

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

11/02/2011
CASE NO: 28266/09

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

In the matter between:

11/02/2011
DATE

SIGNATURE

MARGARET SARAH ANNETTA LAVERACK

Plaintiff (Respondent)

and

VAUGHN GAVIN DAY

Defendant (Applicant)

J U D G M E N T

MNGQIBISA-THUSI J

[1] Before me are two applications in terms of Rule 30 of the Rules of Court wherein the defendant is seeking orders in the following terms:

1.1 setting aside the plaintiff's notices in terms of Rule 36(10)(a) and 36(10)(b) served on the defendant on 21 August 2009 and 2 September 2009, respectively;

1.2 directing that the plaintiff pay the costs of these applications.

[2] The defendant is seeking an order setting aside of the two notices on the ground that they constitute an irregular step and are not in compliance with the peremptory requirements of Rule 36 (10).

[3] In the main matter, instituted during June 2009, the plaintiff is suing the defendant for damages as a result of the injuries she sustained after allegedly being assaulted by the defendant.

[4] The plaintiff issued summons against the defendant on 13 May 2009.

[5] On 3 June 2009 the defendant filed a notice of intention to defend.

[6] Without filing its plea, the defendant brought two other interlocutory applications.

[7] On 21 August 2009 the plaintiff served the defendant with a Rule 36(10)(a) Notice dated 18 August 2009. This Notice reads as follows:

"GELIEWE KENNIS TE NEEM dat die Eiseres van voorname is om tydens die verhoor 18 [Agtien] foto's van Eiseres se beserings as getuienis in die saak sal bied.

GELIEWE VERDER KENNIS TE NEEM dat die Eiseres verlang dat die Verweerder die foto's binne 10 (tien) dae van datum hiervan erken."

[8] On 27 August 2009 the defendant served the plaintiff with a Rule 30(2)(a) Notice calling upon the plaintiff to remedy the irregular step it has taken. The irregularity complained of is that:

- 8.1 The notice is premature as it was delivered before the close of pleadings;
- 8.2 Inspection of the photographs is not offered in compliance with the provisions of Rule 36(10)(a);
- 8.3 The notice requires the defendant to admit the photographs within 10 days of the date of the notice, rather than within 10 days after receipt thereof, as is required in terms of the sub-rule.

[9] In response to the defendant's rule 30(2)(b) Notice, on 2 September 2009, the plaintiff served the defendant with a similar Rule 36(10)(a) Notice as the one delivered on 21 August 2009. This Notice, however, contained an additional paragraph even though it was also dated 18 August 2009. This Notice reads as follows:

"GELIEWE KENNIS TE NEEM dat die Eiseres van voorneme is om tydens die verhoor 18 (Agtien) foto's van Eiseres se beserings as getuienis in die saak sal bied.

GELIEWE VERDER KENNIS TE NEEM dat die Eiseres die foto's hierby aanheg.

GELIEWE VERDER KENNIS TE NEEM dat die Eiseres verlang dat die Verweerder die foto's binne 10 (tien) dae van datum hiervan erken."

[10] Attached to this Notice were black and white pictures apparently depicting the injuries sustained by the plaintiff as a result of the alleged assault on her. It is contended on behalf of the defendant that the photos supplied were in black and white and fuzzy. It was further alleged that it had come to his notice that subsequent to the delivery of the black and white photos, the plaintiff had filed coloured photos with the court.

[11] The defendant again delivered a Rule 30 (2) (b) Notice on the plaintiff dated 22 October 2009. The irregularity complained of is that:

- 8.1 The notice is premature as it was delivered before the close of pleadings;
- 8.2 Inspection of the photographs is not offered in compliance with the provisions of Rule 36(10)(a);

8.3 The notice requires the defendant to admit the photographs within 10 days of the date of the notice, rather than within 10 days after receipt thereof, as is required in terms of the sub-rule.

[12] Rule 36 (10)(a) of the Rules of Court provides that:

“(a) No person shall, save with the leave of the court or the consent of all the parties, be entitled to tender as evidence any plan, diagram, model or photograph unless he shall not less than fifteen days before the hearing have delivered a notice stating his intention to do so, offering inspection thereof and requiring the party receiving notice to admit the same within ten days after receipt of the notice.”

[13] The purpose of Rule 36(10)(a) of the Rules of Court is to make all parties aware of the existence of the objects referred to therein so that the issues might be narrowed down and incontrovertible points eliminated in preparation for trial.

[14] The rule provides for a party who has objects he wishes to be admitted as evidence to invite the other party to peruse and/or view the objects so that if the other party is comfortable with the goods being admitted give his consent even before the trial starts. If the other party does not accept the invitation, the judge the party seeking to use the objects can simply reject the invitation.

[15] In brief argument on behalf of the defendant was that since there were two pending applications with regard to the matter it was not to the advantage of the plaintiff, necessary or relevant for the plaintiff to deliver the notices at this stage. Furthermore it was argued that since the photographs attached to the second Notice were fuzzy and not in colour, the plaintiff had not complied with Rule 36(10)(a). Furthermore, the defendant argued that

there was also no-compliance with the calculation of the timeframes as set out in the Rule 36(10)(a).

[16] Counsel for the plaintiff concede that the Notices constituted an irregularity but only in so far as they did not strictly follow the wording used in the Rule and in the calculation of the period for a response. It was however argued that since the defendant had not approved prejudice as a result of the step taken by the plaintiff, the defendant's application should not be granted.

[17] Rule 30(1) provides that:

"Any party to any cause in which an irregular or improper step or proceeding has been taken by any party, may within 14 days of the taking of such step or proceeding apply to Court to set it aside."

[18] In order to succeed in its application the defendant has to show that it has suffered prejudice as a result of the plaintiff's conduct. A court is entitled, in a proper case, to overlook any irregularity which does not work any substantial prejudice to the other party. *Levitan v Newhaven Holiday Enterprises* 1991 (2) SA 297 (C) at 298A. In *Afrisun Mpumalanga (Pty) Ltd v Kunene NO and Others* 1999 (2) SA 599 the court at 611 stated that:

"Such an application will only be granted where the irregular step would cause prejudice to the applicant seeking to set it aside. The prejudice that is referred to is prejudice which will be experienced in the further conduct of the case if the irregular step is not set aside. There is no prejudice if the furtherance of the case is not affected by the irregular step and the irregular step can simply be ignored."

Furthermore, even if there is an irregularity, the court still has a discretion whether or not to grant the order.

[19] I am not convinced by the argument on behalf of the defendant that the Rule 36(10)(a) Notice cannot be delivered before the close of pleadings.

What has happened here is that the plaintiff has given the defendant the opportunity to see the photos it intends using as evidence during the trial well in advance. I do not find any prejudice to the defendant's conduct of its case by the step taken by the plaintiff nor was any prejudice to the defendant argued. Nor was it argued that this step hindered the defendant in preparing and filing its plea.

[20] If the defendant was not happy with being served with the Rule 36(10)(a) Notice at this early stage they could have simply ignored the step or responded by refusing the admission of the photos without further proof.

[21] Regarding the shortened timeframes given for a response to the Rule 36(10)(a) Notice, the defendant and the quality of the photos attached to the second Rule 36(10)(a) Notice, the defendant could have alerted the plaintiff as to the time limit as allowed by the Rule and sought to be supplied with better quality photos and requested an extension of time for a response since he would need time to consider his response.

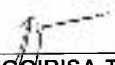
[22] I am of the view that this application was unnecessary if the defendant had just sought other less formal ways to resolve this dispute. It is a matter which could have been sorted out by the attorneys of the parties.

[23] I have dealt with the defendant's two applications in view of the fact that the grounds for complaint are the same.

[24] Accordingly the following order is made:

24.1 The defendant's applications are dismissed.

24.2 Costs are costs in the cause.



MNGQIBISA-THUSI
Judge of the North Gauteng High Court