TEBOHO JOHNNY MOKHETHI & MOTSHADI EVODIA MOKHETHI // THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT

CASE NUMBER: 11/27522

In this judgment obtained by our firm, the duty of the State Attorney to properly represent the State and prepare for trial was addressed, the circumstances in which a postponement of a trial may be obtained and the calculation of the quantum (amount) to be awarded to a child where amputation of his arm was foreseen.

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IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: 27522/2011

DATE: 2013/09/03

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: Yes

SIGNATURE 13 September 2013 DATE

In the matter between

MOKHETHI, TEBOHO JOHNNY **1st Plaintiff**
MOKHETHI, MOTSHADI EVODIA **2nd Plaintiff**

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT **Defendant**

J U D G M E N T

C. J. CLAASSEN J:

[1] This is a claim for damages instituted against the MEC for Health

in Gauteng. The two plaintiffs are respectively the mother and the father of a minor, Thatho Tsepho Mokhethi ("Thato") who was born on 01 March 2002.

[2] On or about 28 March 2007 when Thatho was aged five years old, he was examined at the Sebokeng Hospital for a complaint regarding a growth on his neck. On or about 17 May 2007 a diagnosis of a supraclavicular haemangioma was made. He was then readmitted to the hospital and surgery was performed for the removal of the growth, which left his right arm lame. He underwent a magnetic resonance imaging scan ("MRI" scan) which revealed disruption of the brachial plexus on the right side with a likely phrenic nerve injury.

[3] The defendant acknowledged that its employees acting in the course and scope of their employment at the Sebokeng Hospital were 100% negligent in performing these procedures on Thatho. The question of negligence is therefore not part of this case. What is to be decided is the quantum of damages suffered by Thatho.

POSTPONEMENT APPLICATION

[4] This matter was set down for trial on Friday 30 August 2013. Shortly before the trial date the defendant lodged an application for the postponement of the trial. The defendant filed affidavits whereafter the plaintiffs filed a comprehensive answering affidavit, and the defendant thereafter filed a replying affidavit.

[5] On Friday I dismissed with costs the application for postponement. I now give my reasons for having done so. It is

common cause that the big issue in this matter is whether or not the quantum of damages is affected by a proposed amputation of Thatho's limb. This fact came to the knowledge of the defendants already in late 2012. By March 2013 the plaintiffs officially amended their pleadings, stating that an amputation would be necessary. The defendants did nothing about this until June when they first began to think about calling witnesses in response to the amendment granted to the plaintiffs.

[6] In their application for postponement there is no explanation of the delay as from the latter half of 2012 up to June 2013. Nothing is said to explain their failure to prepare for their defence in meeting the case pleaded by the plaintiffs.

[7] The plaintiffs filed no less than 18 different expert reports whereas the defendant filed none.

[8] It appears from the plaintiff's answering affidavit in the application for postponement, which is marked annexure "D", that numerous letters were sent to the defendant requesting them to prepare for the trial and to be ready to proceed on 30 August. In this regard I quote from the answering affidavit paragraph 7.5 and 7.6 which read as follows:

> "7.5 Plaintiffs repeatedly requested defendant on seven occasions to indicate whether he wished Thatho to be examined by defendant's experts and/or to indicate which experts he intended calling on the merits and/or quantum trial as follows:
> 7.5.1 12 April 2012, annexure B hereto;
> 7.5.2 18 May 2012, annexure F hereto;
> 7.5.3 27 August 2012, annexure I hereto;
> 7.5.4 03 September 2012, annexure K hereto;
> 7.5.5 15 February 2013, annexure R hereto;
> 7.5.6 13 March 2013, annexure S hereto; and
> 7.5.7 17 July 2013, annexure Z hereto

> 7.6 Despite plaintiff's having warned defendant on four occasions that its failure to arrange for Thatho to be examined by his medical experts timeously would not be entertained as a reason for a postponement of the matter and/or that defendant's dilatory conduct in regard hereto would be drawn to the attention of the trial court in support of a punitive costs order as follows
> 7.6.1 27 August 2012, annexure I hereto;
> 7.6.2 03 September 2012, annexure K hereto;
> 7.6.3 15 February 2013, annexure R hereto; and
> 7.6.4 17 July 2013, annexure Z hereto;
> nothing was done by defendant during the period 12 April 2012 until 31 July 2013, i.e. a period of 15 and a half months before Thatho was eventually assessed by Prof Modi. It is only after such assessment that defendant advised plaintiffs that he was of the view that Thatho did not require an amputation of the right arm. To date hereof no expert medico legal reports have been served by defendant setting out any basis or justification for such opinion."

[9] It is further common cause that the defendant did not serve his rule 36(9)(b) notices and/or summaries of his experts on or before 19 August 2013 as required in terms of Uniform Rule 36(9)(b) and indeed to date therefore has failed to do so.

[10] Furthermore no meetings were held between the opposing experts as provided for in the new practice manual section 6.5, and no minute was forthcoming. In this regard I again quote from the answering affidavit paragraph 7.9 which states as follows:

> "7.9 Defendant's aforesaid reprehensible conduct in riding roughshod over the plaintiff's rights and in flagrant disregard of the Uniform Rules of Court and provisions of the new practice manual should not, it is respectfully submitted, be countenanced by the above honourable court. Moreover defendant's strategy of attempting to secure a postponement of the quantum trial by employing such dilatory tactics should, with respect, be rejected by the above honourable court with the contempt it deserves."

[11] Defendant's replying affidavit was filed four days before the trial date, wherein the reasons for the postponement are set out in paragraph 16.5. Basically an allegation was made that Prof Modi needed time to properly investigate the necessity or otherwise, of

an amputation of Thatho's right limb. In paragraph 6.5 of the replying affidavit it is stated that it would be necessary to do an EMG study of Thatho. This, however, has already been performed by the plaintiff's experts. In 16.5.2 it is also stated that an MRI scan will be necessary. As indicated earlier this already has been done by the plaintiff's experts. Similarly it is stated that Prof Modi required a pathology report relating to the previous growth and the recurrence of the growth to be obtained. Such investigation had already been done by the plaintiff's experts.

[12] Finally it is suggested in the replying affidavit that a delay in making the definitive diagnosis after these tests would not adversely affect the minor child's condition. This is in direct conflict with the experts' opinion that have made affidavits attached to the answering affidavit stating that it had become of immanent importance for Thatho to undergo the amputation for fear of further deterioration that might occur because of the imbalance on his spine resulting from his present condition.

[13] It is not necessary for me to deal in particular with each of these allegations except to say that they are convincing and they are in the answering affidavits and the application being on motion, this court is bound to decide the issues based upon the allegations made by the respondent's, in this case, in the plaintiff's answering affidavits to the postponement application.

[14] I will suffice by referring only to the affidavit of Dr Lippert, a qualified paediatric neurologist who states in paragraph 6 as follows:

"6.1 I have been informed that Dr G A Versfeld, an orthopaedic surgeon,

is of the opinion that Thatho requires an amputation of the right arm and a shoulder arthrodesis prior to the fitting of prosthesis.

6.2 Dr Versfeld is of the view that such amputation is reasonable and necessary in the circumstances and preferable to treatment with Botox of the muscles causing the contractures of his wrist, hand and elbow. Such Botox treatment will likely require several anaesthetics and would, in Dr Versveld's opinion 'constitute an on-going battle to correct the contractures already present and to avoid deterioration of such contractures, and at the end of all of this one would still have a 'functionless arm'.

7.1 I am of the opinion that the recommended treatment from a neurological point of view is **urgent amputation** of the right arm. **By delaying such treatment harm is being caused to Thatho. Such harm is both emotional and physical.** In this regard I refer to my aforesaid medico legal report where I stated that there is a heavy psychosocial burden to bear. He is perceived as being in an invalid state enduring mocking and marginalisation. The appearance of the shoulder and arm is unsightly.

7.2 The deformed paralysed atrophied right arm and wasting of the musculature has resulted in an imbalance of the upper body, with the result that the right shoulder is higher than the left shoulder, and resulting from this Thatho has developed a thoracic scoliosis. **By delaying the amputation Thatho will suffer from a worsening of the thoracic scoliosis convex to the right, which may lead to the development of low back pain and further complications relating to the contractures.**

7.3 **It is manifestly evident that this is in Thatho's best interest that an amputation and shoulder arthrodesis with early fitting of a prosthesis be performed as soon as possible."** (Emphasis added)

[15] It is trite law that a postponement is not there for the asking. Where a defendant seeks to apply for the postponement of a trial it has to comply with certain legal requirements. In this regard it is useful to refer to the judgment of Plasket J in **Persadh and Another v General Motors South Africa (Pty) Limited** 2006 (1) SA 455 (SECLD). It is only necessary for me to quote the headnote where these requirements are well set out:

"The following principles apply when a party seeks a postponement of an application:

First as that party seeks an indulgence he or she must show good cause

> for the interference with his or her opponent's procedural right to proceed and with the general interests of justice in having the matter finalised;
>
> Secondly, the court is entrusted with a discretion as to whether to grant or refuse the indulgence;
>
> Thirdly a court should be slow to refuse a postponement where the reasons for the applicant's inability to proceed has been fully explained, where it is not a delaying tactic and where justice demands that a party should have further time for presenting his or her case;
>
> Fourthly the prejudice that the parties may or may not suffer must be considered; and
>
> Fifthly the usual rule is that the party who is responsible for the postponement must pay the wasted costs."

[16] In an unreported decision of **Keegan Press v Premier of Gauteng** 11345/OS delivered on 02 November 2007 in the Witwatersrand Local Division, Boruchowitz J had to deal with a similar situation where there was a delay on the part of the defendant's attorney of record, being the State attorney, in preparing for the trial. At page 17 of the typed record of this judgment the following is stated:

> "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 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 *Myberg Transport* case supra, I am of the view that no proper basis has been placed before this court for a postponement of the trial."

[17] The court then refused the postponement and ordered costs on the scale of attorney and client to be paid by the defendant in that matter.

[18] In his further judgment on the merits, Boruchowitz J had some

further comments to be made and I quote at page 9 of the typed judgment which was delivered on 08 November 2007:

> "This notwithstanding second defendant's attorneys took no discernible steps to acquaint themselves with the plaintiff's case or to properly engage the plaintiff's experts.
>
> Despite not preparing themselves they, by their inaction fraughted the plaintiff in his preparation for trial and forced him to incur additional and unnecessary costs. On countless occasions the State attorney was requested to notify plaintiff's attorneys of the experts that it intended to call, and to indicate when and to whom the plaintiff was required to submit himself for examination. These requests were simply ignored."

[19] And further on page 10 of the typed judgment Boruchowitz had the following to say:

> "The attempt by the second defendant to obtain a postponement of the trial at a late stage clearly caused the plaintiff undue anguish. It is indeed reprehensible that the plaintiff, who through the actions of the second defendant's employees has been reduced to a paraplegic, should also, when attempting to assert his claim, be obstructed by inaction on the part of the State attorney handling the matter on behalf of the second defendant. In my view second defendant's attorneys have done the plaintiff and their client, The Premier of Gauteng Province, a disservice. In the circumstances I would award costs against the second defendant on the scale as between attorney and client."

[20] It is further trite law that the rules regarding expert notices are to be complied with not necessarily in sequence. It is not for the defendant to wait and see if the plaintiff is going to call expert testimony before the defendant decides whether or not its case demands the calling of expert testimony to its own benefit.

[21] The attitude disclosed in the present instance by the defendant's legal representatives amounted to just such an attitude as being more akin to playing a waiting game. Unfortunately the game has redounded to its own disadvantage. It is well worth quoting the judgment of Mullins J in **Doyle v Sentrapoer (Cooperative)**

Limited 1993 (3) SA 175 (SECLD), where at 183B to C the following is said:

> "The time limits provided for in rule 36(9) were not designed to provide a litigant with a tactical advantage over the other party. Each party must prepare for trial individually."

[22] As correctly pointed out by Mr Liebenberg, rule 36(9) does not, as in the case of certain other rules, provide that a plaintiff must take a certain step within a prescribed period whereafter the defendant has a further period to respond thereto. As Addleson AJ said in **Clue and Another v Provincial Administration Cape** 1966 (2) SA 561 E at 563 A-B:

> "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."

[23] I respectfully agree with the aforesaid interpretation of the uniform rules of court dealing with the requirements to enable a party to call expert witnesses.

[24] On a conspectus of all the matters referred to above I was of the view that no proper case had been made out for the postponement to be granted, and I therefore refused it with an order for costs on a party and party scale against the defendant. That resulted in the matter proceeding to trial on Friday, and further on Monday.

THE TRIAL

[25] What perturbed me about the conduct of the defendant during the trial was his uncooperative attitude of refusing to make any admissions regarding the correctness of the expert reports filed by the plaintiff. It required the plaintiff to call several of the expert witnesses merely to come and state that their reports were correct and that they confirmed the contents and conclusions therein. In this regard Dr G. .A Versfeld, the orthopaedic surgeon, Dr Lippert, the paediatric neurologist, Dr Larry Grinker, the psychiatrist, Ms Alison Crosbie, the occupational therapist, Mr Heinrich Grimsehl, the orthotist and prosthetist, Ms Phillipa Jackson, the physiotherapist, Mrs Eleanor Bubb, the clinical and educational psychologist, Ms Anne Jamotte, the industrial psychologist, and Mr G Whitaker, the actuarial expert were all called to come and shortly state that they abided by the contents of their expert reports. Mr Malindi, appearing on behalf of the defendant, were given no instructions to cross-examination them, with the result that all of these witnesses came and merely confirmed their reports and said no more or very little. All I can say is that I was extremely displeased with the manner in which the defendant and his instructing attorney conducted the trial in this matter.

[26] I expressed my dissatisfaction with this procedure and indicated that although I could not force Mr Malindi to make admissions regarding the contents of the plaintiff's expert reports, the displeasure of this court will be shown in an appropriate costs order at the end of the trial, and that is exactly what I propose to do when it comes to deciding the question of costs of the trial.

[27] The expert reports of those witnesses that were called stand uncontradicted and unchallenged. It is not necessary for me to

traverse these reports other than to state that an overwhelming case had been made out by the plaintiffs for the need to urgently cause the necessary procedures to be adopted whereby Thatho's right limb is to be amputated and thereafter to be supplied with the necessary prosthesis as soon as possible.

[28] In my view this would eliminate the taunting that Thatho is currently experiencing from his peer group at school; it will also prevent any further negative deterioration of his spine and his growth; and last but not the least there is also the question of his reduced intellectual capability, which was caused by the injury, to which the psychiatrist and the industrial psychologist testified.

THE *QUANTUM* OF DAMAGES

[29] I now come to the question of the *quantum*. I was referred to the case of **Rens v MEC for Health Northern Cape Provincial Department of Health** cited in Corbett and Honey, VOL VI at page D2-1. This was a case that came before Majiedt J as he then was, on 17 April 2009. The facts in that case are quite similar to the present one. It was a case where a ten year old boy suffered negligent medical treatment in a provincial hospital, the after effects of which required an above elbow amputation of the left arm. In that matter the sequelae also caused self-consciousness, lack of self-esteem and depression in the child. In that case the child was no longer able to obtain a technical qualification and was limited to clerical work in a sheltered environment. It was held that the medical and related expenses amounted to R18 286 550, the loss of earnings R2 418 700, the cost of administration of the trust R4 384 300 and general damages

R600 000, in all totalling an amount of R25 689 550.

[30] Interestingly enough in that matter one of the experts was also Dr Versfeld whose testimony was accepted by the court, that amputation and prosthesis was necessary. The court in that matter also expressed its displeasure at the way in which the attorney for the defendant conducted the trial. In this regard I quote the following at page D2-11:

> "I conclude by expressing my extreme displeasure at the manner in which the defendant has conducted this litigation.
>
> 41.1 Having conceded the merits on 31 October 2007, the defendant was not ready for trial on 22 September 2008 and the matter had to be postponed. I made a punitive order on the scale as between attorney and own client against the defendant for the costs occasioned by the postponement. I also made an order for interim payment of R1 million to be made to the plaintiff to alleviate his suffering to some extent.
>
> 41.2 During the hearing from 24 February 2009 to 26 February 2009 the defendant had no expert witnesses present, challenged the plaintiff's experts testimony only superficially and perfunctorily, and then to my utter astonishment simply closed its case without adducing any evidence whatsoever. This type of conduct smacks of an uncaring and unsympathetic attitude towards the plaintiff's plight, which I can only deprecate in the strongest terms. In a constitutional dispensation founded on values such as human dignity and the advancement of human rights and freedom, one would expect better from a State department."

[31] To add insult to injury, and the pun is intended, in the present matter the court also had to postpone the matter on a previous occasion but ordered the payment of interim amount of R1 million to alleviate the interim trauma. The defendant and his attorney simply disobeyed this order and to date has given no explanation why that amount has not been paid to the plaintiffs in the present action. Had it been paid as ordered by the court, Thatho's deterioration could have been curtailed to a certain extent by having carried out the operation and the supply of a

prosthesis sooner in order for his physical and emotional pain to be diminished.

[32] The conduct of the defendant's attorney in the present instance is also astonishingly reprehensible and cannot be countenanced by this court. As in the **Rens** case the judgment was referred to the defendant by order of court. I propose to do the same in the present matter.

[33] Since the injuries in the **Rens** case were similar to the one in the present case, and general damages were awarded at an amount of R600 000, Mr de Vos for the plaintiff sought an amendment of the plaintiff's pleading to amend the amount of general damages to R700 000. He submitted for my perusal the Quantum Yearbook by Robert Koch for the year 2013, wherein it would appear that the **Rens** amount of general damages for R600 000 then, would currently be R732 000. Mr de Vos quite objectively did not ask for an amendment to R732 000 but was satisfied with an amendment to R700 000. This amendment is granted as there was no objection thereto from Mr Malindi.

[34] I then come to the heads of damage. This is to be found in the latest Algorithm actuarial report found at pages 273 to 286 of the experts' bundle, being annexure D. Again acting conservatively, Mr de Vos asked for damages calculated by the actuary in terms of scenario one. Scenario two was for loss calculated if Thatho would have become an artisan. Mr de Vos was satisfied to claim the lesser amount claimed in scenario one of R2 277 753 which incorporated a 15% contingency deduction. In my view that is a fair contingency to reduce the future loss of earnings of Thatho in

the present case.

[35] Attached to that report is appendix 1, which sets out all the amounts claimed and discussed in the plaintiff's various expert reports starting with amounts testified to in the reports of Dr G. A. Versveld, Dr L. Grinker, Mrs A. Crosbie, Mr H. Grimsehl, Ms Phillipa Jackson and Mrs E. Bubb, amounting in total to R17 898 957. As in the **Rens** case, such amount has to be reduced by a contingency for these future medical expenses, and I adopt the same percentage of 5%, reducing the aforesaid amount to R17 409 0. To this amount must be added the amount stated above for future loss of income as well as the general damages of R700 000.

[36] Furthermore it is necessary to establish a trust for the minor child Thatho, to administer the amount of damages so awarded. The cost of administering the trust is the amount of 7.5% of the total amount. If applied to the amount to be awarded as it would be reducing over the years in future, the present value amounted to R1 498 632. If all of these amounts are added together it amounts to R21 480 394, which is slightly less than the amount awarded in the **Rens** case in 2009. I am therefore satisfied that it reflects a conservative amount of damages in the present matter, and should be awarded to the plaintiffs.

[37] Mr de Vos handed me a draft order. I am adding, as paragraph 7, an order referring this judgment to the MEC for Health in Gauteng via the Registrar of this court.

[38] I then make an order in terms of the draft order marked 'X',

paragraphs 1, 2, 3, 4, 5, 6 and 7 which read as follows:

"HAVING heard counsel for the parties, it is ordered that:

1. Defendant shall pay Plaintiffs in their representative capacities as parents and natural guardians of their minor son, THATO TSHEPO MOKETHI ('the Patient'), a capital amount of R21 480 394.00 in delictual damages, on or before 17 September 2013.

2. The aforesaid amount is payable to the Plaintiffs' attorneys' trust account, the particulars of which are:

   Joseph's Incorporated Trust Account
   RMB Private Bank
   Account Number: 5045 010 3011
   Branch Code: 261 251
   Ref: A Calitz/M232

3.

   3.1 Defendant shall take all reasonable steps to ensure that the capital amount referred to in paragraph 1 above is paid to the Plaintiffs on or before 17 September 2013.

   3.2 Should the Defendant, however, not pay the capital amount on or before 17 September 2013, Defendant will be liable for interest on such amount at the rate of 15.5% per annum from the due date to date of payment, both days inclusive.

4.

   4.1 The Patient is declared to be incapable of managing his own affairs, and Absa Trust Limited, herein represented by Martha Magdalena Prinsloo, of Absa Trust Services, Absa Beatrix Building, corner Soutpansberg Road and 79 Steve Biko Street, Prinshof, is appointed as Trustee to the Patient, and is to provide security to the satisfaction of the Master of the High Court for the due fulfilment of its obligations in terms of the Trust Property Control Act, No. 57 of 1988, as amended.

4.2 The Trustee's remuneration shall be limited to a management fee rate of 1% per annum, plus VAT, on the amount under administration.

5. Plaintiffs' attorneys of record shall cause to be created a Trust on behalf of the Patient to, *inter alia*, protect, administer and/or manage the capital amount referred to in paragraph 1 above.

6. Defendant shall pay Plaintiffs' taxed or agreed costs on the High Court attorney and client scale, excluding items 6.4 and 6.5 below, such costs to include:

6.1 the costs attendant upon the obtaining of payment of the full amount referred to in paragraph 1 above; and

6.2 the costs incurred in obtaining the medico-legal reports, as well as the qualifying and reservation fees, of Mr G. WHittaker, Dr G. A. Versfeld, Dr M. M. Lippert, Dr L. Grinker, Ms Alison Crosbie, Mr H. Grimsehl, Ms P. Jackson, Ms E. Bubb and Ms A. Jamotte; and

6.3 the costs of the radiological reports of Dr M. P. Ligege and Dr P. Goldschmidt, and the costs of the actuarial reports of Mr G. Whittaker of Algorithm Consultants & Actuaries CC, and the costs of the medico-legal report of Dr A. P. J. Botha; and

6.4 the costs of the postponement application; and

6.5 the costs of the application for an interim payment; and

6.6 the costs consequent upon the employment of senior counsel.

7. A copy of this judgment is to be transmitted by the Registrar to the Defendant and to the Head of the Department of Health, Gauteng."

DATED THE 13th DAY OF September 2013 AT JOHANNESBURG