



THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION)
JUDGMENT

Case No: 1820/18

In the matter between

PUMA SPORTS DISTRIBUTORS (PTY)
LTD

PLAINTIFF

and

PETER WILLIAM HUGHES
LENA LYNNCE JANSON
CAREL VISSER

FIRST DEFENDANT
SECOND DEFENDANT
THIRD DEFENDANT

Coram: Rogers J

Heard: 10 November 2020

Delivered: 10 November 2020 (by email to the parties)

JUDGMENT

Rogers J

[1] The first defendant has applied for the postponement of the trial of the above matter which is scheduled to start this Monday, 16 November 2020. I am hearing the application as the judge on urgent duty. As far as I am aware, a judge has not yet been allocated for the trial itself. Since default judgment was granted in May 2018 against the second and third defendants, I shall refer to the first defendant simply as the defendant.

[2] The plaintiff issued summons in February 2018. The case was declared trial-ready in March 2019. It was set down for hearing on 19 November 2019. At the plaintiff's request, the parties agreed in September/October 2019 that the trial be postponed to 25 November 2019 due to counsel's unavailability. That date was, however, not available and eventually the parties agreed to postpone the case to 12 August 2020, which suited both sides.

[3] Due to a registry error, the case was instead postponed to 18 May 2020. Since this date suited neither side, emails were exchanged in February 2020 about securing another date. An articled clerk from the plaintiff's attorneys contacted the defendant's counsel, Mr Oosthuizen SC, to ascertain his availability for 16 November 2020. Mr Oosthuizen confirmed his availability and asked that this be confirmed once the order was granted. On 19 February 2020 Mr Oosthuizen sent a notification to similar effect to his attorney, Mr Williams-Ashman.

[4] On 8 May 2020 the plaintiff's attorneys emailed to Mr Williams-Ashman the order postponing the case to 16 November 2020. Mr Williams-Ashman states, and I accept, that he receives a great many emails and that he unfortunately failed

to open this one, and thus did not know that the date of 16 November 2020 had been confirmed. His oversight came to light when the plaintiff's attorneys contacted him on 21 October 2020 about holding a pre-trial conference. Mr Williams-Ashman immediately replied to say that the articled clerk had not subsequently confirmed to Mr Oosthuizen that the postponement order had been granted and that he (Mr Williams-Ashman) had overlooked the email of 8 May 2020. Mr Oosthuizen, he said, was unavailable on 16 and 17 November 2020. He asked for a short postponement to accommodate his counsel.

[5] He added that his client, who had emigrated to England, was 58 years old and resided in a country which was now regarded by South Africa as 'high risk' for purposes of Covid-19. It would thus not be possible for the defendant to travel to South Africa for the trial.

[6] On 22 October 2020 the plaintiff's attorneys replied to say that their instructions were to proceed with the trial and that if the defendant wanted a postponement he should bring a formal application. Unsigned founding papers were emailed to the plaintiff's attorneys on 2 November 2020. The notice of motion, which is dated 3 November 2020, specified today, 10 November, as the date on which the postponement application would be heard.

[7] There are thus two grounds for the postponement: (a) the defendant's difficulty in travelling to South Africa during the current state of the pandemic, particularly the position in England; (b) Mr Oosthuizen's partial unavailability.

[8] There are legitimate criticisms of both of these grounds. The defendant and his wife, who hold British passports, emigrated to the United Kingdom in July of this year. Although they had *bona fide* reasons, the defendant knew that the present case was pending. He elected to emigrate despite the fact that the pandemic was in full swing, that he is 58 years old, and that his wife (who is older

than he) suffers from co-morbidities. In other words, he was aware of the reasons which would make it difficult for him to return to South Africa later in 2020 for purposes of the trial. There is no evidence that he made any enquiries to his attorney about the status of the trial before leaving.

[9] It is common knowledge that England has experienced a ‘second wave’ of Covid-19, and is currently in a fairly strict state of lockdown. If the defendant travelled now to South Africa, he would have to be quarantined for 14 days upon returning to England. As to whether he can get to South Africa by 16 November 2020, our Level 1 regulations permit international air travel from high-risk countries such as the United Kingdom for business purposes, but this is subject to a permit from the Minister of Home Affairs. The defendant has not provided evidence as to how long such an application would take to process. He did not, upon learning of the trial date on 21 October 2020, take the precaution of seeking a permit (which he could have done, even if a postponement made it unnecessary in the event for him to travel at this time).

[10] The defendant’s inability to travel does not necessarily mean that the trial cannot proceed. We are all becoming more accustomed to virtual hearings. I accept that these are more challenging in the case of trials. Different judges have different views on the extent to which virtual evidence deprives the trial court of the full advantages of in-person hearings. My own view is that, at least from the court’s perspective, such disadvantages as may exist do not usually outweigh the disadvantages of postponing matters indefinitely or for a significant period of time.

[11] However, it is not only the court’s position that must be considered. The position of the parties must also be taken into account. The plaintiff and its legal team are willing for the trial to be conducted by a virtual hearing. The defendant

and his team are less amenable to this. Mr Oosthuizen pointed out that during the course of a trial it is desirable for there to be easy and prompt communication between the client and his legal team, particularly when the opposing side's witnesses being cross-examined. Again, this is not beyond the capacity of human wit to overcome. The legal team can maintain virtual contact with the client on a separate platform such as WhatsApp or email, and if necessary counsel can ask for time to take further instructions.

[12] As to counsel's unavailability, Mr Oosthuizen told me that he was definitely unavailable on 16 November, because he was chairing a disciplinary appeal. It was possible that the matter would run on to 17 November but by no means certain. He also told me from the bar that, because the defendant was applying for a postponement, he has not up to now engaged in trial preparation. He would be available for that purpose tomorrow and if necessary on the weekend but has other professional commitments on Thursday and Friday. I understand from the plaintiff's counsel (Mr Felix, who appeared today for the plaintiff in the absence of Mr Dickerson SC) that a trial bundle has been prepared, but the defendant's legal representatives do not yet have it.

[13] Provided that there is time to obtain other suitable counsel, our courts do not ordinarily have regard to the unavailability of a litigant's preferred advocate. The present case is somewhat different in that Mr Oosthuizen is acting on a contingency basis. It would be more difficult to find a substitute counsel on that basis, particularly on short notice. As against this, the defendant's attorney has not stated in his affidavit that any attempt has been made to find substitute counsel. The defendant does not in terms state that he cannot not afford to pay counsel on the usual basis, though from what he has said about the decline in his financial fortunes and about the fact that he now has only part-time consultancy work, one

can deduce that funding counsel for a trial of a week or two might be beyond his financial means.

[14] In my view, the main problem in the present case is that the defendant and his legal team did not know about the trial date of 16 November 2020 until 21 October 2020. It is for this reason that Mr Oosthuizen did not keep the trial date of 16 November 2020 available. It is for this reason that the potential implications of the second wave in England were not addressed sooner, including the feasibility of running the case virtually. It is for this reason that the defendant's team is now unprepared for trial.

[15] The fault in this regard rests with the defendant's attorney and to some extent with the defendant himself. Mr Williams-Ashman not only failed to open the email of 8 May 2020. He seems to have allowed this matter to drift without enquiry from 19 February until 21 October. He knew in February that the parties were seeking to get a new date and that 16 November was under discussion. He should have been expecting to hear from the plaintiff's attorneys. When he did not, he should have contacted them. The defendant himself is also at fault for permanently leaving the country without bothering to find out the status of the case.

[16] While running this trial virtually may not be to the defendant's liking, I would not be inclined to postpone the case on that basis. Although I do not know the full ambit of the evidence to be led, I have read the pleadings, and it does not seem to me a matter of such complexity that oral evidence could not conveniently be heard remotely. The most contentious oral evidence will probably concern what transpired at a meeting held on 5 April 2016. Present at that meeting were two representatives of the plaintiffs, the defendant and Mr Williams-Ashman. Although the defendant must naturally be able to give his counsel real-time

instructions when the plaintiff's witnesses are being cross-examined, there are means of doing so, as I have previously said. Furthermore, Mr Williams-Ashman could be with Mr Oosthuizen during the cross-examination and would himself be in a position to give factual instructions.

[17] Nevertheless, it does seem to me that setting up a virtual hearing at this late stage may present practical difficulties. The defendant will need to have the trial documentation. The defendant's team itself does not yet have the plaintiff's trial bundle. Given the absence of trial preparation by the defendant's team, it may take a few days for them to decide whether further documents are needed at the trial. I am also alive to Mr Oosthuizen's difficulty in preparing for the trial on very short notice.

[18] There is the added complication that the decision whether or not to allow the trial to be conducted virtually is not mine but that of the trial judge. Quite apart from the preferences of the parties, the trial judge may not be comfortable with a remote hearing. If the whole difficulty had been addressed at an earlier time, there could have been an early allocation, and the trial judge could then have managed the dual aspects of a virtual hearing and postponement.

[19] Counsel have ascertained that trial dates are available in February and March 2021, and that a trial date of 22 February 2021 would be convenient to both sides if a postponement were granted. If the trial is so postponed, the parties could seek an early allocation, so that the question of a virtual hearing could be resolved by the trial judge well in advance of the new date.

[20] It may be that by February next year the pandemic will have subsided to an extent allowing the defendant to travel to South Africa without anxiety, in which case the need for a virtual hearing may fall away. That is what the defendant is hoping for. Mr Oosthuizen acknowledged, however, that if his client

still felt uncomfortable about travelling to South Africa early next year, there could and would be no further objection to a virtual hearing, so the only question would be whether, despite the willingness of both sides to conduct the trial remotely, the trial judge required an in-person hearing. If that ruling were made well in advance of the new trial date, the defendant could make arrangements to get to South Africa.

[21] Accordingly, I have decided, in the exercise of my discretion and in the interests of justice, to allow a postponement. The factors which mainly weigh with me are (a) that the postponement will only be for three months; (b) that the postponement will allow the defendant to have counsel available from the first day of the trial; (c) that a postponement will allow the parties to resolve the question of a virtual hearing (if still necessary) well in advance of the trial date, so that the defendant can if necessary make arrangements to travel to South Africa; (d) that the defendant's counsel has given an undertaking on behalf of his client that if the defendant does not or cannot travel to South Africa in February next year, the defendant will not object to a virtual hearing; (e) that to insist that the trial now proceed may prejudice the defendant in trial preparation and impede the fair presentation of his case; (f) that the plaintiff will not suffer trial prejudice by virtue of the postponement; (g) that the plaintiff's financial prejudice in the main case is met by interest on the money judgment it seeks; and (h) that the plaintiff's financial prejudice in regard to costs can be assuaged by an order against the defendant.

[22] In regard to wasted costs, Mr Felix submitted that the plaintiff was, by virtue of clause 5 of the suretyship on which its claim is based, entitled to such costs on the attorney and client scale. Mr Oosthuizen riposted that the defendant in the main case attacks the validity of the suretyship and also alleges that he has been discharged from liability thereunder, so that reliance on the suretyship at this

stage is premature. However, and quite apart from the terms of the suretyship, the circumstances of this case justify in my view a costs order which as far as possible ensures that the plaintiff is not out of pocket by virtue of the indulgence which I am granting the plaintiff. This applies not only to the wasted costs but also to the costs of opposition to the postponement application, since I am satisfied that such opposition was reasonable and that the plaintiff can regard himself as fortunate that I have come to his aid.

[23] I thus make the following order:

- (a) The trial is postponed to 22 February 2021.
- (b) The parties are directed, within one week of this order, to approach the Judge President with a view to an early allocation of a judge for the trial so that such judge can determine, if necessary, whether or not the trial may proceed virtually.
- (c) The first defendant must pay the plaintiff's costs of opposing the postponement application, and must also pay the costs wasted by the postponement, both sets of costs on the scale as between attorney and client.
- (d) The plaintiff is granted leave to tax the said costs forthwith.

O L Rogers
Judge of the High Court
Western Cape Division

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