



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: YES/NO

Case No: 1955/2016

In the matter between:

BAREND JACOBUS VAN DEN BERG

Applicant

and

**LAND AND AGRICULTURAL DEVELOPMENT BANK OF SA
SUIDWES LANDBOU (PTY) LTD
LORRAINE MARLENE VAN DEN BERG
BAREND JACOBUS VAN DEN BERG N.O.
LORRAINE MARLENE VAN DEN BERG N.O.
HENDRIK STEPHANUS LODEWICUS DU PLESSIS N.O.
THE REGISTRAR OF DEEDS**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent
Sixth Respondent
Seventh Respondent

Coram: Opperman, J

Heard: 20 July 2023

Delivered: 21 August 2023. This judgment was handed down electronically by circulation to the parties' legal representatives *via* email and release to SAFLII on 21 August 2023. The date and time of hand-down is deemed to be 15h00 on 21 August 2023

Judgment by: Opperman, J

Summary: Application for condonation of the late filing of expert notice and summary in terms of rule 36(9)(a) and (b) and for the direction of the court to comply with the provisions of rules 36(9), 36(9A) and rule 37(A)

JUDGMENT

- [1] This is an opposed application in the main action in a trial that is partly heard on various issues separated in terms of rule 33(4) (The rule 33(4)-trial).
- [2] Brought after the trial had already commenced on 27 November 2019, it is to now condone the late filing of an expert notice and summary as contemplated in terms of rules 36(9)(a) and (b) as well as an order directing the parties in the main action to comply with the purported interlocking provisions of rule 36(9), rule 36(9A) and rule 37(A).¹
- [3] The rule 33(4)-trial is set down for six days to continue on 7 November 2023. The reasons for the delay of four years will become clear as the judgment evolves.
- [4] This is the application:²

1.

PURPOSE OF APPLICATION:

- 1.1 The application was launched:
- 1.1.1 Firstly, in terms of the provisions of rule 27 of the uniform rules for, insofar as may be necessary, the extension of time limit(sic) in which the applicant is required to file an expert-notice and summary as contemplated by rule 36(9) and the condonation of defendant's late compliance; and, secondly, for an order:
- 1.1.2 in accordance with the practice of this court, for compliance with the provisions of rule 37A read with 36(9) and 9(A)(sic), requiring that:
- 1.1.2.1 the plaintiffs and the defendant file a joint minute of all the experts within 30 days from this order;
- 1.1.2.2 if any party causes undue delay in the finalisation of the joint minutes, such party's expert reports shall be ignored for the trial purposes;

¹ The rules are depicted later in the judgment.

² "Applicant's Heads of Argument" at paragraph 1: pages 3 to 5.

- 1.1.2.3 should either the defendant or the plaintiffs so request in writing within 10 days from the date that a joint minute has been filed as contemplated in paragraph 1.1.2.1 above, that the plaintiffs approach the court for rule 37(A)(sic) case management procedures to be held after the joint expert reports and notices are filed;
- 1.1.2.4 in the event that any of the parties do not perform in terms of any directions as indicated above or any further directions granted as contemplated in rule 37A, the innocent party shall be entitled to bring an interlocutory application to compel the party in default to comply which(sic) an interlocutory application which will form part of the case management procedure and the application will therefore not have to be brought before the normal motion court; alternatively
- 1.1.3 for the referral of the case for judicial case management as is contemplated by uniform rule 37A.

[5] The respondents opposed the application on the basis that the orders that the applicant seeks are “legally incompetent”.³ They argue that:

1. The recently substituted rule 36(9) requirements causes that the content of the applicant’s expert summary does not meet the requirements of sub-rule 9(b). The non-compliance with rule 36(9) is the end of the application.
2. Secondly, is it the argument of the respondents that the applicant does not overcome the procedural hurdles where he intends to call an expert witness after the trial had already commenced; the applicant required the leave of this court to cure his failure to timeously comply with the provisions of rule 36(9).
3. The third objection goes to the reasons why the first defendant provides no proper basis for the opinion of the first defendants intended expert witness that the credit agreements entered into was reckless within the meaning of the applicable provisions of the National Credit Act 34 of 2005.
4. The next objection to the application is that the expert summary is materially and fatally flawed and defective if regard is had to the provisions of rule 36(9)(b).

³ Paragraphs 12.1 to 12.5 of the “First and Second Respondent’s Heads of Argument and Practise Note”.

5. Lastly, is it proposed in defence of the application that the invocation of rule 37A read with rule 36(9) and rule 36(9A) is fatally flawed.

[6] The issue in the main action turns on monies claimed and allegedly due in terms of two purported credit agreements concluded between the plaintiffs and the defendants. A primary defence is that of reckless credit granted by the plaintiffs to the defendants in terms of the National Credit Act 34 of 2005.

[7] The first and second respondents are the plaintiffs in the main action. The applicant and his mother, Lorraine Marlene van den Berg, are in their personal capacities the first and second defendants. The trustees of the Hermanusdam Trust are the third, fourth and fifth defendants in the main action. The sixth defendant is the Registrar of Deeds. Mr. H.S.L. du Plessis is a trustee of the Hermanusdam Trust. He is also the legal representative of all the defendants in the main action and the applicant here. The seventh respondent is the Registrar of Deeds that purportedly registered the mortgage bond. No relief was sought against the seventh respondent, and they did not oppose the application. Mr. du Plessis does not represent the Registrar of Deeds.

[8] As indicated, the matter is partly heard on separated issues ordered by agreement between the parties in terms of rule 33(4). Relevant to this application is, *inter alia*:

1.13 Whether the second defendant conducted an assessment, as contemplated in section 81(2), and as required in terms of section 80(1)(a) of the Credit Act in relation to the loan agreement ("BV3") or the contract-financing agreement ("BV7").

1.13.1 Should it be found that the second defendant did not conduct such an assessment in respect of the credit agreement "BV3"; whether the relevant credit agreement constitutes reckless credit as contemplated in section 80 of the Credit Act.

1.13.2 Should the court find that the second plaintiff did not conduct said assessment in respect of the credit agreement "BV7"; whether said credit agreement constitutes reckless credit as contemplated in section 80 of the Credit Act.

1.13.3 Should the court find that second plaintiff indeed conducted the assessment referred to in paragraph 1.13 above in respect of the credit agreement "BV3", whether the second plaintiff entered into the credit agreement "BV3" despite the fact that the preponderance

of information available to the second plaintiff indicated that first defendant did not generally understand or appreciate his risks, costs or obligations under the proposed credit agreement as contemplated in Section 80(2)(b)(i) and/or entering into said credit agreement would make the first defendant over indebted as contemplated in section 80(1)(b)(ii), and/or whether the credit agreement is void in such circumstances.

- 1.13.4 Should the court find that the second plaintiff conducted the required assessment referred to in paragraph 1.13 above in respect of the credit agreement “BV7”; whether the second plaintiff entered into the credit agreement with the first defendant despite the fact that the preponderance of information available to the second plaintiff indicated that the first defendant did not generally understand or appreciate his risks, costs or obligations under the proposed credit agreement as contemplated by section 80(1)(b)(i), and/or entering into the credit agreement would make the first defendant over indebted as contemplated by section 80(1)(b)(ii) and/or whether the credit agreement is void in such circumstances. (Paragraphs 3.2 to 3.3 of the amended plea read with paragraphs 11 to 11.4 of the replication).
- 1.14 Should it be found that the credit agreements (“BV3”) or (“BV7”) constitute reckless credit agreements as contemplated in section 80 of the Credit Act but that it is not void:
 - 1.14.1 Whether the agreements (“BV3”) or (“BV7”) in such circumstances, are of no force and effect in view of section 81(3) of the Credit Act. (Prayer 37.2.2.2 of the counterclaim read with paragraph 2.2.3 of the amended plea to the counterclaim);
 - 1.14.2 Whether the court is empowered, in terms of the provisions of section 83(2)(a) of the Credit Act to set aside the first defendant’s rights and obligations in terms of either or both of the credit agreements without the court at the same time making an order that is just and equitable in the circumstances (prayers 37.2.2.3 of the counterclaim read with paragraphs 2.2.6 and 2.2.6.1 of the amended plea to the counterclaim);
 - 1.14.3 Whether the court is entitled and empowered in terms of the provisions of section 83(2)(b) of the Credit Act to suspend the force and effect of the credit agreements indefinitely and without determining a date for their resumption, (prayers 37.2.2.4 of the counterclaim read with the applicable prayer in terms of the amended plea to the counterclaim);
 - 1.14.4 Whether the court is empowered and entitled to declare void or alter the alleged unlawful provisions of the relevant credit agreements in terms of section 90(4) of the Credit Act, without the court at the same time making an order which is just and equitable in the circumstances. (Prayer 37.2.2.5 of the counterclaim read with paragraphs 2.2.4 and 2.2.4.1 of the amended pleas to the counterclaim).

[9] The first issue is then the adjudication of the application for condonation for the late filing of the expert notice and summary; secondly, whether the applicant may demand by way of

a court order from the respondents to employ experts and submit joint minutes under the auspices of case management and at this stage. If condonation is not granted it might be the end of the case.

- [10] In *Mokheithi and another v MEC for Health, Gauteng* 2014 (1) SA 93 (GSJ) at paragraph [20] it was correctly ruled that it is trite law that the rules regarding expert notices are to be complied with. It is not for the defendant to wait and see if the plaintiff is going to call expert testimony before the defendant decides whether or not its case demands the calling of expert testimony to its own benefit. It will be shown that this is exactly the basis on which the application is premised, and it speaks directly to the application *in casu*.
- [11] Rule 36 demands a proper and substantive application for condonation of the conduct of the applicant. The application was launched on 2 February 2023 whilst the 2019-promulgated rules 36(9)(a) and (b) were applicable.
- [12] The uncertainty of the applicant on the aspect of a substantive condonation application is without merit.⁴ The rules are clear. It was amended in May 2019 and May 2023 and demand condonation for non-compliance.⁵ These are the 2019-rules:

⁴ See the Founding Affidavit at paragraph 6.

⁵ Rule 36(9) (The 2023 – rules)

- (a) No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless —
- (i) where the plaintiff intends to call an expert, the plaintiff shall not more than 30 days after the close of pleadings, or where the defendant intends to call the expert, the defendant shall not more than 60 days after the close of pleadings, have delivered notice of intention to call such expert; and
 - (ii) in the case of the plaintiff not more than 90 days after the close of pleadings and in the case of the defendant not more than 120 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinion and the reasons therefor:
Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A(6) and (7) or as directed by a case management judge.
- (b) The summary of the expert's opinion and reasons therefor referred to in subparagraph (a)(ii) shall be compiled by the expert himself or herself and shall contain a statement by the expert confirming that the report is —
- (i) in such expert's own words;
 - (ii) for the assistance of the court; and
 - (iii) a statement of truth.
- [Sub-rule (9) substituted by GN R3397 of 12 May 2023.] (Accentuation added)

Rule 36(9)

No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless—

- (a) where the plaintiff intends to call an expert, the plaintiff shall not more than 30 days after the close of pleadings, or where the defendant intends to call the expert, the defendant shall not more than 60 days after the close of pleadings, have delivered notice of intention to call such expert; and
- (b) in the case of the plaintiff not more than 90 days after the close of pleadings and in the case of the defendant not more than 120 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinion and the reasons therefor:

Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A(6) and (7) or as directed by a case management judge.

[Substituted by GNR.2642 of 1987 and by GNR.842 of 31 May 2019.] (Accentuation added)

- [13] Rule 36(9) demands leave of the court or the consent of the parties, after close of the pleadings and that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A(6) and (7) or as directed by a case management judge.
- [14] The matter was certified to be ready for trial on 30 January 2017 and in terms of the rules and law in general that was applicable at the time. In terms of the then applicable law the matter was certified as trial-ready by Chesiwe, J after an inquiry for that purpose was conducted on 30 January 2017. The matter of expert notices and evidence on the issue of reckless credit was not raised here on 30 January 2017, nor in two preceding pre-trial inquiries on 16 January 2016 and 28 November 2016. The matter was certified ready for trial on 30 January 2017 and in terms of the prevailing law. The issue of reckless credit did exist here already but was not canvassed or addressed.
- [15] The words of Lacock, J in the unreported matter of *JP Ruppington v GP Niddrie and another*, Case number 667/2009 in the Northern Cape Provincial Division of the High Court give context and credence to the legal value for condonation *in casu*. He ruled that if a party is allowed to, on its own volition and autonomously during trial, give notice of the expert

witnesses he desires to call, the trial may be theoretically so, dumped into chaos. It will also deprive the court of its duty to manage the process.

[16] The added reality is trial-by-ambush. This is illegal and not in the spirit of the Constitution that guarantees a fair trial. The parties have a right to know the case they face before trial commences and even before the first case management conference held in terms of rule 37A.

[17] Case management through judicial intervention in terms of rule 37A is not to be abused to escape compliance with the rules of court. It shall be used in the interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases. The nature and extent of which shall be complemented by the relevant directives or practices of the Division in which the proceedings are pending. The rule states explicitly that the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication.

[18] Harms⁶ with reference to case law pointed out that:

1. A party who wishes to call an expert witness on any matter on which the evidence of expert witnesses may be received must deliver: (a) a notice of his intention to call that person as a witness; and (b) a summary of the expert's opinions and the reasons for them within the prescribed time limits.
2. The notice and summary, in the event of case management, must be delivered before a first case management conference held in terms of rules 37A(6) and (7) or as directed by a case management judge.

⁶ Civil Procedure, *Civil Procedure in the Superior Courts*, Part B High Court, UNIFORM RULES 36 & 37A, JUDICIAL CASE MANAGEMENT, Last Updated: February 2023 - SI 76, LexisNexis, <https://www.mylexisnexis.co.za/Index.aspx> on 16 August 2023.

3. Where these requirements are not complied with, expert evidence may not be given except with the leave of the court or with the consent of all parties to the suit.
4. The court must exercise a judicial discretion in this regard, favouring the admission of the evidence subject to the necessary safeguards.
5. The purpose of this rule is to prevent surprise and to give a litigant the opportunity to come prepared to trial to counter the expert evidence adduced by his opponent and to enable the experts to exchange reports and views, thereby limiting the duration of the trial and costs.
6. The time limits were not designed to provide a litigant with a tactical advantage over the other party.
7. Each party must prepare for trial individually.

- [19] The right of access to courts is essential in a constitutional democracy under the rule of law and specifically so in terms of section 34 of the Constitution, 1996: “Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”
- [20] Condonation granted on the facts of this case in terms of rule 27(3) read with rule 36(9), *inter alia*, of the Uniform Rules of Court may break any limitation placed on this right.
- [21] Rule 27(3) states that: “The court may, on good cause shown, condone any non-compliance with these rules.”
- [22] Rule 36(9)(a): “No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless —...”

- [23] The right of access to courts is eclipsed by the right to justice that also entails, *inter alia*, a fair trial. Section 34 of the Constitution refers to the application of law decided in a fair public hearing.
- [24] Fundamental rights and freedoms are not absolute. Their boundaries are set by the rights of others and by the legitimate needs of society and the administration of justice. Section 36 of the Constitution, as a general limitation clause, sets out specific criteria for the restriction of the fundamental rights in the Bill of Rights. These are common knowledge.
- [25] The major considerations that affect condonation are the degree of lateness of the referral, the reason for the lateness, the prospects of success on the merits and the prejudice to both parties which includes the importance of the matter to each party.
- [26] This case is a reminder that the rules of courts may not be utilised to play litigatory games that delay justice and cause costs and procedural misery. The rules may not be warped to the extent that the administration of justice is made a mockery. Litigation must be proper and timeous and may not cause trials to become chaos.
- [27] Courts may also not be held hostage by the reliance on section 34 of the Constitution. Litigation and access to courts are constitutional rights that may not be trampled and ridiculed; it must be conducted with the utmost decorum and respect for the rule of law.
- [28] The pleadings, according to the applicant and accepted by the court as reflected by the papers of record, closed on 13 July 2016.⁷
- [29] The application is seven years later if the close of pleadings are regarded and six years after the matter was certified ready for trial. It is now more than three years since the trial started

⁷ Page 17 at paragraph 3.2.2: “Defendants Notice of Application for Condonation and Orders contemplated by Rule 37(A)-13/7/2023” and hereafter referred to as the ‘Bundle’.

on the very aspect that forms the subject of the expert evidence the applicant wants to submit.

[30] Extensive litigation initiated by the applicant and the other defendants happened since the trial commenced on 27 November 2019 and this issue of the expert was never raised.

[31] The applicant stated that:⁸

6.12 At all relevant times my attorney was of the opinion-and-still-is-that any possible onus of proof that may be placed upon me to prove reckless lending will only be triggered once the plaintiffs have made the allegation that a reckless assessment has been attended to which, it is common cause, to date, has not happened.

[32] This is the explanation of the applicant for the application:

FACTUAL SYNOPSIS⁹

- 4.1 The plaintiffs instituted action against the defendants during May 2016 and claimed payment of certain amounts allegedly due in terms of two purported credit agreements concluded.
- 4.2 The salient feature of the defendant's special plea and counterclaim, for purposes of this application, is that the NCA regulated the transactions upon which the plaintiffs' claims are premised and that:
 - 4.2.1 the 2nd plaintiff failed to have attended to a reckless assessment as contemplated by section 81(2) read with section 80(1)(a) of the NCA; alternatively.
 - 4.2.2 in the event that the 2nd plaintiff has in fact attended to a reckless assessment as contemplated by the provisions of section 80(1)(a), which remain denied, the 2nd plaintiff, notwithstanding the fact that, on a preponderance of information available to it indicating that the defendant did not generally understand or appreciate his risks, costs or obligations under the proposed credit agreements; or entering into that agreement would have made him over indebted, proceeded to conclude the credit agreements;
 - 4.2.3 that the purported credit agreements are accordingly reckless and if not void, voidable;
 - 4.2.4 that the defendant's rights and obligations arising from the purported credit agreements be rescinded as contemplated by section 83(2)(b); alternatively;
 - 4.2.5 that, by virtue of the provisions of section 83(2)(b) the force and effect of these purported credit agreements be suspended.

⁸ Founding Affidavit: BJ van den Berg at page 29 of the Court Bundle.

⁹ Applicant's Heads of Argument dated 12 July 2023.

- 4.3 On 4 July 2019, shortly after the new rule 36(9) became effective, the plaintiffs delivered a rule 36(9)(a) notice of intention to call a certain Dr PC Cloete as an expert witness; the plaintiffs however failed to deliver the subsequent summary as contemplated by sub-rule (b).
- 4.4 The defendant issued and delivered his notice in terms of rule 36(9)(a) and (b) on 17 March 2022- more than a year before the April trial continuance date.
- 4.5 Due to the uncertainty caused by the variation of the time periods for delivering expert notices and the fact that the notices were delivered after the period prescribed by the new rule 36(9), the first defendant's attorney addressed a letter to the plaintiffs' attorney on 15 March 2022, requiring to know whether plaintiffs have any objection to the delivery of the expert notice and summary.
- 4.6 The plaintiffs responded on 22 March 2022 conveying that they are not prepared to consent to the filing and delivery of the notice, alleging, *inter alia*, that the notice does not comply with the provisions of the rule; that the plaintiff will be prejudiced because the defendants have not pleaded any of the facts upon which the expert witness intends to rely as required in terms of rules 18(4), 18(5), 22(2) and 22(3); that it contains opinion evidence which is inadmissible; that the information or facts or documents upon which the expert witness relies in support of each and every opinion are not clearly and unambiguously stated and/or identified; that the reasoning process is not summarized unambiguously and the expert witness appears to attempt to rely upon documents not yet discovered.
- 4.7 The applicable documents were subsequently discovered by the plaintiffs in terms of a supplementary discovery affidavit delivered on 28 April 2022. It is contended that none of the purported objections relates to the notice in terms of sub-rule (a) and, in any event in so far as purported objections are not repeated by the plaintiffs in this application the (sic) contend that it is not required to deal with these purported objections in the scheme of this application.
- 4.8 The plaintiffs proposed in their aforesaid response that the matter be postponed by agreement: all the parties agreed to the postponement of the matter in general due to the fact that the issue of discovery in terms of rule 35(3) was still subject to the outcome of an appeal process.
- 4.9 Should it be held by the court that the onus to prove the recklessness of the purported agreements rests upon the defendant, he shall be required to adduce expert evidence in support of my claim thereabout, whereas, if the burden of proof rests upon the plaintiffs the expert notices shall play a role in countering the plaintiffs' evidence this regard. (Accentuation added)

[33] The applicant addressed the circumstance that caused the non-compliance with the rules in paragraph 6 of the founding affidavit of the applicant. I will address the aspects proposed and evaluate the legal veracity.

1. It is the case for the applicant that it is common cause that the plaintiffs failed to have alleged in their particulars of claim that they have complied with the provisions of the National Credit Act relating to reckless credit and more

particularly, compliance with the provisions of section 81 read with section 80 of the National Credit Act. Their failure to have done so renders their particulars of claim fatally defective. The applicant accordingly approached the matter by entering a special plea of non-compliance whereupon they awaited the response of the plaintiff with the intention to, should they fail to amend their particulars of claim, argue non-compliance at an appropriate time.

- The argument is flawed in that the applicant had to resolve the issue of the onus on the aspect of reckless credit at the beginning of the litigation and before the matter was certified as ready for trial. It is reckless to adopt a wait-and-see stance and then start to prepare and submit vital evidence in the action years after the pleadings closed, the case management happened and after the trial commenced.
2. It is according to the applicant, trite that only a credit provider would be able to testify as to whether it has complied with the provisions of section 81 as such information falls within such credit providers exclusive domain.
- This cannot be correct. The defendants must have known their financial situation at the time of the credit agreements and now base the evidence in the report of the expert witness thereon. It is a contradiction in the evidence of the applicant. On the one hand he submits that he does not possess evidence on which to address the issue but in the same breath he applies for expert evidence prepared by him and his expert on the aspect to be admitted.
3. At all relevant times their attorney was of the opinion and still is that any possible onus of proof that may be placed upon the applicant to prove reckless lending will only be triggered once the plaintiffs have alleged that a reckless assessment has been attended, which it is common cause, has not happened.
- The applicant claims that his legal representative has extensive knowledge of the relevant legislation and law and will maintain their stance on the onus. If they maintain this position, he is bound by the advice of his counsel and must bear the consequences if it is wrong. The applicant cannot change his

evidence and defence in the middle of the trial with an expert witness. Notwithstanding the onus or perceived onus in a case does the primary responsibility remain with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication. The obligation on parties is in terms of rule 37A(2)(c).

4. The applicant indicated that they decided to place their defence of reckless lending on the back burner awaiting the plaintiff's reaction to their special plea.
 - They did so until this trial commenced in November 2019. They realized in 2019 what the reaction of the plaintiff's was; the matter was put to trial. They only obtained the evidence of the expert in 2022 and so adapted their evidence.

5. The applicant, now, autocratically so, has decided to disregard the question as to the effect of the plaintiffs' failure to have alleged compliance in regard to the provisions of section 81 read with section 80 of the National Credit Act and approach the issues in question on the conservative basis that firstly; the effect of the plaintiffs failure would have no effect on the onus of proof and secondly, for the sake of prudence that the onus of proof notwithstanding the applicant will address the issue.
 - This responsibility already existed when it became clear that it is the situation and may not be addressed years after the event and during the trial.

6. After the November 2019 session interlocutory applications and appeals amid the COVID-19 lockdown took precedence and caused the postponement of the trial until the date in April 2023.
 - This date has in the meantime been extended to deal with yet again another interlocutory application, being the one in relation to the expert witness. The conduct of the applicant has caused yet another delay.

7. The applicant further indicates that the bank manager that he consulted during March 2017 and intended to call in respect of his plea of reckless credit relocated and retired. They were accordingly required to find another suitable expert.
 - It is implausible that this took two years. The applicant realized that it was an issue in 2017 but only took steps years later to address the issue. The applicant failed in his litigatory obligation to ensure expeditious and fair litigation.
8. After a prolonged and intensive search consulting a variety of individuals the attorney of the applicant that is also a party in this matter, ultimately located a knowledgeable replacement expert witness and one of the few experts in the field of agricultural finance.
 - The details of the search and situation is not known to the court and the explanation vague.
9. After the expert had been briefed the parties consulted on various occasions and requested information and a variety of documentation which took time to retrieve.
 - Again, the details and challenges are addressed in a sweeping statement that does not assist the court in coming to a fair decision.
10. Mr. Botha and the attorney commenced preparing the rule 36(9)-papers in question which were finalized, served and filed on 17 March 2022; years after the trial commenced and the pleadings closed. Given the voluminous nature of the expert notice and summary, it is submitted by the applicant, that the same were prepared, finalized, edited, and settled within a reasonable period of time.
 - Again, the lack of detail makes the assertion of reasonableness of the delay difficult, if not impossible.
11. As stated above, certain interlocutory applications and appeals were launched which if successful would in all probability have affected the continuation of the

trial in consequence of which the parties agreed to postpone the matter pending the finalization of these matters in late 2022.

- The statement is ambiguous in that the plaintiffs/respondents were forced into the extensive litigation by the applicant and other defendants in the main action and the trial had to be postponed pending the outcome of the applications and appeals.

12. The question also arose, taking into account the fact that the expert notices were delivered in March 2022, whether, if necessary the applicant should approach the court for leave at the appropriate time during the trial or launch a substantial application as is done in this application and secondly whether the provisions of rule 37A applies in regard to the expert issues and if so to what extent. The attorney was originally, insofar the manner in which the application is to be launched, satisfied that this could be done on a summary basis during the trial.

- The attorney was clearly wrong in his assumption since the rules and law is clear. Fortunately, but belated, during November 2022, the attorney was involved in interlocutory proceedings in another High Court that changed his stance on the process.

13. Due to the novelty of these amended rules the attorney considered it and the issues at hand since that came to his knowledge. During November 2022 he left for the USA for the month of December 2022 and upon his return sought a second opinion.

- This is neither here nor there; the delay is due to the applicant's conduct and to the prejudice of the administration of justice. It could have been prevented if due diligence and commitment had been observed from the beginning of the case. The rules were promulgated in 2019 already. The reason(s) for the stay in the USA is not known to the court.

14. In similar fashion the applicant submits that it is clear from all the court papers read with this application and particularly the expert notices that he has a *bona fide* defence and that his defence is not ill-founded. It is based upon facts which if

proved constitute a defense and further that his counterclaims are factually and legally sound.

- This statement is debatable and was put forward for adjudication in the rule 33(4)-trial in 2019.

15. The applicant argues that the plaintiffs/respondents cannot claim any prejudice suffered by them. The plaintiffs were served with the rule 36(9) notices as early as March 2022. This is more than a year prior to the April 2023 trial continuance date and accordingly have been fully aware of the testimony of the expert witness for a considerable period prior to this application. The plaintiff's objection set out in annex B2 is not premised upon the time factor and thus not on the condonation issue itself but instead upon the contents thereof.

- This is just not correct. The case has been delayed for years and the plaintiffs/ respondents are waylaid by yet another application that is unsound in law and fact. The applicant knew in March 2022 that the respondents object to the submission and validity of the expert notice and summary. They only filed an application for condonation on 2 February 2023; eleven months later.

[34] The case has an extensive history of litigation after and before the trial started in November 2019.¹⁰ The litigation, as driven by the defendants in the main action, turned in the Constitutional Court. The litigation ended in judgments against them as none was successful:

1. In the beginning, the defendants in the main action delivered a plea which is inundated with special pleas; twenty to be exact. There are four conditional special pleas and multilayered defenses on the merits.
2. Intertwined herewith is that the applicant in the present application as the first defendant in the main action, filed three conditional counterclaims, an unconditional claim for damages and a conditional claim for damages.

¹⁰

Pages 52 to 60 of the Bundle in the "First Respondent's Answering Affidavit".

3. The mother, Mrs. van den Berg filed a conditional counterclaim and the trustees of the Hermanusdam Trust that are the third to fifth defendants in the main action, filed two conditional counterclaims.
4. The first and second respondents deny that the aforesaid defendants' defenses are well founded.
5. Added to the above is the 2019-action that was instituted against one Mrs. Corinne Steyn. In terms of the 2019-action the first and second respondents instituted conditional claims against Mrs. Steyn as the first defendant.
6. In the light of the extraordinary broad scope of issues that would have had to be dealt with and determined in the trial of the main action the parties agreed at a supplementary pre-trial conference held on 22 November 2019, to request the court to separate a number of issues in terms of uniform rule 33(4) to be adjudicated first and separately from the remaining issues and before the adjudication and determination of the remaining issues.
7. The trial on the separated issues in the main action commenced, as was indicated, on the 27th of November 2019. On 29 November 2019 Mrs. Steyn gave evidence for the first respondent and regarding the registration of the mortgage bond by the trustees of the Hermanusdam Trust in favor of the second respondent. The evidence of Mrs. Steyn was necessary because the trustees of the Hermanusdam Trust deny the validity of the mortgage bond. After the completion of Mrs. Steyn's testimony, the total of the separated issues was by agreement postponed to the 14th, 15th, 17th, 21st, 22nd and 24th of April 2020. Covid then happened.
8. After the postponement of the main action and before the continuation of the main action the application to compel and the consolidation application were issued. As a result, the trial in the main action did not continue during April 2020. Concerningly so, the matter has not proceeded since. It remains in limbo pending the extensive and widespread interlocutory litigation by the applicant and the other defendants.
9. The application to compel and the consolidation application were both dismissed by this court.

10. The defendants in the main action requested leave to appeal in respect of the application to compel and the trustees of the Hermanusdam Trust requested leave to appeal in respect of the consolidation application. This court refused leave to appeal in both the application to compel and in the consolidation application.
11. Leave to appeal from the Supreme Court of Appeal was sought in both applications. The Supreme Court of Appeal refused leave to appeal in both the applications.
12. Applications for reconsideration in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013 followed. These applications were also unsuccessful.
13. Finally leave to appeal was sought from the Constitutional Court. The Constitutional Court also refused leave to appeal.

[35] It is imperative for the reader of this judgment to also have regard to some relevant papers and documents to understand the extensive history of this case caused by the applicant and the other defendants and for context in this application. These are:

1. The pleadings which were exchanged under case number 1955/ 2016 (it is the main action) instituted in this case on 4 May 2016.
2. The order which this court issued in terms of uniform rule 33(4).
3. The interlocutory application in terms of rule 30A dated 11 March 2020 to compel discovery (the application to compel) and the affidavits as well as the heads of arguments which were exchanged in the application to compel.
4. The notice of motion issued on 11 March 2020 in the application for the consolidation of the main action and case number 765/2019 (the 2019-action) and the founding and other affidavits as well as the heads of argument which were exchanged in the application for consolidation.
5. The applications for leave to appeal in respect of the application to compel and in respect of the consolidation application as well as the heads of arguments which were filed in these applications.
6. The applications for leave to appeal filed in the Supreme Court of Appeal in respect of both the applications to compel and the consolidation application.
7. The applications for reconsideration and variation in terms of section 17(2)(f) of the Superior Courts Act 10 of 2013 filed in the Supreme Court of Appeal.

8. The applications for leave to appeal in the Constitutional Court in respect of both the aforesaid applications.
9. This case was also marred with some controversy in that Mr. du Plessis who, as said, represented the defendants in the main action overstepped the boundaries off proper litigation in that he, on allegations by counsel for the plaintiffs introduced factual assertions in the heads of arguments and during oral argument. He in their view testified from the bar and he simply continued to raise new issues of law and fact as the litigation progressed. This caused a delay from November 2019 up to date; more than three years.¹¹
10. Knowing very well what their primary defense is, Mr. du Plessis now in July 2023 makes an application for the admission of the evidence of an expert witness on the alleged reckless credit defence.

[36] Auditing by experts of this defence at the beginning of the litigation with evidence that carries veracity could have spared all the litigants and the administration of justice much distress and costs. The plaintiffs and the defendants still have the option, but it must be exercised with due regard to the rules of the court and proper process.

[37] Condonation may not be granted on the facts of this case. The non-compliance with the rules of the court is unacceptable and places the administration of justice into disrepute.

[38] If the refusal to grant condonation is mistaken the fact remains that the expert summary does not meet the present requirements in terms of rule 36(9)(b). The expert notice is fatally flawed to the extent that a costs order will not address the neglect. The applicant failed, as was put by the respondents in their heads of argument at paragraph 48.2, to act with reasonable promptitude. The prejudice to the respondents and the administration of justice is real for the reasons reflected above.

[39] The refusal of condonation makes the issue of the invocation of section 37A moot. Case management was finalized in 2017 when the matter was certified to be ready for trial. Even

¹¹ Paragraph 21 of the "First Respondents Answering Affidavit".

prior to the introduction of rule 37A and rule 36(9A), cases were managed by the courts either on request or *mero motu* by the court or in terms of a Division's Practice Directives.¹² The case of *Mohai v Road Accident Fund* (2802/2017) [2022] ZAFSHC 115 (16 May 2022) referred to by counsel for the applicant is confirmation hereof.

[40] Interference by the court to regulate the conduct of the plaintiffs will be unconstitutional on the facts of the case. The atmosphere and purpose of rule 37A¹³ is to serve the

¹² *In re: Nedbank Limited v Thobejane and related matters* [2018] 4 All SA 694 (GP), 2019 (1) SA 594 (GP); *Broodie NO v Maposa and Others* [2018] 2 All SA 364 (WCC), 2018 (3) SA 129 (WCC).

¹³ Rule 37A

- (1) A judicial case management system shall apply, at any stage after a notice of intention to defend is filed—
 - (a) to such categories of defended actions as the Judge President of any Division may determine in a Practice Note or Directive; and
 - (b) to any other proceedings in which judicial case management is determined by the Judge President, of own accord, or upon the request of a party, to be appropriate.
- (2) Case management through judicial intervention—
 - (a) shall be used in the interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases;
 - (b) the nature and extent of which shall be complemented by the relevant directives or practices of the Division in which the proceedings are pending; and
 - (c) shall be construed and applied in accordance with the principle that, notwithstanding the provisions herein providing for judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication.
- (3) The provisions of rule 37 shall not apply, save to the extent expressly provided in this rule, in matters which are referred for judicial case management.
- (4) In all matters designated to be subject to judicial case management in terms of sub-rule (1)(a) at any stage before the close of pleadings, the registrar may—
 - (a) direct compliance letters to any party which fails to comply with the time limits for the filing of pleadings or any other proceeding in terms of the rules; and
 - (b) in the event of non-adherence to the directions stipulated in a letter of compliance, refer a matter to a case management judge designated by the Judge President who shall have the power to deal with the matter in terms of the practice directives of the particular Division concerned.
- (5)
 - (a) Notwithstanding the allocation of a trial date, a case that is subject to judicial case management shall not proceed to trial unless the case has been certified trial-ready by a case management judge after a case management conference has been held, as provided for in sub-rule (7).
 - (c) A case management judge shall not certify a case as trial-ready unless the judge is satisfied—
 - (i) that the case is ready for trial, and in particular, that all issues that are amenable to being resolved without a trial have been dealt with;
 - (ii) that the remaining issues that are to go to trial have been adequately defined;
 - (iii) that the requirements of rules 35 and 36(9) have been complied with if they are applicable; and
 - (iv) that any potential causes of delay in the commencement or conduct of the trial have been pre-empted to the extent practically possible.
 - (d) A case management judge may order directions on the making of discovery where the judge considers that such directions may expedite the case becoming trial-ready.
- (6) In every defended action in a category of case which has been identified in terms of sub-rule (1)(a) as being subject to judicial case management in which any party makes application for a trial date

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- following the close of pleadings, the registrar shall issue a notice electronically to the parties, at the addresses furnished in terms of rules 17(3)(b) or 19(3)(a), in respect of the holding of a case management conference.
- (7) The notice by the registrar in terms of sub-rule (6) shall inform the parties—
 - (a) of the date, time, and place of a case management conference in the matter to be presided over by a case management judge;
 - (b) of the name of the case management judge, if available;
 - (c) that they are required to have held a pre-trial meeting before the case management conference at which the issues identified in sub-rule (10) in relation to the conduct and trial of the action must have been considered; and
 - (d) that the plaintiff is required, not less than two days before the time appointed for the case management conference, to—
 - (i) ensure that the court file has been suitably ordered, secured, paginated and indexed; and
 - (ii) deliver an agreed minute of the proceedings at the meeting held in terms of paragraph (c), alternatively, in the event that the parties have not reached agreement on the content of the minute, a minute signed by the party filing the document together with an explanation why agreement on its content has not been obtained.
 - (8) The minute referred to in sub-rule (7)(d)(ii) shall particularise the parties' agreement or respective positions on each of the issues identified in sub-rule (10) and, to the extent that further steps remain to be taken to render the matter ready for trial, explicitly identify them and set out a timetable according to which the parties propose, upon a mutually binding basis, that such further steps will be taken.
 - (9) (a) In addition to the minute referred to in sub-rule (7)(d)(ii), the parties shall deliver a detailed statement of issues, which shall indicate—
 - (i) the issues in the case that are not in dispute; and
 - (ii) the issues in the case that are in dispute, describing the nature of the dispute and setting forth the parties' respective contentions in respect of each such issue.
 (b) A case management judge may, upon considering the statement by the parties referred to in paragraph (a), direct that appearance by one or all of the parties is dispensed with.
 - (10) The matters that the parties must address at the pre-trial meeting to be held in terms of sub-rule (7) are as follows:
 - (a) The matters set forth in rules 35, 36 and 37(6);
 - (b) the soliciting of admissions and the making of enquiries from and by the parties with a view to narrowing the issues or curtailing the need for oral evidence;
 - (c) the time periods within which the parties propose that any matters outstanding in order to bring the case to trial readiness will be undertaken;
 - (d) subject to rule 36(9), the instruction of witnesses to give expert evidence and the feasibility and reasonableness in the circumstances of the case that a single joint expert be appointed by the parties in respect of any issue;
 - (e) the identity of the witnesses they intend to call and, in broad terms, the nature of the evidence to be given by each such witness;
 - (f) the possibility of referring the matter to a referee in terms of section 38 of the Act;
 - (g) the discovery of electronic documents in the possession of a server or other storage device;
 - (h) the taking of evidence by video conference;
 - (i) suitable trial dates and the estimated duration of the trial; and
 - (j) any other matter germane to expediting the trial-readiness of the case.
 - (11) Without limiting the scope of judicial engagement at a case management conference, the case management judge shall—
 - (a) explore settlement, on all or some of the issues, including, if appropriate, enquiring whether the parties have considered voluntary mediation;
 - (b) endeavour to promote agreement on limiting the number of witnesses that will be called at the trial, eliminating pointless repetition or evidence covering facts already admitted; and
 - (c) identify and record the issues to be tried in the action.
 - (12) The case management judge may at a case management conference—
 - (a) certify the case as trial-ready;

administration of justice, not to interfere with the litigatory freedom of parties. The plaintiffs are *dominus litis* and neither the court nor a defending party may prescribe to a plaintiff what the evidence is they must adduce and present.

- [41] The plaintiffs are *dominus litis*, they are the parties to whom the suit belongs, and they are the masters of the suit. The *dominus litis* status may cause a party to derive the benefit of a favorable judgment but there is also the liability for the effects of an adverse judgment, including expenses. They carry the risk.
- [42] Rule 36(9A) prescribes that the parties shall endeavor, as far as possible, to appoint a single joint expert on any one or more or all issues in the case; and file a joint minute of experts relating to the same area of expertise within 20 days of the date of the last filing of such expert reports.¹⁴ It is not legislatively compulsory to file joint minutes; there must be a reasonable attempt. It may also not be expected from any party to obtain expert evidence just because one party chooses to do so; specifically, not four years after the trial

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- (b) refuse certification;
 - (c) put the parties on such terms as are appropriate to achieve trial-readiness, and direct them to report to the case management judge at a further case management conference on a fixed date;
 - (d) strike the matter from the case management roll and direct that it be re-enrolled only after any non-compliance with the rules or case management directions have been purged;
 - (e) give directions for the hearing of opposed interlocutory applications by a motion court on an expedited basis;
 - (f) order a separation of issues in appropriate cases notwithstanding the absence of agreement by the parties thereto;
 - (g) at the conclusion of a case management conference, record the decisions made and, if deemed convenient, direct the plaintiff to file a minute thereof;
 - (h) make any order as to costs, including an order *de bonis propriis* against the parties' legal representatives or any other person whose conduct was conducted unreasonably to frustrate the objectives of the judicial case management process.
- (13) The record of the case management conference, including the minutes submitted by the parties to the case management judge, any directions issued by the judge and the judge's record of the issues to be tried in the action, but excluding any settlement discussions and offers, shall be included in the court file to be placed before the trial judge.
 - (14) The trial judge shall be entitled to have regard to the documents referred to in sub-rule (13) in regard to the conduct of the trial, including the determination of any applications for postponement and issues of costs.
 - (15) Unless the parties agree thereto in writing, the case management judge and the trial judge shall not be the same person.
 - (16) Any failure by a party to adhere to the principles and requirements of this rule may be penalised by way of an adverse costs order.

[R.37A inserted by GNR.842 of 31 May 2019.]

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Inserted by GNR.842 of 31 May 2019.

commenced and seven years after the pleadings closed. The prejudice of costs and delay of the trial for years are now more real.

- [43] In conclusion, the record of this case will show that much of the delay in this case was caused by the continuous issues that arose after the trial commenced and initiated by the applicant *in casu* and the other defendants in the main action. With due respect to the right to access to justice and courts, continuous conduct of this nature will lead to a waste of financial and judicial resources and obstruct the administration of justice that may not be allowed. The time has come for the matter to be vented at trial and concluded.

[44] **ORDER**

The application to condone the late filing of an expert notice and summary in terms of rules 36(9)(a) and (b) as well as an order directing the parties in the main action to comply with the purported interlocking provisions of rule 36(9), rule 36(9A) and rule 37(A) are dismissed with costs that includes the costs of two counsel.



M OPPERMAN, J

APPEARANCES

On behalf of the applicant

H.S.L. DU PLESSIS

HSL du Plessis Attorneys
c/o Lovius Block Attorneys
BLOEMFONTEIN

On behalf of the first and second respondents

DIRK VAN DER WALT SC
WILLEM VAN ASWEGEN
Symington & De Kok Attorneys