

Sirkuleer aan Landdroste: Ja/Nee

IN THE HIGH COURT OF SOUTH AFRICA ***(Northern Cape Division)***

Case Number: 1800/99

Date Delivered: 02-11-2001

In the matter between:

ARNOLD RAUF

Applicant/Plaintiff

and

GENERAL MOTORS CORPORATION

Respondent/Defendant

Coram: Majiedt J

JUDGMENT

MAJIEDT J:

1. This interlocutory application came before me in the Motion Court and I had, by agreement between the parties, ordered that the trial be postponed to a date to be arranged with the Judge President in Chambers, after representations have been made to the Judge-President by the parties. I had reserved judgment on the application for further and better discovery in terms of Rule 35(3) as well as the costs of the application.
2. For the sake of convenience, I shall refer to the Applicant as the

“Plaintiff” and to the Respondent as the *“Defendant”* herein.

Plaintiff seeks to recover from the Defendant a considerable sum of money as damages for bodily injuries and their *sequelae*, sustained when his motor vehicle, manufactured by the Defendant, had overturned.

The action had been set down for trial commencing on 5 November 2001 and a further six weeks thereafter. The parties were *ad idem* that the trial cannot proceed on that date, albeit for different reasons.

3.1 The application for postponement and to compel further discovery was launched by the Applicant on 16 October 2001. It is necessary that I set out in full the events which had preceded this.

3.2 On 8 October 2001 Plaintiff’s attorney forwarded to Defendant’s attorneys by telefaxed letter, a detailed list of items under various headings, in respect of which it sought further discovery, on the basis that same was relevant to the issues between the parties and that the Defendant had the documents in its custody or under its control.

3.3 On 11 October 2001, the aforementioned letter was followed up with another one, similarly forwarded by telefax to Defendant’s attorneys. In this second letter Plaintiff’s attorneys advised that Plaintiff was *“compelled to seek a postponement of the trial*

until his discovery requests have been complied with.”

- 3.4 On 12 October 2001, the Defendant’s attorneys replied to both the aforesaid letters. They dealt *seriatim* with each and every one of the items complained about. Significantly, they also indicated therein their stance that the trial be postponed indefinitely (primarily for security reasons, having regard thereto that many of their witnesses would have to travel from the USA) and proposed as follows:

10.3 *“In the circumstances and because both parties clearly want a postponement, we suggest that this be applied for by consent and that the wasted costs occasioned by the postponement should be reserved. We are happy to prepare papers and make the necessary application to court. We believe that, out of courtesy to the court, this should be done at the earliest opportunity with a view to the application being moved on Friday 19th October 2001.*

10.4 *Unless we hear from you to the contrary by close of business on Monday 15th October 2001 we intend to proceed on the aforesaid basis.”*

3.5 It is quite apparent therefore that, on 12 October 2001, the Plaintiff's attorneys had become aware of the Defendant's position *vis-à-vis*:

- a) the question of a postponement; and
- b) the matter of further discovery, that is to say that Defendant had adopted a very strong stand opposing the need for further discovery.

3.6 Notwithstanding the foregoing, the Plaintiff elected to press ahead to bring an application to court on very short notice for a postponement and for further discovery.

This election was, in my view, ill-considered and unwise as I shall show in due course. The more sensible approach, to my mind, was to accept the proposal for a postponement contained in the Defendant's attorneys' letter of 12 October 2001, and to consider the balance of the contents of the letter relating to further discovery very carefully and in consultation with Plaintiff's experts. Only then would a proper application, brought on proper notice as contemplated in the Rules, have been warranted.

4. The Plaintiff has deposed to the founding affidavit to the application. In his affidavit he makes extremely liberal use of

hearsay averments, emanating primarily from one Byron Bloch, who is described as an “*automobile safety design expert from Maryland, USA*”. There is no accompanying confirmatory affidavit from Bloch attached to the papers.

Surprisingly, the Defendant has not complained of these hearsay allegations nor has it applied for same to be struck out. Upon enquiring from Mr. Wise, who appeared with Mr. Hutton for the Defendant, as to Defendant’s attitude, I was informed from the Bar that Defendant objected to the hearsay and I was asked to disregard such averments. I have a wide discretion to admit hearsay averments, by virtue of the provisions contained in section 3 of the Law of Evidence Amendment Act, 45 of 1988;

See: ***Mnyama v Gxalaba & another*** 1990(1) SA 650 (C) at 653 A-C.

I am of the view that I should do so in this case, in the interests of justice. As will become clear, this matter is one of considerable complexity, magnitude and importance to both parties. Moreover, discovery and the production of documents will be a crucial feature therein, particularly for the Plaintiff.

5. The provisions of Rule 35(3) can be invoked only in respect of those documents which may be relevant to the issues between the parties. In the context of this case, “*relevance*” is of utmost importance.

I say this because two notable features which present themselves on the papers in the interlocutory application and the pleadings in the main action are: -

- a) the Plaintiff's Rule 35(3) notice is couched in very wide terms; and
- b) by the very nature of the Plaintiff's action, which is essentially one of product liability, the Plaintiff is very heavily dependent on the Defendant making full and proper discovery, since most, if not all, the relevant documents are in the Defendant's custody or under its control.

In order to do justice to the parties, a balance must be struck between these features.

- 6. It is necessary that I repeat in detail the Plaintiff's Intendit (as amended) where he sets forth Defendant's alleged negligent conduct:

"8. At all material times hereto Defendant: -

8.1 Carried on the business of the design and manufacture of Chevrolet motor vehicles, and components, for use in such vehicles.

8.2 Exports the vehicles to countries outside the United States of America including South

Africa, alternatively sells such vehicles in the United States with the knowledge that they will be so exported.

8.3 Designed and/or manufactured the motor vehicle and its components including the axle, seats, seat recliner and seat belt assembly and side window.

8.4 Knew or ought to have known that members of the public and more particularly the Plaintiff will suffer damages should the motor vehicle be unsafe due to defects in its design and/or manufacture.

9. In the premises Defendant had a duty to take all steps reasonably necessary to ensure that:

9.1 the motor vehicle is safe for its intended use.

9.2 Components used in the vehicle were capable of serving the purposes for which they were designed and manufactured and more particularly safe and effective operation under the conditions and subject to the hazards to be expected in driving the motor vehicle.

9.3 The motor vehicle is free of any defects in its

design including all parts and components thereof.

9.4 The motor vehicle including its parts and components are manufactured according to its design and specifications.

9.5 All the manufactured components are safe for its intended use.

9.6 All components be tested properly prior to the assembly of the motor vehicle.

9.7 The public and more particularly the Plaintiff is informed and/or warned of any possible defects in the design or manufacture of the motor vehicle that might render the motor vehicle unsafe under certain circumstances.

9.8 Proper roll-over tests of the motor vehicle are conducted.

9.9 Occupants of the motor vehicle and more particularly the Plaintiff are properly and effectively restrained during a roll-over accident.

10. Defendant negligently breached the aforesaid duty in that it failed to take those steps necessary to:

- 10.1 *Ensure that the motor vehicle is safe in all respects.*
 - 10.2 *Ensure that the components used in the motor vehicle, and more particularly the components referred to in sub-paragraph 8.3 supra were capable of serving the purpose for which they were designed and manufactured and safe under the conditions the motor vehicle was to be used, including the conditions arising under the accident.*
 - 10.3 *Prevent the rear axle from failing as it did.*
 - 10.4 *Properly test the various manufactured components and the effectiveness of its design.*
 - 10.5 *Conduct roll-over tests.*
 - 10.6 *Ensure that the Plaintiff was properly and effectively restrained during the roll-over.*
 - 10.7 *Warn the public and more particularly the Plaintiff of the defects in the design and/or manufacture of the motor vehicle stated more fully hereunder.*
11. *Defendant further negligently breached the aforesaid duty in that it knew or ought to have*

known that:

- 11.1 The side window design was defective in the inadequacy of its thin tempered glass to stay intact and in its inadequate retention or attachment to the vehicle body.*
 - 11.2 The driver's seat test, including the seat back recliner lever, design was defective in that the seat back recliner mechanism is vulnerably exposed to the lower of the seat belt.*
 - 11.3 The motor vehicle is not fitted with a seat belt pretensioner.*
 - 11.4 An occupant of the motor vehicle is not effectively protected against ejection from the motor vehicle during a roll-over.*
 - 11.5 The rear axle design was defective in that it was too weak and/or too brittle for its intended purpose.*
-
- 12. The incident and the accident was caused due to the Defendant's wrongful and negligent conduct as aforesaid.*
 - 13. Alternatively to paragraph 12, the accident was caused due to the Defendant's wrongful and*

negligent conduct as aforesaid.”

7. The passages quoted hardly commend themselves as a model of draftsmanship, most notably paragraph 11.2 thereof which should, to my mind, read:

“11.2 The driver’s seat, *including the seat back recliner lever, design was defective in that the seat back recliner mechanism is vulnerably exposed to the lower portion of the seat belt”.*

(I have underlined the words which should be substituted or added to make some sense of the subparagraph).

Even in its improved form, one is not entirely clear as to whether the defective design complained of relates to the seat back recliner **lever** or the seat back recliner **mechanism**.

8. The Defendant has taken issue with Plaintiff on all these averments.
9. Before I deal with the Plaintiff’s Rule 35(3) notice, it is of considerable assistance to remind oneself again of the rationale behind and the objective of Rule 35(3) and to examine how our Courts approach the matter.

- 9.1 In general discovery serves to prevent trial by ambush, to narrow the issues and to eliminate the debating of incontrovertible points;

See: ***Durbach v Fairway Hotel Ltd*** 1949(3) SA 1081(SR) at 1083.

- 9.2 The importance of proper and full discovery has been emphasized by our Courts many times over.

See, *inter alia*: -

Van Vuuren v Agricura Laboratoria (Edms). Bpk. 1974(2) SA 324 (NC) at 327;

Ferreira v Endley 1966(3) SA 618 (E) at 621C;

Durban City Council v Minister of Justice 1966(3) SA 529 (D) at 531B.

- 9.3 The discoverability of documents is determined by the notion of relevance.

The test for relevance has been authoritatively laid down as being every document which contains information which may either directly or indirectly enable (a party) either to advance his own case or to damage the case of his adversary.

See: ***Rellams (Pty) Ltd v James Brown & Hamer Ltd*** 1983(1) SA 556(N) at 564A;

Swissborough Diamond Mines v Government of the RSA 1999(2) SA 279(T) at 316 E-H.

- 9.4 Relevance is to be ascertained by reference to the issues between the parties *ex facie* the pleadings;

See: ***Federal Wine and Brandy Co Ltd v Kantor***
1985(4) SA 735(E) at 753 D-G;

***Copalcor Manufacturing (Pty) Ltd v GDC
Hauliers (Pty) Ltd*** 2000(3) SA 181 (W) at 194A.

In this regard, no reference can be made to a Request for Further Particulars for Trial and the response thereto;

***Swissborough Diamond Mines v Government of the
RSA***, *supra* at 317C-E.

- 9.5 The more complex the dispute between the parties, the greater the need for precision in formulating the issues in the pleadings;

See: ***Imprefed (Pty) Ltd v National Transport
Commission*** 1993(3) SA 94(A) at 106-7

- 9.6 A discovery affidavit is *prima facie* taken to be conclusive, also with regard to the relevancy of documents;

Marais v Lombard 1958(4) SA 224(E) at 227G.

Further discovery will be ordered if it appears from the pleadings and/or the discovery affidavit itself and/or

admissions made by the party making discovery and/or the nature of the case or the documents that there reasonably may be other relevant documents in the possession of the party making discovery;

Swissborough Diamond Mines v Government of the R.S.A, *supra* at 320 F-H.

9.7 The onus rests on the party who/which seeks to go beyond the discovery affidavit to establish that there are other documents that ought to be discovered;

Federal Wine and Brandy Co. Ltd v Kantor, *supra* at 749A.

10. In order to curtail the length of this judgment, I find it convenient to deal with each of the items where further discovery is being sought, Defendant's answer thereto and my finding in respect of the various issues raised. I should point out that the Defendant has already delivered a main and supplementary discovery affidavit in terms of Rule 35(1) and has also delivered two further affidavits in response to Plaintiff's Rule 35(3) notice.
11. The Plaintiff firstly requests discovery of a list of all past and pending litigation cases in the USA, and elsewhere, concerning GM Chevrolet 'Blazer' of 'Jimmy ' vehicles for any of the model years 1989 to 1999, in which allegations were made that any of

the aforesaid vehicles:

- a) has a propensity, tendency or history of going out of control;
- b) has a propensity, tendency or history of rolling over or overturning; or
- c) has a front seat backrest that has a propensity, tendency or history of failing or not staying in an upright position during emergencies or accident situations.”

11.2 It will immediately be apparent that not one of (a) or (b) had been pleaded by the Plaintiff in his amended Intendit, referred to hereinbefore. Plaintiff has insisted through his Counsel, Mr. Trengove, that the request is valid, since these documents may provide alternative explanations of why the accident occurred.

11.3 This amounts, in my view, to a fishing expedition. The Plaintiff has set his sails on the course mapped out in his amended Intendit. He cannot now midstream, as it were, seek to change course and require the Defendant to map out an altered course for him.

11.4 Even less persuasive is the submission that these documents “*may prove or disprove Defendant’s theories of defence*”. Defendant does not bear any onus on the pleadings as they stand, nor has it advanced any “theory of defence” on the

pleadings. I am mindful of the mountain which the Plaintiff has to climb in his action. That does not entitle him, however, to obtain assistance outside the ambit of the Rules.

- 11.5 There is some merit in the request under (c), **supra**. Although it is framed very widely, I am of the view that the request does cover the ground for negligence set forth in par. 11.2 of the Intendit. The failing of the seat backrest may well be shown at the hearing to be related to the exposed recliner lever.

The Defendant is therefore ordered to discover the documents as requested under par (c) supra.

12. Secondly, the Plaintiff requests:

“2. A complete copy of all memoranda, reports, studies, test reports, the results of tests conducted or recorded by experts or by other persons, and deposition transcripts and attachments to deposition transcripts, (whether or not any such documents were produced by GM or by others) with regard to any of the GM Chevrolet “Blazer” or “Jimmy” vehicles for any of the model years from 1989 to 1999, that contains any information or opinion or allegation or suspicion that any such vehicle does or does not:

- 2.1 *Have a propensity, or history of going out of control;*
- 2.2 *Have a propensity, tendency or history of rolling over or overturning or being unstable;*
- 2.3 *Have a rear axle that has a propensity, tendency or history of malfunctioning or falling or separating;*
- 2.4 *Have a front seat backrest that has a propensity, tendency or history of failing or not staying in an upright position during emergencies or accident situations;*
- 2.5 *Have a seatbelt(s) that has a propensity, tendency or history of failing or not restraining occupants in rollover or accident or emergency situations; or*
- 2.6 *Have side windows of which the glass has deficient or insufficient retention capabilities or qualities.”*

12.2 The Plaintiff's case is that the Defendant has disclosed the existence of several similar cases in the USA, but that it mistakenly claims privilege as far as production of these documents are concerned. The Defendant has

acknowledged the existence of several similar cases. It has referred to the practice in the USA of issuing protective orders in respect of Court documents which are furnished to a party to a suit. These orders, as I understand it, serve to secure the confidentiality and intellectual property rights of a party.

- 12.3 The Defendant has stated in its Answering Affidavit that it is in the process of requesting and collating expert reports and depositions in these cases from its attorneys. In doing so, it does not concede an obligation to discover and produce same.

The cases referred to may, in my view, be relevant and the Plaintiff's request is justified.

The Defendant has at no stage conveyed an unwillingness to deliver these documents. In fact, it has indicated to the Plaintiff that it is in the process of collating same for delivery. There was consequently no need to approach this Court for assistance. Rule 35(3) should only be invoked where there is a refusal to deliver relevant documents. That is not the case here.

13.1 Paragraph 3 of the Plaintiff's Notice contains the following request: -

“3. Produce a copy of all correspondence and documents that contain any information about any and all previous or pending investigations by, or complaints to, the National Highway Traffic Safety administration (NHTSA) of the United States Department of Transportation concerning any of the issues described in paragraphs 2.1, 2.2 and 2.4 above with regard to any GM Chevrolet ‘Blazer’ or ‘Jimmy’ vehicle for any of the model years from 1989 to 1999.”

13.2 This request relates to the same aspects as set forth in paragraph 11 *supra*.

For the reasons set forth in par. 11, I am of the view that the request as it relates to par. 2.4 of the Notice is justified, whereas that in par. 2.1 and 2.2 are not.

The Defendant is ordered to discover the documents requested in par. 3 of the request as it relates to par. 2.4 thereof.

14.1 Paragraph 4 of the Notice reads as follows: -

“Produce a complete list of all GM recall campaigns and all Technical Service Bulletins (TSB’S) that concern any vehicle manufactured by GM or any of its subsidiary companies for any of the model years 1989 to 1999, and the recliner mechanism for the backrest of the front seat in such vehicles, including the adjuster lever or handle. Attach copies of such recall campaigns and TSB’s.”

14.2 At the outset I must point out that the request relating to the *“backrest of the front seat”* is at variance with paragraph 11.2 of the amended Intendit, wherein reference is made to *“the driver’s seat”*. I therefore deal with this aspect further on the understanding that the request intended to refer to the driver’s seat.

14.3 A careful perusal of the pleadings, more particularly par.11.2 read with par.9.8 and par. 9.9 of the amended Intendit, reveals that Plaintiff’s averment relating to defective design of the driver’s seat, is that *the seat back recliner mechanism is vulnerably exposed to the lower (portion) of the seat belt”* (my underlining and my insertion).

Par. 7 of the amended Intendit bears relevance to this aspect and it reads:

“7. As a direct result of the incident the motor vehicle overturned and rolled causing Plaintiff to be ejected through the rear side window (‘the accident’).”

If one reads these averments in context, it is abundantly clear that the Plaintiff’s case is that the *“vulnerably exposed”* seat back recliner mechanism/lever caused the seatbelt webbing to become entangled therein, causing the seat back to fall back and, presumably, thereby *“ejecting”* the Plaintiff through the rear side window.

14.4 In his affidavit, James Lee Cnossen Jnr., on behalf of the Defendant, responded to this request by: -

- a) complaining about the *“inordinately and unacceptably wide”* framing of the request, and
- b) stating that, having searched diligently therefor, no such documents (i.e. in respect of recall campaigns and Technical Service Bulletins) could be found in respect of GM Chevrolet *“Blazer”* or *“Jimmy”* vehicles. The Plaintiff, in his Founding Affidavit in this application, rejects this explanation and makes reference to a recall campaign in 1997 affecting some 586 058 Chevrolet Blazer 1996 vehicles. He

annexes a copy thereof and avers that this recall campaign relates to the same or a closely related problem to the one he sets forth in par. 11.2 of his amended Intendit. He avers further that it is a design flaw which Defendant had sought to correct by installing a “*protective cover over the recliner mechanism*” (the quotation comes from the recall campaign notice).

- 14.5 It is noticeable that the Plaintiff did not deem it necessary to attach as annexures copies of the correspondence between the Defendant’s attorneys and his attorneys, to which I have referred in par. 3 *supra*. The letter of 12 October 2001, annexure “JLC4” to Defendant’s Answering Affidavit, is of particular relevance and the omission in attaching same or making reference thereto at all, is quite startling. In that letter, Defendant’s attorneys deal in great detail *seriatim* with the various complaints relating to the alleged non-disclosure and non-production of documents. They deal extensively with this alleged related recall campaign (alluded to by Plaintiff’s attorneys in their letter to the Defendant’s attorneys) and even go as far as **to annex a copy of the relevant Bulletin**. Of further significance is that Plaintiff’s attorney deemed it unnecessary to annex a copy of the recall campaign notice (which the Plaintiff alludes to in his Affidavit) to his letter of 8

October 2001.

14.6 In the Defendant's response, Mr. Cnossen and an expert, Mr. Gerald Cooper, point out that: -

- a) the recall campaign concerned 2 door utility vehicles, whereas Plaintiff had a 4 door utility vehicle; and
- b) that the recall had been actuated by a different problem, unrelated to the one referred to by the Plaintiff. According to them, that recall concerned a potential for the lap seatbelt webbing to be cut through contact with a sharp steel edge on the seat back recliner (not the handle) in an angular frontal collision. Since the 4 door models had a different geometrical design as that of the 2 door models as far as seatbelt routing was concerned, no recall was necessary for 4 door models.

14.7 Mr. Trengove has:

- a) questioned whether the recall campaign notice referred to by the Defendant is the same as the one which the Plaintiff alluded to; and
- b) submitted that, in any event, the request is valid, since the

recall campaign concerns at the very least, a related problem.

- 14.8 Annexure “AR2” to the Plaintiff’s Founding Affidavit appears to have been downloaded from the Internet, probably from the National Highway Traffic Safety Administration (NHTSA) website, if one has regard to the bottom of that page.

Annexure “JLC5” to Defendant’s Answering Affidavit, on the other hand appears to be a General Motors product recall campaign notice addressed to all its agencies and distributorships.

In comparing these two documents, the following similarities present to the reader: -

- a) Both of them refer to two door utility vehicles.
- b) Virtually identical language is used in the two documents in describing the problem which actuated the recall, namely “*. . . the outboard safety (seat) belt webbing on the driver’s and/or passenger’s seat can separate during a frontal impact*”.
- c) The consequences which the problem may cause in an accident is described in almost the same terms “: *. . . if a separation occurred and there were secondary crash events or (vehicle) rollover, there would be no belt restraint of the occupant and increased injuries could*

occur.”

- d) The NHTSA notice declares that “*owner notification will begin during September 1997*”; the Defendant’s Notice is indeed dated September 1997.
- e) Both notices indicate that, in order to remedy the defect, the General Motors dealerships would be required to install a protective cover over the recliner mechanism.

I therefore have no doubt whatsoever that these two documents relate to the same recall campaign.

14.9 Does the recall campaign notice under discussion have any relevance to the issues between the parties, more particularly as enunciated in par 11.2 of Plaintiff’s amended Intendit?

I believe not – there is, to my layman’s mind, a vast difference between

- a) the danger presented by a “*vulnerably exposed*” seat recliner lever which may snag or entangle a seatbelt causing the seatback to fall back; and
- b) the risk of a front outboard seatbelt webbing separating during a frontal impact.

14.10 Having come to the conclusion aforestated, I am of the view that there is no merit in die Plaintiff’s averment that the Defendant has, with reference to this campaign

notice, failed to disclose **relevant** documentation.

There is nothing to suggest that the Defendant is less than truthful and not forthcoming when it claims not to have located any documents as sought by the Plaintiff in par. 4 of its Notice.

I therefore find that there is no basis upon which I should order further and better discovery in respect of the documents referred to in par. 4 of the Rule 35(3) Notice.

15.1 Par 5 of the Plaintiff's Notice requests documents concerning design, manufacturing or materials changes or adaptations for the front seat belts, recliner mechanism for the front seat (including the adjuster lever or handle), rear axle and side windows of all GM Chevrolet "*Jimmy*", "*Blazer*" and other GM sport utility vehicles manufactured since 1996 until date.

15.2 The Defendant's response was that the request is framed unreasonably wide in that it seeks documentation relating to changes and adaptations, whether they are relevant to the specific issues at hand or not.

It then declared that, insofar as it has a bearing on changes and

adaptations relevant to the issues between the parties, Defendant has been unable to locate any such documents, after a diligent search.

15.3 Plaintiff has now averred in his founding Affidavit that there have been significant design changes to the driver's seatbelt and the seatback recliner levers of the 1998 and 2002 Blazers. He annexes four photographs forwarded to him by Bloch, which depicts these changes.

According to the Plaintiff, Mr. Bloch's opinion is that the design change (through the addition of a plastic sleeve to the seatbelt) was in all likelihood intended to prevent the seatbelt webbing from becoming snagged by the recliner lever.

15.4 Defendant's answer to the aforementioned averments is advanced by Mr. Cooper and Mr. William McMillan Jr. The latter is an engineer employed in the Field Performance Assessment Section of the Defendant. Their response can be paraphrased as follows: -

- a) Cooper denies that the plastic sleeve was designed to avoid snagging of the belt with the recliner lever. It was in fact designed in the 1998 Blazer to house a loop which acts as a warning when seat belt loads are exceeded.
- b) McMillan explains that the 2002 model is being marketed

as an entirely new vehicle design under the name “*Trailblazer*”. It therefore has new designs in almost all of its systems (i.e. including seats and seatbelts). He denies therefore that any design changes in the Trailblazer have been as a consequence of safety concerns regarding the interaction between the seat recliner release handle and seat belt system.

15.5 There is, in my view, no merit in the Plaintiff’s request as far as the 2002 Trailblazer is concerned. This is an entirely new model range, with different systems and designs in many different spheres. Any design changes or adaptations can simply be explained away on this basis. It bears no relevance to the issues between the parties.

15.6 I have considered very carefully Cooper’s explanation. While there is a lot to be said for it, I am of the view that design changes and adaptations to the 1998 Blazer may well be relevant. There are conceivably a myriad reasons why a manufacturer implements design changes/adaptations, e.g. aesthetics, practicality, etc. One of such reasons may indeed be to enhance safety. That immediately suggests that the previous design was unsafe or, at the very least, less safe than the new design.

I therefore take the view that the design changes in the 1998

Blazer may be relevant to the issues herein. The request should, however be limited so as to be relevant to the issues between the parties.

The Defendant should therefore discover such further documents as may relate to design changes to the driver's seatbelt and seatback recliner mechanisms of the 1998 Chev "Blazer".

16. Par. 6 of the Plaintiff's Rule 35(3) notice requests copies of all correspondence relating to the matters in the preceding paragraph hereof. Such correspondence is sought as between the Defendant (or its subsidiaries/agents) and the NHTSA.

In this regard, the conclusion which I have reached herein above applies *a fortiori* for the reasons given.

17. The last aspect in the Rule 35(3) Notice is to be found at par. 7 thereof. This relates to documentation concerning the vehicle's rear axle. No complaint about non-discovery and non-production of relevant documentation is leveled by the Plaintiff on this matter. There are, however, certain other aspects raised by the Plaintiff in his Founding Affidavit which requires discussion.

- 18.1 The Plaintiff makes mention of the fact that it can be gleaned from the Defendant's expert notices that Defendant has

changed the designs of the seatbelts by adding a pre-tensioner mechanism. According to Bloch, this was one of the problems with the Plaintiff's vehicle's seatbelt – it did not have a pre-tensioner, thereby allowing the seatbelt to hang slack and in so doing, snag the recliner lever. Plaintiff avers that it is clear that Defendant has added pre-tensioners in its seatbelts since 1996, if regard is to be had to its expert notices. There has been a redesign of the restraint systems in other vehicles, which is relevant to the present matter, so the Plaintiff alleges.

18.2 Mr. Cooper, one of the Defendant's expert witnesses, counters these averments as follows: -

- a) The fact is that other GM vehicles have had pre-tensioners fitted to their seatbelt systems is irrelevant to the seatbelt system of the Blazer vehicles.
- b) Vehicle restraint systems are designed for specific vehicles within specific criteria and parameters, which he lists.
- c) These attributes and criteria will inform the designer as to what will be required to achieve the desired belt restraint system performance in a particular vehicle – no pre-tensioners were necessary to achieve the desired level of performance in the type of vehicle which the Plaintiff had been driving.

18.3 Notwithstanding Mr. Cooper's detailed explanation which at first blush appears to be fairly convincing, I have considerable doubt in my mind as to the real reason for the design change. It seems to me from a lay perspective that Bloch's theory of the snagging of the lever by a slack, hanging seatbelt is not without merit.

It would appear that a seatbelt fitted with such a pretensioner mechanism may have avoided a scenario where a slack seat belt can become snagged in the recliner lever. Moreover, the Plaintiff, to his credit, has specifically pleaded this aspect in its amended Intendit (see par. 11.3 thereof).

While the request is therefore valid, it should be limited to Chev "Jimmy" and "Blazer" vehicles, in my view.

The Defendant must therefore discover all documents relating to the design change of adding a pre-tensioner mechanism to the seatbelt systems in all Chev "Jimmy" or "Blazer" vehicles subsequent to 1996.

19. Plaintiff furthermore complains about the Defendant's "*unreasonable*" refusal to furnish any information about recall campaigns concerning the restraint systems and recliner mechanism of the front seats of other model vehicles with the Defendant manufactures.

He avers that Defendant is unreasonable in limiting its responses to "*Blazer*" and "*Jimmy*" vehicles only.

I have already, in the preceding paragraph, alluded to the criteria for relevance – this limitation by the Defendant is therefore, to my mind, eminently reasonable. In addition, it is correct as the Defendant avers, that the Plaintiff's request is significantly characterized by postulations, hypotheses and conjecture such as *"if"* and *"may be"*.

Discovery and further and better discovery are not to be turned into exercises of trawling the waters or casting one's net – this is what the Plaintiff seeks to do here.

20.1 The Plaintiff has submitted that Cnossen is not a suitable person to respond authoritatively and reliably on behalf of the Defendant to a request to produce documents. He bases this submission on the fact that:-

- a) Cnossen does not have demonstrable knowledge of the subject matter requested;
- b) he does not specify where searches have unsuccessfully been made for documents; and
- c) he is not located in the USA.

20.2 Defendant's answer is that: -

- a) due to Defendant's size of operations, it is not practically possible for one single person to conduct all the searches; and
- b) the Defendant has extensive and organized structures,

databases and systems in place and searches would therefore have been done as extensively and as far reaching as is reasonably possible to locate relevant documentation.

20.3 There is no reason to question the veracity and accuracy of Cnossen's statements.

Moreover, in applying one's common sense, his averments particularly as paraphrased in 20.2(a), *supra* are quite clearly correct.

One needs to bear in mind, further, that the Defendant has already made extensive discovery as I have indicated at the beginning of this judgment. In the course of such discovery it has :-

- a) In its first discovery affidavit of 6 July 2000 listed some 166 documents in the schedule; these documents include those relating to recall campaigns dealing with possible rupture of the fuel tank in a crash as well as problems with the windshield wipers.
- b) On 28/9/2000 it responded to Plaintiff's first Rule 35(3) Notice and it discovered some 35 documents, including video tapes and some 298 photographs. These documents include recall campaign bulletins and technical service bulletins.
- c) On 9/11/2000 the Defendant served a supplementary

affidavit, disclosing some 90 further documents, including the investigation of customer complaints about axle failures, seat recliner or seat adjuster problems and seat belt lock up problems in Chev “*Jimmys*”, “*Blazers*” and “*Bravadas*”.

20.4 Another startling feature of note is how the Plaintiff and his legal representatives have responded to the aforementioned discovery.

The documents discovered on 6/7/2000 by the Defendant, have been delivered to Plaintiff’s attorneys by Defendant’s attorneys; this notwithstanding the fact that inspection of only some of the documents so discovered, had been requested.

In respect of the documents which had been discovered on 28/9/2000, the Defendant’s attorneys had issued an invitation to the Plaintiff’s attorneys to inspect same, but the invitation had not been taken up. The position is exactly the same in respect of the documents which had been discovered on 9/11/2000 by the Defendant by way of supplementary discovery affidavit.

This begs the question: - is the Plaintiff *bona fide* and honest in its complaints that the Defendant is unreasonably refusing to produce relevant documents?

21. The Plaintiff complains in his Founding Affidavit that he is being severely prejudiced by the non-discovery, inasmuch as Bloch is not able to finalise his expert report. The Plaintiff also states that the documentation could provide vital cross-examination

material.

As is apparent from this judgment, the Plaintiff has not succeeded in persuading me that the documents sought, except for those requested in par. 1 of the Notice, are relevant to the issues between the parties. In respect of the documents referred to in par. 1 of the Notice, the Defendant is already in the process of searching for and collating same.

The Defendant has made extensive and detailed discovery of documents. A litigant who fails to inspect discovered documents when invited to do so, can hardly be heard to complain of inadequate and incomplete discovery by the other side. Who is to say that the documents which such litigant seeks to have discovered, do not form part of that which have already been discovered but not inspected ! As a further possibility – how is one to know that a careful perusal and analysis of the discovered documents may not perhaps lead the Plaintiff into the direction in which it has set its course on the pleadings?

In short – prejudice cannot exist where discovered documents are not inspected and where irrelevant matters are pursued by a litigant.

22. There remains the matter of costs. My strong *prima facie* view was that the Plaintiff should bear the costs of his mostly futile effort insofar as the application for further and better discovery goes.

The Plaintiff has been decidedly ill-advised in pressing on with his application (on very short notice to the Defendant, it needs to be said), notwithstanding the fact that he, or at the very least his attorneys, knew on 12 October 2001 that the Defendant not only agreed to a postponement of the trial, but was even

prepared to move the necessary application by consent.

The inference is irresistible and inescapable that no further advices had been obtained from Bloch on the very detailed response from the Defendant's attorneys in their letter of 12 October 2001. Surely it would have been prudent for the Plaintiff to obtain such further advices having regard thereto that most, if not all, his technical information seemingly emanates from Bloch? A case in point is the recall campaign notice, which was annexed to and fully explained in the said letter. A referral to Bloch may well have resulted in him acknowledging that the recall was not relevant to the issues between the parties.

This is the third opposed interlocutory application in this case which has come my way in the Motion Court, if my memory serves me correctly. All these applications have been characterised by emotive language, much mudslinging from both sides and a decidedly frosty atmosphere between the parties, to put it mildly.

This is a matter of great complexity, but also of great importance to both parties, for different reasons. I reiterate my views enunciated during the hearing, that it is in everybody's best interests to rise above the niggling skirmishes and to get this matter to trial as expeditiously and as properly as possible.

My strong *prima facie* views notwithstanding, I believe that it would be proper for the trial judge to decide on the costs of this application. It may well be that it transpires at the hearing that the Defendant did indeed have in its custody or under its control further relevant documentation which had not been produced.

Over and above the order for postponement of the trial which I have already ordered during the hearing on 19 October 2001, I issue the following further orders: -

- 1. The Defendant is ordered to discover the following documents:**
 - 1.1 As set forth in par. 1.3 of Plaintiff's Rule 35(3) Notice dated 23 August 2001.**
 - 1.2 Listed in par. 3 of the said Notice which relate to the aspects raised in par. 2.4 of the Notice.**
 - 1.3 All documents in its custody or under its control which relate to design changes to the driver's seatbelt and seat back recliner mechanisms of the 1998 GM Chevrolet "Blazer."**
 - 1.4 All documents in its custody or under its control which relate to the design change of adding a pre-tensioner mechanism to the seatbelt systems in all GM Chevrolet "Blazer" or "Jimmy" vehicles subsequent to the 1996 model.**
- 2. Costs of the application is reserved for determination at the trial.**

S.A. MAJIEDT

JUDGE

Date heard: 25-05-2001

Date delivered: 02-11-2001

***Counsel for Plaintiff: Mr. R.M. Wise SC and Mr. R. Hutton
Elliott, Marris, Wilmans & Hay***

***Counsel for Defendants: Mr. Trengove
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