

Reportable: Yes / No

Circulate to Judges:

Yes / No

Circulate to Magistrates: Yes / No

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case No: 871/2004

Heard: 13/06/06

Delivered: 01/09/06

EVERITE A C PIPES (PTY) LTD

PLAINTIFF

versus

HERMAN JOHANNES GALAMA

DEFENDANT

JUDGMENT

MOKGOHLOAJ:

1. The defendant brought an application seeking an order that the trial that was set down for 13 June 2006 be postponed **sine die** and that the plaintiff to carry the costs brought about by this application. I was informed at the commencement of the trial that the parties have agreed that the matter be postponed **sine die** and what was to be argued was the issue of costs. The matter was then postponed **sine die** and I reserved my decision

on costs. What follows is my ruling on costs and reasons therefore.

2. The main reason advanced by the defendant that necessitated the postponement application is that the matter is not ripe for trial and that the plaintiff is to blame for such a situation.
3. The action concerns a claim for goods sold and delivered by the plaintiff to Galama Engineering CC for an amount of R94 837.81. The defendant signed and bound himself as surety and co-principal debtor in **solidum** with Galama Engineering CC in favour of the plaintiff for the due and proper compliance by Galama Engineering CC of all its obligations to the plaintiff.
4. A Notice of set down was served by the plaintiff on the defendant on 17 May 2006. On 22 May 2006 the defendant served a Notice in terms of Rule 35(1); (6) and (8) of the Uniform Rules on the plaintiff. A Notice calling the parties to a pre-trial conference was served by the plaintiff on the defendant on 2 June 2006. The defendant served his Discovery Affidavit on the plaintiff on 6 June 2006.
5. The pre-trial conference was held on 8 June 2006 and by this

time the plaintiff had not yet delivered his Discovery Affidavit. The defendant then informed the plaintiff at the pre-trial conference that he is being prejudiced and that it will be impossible to prepare for trial without the plaintiff's Discovery Affidavit. The defendant informed the plaintiff at the pre-trial conference of his intention to apply for a postponement with costs against the plaintiff. The plaintiff agreed to the postponement but suggested that there be no order as to costs alternatively, costs be costs in the cause as both parties, according to the plaintiff, are to blame for non compliance with the Rules of Court.

6. Rule 37(1) states that a party who receives notice of the trial date of an action shall, if he has not yet made discovery in terms of Rule 35, within 15 days deliver a sworn statement which complies with Rule 35(2). The authors of **Farlam, et al** in **Erasmus, Superior Courts Practice Juta**, at page B1-274A comment as follows:

“The effect of this sub rule (R37(1)) is that a party to an action is obliged to make discovery upon receipt of notice of the trial date of an action even

where such a party was not under Rule 35(1) required to make discovery on oath”.

The authors comment further on Rule 35(1) that:

“The rule is permissive in so far as it does not oblige a party to compel his or her opponent to give discovery. However, discovery is a procedure designed for the benefit of the parties and failure to take advantage of the procedure may result in a disorderly presentation of the case in Court. In such a case, the court may show its disapproval of a party’s failure to apply for discovery by an adverse order as to costs.”

(at page B1-250A-B1-251)

7. The defendant received a notice of set down on 17 May 2006 and served his discovery affidavit on 6 June 2006. The plaintiff who set the matter down for trial, only delivered his Discovery Affidavit on 9 June 2006, a day after the pre-trial conference. This day was outside the 15 day period. The 15 day period ended on 7 June 2006. Rule 37(3)(a) provides that a pre-trial conference “shall be held not later than six weeks prior to the date of hearing”.

The conference should thus have been held not later than 2 May 2006. On this date the defendant had not yet received a notice of set down.

8. It is clear that the plaintiff being **dominis litis** after receiving the notice of trial date set the matter down without first satisfying himself that the matter was ripe for trial. Also clear is that the plaintiff served his Discovery Affidavit late and thereby making it difficult for the defendant to prepare for the trial adequately.
9. It is an accepted principle of our law that the party at whose instance the postponement is obtained must pay the costs. See generally **Van Rooyen v Naude** 1927 OPD 122. However, it was held in **Burgerv Kotze and Another** 1970(4) SA 302 (W) at 304 that this may be the normal order if no one is to blame for the postponement. But if a postponement is occasioned by the fault or default of one of the parties then wasted costs are awarded against the party who was at fault or in default.
10. Mr de Koning who appeared on behalf of the plaintiff argued that the defendant is also at fault as he failed to make demand for the compliance with his notice calling for discovery timeously

and further that the defendant did not compel the plaintiff in terms of Rule 35(7). Rule 35(1) provides that the party calling for discovery must give another party 20 days within which to discover. In the present case the plaintiff had until 20 June 2006 to discover. Therefore the defendant could not have brought an application to compel. There was in my view no duty upon the defendant to demand from the plaintiff of his (plaintiff) duties under the Rules of Court nor was the defendant under any obligation to make use of a remedy available to him under Rule 35(7). In my view blame for the postponement of the trial should be attributed to the plaintiff.

11. The plaintiff acted unreasonably in opposing this application and I see no reason why the costs order should not be granted against him.

12. In the result, I make the following order:

The plaintiff is ordered to pay the party and party costs of this application.

FE MOKGOHLOA
ACTING JUDGE

For the Plaintiff : Adv. de Koning
Instructed by : Venter & Van Eeden Inc.
For the Defendant : Adv. Coetzee
Instructed by : Engelsman, Magabane Inc.