



**IN THE HIGH COURT OF SOUTH AFRICA**  
**FREE STATE DIVISION, BLOEMFONTEIN**

**Reportable / Not reportable**  
Case No.: 5668/2018

In the matter between:

**UNIVERSITY OF THE FREE STATE**

Applicant

and

**MOEGAMAD ASHRAF DOOVEY**

First Respondent

**INTERCONNECT SYSTEMS (PTY) LTD**

Second Respondent

*In re:*

**MOEGAMAD ASHRAF DOOVEY**

Plaintiff

and

**UNIVERSITY OF THE FREE STATE**

Defendant

**INTERCONNECT SYSTEMS (PTY) LTD**

Third Party

**Neutral Citation:**

**Coram:** Van Rhyn J

**Heard:** 10 September 2024

**Delivered:** 22 October 2024

**Summary:** Application for postponement of trial – failure by plaintiff to file expert notice and report within prescribed time frames – rule 36(9)(a). Matter removed from the roll – costs.

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## ORDER

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- 1 The matter is removed from the roll.
  - 2 The plaintiff is ordered to pay the wasted costs of the defendant and the third party occasioned by the removal of the matter from the roll, inclusive of the costs of two counsel (where applicable), on Scale C for senior counsel and Scale B for junior counsel.
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## JUDGMENT

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[1] This is an opposed application for postponement heard when the trial was called on 10 September 2024. The matter was set down for trial to be heard on 10, 11 and 13 September 2024. The application is brought by the University of the Free State, the defendant in the main action. A similar application is before this Court, brought by Interconnect Systems (Pty) Ltd, the third party in the main action. For ease of reference the parties will be referred to as in the main action.

[2] The plaintiff, Mr Moegamad Ashraf Doovey caused summons to be issued against the defendant on 12 November 2018 claiming past and future medical expenses, past and future loss of earnings as well as general damages in the total amount of R1 910 000 with interest and costs. The claim emanates from an incident during November 2015 when the plaintiff fell through a ceiling and suffered injuries while performing duties at the defendant's premises. The defendant denies liability and has joined the third party, the plaintiff's employer at the time, to the proceedings.

[3] The parties are *ad idem* that the pleadings are considered closed on 12 July 2021. On 28 September 2023 a pre-trial conference was held during which the plaintiff noted that he will not be appointing an expert witness for purposes of testifying during the trial. The plaintiff, however, attempted to reserve the right to appoint an expert witness. At the judicial pre-trial proceedings held on 13 May 2023 the matter was

certified trial ready in respect of the merits and the adjudication of the quantum to stand over for later determination, if necessary.

[4] A few days later the plaintiff applied for a trial day whereafter the notice of set down was duly served upon the defendant and the third party on 17 May 2024 enrolling the matter for trial on 10, 11 and 13 September 2024. From 17 May 2024 to 17 July 2024 no further steps were taken by the plaintiff. On 18 July 2024 the plaintiff delivered a notice in terms of Rule 35(3) calling upon the defendant to provide certain listed documents.

[5] On 6 August 2024 the defendant delivered a request for trial particulars in terms of Rule 21. According to the defendant, the content thereof was materially the same as the Rule 35(3) Notice. On 6 August 2024 the plaintiff filed a notice in terms of Rule 36(9)(a)(i) of his intention of calling an expert witness, Mr Anton Krause. On 27 August 2024 the plaintiff filed the notice in terms of rule 36(9)(a)(ii) and delivered the expert report of the said Mr Krause.

[6] On the day before the first trial date, 9 September 2024, the defendant filed an application for postponement of the trial. On the same date, the third party also filed its application for postponement of the trial. On the morning of the first trial day, 10 September 2024, Mr Grobler, counsel on behalf of the plaintiff requested an indulgence to file the plaintiff's answering affidavit to the defendant's and third party's application for postponement. Neither the plaintiff nor the third party filed any replying papers and the arguments in respect of the application for postponement were heard during the afternoon of the 10<sup>th</sup> of September 2024.

[7] The reason for the substantive application for postponement is that the plaintiff has taken various late steps, including the out of time delivery on 27 August 2024 of a comprehensive expert report by Mr Anton Krause. On behalf of the defendant, it is contended that reliance is placed on new issues not founded in the pleadings or raised previously. Similarly, the application for postponement by the third party is along the same lines and on the basis that the third party is severely prejudiced as a result of the blatant disregard of the Rules of Court by the plaintiff.

[8] The following was agreed and recorded in the rule 37A minutes:

- (a) the defendant recorded that it intended to amend its plea and would deliver a notice of intention to amend within 15 days of receiving the signed copy of the pre-trial minute from the plaintiff's attorney;
- (b) the plaintiff and the third-party would be entitled to amend their pleadings, should the amendment not be opposed or be effected with leave of the court, in accordance with the provisions of rule 28(8);
- (c) in the event of the parties relying on expert evidence for purposes of the adjudication of the merits of the plaintiff's claim, any further amendments which may be required pursuant thereto will be brought in accordance with the provisions of rule 28;
- (d) plaintiff agrees to serve and file any request for trial particulars within ten days after any consequential amendments subsequent to the defendant's amendment of its plea have been made and the defendant's reply to the plaintiff's request will be served and filed within ten days after receipt thereof or such extended period as the relevant parties may agree to in writing;
- (e) the defendant and the third-party agreed to deliver any request for trial particulars within ten days after the date of the defendant's reply to the plaintiff's request. The replies to any such requests will be served and filed within ten days after receipt thereof, or such extended period as the relevant parties may agree to in writing;
- (f) the plaintiff noted that he will not be appointing an expert but reserve the right to appoint an expert upon receipt of the defendant's reply to the plaintiff's request for trial particulars;
- (g) the defendant will consider its position once request for trial particulars have been delivered and answered by the respective parties. The defendant also reserves its right to appoint one or more experts should the need arise. The third party noted the issues as agreed and reserved its right to amend its pleadings, request trial particulars and appoint an expert(s) should the need arise.

[9] The application for postponement of the trial by the plaintiff and the third-party follows as a result of the late filing of the plaintiff's expert notice and report. The notice in terms of rule 36(9)(a)(ii) was served nine court days before the trial. The attorney

acting on behalf of the third-party, Mr Frankim of Frankim Attorneys, Pretoria, addressed a letter to the plaintiff's attorney, DSC Attorneys, Cape Town, on 4 September 2024 indicating that not only is the filing thereof contrary to the provisions of the Rules of Court, but the time period in which it has been delivered makes it impossible for the other parties to investigate and test the findings of the plaintiff's expert. According to the third party a letter dated 29 August 2024 was also addressed to the plaintiff's attorney subsequent to the delivery of the plaintiff's notice in terms of Rule 36(9)(a)(ii). The third party objected to late filing of the plaintiff's expert notice.

[10] On behalf of the defendant, its attorney also addressed a letter to the plaintiff's attorney on 23 August 2024 requesting that the plaintiff's expert report be provided as a matter of urgency in a bona fide attempt to prepare for the upcoming trial. The plaintiff's expert report was delivered on the 27<sup>th</sup> of August 2024, notwithstanding the request to expedite the delivery thereof. Thereafter the defendant consulted with two expert witnesses in an endeavour to prepare for trial and to salvage the situation with a view to proceed with the trial on the allocated trial dates.

[11] On 5 September 2024 the plaintiff's attorney responded to the third party's letter and indicated that the matter is trial ready and that the expert report was filed in accordance with rule 36(9). On 6 September 2024 the defendant addressed a further letter to the plaintiff indicating that the matter cannot proceed on trial due to the various belated steps taken by the plaintiff as specifically pointed out in the said letter.

[12] In the plaintiff's answering affidavit to the third party's application for postponement it is denied that the plaintiff filed his expert report contrary to the provisions of rule 36(9)(a)(i) and (ii). The plaintiff contends that rule 36(9) was amended on 12 May 2023 to provide that a plaintiff shall, not more than 30 days after close of pleadings, deliver a notice of intention to call an expert and, not more than 90 days after close of pleadings, deliver a summary of such expert's opinion and the reasons therefore. Due to the fact that the pleadings in this matter closed on 12 July 2021, it was impossible for the plaintiff to comply with the provisions of the substituted rule 36(9). Therefore, the plaintiff filed his expert report in accordance with the provisions of rule 36(9) as it was prior to the amendment, being notice to call an expert being given 15 days before the trial and the summary of such expert's opinion and reasons no later than ten days prior to the trial.

[13] During the hearing of this matter, Mr Grobler, however, conceded that the substitution of rule 36 by GN R 842 in GG 42497 of 31 May 2019 took effect from 1 July 2019 with the result that the filing of the expert report by the plaintiff was out of time. Mr Grobler furthermore conceded that the matter is not trial ready and ought to be postponed or removed from the roll. The matter was removed from the roll and such an order was handed down. The only aspect for adjudication remains the issue of costs.

[14] Mr Snellenburg SC, counsel on behalf of the defendant (appearing with Mr Johnson), argued that the plaintiff's late filing of the expert report severely prejudices the other parties. The defendant not only seeks an order postponing the matter but also seeks a costs order against the plaintiff. On behalf of the third party Mr van Ryneveld SC argued that the plaintiff filed a very voluminous expert report shortly prior to the trial date. Notwithstanding objections being lodged, not only by the third party but also by the defendant, the plaintiff ignored the provisions of rule 36(9) and proceeded to travel to Bloemfontein and now asks that a cost order be made against the defendant and the third party. The plaintiff, due to its disregard of the rules of court, should be ordered to pay the wasted costs on an attorney and client scale.

[15] Mr Grobler contended that due to the failure of the defendant and the third party to timeously object to the late filing of the rule 36(9) notices, expenses were incurred by the plaintiff to travel from Cape Town to Bloemfontein for the trial. Not only the plaintiff, his wife and the legal team (which included two counsel and the attorney), also the plaintiff's expert witness had to travel for purposes of the trial.

[16] In *Persadh & Another v General Motors South Africa (Pty) Ltd*<sup>1</sup> Plaskett J (as he then was) succinctly set out the applicable legal principles when a party applies for a postponement as follows:

'The following principles apply when a party seeks a postponement. First, as that party seeks an indulgence he or she must show good cause for the interference with his or her opponent's procedural right to proceed and with the general interest of justice in having the matter finalised; secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence; thirdly, a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic

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<sup>1</sup> *Persadh & Another v General Motors South Africa (Pty) Ltd* 2006 (1) SA 455 (SE) at [13].

and where justice demands that a party should have further time for presenting his or her case; fourthly, the prejudice that the party may or may not suffer must be considered; and fifthly, the usual rule is that the party who is responsible for the postponement must pay the wasted costs.'

[17] In *Sublime Technologies (Pty) Ltd v Jonker and Another*<sup>2</sup> Griesel AJA held as follows:

'With regard to costs occasioned by a postponement, the general rule is that the party which is responsible for a case not proceeding on the day set down for hearing must ordinarily pay the wasted costs. It is important to bear in mind, however, that a litigant is not necessarily 'responsible' for the case not proceeding merely because he or she applies for a postponement. In certain circumstances, a litigant may be forced to apply for a postponement as a result of the conduct of an opponent, e.g. through inadequate discovery, a late amendment or any number of other reasons. The 'normal rule' only applies to 'the party who was at fault or in default.'

[18] The plaintiff simply failed to comply with the provisions of the rule 37 minute and the time limits applicable in terms of rule 36(9)(a), as well as the proviso thereof which reads as follows: 'Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rule 37A(6) and (7) or as directed by a case management judge'. In all matters falling under rule 37A, and despite the time periods laid down in subrule (9)(a)(ii), both the intention to call an expert witness and the summary of such person's opinion and the reasons thereof must be delivered prior to the first case management meeting or otherwise as directed by the case management judge.

[19] The main purpose of rule 36(9) is to require the party, intending to call a witness to give expert evidence, to give the other party(s) such information about the expert evidence as will remove the element of surprise. The subrule in its amended form is more efficient and practical in that it now allows the other party, on receipt of the notice of intention to call an expert witness, more time to consider its position and, if necessary, to find an expert to give evidence at the hearing of the matter. Proper compliance with the subrule may furthermore enable experts to exchange views

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<sup>2</sup> *Sublime Technologies (Pty) Ltd v Jonker and Another* [2009] ZASCA 149; 2010 (2) SA 522 (SCA) at [3].

before giving evidence and thus reach agreement on at least some of the issues, thereby saving costs and the time of the court.<sup>3</sup>

[20] Subrule (9)(a) contains its own sanction in that the party who fails to comply with the provisions thereof is precluded from calling an expert witness. The non-compliance with the provisions of subrule (9)(a) entitles the other party to a postponement of the trial.<sup>4</sup>

[21] To determine what an appropriate cost order should be in this case it is worth recalling that the defendant and the third party objected to the late filing of the rule 36(9) notices by the plaintiff, albeit that the defendant initially attempted to consult with two experts to salvage the situation and only, sometime later, made their intention to bring an application for the postponement of the trial known to the plaintiff.

[22] The court has a discretion to make an order for costs, which discretion must be exercised judicially upon a consideration of the facts in each case. The court has to take into consideration the circumstances of each case, carefully weighing the issues in the case, the conduct of the parties and any other circumstances which may have a bearing on the issue of costs in order to make an order which would be fair and just between the parties.

[23] The usual rule, that the party who is responsible for the postponement should pay the wasted costs is the fifth rule laid down in the **Persadt**- matter and applies to the matter at hand. In the exercise of my discretion under these circumstances, the plaintiff should bear the costs occasioned by the postponement.

[24] In the premises I am of the view that the removal of this matter from the roll is essentially as a result of the plaintiff's failure to file the expert notice and report within the prescribed time frames, which failure was to the prejudice of the other parties. During argument, Mr Snellenburg SC indicated that the normal party and party costs ought to be ordered, whereas Mr van Ryneveld SC argued that having regard to the conduct of the plaintiff a punitive cost order is called for.

[25] It appears that the parties proceeded to convene a rule 37 conference and

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<sup>3</sup> *Hall v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 195 (C) at 200A.

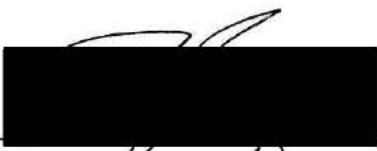
<sup>4</sup> *Smit v Shongwe* 1982 (4) SA 699 (T) at 700 H-701A.

prepared the rule 37 minute with the view that further preparation for the trial will only be dealt with subsequent to attending a judicial pre-trial hearing which took place on 13 May 2024. Since 17 July 2024, steps were taken by the plaintiff to prepare for the upcoming trial. Even though the purpose of the judicial pre-trial is to rule on the readiness of the matter for trial, the parties actually agreed to proceed with the judicial-pre-trial and attend to the further trial preparations thereafter.

[26] Therefore, because of the agreement between the parties, as contained in the rule 37 minutes, to only finalise any amendments to the plea and requests for trial particulars subsequent to the judicial pre-trial, I am of the view that the conduct of the plaintiff does warrant a punitive costs order. The application for postponement has become necessary in consequence of the fault or default of the plaintiff or rather his legal representatives who were unaware of the provisions of the amended rule 36(9) time periods. I do not agree with the submission that those costs be borne by the plaintiff on an attorney and client scale. The plaintiff and/or his legal team were not dishonest or willfully vexatious or guilty of anything more than neglect. Party and party costs will suffice.<sup>5</sup>

[27] **IT IS ORDERED THAT:**

1. The matter is removed from the roll.
2. The plaintiff is ordered to pay the wasted costs of the defendant and the third party occasioned by the removal of the matter from the roll, inclusive of the costs of two counsel (where applicable), on Scale C for senior counsel and Scale B for junior counsel.

  
I VAN RHYN  
JUDGE OF THE HIGH COURT,  
FREE STATE DIVISION, BLOEMFONTEIN

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<sup>5</sup> *Burger v Kotze and Another* 1970 (4) SA 302 (W) at 305 D-G.

**Appearances**

On behalf of the Plaintiff:

Instructed by:

Adv. E Grobler with Adv S Botha

Rosendorff Reitz Barry Attorneys

Bloemfontein

On behalf of the Defendant:

Instructed by:

Adv. N Snellenburg SC with Adv. J Johnson

Phatshoane Henney Attorneys

Bloemfontein

On behalf of the Third Party

Instructed by:

Adv Van Ryneveld SC

McIntyre van der Post Attorneys

Bloemfontein