

JULIUS MPOSELWA

Versus

**LEOCHIWE TRADING (PVT) LTD
t/a KALAMBEZA SAFARIS**

And

NOREEN SIBANDA

And

BENSON SIYAWAREVA

AND

DIRECTOR OF HOUSING – VICTORIA FALLS

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 24 NOVEMBER 2014 & 19 FEBRUARY 2015

Ms C. Mudenda for plaintiff

K. Ngwenya for 2nd and 3rd defendants

No appearance for 1st defendant

Judgment

NDOU J: This is my partly-heard civil trial matter. This matter has a disturbing chequered history characterised by dalliance. The trial commenced before me in October 2010. Just a bit of evidence was adduced from the plaintiff. Thereafter, the matter was subjected to several postponements. Eventually, the matter resumed on 16 October 2014. On that day, the plaintiff's legal practitioner of record was ill and she sent a Mr *Mutsauki* to stand on her behalf. The latter took over the matter at short-notice. He further led the plaintiff in his evidence-in-chief. The matter was postponed *sine die* when the plaintiff was under cross-examination by the defendant's legal practitioner. After the parties failed to reach agreement on the date of resumption of the trial, the Deputy Registrar contacted me. I indicated to him the dates when I

would be available to proceed with the matter. I directed that the matter would proceed on a date convenient to the Registrar of the court. The matter was accordingly set down for continuation on 24 November 2014. Unfortunately, on that date I was not feeling well. I nevertheless forced myself to appear and explain my predicament to the parties and possibly set down a new date convenient to the parties. At the hearing, in chambers, I was informed that the 2nd and 3rd defendants were not in attendance. A legal practitioner, Mr *Ngwenya* had been instructed by their legal practitioner of record to come and seek a postponement as the 2nd and 3rd defendants were said to be out of the country. The plaintiff viewed this conduct as the defendants' insouciance towards this litigation. Ms *Mudenda*, for the plaintiff cited previous instances where the matter was postponed at the behest of the defendants. She submitted that the plaintiff was seriously ill and he wanted the matter to be brought to finality. She prayed that an order be granted in favour of the plaintiff against the defendants with costs. This was opposed by Mr *Ngwenya*. He proposed that a postponement with an order of costs against the defendants will meet the justice of the case.

Generally, a party who appears when the hearing starts, but thereafter withdraws or absents himself from the remainder of the proceedings must be accounted a defaulter – *Katritsis v De Macedo* 1966 (1) SA 613 (A) at 617G-618G and *The Civil Practice of the Supreme Court of South Africa* (4th Ed) Herbstein and Van Winsen at 661. *In casu*, the defendants have applied for postponement, the issue of the default will fall away. It is trite law that the granting of such an application is in the nature of an indulgence and it lies entirely in the court's discretion to grant or refuse the application – *Isaacs & Ors v University of the Western Cape* 1974 (2) SA 409 (C) at 411 and *Gerry v Gerry* 1958 (1) SA 295 (W). A court should be slow to refuse to grant a postponement where the true reason for the 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 – *Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 399 and *Myburg Transport v Botha t/a SA Trade Bodies* 1991 (3) SA 310 (Nm S). The prejudice to the plaintiff if the postponement is granted is that he needs finality to this matter as he is chronically ill and the matter is taxing on his health. Further, the defendants are

in possession of the property subject-matter of this matter. In my view, there is need to bring this matter to finality. The course suggested by the plaintiff's counsel may not achieve such finality as it will open the matter to unnecessary further litigation such as applications for rescission etc. In order to bring the matter to finality expeditiously, it is my humble view that the trial should be set down for continuation at the earliest available date. It is better to conclude the matter on the merits. I will avail myself for continuation of the trial at the date agreed upon by the Deputy Registrar and the parties. I discussed the matter with the Honourable Judge in charge and I am informed it is possible to have the matter heard in April 2015. I have taken all these practical steps because I am concerned by the delay. On the question of costs, it is my view that the defendants caused prejudice to the plaintiff by leaving it to the eleventh hour to inform him that the defendants were out of the country. The reason given that their legal practitioner was making frantic efforts to secure their attendance is not convincing. The defendants have exhibited a cavalier attitude towards the litigation. They must bear wasted costs for this hearing.

Accordingly, the matter is postponed *sine die*. The parties are directed to urgently meet the Deputy Registrar in order to find a convenient date for continuation of the trial in April 2015. The 2nd and 3rd defendants are ordered to bear wasted costs for this hearing.

Messrs Mudenda Attorneys, plaintiff's legal practitioners
Dube & Company legal Practitioners, 2nd and 3rd defendants' legal practitioners