8 March 2012:-

> **"As regards the appointment of Mr Derris today and a possible suggestion that I have refused a postponement leading to a situation today where Mr Botha is or was unrepresented, I will say the following: There has been no urgent application or something of an urgent nature brought to the court with regard to this matter insofar as a postponement of the matter is concerned, to give Mr Derris an opportunity to be present".**
>
> **Record: page 539 line 14 - 21**

[13] The court expressed the view that there was no denial of a postponement. The court took issue with the letter sent by Mr Derris who allegedly expected an agreement to be reached regarding a postponement without bringing it before court. The court accepted that both parties needed to be present at court to argue the postponement.

[14] Section 35(3)(f) of the Constitution provides that every accused person has the right to a fair trial, which includes the right to choose and be represented by a legal practitioner. The decision whether or not to grant a postponement is in the discretion of a trial court. Such discretion must be exercised judicially and upon all the facts and circumstances pertaining to the matter. The importance of legal representation, and where possible, a representative of choice are not to be underestimated. Prejudice to a litigant flowing from a refusal of a postponement is sometimes virtually presumed where the effect of the refusal of an application is to deprive him of legal representation.

[15] In *S v McKenna* 1998 (1) SACR 106 (C) the court held *inter alia,* that if the right to legal representation is to have any meaning, it must include the right to be afforded a reasonable opportunity of securing it. The court further held that the

denial of such an opportunity, when it is demanded, is a denial of the right to legal representation, and thus of the constitutionally guaranteed right to a fair trial, and that the magistrate committed a gross irregularity when he denied the appellant the opportunity of securing a legal representative; and on this ground alone the conviction had to be set aside.

[16] In *Muller v Cancun Investments 25 (Pty) Ltd* (unreported judgment delivered on 14 December 2012, WCHC case numbers 18828/2012 and 5868/2009) the court in referring to *S v McKenna* stated the following at paras [44] and [45]:

> **"[44] Of course the court in *McKenna* was dealing with the right of a person accused of a crime to legal representation and s 35 of the Constitution itself specifically relates to arrested, detained and accused persons. However s 34 of the Constitution provides that:**
>
> > ***'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a Court or, where appropriate, another independent and impartial tribunal or forum.***
>
> **[emphasis supplied]**
>
> **[45] There is nothing in the Constitution which militates against the view that a litigant in a civil matter should not also be afforded a reasonable opportunity to obtain legal representation... if that litigant so desires. I do not suggest that this means that a litigant can take his or her time or proceed at his or her leisure; representation should be secured within a reasonable time."**

[17] It is common cause that the applicant's attorney withdrew from the matter on 24 February 2012. Within a matter of four days and apparently after experiencing severe difficulty applicant appointed another legal representative who indicated that he was not available on the allocated trial date. It is evident from the first respondent's email to the parties that although she extends a possible invitation to the parties to see her in chambers by prior arrangement, she was clear that the

matter cannot be enrolled for an earlier date to deal with a postponement as requested by Mr Derris. In addition to this second respondent indicated that she was not amenable to the further postponement of the matter, hence there was no positive response to Mr Derris's proposal. It would therefore be reasonable to conclude that a meeting in chambers would have been futile.

[18] In her judgment the magistrate found that there was no request for a postponement so that an attorney could have argued the application on behalf of the applicant. The magistrate took a decision on 29 February 2012 that she was not going to entertain an application for a postponement prior to 8 March 2012 and neither would her only colleague in the same division. Mr Derris was thus effectively barred from placing the matter on the roll at an earlier date. All the parties concerned were aware that Mr Derris had commitments in the Constitutional Court on 8 March 2012 and would not be able to attend court on 8 March 2012 to deal with a postponement. It now appears that Mr Derris was expected to set the matter down for a postponement on an urgent basis in defiance of the magistrate's directions.

[19] During argument it was the attitude of the first respondent that she had not closed the doors of the court to the applicant to seek a postponement. It was submitted that not only did rule 55 of the magistrates court rules provide guidance as to what and how the applicant and Mr Derris could have proceeded to further their envisaged application for a postponement, but rule 33 of the "Divorce Court rules" provided specific relief to approach the Regional Court President to convene a court to hear just such an application. It was further submitted by way of a supplementary note filed by first respondent's counsel that the Divorce Court rules were indeed applicable to the matter before the court *a quo* at or before 8 March 2012.

[20] Rule 55 of the magistrates court rules does not assist the first respondent. The magistrates court is a creature of statute and it has no inherent jurisdiction. It is bound by the four corners of the statute which governs its operation as well as the rules promulgated in terms thereof. Rule 55(5) provides that **a court**, if satisfied that

a matter is urgent, may make an order dispensing with the forms and service provided for in the rules and may dispose of the matter at such time and place and in accordance with such procedure as **the court** deems appropriate. This remedy was not available to the applicant since the first respondent had informed Mr Derris that no such application would be entertained by the court prior to 8 March 2012.

[21] Rule 33(8) of the Divorce Court rules provided that:-

> **"Notwithstanding the foregoing subrules, interlocutory and other applications incidental to pending proceedings may be brought on notice supported by such affidavits as the case may require and set down at a time assigned by the registrar or as directed by the president of the division or a presiding officer assigned by him or her"**

and rule 33(9)(a) dealing with urgent applications is to similar effect.

[22] First respondent's counsel submitted that since the Divorce Court rules applied when the divorce action was instituted in the court *a quo* on 26 August 2008 they are still of application, in light of s 9(1) and (2) of the Jurisdiction of Regional Courts Amendment Act 31 of 2008 (which commenced on 9 August 2010) and which read as follows:-

> **"(1) Any proceedings instituted in a Court established under Section 10 of the Administration Amendment Act No. 9 of 1929, before the commencement of this Section and which are not concluded before the commencement of this Section must be continued and concluded in all respects as if this Act had not been passed."**
>
> **"(2) On the date of the commencement of this Section –**
>
> **(a) Each Court established under Section 10 of the Administration Amendment Act 9 of 1929, becomes a Court of the Regional Division designated by the Minister in respect of that Court..."**

[23] However s 9(4) of the same Act provides that:-

> **"The rules in force on the date of the commencement of this Act in respect of the courts established under section 10 of the Administration Amendment Act, 1929 (Act 9 of 1929), remain in force until they are repealed or amended by a competent authority."**

[24] The divorce courts were established under s 10 aforesaid. Government Gazette No 33620 of 8 October 2010 repealed the Divorce Court rules with effect from 15 October 2010, from which date the current magistrates court rules became applicable to all divorce actions, including those pending in the erstwhile divorce courts.

[25] Rule 31 of the magistrates court rules deals with postponements and provides *inter alia* that the trial of an action may be postponed by consent of the parties or by **the court**, either on application or request or **of its own motion**; and there does not appear to be any provision in the magistrates court rules which corresponds with the previous rules 33(8) and (9) of the Divorce Court rules. It was thus not open to the applicant or Mr Derris – as was suggested by counsel for both respondents – to approach the President of the division concerned in the magistrates court for another magistrate to be assigned to hear the application. They were obliged to have brought the application before the first respondent or her only other colleague in the same division. However rule 31 does make it clear that it was open to the first respondent of her "own motion", i.e. *mero motu*, to grant a further postponement in the interests of justice despite the fact that there may not have been any formal application before her. And it is trite that a final postponement is never final in the sense that any further postponement will depend upon the facts and the exercise of a judicial discretion in light thereof.

[26] The record of the proceedings further reflects the following:

(a) In the first instance Mr Derris requested a meeting to arrange a postponement. Having been informed that the matter could not be enrolled for an earlier date, Mr Derris abandoned his efforts to engage the parties further.

(b) At the hearing of the matter on 8 March 2012 the applicant appeared unrepresented, but read the application into the record, which included a request for a brief postponement of the trial. The issue of a postponement was briefly referred to by the magistrate, but not dealt with in the presence of the applicant. This is clearly a misdirection.

(c) After dealing with the application for recusal, having refused same, the magistrate immediately proceeded with the trial, instead of ascertaining the possibility of a postponement, as requested by the applicant, in his founding papers.

(d) It is clear that the applicant at no stage relinquished his right to legal representation. During the proceedings he insisted that he would not be arguing the case, that he and his attorney were 'acting together', that Mr Derris is his legal representative and was unable to be at court and that he would revert to his legal representative to deal with the matter on his return.

[27] It was grossly irregular for first respondent to simply decide to proceed with the matter without considering the issue of a postponement. The court was fully aware that the applicant's previous legal representative withdrew and that he needed to be given an opportunity to obtain another legal representative at short notice. The court is of the view that it was unreasonable of the learned magistrate to deny the applicant's new legal representative an opportunity to facilitate a postponement of the matter. Moreover, the applicant cannot be blamed for the fact

that his legal representative was denied the opportunity to facilitate a postponement prior to the trial date. The magistrate should have allowed Mr Derris to bring the application, which had to be decided on its merits. A new legal representative should also be given an adequate opportunity to prepare for trial.

[28] The fact that the applicant arrived unrepresented at court on 8 March 2012 was a direct consequence of the magistrate's refusal to entertain an earlier application for a postponement. Significantly applicant's conduct is described as being engineered to "force" a postponement. It is highly undesirable for a litigant to be placed in such an invidious position because his legal representative was not given the opportunity to request and motivate for a postponement. The issue should have been dealt with openly and transparently without placing the applicant under the pressure of having to conduct his own case in the manner in which he did on 8 March 2012.

[29] The court is satisfied that as a consequence of the magistrate's failure to accommodate Mr Derris, the applicant has not been afforded the right to a fair trial because, in consequence of a refusal to entertain a postponement, he was wrongly deprived of his right to be represented by a legal practitioner or legal practitioner of his choice. The court is therefore satisfied, from the aforegoing, that the applicant did not have a fair trial and that this resulted in a failure of justice and consequently the proceedings on 8 March 2012 and 9 March 2012 cannot be allowed to stand and ought to be set aside. Due to the fact that the proceedings in the court *a quo* are set aside as a result of an irregularity the court need not consider or pronounce on the merits of the case.

[30] With regard to costs, first respondent seeks a cost order *de bonis propriis* against applicant's attorney of record, G N Derris on the grounds of his failure to respond to correspondence, the late filing of applicant's replying papers and alleged general lack of respect and unprofessional conduct. First respondent referred to *Thundercats Investments 49 (Pty) Ltd and Others v Edmond Mitchell Fenton and Others* 2009 (4) SA 138 (C) where a cost order was granted against counsel who

made scathing and contemptuous attacks inclusive of demeaning and patronising remarks alluding to certain judges' abilities or his perceived lack thereof. First respondent argued that given the gratuitous nature of the averments made against her, more particularly accusing her of bias, being disrespectful and lacking impartiality, first respondent is entitled to insist on such a cost order. However, it was brought to counsel's attention that none of these grounds were raised in the founding papers, and can accordingly not be sustained. First respondent also alluded to prejudice suffered due to applicant's failure to paginate the file and prepare the case, but failed to persuade the court that this resulted in an inordinate amount of expense. In any event this issue was also not raised in the founding papers. Furthermore, despite the perceived inconveniences suffered by first respondent as a result of Mr Derris's conduct complained of, the matter proceeded on the allocated date of hearing.

[31] Mr Derris responded that his failure to respond was due to ill health. He denied that he acted in an unprofessional manner and duly communicated with first respondent's attorneys. This explanation could not be satisfactorily countenanced by first respondent. It is trite that an award of costs *de bonis propriis* against an attorney acting in a representative capacity may only be made in circumstances where he or she acted *mala fides*, negligently, unreasonably or improperly. The court is satisfied that the reasons furnished by Mr Derris are reasonable and acceptable and do not warrant a punitive cost order.

[32] With regard to costs in general, it is clear that the conduct of first respondent resulted in a miscarriage of justice. However, and notwithstanding his success in this court, it cannot be said that the applicant was blameless, if regard is had to the events preceding the appointment of Mr Derris on 28 February 2012; and the unfounded allegations of bias in the applicant's papers. For that the applicant must shoulder his share of the responsibility. As to the second respondent, she has been put to significant inconvenience and expense by both the applicant and the first respondent. Having regard to these considerations it is the courts' view that an appropriate order to make is that the applicant and first respondent shall bear the

second respondent's costs; and that the applicant and the first respondent shall each bear their own costs.

[33] Consequently the following order is made:

1. **The review succeeds.**

2. **Save for the decree of divorce already granted, the proceedings on 8 and 9 March 2012 together with the judgment issued by first respondent is set aside.**

3. **The matter is referred back to the Regional Court for trial *de novo* before a Regional Magistrate other than M D Pangarker.**

4. **The applicant and the first respondent shall bear the costs of the second respondent incurred in these proceedings, jointly and severally, on the scale as between party and party.**

5. **The applicant and the first respondent shall each bear their own costs incurred in these proceedings.**

Goliath

GOLIATH, J

I agree.

J. Owen

CLOETE, AJ