IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 16969/2011

In the matter between:

A C Plaintiff

and

DR ANNALIEN GREEFF Defendant

JUDGMENT DELIVERED 12 JUNE 2018

Andrews AJ

[1] In this action the Plaintiff seeks to recover damages from the Defendant (a general medical practitioner) pursuant to having suffered a stroke on 16 October 2008. The Plaintiff alleges that the Defendant was negligent in that she failed to properly diagnose and treat the Plaintiff's stroke syndrome. In the Plaintiff's second

claim, he seeks to recover damages from the Defendant for failing to properly treat the unitary tract condition he presented with on 17 October 2010.

[2] On 14 August 2017, the parties respective expert witnesses (both neurologists), Dr Kesler for the Plaintiff and Dr Opperman for the Defendant compiled a joint minute in terms whereof the following was agreed upon by them:

> *'A C presented to the Emergency Unit at Hermanus Mediclinic in the early hours of the morning of 16 August 2008. The stroke manifested as a dense right hemiplegia and aphasia.*
>
> *There is no indication from the notes that Dr A Greef, the attending doctor on duty, made a diagnosis of stroke.*
>
> *Dr Opperman was informed that by the time the patient arrived at hospital, the window of opportunity for the use of acute thrombolytic therapy was passed.*
>
> *Dr Kessler was informed that the patient was admitted within three hours of the onset of the stroke and should therefore have been considered for acute thromboylic therapy.'*

[3] During the course of the Rule 37(8) pre-trial hearing, it was recorded by agreement that the issues of merits and quantum would be separated pursuant to the provisions of Rule 33(4) of the Uniform Rules of Court. The Minute recorded that *'[t]he parties agreed to request that the merits be determined first and quantum stand over for later determination.'* The matter was declared trial ready on 20 November 2017. A trial date was allocated for the hearing of this matter on 5 June 2018. An application to compel was brought by the Defendant pursuant to the Defendant's request for further particulars, and was set down for argument in the third division on

29 May 2018, which application subsequently was postponed, to be heard by the trial Judge.

[4] Pursuant to a further pre-trial conference held on Friday 25 May 2018, it became evident that there was a difference of opinion between the parties concerning the ambit of the separation that was previously agreed upon, as the Minute did not define what was meant by "the merits". The Judge President was approached to allocate a Judge for the purposes of resolving the issue of separation. The issue of separation was argued on 5 June 2018. Adv JJ Botha SC appeared for the Plaintiff and Adv A La Grange SC appeared for the Defendant.

Issues in dispute

[5] The Plaintiff contended that the agreement regarding the separation of issues would be limited to the factual issues as reflected in the joint minute of the experts, more specifically, whether Plaintiff was attended to by the Defendant within the window of opportunity for the use of acute thrombolytic therapy.

[6] The Defendant contended that in the context of a delictual claim the notion of "merits" connotes "liability" and that in order to render the second defendant liable in delict the plaintiff has to prove all the elements, namely:

(a) The conduct of the defendant of which he complained;

(b) The wrongfulness of that conduct;

(c) Fault on the part of the defendant (in the form of negligence);

(d) That the plaintiff had suffered harm;

(e) A causal connection between such harm and the defendant's conduct that is the subject of the complaint.

[7] The Defendant submitted that the separation as recorded means that all these issues are to be addressed during the trial, and that it was only the issue of the quantification of the harm, or damages that would stand over for later determination.

Legal Principals

[8] Counsel for the Plaintiff contended that the purpose of Rule 33(4)[1] is to determine the Plaintiff's claim without the costs and delays of a full trial. It was further submitted that the entitlement to seek the separation of issues was created in the Rules so that a factual issue can be determined which can give direction to the rest of the case and, in particular, to obviate the leading of evidence. It was also argued that the procedure is aimed at facilitating the convenient and expeditious disposal of litigation.[2]

[9] In ***Denel (Edms) Bpk v Vorster***[3] Nugent JA remarked as follows concerning the separation of issues generally:

> *'Rule 33 (4) of the Uniform Rules – which entitles a Court to try issues separately in appropriate circumstances – is aimed at facilitating the convenient and expeditious disposal of litigation. It should not be presumed that that result always achieved by separating the issues. In many cases, once properly considered, the issues will be found to be inextricably linked, even though, at first sight, they might appear to be discrete. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing, particularly where there is more than one issue that might be readily dispositive of the matter. It is only after careful thought has been given to the anticipated course of the litigation as a*

[1] Rule 33(4): *'If, in any pending action, it appears to the court mero motu that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on application of any party make such order unless it appears that the questions cannot conveniently be decided separately.'*
[2] *Erasmus: Superior Court Practice* at B1-234 and 235.
[3] 2004 (4) SA 481 (SCA) at para 3.

whole that it will be possible properly to determine whether it is convenient to try an issue separately.'

[10] The approach to be adopted in relation to the ambit of the terms, merits and quantum was clarified in ***Denel*** *(supra).* In this regard it was stated:

'But, where the trial Court is satisfied that it is proper to make such an order – and, in all cases, it must be so satisfied before it does so – it is the duty of that Court to ensure that the issue to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like "merits" and the "quantum" is often thought by all the parties to be self-evident at the outset of a trial, but, in my experience, it is only in the simplest of cases that the initial consensus survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders, a trial Court should ensure that the issues are circumscribed with clarity and precision.'

[11] Counsel for the Defendant highlighted that the SCA has expressed criticism against courts making generalised and non-specific orders in relation to the issue of separation.[4] In amplification, reference was made to ***Odinfin (Pty) Ltd v Reynecke*** it was stated that: '*Judges should not approve a separation just because the parties have agreed to do so. And if a separation is approved, the court must ensure that its terms are clear*.'[5]

[12] This matter appears to have fallen into this mould and ambit, where the separation as agreed upon by the parties was approved without ensuring that its terms were clear. Additionally, the parties were not ***ad idem*** in relation to the understanding of the term "merits".

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[4] See *Odinfin (Pty) Ltd v Reynecke* 2018 (1) SA 153 (SCA) at para 11 and *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) at para 21 *'It is imperative at the start of a trial that there should be clarity on the questions that the court is being called upon to answer. Where issues are to be separated rule 33 (4) requires the court to make an order to that effect. If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision.'*

[5] Ibid at para 11.

[13] The Plaintiff contented that the factual issue (as formulated by the experts in their joint minute) can conveniently be decided separately. If that issue is decided against the Plaintiff, it will dispose of any further litigation according to counsel for the Plaintiff. It was furthermore, argued that the determination of this factual issue is aimed at facilitating the expeditious disposal of the litigation, which will be convenient to both parties. Additionally, it was submitted that it would obviate the leading of expert evidence, which will involve intricate issues of medical negligence, and particularly also, the efficacy of the medical treatment available. Moreover, it will, according to the Plaintiff, also obviate the leading of expensive expert evidence on the issue of quantum.

[14] The Defendant on the other hand, contended that this approach cannot be convenient, nor would it lead to an expeditious disposal of the litigation. Moreover, the Defendant submitted that separation on those limited terms would not have been consented to as it would entail that the litigation be compartmentalised and that the court would be required to adjudicate the matter in a piecemeal fashion. Additionally, counsel for the Defendant refuted that it would be convenient to both parties. It was also contended that the approach proposed by the Plaintiff suggests that the Plaintiff has a measure of doubt in its own case, and falls squarely within the ambit of what the *Denel* case warned against. Defendant's counsel also highlighted the possibility that there may be as many as 3 to 4 trials, each having the effect of a final decision which may be appealed against.

[15] Furthermore, the Defendant's counsel, referring to ***Stedall and Another v Aspeling and Another***[6] argued that the Plaintiff would be incorrect in imputing a restricted meaning to the term "merits". In this matter Leach JA opined that a reference in a pre-trial minute to the effect that the parties had a delictual claim, agreed to separate "the merits and the quantum" meant that the court would be called upon to determine issues relevant to liability. Counsel for the Defendant highlighted that the Supreme Court of Appeal in ***Stedall*** criticised the court *a quo* for regarding negligence as the essential issue that fell to be decided due to the separation of "merits" and "quantum". It was pointed out on appeal that the court *a quo* had overlooked the requirement of wrongfulness, which is an essential and discrete element which has to be established for the delictual liability to ensue and which also had to be addressed at the merits stage of the trial.

[16] ***MTO Forestry (Pty) Ltd v Swart NO***[7] sets out what the Plaintiff would essentially need to prove, In this regard Leach JA stated:

> *'As the appellant's claim is founded in delict, it had to establish first, the conduct of the respondent of which it complained; second, the wrongfulness of that conduct; third, fault on the part of the respondent (in this case in the form of negligence); fourth, that it had suffered harm; and fifth, a causal connection between such harm and the respondent's conduct that is the subject of its complaint.'*

Discussion

[17] It is clear that this matter involves complex issues of medical negligence, more specifically the efficacy of the medical treatment available. A fundamental

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[6] 2018 (2) SA 75 (SCA) at para 2: *'Despite this court having regularly warned of the necessity to clearly identify what issues are to be separately decided under Uniform Rule 33(4), and to obtain a formal separation order there is nothing in the record to indicate that this was done. Nor was any mention made in the opening of the separation issues. None of this is acceptable for the reasons set out, inter alia, in Adlem v Arlow 2013 (3) SA 1 (SCA) para 5 and the authorities there cited*.'

[7] 2017 (5) SA 76 (SCA) at para 12.

aspect in deciding the issue of separation is to consider the pleadings. In this regard, the Defendant has disputed all the elements and consequently, the Plaintiff is called upon to prove the Defendant's delictual liability.

[18] Counsel for the Defendant highlighted that the facts of this case are similar on a factual and procedural basis, to that of ***Chapeikin and Another v Mini***[8] where the Court was called upon to consider a claim based on medical negligence relating to the alleged failure on the part of the medical practitioners to properly and timeously treat the plaintiff's stroke. In the ***Chapeikin*** matter the Plaintiff was faced with the same problems, or constraints in having to prove the causal effect of the harm that she has suffered. It was highlighted by the Defendant's Counsel that the ***Chapeikin*** matter clarified that:

(a) Compensation can only be paid once proof is furnished concerning the extent to which a plaintiff such as Mr C will have been less impaired had the defendant not acted wrongfully and negligently; but also that

(b) The enquiry as to the extent to which the plaintiff's harm would have been ameliorated or prevented forms part of the causation enquiry with which the court is seized as part and parcel of the "merits" enquiry.

[19] Counsel for the Defendant argued that the approach which the Plaintiff is proposing would lend itself to having the matter heard in stages, whereby the same witness may have to be recalled. In this regard, Counsel for the Defendant contended that even if the Plaintiff succeeded in proving wrongfulness and negligence, the issue of causation which lies at the heart of the question as to whether or not delictual liability should ensue, would remain unresolved as was the case in the ***Chapeikin*** matter. This aspect would have to be addressed at a second

[8] [2016] ZASCA 105.

trial, during which, the same medical experts who were party to the joint minute would have to testify. Should the evidence be such, that the finding can be made that there was indeed a causal connection, or link between any of the wrongful, or negligent conduct on the part of the Defendant (which had been established at the initial trial), it would be necessary for a third trial during which the issue of quantification will have to be addressed.

[20] It was highlighted by Counsel for the Defendant that the Plaintiff's proposal could not be sustained, as the joint minute on which Plaintiff places reliance, only deals with the first claim and not the second claim. Counsel for the Plaintiff did not deal with this in any meaningful way in argument and remained steadfast with the submission that the factual determination should be made first.

Conclusion

[21] I am of the view that Plaintiff's proposed separation lends itself to this matter being dealt with in a piecemeal fashion. Whilst it may be a practical approach and have the potential of circumventing a protracted trial, this of course can only be beneficial if the merits do not favour the Plaintiff. If on the other hand, the Court finds in favour of the Plaintiff, the potential of a protracted trial is indeed a stark reality. In this regard, I am in agreement with the Defendant's counsel that any ruling the Court may make will have the effect of a final order and could thus be appealed against. Additionally, there are costs implications as expert witness would potentially have to give evidence again in relation to the next component of the evidence. Therefore, to approach a matter such as this one upon a consideration of convenience cannot hold muster. Litigation in a compartmentalised approach must be avoided.

[22] In light of the fact that the parties are unable to resolve the issue of separation, it would be of pivotal importance to resolve the precise ambit of the separation as required by the plethora of case law earlier referred to. In making this decision it is apposite to have regard to the pleadings. In keeping with the ***Stedall*** decision the issue of "merits" which encompasses all the elements required to prove delictual liability on the part of the defendant will have to be proven by the Plaintiff. As the Defendant places everything in dispute, it will also be incumbent on the Plaintiff to prove "liability" in the context of delictual claims as defined in the ***MTO Forestry*** matter.

[23] In this matter, it is alleged that the Defendant, through her wrongful and negligent conduct, caused harm in the form of the sequelae pleaded in the particulars of claim. In the pleadings it is alleged that had the Defendant acted in accordance with her duty of care, and not negligently, and had she timeously diagnosed and referred the Plaintiff immediately thereafter for the appropriate treatment and to an appropriate specialist, *'he would have had a more favourable outcome to his stroke than is presently the case'.* The Defendant's counsel submitted that inherent in this allegation is that the Plaintiff would have suffered some harm as a result of the stroke, but that the harm he has suffered cannot be ameliorated to an extent had the Defendant not acted wrongfully and negligently. Moreover, the proposed separation fails to take into account the Plaintiff's second claim against the Defendant. Consequently, argument by the Plaintiff that the proposed separation cannot for practical intents and purposes be sustained, as the joint minute compiled by the parties' respective expert witnesses does not deal with the second claim at all.

[24] In light hereof, I agree that a non-specific separation with unclear terms would attract the same criticism as was the case in ***Odinfin*** and ***Bernet*** *(supra).*[9] Therefore, in keeping with what was stated in ***MTO Foresrty*** *(supra)*, it would be prudent for the Plaintiff to initially prove all the elements of delictual liability, namely:

(a) The conduct of the defendant of which he complained;

(b) The wrongfulness of that conduct;

(c) Fault on the part of the defendant (in the form of negligence);

(d) That he had suffered harm;

(e) A causal connection between such harm and the defendant's conduct that causation.

[25] I am of the view that only the quantification of the harm that is proven to be causally linked to the Defendant's negligence (if any) are to stand over for later determination.

Costs

[26] Counsel for the Plaintiff contended that the factual issue could be conveniently decided separately, and that the order should be guided by the factual issue as formulated in the joint minute, and that the rest of the proceedings be stayed until the factual issue has been disposed of. Counsel for the Defendant

[9] See also *Chapeikin (supra)* at para 61: *'This criticism is well founded and applies equally to the approach adopted by the High Court in this matter. This is illustrated by the terms of the order made by the High Court where it finds the appellants liable, but fails to identify the consequences for which they are each liable. Differently put, the court failed to deal with the extent to which the alleged negligent conduct of each of the appellants contributed to Ms Mini's pleaded sequelae or deterioration. As indicated, Ms Mini's complaint is not that the appellants caused her stroke, but rather that they failed to diagnose and treat her condition correctly and refer her to hospital for specialist observation, assessment and treatment. In view of the complaint, it was not sufficient for Ms Mini to merely prove that her condition deteriorated as a result of their failure on the grounds alleged, but it was incumbent upon her to demonstrate that diagnosing and treating the disease differently would have prevented the pleaded sequelae from setting in…'*

argued that the interpretation by the Plaintiff is spurious and untenable and should be ordered to pay the Defendant's wasted costs occasioned by the postponement. On the other hand, Counsel for the Plaintiff argued that costs should stand over for later determination by the trial judge.

Trial Particulars

[27] This matter was enrolled for trial on 05 June 2018. Despite the impasse in relation to the defined terms of the separation, I am doubtful whether, this matter would have proceeded in any way, as the Defendant requested trial particulars in April 2018, which were not yet furnished by the Plaintiff despite the Defendant having launched an application to compel in terms of Rule 30A(2) in May 2018. The issue of the lateness of this request, was briefly canvassed with the parties at the hearing on 5 June 2018, in light of the fact that at the rule 37 pre-conference it was decided that the '*[r]equest for Further Trial Particulars will be made by October 2017, and replies will be filed by 6 November 2017'.* In this regard, ***MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga***[10] is instructive where Cachalia stated as follows:

> *'…the issue in this matter is whether the appellant may resile from agreements made by his attorney, without his knowledge, at a rule 37 conference. The judgment does not deal with agreements reached outside of the context of conducting a trial in the normal course of events. The rule was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs. One of the methods the parties use to achieve these objectives is to make admissions concerning the number of issues which pleadings raise. Admissions of fact made at a rule 37 conference, constitute sufficient proof of those fact…. Rule 37 is thus of critical importance in the litigation process. This is why this court has held that in the absence of special*

[10] 2010 (4) SA 122 (SCA) at para 6.

circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference. And when, as in this case, the agreements are confirmed by counsel in open court, the principle applies with even more force.'

[28] It was contended by Counsel for Plaintiff that no special circumstances were made out by the Defendant for the lateness and or breach of the pre-trial minute. Plaintiff refused to respond on the basis of relevance in light of the approach that the factual issues are to be dealt with first.

[29] It is evident that the parties are *ad idem* that the issue of trial particulars can only be meaningfully addressed once the issue of separation has been finalised. In this regard, Counsel for Defendant indicated that the lateness of the request is capable of being cured through an application for condonation. In relation to the request for trial particulars, the parties have agreed to have this aspect stand over and have undertaken to attempt resolving same between themselves.

[30] In the circumstances, I am of the view that the trial judge will be in a better position to make a determination in relation to costs.

Order

[31] After hearing counsel on behalf of both parties and having read the papers filed on record the following directives are made:

(a) In relation to the precise ambit of the separation of issues in respect of both claims instituted by the Plaintiff against the Defendant:

i. That the parties are to proceed on the merits initially, which includes all the elements of delictual liability, namely the conduct of the Defendant of which the Plaintiff complained; the

wrongfulness of that conduct; fault on the part of the Defendant; that the Plaintiff had suffered harm; and the causal connection between such harm and the Defendant's conduct that is the subject of the complaint;

ii. The issue of quantum is to stand over for later determination.

(b) The Rule 30A(2) application in relation to trial particulars is to stand over for later determination.

(c) Costs are to stand over for later determination.

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P ANDREWS, AJ

Acting Judge of the High Court