HH 89-2002
HC 4685-02

RONNIE JACARANDA GALANTE
vs
EDWARD ELIO GALANTE

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 3 June, 2002

Mrs *V H Fitzpatrick* for applicant
Mr *A P de Bourbon SC* for respondent

SMITH J: The applicant (hereinafter referred to as "Ronnie") has filed an urgent application seeking an order that the divorce action between her and the respondent (hereinafter referred to as "Edward") in case No HC 12886/2000 (hereinafter referred to as "the divorce action") be postponed pending the determination of the appeal she has lodged and that, in the intervening period, a moratorium be placed in respect of the filing of further pleadings, amendments to pleadings, the making or requiring of discovery and any other preliminary procedures, including the holding of a pre-trial conference. The application was filed on Wednesday 29 May, 2002. The hearing of the divorce action was initially set down for 25 February 2002 but, on the application of Ronnie, was postponed to 3 June, 2002. The application is based on the following grounds. Ronnie's previous legal practitioners renounced agency on 29 April and her present legal practitioner only assumed agency on 13 May. An appeal had been noted against the dismissal of Ronnie's Special Plea that Edward is not domiciled in Zimbabwe. It would be inequitable for the Court to proceed with the divorce action before the appeal is determined. The divorce action would entail great time and expense and, if the Supreme Court upheld the appeal and ruled that the High Court had no jurisdiction, enormous wasted costs would have been incurred. Mr Weinkove, Senior Counsel from Cape Town, who had appeared at the hearing of the Special Plea in December 2001, would not be available on 3 June and, as he has been appointed a judge of the

Cape Provincial Division, he will not be available thereafter. That means that another Senior Counsel has to be sourced in South Africa. At present Ronnie is in California, in the United States of America, with the two children of the marriage. She has been unwell. After her flight to the United States she was diagnosed on 27 January, 2002 as having pulmonary embolism and advised not to travel until her condition stabilises. She is fearful of her personal safety if she returns to this country. She is afraid that she may be imprisoned and her right to freedom of movement curtailed. Her sister was arrested on a *tamquam suspectus de fugit* application and detained overnight at Chikurubi Maximum Security Prison. The pleadings in the divorce action have not been finalised as Edward was given leave to amend his declaration and Ronnie has not responded to the amended declaration. As Ronnie's circumstances have changed, since she is now living in the United States and intends to stay there, her pleadings will have to be amended considerably. Discovery has not been properly effected. Ronnie is currently financially disadvantaged. She and the children are living on welfare in California. She was advised by Senior Counsel not to apply for a contribution towards her legal costs while the question of jurisdiction is pending. Consequently she is without funds to defend the action or engage legal counsel. In l999 BARTLETT J issued an order granting her $50 000 as a contribution towards costs and the taxed bill of costs for which she is liable is in the region of $480 000. (In the founding affidavit the figure is given as $480 000 000 but I presume that is a mistake). The parties were married in California and the law in California regarding the rights of parties married in community of property is complex, and so evidence of an expert witness will be required at the hearing of the divorce action. Finally, an expeditious divorce might well aggravate the rift that has developed between the

children and their father. It is imperative that the divorce action is fair and is seen to be fair.

Edward opposes the application. He claims that it would not be inequitable if the divorce action proceeded despite the appeal. It was Ronnie, herself, who instituted proceedings claiming a decree of divorce and other relief in case No HC 13661/98. The issues in that case are substantially the same as those in the current case and it was Ronnie that specifically averred that this Court had jurisdiction. The reason why Ronnie is not prepared for trial is because she has embarked on a deliberate course of conduct to procure the removal of the resolution of the divorce and other ancillary matters, including custody and access, support and division of the property, from this Court to the courts in California. The reason for her so doing is that she believes that she will receive a more favourable financial package in the California courts.

Mrs *Fitzpatrick* submitted that it would be inequitable for the divorce action to commence before the appeal is determined. Ronnie is not ready for the trial. Her case is in disarray. Mr Weinkove is not available to represent her. She has financial problems. The $50 000 she was awarded as a contribution towards her costs is nowhere near what she needs for that purpose. Although BARTLETT J awarded her maintenance *pendente lite* in the sum of $100 000 a month, that was in 1999. Even then, that was probably insufficient to enable her to maintain the family's life style. As at January 2002 that amount is being paid meticulously but it does not take into account the devastating effects of inflation.

Mr *de Bourbon* submitted that the application had little merit. The appeal was noted on 6 March but the application for postponement of the divorce action was not made until 29 May. There is no explanation for the delay. No steps have been taken

by the appellant to try to get the appeal heard expeditiously. The appeal is *mala fide* and has been noted purely for the purposes of delay. Ronnie has a misconceived notion that she will be better off financially if the divorce case is heard and decided in California. Ronnie applied for an order that Edward make further discovery when ADAM J was dealing with the matter last year. No attempt has been made since then to get further discovery. Ronnie complains of lack of funds, yet she will not apply to court for the requisite order. Edward obtained an order from CHINHENGO J that she return the children to this country but she has refused, and is still refusing, to comply with his order. She is making a mockery of the order by this Court in February that the hearing of the divorce action will commence on 3 June, 2002. The application for a moratorium is clear evidence that her intention is to delay the proceedings for as long as possible. She is trying to manipulate the Court.

Mr *de Bourbon* strongly opposed the postponement of the hearing. He submitted, however, that if the court was disposed to grant a postponement, it should attach certain conditions thereto; namely that Ronnie should be required to plead to the amended declaration within 10 days and that if she wished to make an application for an increase in her maintenance *pendente lite* or for a further contribution towards costs or for discovery or further particulars, such application should also be made within 10 days.

In my judgment on 25 February, when I postponed the hearing to 3 June, I said that I considered it desirable, especially in the interests of the children, that the dispute between the parties be settled as expeditiously as possible. I gave Ronnie three months to put her house in order but she has made no attempt to do so. I said that if Mr Weinkove was not available on 3 June, she should make an application, within l0 court days, for an earlier date that would suit Mr Weinkove and I would

change the date. No such application was made until a few days of the date set down for the hearing. I concluded my judgment by saying that if Ronnie does not appear at the hearing on 3 June, it may well be that judgment would be granted in default. Despite that clear statement, I feel constrained to grant a further postponement, although I do so with great reluctance. I agree with many of the submissions made by Mr *de Bourbon*. It is clear that Ronnie decided long ago that she would not be coming to court today. Possibly that has been her stance from the very beginning. Yet the application for postponement was not filed until 29 May, less than a week ago. Why was it not filed two weeks ago so that, if a postponement was granted, that would be known to the parties before the day set for the actual hearing of the divorce action? The reasons given in the certificate of urgency accompanying the application as to why the matter is urgent, are not at all convincing. The fact that an appeal had been lodged was known weeks ago. The fact that Ronnie was not prepared for trial must have been known as soon as the present legal practitioner assumed agency. She must also have realised that Ronnie would not be returning to this country before 3 June.

In *Myburgh Transport* v *Botha t/a S A Truck Bodies* 1991(3) SA 310 (N) MAHOMED AJA laid down the legal principles relevant to an application for the postponement of a trial and to an appeal against the trial Court's decision on such an application. They are set out in the headnote as follows -

> "(1) The trial Judge has a discretion as to whether an application for a postponement should be granted or refused;
> (2) The discretion must be exercised judicially. It should not be exercised, capriciously or upon any wrong principle, but for substantial reasons;
> (3) An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently;

(4) An appeal Court is, however, entitled to, and will in an appropriate case, set aside the decision of at trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles;

(5) 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;

(6) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement even if the application was not so timeously made;

(7) 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 the applicant is not legitimately entitled;

(8) 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. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant can fairly be compensated by an appropriate order for costs or any other ancillary mechanisms;

(9) 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;

(10) 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 applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a 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".

The fact that no party to an action can, as of right, claim a postponement on the grounds that any prejudice suffered by the other side can be remedied by an appropriate order as to costs is clearly set out in the judgment of DAVIS J in *National Coalition for Gay & Lesbian Equality* v *Minister of Home Affairs* 1993 (3) SA 173. At 181 B-G he said -

"The principle on which Mr Hove relied was that an application for postponement should be granted, notwithstanding that it was not made timeously or that the proper procedures had not been followed, but where justice nevertheless justifies such a postponement in the particular circumstances of the case. (*Myburgh Transport* at 315H).

In this case the respondents were served with the applicants' papers some seven months before the matter came before this Court. Persistent efforts were made by the applicants to remind the respondents of their obligations not only to this Court but ultimately to the Constitutional Court. No explanation was provided as to why the respondents had chosen to ignore the proceedings for more than seven months. Mr Mokoena's affidavit simply states that the Cabinet decided the day before the hearing that the application should be opposed and that important matters were raised. An affirmation of an intention to defend cannot serve as an explanation for tardy behaviour. Furthermore, an applicant cannot as of right claim a postponement on the ground that any prejudice his opponent might suffer can sufficiently be overcome by an appropriate order as to cost. On the authority of the judgment in *Estate Norton* v *Smerling* 1936 OPD 44, the authors of Herbstein and Van Winsen *The Civil Practice of the Supreme Court of South Africa* 4th ed at 667 submit that the discretion of the Court is far more limited when an application for postponement is brought by the defendant than in the case where the plaintiff, as *dominus litis*, brings such an application.

The implication of Mr Hodes' argument is that when the State is involved the Court should show greater latitude in granting such dispute. This argument loses sight of the consideration that no litigant, whether the State or a subject of the State, is entitled to a postponement if no reason whatsoever for its failure to observe the Rules of Court has been shown. The date for this hearing had been arranged between the parties early this year in consultation with the Judge President. That special arrangement has, without explanation, been ignored. Much as this Court would have wished to have the views of government before it, it cannot condone the disdain with which the respondents have treated their obligations to the Court."

When the judgment of DAVIS J was appealed against, the Constitutional Court in *National Coalition for Gays & Lesbians Equality* v *Minister of Home Affairs* 2000 (2) SA 1 upheld the decision by DAVIS J to refuse the application for postponement. At p 14 B-D ACHERMANN J said -

"[11] A Court of appeal is not entitled to set aside the decision of a lower court granting or refusing a postponement in the exercise of its discretion merely because the Court of appeal would itself, on the facts of the matter before the lower court, have come to a different conclusion; it may interfere only when it appears that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. On its face, the complaint embodied in the ground of appeal

sought to be introduced by the amendment does not meet this test because it alleges only an error in the exercise of its discretion by the High Court. Even assuming, however, that such ground correctly formulates the test which would permit interference by this Court, the respondents have got nowhere near to establishing such a ground on the facts before the High Court. No such vitiating error on the part of the High Court was contended for by the respondents in their written or oral argument before this Court and none can, on the papers, be found. In fact I am of the view that the High Court correctly dismissed the application for good and substantial reasons and that both the applications in this Court relating to such dismissal ought to be refused."

Similar views were expressed by FRONEMAN DJP in *Carephone (Pty) Ltd* v *Marcus NO and Others* 1999 (3) SA 304 at 320 (para 54) -

"(54) In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required, is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice. Interference on appeal in a matter involving the lower court's exercise of a discretion will follow only if it is concluded that the discretion was not judicially exercised".

Finally, I will refer to *National Police Service Union* v *Minister of Safety and Security* 2000 (4) SA 1110 (cc) where at p 1112 paras 4 and 5, MOKGORO J said -

"[4] The Constitutional Court has the inherent power to protect and regulate its own process. The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An applicant for a postponement seeks an indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interests of justice to do so. In this respect the applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement between the parties. In exercising that discretion, this Court will take into account a number of factors, including (but not limited to): whether the application has been timeously made, whether the explanation given by the applicant for postponement is full and satisfactory, whether there is prejudice to any of the parties and whether the application is opposed. All these factors will be weighed by the Court to determine whether it is in the interests of justice to grant the postponement.
[5] What is in the interests of justice will in turn be determined not only by what is in the interests of the parties themselves, but also by what, in the opinion of the Court, is in the public interest. The interests of justice may require that a litigant be granted more time, but account will also be taken of the need to have matters before this Court finalised without undue delay".

As I have stated earlier, the application for postponement was not made timeously. It could and should have been made at least a week earlier than it was made. The explanation given for postponement can hardly be described as full and satisfactory. The only valid reason put forward is the fact that Ronnie suffered a pulmonary embolism and was apparently advised not to fly for 6 months. As regards her financial position, I cannot agree with the advice she purportedly received, that if she applied for a contribution towards costs it would imply that she accepts that the Court has jurisdiction to deal with the divorce action. The grounds on which the Court exercises jurisdiction in the two cases are entirely different. If she fears that the Court may imply anything from her application, she can make an express disclaimer in her application.

Whilst I am prepared to grant a postponement to enable Ronnie, or at least her legal practitioner, to get her house in order, I am not prepared to order the moratorium sought. It has been held in many cases that, in the interests of justice, there must be a finality to litigation. Cases should not be allowed to drag on from year to year. They must be finalised as expeditiously as possible. To this end, I will order that Ronnie must plead over to the amended declaration within l0 court days, which means that the pleadings must be filed on or before 17 June. If she requires from Edward further particulars or further discovery or if she wishes to make further discovery, that too should be requested or made on or before 17 June. If she wishes to apply for a contribution towards costs or for an increase in the maintenance *pendente lite*, that should be done as soon as possible.

As regards costs, the indulgence is being sought by Ronnie and the application therefore was brought at the last possible moment. Accordingly I feel that she should bear the costs.

It is ordered that -

(1) the hearing of case No HC 12886/00 be postponed to 22 July, 2002.

(2) The applicant pay the respondent's costs.

V H Fitzpatrick legal practitioners for applicant
Atherstone & Cook, legal practitioners for respondent