IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **11045/2013**

In the matter between:

N O Plaintiff

and

D O Defendant

Court: Acting Justice JH Loots
Heard: 2 August 2017
Order: 2 August 2017
Reasons Delivered: 3 November 2017 **REPORTABLE**

ORDER

Having read the papers filed of record, and having heard argument on behalf of both the plaintiff and the defendant, I make the following order[1]:

[1] The order included the following pre-amble "In the matters of N. O., that is case number 11045/2013, in the matter of D. O. v Apple Tree Guest House, and that is matter 21628/2014 and then also in the matter of D. O. v N. O. and the Stellenbosch Municipality, that is matter 21629/2014. I just wish to make a correction with regard to the first case. In that matter also Mr D. O. is the defendant. I propose to refer to the parties in all three of these matters as in case number 11045/2013, so for the avoidance of doubt I shall refer to N. O. as the plaintiff and Mr D. O. as the defendant."

(1) The matters are postponed for hearing in the Fourth Division on 7 November 2017 at 10h00 or as soon thereafter as the matters may be heard.

(2) This order is subject to the provision of the requisite certificate from the Registrar's office, which I am advised will be provided by tomorrow, 3 August 2017.

(3) The defendant is to pay the plaintiff's costs in respect of the application for postponement as well as the wasted costs caused by the postponement of the matter, which costs will include the costs of two counsel.

REASONS FOR THE ORDER

[1] On 2 August 2017 I granted the above order postponing the trial in the divorce action between the plaintiff and the defendant (together with the consolidated matters referred to footnote 1 hereto) to 7 November 2017 and ordered that the defendant is to pay the plaintiff's costs in the respect of the postponement, as well as the wasted costs caused by the postponement of the matter, including the costs occasioned by the employment of two counsel. I now give reasons for that order.

POSTPONEMENT

Legal Principles

[2] In *Persadh v General Motors SA (Pty) Ltd 2006 (1) SA 455 (SE)*, at paragraph [13], Plaskett J succinctly set out the applicable legal principles when a party applies for a postponement, as follows:

"The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised[3]; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence[4]; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case[5]; fourthly, the prejudice that the parties may or may not suffer must be considered; and, fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs[6].

3 *Centirugo AG v Firestone (SA) Ltd* 1969 (3) SA 318 (T) at 320E.

4 *Isaacs and Others v University of the Western Cape* 1974 (2) SA 409 (C) at 411H.

5 *Western Bank Ltd v Lester and McLean and Others* 1976 (3) SA 457 (SE) at 460A.

6 *Burger v Kotze and Another* 1970 (4) SA 302 (W) at 305D - G."

Application to the Facts

[3] When the above principles are applied to the application brought by the plaintiff it was clear that the plaintiff had complied with the elements applicable to the successful application for a postponement, and that the defendant was responsible for the necessity of postponing the trial.

[4] On 28 July 2017 the plaintiff launched an application for the postponement of the trial in the divorce action (which, due thereto that they had been consolidated with the divorce action, included the two related actions under case numbers 21628/2014 and 21629/2014).

[5] The application followed the defendant's refusal to agree to a postponement of the trial despite repeated requests by the plaintiff's attorney of record.

[6] The application for postponement was, principally, based on the defendant's late production of approximately 4 000, mostly undiscovered, documents delivered to the offices of the plaintiff's attorney on 18 July 2017 (approximately 1 500 pages), on 21 July 2017 (a further approximately 1 500 pages), and on 26 July 2017 (a further approximately 1 000 pages forming part of the defendant's trial bundle).

[7] According to the founding affidavit, the plaintiff's attorney of record, immediately upon receipt of the first tranche of documents (merely labelled "Defendant's Documents"), set about collating and checking them against the defendant's various discovery affidavits. This led to her ascertaining that the defendant had not discovered many of the documents provided.[2]

[8] Following the process described above the plaintiff's attorney, on 21 July 2017, drafted a letter to the defendant in which she pointed out the difficulties arising from the manner in which the defendant was providing the documents. To this letter she attached schedules showing her attempts to summarise the documents the defendant had belatedly produced. The defendant was asked to advise the plaintiff's attorney of record how he obtained these documents, and if they were obtained by way of subpoena, to provide copies of the subpoenas to her.

[2] In the answering affidavit, where he specifically dealt with these allegations, the defendant did not dispute the effort the plaintiff's attorney had expended, or that the documents had not been discovered, only alleging that the documents delivered were in the same format as delivered to him, and that the plaintiff's attorney ought to have known the difference between discovered documents and documents received under subpoena.

[9] Only on 24 July 2017, in response to a letter the plaintiff's attorney of record had sent to the defendant, requesting an explanation, the defendant replied by stating that he had obtained the documents by way of subpoena; with the documents delivered to the plaintiff's attorneys' offices representing a "full disclosure of what [he] received from the various institutions and persons" subpoenaed. He, however, did not provide copies of the subpoenas.

[10] In the meantime, during the afternoon of 21 July 2017, the defendant had caused the second tranche of the documents referred to above to be delivered to the offices of the plaintiff's attorneys of record. These documents, the plaintiff's attorney states in the founding affidavit, were also not collated and again consisted of mainly undiscovered documents. The defendant's response, in the answering affidavit, to these allegations in the founding affidavit was that:

> "The documents I delivered comprised documentation sent to me by way of Subpoena and as Ms Koen and her staff were advised, the documents I intend to use at the trial were only the documents that would appear in the trial bundles."

[11] On 26 July 2017 the defendant delivered the aforementioned trial bundle comprising 3 lever arch files containing in excess of 1 000 pages. This prompted the plaintiff's attorney of record to enquire as to the provenance of many of the documents included therein, specifically asking whether the documents included in the trial bundle were new documents or whether they had been extracted from the defendant's discovery documents and/or the documents delivered to the offices of the plaintiff's attorneys of record on 18 and 21 July 2017. The response to this enquiry was that the defendant's trial

bundle included no new documents and that the plaintiff could ignore those documents the defendant had received by way of subpoena not included the trial bundle as they were irrelevant to the defendant.

[12] Of the seven subpoenas sued out by the defendant between April and May 2017 the plaintiff, by virtue thereof that the witnesses involved had contacted the plaintiff's attorneys of record upon receipt of these subpoenas, had notice of only two. The further subpoenas were only "provided" upon receipt of the defendant's answering affidavit in the application for postponement on 1 August 2017, or during the course of argument on 2 August 2017.

[13] As appears from the context above, the defendant opposed the plaintiff's application for postponement. In support of his opposition the defendant filed a 63 page affidavit, excluding the annexures thereto. Despite this, and the many accusations the defendant levelled against the plaintiff in the body of the answering affidavit, the opposition to the application for postponement essentially came down to the defendant alleging:

a. that the plaintiff and her partner, Mr K[…], were overseas at the time of the delivery of the subpoenaed documents, with the result that she would not have considered them prior to her return to South Africa on 26 July 2017;

b. that the documents were the plaintiff's documents and that she could, accordingly, have discovered them;

c. that the documents delivered to the plaintiff's attorney of record within a short period of the defendant having received them; and

d. that the plaintiff, in any event, had sufficient time to prepare (principally because of the history of the litigation, and because thereof that most of the documents with which the defendant had provided the plaintiff were irrelevant).

[14] The first ground of opposition referred to above can be dismissed out of hand. The plaintiff and her partner being abroad when the subpoenaed documents were delivered to the plaintiff's attorneys did not entitle the defendant to decide to not notify the plaintiff's attorneys of their receipt and to not provide them to the plaintiff forthwith. Furthermore, as was evident from the papers filed of record, the plaintiff's legal representatives, immediately upon receipt of the documents from the defendant, attempted to collate and digest them; only requesting that the trial be postponed once this proved to be an impossible task.

[15] So too can the second ground referred to above be rejected. A party is under an obligation to discover those documents that may be relevant to the matter. Should the other party not be satisfied with the discovery made by the party making discovery, Uniform Rules 35 (3), 35 (6), and 35 (7) provide a powerful tool in the arsenal of the party so dissatisfied with the discovery. In ever escalating steps the non-compliant party can be forced to make proper discovery and even see his or her claim dismissed or defence struck out. It is therefore not an answer to say that, because the other party had the documents in their possession or under their control they must be aware

thereof that the documents in question are irrelevant to the issues in dispute. This is especially so where the party dissatisfied with discovery has not availed himself of the provisions of Uniform Rule 35 (3), since the party who had not discovered the documents is thereby led to believe that the documents in question are, also insofar as the other party is concerned, not relevant to the proceedings. In the instant matter the defendant, therefore, at his own risk chose to sue out subpoenas *duces tecum* in circumstances where (on his own version) discovery ought to have been employed should he have wished to both obtain the documents and to alert the defendant thereof that such documents may be relevant to the issues in dispute between them.

[16] The third defence raised in response to the application, at the same time, does not provide an answer to the application for postponement and raises an issue relating to the manner in which many subpoenas *duces tecum* are executed.

[17] Section 35 of the Superior Courts Act, 10 of 2013 authorises the issue of subpoenas, granting the party requiring the attendance of a witness to give evidence, or to produce a document the power, as of right, to do so by suing out from the office of the registrar one or more subpoenas in the form as provided for the Uniform Rules.

[18] Uniform Rule 38 (1) provides that:

> "(a) Any party, desiring the attendance of any person to give evidence at a trial, may as of right, without any prior proceedings whatsoever, sue out from the office of the registrar one or more subpoenas for that purpose, each of which subpoenas shall contain the names of not more than four persons, and service thereof upon any person therein named shall be

effected by the sheriff in the manner prescribed by rule 4, and the process for subpoenaing such witnesses shall be, as nearly as may be, in accordance with Form 16 in the First Schedule.

If any witness has in his possession or control any deed, instrument, writing or thing which the party requiring his attendance desires to be produced in evidence, the subpoena shall specify such documents or thing and require him to produce it to the court at the trial.

(b) Any witness who has been required to produce any deed, document, writing or tape recording at the trial shall hand it over to the registrar as soon as possible, unless the witness claims that the deed, document, writing or tape recording is privileged. Thereafter the parties may inspect such deed, document, writing or tape recording and make copies or transcriptions thereof, after which the witness is entitled to its return." [Emphasis added]

[19] Documents, tape recordings, computer records and other material (hereinafter collectively referred to as "the documents") required in terms of a subpoena *duces tecum* are, therefore, to be deposited with the registrar as soon as the witness is able to do so. The reasons for this are evident. Firstly, many trials would be postponed because the subpoenaed documents are only produced on the first day of trial and, secondly, depositing the documents with the registrar provides a controlled environment where an independent officer of the court holds the documents in order to enable all parties to the litigation, on equal footing, to inspect the documents and make copies or transcriptions of such portions of the documents as they may consider relevant.

[20] The procedure prescribed by Uniform Rule 38 (1) also serves the purpose of obviating the need for the attendance at the trial of a witness who has been subpoenaed merely to produce documents (unless, of course, he or she has to identify the said documents).

[21] A practice, for which the Uniform Rules make no provision, has however developed. In terms of this practice a witness who has been subpoenaed, *duces tecum*, deposits the documents (or copies thereof) with the attorney of record for the party with whom that witness is aligned, or who had sued out the subpoena. The attorney then collates these documents, whereafter the documents, or portions thereof, are forwarded to the other party or parties to the litigation. This is done either by way of discovery, or merely by forwarding the documents to the other party or parties under cover of a letter informing such party or parties thereof that the documents have been obtained from the witness or witnesses by way of subpoena.

[22] The instant matter, where the documents were merely forwarded to the plaintiff's attorney, marked "Defendant's Documents", is a clear example of why the practice described in the immediately preceding paragraph is to be discouraged. Here, coincidentally, the defendant himself (through the offices of his own law firm) also acts as his attorney of record, therefore wearing the hat of client, as well as that of attorney.

[23] Following the issue of subpoenas *duces tecum* on various (mainly institutional) witnesses, already during March, April, and May 2017, the witnesses in question did not deposit the documents with the registrar, as required by Uniform Rule 38 (1) (b), but deposited them with the defendant's law firm. The defendant, despite being placed in possession of the documents did not advise the plaintiff's attorneys of the receipt of the documents, choosing rather to provide the defendant's attorneys with copies of the

approximately 3 000 documents in haphazard tranches, during the week before the commencement of the trial. The defendant then, alleged that:

> "The documents I seek to rely on at court are in the trial bundles. The balance of the documents received by me by way of subpoena were, in my view, without obligation, nevertheless and for the purposes of promoting transparency, delivered by me to Ms Koen's office the rationale for my doing so was to promote transparency and avoid yet another claim for a postponement".

[24] He then sought to argue that, because he had perused the documents and had only included a small portion of the subpoenaed documents in the trial bundle, the plaintiff ought not to have any difficulty preparing for trial.

[25] The aforesaid allegations and argument simultaneously demonstrate:

a. the danger of not following the provisions of Uniform Rule 38 (1) (b) due to one party then being able to act as arbiter of what he or she believes is relevant, before providing the documents to the other party or parties to the litigation;

b. the danger presented by attorneys not appreciating that in circumstances where, despite the provisions of Uniform Rule 38 (1) (b) not having been complied with by virtue of the documents being delivered to them and not the registrar, there is a duty on them to make all the documents so delivered to them available to the other parties to the litigation; and

c. the fact that the defendant failed to appreciate that it is not for him to dictate to the plaintiff which documents she and her legal

representatives are to have regard to out of the plethora of documents the defendant had provided to the plaintiff's attorney of record.

[26] The foregoing, inevitably, leads thereto that the fourth ground relied upon by the defendant in opposition to the plaintiff's application must also fail. I add that, had the defendant pursued his remedies under Uniform Rule 35, the entire issue relating to the trial documentation would have been resolved well in advance of the allocated trial date.

[27] In the premises; the reasons for the plaintiff's inability to proceed were fully explained; the postponement sought was not a delaying tactic; justice demands that the plaintiff be afforded the opportunity to properly prepare for trial; and, therefore, she had shown good cause for the interference with the defendant's procedural right to proceed with the hearing of the matter.

[28] In weighing the prejudice the plaintiff would have suffered had I refused the application for the postponement and forced her to proceed with the trial against the monetary prejudice the defendant alleged he would have suffered should the trial have been be postponed, the balance favoured the plaintiff. In my view the defendant can hardly complain about the postponement where his actions were the cause of the plaintiff being unprepared.

[29] Finally, and in response to a request on behalf of the defendant that I only postpone the divorce action, and allow the associated matters to proceed to trial, it remains my view (besides the fact that the consolidation of the actions

dealt with the defendant's technical contentions in this regard[3]) that a piecemeal determination of actions, which had for apparently good reason been consolidated, would not be in the interest of justice.

COSTS

[30] As was stated in the quotation from *Persadh*, above, the party responsible for the postponement must pay the wasted costs occasioned thereby.

[31] This principle was restated by the Supreme Court of Appeal in *Sublime Technologies (Pty) Ltd v Jonker 2010 (2) SA 522 (SCA)* where, at paragraph [3], Griesel AJA stated:

> "With regard to costs occasioned by a postponement, the general rule is that the party which is responsible for a case not proceeding on the day set down for hearing must ordinarily pay the wasted costs.[2] It is important to bear in mind, however, that a litigant is not necessarily 'responsible' for the case not proceeding merely because he or she applies for a postponement. In certain circumstances, a litigant may be forced to apply for a postponement as a result of the conduct of an opponent, eg through inadequate discovery, a late amendment or any number of other reasons. The 'normal rule' only applies to 'the party who was at fault or in default'. [3]
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> 2. Cilliers Law of Costs (Service Issue 17), para 8.11; Erasmus Superior Court Practice B1-306D - E (Service 28, 33).
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> 3 *Burger v Kotze and Another* 1970 (4) SA 302 (W) at 304F/G.

[32] In paragraph [4] of the judgment in *Sublime Technologies* Griesel AJA continues to state that:

[3] The defendant's counsel had contended that the plaintiff had (as per the notice of motion) only officially sought the postponement of the divorce action, with the result that the other matters could proceed.

"When a trial court is likely to be in a better position than the court hearing the application for postponement, to ascertain the facts and to decide who should be liable for the costs of a postponement, it is a salutary rule that costs should be reserved for later determination.[4]

4 Compare Erasmus loc cit."

[33] I was unconvinced that the trial court will be in a better position to consider who should be liable for the costs of the postponement. The application for postponement consisted of a full set of papers, which clearly set out the facts and the bases of both the application and the opposition thereto. This was followed by nearly a day's argument during which the application was fully ventilated. I see no reason why, in such circumstances, the trial court should be burdened with the rehearing of the application (which a decision on the question of costs in respect of the postponement would necessitate) merely to determine the question of costs in respect thereof.

[34] As is evident from the reasons provided above in respect of the postponement, I am of the view that the defendant was responsible for the plaintiff requiring the postponement of the trial. Furthermore, the plaintiff's attorney of record requested the defendant to agree to the postponement of the matter the moment she realised that they would left with too little time to properly prepare for trial. The defendant, however, simply refused to entertain this request which occasioned the necessity of a formal application for the postponement of the trial.

[35] Not only did the defendant require a formal postponement application, he also chose to file a lengthy affidavit (with annexures comprising approximately 200 pages) in opposition thereto, which was served and filed on the day the trial

was set to commence (Tuesday, 1 August 2017), despite the plaintiff having received the application on 28 July 2017, the previous Friday. As a result thereof that the plaintiff did not have the opportunity to reply to the defendant's answering papers before the first day of trial, the matter had to stand down to the next day.

[36] I therefore see no reason why I should not have ordered the plaintiff to pay the costs of the postponement and the wasted costs occasioned thereby, and no argument advanced enjoined me to do otherwise.

[37] Finally, where the matter warrants the employment of two counsel[4], and shortly before the trial it appears that a postponement is necessary, I see no reason why the costs of the postponement, and the wasted costs occasioned thereby, should not include the costs of two counsel, especially since a postponement is not guaranteed for the party seeking it and almost inevitably leads to a division of focus between the counsel employed in order to provide for the possibility of the trial continuing.

CONCLUSION

[38] In the above-mentioned premises the order of 2 August 2017, as recorded above, was made.

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JH LOOTS

[4] See: AC Cilliers, *The Law of Costs*, LexisNexis, Chapter 13.23, Electronic Edition, updated to September 2017.