Not reportable

**DU TOIT MG**
**PLAINTIFF**
**and**

**COMMERCIAL TRUCK & TRAILER SERVICES CC**
**DEFENDANT**

**JUDGMENT**

**MAVUNDLA. J.,**

[1] This matter was set down for hearing on the 23 August 2007. The parties agreed that the matter should be postponed sine die. However, the parties could not agree as to the question of costs, thus resulting in the issue of costs having to be argued before me. After hearing argument, I reserved my judgment on the issue of costs and postponed the matter sine die.

[2] Mr. Stoop, who appeared on behalf of the plaintiff, submitted that the sole cause of the matter being postponed is on account of the defendant not having timeously complied with:

(a) the terms of Rule 36(9)(a) in that the defendant's notice in terms of this sub-rule was only filed on 7 August 2007, which is not less than 15 days before trial; and

(b) the terms of Rule 36(9)(b) in that the defendant's notice in terms of this sub-rule was only filed on the 16 August 2007,which is less tran 5 days before the trial.

its discovery affidavit on 18 June 2007.

[3] Mr. Stoop stated that as Order was obtained on 13 June 2007 and the defendant only filed respond to the request to discover in terms ompel the defendant to of Rule 35, which

the result of this late delivery on the part of the defendant, the plaintiff has been prejudiced in that this resulted in the need on the part of the plaintiffs expert witness having to consult with further witnesses and having to conduct a further inspection on the relevant block of the engine which is to be found in Tzaneen, so as to enable the said expert witness to re-evaluate his opinion. But for the above failure to timeously comply, the plaintiff was ready to proceed with the trial on the 23 August 2007.

[4] Mr. Nel, who appeared on behalf of the defendant, submitted on the other hand that the blame for the postponement lies squarely on the door of the plaintiff and therefore the plaintiff should be ordered to pay the costs occasioned by the postponement, alternatively the costs should be reserved.

[5] Mr. Nel submits that:

(a) Rule 36(a) & (b) requires each party to file the summary of its expert witness's evidence. There is no room for the other side's expert witness to respond to his counterpart's opinion. Each expert must prepare independently from the other expert witness. In this regard he relies on Doyle v Sentraboer (Co-operative) Ltd 1993 (3) SA 178. Besides, so he submits, the summary of the defendant's expert witness's opinion was faxed to the plaintiff's attorneys of

record 8 days before trial, there has therefore been enough time for the plaintiff's expert witness to have consulted with their witnesses. In this regard he has referred me to the matter of *Coopers (SA) v Detsche Schadlingbekampfung MBH 976 (3) SA 352 (AD).*

(c) the plaintiff failed to call for a pre-trial conference in terms of rule 37, within six weeks before trial. The pre-trial was held only three days before trail. In this regard Mr. Nel has referred me to the matter of Lekota v Editor, 'Tribute Magazine, and another. [1]

(c) the plaintiff had filed a notice of intention to amend its particulars of claim on 10 July 2007. The defendant filed its notice of objection to the said amendment, on the 24 July 2007. The defendant was awaiting a substantive application of amendment to be filed by the plaintiff. The defendant assumed that, as the result of such envisaged amendment, the matter would not be ready for trial on the 23 August 2007. The plaintiff informed the defendant's correspondent attorneys on the 1 August 2007 that he is abandoning the amendment of his particulars of claim, and no longer proceeding with the amendment. It is only on the 10 August that it came to the attention of the plaintiff's attorneys of record that the intended amendment is no longer continued with.

[6] Rule 36(9) of the Uniform Rules of the High Court provide as follows:

> "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 an expert witness may be received unless he shall-
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> (a) not less than 15 days before the hearing, have delivered a notice of his intention to do so;

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[1] 1995 (2) (SA) 706.

(b) not less than 10 days before the trial have delivered a summary of such expert's opinions and his reasons therefore."

[7] The purpose of rule 36(9)(b) is:

(i) to remove the possibility of trial by ambush, to remove the element of surprise.[2]

(ii) to enables the experts of the respective parties to exchange views before giving evidence and thus create an opportunity for the experts to settle or narrow whatever differences that may exists in their respective opinions. A joint report will then be filed. This has the potential advantage of curtailing the duration of the trial and costs.

(iii) to enjoin each expert to prepare independently from the other side's expert. There is no room for replication to the other expert's opinion[3].

(iv) To allow adequate time for the other party to prepare for trial.

[8] In the Supreme Court Practice,4 the learned authors point out that "The rule imposes same time limits on both sides." In casu, the defendant filed in terms Rule 36(9)(b) the summary of its expert's evidence on the 16 AUGUST 2007, four days before the hearing of the matter, instead of the required ten days before the trial. The fact that the said summary was faxed to the plaintiff's expert seven days before the trial, does not alter the fact that there has been short service. In this regard it is apposite to refer to the matter of Tarry Co Ltd v Matatiele Municipality5 where the honourable Kanemeyer A J, as he then was, said that:

2 Coopers (SA) Ltd v Detsche Schadlingbekampfung MBH, 1976(3) SA 353 (AD) at 371 C3 Doyle v Sentraboer (Co-operative) Ltd 1993 (3) SA 178.
481-270
5 Municipality 1965 (3) AS 131 (ECO) at 134 A

"Now on the authorities that have been cited to me to-day it is quite clear that where there has been late, or not discovery, the party in default has the onus of showing that no prejudice was suffered by the other party should the other party ask for a postponement. This approach is clear from cases of *Maedere v Carnes,* 1944 (1) P.H.F 18 (W) and Sachs v Du Preez, 1945 WLD 131. Vide also the matter of Leapman and

Another v Barrow 1971 (4) SA 403 (R), now High Court of Zimbabwe, where Macaulay, J at 404 cited Millin, AJ "in referring to the great importance of complying with discovery order" in Maedere *v Carnes, 1944* (1) P.H. F.18, as saying the following:

> "A discovery affidavit should be served as soon as possible after the Court's order and with a reasonable period before as the party on whom the affidavit was served was entitled to a proper opportunity of considering the documents, reading the affidavits, comparing the documents with those in his own possession so as to make the case, if possible, that there were further documents in existence which should have been disclosed, and to deliberate whether the Court should be moved to order a further and better discovery."

Macaulay, J 40SA-B further quite correctly state that:" it seems to me in

> South Africa the *onus* is placed on the party "in default" because he has not discovered within the time laid down by the Rules of Court. *Prima* facie he is in default and this casts the *onus* on showing that his breach of the Rules has not resulted in prejudice to the other side."

[9] Although the authorities referred to in the preceding paragraph, refer to discovery in terms of Rule 3S, I am of the view that the views expressed therein equally pertain to Rule 36(9)(a)&(b). The defendant has not shown that the plaintiff has not been prejudiced by such short service of its rule 35 (9)(b) notice. The fact that there is no room for the plaintiff's expert to

file a further opinion dealing with the issues raised by the defendant's expert, this does not takeaway the right of the plaintiff to be afforded plaintiff's expert witness the subject of the opinions of the experts, is to be found, and consult with further witnesses, it is within the ambit of preparation for trial. The plaintiff is entitled to be afforded sufficient time to consider the summary of the defendant's expert evidence, and consult with his witnesses, including his own expert. Any short service, has a potential of prejudice. The defendant has not demonstrated that the plaintiff has not been prejudiced as the result of the short service of his Rule 36(9)(b) notice.

[10] With regard to the failure on the part of the plaintiff to arrange for the pretrial conference to be held within six weeks before the hearing of the matter, it is indeed well so that the parties could have identified what ever issues that had to be canvassed. The advantages of holding a pre-trial well in advance, are succinctly stated in the matter of Lekota v Editor, 'Tribute Magazine, and another, (supra).6 The fact that the plaintiff in this case has failed to call for a pre-trial meeting within six weeks before the hearing of the matter, that on its own does not therefore mean that I must mulct the plaintiff with the costs of the postponement. This is so especially because, it is not my understanding that the defendant seeks a postponement because of the reason of this failure to hold a pre-trial within the time frame as stipulated in the rules. The defendant is raising this failure on the part of the plaintiff as a shield why he should not be ordered to pay costs and that such cost must be paid by the plaintiff. I am of the view that for me to decide on this issue, I also need to look at what steps did the defendant take.

[11] Rule 37(2)(b) provides that:

6 At 707H-708F.

"If the plaintiff has failed to comply with paragraph (a), the defendant may, within 30 days after the expiration of the period
mentioned in that paragraph, deliver such notice."

In casu, the defendant did not resort to this sub-rule (2)(b). Although the said sub-rule is not obligatory on the part of defendant, it does not mean thata the defendant can simply lie on his laurels and want to take

advantage of the failure of the plaintiff. On the question of costs, it is trite that the Court must look at the entire circumstances of the case. The general deportment of both parties must be had in regard, in deciding who of the parties is more remiss. In casu, the defendant had to be dragged out of its slumber through a Court order, to move it to discover. The defendant was also late in complying with rule 36(a)&(b). The situation would have been different had the defendant resorted to rule 37(2)(b) and timeously complied with rule 36(9)(a)&(b). I am of the view that having regard to the circumstances stated herein above, this is one matter where, in the exercise of my discretion, I need not have the plaintiff mulcted with costs for its failure to have called a pre-trial conference six weeks before the hearing of the matter. In this regard, I have also taken into consideration the fact that, in this Division, a practice has since developed, in terms of which the pre-trial conference is held a few days just before the trial. I need, however, caution that the sooner practitioners pay attention to strict compliance of Rule 37, the better the interest of their clients would be served.

[12] The defendant's misconception that the matter would not proceed, because the plaintiff had not filed a substantive application for amendment, is misplaced. The fact that the defendant objected to the plaintiff's intended amendment, is no reason at all for the defendant to have failed to prepare and file its Rule 36(9)(a)&(b), within the prescribed

time frames, which are peremptory. But besides, it has been submitted that the defendant's correspondent attorneys were informed well in time of the fact that the plaintiff no longer persists with the amendment. This was not disputed, save that according to the defendant counsel this was never brought to the attention of the defendant's attorneys. It may well be so that it never came to the attention of the defendant's attorneys. It is the

> defendant's correspondent attorneys who failed to bring to the defendant's attorneys and not the plaintiff this fact that the amendment is no longer pursued. Besides, the defendant chose an address that is within 8 kilometres from Court where it would receive documents, which is at the correspondents' address. The defendant's local attorneys are the extension of the defendant's instructed attorneys. The failure of the correspondent attorneys to have brought to the attention of the defendant's attorneys is no excuse at all for the defendant in not having filed its rule 36(9)(a)&(b) notices in time.

[13] In the premises, I am of the view that the postponement of this matter on 23 August 2007 is essentially as the result of the defendant's failure to file the aforesaid notice in terms Rule 36(9)(b), within the prescribed time frames, which failure was to the prejudice of the plaintiff. I therefore find that the defendant is liable for the costs occasioned by the resultant postponement.

[14] In the premises the following order is made;

14.1. The Defendant is ordered to pay the wasted costs occasioned by the postponement of the matter on the 23 August 2007

**JUDGE OF THE HIGH COURT**

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RESPONDENT'S ATT: MR. ZIMMERMAN
RESPONDENT'S ADV: MR. G **J NEL**

**APPLICANT S ADV: MR.BC STOOP**
**APPLICANT'S ATT: MS R VAN VUUREN**