


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 33006/2018

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. YES/NO
	<u>13/06/25</u> DATE
	 SIGNATURE

In the matter between:

**WEZISWE PLATINUM LIMITED**

Applicant

and

**SANTAM LIMITED**

Respondent

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**ORDER**

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1. The application in terms of Rule 30 is dismissed with costs, counsel's fees to be at Scale A.
2. Consent is granted for the respondent's notices in terms of Rule 36(9)(a) and 36(9)(b) to be part of the record in the action.

3. The applicant is entitled, within a period of 60 (sixty) days from the date of this order, to deliver a notice in terms of Rule 36(9)(a), should it wish to call on expert.
  4. The costs of the counter-application is costs in the cause.
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## **JUDGEMENT**

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### **INTRODUCTION**

- [1] The applicant applies for an order under Rule 30(1) to set aside the respondent's notice in terms of Rule 36(9)(a) in respect of the expert witness, Mr Casserley.
- [2] The respondent, in a counter-application, applied for leave to call Mr Casserley as an expert witness at the trial of the action between the same parties, which action was instituted by the applicant as plaintiff.

### **BACKGROUND**

- [3] Summons in the action was issued during September 2018.
- [4] Initially, Stalker Hutchinson Admiral (Pty) Ltd was the only defendant in the action. The respondent was joined as the second defendant in the action in terms of a court order dated 24 February 2020.

- [5] The applicant subsequently withdrew its claim against the first defendant, leaving the second defendant as the only defendant in the action.
- [6] The respondent filed its plea during September 2020 and an amended plea in February 2022, at which date the pleadings were considered closed in terms of Rule 29(1)(b), i.e. *litis contestatio* occurred.
- [7] The respondent issued and delivered the notice in respect of Mr Casserley in terms of Rule 36(9)(a) on 1 September 2022. It is common cause that the said notice was delivered outside the 60-day period provided for in Rule 36(9)(a), calculated from *litis contestatio*.
- [8] The applicant submitted that it is a well-established principle of procedural law that where a party fails to comply with the requirements set out in Rule 36(9), expert evidence may only be given with the leave of the Court or with the consent of all parties to the suit.<sup>1</sup> This is expressly provided for in Rule 36(9) and no authority need to be cited for this submission.

## IRREGULAR PROCEEDING

- [9] After delivery of the notice in terms of Rule 36(9)(a), the applicant's attorney dispatched a letter, which is described as a "courtesy letter",<sup>2</sup> to the respondent's attorney to afford the respondent an opportunity

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<sup>1</sup> *Colt Motors (Edms) Bpk v Kenny* 1987 (4) SA 378 (T) at 387 F.

<sup>2</sup> Founding Affidavit, Caselines 0005-6, para 6.

to remove the cause for complaint. Thereafter the applicant delivered a notice in terms of Rule 30(1) to the respondent, affording it a 10 (ten) day period within which to remove the cause of complaint concerned.

[10] The applicant's attorney stated in his founding affidavit in the application to declare the respondent's delivery of the notice in terms of Rule 36(9)(a) an irregular step and to set it aside as an irregular step,<sup>3</sup> that the respondent's attorney called him telephonically to advise that the respondent will apply for condonation for the late filing of the notice in terms of Rule 36(9)(a).

[11] It is evident that the applicant's application in terms of Rule 30 was delivered before a condonation application could be made.

[12] The applicant contends that it will be prejudiced as the respondent's notice was delivered outside the prescribed timeframe and it is not in accordance with Rule 36(9)(a). The applicant further contends that if the irregular step is not cured by a court order, the applicant will suffer prejudice should the respondent be allowed to call an expert witness outside the prescribed time frame contrary to Rule 36(9)(a).

[13] The respondent contends in the answering affidavit in the Rule 30 application that the applicant will not be prejudiced in the further conduct of its case, nor will it obtain any real advantage by bringing

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3 Caselines 0005-7, para 9.

the application under Rule 30, which application, according to the respondent, is overtechnical and without merit.

[14] The requirement that an applicant applying to set aside a further step in the proceedings must show real prejudice in the continuation of the case is well-known.<sup>4</sup>

[15] In terms of Rule 30(3) the Court has a wide discretion and powers and it is not intended that an irregular step should necessarily be set aside. The discretion must be exercised judicially on a consideration of the circumstances and what is fair to both sides.<sup>5</sup>

#### COUNTER-APPLICATION

[16] Having sought the applicant/plaintiff's consent for the late delivery of the notice in terms of Rule 36(9)(a), and having delivered the summary of Mr Casserley's evidence, the respondent delivered a counter-application in which it sought leave to call Mr Seamus Casserley as an expert witness in the trial.<sup>6</sup>

[17] At the hearing I advised counsel for the respondent that such an order should be made by the trial court.

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4 **Trans-African Insurance Co. Ltd v Maluleka** 1956 (2) SA 273 (A) at 276 F-H; **SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw N.O.** 1982 (4) SA 329 (O) at 333 D-F and 333 H-334 E; **Nasionale Aartappel Ko-operasie Bpk v Price Waterhouse Coopers Inc.** 2001 (2) SA 790 T at 805 E-G; **De Klerk v De Klerk** 1986 (4) SA 424 (W).

5 **Northern Assurance Co. Ltd v Somdaka** 1960 (1) SA 588 (A), 588-596 A.

6 Caselines, 0015-1 to 0015-2.

[18] In view of what is set out above, it is regarded to be in the interests of justice that relief be granted that will allow the action to proceed to trial by means of an order that is fair to both parties.

[19] The admissibility of the evidence of Mr Casserley will have to be taken up by the applicant/plaintiff with the trial court where its objections thereto will have to be ruled on.

### CONCLUSION

[20] The applicant has criticised the respondent for not first seeking its consent for late delivery of the impugned notice in terms of Rule 36(9)(a).

[21] Mr Griessel for the respondent has argued that Rule 30 application is inappropriate in the circumstances of this matter. The respondent submitted that Rule 36(9) contains its own sanction for non-compliance. In a case of non-compliance the consent of the other party can be sought, and, if not obtained, the consent of the court should be sought.

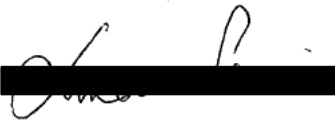
[22] Respondent referred to authority for the submission that Rule 30(1) is a rule of general application, but it is not intended to apply in cases of non-compliance with a rule that provides its own sanction for non-compliance as well as the remedy for non-compliance.<sup>7</sup>

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<sup>7</sup> **Norman & Co (Pty) Ltd v Hansella Construction Co (Pty) Ltd** 1968 (1) SA 503 (T) at 504 A-D.

[23] I am in respectful agreement with the said submission and regard it as relevant in the exercising of my discretion to grant relief that is appropriate under the circumstances of this matter to enable the litigation process to move closer to trial.

[24] Accordingly, I make the order set out above.

  
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**LM du Plessis**  
Acting Judge of the High Court  
Gauteng Division  
Johannesburg

#### **REPRESENTATION**

For the applicant:  
Attorneys:

**Adv P Ngcongo**  
Motalane Attorneys Inc.

For the respondent:  
Attorneys:

**Adv SJ Griessel**  
Ric Martin Inc. Attorneys

Date of Hearing:

24 January 2025.

Date of Judgement:

13 June 2025