

Verslagwaardig:	JA/NEE
Sirkuleer onder Regters:	JA/NEE
Sirkuleer onder Landdroste:	JA/NEE

**IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
IN THE HIGH COURT OF SOUTH AFRICA
(Noord-Kaapse Afdeling / Northern Cape Division)**

**Case No: 549/01
Date Heard: 10/6/2003
Date Delivered:**

In the case between:

CORNELIUS JOHANNES GERHARDUS HORN PLAINTIFF

And

PIETER JACOBUS SWART 1st DEFENDANT

NEL & VENNOTE 2ND DEFENDANT

JC (KOBUS) NEL 3RD DEFENDANT

JUDGMENT

**TLALETSI, AJ
INTRODUCTION**

- The parties have agreed that this matter should not be proceeded with and should be and was postponed **sine die** judgment reserved. What was argued before me was at whose*

door the blame lies for the postponement as such party had to bear the costs occasioned by the postponement.

2. *Plaintiff enrolled the case for trial on the 10th – 12th June 2003. On the 28th March 2003 he served a Notice in terms of Rule 36(9)(b) of the Supreme Court Rules on the defendants. This notice was filed with the Registrar's office on the 31st March 2003. The document contains a summary of the evidence of Mr Benjamin Van Den Heever, who plaintiff intended to call as his expert. On the 5th June 2003 plaintiff served and filed a Supplementary Rule 36(9)(b) Notice. This document is described as a further summary of the evidence to be tendered by Mr Van Der Heever.*

3. *Mr Van Staden who appeared on behalf of the 1st defendant submitted, **inter alia**, 1st defendant was entitled to a postponement because plaintiff introduced new matters in the supplementary Rule 36(9)(b) Notice. This has created a need to consult an expert on these matters. First Defendant was ready to proceed but for these alleged new aspects. Mr Van Staden further submitted that because the Supplementary Notice was filed late 1st defendant is entitled to costs. He was however prepared to allow the determination of costs to stand*

over until the conclusion of the trial. First Defendant did not file a Rule 36(9)(b) Notice.

4. *Mr Botha who appeared on behalf of the plaintiff submitted that 1st defendant should tender the costs as the postponement was at his request. He argued that 1st defendant should have foreseen that an expert will be used, and he instead waited until the last day to decide whether or not to consult the experts. He submitted that the Supplementary Notice was merely an expansion on the Notice which had been filed in compliance with the Rule. He argued further that the determination of costs should wait until the conclusion of the trial. The basis for this submission is that it is only at that stage that the Court will be in a position to decide whether the defendants would have been prejudiced by the matters raised in the Supplementary Notice.*
5. *Mr Green, on behalf of the 2nd and 3rd Defendants submitted,*

inter alia, that he was in a position to proceed and since the plaintiff filed the Supplementary Notice late the plaintiff should be responsible for the costs being the defaulting party who seeks an indulgence.

6. Rule 36(9) reads:

“(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 he shall

(a) ---

(b) not less than ten days before the trial, have delivered a summary of such expert’s opinion and his reasons therefore”

As to the contents of the summary referred to above the

*Appellate Division in **Coopers (SA) Ltd v Deutsche***

***Schädlingsbekämpfung MBH** (3) SA 352 (A) at 371*

D - E per Wessels, JA. said the following:-

“In deciding whether there has been due compliance with sub-rule (9) (b), it is, in my opinion, relevant to have regard to the main purpose thereof, which is to require the party intending to call a witness to give expert evidence to give the other party such information about his evidence as will remove the element of surprise, which in earlier times (regarded as an element affording a tactical advantage) frequently caused delays in the conduct of trials. Indeed,

all the sub-rules of Rule 36 were formulated with that purpose in mind. Consequently, when summarizing the facts or data on which the expert witness premises his opinions, the draughtsman should ensure that no information is omitted, where the omission thereof might lead to the other side being taken by surprise when in due course such information is adduced in cross-examination or evidence.”

7. One of the plaintiff's causes of action against the defendants according to the Particulars of Claim is based on a fraudulent misrepresentation allegedly made regarding the value of the subject matter of the sale agreement and the monthly income it generated. Evidence on which the plaintiff will rely in order to substantiate these allegations is contained in the Supplementary Notice. It is not in dispute that the Supplementary Notice was filed less than the stipulated ten days before the trial.

8. ***I endorse the argument by Mr Botha that the time limits provided for in Rule 36(9) are not designed to provide a litigant with a tactical advantage over the other party and each party has to prepare for trial individually. Authority for this argument is found in Doyle v Sentraoer (Co-***

operative) Ltd 1993(3) SA 176 (SECLD). However this case is distinguishable from the present case in that in the former, the Court had to consider a situation where a party requested a postponement of the trial merely because the details of an expert's opinion, delivered timeously in terms of the Rules of Court, added to or even differed from views expressed previously by other experts in the same field. (See page 183 A). The cause of complaint in casu, is different.

9. I am of the view that in order to decide whether the supplementary Notice is merely an expansion of the original Notice, regard should be had to the evidence as a whole. The trial Court will be in a better position at the conclusion of the trial to decide the nature and extent of the differences if any, between the two Notices as well as the prejudice caused to any parties.

10. In the exercise of my discretion I am of the view, under the circumstances, that the wasted costs occasioned by the postponement of the trial should be reserved for determination by the trial Court.

ORDER

The costs occasioned by the postponement of the trial scheduled for 10 – 12 June 2003 including the costs of arguing the postponement are hereby reserved for decision by the trial Court.

**L P TLALETSI
ACTING JUDGE
(NORTHERN CAPE DIVISION)**

ADV. C BOTHA FOR THE PLAINTIFF instructed by Messrs.
ELLIOTT, MARIS, WILMANS & HAY

***ADV. W H VAN STADEN FOR THE 1ST DEFENDANT instructed
by Messrs VAN DE WALL & PARTNERS***

***ADV. I P GREEN FOR THE 2ND DEFENDANT instructed by
Messrs. DUNCAN & ROTHMAN***