REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO:2009/2747

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) ✓ REVISED.

10/9/12
DATE

SIGNATURE

In the matter between:

Venter, Corina Jana Gerda **Plaintiff**

and

Haupfleisch Inc. **Defendant**

J U D G M E N T

VALLY J

Introduction

1. In this matter after having regard to the papers in the court file and after hearing submissions from the parties I delivered a judgment *ex tempore* and granted the order that is recorded at the end of this written judgment. This is that judgment in amplified form.

2. This is an application for postponement brought by the defendant. The defendant not only seeks an order postponing the matter *sine die* but also seeks a costs order against the plaintiff. It is the defendant's case that the matter is not ripe for hearing and the plaintiff is the cause of the matter appearing on the roll even though it cannot be heard at this stage.

Background

3. The defendant is a firm of attorneys practising within the jurisdiction of this Court. The plaintiff alleges that she concluded a written agreement with a company operating under the name and style of Upbeatprops 158 (Pty) Ltd ("Upbeatprops"). The agreement concerned the purchase of residential property from Upbeatprops by the plaintiff. The residential property was in the process of being built by Upbeatprops at the time of the conclusion of the agreement. The plaintiff acted personally and Upbeatprops was represented by a Mr Pierre Cilliers Hauptfleish ("Hauptfleish") when the agreement was entered into between the plaintiff and Upbeatprops. Hauptfleish is a practising attorney and as such is an officer of this Court. He is also a director of the defendant. He is described in the particulars of claim as being "the controlling mind and principal member of the defendant." Upbeatprops appointed the defendant as the conveyancer that would attend to all the necessary legal formalities to ensure that the terms of the agreement would be implemented and that, eventually, the ownership of the residential

property would be transferred from Upbeatprops to the plaintiff. Hence, apart from being the agent of Upbeatprops as seller of the property, Hauptfleish accepted, on behalf of the defendant, that it performs the duties of a duly appointed conveyancer. In other words, Hauptfleish acted as agent for the seller and as agent for the appointed conveyancing attorney.

4. A further oral contract was concluded between the defendant represented by Hauptfleish and the plaintiff in terms of which the plaintiff would pay the full purchase price of the residential property into the trust account of the defendant who would, in turn, make progress payments to Upbeatprops with each payment being determined by the stage at which the building work was completed by Upbeatprops. It is common cause that Upbeatprops has failed to complete the building work. It is the plaintiff's case that the defendant paid to Upbeatprops an amount that was not due to Upbeatprops. The defendant, as per an affidavit filed on its behalf by Hauptfleish, contends that the agreement between Hauptfleish and the plaintiff was that upon receipt of the full purchase price from the plaintiff, the defendant would hand over the amount received to Upbeatprops.

5. Those are the brief facts of the merits of the case. They are only relevant insofar as they provide background to the application for postponement.

6. The important facts for the present purposes relate, however, to the way the legal process unfolded since summons was delivered in the case. These facts really concern the dates of the various steps in the legal process. The facts, which are common cause, are:

6.1. Summons was served on 23 February 2008. A notice of intention to defend the action was timeously filed by the defendant. An application for summary judgment was brought and an affidavit resisting summary judgment, deposed to by Hauptfleish, was filed on 21 July 2009. The defendant was granted leave to defend the action.

6.2. The plea was served on 22 September 2009. The matter was set down for trial on 17 October 2010. On that day the matter was postponed *sine die* and the plaintiff was ordered to pay the costs of the postponement.

6.3. The matter was set down for trial, once again, on 3 October 2011. On that day the matter was removed from the roll and the plaintiff was ordered to pay the costs.

6.4. An amended particulars of claim was filed on 26 October 2011. The plaintiff's discovery affidavit was filed on 2 December 2011. The defendant's discovery affidavit was filed on 20 August 2010.

6.5. In terms of Rule 37(4) of the Uniform Rules of Court ("the Rules") the plaintiff, on 30 May 2012, presented the defendant with a list of admissions she sought from the defendant. The pre-trial conference was held on 20 July 2012, but the minute was signed on 27 July 2012.

6.6. The plaintiff served a notice in terms of rule 36(10) of the Rules on the defendant on 1 August 2012. The plaintiff's attorney sent three letters to the defendant's attorney indicating that the plaintiff was ready for trial and that the plaintiff's attorney and counsel would be travelling from Port Elizabeth. The plaintiff served a notice in terms of rule 36(9)(a) and (b) of the Rules on the defendant on 22 August 2012.

6.7. The matter was called at the trial court roll on 7 September 2012.

7. Those are the basic procedural facts. They are dealt with in greater detail below.

<u>The application for postponement</u>

8. The defendant contends that there is only one fact that is relevant for purposes of the application for postponement, namely, that the plaintiff only filed its Rule 36(9)(a) and 36(9)(b) notice on 22 August 2012. This

was twelve (12) days before trial. In terms of the provisions of Rule 36(9)(a) it was incumbent upon the plaintiff to serve the expert notice at least fifteen (15) days before trial. The defendant submits that since the notice was three (3) days short of the time period that is required by Rule 36(9)(a), the matter ought to be postponed *sine die,* and the plaintiff should be ordered to pay the wasted costs. It is the defendant's claim that should the matter be allowed to proceed, it would suffer irreparable prejudice.

9. As mentioned earlier, on 30 May 2012 the plaintiff acting in terms of Rule 37(4) furnished the defendant with a list of admissions she required from the defendant ("the Rule 37(4) list"). The defendant ignored the list. The defendant also did not furnish its own list to the plaintiff requiring the plaintiff to make certain admissions. The parties held a pre-trial conference on 20 July 2012 where the defendant was represented by its counsel, Mr Combrink. The plaintiff was represented by her correspondent attorney. At this conference, the plaintiff's correspondent attorney specifically asked Mr Combrink when the defendant intended to respond to the Rule 37(4) list. Mr Combrink indicated that he would respond by 3 August 2012. Mr Combrink failed to meet this promise. By the time the matter was called at the roll call on 7 September 2012, the defendant's response to the plaintiff's Rule 37(4) list was still not furnished. The position remained unchanged on 10 September 2012 when the hearing commenced. Despite this shortcoming, the defendant insisted that the matter would have been

ripe for hearing, but for the fact that the plaintiff's Rule 36(9)(a) notice was short-served by a period of three (3) days. When Mr Combrink was asked why the Rule 37(4) list was ignored and why his promise, given at the pre-trial conference, to respond thereto by 3 August 2012 was not kept, he merely stated that he could furnish the response within a day or two. This answer, unfortunately, is no explanation for the defendant's and Mr Combrink's failings. It needs be said that once counsel gives an undertaking to do something at a pre-trial conference it is the duty of that counsel to ensure that that undertaking is abided by. It is unacceptable for counsel to attend a pre-trial conference unprepared and to further give an undertaking which is not respected. To give such an undertaking and to not respect it thereafter demonstrates disregard for the provisions of Rule 37, is an unwarranted discourtesy to the opposing party and its legal representatives and is disrespectful of the Court that is called upon to hear and determine the case. Counsel should make every reasonable effort to assist the Court in identifying and narrowing the issues before Court. Furnishing a response to a Rule 37(4) list after promising to do so is an essential component of that duty.

10. The attorneys also bear a duty to respond to the Rule 37(4) list. It also bears reminding that the defendant in this matter is a firm of attorneys and the main protagonist involved in the case is a practising attorney who, by virtue of holding that office, is an officer of this Court. Unlike an ordinary litigant he ought to be aware of the importance of the Rule

37(4) list. After all, the objective of Rule 37(4) is, amongst others, to ensure that the litigation between the parties is conducted in an orderly and focused manner, and that it is concluded as soon as possible.

11. In the present case it does not go unnoticed that while the defendant adopt a lackadaisical approach to furnishing its response to the plaintiff's' Rule 37(4) list, it seeks to take full advantage of the plaintiff's failure to strictly comply with the provisions of Rule 36(9)(a) by hinging its application for postponement entirely on this failure and by concomitantly seeking a cost order against the plaintiff for her failing. Such a lack of consistency on the part of the defendant regarding compliance with the Rules is cause for concern.

12. As the defendant failed to furnish its response to the Rule 37(4) list, the pre-trial conference that was held failed to achieve its purpose. Rule 37(4), it should be remembered, is but one aspect of the pre-trial conference. The failure of the defendant to respond to the plaintiff's Rule 37(4) list resulted in the parties not being able to take the necessary steps to bring the litigation to a close.

13. The defendant must have known that absent its response, the plaintiff would have to accept that it has refused to make any admissions and she would be left with the duty to prove each and every fact not admitted in the defendant's plea. The danger of this stance, which would result in the Court of having to hear evidence on almost every

facet of the case, and thus placing an undue burden on the Court, seems not to have borne any weight with the defendant.

14. The importance of Rule 37 for the finalisation of the matter cannot be overstated. It "*was introduced to shorten the length of trials, to facilitate settlement between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise.*"[1] The admissions sought by the delivery of a Rule 37(4) list by the parties to each other is what makes the operation of the Rule 37 conference meaningful. It is imperative that the parties deliver this list to each other ten days before the pre-trial conference is held – the Rule is couched in peremptory terms:

> "(4) Each party shall, not later than 10 days prior to the pre-trial conference furnish every other party with a list of-
> (a) the admissions which he requires;
> (b) the enquiries which he will direct and which are not included in the particulars for trial; and
> (c) other matters regarding preparation for trial which he will raise for discussion." (emphasis added).

15. The importance of the Rule is underscored by Practice Directive 6.12, which provides, *inter alia* that:

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[1] *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another* 2010 (4) SA 122 (SCA) at [6], (footnotes omitted).

"2.2 Parties have a continuous obligation to seek to narrow issues and to comply with the substantive requirements of Rule 37. ..."

16. Despite the failure to comply with the provisions of Rule 37 and with Practice Directive 6.12 the parties were of the view that the matter was ripe for hearing.

17. On 6 August 2012 the plaintiff's correspondent attorney wrote to the defendant's attorney stating:

> "We advise that it was agreed at the pre-trial meeting on 20 July 2012 that your reply to plaintiff's Rule 37(4) notice be filed 3 August 2012.
> You have failed to deliver the said reply as well as the signed pre-trial minute.
> We confirm that the aforementioned will be brought to the attention of the court on the date of hearing of this matter as well as a request by plaintiff for a special costs order against defendant in this regard." (grammatical errors are in the original)

18. The defendant ignored this letter. On 13 August 2012, the plaintiff's attorneys followed it up with another letter, wherein they stated, *inter alia*:

> "2 We have been instructed by our instructing correspondents to advise you that:-
> 2.1 they fully intend on proceeding to trial on the 7th September 2012;
> 2.2 the attorney, counsel and client have made the necessary travel arrangements to attend court on

> the date of trial." (grammatical errors are in the original)

19. Once again, the defendant's attorney ignored this letter. On 22 August 2012 the plaintiff's correspondent attorney sent a third letter to the defendant's attorney. This time the plaintiff's correspondent attorney stated, *inter alia*, that:

> "We confirm that this matter is ready to proceed to trial on 7 September 2012"

20. The contents of these letters demonstrate that the plaintiff refused to let the failure of the defendant to respond to her Rule 37(4) list prevent the finalisation of the litigation. She demonstrated her determination to finalise the matter by ensuring that her legal representatives prepare for the hearing and that they travel from Port Elizabeth for this purpose. She, too, travelled from Port Elizabeth so that the matter could be finalised. Her attorneys categorically informed the defendant's attorneys of this who, in turn, did and said nothing about it.

21. Also on 22 August the plaintiff served the defendant with the Rule 36(9)(a) and (b) notice. The notice reads:

> "... that at the hearing of the above matter, the Plaintiff intends calling Rian du Preez, a Builder to testify as an expert on behalf of the Plaintiff.
>
> ...
>
> ... Mr Rian du Preez will testify as follows:
>
> (a) That he attended to complete the building work at Erf 1459, Byers Park, Ext 74.

(b) That on the date of him starting on site to complete the building work, he found that he floors of the works were not all screeded, no cornices were fixed, no internal sills were supplied and attached and that the roof trusses and beam fittings were not completed.

(c) That the building works as set out in paragraph 4.1.4 of the Agreement between the plaintiff and the Upbeatprops 158 were not completed when he came on site."

22. The provisions of Rule 36(9) read:

"(9) No person shall save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he shall-

(a) not less than fifteen days before the hearing have delivered notice of his intention so to do; and

(b) not less than ten days before trial, have delivered a summary of such expert's opinion and his reasons therefor."

23. There are two time periods referred to in the Rule. The first time period is the period for giving notice of an intention to call an expert witness (Rule 36(9)(a)), which is fifteen days before the hearing. The second time period refers to the notice of the summary of the expert's opinion (Rule 36(9)(b)), which is ten days before the hearing. In the present case, the plaintiff consolidated the (a) and (b) parts of the notice into a single notice. The plaintiff's notice was only sent twelve court days before the hearing, which means that the (a) part of Rule 36(9) – the notice to call an expert witness – was three days short of what is

required, but the notice of the summary of the expert's testimony was only required to be served ten days before the hearing and as the plaintiff had served the notice twelve court days before the hearing, she had fully complied with the provisions of Rule 36(9)(b).

24. Having received the plaintiff's notice the defendant did, and said, nothing, and so the plaintiff was given no indication of the defendant's attitude to the fact that the Rule 36(9)(a) notice was three days short of the time period prescribed in the Rule. More importantly, on 7 September 2012 counsel for both parties appeared in Court at the trial roll call, and informed the presiding judge that the matter was ripe for hearing, and they were both ready to do battle at trial. They also indicated that the hearing would last at least two days. On 7 September 2012 the matter was unfortunately crowded out, which meant that they had to appear on the next court day which was 10 September 2012 as 8 and 9 September 2012 was a weekend. Up to this point the defendant had still not complained, or give any indication of its attitude to the fact that the Rule 36(9)(a) notice – which as we know is merely a notice of an intention to call an expert witness – was delivered three court days short of what is required in terms of the said Rule. On 10 September 2012 when the matter was, once again, called at the trial roll call, the defendant's counsel, Mr Combrink, took the plaintiff's counsel by surprise and indicated to the presiding judge that the defendant intended to apply for the matter to be postponed as it felt prejudiced by the short service of the Rule 36(9)(a) notice. The matter

was accordingly allocated for hearing of the application for postponement.

25. The application for postponement was brought from the bar by Mr Combrink. When asked why was a substantive application on motion with a supporting affidavit not brought, he replied that the defendant would be relying solely on the fact that there was short service of the Rule 36(9)(a) notice, and as this was a common cause fact there was no need for the defendant to bring a substantive application for postponement. In particular, he stated that he specifically advised against bringing a substantive application. When asked to indicate when he realised that the defendant should apply for the matter to be postponed, he replied that it was when he consulted for purposes of preparation for trial. He did not specify the exact date, but indicated that this was well before 7 September 2012, which is when the hearing was to commence. Having presented this fact from the bar, he was then unable to explain why he failed to alert the plaintiff's counsel of his intention to apply for a postponement well before the hearing, and why he misled the presiding judge at the roll call on 7 September 2012 by indicating that the matter was ripe for hearing and that he was ready to proceed with the trial. It is important to note that had he informed the presiding judge on 7 September 2012 that the defendant would be applying for the matter to be postponed, the matter may well have been dealt with on that day, but as he indicated that the trial would proceed and that it would last at least two days the matter got crowded out as it

was necessary to find a judge who was available for at least two days. Furthermore, apart from misleading the presiding judge at the trial roll call Mr Combrink misled the plaintiff's counsel into believing that the trial would commence as soon as a judge was available for at least two days. This resulted in the plaintiff, who had travelled from Port Elizabeth, to have to wait until 10 September 2012 for the matter to proceed. All of this could have been avoided by simply showing some courtesy to the plaintiff's counsel. Unfortunate as this may be, it is, nevertheless, necessary to consider the merits of the application for postponement.

26. Mr Combrink submitted that the late delivery of the Rule 36(9)(a) notice caused the defendant such prejudice that it could only be remedied by the matter being postponed, and that as the cause of the postponement was the late delivery of the notice, the plaintiff should be mulcted with a costs order. He claimed that as a result of the receipt of the notice, the defendant would now have to call its own expert witness and that the defendant intended to call an experienced architect, as an expert witness, whose testimony would be directed at meeting the expert testimony to be presented by the plaintiff. When asked why this fact was presented from the bar when it should have been presented in an affidavit and given to the plaintiff so that the plaintiff could respond to the averment, he said that it was as a result of the advice he had given to the defendant that it should not be presented in an affidavit. Mr Combrink was also not able to provide any details as to what steps the

defendant took between 22 August and 7 September 2012 to secure the testimony of the necessary expert in order to meet the case the plaintiff intended to present.

27. The principles applicable to an application for a postponement have been succinctly captured by Mahomed AJA (as he then was) in the following terms:

> "5 A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case.
>
> 6 An application for postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. ... Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for postponement, even if the application was not timeously made.
>
> 7 An application for postponement must always be *bona fide* and not used as a tactical manoeuvre for the purposes of obtaining an advantage to which the applicant is not legitimately entitled.
>
> 8 Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the Court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be

compensated by an appropriate order of costs or any other ancillary mechanisms.

9 The court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not." [2]

28. It is clear from the submission of Mr Combrink that the real complaint of the defendant is against the Rule 36(9)(b) part of the notice and not the 36(9)(a) part of the notice. It is the nature of the evidence that the plaintiff intends to call that is the cause of the defendant's anxiety about proceeding with the hearing without being able to tender its own expert testimony in rebuttal of that presented by the plaintiff. Thus, while the defendant complains about the Rule 36(9)(a) notice being short served, it is actually the Rule 36(9)(b) notice that it is most concerned about. As the two notices have been consolidated into one the defendant is able to camouflage its complaint against the Rule 36(9)(b) notice by taking offence against the Rule 36(9)(a) notice. Thus, while it is true that the plaintiff has failed to comply in strict terms with the time period set out in Rule 36(9)(a), however, as the 36(9)(a) notice is not as significant as the 36(9)(b) notice, it cannot be said that the defendant "*has shown good and strong reasons*"[3] for the matter to be postponed. The defendant has not furnished a complete and satisfactory reason for the application, something it would have done had it brought a substantive application on motion with a supporting affidavit, which would have

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[2] *Myburgh Transport v Botha t/a S A Truck Bodies* 1991 (3) SA 310 (NmSC)at 315B-G (footnotes omitted)

[3] *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 (3) SA 482 (SCA) at 494D

dealt in detail with the prejudice it would suffer if the expert evidence of the plaintiff was accepted in the absence of it being given an opportunity to appropriately rebut that evidence. It would also have indicated why it chose not to present any expert testimony until it was served with the plaintiff's Rule 36(9)(a) and (b) notice. After all, given the disputed issues between the parties the defendant ought to have considered the need for it to present expert testimony independent of the plaintiff's decision to the testimony of an expert.

29. It bears mentioning that had the defendant responded timeously to the plaintiff's Rule 37(4) list, the Rule 36(9)(a) and (b) notices may have been rendered unnecessary. So, while the plaintiff served her Rule 36(9)(a) notice three days short of that required in terms of the provisions thereof, this fact cannot be considered independently of the defendant's failure to respond to her Rule 37(4) list.

30. Thus, the facts of this case demonstrate that:

30.1. the defendant did not bring its application for postponement timeously;

30.2. notwithstanding the short service of the Rule 36(9)(a) notice, the defendant has not at all explained the reason for its lack of preparedness; and,

30.3. the defendant has not shown that the prejudice it will suffer should the application for postponement be refused is greater than the prejudice the plaintiff would suffer should the application be granted.

31. Ordinarily, the application for postponement should be refused. However, in terms of Rule 36(9)(a) and (b) , the plaintiff is not entitled to call her intended expert witness without the leave of the court or the consent of the defendant unless she had complied with the time periods prescribed therein. As she has not complied with the time period prescribed in Rule 36(9)(a) she requires the leave of the court or the consent of the defendant. The defendant has not only refused its consent, but has made it unambiguously clear that it will resist, in the strongest terms possible, any application by the plaintiff to the court for leave to have the expert testimony admitted. As at the time of the hearing on 10 September 2012 the plaintiff had not yet sought the leave of the court to have the evidence admitted. The reason for this is that until the morning of 10 September 2012 the plaintiff was unaware that the defendant intended to take object to the short service of her Rule 36(9)(a) notice. Alert to the fact that the plaintiff had an opportunity to seek the leave of the trial court to have her expert testimony admitted despite her failure to comply with the time period prescribed in Rule 36(9)(a), counsel for the plaintiff, Mr Pretorius, asked for the defendant's application for postponement to be denied and for this issue to be left to the discretion of the trial court. This

approach is unappealing for the simple reason that it essentially means that two different judges would be dealing in succession with the same issue between the same parties. This constitutes an unjustifiable waste of judicial resources. Thus, as the defendant insists that this issue would not go away even if the application for postponement was denied, there is little point in refusing the application.

32. There is another reason why the granting the application for postponement would be appropriate: the parties have failed to comply with the provisions of Rule 37. Their pre-trial conference was a sham: they merely went through the motions in order to ensure that they secure an allocation for hearing by the presiding judge at the trial roll call. If this matter is not postponed, the trial court would be faced with the unenviable task of having to hear evidence on each and every facet of the parties' respective cases as the parties have not made any attempt to identify the factual disputes, or narrow issues between them. While the plaintiff is not wholly absolved for this state of affairs I, nevertheless, hold that the defendant must shoulder the large majority of the blame: if it had responded to the plaintiff's Rule 37(4) list which was served on it long before the pre-trial conference was held, and further, if it had kept its promise to respond thereto before the trial date, substantial progress would have been made in narrowing the factual disputes between them resulting in the saving of valuable judicial resources.

33. This now leaves the issue of costs.

Costs

34. To determine what an appropriate cost order should be in this case it is worth recalling that the defendant:

34.1. failed to respond to the plaintiff's Rule 37(4) list even though it received this list long before the pre-trial conference. Further, it bears remembering that its counsel, Mr Combrink, failed to live up to his undertaking to the plaintiff that the response would be furnished by 3 August 2012;

34.2. failed to furnish any explanation for not responding to the Rule 37(4) list;

34.3. failed to respond to the letters of the plaintiff where the plaintiff specifically informs it of its duty to respond to her Rule 37(4) list, and that she and her legal representatives would be travelling from Port Elizabeth for purposes of the trial;

34.4. ambushed the plaintiff by only raising its objection to the fact that the Rule 36(9)(a) notice was delivered three days short of what is required by the provisions of the said Rule on 10 September 2012;

34.5. cannot, and did not, object to the Rule 36(9)(b) notice, yet it is this notice that is the real cause of its anxiety about the trial proceeding;

34.6. failed to bring the application for postponement timeously;

34.7. brought the application for postponement from the bar without furnishing the court with any factual material regarding the prejudice it allegedly stands to suffer as a result of the short service of the Rule 36(9)(a) notice; and,

34.8. misled the presiding judge at the trial roll call and the plaintiff on 7 September 2012 by stating that the matter was ripe for hearing and that it was ready to do battle, thus forcing the matter to stand down until 10 September 2012.

35. This conduct certainly calls for censure and warrants a punitive costs order.[4] A punitive cost order is the only measure available to the court to deal with the inappropriate conduct displayed by the defendant in this case.

36. Furthermore, this is a matter where it would be unjust and unfair to require the plaintiff to be out of pocket because of the postponement

[4] See *Koetsier v SA Council of Town and Regional Planners* 1987 (4) SA 735 (W) at 7441987 (4) SA 735 (W) at 744J-745A

when the postponement would have been avoided but for the lack of diligence on the part of the defendant.[5] Hence, she should receive the full compensation the law allows for the inconvenience and expense she is forced to endure as a result of the postponement. Finally, there is no reason why she should await the finalisation of the matter before she recovers her costs. This is especially so when regard is had to the fact that the matter can only be set down for hearing some time in 2013. This is clearly a matter:

> "Where the applicant for a postponement had not made his application timeously, or is otherwise to blame with respect to the procedure which he has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the Court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action."[6]

37. Accordingly, the following order is made:

1 The matter is postponed *sine die*.

2 The defendant is ordered to pay the wasted costs, including the costs of 7 September and 10 September 2012, on an attorney and client scale as well as all expenses and disbursements advanced by the plaintiff relating to the travel of her attorney and

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[5] See *Nel v Waterberg Landbouwers Ko-operatieve Vereeniging* 1946 (AD) 597 at 607; *Swartbooi v Brink* 2006 (1) SA 203 (CC) at [27]
[6] See *Myburgh Transport* (*op cit*) at 315G-I.

counsel from Port Elizabeth and which cost are to be taxed immediately.

3 The defendant is to furnish its response to the plaintiff's Rule 37(4) notice within 10 days of this order.

B Vally J
Judge of the South Gauteng High Court
Johannesburg

Appearances:

For the Plaintiff	:	Adv B Pretorius
Instructed by	:	Jordaan & Wolberg Attorneys
For the Defendant	:	Adv D Combrink
Instructed by	:	Bennett Francis & Maitin Inc
Date of hearing	:	10/9/12
Date of judgment	:	10/9/12