

SOUTH AFRICA / JUDGMENT

Pentree Limited v Nelson Mandela Bay Municipality (3119/2013) [2017] ZAECPEHC 59 (12 December 2017) [2017] ZAECPEHC 59

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

J W Eksteen

CASE / FILE NUMBER

3119/2013

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION, PORT ELIZABETH

Case

No.: 3119/2013

Date

Heard: 27 November 2017

Date Delivered: 12

December 2017

In

the matter between:

PENTREE

LIMITED

Plaintiff

and

NELSON

MANDELA BAY MUNICIPALITY

Defendant

JUDGMENT**EKSTEEN J:**

- [1] The plaintiff claims compensation in terms of section 12(1) and (2) of the Expropriation Act, 63 of 1975 (the Act) in respect of a property (the subject property) expropriated by the defendant on 2 October
2011. The amount of compensation payable and the highest and best use of the land is hotly disputed. The plaintiff's case in the trial has progressed to an advanced stage and Ms Jenny Falck (Falck), an expert valuer, was called to testify on behalf of the plaintiff in respect of these issues. When the matter was adjourned Falck had completed her evidence in chief and cross-examination had commenced. During the adjournment, the defendant served notice in terms of Rule 36(9)(a) and (b) of the Uniform Rules of Court (the Rules), of its intention to call Mr Erwin Rode (Rode) to testify on behalf of the defendant as an expert valuer. These notices prompted the present application in which the plaintiff seeks an order precluding the defendant from relying on the evidence of Rode as foreshadowed in the notices during its further cross-examination of Falck and from calling Rode to give such evidence. It seeks a further order that the delivery of the said notices be set aside as an irregular step as envisaged in Rule 30(3) of the Rules.
- [2] The trial stands adjourned at this stage to October 2018. By agreement between the parties the present application is brought in advance of the resumption of the hearing in lieu of an objection to the utilisation by the defendant of Rode's intended evidence in its further cross-examination of Falck and its leading of that evidence. The procedure is adopted in an endeavour to avoid the unnecessary loss of court time when the hearing recommences.

Background

- [3] Falck commenced her evidence on 26 October 2016. During the course of her evidence the defendant objected to the admissibility of portions of her evidence. The matter was argued and I reserved judgment in respect of the ruling. At this stage the plaintiff proceeded with the presentation of further expert witnesses until the conclusion of the set down period. I delivered my ruling to the objection on 17 November 2016. Following upon the adjournment and on 8 December 2016 the defendant delivered Rule 36(9)(a) and (b) notices in respect of one Professor Sharp, a statistician, which questioned the reliability of a regression analysis that Falck had used in her valuation of the subject property. In response Falck prepared a supplementary valuation and a further Rule 36(9)(b) notice in respect of the evidence of Falck was delivered on 17 January 2017.
- [4] On 1 February 2017 Falck resumed her testimony. In the course of her evidence in chief and on 9 February 2017, following argument on a further objection raised by the defendant the plaintiff delivered yet a further notice in terms of Rule 36(9)(b) relating to the evidence of Falck in which she expanded on the evidence foreshadowed in her supplementary

valuation. The defendant objected to Falck testifying in accordance with her further notice which had been filed out of time and during the course of the presentation of her evidence. I condoned the late filing of the notice and ruled that the plaintiff may proceed to lead the evidence of Falck to the conclusion of her evidence in chief. I ruled that the defendant would be entitled to an adjournment of the proceedings, if required, at the conclusion of the evidence in chief of Falck.

- [5] At the conclusion of Falck's evidence in chief the matter stood down and the defendant delivered a request in terms of Rule 2(c) of the Eastern Cape Practice Directions for an amplification of the additional expert notice. The amplification was duly provided and the defendant consulted its valuer, Mr Margolius. On 20 February 2017 counsel indicated that he did not consider it necessary to file a further report from Margolius at that stage and that he was prepared to proceed to cross-examine Falck. His cross-examination proceeded for four days before the set down period expired and the matter was again adjourned.
- [6] At this juncture, during the adjournment and in April and May 2017 the defendant delivered the notices in terms of Rule 36(9)(a) and (b) respectively in respect of the evidence of Rode. A report prepared by Rode entitled "Report on Valuation Method of Ms Jennifer Falck" was delivered in lieu of his summary as envisaged in Rule 36(9)(b) of the Rules.
- [7] In his report Rode responds to the methodology adopted by Falck in the exercise of her valuation. He criticises important assumptions on which Falck relied, her selection of a valuation method (the comparable sales method) and her application of that method including her assessment of the comparable transactions and other market evidence. By virtue of the criticism of Falck's

assessment of comparable transactions Rode considers that a different valuation method, the land-residual method ought to have been employed for the verification of the market value arrived at by the other valuation methods adopted by Falck. Falck had, in evidence, rejected the use of the land-residual method and Rode is critical of her rejection thereof.

The objection

- [8] The plaintiff objects to the defendant's intention to call Rode as an expert witness and to put Rode's evidence to Falck during cross-examination as:
- (a) the notices, it is alleged, are out of time in that the defendant has failed to comply with the time periods stipulated in Rule 36(9) of the Uniform Rules; and
 - (b) the notices are filed at such a late stage in proceedings that the prejudice caused thereby cannot be cured by a postponement coupled with an appropriate costs order.
- [9] Rule 36(9) provides:

- (9) No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he shall—
- (a) not less than fifteen days before the hearing, have delivered notice of his intention so to do; and
- (b) not less than ten days before the trial, have delivered a summary of such expert's opinion and his reasons therefor."
- [10] On behalf of the defendant it is argued that where Rule 36(9) refers to "fifteen days before the hearing" and "ten days before the trial" it should be interpreted as referring not to the commencement of the evidence in the trial hearing, but to the commencement of each session when evidence is given. It accordingly disputes the suggestion that the notices were filed late. By virtue of the conclusion to which I have come in this matter I do not think that it is necessary to resolve this dispute. Suffice it to say that on the ordinary reading of the rule it appears to me, *prima facie*, that the rule envisaged that the said notices were required to be filed prior to the commencement of the first session of trial.

I shall accordingly accept for purposes of this judgment, that the notices were filed late and not in accordance with the timeframes set out in Rule 36(9). I pause to record, however, that both parties have filed numerous notices in terms of Rule 36 after the commencement of the trial. The trial commenced in February

2015. No less than 27 notices in terms of the provisions of Rule 36(9) of the Rules have been filed after the beginning of November 2015. Save to the extent set out earlier herein,

however, no objection was taken to these notices by virtue of them being filed out of time.

[11] Mr Breitenbach SC, on behalf of the plaintiff argues further that the notice of the evidence of Rode comes at a stage when Falck is already under

cross-examination. He would therefore need to consult with Falck at this stage in respect of the views of Rode and, depending on her advice, he would probably need to present additional evidence in chief from Falck and possibility also need to recall witnesses who have already testified or to call additional witnesses. Such a consultation would be wide-ranging and would deal with topics already canvassed under cross-examination. For this reason, so the argument goes, it would carry with it a significant risk that the integrity of the evidence of Falck as a whole would be compromised. Prejudice would accordingly be caused by the condonation of the late filing of the notices, so it is contended, which cannot be cured by a postponement coupled with an appropriate costs order.

[12] Mr Ford SC, on behalf of the defendant, on the other hand, contends that I ought, in the context of the present matter, to condone the late filing of the notices as I am entitled to do by virtue of the provisions of Rule 27(3) of the Rules.

- [13] The Court has a wide discretion to condone non-compliance with the Rules (see *Smith NO v Brummer NO* 1954 (3) SA 352 (O) at 358A; and *Du Plooy v Anwes Motors (Edms) Beperk* 1983 (4) SA 212 (O) at 216H-217A) which must, in principle, be exercised in the light of all the circumstances. (See *Coopers (South Africa)(Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH* 1976
- (3) SA 352 (A) at 374B; and *Smit v Shongwe* 1982
- (4) SA 699 (T) at 701G.) The discretion will of course be exercised judicially with due regard to the question of prejudice or potential prejudice to each of the parties. (*Coopers supra* at 372H and 374B.)

Purpose of Rule 36(9)

- [14] The main purpose of the rule was summarised in *Coopers (SA) supra* at 371 where Wessels JA recorded:

“In deciding whether there has been due compliance with sub-rule (9) (b), it is, in my opinion, relevant to have regard to the main purpose thereof, which is to require the party intending to call a witness to give expect evidence to give the other party such information about his evidence as will remove the element of surprise, which in earlier times (regarded as an element affording a tactical advantage) frequently caused delays in the conduct of trials. Consequently, when summarising the facts or data on which the expert witness premises his opinions, the draughtsman should ensure that no information is omitted, where the omission thereof might lead to the other side being taken by surprise when in due course such information is adduced in cross-examination or evidence.”

- [15] The purpose and the effect of Rule 36(9) was subsequently elaborated on in some detail in *Doyle v SentraBoer (Cooperative) Limited* 1993 (3) SA 176 (SECLD) where Mullins J explained at 180G-181B:

“Rule 36(9) is a limitation on the right of litigants to call whoever they choose as witnesses. Normally a party does not know what

witnesses the other party is going to call, or what such witnesses are going to say. He must prepare as best he can by assembling his own witnesses to deal with the issues raised on the pleadings. There are other provisions of Rule 36, such as discovery, production of documents, medical and physical examinations and such like, which assist a party in preparing for trial. Moreover

a party is not required to inform his opponent who his witnesses are or what they are going to say.

Rule 36(9), however, makes serious inroads upon the common-law right of a party to exercise the fundamental and valuable right to call a witness without a warning to his opponent (*Boland Construction Co (Pty) Ltd v Lewin* 1977

- (2) SA 506 (C) at 508.) It also places such party at a disadvantage in having to intimate in advance what his expert witness is going to say. This disadvantage does not apply to non-expert witnesses, who can be called without warning, no matter how much the evidence may take the other party by surprise.

Prior to the promulgation of the Uniform Rules of Court, even expert witnesses could be called without notice to the other side. While providing a tactical advantage, this frequently led to postponements and other delays in the conduct of trials. ... Expert witnesses should be impartial, and the frequently very involved and technical nature of their evidence demands that the other party should be able to prepare to cross-examine such witnesses and, if necessary, to allow his own expert witnesses to prepare in advance to counter such evidence.”

For these reasons the rule ought to be interpreted restrictively and the Court ought to lean in favour of granting condonation for the non-compliance with the rule in the absence of cogent reason to the contrary.

Prayer 1

- [16] The main relief sought by the plaintiff is set out earlier herein. In prayer 1 of the plaintiff’s notice of application it seeks an order to preclude the defendant firstly from utilising the evidence of Rode foreshadowed in the notices in its further

cross-examination of Falck and secondly from calling Rode to give evidence.

- [17] As appears from the title of the report by Rode (“Report on Valuation Method of Ms Jennifer Falck”) it sets about criticising the methodology employed by Falck in her valuation of the subject property. Rode did not embark on any investigation of his own to attempt to express an opinion on any pleaded issue. Counsel on behalf of the defendant is generally entitled to test the reasoning of Falck in arriving at her conclusions by cross-examination. He is entitled to consult with any expert he

pleases and to consider any written authority which he is able to obtain in order to conduct his cross-examination. He would be entitled, in testing the merit of her evidence, to put every criticism raised by Rode to Falck without reference to Rode or to the Rule 36(9)(b) notice. He would be entitled to do so without filing a notice in terms of Rule 36(9) in respect of Rode or any other expert with whom counsel may have consulted.

- [18] This Mr Breitenbach was constrained to acknowledge during argument, however, he submitted that where such cross-examination is linked to the opinion of a particular expert which the defendant wishes to call it should first comply with the provisions of Rule 36(9) of the Rules before he would be entitled to put such proposition to the witness. Unsurprisingly Mr Breitenbach was unable to refer to any authority supporting this proposition.

- [19] Rode, as recorded earlier, did not attempt to value the subject property and he expresses no view on its value. The report by Rode contained in the Rule 36(9) notices criticises important assumptions made by Falck and explains why, in his expert opinion, he considers such

assumptions to be fallacious. He doubts the reliability of her method of valuation (the comparable sales method) and criticises her application of that method, including her assessment of comparable transactions and other market evidence, and he advances reasons for his opinion in this regard. He postulates that a different valuation method should have been employed to verify her conclusions arrived at by the comparable sales method and, had she done so correctly, he opines that the fallacy in her valuation would have been revealed. All of this, in my view, constitutes evidence which is strictly in answer to the various reports contained in the Rule 36(9)(b) notices filed in respect of the evidence of Falck and to which she has testified. It is a rebuttal of her evidence.

- [20] This brings me to the structure of Rule 36(9) which I have set out earlier. In *Klue and Another v Provincial Administration*, Cape 1966 (2) SA 561 (E) at 563A Addleson AJ (as he then was) concluded:

“I do not think that Rule 36 (9) (b) was designed to encourage one party to wait until ten days before a trial in order to satisfy himself that his opponent does not intend to call expert evidence, before himself deciding whether or not to call expert evidence on a material issue on the pleadings. Such an approach would in many cases result in a situation of stalemate and would in my view be contrary to the spirit of the Rule.”

- [21] The rule accordingly does not provide for a plaintiff to take a particular step within a prescribed period whereafter the defendant

is required to respond thereto. The rule imposes the same limitation on each party requiring it to file its notices within the stipulated time prior to the commencement of the trial. It would accordingly be impossible, if the parties adhere to the rule, for an expert on one side of the litigation to timeously give notice of his expert criticisms relating to the evidence of his counterpart on behalf of the other party. For this reason Margo J, giving the unanimous judgment of the Full Court on appeal in the matter of *Coopers (SA) supra*, concluded that the rule was “not intended to cover evidence strictly in answer to an opposing parties summary”. (The judgment of the Full Bench is not reported. See, however, the commentary in *Erasmus: Superior Court Practice* (2nd ed) vol 2 p. D1-491.) The further appeal to the Appellate Division (now the Supreme Court of Appeal) was decided on different

grounds and the finding of the Full Bench was not addressed by the Appellate Division. I am in agreement with the conclusion of Margo J and it accords with the manner in which the rule has in my experience been applied in this Division. Usually evidence in rebuttal of an expert’s opinion would be given without a further Rule 36(9) notice by an expert in respect of whom notice has been timeously given by the opposite side and cross-examination would proceed on instructions provided by such an expert. In principle, however, I do not think that the position can be different where the evidence in rebuttal emanates from a different expert. For this reason I consider that Mr Ford, on behalf of the defendant is entitled to put Rode’s criticisms of Falck’s valuation to her during cross-examination. I do not consider that such a ruling could serve to undermine the purpose of the rule in any manner. Falck is herself an expert in the same field as

Rode. She has expressed her expert opinion and she has had very extensive notice of the conflicting views expressed by Rode. She has ample time to prepare her responses thereto prior to the cross-examination proceeding in October 2018. There can be no element of surprise to her. Similarly, in the event that Rode is called to testify counsel on behalf of the plaintiff will have had extensive notice of the opinions of Rode before he begins to testify. In the event that he requires time to consult with Falck in order to prepare his cross-examination that may be done after she has completed her evidence. Should a postponement be required to do so any prejudice which may arise therefrom may be compensated for by an appropriate costs order.

[22] I turn to consider the second leg of the objection. Rode's report, as alluded to earlier, is essentially a criticism of Falck's valuation. It is his conclusion that her valuation is fallacious for the reasons contained in his report. The present proceedings are, of course, expropriation proceedings where there is no lis between the parties and no onus on either of the parties in respect of the value of the subject property. At the conclusion of the matter I would be required

to fix the amount of compensation payable. In the event that Rode's criticisms should be valid and that Falck's

valuation is indeed fallacious the Court may be seriously misguided in coming to a conclusion without reference to Rode's evidence in respect of the reasonable compensation to be awarded. It would, in those circumstances, result in major prejudice to the defendant were I to fix the amount of compensation without considering Rode's criticism of Falck's approach.

The interests of justice require not only that Falck's opinions be tested against the criticism of Rode but also that Rode should be heard, and his opinions tested under cross-examination.

[23] I am by no means persuaded that there is any entitlement to consult with the witness Falck nor to lead further evidence in chief from her at this stage. In the event that Falck is of the view that Rode's opinions and his attack on her methodology or assumptions are unfounded she is able, by virtue of her own expertise, to defend her valuation in cross-examination. If she were to advise that the plaintiff would be required to lead further witnesses in order to meet the criticism or to recall witnesses who have already testified such advices could be conveyed after she has testified and any prejudice arising from the late filing of the notice could then be cured by a postponement. In the event that portions of Rode's report are not raised in cross-examination the plaintiff may seek leave at the conclusion of the cross-examination to raise these issues in evidence with Falck. Nevertheless, in this case the defendant has agreed that counsel for the plaintiff may consult with Falck at this stage notwithstanding that she is currently under cross-examination. I shall accordingly consider the matter on this basis.

[24] I revert now to the prejudice which Mr Breitenbach contends would result from such a consultation. The essence of the argument is that the integrity of the evidence of Falck as a whole may be compromised as it may be influenced or tainted by the wide ranging interview which he would be required to hold with her. I readily accept that it is ordinarily improper to

consult with a witness whilst she is under cross-examination. I accept too that in the case of a factual witness the evidence of such a witness may well be influenced or tainted by such an interview to the extent that the integrity of such witness's evidence as a whole might be undermined. In the case of expert witnesses, however, they are required to be impartial. The resolution of a conflict between the opinions of rival expert witnesses will generally not depend on credibility but rather on the reasoning inherent in their opinions. The ultimate finding will depend on the examination of the opinions expressed and an analysis of the reasoning behind them. (See the South African Law of Evidence 2nd ed p. 328.) In these circumstances the prejudice which the plaintiff contends for seems to me to be more apparent than real.

- [25] In the circumstances I consider that the interests of justice require that the late filing of the Rule 36(9)(a) and (b) notices in respect of the evidence of Rode be condoned. The objection to the use of the content of the Rule 36(9)(b) notice in cross-examination and to the calling of Rode to testify can therefore not be sustained.

Prayer 2

- [26] I have accepted earlier that the Rule 36(9) notices were not delivered in terms of the Rules. To this extent the delivery of the notices are irregular. Rule 30(3) of the Rules, however, confers a wide discretion on the Court to make any order as to it seems meet in these circumstances. I have considered earlier the balance of prejudice to the parties and to the Court if the evidence of Rode were to be excluded. By virtue of the conclusion to which I have come in respect of prayer 1 it must follow that the application to set aside the said notices must fail. In these circumstances the relief sought in prayers 3 to 5 of the notice of motion, which seek condonation in respect of various procedural shortcomings, need not be considered.

Costs

- [27] The blame for the notices being late, as measured against the time frames set out in the Rules, cannot be laid at the door of the defendant. Three supplementary notices in terms of Rule 36(9)(b) of the Rules in respect of the evidence of Falck were filed after the commencement of the trial. The criticism of the approach set out in these notices and in Falck's evidence could therefore not have arisen 15 days prior to trial. The attack on the utilisation of Rode's opinion in cross-examination and in evidence was ill-founded for the reasons set out earlier herein. In these circumstances I consider that the costs of this application should follow the result.
- [28] In the result, the application is dismissed with costs, including the costs of two counsel.

J W EKSTEEN

JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff:

Adv A Breitenbach SC and Adv Townsend instructed by DHM Attorneys, Somerset West c/o Greyvensteins Inc, Port Elizabeth

For Defendant:

Adv EAS Ford SC and Adv G Richards instructed by Rushmere Noach Inc, Port Elizabeth

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