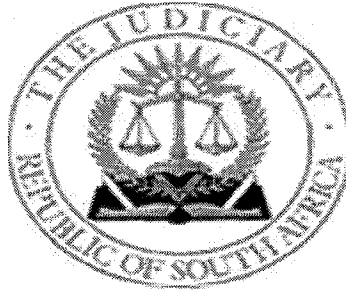


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE: 33310/2016

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED
09/03/18 ML TWALA	

In the matter between:

TENDAI NYAMAKUTI

PLAINTIFF

AND

**MURRAY & ROBERTS CONSTRUCTION
(PTY) LTD**

DEFENDANT

AND

**WACO AFRICA (PTY) LTD
t/a FORM – SCAFF**

THIRD PARY

In re:

**MURRAY & ROBERTS CONSTRUCTION
(PTY) LTD**

APPLICANT

AND

TENDAI NYAMAKUTI

RESPONDENT

CLEMENT JOS HOOYBERG

DEFENDANT

JUDGMENT

TWALA J

- [1] Before this Court, is an application wherein the applicant seeks an order that the respondent's notice of set down dated the 2nd of August 2017 be set aside as an irregular proceeding.
- [2] It is common cause that the respondent instituted a claim for damages against the applicant who defendant the action. The applicant thereafter filed a third party notice and the third party in turn filed a notice of intention to defend. It is further not in dispute that the third party failed to file its plea within the prescribed time limits for filing such a plea. The respondent frustrated by the conduct of the defendants in not observing the time limits prescribed for filing pleadings, applied for the trial date. The applicant filed a notice in terms of Rule 30 objecting to the respondent's application for trial date in that it is an irregular step since the pleadings had not been closed. On the 2nd of August

2017, the respondent proceeded to serve and file a notice setting the matter down for trial on the 24th of April 2018. The third party only filed its plea on the 2nd November 2017.

- [3] It is contended by counsel for the applicant that the respondent's application for a trial date was an irregular step since the third party had not pleaded at the time and was not placed under bar by the respondent. It is contended further by counsel that the third party had become a party in the proceedings as a defendant since it entered the appearance to defend. The respondent should have followed the normal procedures to bring the pleadings to a close before applying for the trial date but failed to do so. The matter should not be heard on the 24th of April 2018 since, as the argument goes, the obtaining of the trial date was an irregular step and the Court should not be seen to condone the breaching of the rules of Court.
- [4] Counsel for the applicant contended further that, the applicant will be prejudiced if the matter were to proceed to trial on the 24th of April 2018 for it is a complicated matter involving engineering issues which require the services of experts. The applicant, so it is contended, still has to do some investigation before this matter can be ventilated properly – hence the notice of set down should be set aside.
- [5] Counsel for the respondent contended that the pleadings had closed between the applicant and the respondent and it was upon the applicant to bar the third party for there was a *lis* between them [applicant and the third party]. Further, so it is contended by counsel, the respondent is claiming damages arising out of an accident and the applicant joined the third party as its insurer which has nothing to do with respondent. It cannot be correct to say, so goes the argument, that the

applicant will be prejudiced if the matter proceeds to trial on the 24th of April 2018.

- [6] The applicant was informed of the trial date on the 2nd of August 2017 and had ample time to investigate the matter and engage the services of experts if need be. Expert notices are to be filed, it is contended by the respondent, in terms of the rules at least six weeks before the date of trial of the matter and there is still sufficient time to do so. The applicant is not in a hurry to finalise this matter whereas the respondent suffers prejudice in the delay in bring this matter to finality.
- [7] It is well established that the rules exist for the courts, and not the courts for the rules. The object of the rules is to ensure that there is a fair trial or hearing of the matter between the parties.
- [8] Rule 13(7) provides as follows:
“The rules with regard to the filing of further pleadings shall apply to third parties as follows:
- a) *In so far as the third party’s plea relates to the claim of the party issuing the notice, the said party shall be regarded as the plaintiff and the third party as the defendant.*
 - b) *In so far as the third party’s plea relates to the plaintiff’s claim, the third party shall be regarded as a defendant and plaintiff shall file pleadings as provided by the said rules.*
- [9] I agree with the applicant that there were remedies available to the respondent as plaintiff to force the third party to file its plea. I hold the view that the respondent took an irregular step by applying for the trial date before the

pleadings were closed-thus breaching the rules of Court. However, as indicated above, the rules exist for the courts and not visa versa.

- [10] In the case of **Ncoweni v Bezuidenhout 1927 CPD 130**, it was pertinently observed that:

“the rules of procedure of this Court are devised for the purpose of administering justice and not of hampering it, and where the rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course if one is absolutely prohibited by the rule one is bound to follow this ruled but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction”

- [11] In the case of **Arendsenes Sweefspoor cc v Botha 2013 (3) SA (SCA) 399**, the Supreme Court of Appeal stated the following:

“With the advent of the constitutional dispensation, it has become a constitutional imperative to view the object of the rule as ensuring a fair trial or hearing. Rules of Court are delegated legislation, having statutory force, and are binding on the court, subject to the court’s power to prevent abuse of its process. And rules are provided to secure the inexpensive and expeditious completion of litigation and are devised to further the administration of justice. Considerations of justice and fairness are of prime importance in the interpretation of procedural rules.”

- [12] I am unable to disagree with the respondent’s counsel that there is no prejudice to be suffered by the applicant if the matter is heard on the 24th of April 2018. The applicant was informed of the trial date on the 2nd of August 2017 and had ample time to prepare for the trial. It is not clear to me why the applicant did not prosecute this application immediately after it received the notice of set down on the 2nd of August 2017. However that does not entitle the respondent to

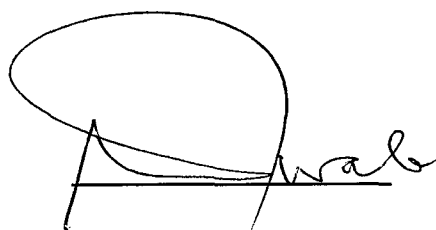
ignore the rules of court. The rules are there to be observed and followed. The flagrant disregard of the rules will only be condoned by the court if it does not interfere or hamper the course of justice. The ineluctable conclusion one draws from the bringing of this application almost two months before the hearing of the matter is that it is intended to hamper the course of justice to the prejudice of the respondent.

[13] The summons was issued in September 2016 in this case and the applicant had sufficient time to investigate and prepare for the trial. The applicant was served with the notice of set down on the 2nd of August 2017 notifying it of the date of trial of the 24th of April 2018. The applicant had known of the trial date for eight months and wants the court to believe that it could not, in that time, prepare for the trial. However the applicant still has time to prepare for the trial. In my view, there is no prejudice to be suffered by the applicant if the matter is heard on the 24th of April 2018. It is my respectful view therefore the application to set aside the notice of set down falls to be dismissed.

[14] In the circumstances, I make the following order:

A. The application is dismissed

B. The applicant to pay the costs of the application

A handwritten signature in black ink, appearing to read 'Twala J', is written over a horizontal line.

TWALA J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

Date of hearing: 5 March 2018

Date of Judgment: 9 March 2018

For the Applicant: Advocate: Y. S Ntloko

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