KEEGAN MARCHELLE PRESS // THE PREMIER OF THE GAUTENG PROVINCE

CASE NUMBER: 06/11345

This judgment obtained by our firm dealt with the dilatory and obstructive behaviour of the State Attorney when defending the State in a negligence claim as well as the determination of the amount of damages to be awarded to a man paralysed due to the negligence of the State.

LOM Business Solutions t/a Set LK Transcribers/aj

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG CASE NO: 11345/06

2007-11-02

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE YES/NO
(2) OF INTEREST TO OTHER JUDGES YES/NO
(3) REVISED

DATE 29-2-2008 SIGNATURE

In the matter between

KEEGAN PRESS Plaintiff

and

PREMIER OF GAUTENG Defendant

JUDGMENT

BORUCHOWITZ, J: This is a trial action in which the plaintiff claims damages from the defendants arising from physical injury sustained in a motor collision as well as injury arising from medical negligence of the second defendant's employees. The second defendant is The Premier of the Gauteng Province who is sued in his official capacity as nominal defendant for all claims arising against the Helen Joseph Hospital. The second defendant is represented herein by the State Attorney.

The trial was set down for hearing on 1 November 2007. On 31 October 2007 an application for postponement of the trial was brought

by the second defendant. The relief sought is an order postponing the trial *sine die* and directing the applicant, the second defendant, to pay the wasted costs occasioned by the postponement. The application is strenuously resisted by the plaintiff.

The plaintiff's case against the second defendant is that as a result of the negligence of its employees, acting in the course and scope of their employment with second defendant, the plaintiff sustained paralysis of his lower limbs with incontinence of the bowel and bladder, and other related injuries. The grounds of negligence are set out in paragraph 23 of the particulars of claim which reads:

"23. In breach of its/his/their duty if (sic) care, the second defendant and/or its employees, acting within the course and scope of their employment of the second defendant were negligent in that he/she/they:

23.1 failed to diagnose the fractures to the dorsal spine timeously and/or

23.2 failed to treat the plaintiff as a spinal injured patient until proven otherwise in circumstances when they ought to have done so; and/or

23.3 failed to examine the plaintiff properly or adequately upon his admission to hospital and/or the days subsequent thereto; and/or

23.4 failed to observe the plaintiff properly or adequately in the first week of his admission to hospital and/or to act in accordance with observations made; and/or

23.5 failed to arrange for appropriate special investigations including but not limited to plain x-rays, CAT scan or MRI scan of the plaintiff's back, timeously or at all; and/or

23.6 failed to diagnose the fractures of the spine that were evident on an x-ray of the plaintiff's chest performed the 27 June 2004 and/or

23.7 failed to put the plaintiff in traction and/or to perform fusion surgery to the plaintiff's spine timeously; and/or

23.8 failed to avoid the plaintiff's paralysis in circumstances that, by the exercise of due care and diligence, they could and should have done so."

To facilitate a proper understanding of the material issues that arise in the instant application it is necessary to set out a chronology of the relevant events.

The following facts are either common cause or incapable of dispute. Summons was issued on 24 May 2006. The second defendant's plea was delivered on 14 August 2006 following a notice of bar that was served on 10 July 2006. On 9 June 2006 plaintiff replied to second defendant's notice in terms of Rule 36(4) and furnished second defendant with the hospital records and an index of x-rays in plaintiff's possession. This was prior to the receipt of the plea.

On 16 February 2007 plaintiff's attorneys addressed a letter to second defendant's attorneys notifying it of plaintiff's intention to call named experts, identifying their field of expertise. In that letter plaintiff specifically invited second defendant to indicate which medico-legal

appointments second defendant will be setting up for examination of the plaintiff and what further information it required.

A notice of set down of the trial was served on the second defendant's attorneys on 16 March 2007. On 26 April 2007 plaintiff served a Rule 36(9)(a) on the second defendant listing the experts plaintiff intended calling at the trial of the matter. On 18 May the plaintiff repeated its request to the second to

> "Kindly indicate which experts you shall be sending the plaintiff to for the purposes of medico-legal reports."

On 27 June 2007 second defendant's attorney responded to such request intimating:

> "... we are not yet in a position to advise you of the experts for the purpose of medico-legal reports. We have just received advice on evidence ...from our counsel. We will advise when ready."

On 7 September 2007 the plaintiff furnished the second defendant with the expert medico-legal reports of 12 experts. It served on that day the relevant notice in terms of Rule 36(9)(a) and (b).

The plaintiff served further expert medico-legal reports on the second defendant on 12, 14, 18 and 26 September 2007. Further medico-legal reports were also served on 15, 17 and 29 October 2007. A summary of the expert evidence to be given by a Dr Van der Spuy was delivered to the second defendant on 26 October 2007.

An application for the separation of issues relating to merits and quantum was launched by the first defendant in June 2007 and argued

on 13 August 2007. The matter came before *Mogagabe, AJ* on 21 September 2007 who dismissed the application. *Mogagabe, AJ* was of the view that it was desirable in the interests of expedition and finality of litigation to have all the issues ventilated in one hearing so that the court should at the conclusion of the trial dispose of the litigation. Second defendant agreed to abide by the decision of the court and did not elect to participate in such application.

On 3 September 2007 plaintiff requested an early pre-trial conference which was held on 18 September 2007. This was the first of two pre-trial conferences. On 17 September 2007 second defendant's attorneys requested a copy of the Helen Joseph Hospital records. These were furnished on 18 September 2007, despite the fact that the same records had been supplied to them under cover of a Rule 36(4) reply on 9 June 2006. At the pre-trial conference which was held on 18 September 2007 second defendant agreed that "neither party was prejudiced as a result of any alleged non-compliance with the Rules of Court" and the issue of a possible postponement was not alluded to or raised.

Initially the second defendant did not despite requests, sign the necessary pre-trial conference minute however this was signed by second defendant on 20 July 2007. At the first pre-trial conference on 18 September 2007 second defendant's attorneys requested copies of the x-rays, despite the fact that the existence of such x-rays was alluded to in the records that were provided to the State Attorney on 9 June 2006. Pursuant to that request copies of the x-rays were made. It

appears that there was agreement between the second defendant's attorney and plaintiff's attorney that the second defendant would pay for the set of copies and that the invoice would be issued in the name of the State Attorney. This allegation is made in paragraph 6.2.3 of the answering affidavit and is not disputed or dealt with in the replying affidavit filed on behalf of the second defendant. Second defendant's attorneys thereafter refused to pay for the copy of the x-rays as had been agreed relying on a contention that second defendant was the owner of the x-rays and not obliged to effect payment. In effect second defendant's attorneys reneged on the agreement that had earlier been reached. A second pre-trial conference was held on 15 October 2007. It was there agreed that the costs of making copies of the x-rays would be costs in the cause and on that basis the x-rays were made available to the second defendant.

On 10 October plaintiff's attorney Mr Calitz addressed a letter to the second defendant's attorneys confirming a telephone conversation between himself and a Ms Flatela in which the latter advised *inter alia*

> "that you intend sending the plaintiff for medico-legal examinations but that you do not know to whom and when."

On 18 October 2007 second defendant's attorneys requested that plaintiff attend and submit to an examination by a Dr Younis an orthopaedic surgeon and Dr George a neurosurgeon on 22 October 2007. On the latter date the plaintiff presented himself for such appointments and was examined by Dr Younis, however prior to the appointment with Dr George he was informed that the appointment had

been cancelled because Dr George had urgent things to attend to.

Before the initial pre-trial conference the plaintiff addressed a Rule 37(4) notice to the defendant dated 2 October 2007 and in the minutes of the pre-trial conference held on 15 October 2007 the following is specifically minuted in paragraph 5.1: "When does second defendant intend to reply to plaintiff's Rule 37(4) notice dated 2nd October 2007, hereunto annexed marked annexure B?"

The reply given was that:

> "Second defendant will reply to such notice within one week after receiving copies of the x-rays."

It is common cause that despite the relevant x-rays being delivered to the second defendant and the lapse of a week thereafter the Rule 37(4) notice has not been replied to.

The second defendant delivered its discovery affidavit on 28 May 2007. Significantly in the affidavit all that is discovered are the pleadings and three letters sent from plaintiff's attorneys to the State Attorney. The medical records which were provided to the second defendant's attorneys on 9 June 2006 are not discovered. It is common cause that during the entire period when pleadings were exchanged there were only three letters written by the State Attorney to plaintiff's attorneys. These are not discovered and nor are the letters which the plaintiff's attorneys addressed to the second defendant. In regard to the request that second defendant send plaintiff for medico-legal reports and to indicate the experts upon which it intended to rely some eight letters were addressed by plaintiff's attorney to the State Attorney. At

least two of those letters were addressed prior to the compilation of the second defendant's discovery affidavit.

The aforegoing is a summary of those facts which are relevant to the determination of the instant application.

It is trite that a postponement is not there merely for the asking a party who seeks a postponement is required to advance satisfactory reasons for the grant of a postponement. See in this regard *Myburgh Transport v Botha trading as SA Truck Bodies* 1991 (3) SA 310 (NSC) at 314F-315J.

The considerations which weigh with a court in considering whether to grant a postponement were set out in the *Myburgh* judgment and include the following:

1 The trial judge has a discretion as to whether an application for a postponement should be granted or refused. This is a discretion which must be exercised judicially and not capriciously or upon any wrong principle, but for substantial reasons. Generally a court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained and where the unreadiness to proceed is not due to delaying tactics and where justice demands he should have further time for the purpose of presenting his case. Considerations of prejudice are ordinarily the dominant component of the total structure in terms of which a discretion of a court will be exercised. What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order

of costs or any other ancillary mechanisms. The court should weigh the prejudice which will be caused to the respondent in such application if the postponement is granted, against the prejudice which will be caused to the applicant if it is not. Where the applicant for the postponement has not made the application timeously or is otherwise to blame with respect to the procedure which he has followed but justice nevertheless justifies a postponement in the particular circumstances of a case the court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent on the scale of attorney and client.

The second defendant has in the present instance tendered to pay the wasted costs occasioned by the postponement.

The essential basis upon which the postponement is sought in the present matter is to be found in paragraph 8 of the founding affidavit of the applicant. It reads:

> "The second defendant is not ready for the trial because it has not been able to secure, consult and prepare opinion (sic) of its experts timeously. This matter arises from an alleged negligence of the servants of the second defendant at Helen Joseph Hospital. As a result thereof it was therefore necessary that the second defendant obtains the hospital records regarding the treatment of the plaintiff at the hospital. Unfortunately the hospital records have been mislaid. The plaintiff has been kind enough to assist in this matter by furnishing the second defendant with copies of the records that it obtained for (sic)

Helen Joseph Hospital. Unfortunately those copies are incomplete. The missing pages of the copies are very crucial to the preparation of the case for the second defendant. Serious matters have been set afoot to trace the necessary hospital records."

In paragraph 9 the following is said:

"In addition thereto the second defendant has been unable to obtain the x-ray plates of the x-ray examinations done on the plaintiff from the first date of his admission at the Helen Joseph Hospital, these x-ray plates and reports are crucial to second defendant's case as plaintiff's case turns around an allegedly misdiagnosis of plaintiff's spine particularly at the time of the plaintiff's admission at the hospital. It only obtained the x-rays on 17 October 2007. As a result of the aforegoing the second defendant has been unable to consult and prepare timeously for the trial."

Paragraph 10 reads:

"Although the plaintiff has delivered some of its expert notices and summaries timeously and within the time period laid down by the rules, it is necessary for the second defendant to consult its experts concerning the contents of the expert summaries. The second defendant has in fact consulted with experts and has requested them to draft opinions. The plaintiff has also indicated he is not prepared to condone the late filing of the expert notices and summaries."

That is in essence the case made out in the founding affidavit.

In the replying affidavit in paragraph 4 thereof the following is said:

> "I confirm that despite the fact that the expert notice was given on 26 April 2007 the experts' medico-legal reports were only delivered on 7 September, 26 September and the rest in October 2007. The import hereof is that although the medico-legal reports were delivered within the time period allowed by the rules, the second defendant only became aware of the contents thereof when they were served. The second defendant's attorneys had previously indicated, as early as June 2007 that plaintiff's expert medico-legal reports were needed in order to consult properly with the second defendant's experts."

In argument counsel for the second defendant indicated that this last mentioned request by second defendant's attorney was done orally. There is no indication in the affidavits that an oral or any other request was made.

In fact, in paragraph 8 of the replying affidavit the following is stated:

> "The second defendant could not have had the plaintiff examined until the second defendant had a clear opinion regarding its own case."

As is evident from paragraph 8 of the second defendant's founding affidavit its essential complaint is that it has been unable to timeously secure, consult and obtain an opinion from its experts. This assertion is

repeated in the replying affidavit in paragraph 4 and in paragraph 8 thereof where it is stated that the second defendant could not have had the plaintiff examined by its experts until the second defendant had "had a clear opinion regarding its own case."

This is clearly a case in which the evidence of experts are essential. The second defendant would undoubtedly have been aware when preparing for trial that it would have to have obtained the services of experts in order to properly resist the plaintiff's claim. An analyses of the facts reveal that the second defendant's lack of preparedness and inability to timeously secure, consult and prepare the opinion of its experts is entirely of its own making. It is clear, on a proper analysis of the chronology of events to which I have alluded, that the State Attorney did very little, if at all, to prepare itself for trial and that it was only in about October 2007 on the eve of the trial that it suddenly got underway with its preparation. It is then that it invited plaintiff to submit to a medico-legal examination by its experts. I do not accept the second defendant's assertion in the replying affidavit that it could not have had the plaintiff examined until the second defendant had a "clearer opinion" regarding its own case. That is with respect absurd and not our law, or practise.

The Rules of Court permitted the second defendant to require the plaintiff to submit to a medico-legal examination in order to prepare its case. (See Rule 36.) There is clear authority that a party cannot wait until the filing of expert summaries to start preparing its expert evidence. In this regard I refer to the dictum of *Mullins, J* in *Doyle v*

Sentra boer (Co-operative) Limited 1993 (3) SA 176 (SECLD) at 180G where the following is stated:

> "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 suchlike, 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."

It was argued by counsel on behalf of the second defendant that the true issue which the court has to decide in the present matter does not emerge from the pleadings, the particulars of claim are vague and do not give an indication as to the essential issue. The issue to be decided is whether the plaintiff sustained secondary neurological injury to the spinal cord as a result of medical negligence of second defendant's employees as a result of their failure to timeously diagnose the fractured dislocation which the plaintiff had sustained. This it is submitted by counsel does not emerge from the pleadings. My attention was drawn to paragraphs 23.6 and 23.8 of the particulars of claim. In paragraph 23.6 it is stated that there was a failure to diagnose the fractures of the spine that were evident on an x-ray of the plaintiff's chest performed on 27 June 2004; and in paragraph 23.8 it is alleged baldly or generally

that the plaintiff failed to avoid the plaintiff's paralysis in the circumstances, when by the exercise of due care and diligence they could and should have done so.

The fallacy with the second defendant's submission is that the Rules of Court make provision for a request for further particulars for trial. Had these been requested second defendant would have known precisely what the plaintiff's case was about to enable it to properly prepare for trial. See Rule 21(2). There is also provision in terms of Rule 37(4) to obtain particularity as to the precise nature and scope of the issue in dispute. The very object of the rules is to facilitate a definition of the issues so that the parties are properly prepared for trial. Second defendant's attorneys did not avail themselves of the rules. They did not seek further particulars or display any interest in the matter. Second defendant cannot now complain that it only at a late stage got to know precisely what the plaintiff's case was about.

Counsel for the second defendant also sought to rely on the fact that the State Attorney only received the majority of the summaries of the plaintiff's experts on 7 September 2007. But that is some eight weeks ago. There is no indication what second defendant's attorneys did during the eight week period in order to prepare for trial. In terms of the Rules of Court the expert summaries ought only to have been filed by the parties some 10 days prior to the trial but plaintiff's attorneys took the wise precaution of delivering them earlier and of notifying the second defendant well in advance that plaintiff intended to call experts. They delivered an expert notice in terms of 36(9)(a) of the Rules, on 26

April 2007 in which they listed the names and specialities of 12 experts that it intended to call.

In the correspondence plaintiff's attorneys took the wise precaution of warning the second defendant to be ready and to indicate which medico-legal appointments the defendant would be setting up for examination of the plaintiff. I refer in this regard to the letter of 16 January 2007 (page 43 of the papers). In the letter of 18 May 2007 (annexure G at page 52 of the papers) the following is specifically stated:

> "As you are aware a trial date has been allocated for 1 November 2007. Could you kindly indicate which experts you shall be sending the plaintiff to for the purpose of medico-legal reports."

They were also told in that letter that the plaintiff had briefed advocate N De Vos SC on trial. I refer also to the letters dated 27 September 2007, (page 100 of the application) as also the letter of 10 October 2007 (page 112).

The only response received from second defendant's attorneys concerning the request that they indicate which doctors the plaintiff must submit himself to for medico-legal report was a telephonic indication on or about 10 October 2007 (referred to in plaintiff's attorney's letter of that date at page 112 of the application) in which the plaintiff's attorney was told by a Ms Flatela on 9 October 2007 that the second defendant intends sending the plaintiff for medico-legal examinations but that they did not know to whom and when.

Finally a letter was received from the State Attorney on 29 October 2007 (annexure CC at page 123) in which it was stated:

> "Rule 37(4) apply and the information about the whereabouts of the doctors will be furnished to you on or before 29 October 2007."

It is difficult to comprehend how second defendant's attorneys could have expected plaintiff to submit himself for examination on or before 29 October 2007, several days prior to the trial. All of this is indicative of the indifferent attitude of the second defendant's attorneys in relation to the matter.

It was further argued on behalf of the second defendant that the hospital records are incomplete and that this is a further reason why second defendant is not properly prepared for trial. No detail or indication is given either in paragraph 8 of the founding affidavit or in argument, as to the respects in which the hospital records are said to be incomplete. One would have expected the doctors who were allegedly involved in the matter on behalf of the second defendant and who treated the plaintiff to have identified the specific pages of the hospital records that are missing. This has not been done. It is said that serious matters have been set afoot to trace the hospital records but no indication is given as to what these investigations are about.

What is particularly significant is that the hospital records are the property of the second defendant. And moreover, the plaintiff made available its copy of the records to second defendant's attorneys on 9 June 2006. Since that date there was no suggestion that the hospital

records were incomplete. The allegation that the hospital records are incomplete is in my view an afterthought and no credence can be placed on this assertion in the papers.

Upon a conspectus of the papers it is clear that the inability or lack of preparedness of the second defendant is due entirely to the deliberate inaction of its attorneys handling the matter on its behalf. This cannot form the basis for a postponement.

The fact that certain of the expert summaries have come in late particularly the summary concerning Dr Van der Spuy is not a matter that could occasion prejudice to the second defendant. If the second defendant is in any way prejudiced by the late filing of such summary the plaintiff will be precluded from calling Dr Van der Spuy as a witness and the trial judge will if necessary make the appropriate order.

The plaintiff, who is seriously disabled is entitled to have expeditious access to our courts and to assert his claim within a reasonable time. He cannot as appears to be the case in the present matter be thwarted by the inaction of the State Attorney in preparing for trial. Taking into account fairness and justice and considerations of prejudice and all of the considerations referred to in the *Myburgh Transport* case supra I am of the view that no proper basis has been placed before this court for a postponement of the trial.

Before granting the order I would deal with the question of costs. This application has taken up some two days of court time. The parties have had to exchange affidavits. The reasons advanced by the second defendant in support of its application for a postponement are spurious

and without foundation. There is no reason whatever why the plaintiff who was at all times willing and able to commence with the trial and who has prepared himself for the trial, should be required to pay any of the costs occasioned by the application for postponement. I refer in this regard to the matter of in re *Alluvial Creek Limited* 1929 CPD 532. Notice has been given to the second defendant of its intention to ask for costs on an attorney and client scale. It is only fair and proper that the plaintiff be fully compensated for the two days which have been futilely spent in dealing with the application for postponement.

The following order is therefore granted.

1. The application for postponement is refused.

2. The second defendant is to pay the costs occasioned by the application for postponement on the scale as between attorney and client.