Judgment No. HB 94/06
Case No. HC 1565/03

NDABEZINHLE MAZIBUKO

Versus

THE COMMISSIONER OF POLICE

And

THE MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 28 SEPTEMBER AND 5 OCTOBER 2006

S Chamunorwa. for plaintiff
Ms D Vundla, for all the defendants

Ruling on Application for Postponement/Alteration of Set-Down

NDOU J: Briefly, the plaintiff, a legal practitioner, practising from a Bulawayo legal firm, issued out summons claiming $1 000 000,00 (revalued) being damages for assault, injuria and impairment of dignity. The summons were issued out on 30 July 2003. The defendants are defending the claim. A round table conference of the parties was held. All the defendants did not attend, but their legal practitioner attended. A pre-trial conference was later set down. None of the defendants attended. Their legal practitioner attended and sought the Judge (and plaintiff's) indulgence for postponement. They tendered wasted costs. The hearing of the pre-trial conference was postponed to a fresh date. When the pre-trial conference was set down again, the defendants did not turn up but their legal practitioner did. Once more, the Judge indulged them and held the pre-trial conference in their absence. This defeated the objective of holding a pre-trial conference in the first place. Nevertheless, the matter was referred to trial. By his (undated) minute the Deputy Registrar of this court

allocated the dates 28 – 29 September 2006 for the case to be heard, thus giving the

parties notice of the date in terms of Order 31 Rule 215(2) as read with Rule 214 of the High Court Rules, 1971. Although this notice was undated, it is common cause that it was received by the plaintiff's legal practitioners on 19 April 2006 at 1554 hours and defendants' legal practitioners on the same date at 1538 hours. There is written proof of such service. In any event, on 12 April 2006, both parties' legal practitioners had already signed a "Consent Notice to Set Down" which was filed on 17 May 2006. This gave each party at least four(4) months to prepare for trial. When the trial commenced, Ms *Vundla*, for the defendants sought a postponement. The first ground for the application is that the defendants are not present. The second ground is that she had not taken instructions as she has not seen the defendants. In fact, she communicated with the defendants through the Civil Division of the Attorney General's Office. Cumulatively, the defendants are simply not ready and seek a postponement to prepare for the trial notwithstanding their knowledge of the trial date for over four (4) months. Recently, in *Hunda* v *Hunda* HB-56-06, BERE J observed (at pages 3-4 of his cyclostyled judgment):-

> "Matters properly set down are not postponed through mere correspondence but it is imperative that a litigant personally presents himself/herself at court and if he has to be excused, that indulgence does not come from his legal counsel but from the court itself. An application for postponement is not automatically granted. It can either be granted or refused. Once it is refused, the trial must proceed."

I agree. Alteration of set down is done in terms of Rule 217 which provides:

> "Where a case has been set for trial or argument any party may apply to the court or Judge to have the set down set aside and for good cause shown the court or judge may set it aside and fix another day for the trial or argument or make such other order as it or he, as the case may be, considers just:

> Provided that with the consent of all parties and with the approval of the registrar a set down may be altered without application to court or to a judge." See also *Nezi* v *Matiza* HH-103-03.
>
> HB 94/06

The proviso does not apply to the facts of this case as the application is opposed. It is clear that Rule 217 gives the court wide discretion when an application for alteration of set down is made. The question here is whether the defendants have shown good cause in order for me to set aside this set down and fix another. The granting of such an application is in the nature of an indulgence and it lies entirely in this court's discretion to grant or refuse the application. But, such discretion must be exercised in a judicial manner. The 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 the party's unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting its case – *Madnitsky* v *Rosenberg* 1949(2) SA 392(A) at 399; *Myburgh Transport* v *Botha t/a SA Truck Bodies* 1991(3) SA 310 (Nms); *Prinsloo* v *Saaiman* 1984(2) SA 56(O) and Shapiro v Shapiro 1904 TS 673. The basis upon which such an application rests is that unless the postponement is granted, the applicant (defendants *in casu)* will suffer prejudice in the case. *In casu*, there is a bare allegation that the defendants will be prejudiced as they intend to defend the matter. Such a bare allegation is insufficient. By their own conduct, the defendants have not shown serious desire to defend. As alluded to above, they did not bother to attend the round table conference, two pre-trial conferences and finally this trial. One would understand if one of them appeared on behalf of all three of them. For four months after the trial date had been agreed upon, they did nothing to prepare for trial. If there is any prejudice, it is really

of their own making – *Hudson* v *Hudson* (1926) 8 PH F45 (C) and *Murphy* v *SAR & H & Anor III*, 1946 NPD 642.

The defendants have not fully explained the true reason of their non-preparedness. The fact that first defendant is now posted in a remote area is not a satisfactory explanation in view of the four months period the defendants knew about the trial date. In any event, the defendants did not make a substantive application. They exhibited a cavalier approach to their application. It seems to me that the unreadiness is due to delaying tactics. The interests of justice do not justify that they be given further time.

In such an application I also have to consider the prejudice to the respondent (i.e. plaintiff *in casu*). It is trite that an applicant cannot as of right claim a postponement on the ground that any prejudice his opponent might suffer can always and sufficiently be overcome by an appropriate order as to costs – *Estate Norton* v *Smerling* 1936 OPD 44 and *Vollenhoven* v *Hoenson & Mills* 1970 (2) SA 368 (C). The matter commenced in 2003 almost four years ago. There is a need to bring it to finality. The plaintiff is a practising legal practitioner in the city where the conduct complained of allegedly took place. There are obviously other aspects of prejudice evident from these facts that cannot be cured by mere payment of wasted costs as the defendants have tendered (but not paid) in all previous applications for indulgence. Looking at the circumstances of the case I feel that this is a case where the application for alteration of the set down date should be refused.

Accordingly, I refuse the application for postponement and order that the trial

will proceed on 29 September 2006 at 1000 hours.

Calderwood, Bryce Hendrie & Partners, plaintiff's legal practitioners
Dube & Partners instructed by the Civil Division of the Attorney-General's Office, defendants' legal practitioners