



**REPORTABLE**

CASE NO: SA 9/2017

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**UNITED AFRICA GROUP (PTY) LTD**

**Appellant**

and

**URAMIN INCORPORATED  
ERONGO DESALINATION COMPANY  
(PTY) LTD  
URAMIN NAMIBIA (PTY) LTD**

**First Respondent  
Second Respondent**

**Third Respondent**

**Coram:** MAINGA JA, SMUTS JA and HOFF JA

**Heard:** 23 October 2018

**Delivered:** 23 November 2018

**Summary:** Appeal against cost order – the general rule that costs follows the event not applicable in those instances where a litigant applies to court for condonation of the non-compliance with the provisions of the rules or of a statute. In such a case where an indulgence is granted the applicant may be ordered to pay the costs (even on the scale of attorney and client) which can reasonably be said to be wasted because of the application provided that the opposition to such application for postponement is in the circumstances reasonable and not vexatious or frivolous.

An order to pay the wasted costs may be ordered where the applicant for the indulgence was at fault or in default. This general rule may be departed from where a litigant was forced to apply for a postponement as a result of the conduct of an opposing party. In such an instance a court may order each party to pay his or her costs, or may make no order as to costs, or order that wasted costs be costs in the cause.

On appeal: The opposing parties blamed each other for the necessity to apply for an application for a postponement of the trial. Appellant blamed the respondents amongst others, for failing to timeously discover documents relevant for preparation for trial. The respondents amongst others blamed the appellant for non-compliance with the rules of court and for an inordinate delay in launching the application for postponement. A court in considering an appropriate cost order must take into account all the circumstances, and must consider the contentions by both litigants in the interest of fairness. Where a court, in its judgment, considered only the allegations of one of the litigants, such fact amounts to a misdirection, justifying interference on appeal.

Punitive cost order against appellant on attorney own client scale set aside and substituted with order that the order for costs of the postponement stand over for determination at the conclusion of the hearing of the action.

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## APPEAL JUDGMENT

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HOFF JA (MAINGA JA and SMUTS JA concurring):

[1] This is an application for condonation of the late filing of an appeal record contrary to the provisions of rule 8(2)(b) of the rules of this court and for reinstatement

of the appeal. The record of the proceedings of the court *a quo* was filed with the registrar by the appellant three days late.<sup>1</sup>

[2] The respondents have not opposed the condonation application but stated that 'the respondents' non-opposition is without prejudice to the respondents' rights and same should not be regarded as an indication that the appellant's aforesaid application carries prospects of success'.

[3] The approach by this court regarding an application for condonation for non-compliance with one or more rules of this court is well established.

[4] In *Balzer v Vries*<sup>2</sup> it was held that a litigant in an application for condonation is required to meet two requisites of good cause before such litigant can succeed in such application. Firstly, a reasonable and acceptable explanation for the delay must be established, and secondly, the court must be satisfied that there are reasonable prospects of success on appeal. Factors relevant in determining whether such an application should be granted include:

'the extent of the non-compliance with the rule in question, the reasonableness of the explanation offered for the non-compliance, the bona fides of the application, the prospects of success on the merits of the case, the respondent's (and where applicable, the public's) interest in the finality of the judgment, the prejudice suffered by other litigants as a result of the non-compliance, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.'<sup>3</sup>

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<sup>1</sup> In terms of rule 9(1)(b) the appeal is deemed to have been withdrawn.

<sup>2</sup> 2015 (2) NR 547 (SC) at 551J-552A-E; See also *Channel Life Namibia v Otto* 2008 (2) NR 432 (SC) at 439-440; *Ondjava Construction v HAW Retailers* 2010 (1) NR 286 (SC) at 288; *Beukes & another v SWABOU SA 10/2006* [2010] NASC para 12; *Arangies v Quick Build* 2014 (1) NR 187 (SC) at 189-190; and *Shilongo v Church Council of the Evangelical Lutheran Church* 2014 (1) NR 166 (SC).

[5] The legal practitioner on record for the appellant deposed to an affidavit in which he explained the reason for the delay. Counsel appearing on behalf of the respondents did not take issue with the explanation given by appellant's legal practitioner. This court is of the view that in the circumstances the explanation given was a reasonable and acceptable one.

This court must now consider the prospects of success on appeal.

#### The prospects of success on appeal

##### *The background*

[6] The appellant (as plaintiff) during May 2014 issued a combined summons by way of edictal citation against the respondents out of the office of the registrar of the High Court. In the particulars of claim (intendit) and on the strength of an alleged agreement, the appellant prayed for an order ordering the first, second and third respondents to *inter alia* take all the necessary steps to transfer a desalination plant (situated at the village of Wlotzkasbaken at the coast of Namibia) from the third respondent to the appellant. These action proceedings were opposed by the respondents which filed a special plea, a plea as well as a counterclaim. The matter was case managed by a managing judge in terms of the relevant rules of the High Court.

[7] On 31 March 2016, a joint proposed pre-trial order was made an order of court and the matter was set down for trial from 19 to 30 September 2016. Subsequently,

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<sup>3</sup> *Rally for Democracy and Progress & others v Electoral Commission for Namibia* 2013 (3) NR 664 (SC) para 68.

during the process of case management, applications were brought for the amendment of pleadings; a notice<sup>4</sup> for further and better discovery was served on the respondents; status reports were filed; some correspondence was exchanged between the respective legal practitioners; case management reports were filed; and case management orders were issued by the managing judge. On 14 September 2016 an application for a postponement was filed by the appellant accompanied by an affidavit in support of the application. This application was opposed by the respondents. On the morning of 19 September 2016 prior to the launching of the postponement application, a condonation application for the late filing of the application for postponement was filed.<sup>5</sup>

[8] During the hearing of the postponement and condonation applications the court *a quo*, after hearing argument on behalf of the respective parties and with 'considerable reluctance' granted the application for a postponement and made the following orders:

'14.2 The plaintiff is ordered to pay the wasted costs occasioned by the postponement which costs will include all the costs of one instructing and two instructed counsel. Such costs will be taxed on the scale as between attorney and own client and such costs will include the travelling and accommodation costs of the plaintiff's witness who travelled from France to attend the hearing.

14.3 The provisions of Rule 32(11) of the High Court Rules shall not be applicable in the taxation of this particular hearing.

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<sup>4</sup> In terms of rule 28(8)(a) of the rules of the High Court.

<sup>5</sup> Rule 96(3) of the High Court rules provides that when a matter has been set down for hearing a party may on good cause shown apply to the judge not less than 10 days before the date of hearing to have the setdown changed or set aside. There was thus a clear non-compliance by the appellant of this rule.

14.4 The matter is postponed for a status hearing to be held on 17<sup>th</sup> of November 2016 at 15h30.'

[9] It is common cause that the reference to the 'plaintiff's witness' in para 14.2 is wrong. It was the defendants' witness who travelled from France.

[10] The appellant subsequently filed a notice of appeal against the orders reflected in paras 14.2 and 14.3 of the court order.

### *The High Court judgment*

[11] The High Court found that the reason for the postponement laid in the fact that the plaintiff (appellant) was totally unprepared to proceed with the trial, and that for whatever the reason may have been for plaintiff not proceeding with the trial, plaintiff must have been aware some time prior to 14 September 2016 that it would not be ready to proceed with the trial.

[12] The judge *a quo* pointed out that the policy of the court, as far as applications for postponements are concerned (as contained in a practice directive), is a hundred percent clearance rate policy which is being pursued, and that the court must, unless compelling reasons are provided, apply a strict non-adjourment policy on matters set down for trial or hearing.

[13] The judge *a quo* further referred to the fact that the condonation application was filed on the morning of the first trial date, and viewed such conduct as a further indication of the 'somewhat careless manner in which the plaintiff had approached the

case and its preparation for trial'. The judge *a quo* emphasised that there was some inordinate delay in bringing the application for postponement in the first place.

[14] Reference was made to statistics which shows that for the period of 9 May 2016 until 16 September 2016 about one third<sup>6</sup> of cases enrolled for trial had to be postponed due to the fact that one of the parties was not ready to proceed with trial.

[15] It was pointed out that the defendants were ready to proceed with trial, and that one of their witnesses from Europe was present in court.

[16] The judge *a quo* stated a well-known fact, namely, that the demands in the trial division of the High Court are high.

[17] The judge *a quo* reminded litigants that when a matter was enrolled for trial, it was done on the assumption that the parties would be ready to proceed with the trial. It was pointed out from the various reasons advanced by the plaintiff, why it was not able to commence with the trial, plaintiff sought to place the blame mainly on the defendants.

[18] The judge *a quo* mentioned that the plaintiff (appellant) would clearly be prejudiced if the application for a postponement is refused, but stated that the court's time had been wasted, and that the defendants (respondents) would suffer financial prejudice. Therefore, the court expressed the view that the defendants should not be out of pocket in these circumstances if a postponement is granted.

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<sup>6</sup> My own calculation of the figures referred to.

### Submissions on appeal

[19] Mr Möller, who appeared on behalf of the appellant submitted that the appellant has reasonable prospects of success because the court *a quo* disregarded or attached insufficient weight to the following considerations:

Firstly, the matter had been enrolled by the court before all matters required for preparation for the trial had been addressed, or could have been addressed, under the judicial case management procedures;

Secondly, that the appellant's unreadiness for trial arose from the respondent's overall obstructive and dilatory conduct in the proceedings, and in consequence the matter was not ripe for hearing on trial; and

Thirdly, the court *a quo* had not adequately addressed any of the matters placed before it through the appellant's status reports under the case management process prior to 8 September 2016.

[20] Mr Möller, submitted that by granting the costs orders against the appellant the court *a quo* failed to exercise its discretion judicially, acted arbitrarily, and the orders on costs were vitiated by misdirection. It was further submitted that, by failing to rationally consider or to at all consider the facts and circumstances that compelled the appellant to apply for a postponement of the trial, the court *a quo* misdirected itself.

[21] It was submitted that, the court failed to consider that the appellant was not responsible for having to seek the postponement of the trial, but that such circumstances were brought upon the appellant by the respondents.



[22] It was submitted that a comprehensive new substituted discovery affidavit which included previously undiscovered documentation, as well as the filing of supplementary witness statements shortly before the trial made it impossible for the appellant to properly prepare for trial and such conduct amounted to trial by ambush on the part of the respondents.

[23] In its heads of argument the appellant sets out the events leading up to the request for a postponement which I shall briefly summarise.

[24] On 5 November 2015 in appellant's case management report appellant requested further and better discovery.<sup>7</sup> The documents sought to be discovered were identified.

[25] On 19 November 2015 the appellant filed a notice in terms of the provisions of rule 28(8)<sup>8</sup> in which it sought a direction for additional listed documents to be discovered. It was recorded that these additional documents were required for preparation of the trial and for further consultation. The respondents did not respond to this rule 28(8) notice.

[26] In a joint case management report (dated 12 November 2015) and made an order of court on 19 November 2015 the matter was postponed to 31 March 2016 for a pre-trial conference. In this joint case management report the appellant refers to its

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<sup>7</sup> The appellant and respondents delivered discovery affidavits on 30 January 2015.

<sup>8</sup> Of the rules of the High Court.

request for further and better discovery filed in terms of rule 28(8)(a). No direction was issued by the court under rule 28(8)(b).

[27] On 30 March 2015 the appellant, in a document referred to as 'plaintiff's proposed pre-trial order', and in consequence of a lack of the additional discovery, sought to bring an application under rule 32, to compel the respondents to make discovery.

[28] On 30 March 2016 in a joint proposed pre-trial order, the respondent's indicated that they would respond to the rule 28(8)(a) notice by way of an affidavit.

[29] On 31 March 2016 the proposed joint pre-trial order was made an order of court and the matter postponed for trial on the floating civil roll for the period 19 to 30 September 2016. Mr Möller, submitted that on 31 March 2016 the respondents insisted to go to trial but no direction was issued by the court on the issue of the outstanding discovery.<sup>9</sup>

[30] On 16 June 2016 in a further proposed pre-trial order, the appellant sought directions from the managing judge in respect of three outstanding interlocutory matters, including its application to compel discovery. No direction or order was issued by the court and the matter was postponed to 7 July 2016 for a status hearing.

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<sup>9</sup> A transcript of the proceedings on 31 March 2016 did not form part of the appeal record when it was filed by the appellant.

[31] In view of an agreement (embodied in a status report dated 4 July 2016), the court *a quo* ordered on 7 July 2016, *inter alia* that the respondents must file their discovery in terms of rule 28(8) on or before 5 August 2016 and that the parties would file their supplementary witness statements on or before 19 August 2016. The matter was postponed to 8 September 2016 for a pre-trial conference.

[32] It was pointed out that the respondents filed a completely new discovery affidavit described as a 'substitute and supplementary affidavit', which referred to significant new documentation which were not requested nor previously discovered, and that the respondents did not provide the required documents as previously requested in the rule 28(8) notice.

[33] In this 'substitute and supplementary affidavit', the deponent on behalf of the respondents stated that five directors<sup>10</sup> who used to be employed (by the respondents) 'dealt with issues relevant to the matter, including documents relevant to this matter, and were in possession of further documents relevant to this matter on behalf of the defendants'. It was stated that these individuals were no longer employed (by the respondents) and that the respondents no longer had any contact with them as the 'relationship with these persons have soured . . . .'

[34] It was submitted by Mr Möller, that these directors are peregrine to the court's jurisdiction and to serve *subpoenae* on these directors as well as on those third

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<sup>10</sup> Identified in the supplementary discovery affidavit.

parties in possession of documentation previously in the respondents' possession or control was impossible to achieve in time for appellant to be ready for the trial.

[35] It was further submitted that supplementary witness statements (filed late by the respondents on 25 August 2016) contained a set of three new voluminous statements,<sup>11</sup> not authorised by the court.

[36] Mr Heathcote, on behalf of the respondents submitted that the court *a quo* did not fail to exercise its discretion judicially, nor did it act arbitrarily or capriciously, and that its judgment was not vitiated by misdirections.

[37] In the heads of argument of the respondents Mr Heathcote, referred to the conduct of the appellants which led to the application for a postponement. I shall not refer to those instances already mentioned by Mr Möller (*supra*).

[38] It was submitted that appellant's amended pleadings were only delivered on 29 June 2016 notwithstanding the fact that it formed its intention to amend as far back as 29 September 2015. Further that, the appellant gave notice of its intention to amend pleadings on 15 April 2016 (some six and a half months later).

[39] On 2, 5 and 29 August 2016, the respondents substantially complied with the court order dated 7 July 2016 by delivering their amended plea, their rejoinder, their

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<sup>11</sup> Consisting of 351 pages with annexures.

substitute and supplementary discovery affidavit (on time), and their amplified and further witness statements (late).

[40] The next day on 30 August 2016 in a letter, the appellant complained (*inter alia*) about the inadequacy of the respondents' responses concerning discovery.

[41] On 31 August 2016, in a status report, the appellant indicated that it would seek an order for the postponement of the trial and should it be compelled to bring formal applications on affidavit it would seek punitive cost orders (attorney and own client) and orders *de bonis propriis*.

[42] On 6 September 2016, in a supplementary status report, the appellant sought directions including a postponement of the trial, the last mentioned without a substantive application, as was required.

[43] On 8 September 2016, at the pre-trial conference, the appellant, in the court *a quo*, from the bar complained about the respondents' lack of discovery and proposed the matter be postponed *sine die*. The respondents informed the court that they were ready for trial. The court *a quo* indicated that the matter is enrolled and if there is to be an application for a postponement, it should be lodged accompanied by an affidavit as to why a postponement is being sought and indicated that the trial judge would deal with such application in due course.

[44] It so happened that the managing judge became the trial judge in the matter.

[45] It was submitted by Mr Heathcote, that the provisions of rule 96(3) of the High Court rules are clear and unequivocal, which provide that when a matter has been set down for a hearing a party may on good cause shown apply to the judge not less than 10 court days before the date of hearing to have the set down changed or set aside. The appellant, it was submitted, failed to comply with the provisions of this rule by launching an application for postponement on the trial date. Thus, it was submitted, that where a rule of court governs a certain situation, a party cannot rely on the inherent jurisdiction of the court *a quo* to regulate its own proceedings in order to circumvent the provisions of the rule because there was (as in this instance) no *lacuna* in the law. My understanding of this submission is that the court *a quo* in these circumstances would have been justified to refuse the postponement application in the absence of good cause shown. Such good cause, which includes a bona fide defence, was lacking, it was submitted.

The cost orders of the court *a quo*

[46] One of the cost orders made by the court *a quo* was that the provisions of rule 32(11) shall not be applicable in the taxation of that particular hearing:

Rule 32(11) provides that:

‘Despite anything to the contrary in these rules, whether or not instructing and instructed legal practitioners are engaged in a cause or matter, the costs that may be awarded to a successful party in any interlocutory proceeding may not exceed N\$20 000.’

[47] The appellant contends that the provisions of rule 32(11) are imperative and prohibitive in that it specifically requires that no cost order may be awarded in excess of N\$20 000.

[48] The respondents submitted that the rule is not applicable since the appellant being the successful party did not get a cost order in its favour, the respondents (the unsuccessful party) did.

[49] It was further submitted that, the provisions of rule 32(11) cannot and do not take away the court's discretion regarding cost awards. In support of this submission reference was made to the matter of *South African Poultry Association & others v Ministry of Trade and Industry & others*<sup>12</sup> where the High Court acknowledged that it has a discretion to grant costs on a higher scale. It was submitted that the rule must be interpreted restrictively, not to take away from the basic rule, namely, that an award of costs is in the discretion of the judge.

[50] I do not deem it necessary to decide the application and interpretation of this rule in practice in view of the reasons set out below.

I shall now consider the punitive cost order.

[51] In the matter of *Du Toit v Dreyer & others*<sup>13</sup> this court summarised the approach to costs as follows:

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<sup>12</sup> 2015 (1) NR 260 (HC) paras 67 and 68.

<sup>13</sup> 2017 (1) NR 190 (SC) para 40.

‘ . . . it is settled law that a trial court has a discretion as to whether to award costs or not to a party, and if it has to make an award, to which of the parties to the proceedings. That discretion, however, has to be exercised judicially and not capriciously, or arbitrarily. The general rule, however, is that costs follow the event, that is to say that the successful party gets his or her costs. Put adversely, the unsuccessful party is, as a general rule, mulcted in costs. This being the general rule, an appellate court will be slow to interfere with the trial judge’s decision in the manner the costs were awarded. Such interference cannot be justified on the mere feeling that if the appellate judge had been presiding at the trial he or she would have made a different cost order. The power to interfere can only be exercised if it is found that the trial judge did not act judicially, or when the appellate court is of the view that the order denying costs is vitiated by a misdirection, or if the trial judge acted capriciously or arbitrarily.’

[52] Where a litigant applies to court for condonation of non-compliance with the provisions of the rules of court or of a statute and for the postponement of the trial (as in this instance), the general rule is that the applicant should pay the costs of the application.

[53] In *Smith en ‘n ander v Van Heerden en andere*<sup>14</sup> the court referred with approval to a passage in *LAWSA op cit* para 302, where the following appears in a case where a court is approached for an indulgence:

‘The general rule that costs follow the event is not applicable to successful applications for the grant of an indulgence by the court. In such cases the general rule is that the applicant should pay the costs of the application and, in certain circumstances, even the costs of opposition to the application . . . .’

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<sup>14</sup> [2002] 4 All SA 461 C at 474i-475a.



[54] Where an application for an indulgence is granted, it has been held that the applicant for the indulgence should pay all the costs which can reasonably be said to be wasted because of the application (even on attorney and client scale, where appropriate), such costs to include the costs of such opposition to the application provided that the opposition is in the circumstances reasonable and not vexatious or frivolous.

[55] The general rule that the applicant for the granting of an indulgence should bear the costs of the application may, however, be departed from, and in this regard the conduct of the respondent may be relevant.<sup>15</sup>

[56] The High Court of Namibia in the matter of *Anette Skibowski-Beth v Beate Raith & another*<sup>16</sup> per Silungwe AJ, stated the position as follows at para 19:

'The general rule is that an applicant for a postponement who is responsible for the case not being proceeded with on the day set down for hearing, must pay wasted costs: . . .The present matter is, in my view, a case in point, as the responsibility for postponement lies at the door of the plaintiff. This is, of course, to be contrasted with a case where each of the parties, or none of them, has contributed towards the need for postponement of the trial; in such circumstances, the court may, for instance, make no order as to costs; order each party to pay his or her own costs; order that wasted costs be costs in the cause. See *Christiaan v Metropolitan Life Namibia & another, supra*, at 258C-D; *Prior t/a Pro Security v Jacobs t/a Southern Engineering* 2007 (2) NR 564 at 566; *Klein v Klein* 1993 (2) SA 684 (B) at 654A.'

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<sup>15</sup> See *Meintjies NO v Administrasieraad van Sentraal – Transvaal* 1980 (1) SA 283 (T) at 294H-295A; *Van Marseveen v Union Government* 1918 AD 60 and 61, *Smith v Van Heerden (supra)* at 475(a).

<sup>16</sup> An unreported judgment delivered on 24 March 2009 in case no. (P) I 2836/2006.

[57] This court recently in the matter of *Du Toit v Dreyer & others* on appeal confirmed an order by the High Court, at the conclusion of a trial, refusing to grant a cost order in favour of the appellant (said be the successful party) because of the reprehensible manner in which the case was litigated. Although in this matter the refusal to grant a cost order in favour of the successful party was made at the end of a trial, it illustrates the approach that in exercising its discretion, a court may consider the conduct of a litigant or the litigants in instituting or defending proceedings.

[58] A litigant is thus not necessarily responsible for a case not proceeding on the day set down for hearing merely because such a litigant applied for a postponement. In certain circumstances a litigant could be forced to apply for a postponement as a result of the conduct of an opposing party. The general rule only applies to the applicant who was at fault or is in default.

[59] In my view, the court *a quo* misdirected itself by referring only to, and by only considering the conduct of the appellant which the court *a quo* described as 'somewhat careless'. The court *a quo* emphasised the fact that the application for postponement was brought about by the fact that the appellant was totally unprepared to proceed with the trial. Although the court *a quo* stated that the appellant sought to place the blame mainly on the conduct of the respondents, the conduct of the respondents, was not duly considered or accorded any weight by the court *a quo*. It is trite that a court must consider all the circumstances presented by the parties in an application for postponement (not only those against an applicant),

since a basic factor in the exercise of a court's discretion in respect of the issue of costs, is the aim of fairness to all parties.

[60] In its founding affidavit, the appellant explained why it was forced to apply for a postponement of the trial. The deponent of the founding affidavit referred (amongst numerous other issues) to the content of a letter dated 30 August 2016<sup>17</sup> addressed to the legal practitioner of the respondent in which amicable resolutions of certain interlocutory matters were sought by the appellants. In this letter appellant stated that it was prejudiced by respondents' failure to make full discovery, by respondents' late filing of pleadings, the unauthorised and late, filing of a voluminous 'substituted and discovery', three new voluminous witness statements with annexures filed out of time, that respondents sought to avoid discovery by claiming confidentiality and irrelevancy, that appellants were being forced to obtain relevant documents from third parties,<sup>18</sup> that appellants unreadiness to proceed did not arise from any dilatoriness, and that no requests for particulars on trial and answers were exchanged, and remained outstanding. The appellant stated that notwithstanding the comprehensive nature of the letter and the clear and full explanations as to why the appellant would not be ready to conduct the trial on 16 September 2016, respondents responded in an abusive manner.<sup>19</sup>

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<sup>17</sup> Comprising of 10 pages.

<sup>18</sup> AREVA, the Government of the Republic of Namibia, its Ministers and State Departments, Stubenrauch Planning Consultants CC, Bank of Namibia, Erongo Local Authority, Namwater and the Competition Commission.

<sup>19</sup> By a letter (of one page) dated 31 August 2016 in reply to applicant's letter dated 30 August 2016.

[61] The court *a quo* had to consider the reasons as alleged by the appellant why it was not ready to proceed to trial in the consideration of an appropriate cost order. This was not done by the court *a quo* in its judgment. The opposing parties blamed each other for the necessity to apply for an application for a postponement of the trial, and it appears that some blame is also to be apportioned to the managing judge himself, by failing to give the directions timeously as requested by the appellant.

[62] In my view, what Griesel AJA stated in the matter of *Sublime Technologies (Pty) Ltd v Jonker & another*<sup>20</sup> is apposite in respect of the issue of the cost order in this appeal, and which I endorse:

‘22 The present case is, in my view, an instance where the trial court is likely to be in a better position than the court hearing the application for postponement, to decide who should be liable for the costs of the postponement.<sup>21</sup> The mere fact that the appellant may, with the benefit of hindsight, be criticised for the fact that it did not, at an earlier stage give the requisite notice in terms of s 30 of Act 25 of 1965, or that it did not timeously utilise its remedies in terms of rule 38 to obtain copies of the bank statements, may or may not be decisive at the end of the trial when it comes to the costs of the postponement. On the other hand, it may appear in the fullness of time and after all the evidence has been heard, that the postponement was precipitated by a spurious objection on the part of the respondents; or that they had lied about their possession of the documents in question; or that they had been obstructive and had deliberately adopted delaying tactics throughout the process (as claimed by the appellant), in which event it would work great injustice to have rewarded them at this stage with an irrevocable order for costs arising from the postponement.

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<sup>20</sup> 2010 (2) SA (SCA) 522 para [22] and [23].

<sup>21</sup> In the court *a quo* the application for postponement was indeed heard by the trial court. [Footnote provided].

23 . . . should it appear at the end of the trial that the appellant itself was entirely to blame for the postponement, or that it was pursuing vexatious and baseless claims against the respondents (as they allege), then the court can fully give effect to such a finding at that stage by mulcting the appellant in costs, in which event the respondents would have lost nothing.<sup>22</sup>

[63] The appellant was in the circumstances of this case, in my view, justified to approach this court for the requested relief in view of the reasonable prospects of success on appeal.

[64] In the result the following orders are made:

- (a) The application for condonation for the late filing of the record of the appeal is granted and the appeal is reinstated.
- (b) The cost orders of the court *a quo* (paragraphs 14.2 and 14.3) are set aside and substituted by an order that the costs of the postponement stand over for determination at the conclusion of the hearing of the action.
- (c) The respondents are ordered to pay the appellant's costs of appeal jointly and severally, which costs include the costs of one instructing and one instructed counsel.

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<sup>22</sup> See also *Williams v Harris* 1998 (3) SA 970 (SCA) at 985H-J.

- (d) The matter is referred back to the High Court to deal with it in accordance with the relevant case management rules.

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**HOFF JA**

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**MAINGA JA**

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**SMUTS JA**

## APPEARANCES

APPELLANT:

A P Möller

Instructed by Theunissen, Louw & Partners,  
Windhoek

RESPONDENT:

R Heathcote

Instructed by Francois Erasmus & Partners,  
Windhoek