995/98

IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

In the matter between:

MATIDI PAUL MOTSHEGOA APPLICANT

and

PAULINE MOIPONE MOTSHEGOA 1ST RESPONDENT

REGISTRAR OF THE HIGH COURT (Mmabatho) 2ND RESPONDENT

JUDGMENT

MOGOENG J.

MAFIKENG

DATE OF HEARING : 23 FEBRUARY 2000
DATE OF JUDGMENT : 11 MAY 2000

COUNSEL FOR APPLICANT : ADV S.G. MOTHIBE
COUNSEL FOR 1ST RESPONDENT : ADV E. THERON

MOGOENG J: On 30 November 1995 Smith J ordered the Applicant to pay maintenance in respect of his minor child in the sum of R500.00 per month. It is common cause that the Applicant has not complied with this order to date.

As a result of the Applicant's failure to pay, the first Respondent caused a writ of execution ("the writ") to be sued out of this Court for the arrears in the amount of R11 500.00 plus interest at the applicable rate. Pursuant to the writ, the Applicant's goods were duly attached on 16 September 1998. This happened almost three

years after Smith J had made the order which the Applicant had continued to ignore. The Founding Affidavit was deposed to by the Applicant's instructing attorney, Mr Setshogoe.

On 11 November 1998 the Applicant responded to the said attachment by launching an application for the setting aside of the writ. This application was intended to be heard on 11 February 1999. On 10 February 1999 the first Respondent filed an application in terms of Rule 30 calling upon the Applicant to ensure that his Notice of Motion complies with the provisions of Rule 6(5)(a) and (b). As a matter of fact that Notice of Motion did not comply with the said Rule. It is not disputed that the Applicant removed the application from the Roll, probably owing to the defective Notice of Motion, and it was accordingly not before Court on 11 February 1999.

Applicant did not take any further action in pursuit of his application for the setting aside of the writ. As a result, the first Respondent's attorneys caused the Sheriff to carry out the writ and he did so on 22 April 1999. Applicant's attorneys responded promptly by preparing an amended and proper Notice of Motion on 22 April 1999 and served it on the first Respondent's attorneys the next day. It is noteworthy that after slightly more than two months of inactivity it took the execution of the writ to spur the Applicant's attorneys into action. It will become even clearer later in this judgment, that for as long as there was no threat to execute the writ, the Applicant's attorneys have always been content to sit back and relax rather than take such steps as are necessary to bring the matter to finality.

First Respondent filed her Answering Affidavit on 9 June 1999. On 28 July 1999 when the Applicant's attorneys were supposed to file a Replying Affidavit, they faxed a Confirmatory and Supplementary Affidavits to the first Respondent's attorneys but filed none with the Registrar's office. The Confirmatory Affidavit was deposed to by the Applicant and it is dated 17 November 1998. It ought to have been filed together with the Founding Affidavit but was not. Assuming that it was filed on 28 July 1999, it is about eight months late and no attempt has to date been made by the Applicant or his attorneys to explain this inordinate delay. The so-called Supplementary Affidavit was deposed to by a policeman by the name of Senwedi. It seeks to introduce a completely different ground for the setting aside of the writ. It effectively says that the order by Smith J should not be complied with because the minor child has always been staying with the Applicant. It is difficult to understand which aspect of Mr Setshogoe's hitherto unconfirmed Founding Affidavit, it seeks to

supplement. But that is not all. This Supplementary Affidavit was deposed to on 22 May 1996 and it relates to what allegedly happened then. It was therefore deposed to, for whatever reason, some two years five months prior to the launching of the application for the setting aside of the writ.

On 22 September 1999 the first Respondent made yet another application in terms of Rule 30. The thrust of it was that no basis was laid for the introduction of the aforegoing affidavits (which somehow found their way into the court file as faxed copies), no application was made for the condonation of the late filing of those affidavits and for raising completely new basis for the setting aside of the writ or the possible or apparently contemplated rescission of the order by Smith J. I have added the possible rescission of the order by Smith J because the substance of Senwedi's affidavit could only be relevant to an application for rescission but certainly not to the setting aside of the writ alone.

Three issues arise from this case. Firstly, whether or not a postponement should have been granted; secondly, whether or not the application for the setting aside of the writ has any merit; thirdly, whether or not the extraordinary costs order is warranted in this matter. It will become evident later in this judgment that the first two issues are interrelated.

AN APPLICATION FOR A POSTPONEMENT

General principles governing a postponement.

Applications for rescission of default judgment, removal of a bar, leave to defend an application and extension of time for the filing of pleadings must be seen as species of the same genus. (See DU PLOOY v ANWES MOTORS (Edms) Bpk 1983 (4) SA 212 (O)). An application for a postponement also falls in the same category as the aforegoing. Therefore, the principles which apply to an application for the removal of a bar, particularly in so far as they relate to the meaning of 'good cause' or a 'sound reason' apply with equal force to a postponement subject to such modifications as may be dictated

by the context. I turn now to the general principles applicable to a postponement.

Before or on the day of the hearing any party may apply on notice for a postponement. Such an application need not always be made on affidavit. It may and is sometimes made from the Bar. (See Hebstein & Van Winsen, The Civil Practice of the Supreme Court of South Africa 4th edition (JUTA) at 666; MADZIMBAMUTO v LARDNER-BURKE N.O. & ANOTHER N.O. 1966 (2) SA 445 (R)). The granting of such an application is in the nature of an indulgence and that indulgence is not to be had for the asking (See MANN v LEACH [998] 2 All SA 217 (E)). It lies entirely within the court's discretion whether or not to grant the indulgence sought. (See ISAACS & OTHERS v UNIVERSITY OF THE WESTERN CAPE 1974 (2) SA 409 (C) at 411; WESTERN BANK LTD v LESTER & MACLEAN & OTHERS 1976 (3) SA 457 (SE) at 460A). That discretion is a judicial one and can be corrected on appeal if not exercised in a judicial manner. (See PRINSLOO v SAAIMAN 1984 (2) SA 56 (O) AT 57G).

A party who applies for a postponement must therefore show good cause for the interference with the other party's procedural right to proceed. (See GENTRIUCO AG. v FIRESTONE SA (Pty) LTD 1969 (3) SA 318 (T)). The broad meaning of good cause and the correct approach to applications of this nature was explained as follows in SMITH N.O. v BRUMMER N.O. AND ANOTHER 1954 (3) SA 352 (O) at 357H-358C:

> " Volgens die gemelde gewysdes kom dit voor dat die Hof in aansoeke van hierdie aard _ ruime diskresie het om uitgeoefen te word na galang van die

> omstandighede in elke besondere saak. Die neiging van die Hof is om aansoeke om opheffing van belet toe te staan (a) waar daar _ redelike verduidelikking aangevoer word vir die aansoekdoener se versuim; (b) die aansoek *bona fide* is en nie gedoen word met die bedoeling om die teënparty se eis te vertraag nie; (c) voorts dit blyk dat daar nie _ roekelose of opsetlike verontagsaming van die Hofreëls is nie; (d) ansoekdoener se saak nie klaarblyklik ongegrond is nie, en (e) die teënparty nie tot so a mate benadeel is dat hy nie vergoed kan word deur _ gepaste bevel aangaande die koste te maak nie.

Die afwesigheid van een of meer van bogemelde omstandighede mag daartoe lei dat die aansoek afgewys word. Waar die versuim te wyte is aan die nalatigheid van aansoekdoeners se prokureurs, sal aansoekdoener se aansoek nie afgewys word nie tensy die nalatigheid of onoplettendheid volgens die mening van die Hof sodanige graand van skuld bereik het as wat, inagnemende die ander omstandighede van die saak, hom nie geregtig maak op die regshulp wat hy vra nie."

I will now unpack these requirements and discuss them with reference to such attempts, if any, as may have been made by the Applicant to meet them and to motivate his application for a postponement:

Was a reasonable explanation for the Applicant's delay forthcoming?

Counsel for the Applicant said that the Applicant needed the postponement so that he could apply for condonation. However, this Court was not given any explanation whatsoever as to why the Applicant, who brought an application for the setting aside of the writ, has done nothing to comply with the Rules of this Court or to bring an application for the condonation of his non-compliance with those Rules for the whole of the year 1999. The other reason advanced was that the Applicant had not put his attorneys in funds to enable them to proceed with the application. Applicant's attorneys had ample opportunity before the matter was set down to address this problem. No explanation was forthcoming for not

having done this before 23 February 2000.

I am alive to the principle that a Court should be slow to refuse a postponement where the true reason for the party's non-preparedness has been fully explained, where his own unreadiness to proceed is not due to delaying tactics and justice demands that he/she should have more time for presenting his/her case. (See MEDNISKY v ROSENBERG 1949 (2) SA 392 (A) at 399). As the following discussion will also show, this is not the position in this matter.

Is the application bona fide and not made with intent to delay the other party's claim?

Once again, the Applicant and his attorneys did nothing from September 1999 until 19 January 2000 to take any of the following measures which they had a responsibility to take:

(a) to bring an application for the condonation of the late-filing of the aforementioned affidavits;
(b) to settle and file a Replying Affidavit;
(c) prepare and file heads of argument;
(d) to set the matter down for hearing.

As a result of the Applicant's paucity of action, the first Respondent took it upon herself to do what should have been done by the Applicant by applying for the date of hearing. The first Respondent's legal team went so far as to prepare heads of argument which were filed of record on 21 February 2000. On the day of the hearing, the Applicant's attorneys briefed counsel to apply for a postponement and tendered costs on an attorney and client scale. The application was opposed. In the end, I refused the application for a

postponement. Thereafter the first Respondent's counsel applied for the dismissal of the main application with costs on an attorney and own client scale against the Applicant's attorney *de bonis propriis*. I granted an order in these terms.

It is, in the first place, fitting to examine the bases on which the application for a postponement was brought. The application was for a postponement *sine die*. Notwithstanding pertinent questions by the Court about whether or not the Applicant was in a position to commit himself to a period within which he would be able to resolve whatever problems he requires the postponement for, counsel for the Applicant said that he was not able to. The reason for his inability to give the Court such an indication was that attempts would first have to be made to communicate with the Applicant so that he could give instructions to his instructing attorneys and put them in funds. The Court asked counsel what instructions the Applicant had given his attorney about the postponement and counsel's response was that the application for a postponement was not even as a result of the Applicant's instructions. It was the instructing attorney's own initiative. Any party, the Applicant in particular, desirous of a speedy resolution or finalisation of the matter would not have applied for a postponement *sine die*. He would have been able to say whether or not papers relating to the application for condonation and heads of argument would all be ready within two weeks or a month. Applicant's team was not prepared to commit itself. They apparently want the matter to drag on and on, hence an application for a postponement *sine die* and the unwillingness to be put on terms. The following grounds for the application for a postponement are perhaps more telling than the reluctance to fix a date to which the matter

could be postponed.

(a) The notice of set down reflects the date of hearing as 23 February 1999 instead of 23 February 2000.

Applicant's counsel did not say that his attorneys were ever confused as to the date of hearing. In any event there is no way they could have been confused since the notice of set down was served on the Applicant's attorneys in January 2000. It could not have been served on them in January 2000 if it was intended that the matter be heard in February 1999. In any event, the notice of set down filed of record reflects the date of hearing as 23 February 2000. It is therefore irrelevant that the Applicant's attorneys may, at some earlier stage, have been served with a notice of set down which incorrectly reflects the date of hearing as 23 February 1999 since the date was corrected in January 2000 already when a notice of set down with a correct date was served on the Applicant's attorneys.

(b) The case number reflected in the notice set down is incorrect.

The case number reflected on the notice of set down which was served on the Applicant's correspondent attorneys on 19 January 2000 is the correct one. Even if it were incorrect the set down contains particulars, such as the Applicant's attorneys' reference number for this matter, which would have made it clear to those attorneys which matter was being set down.

(c) Notice of set down was not communicated to the Applicant's instructing attorneys.

The notice of set down was served on the Applicant's correspondent attorneys, in Mmabatho, on 19 January 2000. This is what the first Respondent's attorneys are required to do by the Rules since their address is the one chosen for service of process on the Applicant's behalf. I do not understand how any attorney could suggest that service should have been effected on the instructing attorneys at Ga-Rankuwa.

Applicant's attorneys conducted themselves as if the said postponement was to be had for the asking. No explanation for the delay was proffered. Furthermore, one would have expected them to behave in a manner which would show that they were alive to the need for the matter to be brought to finality. Instead they were not prepared to brief counsel to argue the matter should a postponement be refused in view of the fact that the matter had, as at 23 February 2000, been pending for more than one year. On the contrary counsel was briefed on the morning of the hearing to apply for a postponement.

I am therefore satisfied that the application for a postponement is not *bona fide* and was made with intent to delay the first Respondent's claim.

Did the Applicant recklessly or intentionally disregard the Rules of this Court?

The rules of court, which constitute the procedural machinery of the courts, are intended to expedite the business of the courts. Consequently, they must be interpreted and applied in a spirit that

will facilitate the work of the courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible. (Hebstein & Van Winsen supra at 33; SACCA (Pty) LTD v THIPE & ANOTHER (1999) 20 ILJ 2845 (LAC) per Mogoeng AJA). A superior Court has inherent jurisdiction to prevent the use of the rules for ulterior purposes and will not hesitate to prevent such abuse. (See HUDSON v HUDSON & ANOTHER 1927 AD at 267-268).

The historical background of this case, the grounds for the application for a postponement and the manner in which the Applicant and his attorneys have handled this matter exposes the true reason behind the application for the setting aside of the writ and the application for the postponement. That reason is that the Applicant never intended to comply with the order of this Court directing him to pay maintenance for his minor child. He approached his instructing attorney and gave him a clear mandate. The mandate was that the attorney had to devise and employ every possible legal stratagem, delaying tactic and technicality to ensure that the Applicant defies or frustrates the order of this Court *ad infinitum*. The result was that the Rules of this Court were abused in the furtherance of that ulterior motive.

I am of the view that the Applicant has intentionally or recklessly disregarded even the basic Rules of this Court.

Is the application to set aside the writ obviously without foundation?

On 11 November 1998 the Applicant applied for the setting aside of the writ. The ground for the setting aside was that the writ was invalid in that the first Respondent 'had failed to issue summons against Applicant to recover [the] amount allegedly owed to her . . .' and that the Registrar had 'issued the said warrant without there

being judgment noted in the court file for the payment of the amount of R11 500.00.' In considering this question, I disregarded all the other affidavits which are not properly before this Court. I only focussed on the Founding Affidavit and of course the Answering Affidavit.

There are problems with this application. Page 1 of the Founding Affidavit was only initialled by either the deponent or the Commissioner of oaths instead of both of them, and page 2 is not initialled at all. Furthermore, page 2 is a fax copy and there was no reason given why the original page, properly initialled, was not filed.

The real problem relates to the soundness of the basis for the setting aside of the writ. Though the list cannot be said to be definitely exhaustive, I am only aware of the following grounds, on which a writ may be set aside, which are authoritatively set out by Hebstein & Van Winsen supra at 809-810:

(a) if the judgment was not definite and certain, as where the amount payable under the judgment can be ascertained only after deciding a further legal problem;

(b) when the debt in respect of which the judgment was obtained had been extinguished prior to the judgment;

(c) when the judgment has been extinguished by compensation or novation even if the judgment is not certain;

(d) when the judgment on which the writ is based is rescinded;

(e) when the writ erroneously refers to a certain person as a party; and

(f) when a writ has not been issued in conformity with the judgment in question.

The ground sought to be relied on by the Applicant is not covered by any of the above. The only ground which is remotely similar to that relied on by the Applicant is (a) above. Even on the doubtful assumption that the Applicant intended to rely on (a) he would still have a serious problem. It is clear to me that there is no further legal problem to be decided before the amount payable under Smith J's judgment can be ascertained. On the other hand there is not even a degree of factual uncertainty in the judgment in question which could be said to render execution incompetent. On the contrary, it is common cause or at least not disputed that the judgment or order has a clear meaning and that it was not complied with. The order granted by Smith J possesses the degree of liquidity and certainty with respect to the amount of money which the Applicant was ordered to pay as would justify the issue of a writ of execution. The accrued amount payable is readily ascertainable and is a mere matter of calculation, regard being had to the number of months in respect of which the R500.00 was not paid as explained by the first Respondent in her affidavit in support of her application for the writ. (See DE CRESPIGNY v DE CRESPIGNY 1959 (1) SA 149 (N) at 152-153; Erasmus Superior Court Practice, B1-323). Therefore, there exists no basis for the setting aside of the writ. The application therefore never had any basis in the first place.

The application for setting aside the writ is obviously without foundation.

Is the first Respondent prejudiced to an extent which cannot be rectified by a

suitable order as to costs?

Prejudice to both parties forms the basis upon which an application for a postponement is to be considered. A postponement cannot be claimed as a matter of right despite an offer of an appropriate order as to costs. (See PANJEL v KREMETART KLINIEK (Pty) LTD 1976 (4) SA 387(T); VOLLENHOVEN v HOENSON AND MILLS 1970 (2) SA 368 (C)).

Applicant's counsel was unable to explain to this Court what prejudice the Applicant stands to suffer should a postponement not be granted. Assuming in his favour that the refusal to postpone denies him the right to set aside the writ, I have little difficulty in concluding that he and his attorneys are the authors of his own misfortune.

The first Respondent was patient enough to give the Applicant about three years within which to comply with the Court order but the Applicant refused to comply and neglected to challenge the Court order on such basis as the order could possibly be challenged. As at the date of the hearing of the application, the order had not been complied with for a period of more than four years and two months. For a period of more than one year since the Applicant had brought the application to set aside the writ, his application was characterised by calculated sluggishness and a deliberate or reckless disregard of the Rules of this Court. All these were designed to delay the hearing of the main application, which I must say is in a shambolic state, so as to avoid compliance with the order by Smith J. A postponement *sine die* of an application which the Applicant had successfully delayed for more than a year, through his slackness, would prejudice the first Respondent in a manner which no order as to costs could rectify.

Applicant has therefore failed to show good cause for the postponement. A postponement *sine die* would serve no other purpose but to advance the Applicant's delaying tactics and help him realise the main objective which is to defy Smith J's order.

It will not be necessary to explain why the application to set aside the writ of execution was dismissed. The merits of that application have already been dealt with above.

COSTS

In dismissing the application, I made an extraordinary order as to costs against the instructing attorney *de bonis propriis*. In doing so, I was alive to the following principles set out by A C Ciliers, Law of Costs (Butterworths) at paragraph 10.25, the authorities cited therein and the facts of this matter.

The tendency is to award costs *de bonis propriis* against erring attorneys only in reasonably serious cases, such as cases of dishonesty, wilfulness or negligence in a serious degree.

In recent years the Court has often warned practitioners that they may be ordered to pay unnecessary costs *de bonis propriis* in certain circumstances. Such warnings have occurred where there had been a gross delay in seeking amendments, where an attorney had failed to comply with the rules or where there had been unnecessary documentation.

In RAUTENBACH v SYMINGTON 1995 (4) SA 583 (O) the Court made it clear that its discretion to award costs *de bonis propriis* is not

restricted to cases of dishonest, improper or fraudulent conduct and that no exhaustive list existed. The discretion includes all cases where special circumstances or considerations justify such an order. In KHAN v MZOVOYO INVESTMENTS (Pty) LTD 1991 (3) SA 47 (TK) at 48G-H a plaintiff's attorney was ordered to pay wasted costs *de bonis propriis* where his conduct was unreasonable in that he was slack and apparently unconcerned in the handling of his client's case.

There are several issues which must be highlighted about the manner in which the Applicant's instructing attorney handled this application.

(a) The Founding Affidavit was attested to on 16 November 1998. This appears from both the handwritten entry and the date stamp of the commissioner of oaths on the last page of that affidavit. However, the Registrar's date stamp reflects the date on which the papers were filed as 11 November 1998. In other words, the papers were filed five days before the Founding Affidavit was completed. This is strange and unsatisfactory particularly since no attempt was made to explain the disparity.

(b) It is the instructing attorney himself who deposed to the Founding Affidavit. In paragraph 4 thereof he refers to the Confirmatory Affidavit of the Applicant. As I said above, that Confirmatory Affidavit was only faxed to the first Respondent's attorneys on 28 July 1999, which is more than eight months after the application was launched. This was done as a direct result of the first Respondent's complaint in her Answering Affidavit that this affidavit was not filed. The original Confirmatory Affidavit was not filed with the Registrar's office and it is still a mystery as to how its fax copy found its way into

the Court file. This failure to comply with the Rules has neither been explained nor has the Applicant applied for condonation. The result is that I only have Mr Setshogoe's affidavit and to the extent that the Applicant's Confirmatory Affidavit is not properly before me and therefore has to be disregarded, I do not have any Confirmatory Affidavit to support Mr Setshogoe's allegations that the writ must be set aside.

(c) One of the grounds on which Mr Setshogoe sought to challenge the writ of execution was that this Court did not have jurisdiction to issue a writ of execution for the sum of R11 500.00. It appears that upon further reflection and in particular after the first Rule 30 notice, he realised that he was mistaken. As a result, he deposed to a Supplementary Affidavit on 20 May 1999 conceding that this Court has jurisdiction. It is not clear when this affidavit was actually filed. But the point is that no leave was sought to file this affidavit or to apply for condonation for its late-filing. Assuming that the Applicant's instructing attorney brought the application hastily without proper reflection, he must have realised at least after receipt of the first Rule 30 notice and the Answering Affidavit, which was some eight months before the hearing, that his application was marred by problems and was very likely to fail. He was warned by the first Respondent's attorneys that costs would be asked for on an attorney and client scale. He knew, as a result of the Answering Affidavit and the two Rule 30 applications, that the Applicant's papers were in a state of a mess. He had enough time to advise his client to abandon the application or to remedy the defects in the papers and to prepare properly in

respect of subsequent documentation. Instead he raised three unfounded technical objections to the matter being proceeded with. See WEBB AND OTHERS v BOTHA 1980 (3) SA 666 (N); IMMELMAN v LOUBSER EN _ ANDER 1974 (3) SA 816 (A).

(d) Page 1 of the Founding Affidavit was only initialled by either the deponent or the Commissioner of oaths. As regard page 2, it is a fax copy and it has not been initialled at all and this has not been explained.

(e) Having removed the matter from the Roll of 11 February 1999, the Applicant's attorneys only acted again when the Applicant's goods were again attached on 22 April 1999.

(f) Some eight months after the application was launched, Senwedi's Supplementary Affidavit was faxed to the first Respondent's attorneys. The affidavit was deposed to some two years before the application was brought and introduces a new ground for the application. Its production was also not explained, not even seven months later. Given the nature of the application this is an unnecessary document.

The manner in which the two Supplementary Affidavits and the Confirmatory Affidavit were produced and served and the failure to explain their introduction clearly indicates a deliberate disregard of the Rules or at least a reckless disregard thereof. How can any attorney allow this to happen and still lack the courtesy to explain what happened? How can no explanation be proffered over a period of about seven

months and only when the matter is to be heard seek the indulgence so as to explain what happened? I have no doubt that this is a calculated abuse of due process or at least gross negligence.

(g) Applicant's attorneys were not keen to set the matter down for hearing so that it could be finalised. It is the first Respondent who set it down. Still the Applicant's attorneys had the audacity to seek to prolong the matter further on flimsy grounds to say the least.

(h) The instructing attorney did not even have instructions from the Applicant to apply for a postponement or to oppose the dismissal of the application.

In considering the question whether costs must be awarded against an attorney *de bonis propriis*, the Court must always bear in mind that practitioners, like all other people have varying degrees of capabilities and that to err is human. Room must therefore be made for mistakes resulting from negligence, superficial research, insufficient knowledge of the law, etc. On the other hand the Court would be failing in its duty if it were not to remind practitioners that much as they have an obligation to their clients, even those with bad cases, they also have an obligation towards the Court. The duty to the Court entails, *inter alia*, not to use its Rules in order to frustrate the very purpose for making them, to respect Court orders and challenge them on legitimate, although at times mistaken, grounds but not to purposefully seek to sabotage them under the guise of advancing the rights of a client. Practitioners must know that there

is a line which divides a pursuit of a client's genuine course and an abuse of process which they dare cross at the risk of personally attracting the wrath of the Court.

Applicant's attorneys have consistently and promptly seized every available opportunity to delay the finalisation of the application they have themselves launched. This is consistent with no other objective but ensuring that Smith J's order is not complied with. Some of the Rules repeatedly flouted by these attorneys, such as filing affidavits without leave of Court or an endeavour to seek one, are so basic that the attorneys cannot be heard to say that they were not aware of them. To allow them to get away with such wanton disregard for the Rules, is to allow them to ignore the import of their rules of ethics and the oath they took upon their admission as attorneys.

I have no doubt that the Appellant's attorneys have earned their chance to be mulcted with costs in the manner this Court did. The role of the Applicant's instructing attorney as highlighted above, show that he is more to blame for the delay and the flouting of the Rules than the Applicant himself. I hope that this will prompt them and others to always resist the temptation to abuse the Rules of Court.

It is for the above reasons that I refused the application for a postponement and dismissed the application for the setting aside of the writ of execution with costs on an attorney and own client scale against the Applicant's instructing attorneys *de bonis propriis*.

M.T.R.MOGOENG

JUDGE OF THE HIGH COURT

ATTORNEYS FOR APPLICANT : RICHIE THAGA
ATTORNEYS FOR 1ST RESPONDENT: C.O. MOROLO & PARTNERS

c/o PHANCY MAGANO & PARTNERS