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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

**REPORTABLE
CASE NO: 8617/2019**

In the matter between:

O[...] S[...] N[...] OBO R[...] J[...]

Applicant/ Plaintiff

and

MOEGAMAT SHADLEY CHILWAN

Respondent/ Defendant

ORDER

PARKER, AJ:

1. The application for leave to file the expert report of Mr Anton Krause, an Occupational Health and Safety Specialist, is granted.

2. The further conduct of the hearing be managed through a case flow management meeting convened on a date to be agreed.
 3. Costs stand over for later determination to the end of the merits hearing.
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JUDGMENT

[1] This opposed interlocutory application brought by the plaintiff to obtain leave of the court in terms of rule 27(1) for the extension of time for the filing of an expert report by Mr. Anton Krause, who is an Occupational Health and Safety Specialist, as contemplated in terms of rule 36(9) of the Uniform Rules of Court. The application is opposed by the defendant on several grounds.

[2] The issues for determination are:

- 2.1 Whether the applicant has demonstrated good cause;
- 2.2 Whether there is a bona fide explanation for the delay;
- 2.3 Whether the order the court intends to grant will prejudice the respondent, and,
- 2.4 Who bears the costs?

[3] The applicant instituted action against the respondent when the entrance gate to the premises of the respondent became dislodged and toppled directly over and on top of the applicant's minor child. The applicant pleaded that the incident was wrongfully and negligently caused by the respondent in that he, inter alia, failed to take reasonable precautions to ensure that the gate was safe for use by members of the public. The trial commenced on 18 February 2025 and one witness testified. An inspection in loco was conducted on the same day. The trial was postponed for a further hearing to 25 March 2025, on which date, and, at the request of the respondent, the parties agreed that a

witness for the respondent would lead evidence as she would leave the country and would not be available when required to testify. On this basis, the court heard the evidence of Ms. Van Rhyn.

[4] At the inspection in loco, the respondent drew the attention to a position where a bracket had been present at the time of the incident, shown by various holes in the puller where the gate normally closes. Ms. Van Rhyn's testimony was that she was not present when the incident occurred, however she led evidence on the use of the gate, which was generally observed as dangerous. It was also her testimony that she denied that there was a bracket in place as pointed out at the inspection in loco. Rather, she testified that there was a stopper in place which was mounted at the bottom of the wall at the end of the gate trap.

[5] Following this, a decision was taken by the applicant to procure an expert opinion since there was conflicting evidence regarding the stabilizing features which were in place at the time of the incident. The applicant believes that an expert would provide the court to understand the issue arising, more so, the crucial question as to whether the gate was dangerous and if so, what the reasons were for such a determination. The expert could similarly opine on the precautions that could have been in place to ensure that the gate was safe.

[6] Of relevance to the application are two rules. One is Rule 36 (9) of the Uniform Rules of Court which was amended in 2019¹. The thrust of the rule is that no person shall, save with the leave of the court or the consent of all parties to a suit, be entitled to call as a witness any person to give evidence of an expert nature, unless the party intending to call the expert complies with the requisite time periods specified in the rule, including a summary of the expert's opinion and the reasons therefore. Provided that the notice and summary shall in any event be delivered before a case management conference held in terms of Rules 37A (6) and (7) or as directed by the judge.

¹For the purposes of this interlocutory application the full extent of rule 36(9) will not be set out, however the relevant provisions are 36(9) a (i) and (ii).

[7] As a result of the evidence led by Ms. Van Rhyn, the applicant addressed a letter to the respondent to obtain consent to file the report of Mr. Krause, which consent was denied. The respondent is of the view that the decision to appoint an expert was late and more so because the applicant has to demonstrate good cause which includes a full explanation for the default and further, be bona fide. Further, the purported expert report provided is unnecessary because if the applicant believes that the evidence is such that the admission which has been made by the two witnesses that the gate was dangerous, there is no need to call an expert witness. Nevertheless, the safeness or not of the gate and the sufficiency of the stabilizing features was central to the case. The evidence of Ms. Van Rhyn did not change the applicant's case and it did not change what the applicant knew it had to prove. Accordingly, the applicant's explanation is not reasonably advanced since nothing in the evidence has changed anything in respect of the pleaded case.

[8] The respondent's view with regard to the explanation tendered as to why it was not anticipated that expert evidence would be needed, was not enough. I will elaborate further on this aspect when dealing with the applicant's averments regarding their financial constraints.

[9] The applicant attributes the respondent's denial to give consent to the filing of the expert's report due to the findings of the expert levelled against the respondent.

[10] In turning to the applicability and extent of Rule 36(9)(a), the applicant referred to the impracticalities of the new timelines which was addressed in the Gauteng Local Division, Johannesburg, where, in terms of its Practice Directive 6.6, provides for extended time periods which parties must comply with in all matters where expert notices and summaries must be delivered². Thus, the applicant argues it would be

² The practice note provides that whenever it appears on reasonable grounds that the time periods were filing and exchanging of expert notices and the reports are in the circumstances of the case inadequate subject to the directives in paragraph 6.15 of the manual the parties may by agreement concluded within 30 days of close of pleadings vary the times for compliance.

unfair to preclude a party from calling expert evidence upon his or her failure to comply strictly with the rule³.

[11] The applicability of the second rule and without citing the full extent of Rule 27, in *Du Plooy v Anwes Motors (EDMS) Bpk*⁴ and *Wapnick & Another v Durban City Garage & Others*⁵. The rule affords the court a wide discretion⁴ in instances where the parties are not able to reach an agreement. The court may upon application or notice and on good cause shown, make an order extending or abridging any time period prescribed by the rules or by an order of court, including taking steps in connection with any proceedings of any nature whatsoever upon such terms as the court deems meet.⁶ This includes any extension as to the recalling, varying or cancelling of results of the expiry of any time so prescribed or fixed; whether such results flow from the terms of any order from these rules.⁷ The court may on good cause shown, condone any noncompliance with these rules.⁸

[12] The applicant is required to show that it has good cause and have tendered an explanation for the default to enable the court to understand how it occurred⁹ and further that the explanation tendered is bona fide and not patently unfounded.¹⁰ The applicant relied on certain references in the transcribed record.¹¹ The explanation for the default was not accepted by the respondent in keeping with *Ingosstrakh v Global Aviation*¹² Further, that the application is brought at a very late stage of the proceedings and was not considered prior to the evidence of Ms. Van Rhyn.

³ *Coopers SA (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung mbH* 1967(3) SA 352(A) at 373D-H

⁴ 1983(4) SA 212 (O) at 216H-217A

⁵ 1984(2) SA 414 (D) at 423H-424B

⁶ Rule 27(1)

⁷ Rule 27(2)

⁸ Rule 27(3)

⁹ *Silber v Ozen Wholesalers (Pty)Ltd* 1954 (2) SA 345(A) at 353A

¹⁰ *Ingosstrakh v Global Aviation* 2021 (6) SA 352 (SCA) at 360 D-E

¹¹ Transcript: as to the use of the words "dangerous ", and "stopper"

¹² Supra para [21]

[13] Applicant has made a submission that nothing prevents the respondent from filing their own expert report if they deem it necessary. The various objections raised by the respondent particularly that at the case management stage, the applicant had not indicated that it was intending to call an expert witness. Applicant countered this due to the financial constraints of client and having accepted the brief on a contingency basis, it was not in a financial position to finance the litigation. This argument was rejected as the respondent argues that applicant has now nevertheless, found the finances to do so.

[14] In researching a definition of "good cause", I agree with the submissions made by the applicant that the courts have refrained from attempting to formulate an exhaustive definition of what constitutes "good cause." It makes sense to do so because it would hamper the exercise of the court's discretion.¹³ I do not believe that the applicant had intentions of delaying the trial, as it simply would make no sense to do so.

[15] It is trite that in the ordinary course, where party is responsible for a postponement, that the party should bear the wasted costs.¹⁴ The respondent is cognizant that if the costs of the application or the wasted costs of the postponement of the further trial are awarded against the applicant, the danger exists that the respondent run the risk that it will not be compensated for, by such an order for costs, thus adding to the possible prejudice suffered by the respondent. The authorities have shown that the indulgence sought must not prejudice the other party in a way that cannot be compensated for by a suitable order as to postponement and costs. Hence, it may be appropriate under these circumstances for costs to stand over for later determination.

[16] Rule 36(9) (a) as amended anticipates that a plaintiff who decides it requires an expert on the basis of pleadings is to be done shortly after the close of pleadings. Ordinarily, a plaintiff is not therefore entitled to wait to hear what the evidence is led by a defendant's witness before deciding whether to appoint an expert. It was only because

¹³ Ibid Silber at 353A

¹⁴Persadh and Another v General Motors South Africa (Pty) Ltd 2006 (1) SA 455 (SE) at 459G

Ms. Van Rhyn was interposed that the applicant happened to hear her evidence before it closed its case.

[17] In following the Constitutional Court in *Pickfords*¹⁵ reinforced that condonation is not a mere formality and good cause must be shown.

“ Courts are afforded a wide discretion in evaluating what constitutes ‘good cause’ so as to ensure that justice is done. Ultimately, the overriding consideration is the interests of justice, which must be considered on the facts of each case.”

[18] *Pickfords*,¹⁶ also in applying the overriding consideration of the interests of justice, which must be considered on the facts of each case.

“Factors germane to this enquiry may include the extent and the cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the issue(s) to be raised in the matter; and the prospects of success”.

[19] After carefully considering the submissions made by both counsels, and on consideration of all the facts, and in the exercise of the court's wide discretion and the interest of justice considerations under section 34 of the right of access to courts, it is reasonable to conclude that the applicant has succeeded on having shown good cause. There are times such as this matter, when procedural errors should not be allowed to obstruct substantive justice, even when those errors are solely caused by that party seeking condonation, on good grounds having been demonstrated. I am not of the view that the applicant was reckless or had an intentional disregard of the rules of court.¹⁷ I also cannot disregard the importance of the matter for the applicant, and the respondent and the applicant's prospect of success and the importance of the issue to be

¹⁵Competition Commission of SA v *Pickfords Removals SA (Pty) Ltd* 2021 (3) SA 1 (CC) at para [54]

¹⁶ *Ibid*

¹⁷*Junkeepsad v Solomon* (37003/2019, 37456/2019) [2021] ZAGPJHC 48 (7May 2021) at para [6]

determined. These are all relevant factors.¹⁸ Under the prevailing submissions to refuse a litigant to instruct an expert is such that rule 36 (9) discriminates against litigants who do not have the financial means to instruct experts. I reiterate that it is in the interest of justice to condone the late delivery of the notice in terms of Rule 36(9) (a) and (b) where it appears that a refusal may lead to injustice

[20] I agree that it could surely not have been the purpose of the amended rule to exclude litigants without the financial means to file expert reports at a later stage, bearing in mind that we are still at liability stage, we have not even reached the quantum hearing. Given the evidence led thus far and the contradictory nature of the evidence in relation to the stabilizing features that an expert would be necessary not only for the benefit of the parties but ultimately for the benefit of this court.

[21] I do not accept that the applicant's expert evidence is an attempt to tailor the evidence since the respondent is still at liberty to cross examine the expert and therefore, it is too early to say it was tailored.

[22] As for costs, respondent argued that the application is to be dismissed with costs to be awarded against the applicant, including the wasted costs of the postponement brought about by this application. The applicant argued that the objections raised were purely a technical grounded opposition, was unreasonable, and the respondent should have accepted the invitation when it requested same. The respondent however, at the get go, refused to give it consideration, and therefore, the costs brought about by this application, if successful, are directly attributable to the respondent's conduct in its unreasonable opposition to the filing of the expert report, especially since the applicant made various attempts to procure the consent. I deem it prudent to make a determination on costs later.

[23] Accordingly, it is ordered:

¹⁸ Ferris s v First Rand Bank Ltd 2014 (3) SA 39(CC) at 43G-44A

1. The application for leave to file the expert report of Mr Anton Krause, an Occupational Health and Safety Specialist is granted.
2. The further conduct of the hearing be managed through a case flow management meeting convened on a date to be agreed.
3. Costs stand over for later determination to the end of the merits hearing.

R K PARKER
ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for Applicant: Adv E Benade

Instructing Attorney: Daneil Botha, Holly Wynne (DSC Attorneys)

Counsel for Respondent: Adv D G Whitcomb

Instructing Attorney: Hannes Stimie (Stimie Attorneys)