



DELETE WHICHEVER IS NOT APPLICABLE

REPORTABLE: ~~YES~~/NO.

OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.

REVISED.

30/7/2010

SIGNATURE

**IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT, PRETORIA)**

CASE NO: 3852/2008

In the matter between:

30/7/2010

J M MASEMOLA

Plaintiff

And

MINISTER OF SAFETY AND SECURITY

1st Defendant

MPENDULO JONGIKAYA ZOKO

2nd Defendant

JUDGMENT

LEDWABA, J

- [1] The parties' legal representatives agreed at a pre-trial held on 19 July 2010 that the trial set down for hearing from 26 July 2010 to 13 August 2010 is not ready to proceed since both parties were not ready to proceed with the trial and further that on the issues in the papers the trial would not be finalised within the period allocated for hearing.
- [2] Advocate Maritz, who appeared for the plaintiff, submitted that the plaintiff's non preparedness was mainly caused by

the defendants' failure to comply with Rules 35, 36 and 37 of the rules of this court.

- [3] Advocate Maritz argued that the court should order that the defendants' were liable to pay plaintiff's wasted costs. The defendants' counsel, Advocate Erasmus, argued that the appropriate order to be made is that the costs should be costs in the action, or that the costs were to be reserved.
- [4] The undermentioned summarised facts are common cause between the parties:
- 4.1 The plaintiff's attorneys served the defendants' attorneys with the notice of set down on 22 July 2009.
 - 4.2 Plaintiff's attorneys served the defendants' attorneys with notice to discover in terms of rule 35(1), (6), (8) and (10) on 2 October 2008.
 - 4.3 Plaintiff's attorneys served defendants' attorneys with a discovering affidavit on 17 June 2010.
 - 4.4 On 28 May 2010 plaintiff's attorneys faxed a notice in terms of rule 37 informing the defendants' attorneys that a pre-trial conference would be held on 3 June 2010 at 16h00. The said notice was filed at court on 31 May 2010.

- 4.5 Plaintiff's attorneys served and filed notices in terms of rule 36(9) (a) and (b) on 24 June 2010 and 29 June 2010, respectively.
- 4.6 Defendants' attorneys did not attend the pre-trial scheduled for the 3 June 2010.
- 4.7 Defendants' attorneys served plaintiff's attorneys with an unsigned discovery affidavit on about the 1 July 2010.
- 4.8 On 7 July 2010 plaintiff's attorneys sent a letter to the defendants' attorneys requesting that a pre-trial conference be held on 19 July 2010.
- 4.9 Defendants' attorneys served plaintiff's attorneys with a notice in terms of rule 36(9) (a) and (b) on 13 July 2010. The said notice was served nine days before the hearing instead of, at least, fifteen days before the hearing.
- 4.10 On the 14 July 2010 plaintiff's attorneys addressed a letter to the defendants' attorneys informing them that their notice in terms of rule 36(9) (a) and (b) was not served timeously, that they were prejudiced in their preparation for trial and that, if necessary, plaintiff would apply for a postponement and ask for a cost order against the defendants.

- 4.11 Defendants' attorneys responded by faxing a letter to plaintiff's attorneys on 14 July 2010 confirming that they will attend of the pre-trial conference scheduled for the 19 July 2010 and further promised to send copies of documents mentioned in the first schedule of the defendants' "discovery affidavit(s)".
- 4.12 The defendants' attorneys in the said letter estimated the duration of the trial to be nine to ten days.
- 4.13 Defendants' attorneys wrote to plaintiff's attorneys on 14 July 2010 and stated in their letter that the copies of the 'discovered' documents were available at the office to be collected. They also requested plaintiff's attorneys to furnish them with copies of the documents discovered by the plaintiff.
- 4.14 On 15 July 2010 defendants' attorneys gave plaintiff's attorneys a bundle of documents consisting of 1226 pages.
- 4.15 A pre-trial conference was held on 19 July 2010 and the parties, *inter alia*, agreed that merits and quantum should not be separated.
- 4.16 Defendants' attorneys served plaintiff's attorneys with a signed discovery affidavit commissioned on 8 July 2010 but same was only served on 20 July 2010. The

plaintiff did not condone the late filing of the defendants' discovery affidavit(s).

4.17 The 'index bundle of documents' of the defendants reflected of 1540 pages, which means it had extra 314 pages compared to the bundle of documents given to the plaintiff's attorneys.

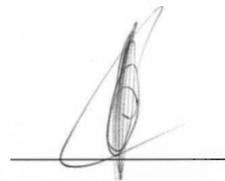
- [5] Advocate Erasmus submitted that the reason why the defendants' did not attend a pre-trial on 3 June 2010 is because their file at the State attorney's office was transferred from Mr. Olwage to Mr. Minnaar and documents did not reach Mr. Minnaar timeously.
- [6] Advocate Erasmus further submitted that the plaintiff too was not ready to proceed with the trial because he did not serve the defendants' attorneys with an expert notice to prove his claim of R10 918 800 for loss of income.
- [7] He further submitted that both parties were not ready to proceed with the trial and the parties have now further agreed that the matter should be set down for hearing for 3 months. He therefore requested the court to order that costs should be costs in the main action.
- [8] It is trite that the award of costs is a matter where the court has to exercise its discretion judicially.

- [9] The general rule is that a party who caused the case not to proceed on the trial date must ordinarily pay the wasted costs.
- [10] On careful analysis of the facts which are common cause, in my view, what caused the plaintiff not to be prepared for the case timeously is the defendants' failure to attend the pre-trial conference on the 3 June 2010 and the defendants' failure to properly discover timeously.
- [11] The fact that after the plaintiff's attorneys received the discovered documents they realised that the duration of trial would be more than what the parties estimated cannot, in my view, be a factor to absolve the defendants' attorneys conduct of failing to attend the pre-trial conference and to properly file a discovery affidavit timeously.
- [12] Defendants' attorneys were warned as early as on the 14 June 2010 that the notices in terms of rule 36(9) (a) and (b) were not filed timeously and that the failure to discover prejudiced the plaintiff in the preparation for the trial.
- [13] Plaintiff's alleged failure to file an expert notice in terms of rule 36(9) (a) and (b) for loss of income cannot, in my view, be regarded as a cause for the postponement. Plaintiff had decided to conduct and take a risk of proceeding with a case without using further experts.

[14] I need to record that it is important that the parties should hold an effective pre-trial conference before they decide on the duration of the trial and apply for dates of hearing.

[15] **I therefore, make the following order:**

- (i) **The matter is postponed *sine die*.**
- (ii) **The defendants are jointly and severally liable to pay the plaintiff's wasted costs, which costs should include the costs of opposition.**

A handwritten signature in dark ink, appearing to read 'A. P. LEDWABA', is written over a horizontal line.

A. P. LEDWABA
JUDGE OF THE HIGH COURT