IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

Date: 29/08/2008
Case No: 8185/06

UNREPORTABLE

In the matter between:

BVM ROSSAAK	Plaintiff
And	
PROF. H VAN DER WALT	1st Defendant
DRS DUBUISSSON, BRUINETTE & KRAMER INC	2nd Defendant
DR. T SLAVAK	3rd Defendant

JUDGMENT

MAVUNDLA, J

[1] On the 22 August 2008 I postponed this matter sine die and indicated that I will deliver my judgment with regard to the issue of costs on the following Friday, which is the 25 August 2008.

[2] The plaintiff instituted an action for damages in her personal capacity as the widow of her late husband Mr. Terje Rossak, ("the deceased") and in her capacity as executrix of the estate of the deceased, against the three defendants as the result of the death of the deceased on 22 November 2001 on the basis of alleged negligence on the part of the three defendants in their treatment and diagnoses of the deceased's condition, resulting in his death on 22 November 2001.

[3] The defendants in their plea denied all the allegations of unlawful and negligence on their part. They also raised a special plea of prescription.

[4] The matter was set down on the roll for hearing on 22 August 2008 by the plaintiff per notice of set down dated 5 September 2006. On the 21 September 2006, the defendants remitted a letter to the Plaintiff requesting that the plaintiff agree that the special plea should first be set down for hearing[1], The Plaintiff, through her attorneys agreed to this request[2]. It would seem that the parties held a pre-trial on 13 August 2008. The Minutes of the aforesaid the pre-trial conference recorded, *inter alia*, that:

'Subject to the approval of the trial court in terms of the provisions of Court Rule 33 (4), the parties agreed that the issue of the prescription of the plaintiff's claims against the first, second and third defendants, as contained in the special pleas of the first defendant and second and third defendants, should be determined separately from the other issues, at the trial of 22 August 2008.

[5] At the commencement of the matter, counsel for the respective parties

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[1] The relevant letter to Plaintiff's letter reads as follows:
"We refer to the above matter and note that you have now proceeded to set the matter down for hearing for 22 August 2008
It is out instructions to, on behalf of the First, Second as well as Third Defendant, request you to agree that the Special Plea should first be set down for hearing.
You will note that this request is also made on behalf of Messrs Bowman Gilfilian, We look to be hearing from you as a matter of urgency." The letter is marked "MLAJ.6"

[2] The plaintiff's attorneys responded per a letter dated 10/1/2006 as follows:
"1. We refer to your letters of21 SEPTEMBER 2006 AND 19 October 2006, sent on behalf of the First, Second and Third Defendants, regarding the hearing of the Special Plea.

informed me that the parties are ad idem that it is no longer convenient that the matter be proceeded with on the Special Plea of Prescription. The parties were ad idem that evidence of the experts would have to be lead when dealing with the special plea. They were ad idem that the experts would also have to testify when dealing with merits as well as with quantum related issues, and that for these reasons it was no longer convenient to proceed with the matter on the bases the matter had been set down for hearing. However the parties could not agree on the question of cost.

[6] The attitude of the defendants was that the question of costs should be reserved, to be dealt with when the matter is finally dealt with on all related issues. The defendants were of the view that in the alternative, it should be ordered that the costs be costs in the course. On the contrary, it was submitted by Mr. Joseph on behalf of the plaintiff that the defendants should be ordered to pay the plaintiff's costs occasioned by the fact that the matter is no longer being proceeded with. Mr. Joseph submitted *inter alia* that this court is in a better position to decide the issue of costs. He further contended that the plaintiff did not bear any onus to show that the plaintiff's right had not prescribed. He submitted that it is the defendants who bore the duty to begin and they bore the onus to show that the plaintiff's claim had prescribed. He submitted that the plaintiff had for tactical reasons agreed that the matter should be set down for hearing on the special

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2. We agree that the Special Plea will be set down for hearing. The Special Pleas will be set down for hearing on 22 August 2008." I

plea. He says that there is no reason why the plaintiff should not be awarded costs occasioned by the fact that the is no longer proceeding. It needs mention that Mr. Joseph, on a specific question by myself whether the plaintiff did agree that it is no longer convenient that the matter be proceeded with on the narrow issue, as stated herein above, confirmed that it is so. I did not understand Mr. Joseph to be saying that the concession that it was no longer convenient for the matter to be proceeded on special plea, was made subject to any condition, in particular that in the event of the matter not being proceeded with, the plaintiff will insist that the defendants must pay the costs occasioned by the postponement.

[7] It is trite that the question of costs resorts within the discretion of the court. In deciding this aspect of costs, I shall also have regard to the two cases which I shall cite herein below. I must also consider the prejudice caused and who is at fault.

[8] In the matter of Rauff v Standard Bank Properties[3] Flemming DJP pointed out *inter alia* that it is the duty of the attorneys representing litigants, to ensure that they investigate the prospect of proceeding with the cases on the least costs effective process, for the benefit of their clients. It is their duty to handle their clients' cases in the most skillful and professional manner. Indeed, it would not have prudent of the legal teams of the respective parties, had they not explored separation of the

[3] 2002 (6) SA 693 at 703 (WLD)

issues[4].

[9] In the matter of Tudoric v Tudoric-Chemo and another[5] the learned AP Joubert AJ pointed out that the question of separation of issues in terms of rule 33(4) is not a mere formality. Rule 33(4) is aimed at shortening the proceedings and not to protract them. Where the granting of separation would not avert hearing of the same witnesses and evidence on, for instances on merits and later on quantum, then it is not convenient to grant separation. Not granting separation would avert a situation where different conclusion on credulity of the same witnesses might result. The court will refuse separation, even if the parties have agreed to separate, if the Court is of the view that it is not convenient to grant separation. The court must weigh the advantages

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[4] Rauff v Standard Bank Properties (supra) at 703 Flemming DJP said:

> '"[21.1]The entitlement to seek the separation of issues was created in the Court Rules so that an alleged lacuna in the plaintiff's case or an answer to the case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and in particular to obviate a parcel of evidence. The purpose is to determine the fate of the plaintiff's claim (or one of the claims) without the costs and delays of a full trial. Proper handling of litigation-and accordingly professional handing of a case-requires that this avenue be explored to the advantage of the own client, the flow of Court hearings and even of their client. An attorney does not practice in isolation. That is so even if his own client cannot discern the attorney's lack of professionalism or inability to home in on what is relevant. It is not proper work if the separation of issues is attended to long after the pleadings are closed.
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> [22.2] The possibility of separation of issues is so important that an attorney should as soon as pleadings have closed make a strategic assessment of the real trial needs of the case bearing in mind the duty to eliminate avoidable delays and costs. The attorney must apply himself to an assessment of how the matter can proceed with maximum expedition and without avoidable costs. There is so much that can be done and be gained by so using the attorney's insight that the frequent excuse that discovery must first be obtained is more often than not an exaggeration of the importance of discovery and a lame excuse for inactivity. And the duty to discover in terms of Court Rule 37(1) can be speedily enforced.
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> [23.1] Lastly there is the pre-trial procedure in terms of Court Rule 37 and whatever is done with the same object. The failure to employ this tool positively rather than as a matter of avoiding criticism marks a serious defect in either willingness or competence to ascertain the real trial needs of a case."

and disadvantages of separation. The Court also cited, *inter alia* the dictum Miller J in Minister of Agriculture v Tongaat Group Ltd supra at 362G-H:

'Ordinarily it is desirable in the interests of exception and finality of litigation to have one hearing only at which all the issues are canvassed so that the Court, after conclusion of the trial, might dispose of the whole if the case. Rule 33(4) was no doubt conceived in the realization that in some instances the interests of the parties and the ends of justice would be better served by disposing of a particular issue (or issues) before considering other issues of which, depending on the result of the issues singled out, might fall away or become confined to substantially narrower limits.[6]"

[10] *In casu*, the parties were initially of the view that it would be convenient to proceed with the matter on the special plea. Indeed, a special plea on, *inter alia*, the point of prescription, if successful, has the potential of truncating the proceedings and drastically cut and save the parties a lot of costs. It would have been sheer carelessness on the part of the defendants had they not at all considered the avenue of proceeding on the narrow issue. *In casu* both parties had agreed that the matter would be proceeded with on the narrow issue of the special plea. Non of the parties, in my view can be faulted for having initially taken the view that it would be convenient to proceed with the matter on the basis they had

[5] 1997 (2) SA 246 (WLD) at 251 B etc
[6] Tudoric -Ghemo v Tudoric -Ghemo (supra) at 252C-D.

so agreed, namely that the matter be set down for hearing of the special plea.

[11] In my view when litigants bring proceedings to court, they must at all time, do so with a measure of integrity and honesty. It is not expected that one party must mislead his opponent in order to gain tactical advantage as the result. *In casu*, the plaintiff agreed all along that the matter must be placed on the roll for hearing on the narrow issue of special plea. Once the parties on re-evaluation of the further conduct of the case, they came to the conclusion that it was no longer convenient to proceed with the case as originally thought and agreed upon, and agreed that the matter should therefore not be proceeded with as initially agreed upon, it cannot be heard of one of the parties to cry foul and say that he is now being prejudiced by the postponement. Indeed such stance on one of the parties would smack of nothing else but pure opportunism. It would be ill-conceived on the part of the plaintiff, once it agreed that the matter should be placed on the roll for hearing on the special plea that it was no longer convenient to proceed on the special plea as initially agreed upon, to renege on this agreement and demand that the defendants must pay her costs.

[12] Where the parties have re-assessed the wisdom of proceeding on their initial agreed cause, and agreed that it is no longer prudent to proceed on that initial agreed cause, it would be incorrect, in my view, to want to apportion blame on either party for the fact that the matter is now being

postponed. I do bear in mind the provisions of the Prescription Act No. 68 of 1969.[7]

[13] In this matter the deceased expired on 22 November 2001. It is as the result of his demise that the plaintiff is claiming. In the matter of of Gericke v Sack[8] Diemont J A said:

"The Act merely requires the creditor to seek such knowledge by the exercise of reasonable care; she is not required to issue summons-she is given a generous three in which to institute proceedings. All that she is called on to do is to ask one question to establish identity and not content to play a purely passive roll. If she could have acquired this knowledge by acting diligently, her inertia, ineptitude or indifference will not excuse her delay. The creditor who fails to exercise the reasonable care prescribed by the Act must pay the penalty for he is then deemed to have acquired the knowledge necessary for the debt to become due and for prescription to begin to run."

[14] The summons in this matter were only issued on15 March 2006. On face value the matter has prescribed. However, such a simplistic approach will be incorrect. This is a matter that would require the evidence of medical expert witnesses to enable the court to determine when the plaintiff is deemed to have had sufficient knowledge to have

[7] 12(3) Prescription Act, No 68 of 1969.) "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquire it by exercising reasonable care."

exercised her right to claim. In a matter such as this, it would have been inappropriate to grant a separation of the special plea from the rest of the merits of the matter. The reason for this conclusion is because I was informed that such evidence would have taken more than three days to lead (of course to even test it through cross examination). There would have been neither advantage nor any convenience to dealing with the special plea neither under those circumstances nor to grant separation thereof from the merits of the case. I would therefore have refused an application for separation, had there been such an application. In any event there was no such application.

[15] The court which will be seized with the hearing of evidence pertaining to the merits, would be in a position to determine the issues that would have to be decided in adjudicating on the special plea. Without the advantage of the evidence of the experts around the treatment of the deceased and around the question of negligence, it would be inappropriate for me to decide the question of costs and I accordingly refrain to do so. Further, in view of the fact that there had been an agreement between the parties with regard to the further conduct of the case, I do not think that I should place the doormat at the door of either parties for the postponement occasioned by their agreement. In the event I were to order that the costs should be costs in the event, the plaintiff in the event she subsequently fails, she would be called to pay the costs up to that future point, which costs would include the costs

[8] 1978 (1) SA 821 (AD) at 8320.

occasioned by the postponement of the 22 August 2008. Had the matter proceeded now, and the defendants were successful, the plaintiff would have been saved the subsequent costs. Of course this cuts both ways. I am of the view that an appropriate order at this stage would be to have the costs reserved. This would avoid mulcting any of the parties with costs occasioned by the postponement without the benefit of the evidence of expert witnesses.

[16] In the premises I make the following order:

That the costs of the 22 August 2008 are reserved.

JUDGE OF THE HIGH COURT

Heard on the:	22/08/2008
Date of judgment:	29/08/2008
Plaintiff's Att:	Mr. Rontgen (snr)
Plaintiff's Adv:	Mr. M. Joseph
1st Defendant's Att:	Mr Van Der Wal
1st Defendant's Adv:	Mr. G Ammn with Ms. C Nikschtat
2nd & 3rd Defendants' Att:	Ms. Wessels
2nd & 3rd Defendants' Adv:	JH Sröh S.C.