

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION,**

**JOHANNESBURG**

**CASE NO.: 09093/13**

- |   |
|---|
| (1) REPORTABLE: <b>YES</b>                  |
| (2) OF INTEREST TO OTHER JUDGES: <b>YES</b> |
| (3) REVISED: <b>NO</b>                      |

**13/10/2022**

**DATE**

**SIGNATURE**

In the matter between:

**LOMBARD INSURANCE COMPANY LIMITED**  
(Registration Number: 1990/001253/06)

Plaintiff

and

**GORDON ANDREW McCRAE**  
(Identity Number: [...])

Defendant

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**JUDGMENT**

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**PULLINGER, AJ**

*(Summary – actions designated “commercial” in terms of the Commercial Court Directive. The procedural steps stipulated in the Directive are couched in peremptory terms. Where parties choose the commercial track they are ordinarily obliged to adhere to the procedure set out in the Directive. Cases designated as commercial cases should be disposed of expeditiously, in accordance with a clear timetable and the procedure stipulated in the Directive (unless a particular provision in the Directive is not applicable)).*

**Introduction**

- [1] This matter came before me from the Commercial Court as a civil trial.
- [2] On 19 November 2020, the learned case management judge certified this matter as trial ready. But the matter was not ripe for trial.
- [3] This judgment is occasioned, therefore, by a postponement application at the behest of the defendant. Succinctly stated, the defendant is not ready to proceed to trial, either on the action as a whole, or on the issue he raises in his special plea.

- [4] The facts giving rise to the postponement application are not contentious.
- [5] On 26 April 2022, the plaintiff's attorneys applied for the allocation of a trial date.
- [6] The trial date of 3 October 2022 was allocated in or during the beginning of May 2022, and a notice of set down was delivered by the plaintiff's attorneys on 5 May 2022.
- [7] At the beginning of July 2022, the defendant appointed Messrs Otto Krause Inc as his attorneys. At the time of their appointment, the defendant provided Otto Krause Inc with such documents as he had in his possession.
- [8] By 18 July 2022, Otto Krause Inc found themselves in the position that they would not be ready to proceed with the trial in this action on 3 October 2022. On that date, a letter was dispatched to the plaintiff's attorneys requesting that the action be postponed for the following reasons:

"5. In short ... we record that it is our understanding that the matter is set down for trial for 4 October 2022, our client for a long period did not have the benefit of legal representation and that our client seeks postponement of the matter for the reasons as are more fully set out hereunder.

6. Our clients [*sic*] position remains at the basis of the suretyship that your client is attempting to enforce against him is for the contractual obligations contained in the surety document itself. This our client contends is incorrect because the correct construct of a suretyship should rather be that any liability of our client under the suretyship should arise from the principal's debtors [*sic*] breach of the contract.

7. In this regard we would appreciate it if you would favourably consider this request for a postponement *sine die* and after careful consideration of the following:
  - 7.1 during the hearing of the matter, a clear distinction was going to be drawn between:
    - 7.1.1 the obligation which arises from the principal debtor's breach of contract, that being the principal obligation that the surety document offers security for; and
    - 7.1.2 the contractual debt itself, i.e. the surety document, which is in fact a secondary legal obligation, and attached to your clients' [*sic*] particulars of claim as "L5".
8. The matter in broad terms therefore clearly relates to a written contract of surety and the remedies available to a surety under such circumstances. In this regard it is trite that the obligation between a creditor and a surety is the same as that of the obligation between the creditor and the principal debtor.
9. It has always been our client's contention that the contractual debt is contrived because of the historic certification that was merely repeated later to complete your clients [*sic*] cause of action. Our client remains steadfast on this point as well as the resulting prescription argument.
10. Moreover, there was never any primary obligation between our respective clients or any performance obligation on our client. Therefore, our clients [*sic*] position remains that any obligation that he may have towards your client is the result of the obligation which arises from the principal debtors [*sic*] alleged breach of the contract, which necessitated the payments by your client as a result of the guarantees that it issued.
11. The furtherance of the matter on 4 October 2022 will consequently be dependant on a proper and full investigation of the principal debtors [*sic*] alleged breach of contract (the primary obligation) and not the secondary contractual debt itself, i.e. the surety document.
12. We respectfully submit that you will agree that if the surety document created a primary obligation, your client would for instance have the right to call on our client to fulfil the contract obligations of the primary debtor by for instance seeking specific performance of its obligations. Obviously, this is not your client's position in that it only seeks enforcement of the secondary obligation, i.e. the suretyship.

13. It is further trite that a surety normally becomes enforceable as soon as the principal debtor is in default. Moreover, *ex facie* the document attached as "L5" to the particulars of claim, it is alleged that our client found himself as co-principal debtor jointly and severally with MDM. Consequently, any liability of our client becomes enforceable at the same time as MDM (the principal debtor) was in default.
14. There have now been numerous matters that commenced in the South Gauteng High Court (Johannesburg) that dealt at length with the questions of the alleged default of MDM in the Loulo Project in Mali. See for instance in this regard:
- 14.1.1 Case Number: 2006 06/3034;
- 14.1.2 Case Number: 2006 06/6507;
- 14.1.3 Case Number: 2008 08/36671;
- 14.1.4 Case Number: 2011 11/45553.
15. None of these matters resulted in the final determination by the court on the date of the alleged default was or even whether MDM was ever in fact in default of its obligations.
16. We therefore respectfully submit that at the very least these cases point to the fact that the court hearing this matter will need to consider all the facts to determine the principal debtor [*sic*] alleged default before it could ultimately decide on the obligation which arises from the principal debtor's breach of contract.
17. We speculate but imagine that this was one of the reasons why your client approached the court for separation of issues and in order to have the prescription issue and the question of default heard separately. The ultimate failure of that application in the finding by Fischer J that " ... a *hearing of the entire factual complex will be beneficial if not necessary for a proper determination of the matter*", supports our client's contention that a "*holistic ventilation*" of all the issues is needed.
18. In the current matter the alleged default of MDM will consequently play a central role in the final determination of the matter. This is going to necessitate but not be limited to the leading of evidence on:
- 18.1 the voluminous Loulo Project in Mali contract;

- 18.2 the certification by J Steel and his whole evidence in that regard;
- 18.3 the conclusion of the repayment agreement and the outcome thereof;
- 18.4 the oral evidence of Watson and his report;
- 18.5 the final L & D accounts of the different companies and the evidence by the liquidators in that regard;
- 18.6 payments made by Somilio and by others to the liquidators ...".

[9] The contentions in this letter form the basis of the defendant's allegations in his application for postponement. I express no opinion on the correctness or otherwise of the legal submissions in Otto Krause Inc's letter, and no submissions in relation thereto were advanced in argument before me.

[10] The approach taken by Otto Krause Inc on behalf of the defendant appears responsible and in accordance with the principles stated in **Myburgh Transport**.<sup>1</sup>

[11] The plaintiff declined the defendant's request on 30 August 2022. A further request that the trial be postponed by agreement was made on 8 September 2022 and, from what I am able to deduce, declined on or about 12 September 2022.

[12] This, very properly, occasioned a substantive application launched by the defendant on 21 September 2022.

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<sup>1</sup> **Myburgh Transport v Botha t/a S A Truck Bodies** 1991 (3) SA 310 (NmS) at 311 B – C/D

[13] The plaintiff opposed the application for postponement on numerous cogent grounds. The most significant of which is that this postponement is the third postponement in the matter, and that the defendant has been absolutely supine in preparing his defence over a very extended period of time.

[14] The argument has merit. The current version of the plea is dated 29 August 2016. The plea is a comprehensive and well-drawn pleading that could only have been prepared with the assistance of the defendant and on his instruction.

[15] For reasons that are opaque, the attorneys of record then acting for the defendant withdrew and new attorneys were appointed at a very late stage.

### **Procedural background**

[16] This action commenced by way of combined summons on 13 March 2013. On 17 April 2013, Messrs Wayne van Niekerk Inc. entered a notice of intention to defend on behalf of the defendant. The plaintiff then applied for summary judgment and the defendant delivered an affidavit opposing such summary relief. As far as I am able to determine, the court granted the defendant leave to defend the action by agreement.

[17] Thereafter, this matter appears to have meandered towards a trial on 19 May 2015. The trial on 19 May 2015 was postponed by agreement because the defendant was not in possession of certain documents, apparently in the

possession of his erstwhile attorney, Wayne van Niekerk, who had by then been struck from the roll of attorneys. Some correspondence was exchanged between Messrs Alexander Montano Attorneys, then acting for the defendant, and the plaintiff's attorneys regarding various documents, before Messrs Schindlers Attorneys were appointed by the defendant, and the trial again postponed so that a substantive amendment could be effected to the plea. As recorded above, the current version of the plea delivered on behalf of the defendant by Schindlers Attorneys was delivered at the end of August 2016.

[18] In 2018, the plaintiff launched an application for a separation of issues in terms of Rule 33(4). The application for separation sought to separate the special plea and the issues in paragraphs 21, 22 and 25 of the defendant's plea from the remainder of the issues in the action.

[19] This application was argued before Fischer J on 31 July 2018. The defendant was unrepresented and opposed the application for separation of issues himself.

[20] On 16 August 2018, the learned judge dismissed the separation application for the reason that:

"[13] It seems to me that a hearing of the entire factual complex will be beneficial if not necessary for a proper determination of the matter. The fact that the claim is based on a hierarchy of obligations which are part of a broader contractual context militates against the granting of the order sought. I am not persuaded that a separation of the issues along the lines proposed by the plaintiff will necessarily be more convenient than a holistic hearing. Nor am I persuaded that a holistic ventilation of all issues will



result on a significantly more protracted determination of the issues. In fact, it seems inevitable that an attempt to try the proposed issues separately will lead to a broader enquiry."

[21] In the hope that the special plea of prescription could, at least, be disposed of, I canvassed with Mr Garvey, for the defendant, the possibility of the trial proceeding solely on the question of prescription raised in the defendant's special plea. At face value, and as pointed out by Mr Daniels SC, for the plaintiff, the formulation of the defendant's special plea is very narrow. *Prima facie*, it requires the interpretation of a series of security agreements. There is no contention that any of the security agreements are not what they purport to be, or in any manner ambiguous.

[22] Mr Garvey, having taken instructions, reiterated his client's position, being that substantial evidence would be required for the special plea to be determined.

[23] I have reservations whether any of the evidence required by the Defendant would be admissible at trial. The law relating to the admissibility of evidence of surrounding circumstances is now settled.<sup>2</sup> Issues of admissibility are determined with regard the relevance of the evidence to the issues on the pleadings<sup>3</sup> for, if they are not relevant to the issues as formulated in the pleadings, the evidence is *ex lege* inadmissible.<sup>4</sup> This is one of the reasons that I decided to reserve the question of costs, and is something to which I shall return shortly.

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<sup>2</sup> **Tshwane City v Blair Atholl Homeowners Association** 2019 (3) SA 398 (SCA) at [63] to [69]

<sup>3</sup> **Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others** 1999 (2) SA 279 (T) at 316 E to 317 B

<sup>4</sup> Section 2 of the Civil Proceedings Evidence Act, 1965

[24] Subsequent to the plaintiff's separation application failing, and on 5 February 2019, the plaintiff applied for the designation of this matter as a "*commercial matter*", and that it be prosecuted in accordance with the Commercial Court Practice Directive of 3 October 2018 ("**the Directive**").

[25] On 22 February 2019, this action was certified as a commercial court case and became subject to the Directive.

### **The Commercial Court Directive**

[26] The relevant portions of the Directive<sup>5</sup> provide:

#### "CHAPTER 3 – THE FIRST CASE MANAGEMENT CONFERENCE

1. As soon as reasonably possible after the Commercial Court case is allocated to a Judge or two Judges, the first Case Management Conference must be held at a time and date determined by the Judge or two Judges allocated to the matter, on application by the plaintiff within 15 (fifteen) days of allocation. If the plaintiff fails to make an application as required any other party may apply for Case Management Conference.
2. At the First Case Management Conference, the following general matters must be canvassed:
  - a) A general sense of what the matter is about;
  - b) What needs to be done to bring the matter to trial;
  - c) A timetable for getting the matter expeditiously to trial;

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<sup>5</sup> I quote the provisions of the Directive as they stood at the time. On 2 June 2022 the Deputy Judge President issued a revised Directive.

- d) A potential trial date;
  - e) The number of witnesses likely to be called, including expert witnesses;
  - f) The probable length of the trial; and
  - g) Creating an appropriate electronic means for communications and exchange and filing of documents.
3. The Judge or the two Judges will then, absent agreement, determine the timetable to bring the matter to trial.

#### CHAPTER 4 – GETTING THE MATTER READY FOR TRIAL

1. Matters heard in the Commercial Court will be dealt with in line with broad principles of fairness, efficiency and cost-effectiveness.
2. The following steps will usually be of application, subject to the requirements of the particular case.
3. The plaintiff, within the period specified by the Judge at the first Case Management Conference, must file a statement of the case containing the following:
- a) The plaintiff's cause(s) of action and relief claimed;
  - b) The essential documents the plaintiff intends to rely on, and
  - c) A summary of the evidence the plaintiff intends to rely on.
4. The defendant, and third parties, if any, within the periods specified by the Judge or Judges at the first Case Management Conference must file a responsive statement of the case containing the following:
- a) The defendant's or third party's defence(s) and any counterclaim relied upon;

- b) The essential documents the defendant or third-party intend(s) to rely on;
  - c) A summary of the evidence the defendant or third-party intend(s) to rely on.
5. Any party against whom a claim is made must similarly file a statement of defence.
6. No request for further particulars may be sought in the Commercial Court.

#### CHAPTER 5 – THE SECOND CASE MANAGEMENT CONFERENCE AND CONSEQUENTIAL STEPS

1. A Second Case Management Conference must be held at which the parties will present either an agreed list of triable issues or, absent agreement, each party's identification of the triable issues. All interlocutory issues will be dealt with at this conference or at any postponed date, including determination of the triable issues.
2. At this conference the dates for filing of full witness statements by the parties will be fixed, it being understood that the witness statements will constitute, save with the leave of the Judge or Judges, the evidence in chief of the particular witness.
3. No general discovery is required in commercial court cases.
4. At a second Case Management Conference, the Judge or Judges may allow for the targeted disclosure of documents. If permitted, a request for disclosure must be made concerning specific documents or classes of documents that are relevant to the dispute as defined in the statement of case or responsive statement of the case. Any enforcement applications relating to disclosure will be determined by the Judge or Judges in good time to permit of orderly preparation for trial.
5. Expert evidence that is sought to be led at trial is to be dealt with as follows:
- a) If the matter involves expert evidence, within the times determined by the Judge or Judges, the experts must:

- b) Convene a meeting of the experts;
  - c) File their expert reports;
  - d) Produce a joint minute setting out the issues of agreement and disagreement as between the experts and the reasons for the disagreement.
  - e) The Judge or Judges may convene a meeting with the experts to narrow the issues to be determined at trial.
6. Should further conferences be required, parties may approach the allocated Judge or Judges to convene a conference upon good cause; the allocated Judge or Judges will determine whether to convene such a conference and dispose of any further matters arising."

[27] It appears that practice directives enjoy the same status as the Uniform Rules of Court. <sup>6</sup> But, even if this is not the case, it is entirely irrational and wasteful that litigants would apply, in terms of the Directive, for the certification of a matter as "commercial", and then ignore the mechanism provided in the Directive for the prosecution of the matter.<sup>7</sup> Further, the procedural steps stipulated in the Directive are couched in peremptory terms. I can see little scope for litigants, who chose to have their dispute resolved by application of the Directive, avoiding or sidestepping the carefully considered and well-designed process therein.

[28] There is, then, an obligation on litigants, their legal practitioners and judges, ordinarily, to adhere to the procedure stipulated in the Directive.<sup>8</sup> I say

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<sup>6</sup> Section 173 of the Constitution

<sup>7</sup> In the instant case, the plaintiff applied for the certification of this action as "commercial". Notwithstanding some resistance from the defendant, the matter was duly certified as commercial.

<sup>8</sup> ***In re: Several Matters on the Urgent Court Roll*** 2013 (1) SA 549 (GSJ) at [13]

“ordinarily” because of the power retained by courts to regulate their own process and because the mechanism I shall now discuss being more appropriate for proceedings by way of action than by way of application.

[29] I have quoted the provisions of the Directive in full, not to add undue length to this judgment, but to set out the structure of the Directive, and to give context to the discussion that follows as to the reason why the steps envisaged at each stage of Directive are important in giving effect to the purpose thereof. As far as I have been able to ascertain, there are, as yet, no judgments dealing with the interpretation and application of the Directive. It is for this reason that I embark on the discussion below.

[30] Chapter 3 of the Directive concerns the first case management meeting. It is apparent from clause 1 of Chapter 3 that it is to be held within a short time of the allocation of a case to the commercial stream, and, in clause 2, it contemplates that some eight issues *must* be traversed. These eight issues are, for obvious reasons, fundamental to the expeditious prosecution of a case. At the end of the first meeting, the case management judge will set a timetable either by agreement between the parties, or on the exercise of his or her own discretion. It is, therefore, contemplated that the parties, with guidance of the case management judge, will from the very outset, work towards ensuring that a matter is ripe to be heard by a pre-determined hearing date.

[31] Chapter 4 of the Directive concerns the steps to be taken immediately after the first case management meeting. It requires, *inter alia*, the delivery of

“statements” setting out the cause of action and relief claimed, on the one hand, and the defence/s relied upon on the other, the identification of the essential documents on which parties will rely and a summary of their evidence (“**Summary Statements**”).

[32] The delivery of Summary Statements is a very important step in the prosecution of a commercial court matter, because requests for further particulars are impermissible in terms of the Directive.<sup>9</sup>

[33] The purpose of the Summary Statement is to provide insight, with a degree of precision and clarity, into each party’s case to prevent any surprise or prejudice at trial. This conclusion must be one of logic and common sense, given that this is the precise purpose that requests for further particulars and answers thereto, exchanged in terms of the Uniform Rules of Court, would ordinarily fulfil.<sup>10</sup>

[34] Clearly, therefore, the delivery of a Summary Statement is necessary irrespective of whether pleadings (as contemplated by Uniform Rules of Court) have been exchanged. Again, the underlying purpose of expedition and pragmatism is clear; pleadings in the traditional sense comprise a statement of such material facts<sup>11</sup> necessary for a party to prove a cause of action or a defence<sup>12</sup>, but does not traverse the evidence that will be adduced to prove

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<sup>9</sup> Chapter 4, clause 6

<sup>10</sup> **Annandale v Bates** 1956 (3) SA 549 (W) at 550 H and 551 E; **Lotzoff v Connell and another** 1968 (2) SA 127 (W) at 129 C – F and the authorities therein cited

<sup>11</sup> **Mabaso v Felix** 1981 (3) SA 865 (A) at 875 A – H

<sup>12</sup> Rule 18(4) of the Uniform Rules of Court; **Trope v South African Reserve Bank and another** 1992 (3) SA 208 (T) at 210 F/G to J

those facts or identify the witnesses who will give that evidence. As such, traditional pleadings do little to illuminate the ambit of the evidence available to the parties and which will be led ultimately. Where Summary Statements are not delivered, the purpose and efficacy of the Directive is undermined.

[35] Under Chapter 5 of the Directive, a second case management conference is convened. The purpose of the second case management meeting is to remove any procedural obstacles that may have arisen from the steps taken by the parties, or not so taken as the case may be, prior to that meeting.

[36] If the steps in Chapters 3 and 4 of the Directive have been properly followed, then it would be a matter of course for the parties to prepare a list of agreed triable issues, or at least that triable issues are identifiable, and any interlocutory issues can then be identified and resolved in an orderly manner.

[37] The most important aspect of the second case management meeting, for purposes of the Directive, is the fixing of a date for the delivery of witness statements. It is envisaged by the Directive that the witness statements will constitute a witness' evidence in chief and, naturally, attach or reference all documents to which that witnesses' evidence relates.<sup>13</sup>

[38] The clear purpose of this part of the Directive is to eliminate the otherwise very wide ambit of discovery, and to confine it to the identification of documents on which the parties will rely directly. The link to the Summary Statements is again

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<sup>13</sup> Chapter 5, clause 2



clear as these define the ambit of the true dispute and identify any contentious documents.

[39] Discovery, as envisaged in the Uniform Rules, can be a very time consuming and expensive exercise. Discovery, as a general proposition, requires that “ ... *every document relates to the matter in question in the action which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry which may have either of these two consequences*”<sup>14</sup>, must be discovered.

[40] General discovery is, therefore, very wide and encompasses documents that may not necessarily be relied upon by a litigant. The clear purpose of the Directive is to prevent this unnecessary expenditure of time and the litigants' resources.

[41] The Directive recognises that there will be times when the opposing side may be in possession of a document or documents that are necessary for the trial.

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<sup>14</sup> **Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co** (1882) 11 QBD 55, cited with approval in **Investec Bank Limited v O'Shea N.O.**, an unreported judgment of the Western Cape Division, under case number 10038/2014, dated 16 November 2020

As such, the Directive makes provision for the targeted disclosure of documents. As with general discovery, the documents sought must be relevant and admissible to the dispute as defined in the statement of case or responsive statement. The procedure permitted by the Directive the cumbersome procedure in Rule 35(3) of the Uniform Rules of Court.

[42] Finally, Chapter 5 of the Directive deals with the issue of expert witnesses, and seeks to streamline expert evidence and limit points of disagreement, all with a view to even further refining the triable issue or issues between the parties.

[43] Reverting to the timetable set under Chapter 3 of the Directive. With proper application of mind to the issues listed in Chapter 3 that culminate in the timetable, postponements should be rare and only be required in exceptional cases; matters should be capable of being tried, cost effectively and expeditiously, within the parameters of the timetable.

[44] As with all litigation, the *bona fide* cooperation of the litigants and their representatives is required and expected; for in the absence thereof, the process provided by the Directive to expedite the resolution of disputes will flounder, and matters designated as commercial will limp along without any direction. This is at odds with a fast track designed specifically for the benefit of litigants who chose the resolution of a commercial dispute outside of the strictures of the ordinary track provided by the Uniform Rules.

[45] Properly construed and applied, the Directive provides an efficient and effective fast track to litigants with a *bona fide* desire to resolve their dispute. This is why the Directive is only made applicable to commercial cases after consideration of an application for such a designation. And, once a case becomes subject to the Directive, proper compliance therewith is central to the success thereof.

### **The present case**

[46] The Directive was not followed in this case. I am led to believe that this is, in part, due to the defendant not being represented. This fact seems to me all the more reason that the Directive should have been followed to a greater degree, because there would have been no room for a lengthy hiatus in the preparation of the trial.

[47] There is no indication from the documents filed of record that any directions for the delivery of summary statements, witness statements or the disclosure of such documents, as are strictly necessary for the ventilation of this action, were given.

[48] The issue of documents is a long standing issue, and appears to be a real impediment to the prosecution of this matter.

[49] It is in this context that I, very reluctantly, granted the application for postponement, directed the parties to agree on terms for the filing of witness statements and ancillary issues, including the plaintiff's right to apply to court to

have the defendant's defence struck out and apply for judgment should any of the directions given by a case management judge not be followed.

[50] The parties, for various reasons, were not able to agree on the terms of a draft order, save to make provision that the Deputy Judge President appoint a case management judge to guide the parties through the process set out in the Directive, and to give directions for the bringing of substantive application for targeted disclosure. An order making certain procedural rulings will ensue. The costs occasioned by the postponement will also be reserved.

[51] This appears to me to be a just and equitable result in the circumstances. When this matter comes before a trial court again, the trial court will be in a position to hear the defendant's evidence, determine whether any of the evidence required by the defendant is admissible and whether this postponement (and the opposition to the separation of issues) was a dilatory strategy or not.

[52] By reserving the wasted costs of the trial on 3 and 4 October 2022, the trial court seized with this matter in due course will be able to do better justice to the parties than what I have been able to do, since I simply do not have the facts to determine the degree of the defendant's culpability in failing to ensure that his defence was properly and timeously prepared, his failure to have retained legal representatives, and to have gathered the witnesses and evidence that he requires to establish the defence summarised in the letter to which I referred above.

[53] Should it transpire that the defendant has been engaged in dilatory strategies and/or the opposition to the separation of issues (before Fisher J or me), cynical or vexatious in the sense contemplated in **Alluvial Creek**<sup>15</sup>, the plaintiff should be entitled to request the trial court to order that those costs reserved before Fisher J and me be paid on an appropriate punitive scale.<sup>16</sup>

### Order

[54] In the result, the following order is made:

[54.1] the trial in this action is postponed *sine die*;

[54.2] the wasted costs occasioned by this postponement are reserved for determination by the trial court hearing this matter in due course;

[54.3] the parties are directed, jointly, to approach the learned Deputy Judge President requesting the appointment of a case management judge for purposes of convening a first case management meeting as contemplated in Chapter 3 of the Commercial Court Directive, and for the further management of this action as contemplated in Chapters 4 and 5 of the Commercial Court Directive within 5 days of this Order;

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<sup>15</sup> *In re Alluvial Creek* 1929 CPD 532 at 535

<sup>16</sup> Consider: **Waste Products Utilisation (Pty) v Wilkes and another** 2003 (2) SA 515 (W) at 587 F/G to 588 D

[54.4] the plaintiff is directed to deliver its Summary Statement within 5 days of this order and the defendant its Summary Statement within a further 5 days of delivery of the plaintiff's Summary Statement;

[54.5] the defendant is directed to make such substantive application as he is advised to make for the targeted disclosure of documents as contemplated in the Commercial Court Directive within 5 days delivery of its Summary Statement referred to in paragraph 54.4 above;

[54.6] the plaintiff may deliver any such answering affidavit as it is advised to deliver within a period of 10 days from the date of the defendant's application, and a replying affidavit may, if necessary, be delivered a further 5 days thereafter;

[54.7] any application for targeted disclosure is to be heard in accordance with such directions as the case management judge appointed by the Deputy Judge President, pursuant to paragraph 3 above, may direct.

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**A W PULLINGER**

ACTING JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG

*This judgment was handed down electronically by circulation to the parties' and/or parties' representatives by email and by being uploaded to CaseLines. The date and time for hand-down is deemed to be 10h00 on 13 October 2022.*

Date of hearing: 3 and 4 October 2022

Date of judgment: 13 October 2022

**Appearances:**

Counsel for the plaintiff: A J Daniels SC

Attorney for the plaintiff: Frese Gurovich Attorneys

Mr I P Gurovich/L0060.1405

Counsel for the defendant: C Garvey

Attorney for the defendant: Otto Krause Inc

Mr Krause/ADS/MAT41345