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**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 25644/2014**

|     |                                     |
|-----|-------------------------------------|
| (1) | REPORTABLE: YES/NO                  |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED                             |

\_\_\_\_\_  
**Date:**

\_\_\_\_\_  
**WHG VAN DER LINDE**

In the matter between:

ZONDO, NWABISA

PLAINTIFF

and

THE MEC FOR HEALTH OF THE GAUTENG

PROVINCIAL GOVERNMENT

DEFENDANT

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JUDGMENT

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Van der Linde, J:

- [1] In this trial action the parties have agreed to separate, under rule 33(4), the defendant's application for an amendment to his plea from the other issues that arise between the parties on the pleadings. The postponement of the other issues is a forgone conclusion because the matter will not be allocated a trial judge in respect of those, for reasons related to non-compliance with Practice Directives of this court. This latter fact has a costs implication to which I will return below. I will make an appropriate separation order at the end of the judgment. I am required to decide the amendment, the costs of the amendment, and the costs of the postponement of the rest of the issues. I deal with these issues in turn.
- [2] The amendment is to introduce the plea of prescription. The plaintiff claims from the defendant R21,5m as damages for the defendant's breach of contract alternatively of a delictual duty of care after her minor son, O, born 9 October 2007, suffered permanent brain damage during and immediately after birth as a result of the negligence of the defendant's staff at the Natalspruit and Chris Hani Baragwanath Hospitals. The claim is made up of future medical expenses (R12m), future loss of earning (R5m), general damages (R3m), and the costs associated with the protection of funds (R1,5m).
- [3] The plaintiff sues in her representative capacity as mother and natural guardian of her minor son. The minor's claims will not become extinguished by prescription until a year after he becomes a major at the age of 18.<sup>1</sup>
- [4] The defendant's special plea contends that properly construed, the plaintiff's claims all, except the R3m claim for general damages, are claims of the parents and not the minor child; and that those claims, thus in the aggregate amounting to R18,5m, have been extinguished by prescription. In other words, there is in the case of the parents no delay of prescription as applies in the case of the minor.
- [5] Since the defendant's application is for an amendment and since one is not now concerned with the merits of the proposed special plea, the question is merely whether the special

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<sup>1</sup> S.13(1)(a) of the Prescription Act 68 of 1969.

plea, if allowed, will raise a legally sustainable defence. Questions of the timing of the application do not come into it, since prescription may be raised “... *at any stage of the proceedings.*”<sup>2</sup>

[6] The objection against the proposed amendment is the mirror image of the proposed special plea. It is that the claim is in truth the plaintiff’s claim in her representative capacity; it is not the plaintiff’s claim in her personal capacity.

[7] The issue here is therefore not whether the plaintiff has a contractual or delictual claim for future loss of earnings and future medical expenses, assuming that her son was negligently injured by the hospital staff. The question is whether the minor has such a claim, whether concomitantly with the mother’s claim or not.

[8] It seems to me that *Guardian National Insurance Co Ltd v Van Gool*, NO,<sup>3</sup> referred to by Mr Pauw, SC who appeared with Ms Mansingh for the defendant, is in point against the defendant. In that case the father of a minor, who was injured when a motor vehicle ran her over, sued the relevant insurance company under the Compulsory Motor Vehicle Insurance Act 56 of 1972 in his representative capacity for future medical expenses, future loss of earnings and general damages. The question was whether the claim for future medical expenses was a claim of the father or of his minor daughter.

[9] In the judgment of the then Appellate Division, Joubert JA for the court examined the origins of the claim for bodily injuries. The learned judge explained that when the *actio legis Aquiliae* was originally enacted in 286 BCE, it did not include a claim for bodily injuries. In time the Praetor extended the remedy to include compensation for patrimonial loss in respect of bodily injuries. This included claims for future loss of earnings.

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<sup>2</sup> S.17(2) of the Prescription Act.

<sup>3</sup> 1992 (4) SA 61 (AD).

[10] In Roman Law only the paterfamilias could institute the claim, and not the filiusfamilias; this is because the paterfamilias was the only one that paid the bills. If the filiusfamilias acquired anything at all, this was acquired, virtually in a socialistic sense, by the paterfamilias.<sup>4</sup>

[11] Although the Dutch lawyers allowed the claim, when it was received there many year later, to include a claim for non-patrimonial losses, such as for pain and suffering, in this country first the Cape Provincial Division in Hoffa NO v SA Mutual Fire & General Insurance Co Ltd<sup>5</sup> and then the Appellate Division in Government of the Republic of South Africa v Ngubane,<sup>6</sup> held that the claim for non-patrimonial loss was a claim sui generis, and did not fit the actio legis Aquiliae.

[12] Joubert JA pointed out however that the Dutch never accepted the Roman concept of a patriarchal family reigned over by a paterfamilias. Roman-Dutch law did however consider that parents had parental authority over the minor children, and by operation of the natural law there was a reciprocal duty of support between parents and children, the extent of which was determined by their means.<sup>7</sup>

[13] In dealing with the potential claims of a minor, Joubert JA held (emphasis supplied):<sup>8</sup>

*"Natural persons acquire at birth legal capacity (regsbevoegdheid) to have or possess legal rights and duties. See Boberg The Law of Persons and the Family 1977 at 37-41, 529. A minor may at birth or at any time during minority inherit property and become the owner thereof. He may have an estate of his own with an income, as appears from numerous references in the authorities, for example Van der Keessel ad Gr 1.6.1, 3; Lee and Honoré (op cit para 148(i)-(iv), (vi)).*

*In the present matter Catherine has no assets or income of her own. Since she is not self-supporting to maintain herself, there is accordingly available to her a right to claim support*

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<sup>4</sup> Van Gool, NO at 64 in fin.

<sup>5</sup> 1965(2) SA 944 (C).

<sup>6</sup> 1972 (2) SA 601 (A).

<sup>7</sup> Van Gool, NO, at 65 in fin to 66A.

<sup>8</sup> Op cit, at 66 C to F.

*from her parents to pay, according to their means, her prospective medical and hospital expenses. But as the victim of a delict perpetrated against her she also has an additional legal right to claim compensation from the wrongdoer for general damages relating to non-patrimonial loss (such as pain and suffering, loss of amenities, disfigurement and loss of expectation of life) as well as prospective patrimonial loss such as future medical and hospital expenses and future loss of earnings. The delictual liability of the wrongdoer (Van Gool in his personal capacity) arising from the collision falls ex lege on the appellant as an authorised insurer of the motor vehicle in terms of the provisions of the Act.*

*A minor has no locus standi in judicio to appear on his own in civil proceedings. Voet 5.1.10, 11; Herbststein and Van Winsen The Civil Practice of the Superior Courts in South Africa (1966) at 142. He requires the assistance of a guardian or a curator ad litem in Court. Wolman and Others v Wolman 1963 (2) SA 452 (A) at 459A-B. In the case of an infans below the age of seven years the practice is that the guardian or curator ad litem should sue or be sued in his representative capacity. Lee and Honoré (op cit para 149). That procedure was in fact adopted in the present matter since Van Gool instituted the action in his capacity as father and natural guardian of Catherine. He did not personally claim any relief. The special plea is directed at the fact that he sued in his representative and not his personal capacity. It is Catherine and not Van Gool who is party to the action as plaintiff. Mokhesi NO v Demas 1951 (2) SA 502 (T) at 503E; Greyling v Administrator, Natal 1966 (2) SA 684 (D) at 689A-B.”*

[14] So Van Gool made it plain that a minor has a claim for prospective patrimonial loss such as future medical and hospital expenses and future loss of earnings. Van Gool has not been overruled by the Constitutional Court, nor departed from by the Supreme Court of Appeal. It is thus binding on this court. In my view the present case is indistinguishable, and the contentious claims preferred here are, as in Van Gool, at least also claims of the minor.

[15] Mr Pauw submitted that Van Gool was distinguishable, since it was not concerned with prescription, as this case is. It does not appear that prescription was expressly raised in Van

Gool, but I do not see how that affects the principle. The principle at issue here concerns whether a minor suffers damages of the nature with which we are concerned and, if so, whether his guardian has the right to claim them on behalf of the minor. Van Gool held that the minor and her guardian have those rights. Prescription, especially strong prescription, is concerned with extinguishing rights as a result of inaction; it is not concerned with identifying the repository of those rights.

[16] It follows that the objection to the amendment is well-taken, and the application to amend must be disallowed. Costs of the application must follow the result.

[17] That leaves the costs of the postponement of the rest of the issues. One does wonder what those costs might be, because the trial did start, but did not run its course. That is however a matter for the taxing master. As to liability for those costs, Mr Pauw submitted that at roll call on 29 August 2016 the real issue that concerned the Deputy Judge President, was the fact that the further pretrial conference which the letter of 26 July 2016 directed, was left for as late as 19 August 2016. He said that the plaintiff's response to the letter of the Deputy Judge President was to propose a pretrial conference for 18 August, not earlier; which then in the event could not be pulled off until the next day.

[18] Mr Strydom, SC who appeared for the plaintiff with Ms Viljoen, submitted that the parties would not have been in the position of poor pretrial performance had it not been for the defendant's reticence in responding to the questions posed at the pretrial conferences held earlier this year.

[19] The difficulty with delays is that ultimately squeeze trial readiness into an impossible frenzy, is that one is always able to point back in time to some earlier delaying performance upstream and then, looking forward again, to aggregate those to arrive at an explanation for why things are not ready when they should be.

[20] In practice however things have a way of developing such that there comes a time when parties are required to have a sense of urgency, absent which a matter will not be ready for

trial allocation. Put differently, there comes a time when some things are on the critical path of trial allocation readiness, but others are not.

[21] I am afraid that the plaintiff's email of 1 August 2016 concerned a matter which was on the critical path of trial allocation readiness, but the email did not display the required sense of urgency. The trial had been set down for Tuesday 23 August 2016, and three weeks away meant that the pretrial conference which the Deputy Judge President directed, could not wait until the Friday before the trial.

[22] In my view the plaintiff was thus primarily responsible for the failure of this matter being allocated a trial judge, and the plaintiff should be ordered to pay the wasted costs occasioned by the postponement.

[23] In the result I make the following order:

- (a) The issue of the defendant's application dated 26 August 2016 to amend his plea to introduce the plea of prescription, is separated from the other issues that arise between the parties on the pleadings, and it is directed that the trial of those other issues so separated is postponed sine die.
- (b) The plaintiff is directed to pay the costs wasted as a result of the postponement referred to in the previous paragraph, such costs to include the costs occasioned by the employment of two counsel.
- (c) The defendant's application dated 26 August 2016 for an amendment of its plea is refused with costs, such costs to include the costs occasioned by the employment of two counsel.

WHG van der Linde  
Judge, High Court  
Johannesburg

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Date argued: 29 August 2016  
Date of judgment: 02 September 2016