

IN THE HIGH COURT OF SWAZILAND

CIVIL CASE NO.1419/96

In the matter between:

SWAZILAND CONSULTING ENGINEERS INC : PLAINTIFF

and

SAXON (PTY) LTD : DEFENDANT

CORAM : MAPHALALA AJ.

FOR THE PLAINTIFF : MR. MASUKU

FOR THE DEFENDANT : MR. SIMELANE

RULING (RULE 30(5))

13/07/97

The Defendant opposes the application made by the Plaintiff to compel discovery. The Defendant's counsel argued that the application was ill-founded because there had been a non-compliance with Rule 30(5) of the High Court Rules. The said Rule reads as follows:

"Where a party fails to comply timeously with a request made or notice given pursuant to this Rule.

The party making the request or giving the notice may notify the defaulting party that he intends, after the lapse of seven days to apply for an order that such notice or request be complied with, or that the claim or defence be struck out. Failing compliance within

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the seven days, application may be made to Court and the Court may make such order thereon as to it seem fit."

He submitted that the effect of this Rule is to preclude an application of the present kind unless and until a notice in terms of the Rule has been given. Plaintiff has not given such a notice.

Mr. Masuku for the Plaintiff argued that the Plaintiff has no duty to comply with Rule 30(5) of the High Court Rules. He referred the Court to a number of decided cases on this point. He argued that Rule 30(5) is not mandatory and thus not preemptory (see KHUNON'S OTHER VS FIHRER'S SON 1982(3) S.A. 353 PAGE 360). Further, that Rule 30(5) is of general application and applies in all those cases where a particular rule does not itself provide for a special sanction for non-compliance with a notice or request. (REF. ERASMUS' COMMENTARY ON SUPERIOR COURT PRACTICE, NORMAN'S COMPANY LTD VS HANSELLA CONSTRUCT PLUMBING (PTY) LTD 1968(1) S.A. 503.

In my view Mr. Masuku's contention is correct. Rule 30(5) is a general one and does not override the provisions of other rules which make provision under those rules. Thus, where a party has failed to comply timeously with a request for a further particular his opponent can resort to the provisions of Rule 35(11) without the giving of the notice contemplated in Rule 30(5). Rule 35(11) reads as follows.

"If any party fails to give discovery as required under sub-rule (2) or having been served with a notice under sub-rule (7), omits to give notice of a time for inspection as required under sub-rule 8 or fails to give inspection as required by sub-rule (10), the party desiring discovery or

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inspection may apply to a court, which may order compliance with the Rule and, failing such compliance, may dismiss the claim and strike out the defence.

See HERBSTEIN AND VAN WINSEN - THE CIVIL PRACTICE OF THE SUPERIOR COURTS OF SOUTH AFRICA (3 ED.) AT PAGE 382).

In the instant case, this is what the Plaintiff did. The Plaintiff proceeded in terms of Rule 35(11) as it is entitled to do so by the rules. Rule 35(11) has no application in the present circumstances.

The application to compel discovery is granted with costs.

S. B. MAPHALALA

ACTING JUDGE

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