/SG

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 25/05/2004

CASE NO: 22760/2002

UNREPORTABLE

In the matter between

ERNISTUS JOHANNES JACOBUS VISSER PLAINTIFF

And

PLATINUM MILE INVESTMENTS 229 (PTY) LTD 1ST DEFENDANT

REGISTRAR OF DEEDS 2ND DEFENDANT

JUDGMENT

LEGODI, AJ

A. INTRODUCTION

This is an application in terms whereof the applicant (hereinafter referred to as the defendant) is asking for:

1. The main action to be postponed *sine die*.

2. The respondent (hereinafter referred to as the plaintiff) be ordered to pay the wasted costs occasioned by the postponement and;

3. The plaintiff be ordered to pay for the costs of this application for the postponement.

4. The grounds on which the defendant asked for postponement were set out as follows:

4.1 That the plaintiff has failed to make timeous and adequate discovery of relevant documents which failure has prejudiced the defendant in its preparation for the trial.

4.2 That the plaintiff only furnished the defendant with his discovery affidavit on 2 April 2004 and that the discovery was also inadequate.

4.3 That the plaintiff has failed to reply to the defendant's

notice in terms of rule 35(3).

4.4 That the plaintiff failed to reply to the defendant's request for particulars for the purpose of trial dated 31 March 2004.

4.5 That the plaintiff has failed to timeously taken necessary steps to arrange a pre-trial conference.

B. BACKGROUND

1. The pleadings in the main action closed during April 2003.

2. On 8 June 2003 the defendant filed notice to discover in terms of rule 35(1) and in the meantime the main action was set down for hearing on 4 May 2004.

2.1 Only on 2 April 2004 did the plaintiff respond to the discovery notice filed on 8 June 2003.

3. On 7 April 2004 the defendant served on the plaintiff request for further particulars for the purpose of trial in terms of

rule 21.

4. The plaintiff did not respond to the request for further particulars and subsequently the defendant filed notice to compel the plaintiff to furnish further particulars and enrolled same for hearing on an unopposed roll for 4 May 2004.

5. On 5 March 2004 the defendant requested the plaintiff to make arrangements for pre-trial conference.

6. On 5 March 2004 the defendant's attorney also reminded the plaintiff's attorney of the outstanding discovery affidavit by the plaintiff, which discovery affidavit was only served on 2 April 2004?

7. On 1 April 2004 in a letter the defendant informally attached copy of the defendant's request for further particulars for purpose of trial and further requested the plaintiff to consent to the inspection and copy certain building plans.

8. On 2 April 2004 the plaintiff's attorney responded to the letter of 1 April 2004 in which the request for inspection was refused on the basis that the request was vague and as regard copy of the request for further particulars the plaintiff acknowledged receipt thereof without any comment.

9. On 8 April 2004 the defendant filed in terms of rule 35(3) notice in terms whereof the defendant requested additional documents to be disclosed or discovered.

10. On 22 April 2004 the defendant's attorney wrote a letter to the plaintiff's attorney wherein amongst others the defendant reiterated the failure by the plaintiff to arrange for pre-trial conference and or the need for pre-trial conference and failure to respond to the notice in terms of rule 35(3). The plaintiff's attorneys were further requested to attend the pre-trial conference on 23 April 2004 at 16h00 at the offices of the defendant's attorneys.

11. In response to the letter of 22 April 2004, the plaintiff's attorney in their letter dated 23 April 2004 indicated that the

practice was that pre-trial conferences are attended to by counsels and that as such the pre-trial conference should be held in Pretoria at the offices of the plaintiff's counsel.

11.1 In the same letter and regarding the notice in terms of rule 35(3) the response was that the additional information or documents so requested were not relevant and if the defendant so wishes and sees the relevancy in the additional documents the defendant can readily obtain such public documents at the offices of Surveyor General and regarding the request for further particulars for the purpose of trial, it was the attitude of the plaintiff that the documentation was lengthy, that various of the information requested can in fact be found in the papers and that it was also difficult to see the relevancy of certain requests made.

12. The defendant's attorney on 23 April 2004 responded and indicated that the plaintiff's attitude was disregarding the rules of court and that the invitation to attend a pre-trial conference was to be between the attorneys on 23 April 2004

and that the counter proposal by the plaintiff's attorney to have the conference be held at the offices of the plaintiff's counsel was a rejection of the defendant's proposal to hold at the conference at the offices of the defendant's attorney in Bryanston, Johannesburg where only attorneys will be involved. It was further indicated that in any event counsel for the defendant was not available to attend the pre-trial conference on 23 April 2004 as suggested.

13. In response to the later letter from the defendant's attorney, the plaintiff's attorney indicated that since 21, 22 and 23 April 2004 the plaintiff's counsel without success has been training to get hold of the defendant's counsel with a view to arrange a pre-trial conference as it is said to be the practice in this division to have such arrangements to be made amongst counsels. A further suggestion was made by the plaintiff's attorney to have a pre-trial conference be held on 26 April 2004 at any time and it was suggested by the plaintiff's attorney that the defendant's attorney should indicate the time when counsel will be available on 26 April 2004. It was also indicated in

the response that the practice in the Pretoria High Court was that the only requirement was that a proper pre-trial conference must be held and that in this division time limits prescribed in rule 37 were not strictly enforced and that a pre-trial conference could be held few days before trial or even a day before trial. The plaintiff's attorney also denied that the plaintiff did not make a proper discovery and stated that it was the intention of the plaintiff to supply the further particulars at the pre-trial conference had the defendant or its attorney attended one and that the issue of improper or insufficient discovery could be raised at the pre-trial conference.

14. The response by the defendant about the latest proposal to have the pre-trial conference be held on 26 April 2004, was that neither the defendant's attorney nor its counsel was available for such a conference on 26 April 2004 as the attorney was involved in an urgent matter and counsel for the defendant in an arbitration elsewhere.

15. On 28 April 2004 at 13h38 the plaintiff's attorney served a

notice in terms of rule 37 calling upon the defendant to attend a pre-trial conference at the offices of the plaintiff's counsel on 29 April 2004 at 14h00.

16. The defendant's attorney on the same day responded to the notice by addressing a letter to the plaintiff's attorney wherein it was indicated that the attorney for the defendant was still preparing substantial papers in regard to an urgent application and a counter proposal was then made to have the pre-trial conference be held on 30 April 2004 between the attorneys and that one hour will be set aside for this purpose as the defendant's attorney was having other pressing commitments in view of the pending urgent application.

17. On 29 April 2004 and at 11h49 the plaintiff's attorney responded and indicated that as a formal notice has been served the pre-trial conference will proceed as scheduled for 14h00 with or without the defendant's attorney and or counsel. The defendant's attorneys were also told in the letter that trial will proceed on 4 May 2004 with or without

the defendant's attorney and or counsel and that any attempt to have the matter postponed will be resisted.

18. On 30 April 2004 at about 10h06 the defendant's attorney faxed a letter to the plaintiff's attorney ... it was.

C. AD DISCUSSION AND SUBMISSIONS

The proper function of the court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable courts to perform this duty with which in turn, the orderly functioning, and indeed the very existence, of society are inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with real issues between them, but also to ensure that courts dispense justice uniformly and fairly and that the true issues are clarified and tried in a just manner.

Of course Rules of Court like any set of rules cannot in their very nature provide for every procedural situation that arises. They are not exhaustive and moreover are sometimes not appropriate to specific cases. Accordingly the superior courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it, and if needs be relax, the Rules of Court, according to the circumstances.

Unfortunately this concomitant brings in its train the opportunity for unscrupulous litigants and those who would wish to delay or deny justice to so manipulate the court's procedures that their true purpose is frustrated. Courts must ever be vigilant against this and other types of abuse. What is more important is that the court's officers, and especially attorneys, have an equally sacred duty. Whatever the temptation or provocation might be, they must not lend themselves to the propagation if this evil, and so allow the administration of justice to fall into disrepute.

Nothing less is expected of them. Attorneys whatever their personal likes and dislikes might be, must ensure that the Rules serve their true purpose being to save guard the interest of their

clients in a way that will be expected of them.

[See *V. Hunou and Another v Fihrer & Son* 1982 (3) 354 (WLD) 355G-H and 356A-D.]

In terms of the practice manual a matter is normally dealt with as ready for trial only if the signed minute of the rule 37 conference is available and is free of any need to complete discussions and outstanding promises to revert. At the roll call priority may be given to cases in which a minute of acceptable quality was timeously filed with the registrar. (See *Practice Manual* pg 9 paragraph 10.)

On 24 April 1995 ELOFF JP as he then was, in the matter of *Kemp v Randfontein Estates Gold Company* 1996 (1) SA 373 (WLD) indicated that he issued a practice direction during 1994 which was to the effect that since rule 37(10) contemplates that time constraints may be altered by a judge in chambers without hearing the parties, informality in such applications was contemplated. He further directed that where rule 37(3) or (7) had not been observed timeously, the parties could informally approach

the Judge President or Deputy Judge President to grant condonation. Since then numerous informal requests for condonation were made and were dealt with and this created problems and as a result ELLOFF JP in the case of *Kemp* and in laying down what he considered to be appropriate practice he stated:

- That rule 37 does not say that the omission to take any procedural steps mentioned in rule 37(3) or (7) attracts the duty to apply for condonation.

- That his remarks as indicated above did not apply to cases where no proper minute was filed or handed up at all.

- That for years it has been the practice in this division to require proof of a proper pre-trial conference before a case is assigned to a judge for hearing.

- That judgment in *Kemp's* case should be understood as dealing only with a situation where a proper conference was held and an adequate minute is provided, albeit out of time.

- That condonation was not necessary where a proper conference was held and an adequate minute was provided.

- That the litigants may in consequence of their failure to observe the prescriptions as to time possibly lose their position on the day's roll or the judge hearing the case may, if he finds that the omission to observe the rule occasions delays in the disposal of the case, make an appropriate order as to costs.

Rule 37(2) puts a plaintiff under an obligation to convene a pre-trial conference within five days upon receipt of a notice of a trial date of an action. If a plaintiff fails to convene such a conference within the stipulated period a defendant may in terms of rule 37(2)(b) and within 30 days after the expiry of the five days period referred to in sub rule 37(2)(a); deliver such a notice in which he appoints a date, time and place for a pre-trial conference.

In terms of rule 37(1) a party to an action and receiving a

notice of a trial date is under obligation to make discovery of all the documents and or tape recordings relating to any matter in question in such an action even though such a party was not required in terms of rule 35(1) to discover.

Rule 37(3) provides that date, time and place for the pre-trial conference may be amended by agreement, provided that the conference shall be held not later than six weeks prior to the date of the hearing and if the parties do not agree on the date, time or place for the conference, the matter shall be submitted to the registrar for his decision.

In rule 37(7) the minutes of a pre-trial conference shall be filed with the registrar not later than five weeks prior to the trial date.

The first issue raised by this case was whether or not the case was ready for trial as on 4 May 2004 when the request for a postponement was argued before me. In terms of the Practice Manual referred to earlier in this judgment a matter is normally dealt with as ready for trial only if the signed

minute of the rule 37 conference is available and is free of any need to complete discussions and outstanding promises to revert. In the instant case, pre-trial conference was never held, no such signed or unsigned minutes was available, there appear to have been outstanding compliance with the rules 37 and 35, parties could not agree as to what is relevant and not relevant and there was outstanding application in terms of rule 21 which application was placed before another judge as at the time when this matter was argued before me. In my view clearly this mater was not ready for trial and as a result I postponed the matter *sine die* and reserve judgment regarding costs of the application for postponement and any wasted costs occasioned by the postponement.

I now turn to consider the issues raised before me regarding costs of the postponement and related costs thereto.

Counsel for the defendant Mr L van Tonder submitted that the plaintiff was throughout uncooperative and in particular that the plaintiff or his attorney should have accepted or conceded that the matter could not proceed to trial, and if

conceded, this would have resulted in a minimum costs having been incurred. It was further argued that the plaintiff persisted in his view that the matter will proceed notwithstanding his failure to timeously comply with the Rules of Court to the prejudice of the defendant. This submission was made in the light, I believe, of the letter of 29 April 2004 wherein amongst others the plaintiff or his attorney stated as follows:

> "You are advised to keep your diary open for next week as plaintiff intends to proceed with the trial with or without a pre-trial, and in fact intends in view of your attitude, if necessary to seek an order for attorney/own client costs in this respect.
>
> You are furthermore advised that should you intend to seek a postponement, you are required to bring a formal application for a postponement, and to provide ourselves with sufficient time to reply thereto, bearing in mind that any attempt at a postponement will be vigorously opposed."

The letter of 29 April 2004 from the plaintiff's attorney referred to herein, was prompted by a letter dated 28 April 2004 in which the defendant's attorney indicated that neither himself nor his counsel was available to attend a pre-trial conference which was set down for 29 April 2004. The notice for such a conference was served on the defendant's attorney at 13h38 purportedly being in notice in terms of rule 37.

The question raised by the plaintiff's response that the trial will proceed on 4 May 2004 with or without the pre-trial conference is whether or not the plaintiff genuinely believed that the trial could proceed without the pre-trial conference having taken place and without the minutes of the pre-trial conference. Secondly a further question raised by the response was whether or not it was not open to the plaintiff to resort to rule 37(3)(b) in terms whereof he could have referred the matter to the registrar because parties could not agree on the date, time and place for the pre-trial conference instead of adopting the attitude that the matter will proceed with or without them holding the pre-trial conference and submitting the minutes thereof.

It is important to mention that flexibility and relaxation in enforcing the Rules of Court in the form of the general practice of a particular division will only apply where the practice has been complied with. This was also the view as expressed by ELLOFF JP as he then was in the case of *Kemp* and in my view correctly so.

Parties to an action should still be bound by what the rules provide where a practice existing in a particular division has not been complied with like in the instant case.

The plaintiff in this case was served with notice to discover during June 2003 in terms of rule 35. However, this notice was only responded to on 2 April 2004. On 7 April 2004 the plaintiff was served with a notice of request for further particulars for trial in terms of rule 21. The plaintiff was under obligation to furnish further particulars within ten days from 7 April 2004. However, the plaintiff failed to comply and as a result the defendant made an application to have the plaintiff be compelled to furnish such requested particulars and this application was set

down for hearing on 4 May 2004 in a motion court of this division. The defendant was on the other hand not satisfied with the documents disclosed by the plaintiff and as a result the defendant served the plaintiff with a notice in terms of rule 35(3) for discovery of additional documents. This was also not complied with and the attitude by the plaintiff was that the documents so required were not necessary and or relevant and that in any event the defendant can obtain the documents from the Surveyor General. On 5 March 2004 the defendant's attorney wrote a letter to the plaintiff's attorney wherein a request or reminder was made to make arrangements for a pre-trial conference. This was not responded to until round about 21/22 April 2004 when the defendant proposed a pre-trial conference to be held on 23 April 2004. The time, date and place were given and the plaintiff objected thereto on the basis that such a conference has to be attended to by counsels and that it must be at the offices of the plaintiff's counsel in Pretoria. The 26 April 2004, 29 April 2004 and 30 April 2004 were eventually proposed one after the other as indicated in this judgment, but none of these days was ever utilised as parties could not agree due to unavailability of attorneys and or counsels and or disagreements on whether or not only attorneys

should attend and or the venue thereof.

The purpose of holding a pre-trial conference not later than six weeks prior to the date of hearing is to facilitate settlement discussions of a number of specific topics with a view to avoid incurring unnecessary costs and to protect a party against costs; to ward off an opponent who is unable to proceed to trial and or is not serious about doing so. [See *Leko TA v Epiton "Tribute Mayzine* 1995 (2) SA 706 (W) 707E, 707H-708E.]

The purpose of the amended rule 37 is to promote the effective disposal of the litigation. The main object of the rule is investigating ways is avoiding costs. It is intended to expedite the trial and limit issues before the court. [See *Hendricks v President Insurance Co Ltd* 1993 (3) SA 158(C) 166E.]

Mr Rossouw who appeared on behalf of the plaintiff sought to rely on the case of *Kemp*. In my view the instant case is clearly distinguishable from *Kemp's* case in that no pre-trial conference was held in the present case and as indicated by ELLOFF JP relaxation of the rules will not be applicable in the name of general

practice even where such practice was not complied with like in this case where the parties had failed to hold the pre-trial conference.

Mr Rossouw sought to suggest that if one was to have a look at the action which was started by a way of motion, evidence deposed to in those affidavits, subsequent declaration and certain admissions made in the pleadings, there can be no basis for the defendant to suggest any prejudice occasioned by non-compliance with the rules and or certain demands made on the plaintiff. This submission seems to suggest that it was not necessary for the plaintiff to comply with the rules and or requests made and or that the additional documents were not relevant. As regard the further particulars so requested it was submitted on behalf of the plaintiff firstly that most of the particulars requested were not relevant and or that they form the subject of the admitted facts and secondly that such requests will in any event be dealt with at the pre-trial conference. In my view a useful pre-trial conference will also need informed particulars with a view to articulate what is or not still in issue, secondly I do not think that a party should be allowed to withhold information or not to comply with the rules solely on

relevancy, for if a party is placed in possession of a particular information or document, such a party could never be in a position or better position to decide whether or not a particular information or document is relevant or not.

The defendant was also, however, criticised for not making it possible to hold a pre-trial conference or to at least not enforce the rules when the plaintiff failed to do so. Like, in the present case the defendant could as well have timeously compelled the plaintiff to make discovery, the defendant could have in terms of rule 37(2)(b) deliver a notice of the pre-trial conference when the plaintiff had failed to do so in terms of the rules and the defendant could have timeously served the plaintiff with notice of requests for further particulars in terms of rule 21.

However, in my view the plaintiff should have foreseen that this matter could never have been ready for trial without the pre-trial minutes and the plaintiff's attitude when so warned that the matter was not ready for trial and that it ought to be postponed, unnecessarily resulted in the substantive application for a postponement and in my view had the plaintiff conceded to a

postponement timeously costs could have been saved including large portion of wasted costs. This attitude coupled with failure to comply with the rules and failure to refer the dispute regarding the holding of a pre-trial conference to the registrar should attract costs against the plaintiff.

The matter has already been postponed *sine die* and I therefore conclude by making the following further orders:

1. The plaintiff is ordered to pay the costs of the application for a postponement.

2. The plaintiff is further ordered to pay wasted costs occasioned by this application.

3. All costs shall be on a party and party scale.

M F LEGODI
ACTING JUDGE OF THE HIGH COURT

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