



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED: [REDACTED]

Date: Signature: [REDACTED]

CASE NO: 21/40889

DATE: 11 September 2023

In the matter between:

**MIDNIGHT STAR TRADING 437 CC t/a
BRAAMFISCHERVILLE SPAR**

Plaintiff

and

MINISTER OF POLICE N.O.

First Defendant

**NATIONAL COMMISSIONER OF THE SOUTH AFRICAN
POLICE SERVICES N.O.**

Second Defendant

**COMMANDING OFFICER OF THE SOUTH AFRICAN POLICE
SERVICES POLICE STATION DOBSONVILLE N.O.**

Third Defendant

THE STATE ATTORNEY

Fourth Defendant

Coram: M Van Nieuwenhuizen, AJ

Heard on: 31 July 2023

Delivered: 11 September 2023

JUDGMENT

M VAN NIEUWENHUIZEN, AJ:

- [1] This is an action for damages arising from the alleged failure of the defendants to adhere to an order of the Labour Court and to assist the plaintiff in keeping the peace at the plaintiff's premises in the midst of an illegal strike.
- [2] The result of the alleged failure of the defendants to perform their duties caused the plaintiff to allegedly suffer damages in excess of R4 000 000,00.
- [3] The trial was to commence on the 31st of July 2023 and according to the joint practice note signed by both parties the estimated duration of the trial was estimated to be three to five days. One Court day before the trial were to commence on the Monday, the 31st of July 2023, the defendants on Friday, the 28th of July 2023, delivered and uploaded an application for a postponement of the trial.
- [4] The basis upon which the defendants brought the application to postpone the trial is allegedly the following:
- 4.1 The plaintiff failed to fully discover;
- 4.2 Once the plaintiff fully discover the defendants intend to appoint an actuary;
- 4.3 There is a pending interlocutory application;
- 4.4 The plaintiff has not complied with the Practice Manual and Directives.
- [5] The plaintiff delivered its answering affidavit on the day of the trial, the 31st

of July 2023 and the defendants chose not to deliver a replying affidavit.

- [6] Advocate Makola on behalf of the defendants uploaded to CaseLines comprehensive heads of argument and certain case law.
- [7] At the outset the plaintiff informed this Court that it is not opposed to the postponement as was also indicated in its letter dated the 19th of July 2023, however sought an order that the defendants pay the wasted costs, including the reservation fees of both senior and junior counsel. By virtue of the fact that there was no opposition to the postponement in principle, I granted the postponement to the defendants. I am called upon to determine the issue of costs.

RELEVANT CHRONOLOGY APPLICABLE TO THE APPLICATION FOR A POSTPONEMENT AND COSTS

- [8] The plaintiff's summons was served on the 9th, 14th and 29th of September as well as on the 5th of October 2021, respectively.
- [9] A notice of intention to defend was served on the plaintiff (out of time) on the 11th and 22nd of November 2021, respectively.
- [10] The parties agreed to service by e-mail.
- [11] The defendants failed to timeously file a plea and the plaintiff's attorney caused a notice of bar to be served on the State Attorney on the 13th of January 2022.
- [12] A plea was thereafter served on the 25th of January 2022, whereafter pleadings closed.
- [13] On the 15th of March 2022 the plaintiff served on the defendants a notice

in terms of Rule 35 calling for discovery.

- [14] On the 22nd of March 2022 the plaintiff's attorney caused a pre-trial agenda to be served on the defendants.
- [15] A pre-trial conference was arranged between the parties and held on the 23rd of March 2022 (*"the first pre-trial conference"*). At the first pre-trial conference the defendants indicated that they were not ready to proceed at that stage. The reason provided was that evidence was still outstanding.¹
- [16] The plaintiff filed a discovery affidavit on the 8th of April 2022.
- [17] The plaintiff had to apply for an order to compel discovery by the defendants, however the defendants discovered before the hearing and only a costs order was granted in the circumstances on the 11th of August 2022.
- [18] On the 28th of November 2022 the plaintiff served the notice of set down of the matter for trial.²
- [19] The plaintiff alleges that in preparation for trial a further pre-trial conference was arranged with the defendants' legal representatives and held via Zoom conference on the 8th of May 2023 (*"the alleged second pre-trial conference"*). The plaintiff alleges that the pre-trial was attended by both Advocate M Snyman SC for the plaintiff and Advocate T Makola for the defendants, where it is alleged by the plaintiff that the parties *inter*

¹ Para 11.1, Joint Pre-Trial Minutes dated the 1st of April 2022 signed by both parties. On the 1st of April 2022 the plaintiff's attorney caused the signed minutes of the pre-trial to be served on the defendants

² CaseLines, section 17

alia agreed to the following:³

- 19.1 That the parties were ready to proceed to trial.
- 19.2 The defendants were not of the view that the plaintiff did not comply with the Rules of Court.
- 19.3 The defendants agreed that the quantum and merits not be separated.
- 19.4 The defendants were requested to indicate if they wished to seek or make admissions, upon which they indicated that they would revert.
- 19.5 The defendants would request further particulars for trial or admissions sought by no later than 31 May 2023.
- 19.6 That the defendants did not wish to discover further.
- 19.7 That the defendants did not intend to call any expert witnesses.
- 19.8 That the plaintiff intended to call an expert actuary.
- 19.9 That the plaintiff still needed to discover further documents.

[20] After having held the alleged second pre-trial conference, the plaintiff's attorney caused a copy of the notices and reports in terms of Rule 36(9)(a) and (b) to be served on the defendants' attorneys.

[21] The plaintiff furthermore states that the actuarial report was in possession

³ CaseLines, 03-4

of the defendants since mid-May 2023.⁴

[22] The minutes of the alleged second pre-trial conference were served on the defendants on the 26th of May 2023, however the defendants did not sign the minutes. The defendants allege that there was no second pre-trial conference held on the 8th of May 2023, hence their failure to sign the pre-trial minutes presented by the plaintiff. The plaintiff alleges that the parties agreed to exchange any further questions or Rule 21 questions for purposes of trial by the 31st of May 2023. The plaintiff alleges that it complied but the defendants did not.⁵

[23] The plaintiff furthermore alleges that it was foreseen that the parties might have to meet again in light of the outstanding questions, but as no questions came from the defendants, minutes of the alleged second pre-trial conference were served on the defendants on 26 May 2023. Of significance is the fact that no objection has been raised to the content thereof either formally or in a letter and the plaintiff alleges that had the defendants been of the view that no pre-trial conference had been held, it surely was obliged to raise the issue before, which they did not. The plaintiff furthermore alleges that the pre-trial was recorded via Zoom and if disputed the recording can be made available.

[24] On the 20th of June 2023 the plaintiff delivered a further discovery.

[25] On the 21st of June 2023 the defendant served a notice in terms of Rule 35(3) and (12) requesting further documentation. The plaintiff alleges that it was clear that the request in terms of Rule 35(3) and (12) was not served as a result of the second discovery by the plaintiff as some of the documents so requested were in fact discovered the day before. The plaintiff states that it is admitted by the attorney for the defendants that

⁴ CaseLines, 02-47

⁵ CaseLines, 03-31

she only received the further discovery on the 22nd of June 2023.⁶ The plaintiff's attorney alleges that it was clear that the plaintiff in any event on the 20th of June 2023 provided all documents so requested.

[26] Of significance is the fact that on the 12th of July 2023 and after not having raised the issue before and having admitted in its plea that proper notice and demand was made in respect of the claim, the defendants requested *"a Court order for the section 3 condonation as we are in the process of amending our plea"*.⁷

[27] A third and further discovery affidavit and documents were served by the plaintiff on the 13th of July 2023, which the plaintiff alleges included documents that were obtained from the Spar Group, the franchisor of the store operated by the plaintiff. The plaintiff alleges that these documents were not in its possession as the documents were lost in a fire during March 2019.⁸

[28] The plaintiff's attorney replied to the letter of the 12th of July 2023 on the 13th of July 2023 by indicating that no dispute has been raised before in respect of the notice as required in terms of the Institution of Legal Proceedings Against Certain Organs of State Act, Act 40 of 2002. The plaintiff's attorney furthermore pointed out that the current denial resulted in an admission that proper notice had been given is being withdrawn and would necessitate a formal application. The plaintiff's attorney states that it was pointed out that the defendants had been aware of the set down and enrolment of the action since November 2022 and that an amendment a mere twelve days before trial was unacceptable. It was indicated that any such amendment would be opposed and should it result in a

⁶ CaseLines, 02-57

⁷ CaseLines, 22-59

⁸ CaseLines, 20-2

postponement the defendants would be held liable for the wasted costs.⁹

[29] The plaintiff's attorneys avers that she was informed by her counsel that he telephonically discussed the matter with counsel for the defendants on the 17th of July 2023 when preparing the joint practice note, a draft which was later signed, that had been sent to counsel for the defendants. The plaintiff's attorney states that the issue relating to the notice as required in terms of section 3 of Act 40 of 2002 was discussed and that the defendants, should they wish to proceed raising such issue, will have to apply to Court for an amendment. Advocate Snyman apparently indicated that should this happen the matter would in all probability result in a postponement, which would be considered by the plaintiff if the defendants tendered the costs occasioned thereby. On behalf of the defendants it was apparently raised that they would wish to appoint their own actuary.¹⁰

[30] On the 18th of July 2023 the parties uploaded to CaseLines a joint practice note¹¹ indicating that the parties would seek an allocation of the matter estimated to last three to five days. The defendants' counsel did not indicate that any postponement would be sought.¹²

[31] On the 18th of July 2023 the defendant served a further discovery affidavit and uploaded its discovery documents to CaseLines. The plaintiff alleges that in this bundle was *inter alia* the case docket relating to the arson and looting of the plaintiff's store as requested in January 2023.¹³

⁹ CaseLines, 22-63 to 22-65

¹⁰ Answering Affidavit, para 2.21, CaseLines 30-7

¹¹ CaseLines, 21-4 to 21-6

¹² Answering Affidavit, para 2.22, CaseLines 30-8

¹³ Answering Affidavit, para 2.23, CaseLines 30-8

- [32] On the 18th of July 2023 a letter was received from the defendants' attorneys indicating that the plaintiff had made further discovery on 20 June 2023, that further documents were sought in terms of Rule 35(3) on 21 June 2023 indicating that the last day to provide the documents was 6 July 2023.¹⁴
- [33] The letter further states that the defendant requires the CCTV footage taken during the period 7 to 18 March 2019 which the plaintiff alleges that incidentally the plaintiff has already confirmed that it does not have in its possession and it was destroyed in a fire.
- [34] The plaintiff states that of significance is the fact that the defendants claim to require the documents to be able to amend its plea. The plaintiff's attorney states that this statement is made despite having stated at the pre-trial in May 2023 that no amendment would be sought.¹⁵ The plaintiff's attorney states that the defendant has been requested to provide the docket of the arson and looting already in January 2023 and the documents have only been discovered on 18 July 2023.¹⁶
- [35] The plaintiff's attorney states that on the version of the defendants the Rule 35(3) and (12) notice was served without having regard to the further discovery. The result is that the defendants, should the documents be required, was in a position to have not only sought the documents earlier, but if sought timeously would have been able to compel further discovery. An application to compel further discovery was only served on Thursday, the 27th of July 2023.¹⁷
- [36] The plaintiff's attorney states that only after having served the notice to

¹⁴ CaseLines, 26-36

¹⁵ Para 2.26, Answering Affidavit, CaseLines, 30-

¹⁶ CaseLines, 12-4, Answering Affidavit, para 2.27, CaseLines 30-9

¹⁷ CaseLines, 25-1

compel further discovery did the defendants decide to obtain instructions from its clients to appoint an actuary. That is a mere two days before trial and clearly not enough time to appoint and instruct an actuary who had to have filed a report in terms of Rule 36(9) already within sixty days of the close of pleadings, pleadings having closed already at the beginning of 2022.

[37] The plaintiff's attorney points out that the defendant after admitting that the plaintiff properly demanded payment and gave notice of the claim, the defendants claim that the plaintiff has not complied with section 3 of Act 40 of 2002. The plaintiff points out that only if the notification is challenged or denied is condonation for any late notice of the intended claim to be sought and that the defendants only challenged the correctness of the notification on 18 July 2023.¹⁸

[38] The plaintiff's attorney pointed out in a reply on the 19th of July 2023 that no prejudice is claimed. The plaintiff's attorney furthermore pointed out in the aforesaid letter that the plaintiff would be amenable to a postponement upon the defendants tendering the wasted costs including the reservation fees of both senior and junior counsel. No response was received to the aforesaid proposal.¹⁹

[39] The plaintiff in Court pointed out that it is ready to proceed, but that it is amenable to the postponement sought however the seek the wasted costs including the reservation costs of two counsel.

DELIBERATION

[40] The defendants have chosen to opportunistically raise a compliance issue in terms of the Institution of Legal Proceedings Against Certain Organs of

¹⁸ CaseLines, 26-39

¹⁹ CaseLines, 26-43

State Act²⁰ a mere twelve Court days before trial, an issue that ought to have been addressed right at the outset of the matter when the action was brought against them. The defendant sought to use such alleged non-compliance issue, which they allegedly had not noticed before as a reason to claim a postponement. This is one of the first issues that Organs of State ought to look at when proceedings are brought against them.

[41] From the aforesaid it is apparent that the defendants have:

- 41.1 waited until approximately twelve Court days before trial before intimating that they are in the process of amending their plea,²¹ after having previously intimated that they were ready to proceed with the matter. Thereafter on the 17th of July 2023 they signed a joint practice note in which the defendants agreed that the parties will seek an allocation and an oral hearing of the matter in open Court;
- 41.2 failed to timeously seek further discovery in terms of Rule 35(3) and (12) timeously. Had such discovery been sought timeously they would have been in a position to compel further discovery timeously;
- 41.3 waited until the eleventh hour before delivering and uploading an application to compel discovery²² when it is apparent that they could have done so weeks earlier;²³
- 41.4 failed to timeously or at all deliver their expert's (actuary) notice

²⁰ Act 40 of 2002

²¹ Having only done so in a letter dated the 12th of July 2023.

²² Having waited until the 27th of July 2023, CaseLines 25-1

²³ There was no need for the defendants to have waited for the plaintiff's attorney's reply of the 19th of July 2023 prior to proceeding with an application to compel.

and report and are substantially out of time in this regard.²⁴

[42] Having regard to the aforesaid defaults of the defendants I find that they are solely to blame for their unpreparedness.²⁵

[43] The aforesaid set of circumstances are exacerbated by the fact that the defendants waited until the eleventh hour before launching a substantive application for a postponement.²⁶

[44] Of significance is the fact that the plaintiff as far back as the 19th of July 2023 in a letter advised the defendants that they would be amenable to a postponement upon the defendants tendering the wasted costs including the reservation fees of both senior and junior counsel and that the defendants failed to respond to the aforementioned proposal.²⁷

[45] The postponement must clearly carry with it an order as to costs, having regard to the substantial delays of the defendants in:

45.1 a mere twelve days before trial raising a compliance issue which ought to have been raised at the outset of the matter;

45.2 not timeously or at all pursuing an amendment of their plea;

45.3 not timeously calling for further and better discovery in terms of

²⁴ ***Southey v Executor of Estate Late Pierre Scheepers*** (2996/2016) [2021] ZAECHGHC 46 (11 May 2021); Rule 36(9)(a) and (b)

²⁵ ***Myburgh Transport v Botha t/a SA Truck Bodies*** 1991 (3) SA 310 (NmS)

²⁶ The defendants only having done so on the eve of the trial being Friday, the 28th of July 2023, after having agreed in a joint practice note on the 18th of July 2023 that “*The parties will seek an allocation and oral hearing of the matter in open Court*” (para 7), CaseLines 21-5

²⁷ CaseLines, 26-43

Rule 35(3) and (12);

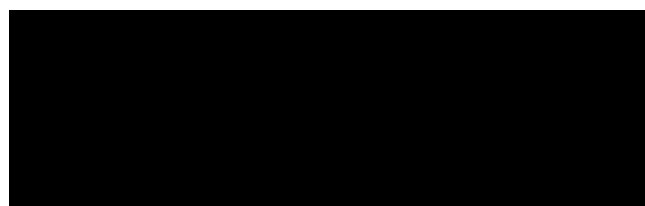
- 45.4 failing timeously to deliver an application to compel;
- 45.5 failing to respond to correspondence; and
- 45.6 their failure to deliver their expert notice and report timeously or at all.

[46] Both parties have agreed that this Court is in the best position to determine the issue as to costs.

ORDER

[47] Accordingly, I issue the following order:

- 47.1 The trial set down on the 31st of July 2023 is postponed *sine die* by agreement between the parties.
- 47.2 The defendants are ordered to pay the wasted costs including the costs of two counsel as well as the reservation fees of both senior and junior counsel for trial.



M VAN NIEUWENHUIZEN
*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 11 September 2023.

HEARD ON:	31 July 2023
DATE OF JUDGMENT:	11 September 2023
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