FORM A

FILING SHEET FOR EASTERN CAPE JUDGMENT

Appeal Judgment

` ECJ NO: 055/2005

REFERENCE NUMBERS:

- Registrar: CA 433/2004

DATE DELIVERED: 29 April 2005

JUDGE(S): Pickering and Plasket JJ

LEGAL REPRESENTATIVES:

Appearances:

- for the State/Applicant(s)/Appellant(s): A Beyleveld
- for the Accused/Respondent(s): TJM Paterson

Instructing attorneys:

- Applicant(s)/Appellant(s): Netteltons
- Respondent(s): Whitesides

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)

CASE NO: CA 433/2004
DATE DELIVERED:

In the matter between

BARON CAMILO AGASIM-PEREIRA OF FULWOOD **Appellant**

and

WERTHEIM BECKER INCORPORATED **Respondent**

JUDGMENT

PICKERING J

The appellant was the defendant in an action instituted by respondent against him in the magistrate's court, Port Elizabeth, during July 2002 in which respondent, a firm of attorneys, sought judgment against appellant in the sum of R92 059,94 together with interest thereon and costs of suit. Respondent's action was in respect of professional fees made liquid by taxation of a bill of costs on 5 June 2002 in respect of certain professional services rendered by respondent on appellant's behalf. The action was defended by appellant who disputed liability thereon and who filed a counter-claim, *inter alia*, for an order that respondent render a full account for such services.

On 14 November 2003 the matter was set down for hearing in the magistrate's court, Port Elizabeth, the date of trial being 27 January 2004. On 27 January 2004, however, appellant's attorney, Mr. Burmeister, applied for a postponement of the trial on the basis of appellant's alleged illness and consequent inability to attend court. This application was opposed by

respondent and, after the hearing of argument as well as *viva voce* evidence adduced on behalf of respondent, the application for a postponement was refused by the magistrate. Appellant's attorney thereafter withdrew whereupon judgment was granted in favour of respondent and appellant's counter-claim was dismissed with costs.

Appellant now appeals against the judgment granted by the magistrate on the basis that he erred in refusing the application for a postponement.

It is necessary to set out in some detail the background to this matter.

The trial was originally set down for hearing in the Port Elizabeth magistrate's court on 13 and 14 October 2003. This was confirmed on behalf of respondent in a letter written to appellant's attorney, Mr. Burmeister, on 7 August 2003. On 23 September 2003, however, Burmeister addressed a letter to respondent stating as follows:

> "*We regret to advise that, as a consequence of ill-health on the part of our client, he is unable to travel or attend Court at this point in time. We understand the process in America has also been put on hold pending his recovery. Our client will accordingly not be able to attend the hearing of the above matter on the 13 and 14 October 2003 and we shall in due course submit a medical certificate.*" (Annexure A10)

A number of letters were then addressed by respondent to Burmeister seeking further information as to appellant's alleged illness. There is some dispute on the papers as to whether or not certain of these letters were received. Be that as it may, respondent eventually wrote as follows to Burmeister on 7 October 2003:

> "*Your client cannot expect that this matter is capable of being*

> *postponed simply due to his non appearance. I reiterate that the nature of your client's illness has not been disclosed. I am also instructed that on a previous occasion your client required a postponement of a matter on the grounds of having suffered a stroke whereas it subsequently transpired that it was simply an embolism in the eye and which did not preclude your client from either travelling or attending Court.*" (Annexure A15)

A further exchange of correspondence ensued and, after appellant had eventually tendered the wasted costs occasioned by the postponement, the trial was postponed by agreement to a date to be arranged.

Thereafter the matter was again set down for trial on the 27 January 2004. In a letter dated 19 November 2003 addressed by respondent to Burmeister the following was stated:

> "*Our correspondent has informed us that a trial date has been obtained for 27 January 2004. Hopefully by the time you receive this letter a notice of set down will have been served on you. Kindly note that no further indulgences or postponements will be entertained and you are requested to notify your client immediately of this trial date so as to enable him to make timeous arrangements to attend this trial*." (Annexure A21)

On 3 December 2003 Burmeister responded by sending the following telefax to respondent:

> "*We have requested our client to advise us as to his state of health in order to establish whether the matter can proceed on 27 January 2004 and we await his instructions in this regard.*" (A32)

On 18 December 2003, however, Burmeister wrote to respondent stating as follows:

> "*We have been advised telephonically by our client that his medical condition is such that he will not be able to travel to South Africa to attend the trial of this matter on the 27 January 2004. A medical report in confirmation of the aforegoing is expected and will be forwarded to yourselves when same comes to hand*." (Annexure A22)

This brought forth the following response from respondent on 19 December 2003:

> "I*f your client's medical condition is still such that he will not be able to travel to South Africa to attend a trial in this matter having regard to the fact that the trial is in some six weeks time, we will require two independent medical certificates relating to his condition setting out details thereof and detailed reasons as to why he cannot travel to South Africa to attend the trial. Please revert URGENTLY.*" (A23)

On the same day Burmeister replied stating as follows:

> "*Further to this matter we attach hereto a medical certificate, dated 8 December 2003, relating to our client's condition the contents whereof is self explanatory. It is accordingly clear that the matter will not proceed on the 27 January 2004*." (Annexure A25)

The attached medical certificate (Annexure A36) purported to emanate from a certain Dr. Correa, a gynaecologist and obstetrician, apparently practicing in Brazil, and reads as follows:

> "*I hereby certify that Baron Camilo of Fulwood has been taking special*

medicines and must avoid stressing situations as well as long journeys up to March 2004. CID 167.1"

On 13 January 2004 respondent replied to this letter stating, *inter alia*, as follows:

"*The medical certificate does not comply with our requirements in that it does not deal with the 'special medicines' (sic) being taken by the Baron and why he must avoid* 'stressing situations'*, as well as* 'long journeys' *and why* 'stressing situations and long journeys' *should be avoided up to March 2004 but not thereafter. Furthermore, it is noted that the medical certificate is provided by Dioni Jose Correa M.D. gynaecologist and obstetrician. We assume that the Baron does not have any gynaecological or obstetric ailments or complaints. The certificate is required from the appropriate specialist. If the appropriate certificate cannot be furnished and in this regard please refer to our letter of 19 December 2003 wherein we requested you to arrange two independent medical certificates relating to his condition, please call upon the specialist to attend Court on 27 January 2004 to give the appropriate evidence of the Baron's inability to travel and details of his medical condition and the* 'special medicines' *he is taking. The certificate is clearly unacceptable.*

It is for your client to satisfy us and in due course the Court of your client's inability to either travel or appear in Court for health reasons. You are hereby notified that this matter will proceed to trial on 27 January 2004 unless and until a satisfactory medical certificate is furnished. It seems apparent that your client continues to use the ploy of allegedly (sic) 'ill-health' *to avoid attending Court*." (Annexure A26)

Also on 13 January Burmeister wrote to respondent in the following terms:

> "*We refer to your letter of 19th December 2002 (*sic*) and confirm that we have now had an opportunity of discussing this matter with our client. The Baron is prepared to submit to a medical examination by a doctor of your choice at Guiania, Brazil at the expense of yourselves. We shall be pleased to hear from you in this regard. We again reiterate that this matter cannot proceed on the 27th instant.*" (A24)

On 16 January 2004 Burmeister replied to respondent's letter of 13 January, *inter alia*, as follows:

> "*We refer you to the report of Dr. Paulo Alfonso Guimaraes dated the 28 September 2003 forwarded to yourself on 1 October 2003 which confirms our client is receiving treatment for aneurismatic formation in the segment of the M1 (CID 16.7) (sic). A similar code CID 167.1 is referred to in the report of Dr. Correa and we understand that same is an International code relating to our client's complaint. Our client furthermore states that it takes almost 4 months to obtain an appointment with Dr. Guimaraes and he is accordingly unable to obtain an updated report at this point in time although his general practitioner, Dr. Correa confirms the present condition. Kindly note that it is not possible for our client to arrange for the specialist to attend Court on 27 January 2004 due to the logistics involved therein.*
>
> *We furthermore wish to place on record that our client underwent brain surgery in Portugal during August 2002.*" (Annexure A28)

This letter was replied to on the same day by respondent who stated as follows:

> "*Your client has now produced three medical certificates dated*

1.1 28 September 2003 from Dr. P Guimaraes of the Institute of Neurology Santa Bueno, Guiania, Brazil.

1.2 8 December 2003 from Dr. Correa gynaecologist and obstetrician of Saint Marista, Guiania, Brazil.

1.3 17 October 2003 from Dr. Velga Lobo, M.D., neurologist and neuro surgeon of St. Bueno, Guiana, Brazil.

It is noted that your client underwent brain surgery in Portugal in August 2002. Mr. Gordon (of respondent's firm) had heard that your client had suffered a stroke and when he sympathised with your client at the time, your client simply dismissed the incident as not being serious."

The letter continues to state as follows:

"*2.1 The medical certificates are vague*

2.2 It is unlikely that having been treated as indicated in Dr. Velga Lobo's report, which is hearsay, that he will have any further problems relating to the incident. The problem as described is not progressive. (My emphasis).

2.3 *Your client has travelled extensively since the* 'brain surgery' *(sic) to South Africa, Scotland and Brazil with no ill effect and there is therefore no reason why he cannot travel to South Africa to attend a trial.*

2.4 The report from Dr. Guimaraes dated 29 September 2003 states that he is advising (sic) your client not to travel for 60 days. Those 60 days have now long since elapsed.

3. If your client is indeed in the state of depression and anxiety this should not prevent him from attending the trial.

4. If you expect the Court to take the matter seriously your client is required to provide a detailed medical report by a competent

specialist dealing with his alleged problem and setting out what occurred, how he has recovered and why he cannot attend the trial.

5. *We are not satisfied with your client's explanations that he cannot attend the trial and we will therefore not agree to a postponement of the matter on the basis of the information to hand*." (Annexure A30)

Nothing more was heard from Burmeister until 26 January 2004 when he forwarded to respondent a further medical certificate purporting to emanate from a Dr. Rigatto, a neurologist, of Guiania, Brazil, in which it was stated that appellant was under neurological care and was using certain medication which occasioned side effects such as "*loss of memory, thinking co-ordination and reflexes*". According to this purported certificate it was "*necessary that the patient avoid stressful situations, physical fatigue such as long journeys and others*." The certificate proceeds to state that appellant had been *"diagnosed with a cerebral aneurism and should be under constant neurological evaluation*". (Annexure A38)

Respondent, however, refused to accept this certificate.

At the hearing of the matter on 27 January 2004 appellant was not present but was represented by Burmeister who made an informal application from the Bar for a postponement, in the course of which he handed into Court the aforementioned and other medical certificates. A document headed "*Plaintiff's Written Submissions*" was also handed into Court. In this document the point was taken that "*proper medical evidence is required to be produced*" and it was furthermore submitted that the medical certificates were hearsay and not admissible in evidence.

It is clear from the above therefore that respondent was prepared to accept

neither the medical certificates nor Mr. Burmeister's *ex parte* statements from the Bar. Such being the case one would have expected that the magistrate would have been asked to make an *in limine* ruling as to the admissibility of the medical certificates. Somewhat surprisingly, however, this procedure was not followed. Instead Mr. Burmeister was allowed to present his argument, in the course of which he relied extensively on the disputed medical certificates, whereafter Mr. De Jager, who appeared on behalf of respondent, objected to the admissibility of such medical evidence. Be that as it may, it is clear that the issue of the admissibility of the medical certificates was raised at the outset of the application before the magistrate. It should further be pointed out that no affidavit from appellant himself in support of the application for a postponement was presented to the Court.

In his judgment the magistrate stated that if the appellant had been able to consult extensively with at least 5 doctors then "*surely I think he can come to Court and the condition can be seen – his condition be seen in Court*." He stated further:

> "*In the present case, although I accept the medical reports, because of the distance and modern technology, we cannot only rely on originals. We may certainly accept a faxed copy because also of the distance. But, at the same time, I think it is not conclusive. It does not give conclusive proof that the appellant is unable to come to this Court and is unable to give evidence. If perhaps I may say that there was some evidence that he is lying in hospital, he cannot go anywhere, well I think that may have been a reason that at least it is difficult for him. As I have already indicated, although it could be waste of time, if he comes here and we can see that there are many witnesses to give evidence here and in the middle of the evidence, it is seen that this witness does not really give what is necessary, there is some illness, a break is given. Well, I think if justice is being done because everybody*

> *clearly sees that nothing else could be done. In the present case, I am not satisfied that the defendant has exhausted all the efforts of coming to Court and accordingly the application for a postponement is refused.*" (sic)

At the hearing of the appeal Mr. Beyleveld, who appeared for appellant, submitted that the magistrate had correctly admitted the medical certificates but that his finding that appellant had been capable of attending court was not justified in the light of the averments contained in those certificates. Mr. Paterson, who appeared for respondent, submitted, however, that the magistrate had erred in admitting the medical certificates but that, in the event of it being found that such certificates had been correctly submitted there were no grounds justifying interference with the magistrate's exercise of his discretion in refusing the application for a postponement.

I will deal firstly with the issue of the admissibility of the medical certificates. In this regard it would appear that the magistrate misconstrued the basis of respondent's objection to their admissibility and was under the impression that the objection thereto was to the production of faxed copies as opposed to the original certificates. It appears, however, from what I have set out above that respondent's objection related firstly to the fact that no formal application for a postponement had been brought by appellant and secondly to the production of unattested medical certificates, certain of which amounted to hearsay evidence.

It is clear that as far back as 19 November 2003 Burmeister had been advised by respondent that "*no further indulgences or postponements*" would be entertained. He was furthermore advised on 19 December 2003 of respondent's dissatisfaction with his bland assertion that appellant would not be able to travel to South Africa. Respondent's further letters dated 13 and 16 January 2004 respectively make it abundantly clear that appellant was not

prepared to accept such medical certificates as had been produced up until then. In these circumstances, in my view, Burmeister should have appreciated that a formal application for a postponement supported by the requisite medical certificates in properly attested form was required. It appears from the correspondence, however, that Burmeister's approach to the matter was coloured by his failure to appreciate that appellant was, in the circumstances prevailing, seeking an indulgence from respondent. He appears to have been of the view that a postponement was his for the asking. This is apparent from his initial insistence that should respondent not be satisfied with the medical certificates tendered by appellant it should have appellant examined by an independent medical practitioner at its own expense. He furthermore made the categorical assertion on 19 December 2003 that "*the matter will not proceed on 27 January 2004*." He thereafter not only failed to tender such costs as may have been wasted in consequence of any postponement but adopted the attitude that respondent was liable to pay such costs.

In this regard he stated, *inter alia,* that respondent, "*at his peril came to Port Elizabeth today to oppose this application*" and that "*if there have been costs which have been occasioned, I submit that these costs have been occasioned at the instance of the plaintiff and that in the event of a postponement being granted, no order of costs against the defendant should be made, on the contrary, the plaintiff should be ordered to pay the wasted costs occasioned thereby*."

This was a somewhat startling submission. I should mention that, Mr. Beyleveld, correctly, did not seek to support it and conceded that, should a postponement be granted, appellant should in fact pay such costs on the scale as between attorney and own client.

In Joshua v Joshua 1961 (1) SA 455 (GWLD), referred to by Mr. Paterson, the

defendant applied for a postponement of a trial on the ground of his ill-health. The application was opposed by the plaintiff who pointed out that no formal notice of motion of the application for a postponement had been given and that no costs had been tendered. Defendant's counsel then asked for leave to hand in a doctor's certificate from the Bar "*without any proof or identification*", relying in this regard on Hanson, Tomkin and Finkelstein v D.B.N. Investments (Pty) Ltd 1951 (3) SA 769 (N). It appeared that the defendant's attorneys had been aware for a week prior to the application for the postponement being made of the defendant's alleged ill-health. In refusing the postponement De Vos Hugo J stated as follows at 457 A-C:

> "*The determination of an application for a postponement is a matter which is in the discretion of the Court but the discretion should be judicially exercised. Plaintiff got to know of the intention to apply for a postponement on the 13th of November and found it possible to come prepared to Court to oppose the application. I can see no reason why the defendant could not have given proper notice of her intended application and produced evidence in the proper manner to support the application. In the exceptional circumstances which existed in Hanson, Tomkin and Finkelstein's case,* supra*, I can agree that a doctor's certificate can be handed in from the Bar but where there is time enough to prove such a certificate in the correct manner it should be done and the certificate cannot be accepted from the Bar. The result is, therefore, that there is no proper proof of ill-health to justify a postponement.*"

In the case of Hanson, Tomkin and Finkelstein the defendant only became aware on a Friday preceding the trial the following Tuesday of the ill-health of its principal witness. An affidavit by a medical practitioner was tendered in support of an application for a postponement. Plaintiff objected to the affidavit being put in, contending that a formal application on notice should have been

made for a postponement or that the medical practitioner should have been called to testify. Caney AJ stated in this regard that *"generally an application for a postponement should be made in proper form in accordance with the Rules governing the making of applications*" but that the circumstances were such that a postponement should be granted.

In my view this matter falls squarely within the principles enunciated in Joshua v Joshua *supra*. Appellant had ample time within which to prepare a formal application for a postponement, fully supported by duly attested and authenticated medical certificates. According to the correspondence Burmeister was in regular telephonic contact with appellant and it would have been a very simple matter for such an application to have been prepared. No exceptional circumstances existed such as to justify condonation of appellant's failure to follow the proper procedure. There are also, in my view, very valid reasons for requiring compliance therewith. In Hanson, Tomkin and Finkelstein, *supra*, at 773 F-G, Caney AJ referred with approval to counsel's submissions as to the consequences of the making of an informal application (albeit not an application for a postponement) from the Bar, namely:

> "*(T)hat* ex parte *statements are made and correspondence referred to by counsel who may not be* ad litem *on the facts, nor fully instructed, with the result that the Court is inaccurately informed. It might be added that it leaves room for an unscrupulous litigant to give instructions which he could not honestly depone on oath, and so advance his interests under the cloak of his counsel who, accepting those instructions at their face value, informs the Court of the facts from the Bar."*

Having regard to the aforementioned principles I am of the view that the magistrate erred in admitting the medical certificates into evidence and in not refusing a postponement on the basis of appellant's failure to adduce proper

proof of ill-health such as to justify a postponement.

In the event that I may be wrong in my view as to the admissibility of the medical certificates I turn to deal with the issue as to whether or not the magistrate correctly exercised his discretion to refuse a postponement on the basis of the averments contained in such certificates.
In National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) the following was stated at para 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.*"

See too: Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NmSC).

I have set out above the magistrate's reasons for refusing the postponement. Although these reasons are not a model of clarity it appears therefrom that the magistrate was not satisfied that the appellant was unable to travel to South Africa. He was of the view that appellant should attend Court and that if it then transpired that he was unable to testify because of illness a postponement could in that event be granted.

The magistrate had before him, not only the medical certificates but also certain *viva voce* evidence which was adduced on behalf of respondent, such evidence being that of a neurosurgeon, Dr. Keeley, and an attorney, Mr. Gordon.

It is common cause that appellant suffered some sort of illness during August 2002. As is apparent from Burmeister's letter of 16 January 2004 (Annexure A28) appellant had allegedly undergone brain surgery in Portugal at that time. This, however, was refuted by Mr. Gordon who testified on behalf of respondent but who had been acting as appellant's attorney during September 2002. He stated that on 20 September 2002 appellant, in the company of Burmeister, came to consult with him in his office in Johannesburg. They told him that they had travelled from Port Elizabeth that morning. Gordon had heard that appellant had suffered a stroke and he accordingly extended his sympathy to him but appellant dismissed what had happened to him as "*being nothing*." Appellant had a full head of hair and there were no marks on his head suggesting that he had undergone an operation thereto. In the course of his cross-examination of Gordon, Burmeister stated that "*I cannot recall specifically the conversation in the boardroom at your office, relating to the stroke as I said*." In his address to the magistrate at the conclusion of the evidence Burmeister said:

> "*This question of the operation: I think we are dealing with the matter of words there. The word 'operation' has been bandied around, but if we look at the reports, then you will actually see that it was not so much an operation, but it was more a procedure. It was a medical procedure…it was not an operation as such. If I understood it as an operation, then it appears that I was incorrect, but that is what it seems to be, from the evidence before us.*"

I pause to mention that it was, of course, Burmeister himself who had

"*bandied about*" the words "*operation*" and "*brain surgery*". His casual dismissal of the issue as a matter of mere semantics was accordingly disingenuous in the extreme. It can be accepted, however, that appellant did not undergo any form of brain surgery, whatever the true nature of his medical complaint during August 2002 may have been.

Gordon testified further that since appellant's illness in August 2002 appellant had, to his knowledge, travelled to Scotland and then to South Africa before returning to Scotland from whence he had travelled to Brazil. This evidence, which was not challenged under cross-examination, is of considerable importance as will appear hereunder.

I turn then to deal with the respective medical certificates in their chronological order.

The first such certificate is that of Dr. Guimaraes of the Institute of Neurology of Guiania. It should be remembered that this certificate, dated 28 September 2003, had been furnished by Burmeister to respondent in support of his request for a postponement of the trial which had been set down for 13 and 14 October 2003. The certificate states as follows:

> "*I hereby certify that BARON CAMILO OF FULWOOD is under my clinical care for the treatment of an aneurismatic formation in the segment of the M1 (CID 16.7). As a consequence of the above mentioned, he is in a state of anxiety and depression. For the next 60 days I am advising that he refrain from any stressful activity, including travelling, as that may cause cerebral bleeding.*"

It appears from the original certificate in the Portuguese language that the reference to "*CID 16.7*" has been incorrectly transcribed. It should in fact be a reference to "*CID 167.1*".

The following certificate prepared by Dr. Sharon Hoyes of Florida, United States of America, is dated 13 October 2003. The certificate states as follows:

> "*The abovementioned individual, a long time patient of mine, has asked me to write a letter regarding his present medical condition. After suffering a severe bout of headaches, he underwent a cerebral angiogram, which showed an aneurism. He is tentatively scheduled to undergo a definitive procedure in the upcoming few months, which will take place in South America. At present he is taking Effexor XR, a medication to reduce anxiety and tension in hopes of optimising the outcome of this procedure. He also is taking an analog of Meclizine, a weak antihistamine to reduce the dizziness associated with his condition.*"

As was submitted by Mr. Paterson this certificate does not assist appellant at all. Nowhere does Dr. Hoyes state that she herself examined the appellant and, if appellant had in fact been in Brazil on 28 September 2003 when examined by Dr. Guimaraes, then he would have had to travel to Florida shortly thereafter in order to consult with Dr. Hoyes. In such event he would clearly have been able to travel to South Africa. Mr. Paterson accepted, however, that appellant in all probability remained in Brazil. Mr. Beyleveld did not contend to the contrary. That being so, it is clear that the contents of the certificate of Dr. Hoyes amount to no more than hearsay and are accordingly inadmissible. In the circumstances no further regard need be had thereto.

The next certificate is that of Dr. da Velga Lobo, of the Institute of Guiania. The certificate is dated 17 October 2003 and reads as follows:

> "*I hereby certify that BARON CAMILO OF FULWOOD has an*

aneurismatic formation in the segment of the MIL (CID 167.1) diagnosed by an angiographic digital surgery in Portugal, in the year 2002. Currently the patient shows memory lapses, transitory amnesia, drowsiness (somnolence) and frequent insomnia. Under these conditions he should remain in reasonable rest until such time as the suitable treatment is complete."

The following certificate is that prepared by Dr. Correa on 8 December 2003. The certificate reads as follows:

"*I hereby certify that BARON CAMILO OF FULWOOD has been taking special medicines and must avoid stressing situations as well as long journeys up to March, 2004. CID 167.1*."

The final certificate is that of Dr. Susanie Rigatto of the Multimed Clinica, Guiania, Brazil. The certificate, which is dated 21 January 2004, reads as follows:

"*This is to certify that Baron Camilo of Fulwood is under neurological care and is presently using the following medication: Efexor XR 150 mg and Zetron, such medications present several side effects at congenitive level, such as: loss of memory, thinking co-ordination and reflexes. For the best improvement of this diagnosis it is necessary that the patient avoids stressful situations, physical fatigue such as long journeys and others. Aforementioned patient has frequent lapses of memory and should be under rest for indefinite time. CID (International Code of Disease) 167-1. He has been diagnosed with a Cerebral Aneurysm (sic) and should be under constant neurological evaluation.*"

Dr. Keeley, the aforementioned neurosurgeon who testified on behalf of

respondent, was requested to furnish his opinion on the contents of the various medical certificates and, in particular, those prepared by Dr. Guimaraes and Dr. da Velga Lobo wherein mention was made of appellant's "*aneurismatic formation in the segment of the M1.*" It is clear, and Dr. Keeley conceded as much, that he was at somewhat of a disadvantage inasmuch as he had not had the benefit of personally examining the appellant.

In summary, his evidence was to the effect that an aneurism is a defect in the wall of an artery in which the inner lining of the artery forms a balloon or bulb much like a blow-out in a tyre. This is a life-threatening condition for which surgery is the requisite treatment. Surgical treatment would cure the defect and no further treatment would be required thereafter unless the patient had been left with a serious post-operative neurological deficit with paralysis, weakness or something of that nature. Were that not the case the patient would be a "*perfectly healthy man*." According to Dr. Keeley rest is not the treatment for an aneurism and there is in fact no medication for an aneurism which has not been operated on.

With specific reference to appellant Dr. Keeley stated that the "*segment of the M1*" mentioned in the report of Dr Guimaraes and Dr. da Velga Lobo was a reference to "*the first division of the middle cerebral artery*" and was a technical term explaining the situation of the aneurism within the cerebral vasculature. The further reference therein to "*CID 167.1*" was to an international code relating to depression and stress. Dr. Keeley stated that although the certificate of Dr. de Velga Lobo referred to "*angiographic digital surgery*" the word "*surgery*" was incorrectly used and what was probably intended was a reference to "*digital angiography*" which was a non-invasive investigative procedure more commonly known as a MRI scan.

Dealing with the certificate of Dr. Guimaraes, Dr. Keeley conceded that stressful activity might cause cerebral bleeding but stated that such stress

would to some extent be negated by giving appellant "*calming medication*."

According to Dr. Keeley the medication referred to by Dr. Rigatto in particular, namely Efexor XR and Zetron, was prescribed for depression and anxiety and general anxiety disorders. Its side-effects were indeed as described as Dr. Rigatto in her certificate and it was this medication and not any aneurism which in his opinion was causing appellant's alleged memory lapses. The medication was entirely unrelated to the aneurism and if appellant were to be weaned off it over a period of a week to 10 days, the side-effects would disappear. In all the circumstances Dr. Keeley was of the opinion that there was no reason for appellant not to be able to travel to South Africa in order to testify.

Mr. Paterson also advanced certain other criticisms in respect of the certificates.

The certificate of Dr. Guimaraes, dated 28 September 2003, advised against travelling for "*the next 60 days.*" That period would have expired by the end of November 2003 and the certificate is accordingly of no relevance to the proceedings of 27 January 2004. The certificate of Dr. da Velga Lobo, dated 17 October 2003 advised that appellant "*should remain in reasonable rest until such time as the suitable treatment is complete*." What such suitable treatment might be the certificate does not say. It is also not apparent therefrom whether or not a longer period of rest than the 60 days referred to by Dr. Guimaraes was envisaged. There is no indication at all as to when such treatment would be completed and, in particular, as to whether such treatment would, as at 27 January 2004, still be ongoing. The certificate is entirely unhelpful in this regard.

The certificate of Dr. Correa not only does not state that he examined appellant personally but it also does not indicate what "*special medicines*"

appellant had been taking nor why it was necessary for him to avoid long journeys up to March 2004 but not thereafter. The reference to "*CID 167.*1", however, would appear to be some indication that Dr. Correa was referring in this regard to appellant's depression and anxiety, which, as noted by Dr. Keeley, is unrelated to the aneurism.

The certificate of Dr. Rigatto is similarly unhelpful. It appears therefrom that the recommendation that appellant not undertake long journeys was made in order to enable appellant to cope better with the side-effects of the anti-depression medication and is not related in any way to the aneurism.

These certificates must also be seen in the light of Gordon's evidence. It is apparent therefrom that within a month of the diagnosis of appellant's "*aneurismatic formation*" he was travelling extensively to South Africa, Scotland and Brazil. No explanation whatsoever was forthcoming either from appellant himself or a medical practitioner as to why he was then able to travel with no apparent ill effects whereas, a year later, he was unable to do so.

In Isaacs and Others v the University of Western Cape 1974 (2) SA 409 (C) the following was stated at 411 H:

> "*It is clear that an appellant who seeks a postponement must satisfy the Court that it should grant him such indulgence. Despite this fact a Court will be slow to refuse a postponement because of the consequences which may ensue. However, a party who seeks this form of relief should fully explain the true reason for his non-preparedness.*"

In the present matter appellant has, in my view, failed abysmally to explain to the Court the true nature of his alleged illness; the treatment therefor; the

prognosis in respect thereof; and the time by which he expects to be in a condition such as to enable him to travel to South Africa.

The general rule is that, unless there is serious prejudice to a plaintiff which cannot be cured by an award of wasted costs, a matter will be postponed. Mr. Beyleveld submitted in this regard that any prejudice suffered by respondent would be cured by an award of attorney and own client costs. There are, of course, exceptions to the general rule.

In Kentridge v Coastal Finance Co (Pty) Ltd 1960 (2) SA 40 (D&CLD) Milne AJP stated at 42 G-H:

> "*It seems to me, then, that notwithstanding that the applicant can suffer no prejudice in this case beyond the delay in actually obtaining the payment of his claim and such prejudice as may result from the fact that three more months will separate the time between the trial and the events to which the witnesses will testify, this is a case in which the applicant has not shown sufficient grounds why the Court should exercise its discretion in his favour.*"

In my view this dictum is entirely apposite to the present matter.

See too: Vollenhoven v Hoenson & Mills 1970 (2) SA 368 (C) where the following was stated at 373 B:

> "*It is in the public interest that litigation should be disposed of as speedily as possible. There is such a thing as the tyranny of litigation, and in many cases it cannot be said that the mere offer of paying wasted costs would adequately compensate a respondent for any inconvenience suffered as a result of the granting of a postponement.*"

I am furthermore not persuaded by Mr. Beyleveld's submission made with reference to Myburgh Transport *supra* at 315 H-I that, despite the manifold defects in the application, justice nevertheless demanded that a postponement be granted. In my view justice demanded rather that the application for a postponement be refused.

In my view therefore, the magistrate was in all the circumstances correct in his view that the facts did not establish that appellant was unable to travel to South Africa. He therefore exercised his discretion correctly and judicially in refusing the application for a postponement and in thereafter granting judgment by default against appellant.

Accordingly the appeal is dismissed with costs.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

I agree,

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C. PLASKET
JUDGE OF THE HIGH COURT