CIV/T/598/95

IN THE HIGH COURT OF LESOTHO

In the matter between

LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY **Plaintiff**

and

MASUPHA EPHRAIM SOLE **Defendant**

REASONS FOR RULING ON POSTPONEMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
On 1st day of April 1997.

It will be recalled that on the 5th November 1996 I dismissed the Defendant's application moved by Mr. Fischer for the postponement of the trial in this matter with costs including costs of two (2) counsel. Yet this notwithstanding and before the ink in my pen had had time to dry up sufficiently the Defendant moved yet another application for postponement of the trial on the 8th November 1996. Mr. Hoffman S.C. moved the application on behalf of the Defendant on this occasion.

After having heard arguments from both sides I gave an impromptu ruling postponing the matter in the following words:-

"I want to remark that I am not happy with the conduct of the defendant in this case. A similar application was made before me on 4 November 1996 for postponement of the matter. I disposed of the matter, I refused the application for postponement. Again I am being asked to postpone the matter once more. I consider that this is an abuse of Court process. I have gained the impression that the defendant has never really intended to proceed with this matter. For these reasons, the reasons will be filed later but I am nonetheless persuaded to grant the postponement because of the non-preparedness of the defendant's counsel in the matter. I consider that in all fairness defendant must have legal representation of his own choice. It is for that reason that the application for postponement is reluctantly granted. But the postponement is with effect from Monday, 11 November 1996. Counsel are hereby directed to find new dates with the registrar today. Defendant is ordered to pay costs, to pay all the wasted costs of the plaintiff occasioned by the postponement on attorney and client scale including costs of two counsel. As I said reasons will be filed later. What this ruling means is that Mr. Penzhorn is at liberty to utilise the remaining time and by that I wish to indicate that my ruling of 6 November 1996 remains, namely that plaintiff will proceed with the opening of his case and lead the evidence of the accountant."

I proceed now to give the reasons as promised. I should also mention that the transcript in the matter has only been made available to me this week hence I am now in a position to embark upon the task at hand with the benefit of the transcript record.

It will further be recalled that the main reason why the Defendant wanted a postponement of the trial sine die on the 4th November 1996 was that full discovery of documents had not been made in terms of Rule 34 (6) of the High Court Rules 1980. In this regard Mr. Fischer submitted as follows at page 27 of the transcript record:-

> "This is an application for the postponement of this trial sine die for the simple reason that the plaintiff has seen fit to refuse to discover documentation that he was called upon in terms of Rule 34 (6) to discover and make available."

Mr. Hoffman in the present application for postponement of the matter surprisingly traversed the whole field that Mr. Fischer had gone through on the question of discovery of documents. Indeed the main bulk of his submission was devoted to this topic notwithstanding the fact that the court had at that stage already heard full argument thereon from Mr. Fischer and had already reserved its ruling until after it had heard the opening address by Mr. Penzhorn S.C. for the plaintiff and until after it had heard the evidence of the Accountant in Chief. The court accordingly felt that it was treated in a cavalier manner and thus took this into account in awarding costs on attorney and client scale as a mark of its displeasure.

As earlier stated the only reason why the court reluctantly acceded to the application for postponement was because of Mr. Hoffman's non preparedness to proceed with the matter at that stage coupled with Mr. Fischer's unavailability. The court did so in fairness to the Defendant who must have legal representatives of his own choice regard being had to the substantial nature of the claim he is facing. The court took into account however the fact that the notice of set down in the matter

had been filed by mutual consent of both parties as far back as the 26th April 1996 for hearing on 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15 November 1996. Yet the Senior Counsel Mr. Hoffman was only engaged for the first time on 8th November 1996 when the matter was already in progress. The Court accordingly felt that the blame for the postponement lied squarely at the door of the Defendant. Nor was that all.

It further transpired that Mr. Fischer's unavailability was caused by the fact that he was double booked in that he allowed himself to be engaged in another matter for the week beginning on the 11th November 1996 knowing fully well that this matter had already been set down for hearing on that week as well. The Court felt that these were delaying tactics designed to force a postponement to the prejudice of the Plaintiff. There was therefore a need for the Court to mark its disapproval with an appropriate order as to costs.

In the circumstances the Court applying the principles laid down in Myburgh Transport v Botha t/a S.A. Trust Bodies 1991 (3) S.A. 310 reluctantly granted the postponement sought but ordered the Defendant to pay all the wasted costs of the Plaintiff occasioned by the postponement on attorney and client scale including costs of two (2) counsel.

M.M. Ramodibedi

JUDGE

1st day of April 1997

For Applicant/Defendant : Mr. Hoffman S.C. (Assisted by Mr. Fischer)

For Respondent/Defendant: Mr. Penzhorn S.C. (Assisted by Mr. Woker)