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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case Number: 26457/2020

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE

SIGNATURE

In the matter between:

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

Defendant/Applicant

and

M[...], M[...]

First Plaintiff/First Respondent)

M[...], N[...] S[...]

Second Plaintiff/Second Respondent)

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 18 April 2024.

JUDGMENT

POTTERILL J

Introduction

[1] The applicant, the Member of the Executive Council for the Health of Gauteng Provincial Government [MEC] is seeking condonation for the late service and filing of the expert reports. Furthermore, that leave be granted for Dr Mhlongo's evidence to be adduced. The respondents in this application are the mother and father of their child R[...] M[...]. They on 22 June 2020 issued a summons against the MEC. The claim was for damages suffered by the child due to birth asphyxia that has left her both mentally and physically severely impaired.

[2] The MEC filed a special plea and plea on 17 September 2020 and an amended plea and special plea in September 2023. In both the plea and amended plea the MEC raised as a defence a "Public Health Care" Defence. The respondents' reply made it plain that this defence would be opposed.

[3] I find it prudent to refer to this defence as pleaded. It seems the MEC relies on a common law remedy that needs to be developed. The plea does however not make out a case for the development of the common law.

[4] The MEC conceded liability and this was recorded and ordered by the Court on 2 March 2023. The MEC preserved the right to pursue the Public Health Defence. The other conditional defence being a dilatory request to delay the quantification of Ria's damages for five years was abandoned before me.

[5] The applicant sought condonation for expert reports relating to quantification of the claim. These reports are not in issue before me because I let the matter stand down from Monday to Tuesday for counsel of the MEC to familiarise themselves with their own actuarial report that was filed late. Counsel for the respondents also took this time to go through the actuarial report and placed on record that it was prepared to accept the defendant's actuarial report. In contention before me is the late filing of Dr Mhlongo's report relating to the plea of the Public Health Defence.

[6] The state attorney on behalf of the MEC attested to an affidavit setting out that the report of Dr Mhlongo, an economist, was filed on 12 April 2024. This is one court day before the matter that was to proceed on trial for three weeks. He

informed the court that this application “is thus filed pursuant to the respondents’ objection.”

[7] The good cause for the late service of the expert report is explained as the MEC procuring the services of a company to appoint experts for the purposes of investigating and quantifying the plaintiffs’ claim. This company accepted the mandate in this matter on 12 January 2022. The attorney further states that he proceeded to file the Rule 36(9)(a) notices in respect of the appointed experts.

[8] Paragraph 10 of the affidavit reads as follows: “Dr Mhlongo august 2023. His report was thus filed as per his undertaking on 12 April 2024.” It was submitted Dr Mhlongo’s evidence is essential for the applicant’s case as he is the only expert appointed to prove the Public Health Defence.

[9] The deponent further opines “that this application” is in order and that there is a good cause to condone the late service and filing of the defendant’s expert reports. Dr Mhlongo has filed a persuasive report and it is submitted that the Public Health Defence has prospects of success. It would thus be in the interests of justice to grant condonation and allow the evidence of Dr Mhlongo. If his evidence was not to be heard then it would “be directly in conflict with the *audi alteram partem* principle and the right to access to the courts.”

The respondents’ opposition to the condonation application

[10] On behalf of the respondents it was set out that as early as September 2020, three and a half years ago, the MEC knew that the Public Health Defence required evidence. The set-down for this quantification and defence trial was already served on 31 August 2022.

[11] Despite the first quantum pre-trial agreement that the MEC’s Rule 36(9)(a) notices would be delivered by 23 June 2023 and the Rule 36(9)(b) notices by 21 August 2023 no notices in terms of Rule 36(9)(a) and (b) were delivered on the due dates. The MEC now delivered notices in terms of Rule 36(9)(a) for the 20 experts listed in a Rule 30A application from the respondents delivered on 22 August 2023.

The first Rule 36(9)(a) notice delivered by the MEC on 27 March 2024 only related to a quantity surveyor, an ophthalmologist and a paediatric surgeon.

[12] For the first time in the second quantum pre-trial conference's reply the MEC on 27 March 2024, two weeks before trial, in paragraph 8.5 replied as follows: "The defendant has filed Rule 36(9)(a) in respect of Dr Mhlongo's reports." The attorney for the respondent on 28 March 2024 in writing informed the MEC that no such notice was served on them.

[13] The MEC's notice in terms of Rule 36(9)(a) and (b) in respect of Dr Mhlongo was served on the respondents' attorney at 15:33 on 12 April 2024, the day immediately preceding the first day of trial. This report consists of 78 pages. There were no joint minutes between the expert witnesses. Reference is made to an inspection at Chris Hani Baragwanath Academic Hospital. No documents had been discovered pertaining to such inspection. None of the "clinical protocols", "other standard documents" or "service provision assessment" referred to in the report are attached to the report. No tender lists were discovered. Dr Mhlongo did not sign or date his report.

[14] The MEC's attorney has not at all explained the delay between 12 January 2022, the date of appointment of the MEC's intermediary, and the date the report was delivered on 12 April 2024. Nothing was set out as to what measures were taken between those dates to procure the expert report of Dr Mhlongo. Not a single fact is set out as to what steps were taken after the allocation of the trial date to timeously procure and deliver Dr Mhlongo's report. It was submitted that the only inference to draw is a reckless disregard of the Rules of this Court. Paragraph 10, the only paragraph dedicated to the delay, is simply meaningless.

[15] On behalf of the respondents it was further submitted that the application was not brought in good faith and does not constitute good cause. The MEC had not timeously prepared for the quantum of damages. If the late filing of Dr Mhlongo's report is condoned the trial will inevitably have to be postponed for the respondents' experts to consider this report and to file a supplementary expert report. An inspection at the hospital will have to follow and the respondents will have to cause a

Rule 35(3) for the discovery of the documents that Dr Mhlongo relied on in compiling his report.

[16] But importantly, the defendant's plea does not disclose a Public Health Defence. The plea does not seek development of the common law seemingly premised on the MEC's constitutional duties and her dire financial position. The evidence of Dr Mhlongo is accordingly irrelevant.

[17] An interim payment would not cure any prejudice as the previous interim payment, so ordered, has not been paid by the MEC. The MEC has not tendered to pay Ria's damages that do not fall within the remit of the Public Healthcare Defence.

[18] If the late filing is condoned the resultant postponement will result in irreparable prejudice for the child R[...]. She requires immediate, complex and costly care and caregiving. The parents of R[...] are unable to afford R[...]s care and caregiving.

Decision on condonation

[19] At the outset I must remark that the averment made by the attorney for the MEC that the application is only brought because of the opposition by the respondents is simply alarming. Any party should, when there has been non-compliance with the rules, apply for condonation without delay. Filing a report one day before a trial is to commence, is an example of non-compliance with the rules par excellence, and the MEC should have filed the report with an application for condonation, with or without opposition.

[20] For condonation to be granted good cause must be shown. For good cause to be shown the MEC must set out why the report is late. Not a single reason is set out why the report is late. If sense is to be made of paragraph 10 of the application it seems that Dr Mhlongo only gave an undertaking that the report would be filed on 12 April 2024, a day before trial. That is simply preposterous and negates against finding that good cause was shown.

[21] Not a single fact is set out why there is a delay and what caused the delay. Not a single fact is set out as to what the attorney did to obtain the report earlier, or why it could not be obtained earlier. There is simply no explanation as to the delay of 21 months since the appointment of the expert intermediary to 12 April 2024, the date the report was delivered. The affidavit does not take the court into its confidence as to what measures were taken for 21 months to procure this report. What makes the matter worse is that no Rule 36(9)(a) notice was served on the respondents. Despite submissions from the bar that this was served; it clearly never was. It was served for the first time on 12 April 2024. The only inference this court can make is that only on 27 March 2024 (the second quantum pre-trial); 2 weeks before the trial date, Dr Mhlongo came on board.

[22] Without any, let alone a satisfactory explanation, for the delay this court cannot assess the MEC's conduct and motives.¹ It is an absolute requisite that an applicant for condonation must show good cause and cannot only rely on the fact that the respondents will suffer no prejudice. In this matter, the MEC does not at all address unsurprisingly, the prejudice to the respondents. On the lack of a satisfactory explanation alone the application for condonation must be dismissed.

[23] An applicant must also satisfy the court that it has a *bona fide* defence.² To this end the applicant in an application for condonation must set out the facts in outline, if proved, that would constitute a defence. The only fact set out in this application is that "Dr Mhlongo has filed a persuasive report." This is not setting out in outline the defence and the MEC has not shown that the defence is good in law. If regard is had to how this defence has been pleaded then the defence is not a defence that would in law or fact constitute a defence.

[24] What makes matters worse is the report refers to documentation that has not been discovered. This would inevitably lead to a postponement that will prejudice the respondents to the extreme in caring for their daughter. There is nothing to gainsay this in the application on behalf of the MEC.

¹ *Van Wyk v Unitas Hospital and Another* 2008 (2) SA 472 (CC) at 477E-G

² *Santa Fe Sectional Title Scheme No 61/1994 Body Corporate v Bassonia Four Zero Seven* CC 2018 (3) SA 451 (GJ) at 454F-G

[25] I find it disturbing that where the MEC faces a substantial claim and her financial woes are expressed, litigation is conducted with a reckless disregard of the Rules of Court. This is so because there was non-compliance with the pre-trial commitments and the reports are filed a day before trial, Dr Mhlongo's report, without the relevant documentation attached thereto, filed late and the application falling far short of what is required to sustain an application for condonation support this finding of recklessness.

Costs

[26] The MEC sought an indulgence from this Court, yet the MEC does not offer the costs. Once again an indication of a total disregard of judicial precedent.

[27] The respondents seek that the MEC pay the costs on an attorney and client scale including costs of senior counsel. It argued that the MEC's reckless disregard for the Rules, the lack of reasons for the delay and the lack of *bona fides* of the application support such a costs order.

[28] An order of costs on attorney and client scale is granted to mark the Court's disapproval of the conduct of the party. Granting such an order ensures that the successful party will not be out of pocket in respect of the expenses caused to that party by this litigation. A court will only grant such an order where special grounds are present. Dilatory and reckless conduct is such a special ground. I am satisfied that for all the reasons set out in this judgment the award of costs on an attorney and client scale is warranted.

[29] I make the following order:

The application for condonation is dismissed. The report is not admitted and the evidence of Dr Mhlongo is not to be presented. The applicant herein must pay the costs on an attorney and client scale, including the costs of senior counsel.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 26457/2020

HEARD ON: 16 April 2024

FOR THE APPLICANT/DEFENDANT: ADV. A. MOFOKENG
ADV. T. MADILENG

INSTRUCTED BY: State Attorney, Pretoria

FOR THE RESPONDENTS/PLAINTIFFS: ADV. S. FARRELL SC

INSTRUCTED BY: Joseph's Inc.

DATE OF JUDGMENT: 18 April 2024