

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. 4465/2007

In the matter between:-

FEZILE MVANO CHARLIE

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

HEARD ON: 2 NOVEMBER 2010

DELIVERED ON: 18 NOVEMBER 2010

JUDGMENT

RADEBE AJ:

[1] This matter was set down for trial on 2, 3 and 5 November 2010. The plaintiff was represented by Mr. Ian Dutton from the Durban Bar and the defendant was represented by Mr. Christol Coetzer from the Bloemfontein Bar. During the course of the morning of the first trial day, the parties engaged in protracted settlement negotiations, culminating in a consent order being granted. Settlement was reached in respect of all issues except the reserved costs of 3 August 2010.

- [2] The issue of the aforesaid reserved costs was re-opened for argument. Reference was made to the record of the transcript of the proceedings before the Honourable Mr Justice Van der Merwe J when on 3 August 2010 the plaintiff sought to amend his particulars of claim. The court granted an order in plaintiff's favour in respect of the amendment. Thereafter the defendant sought and was granted adjournment with costs reserved. The plaintiff duly amended his particulars of claim by adding sub-paragraph 5.5 which read: "a head injury". In due course plaintiff filed his amended pages.
- [3] The defendant's application for a postponement was based on the ground that: until 3 August 2010 the particulars of claim and the pleadings as they stood, only dealt with orthopaedic injuries; that the amendment basically affected the general damages and the past and future loss of income by increasing the quantum thereof. Up till then the amendments sought and effected by the plaintiff concerned the quantum of damages and no amendment notice had been filed regarding head injuries. Paragraph 5 of the original particulars of claim reads as follows:

“5. In and as a result of the accident the Plaintiff sustained the following injuries:

- 5.1 left open femur fracture;
- 5.2 left humerus fracture with radial nerve paralysis;
- 5.3 wrist drip; and
- 5.4 left ulner fracture tibia and fibula.”

The amended paragraph 5 adds:

“5.5 head injury.”

- [4] Counsel for the plaintiff argued that the defendant had known for quite some time before 3 August 2010 that the plaintiff had intended to amend his particulars of claim by the addition of sub-paragraph 5.5. Therefore the defendant ought to have prepared its case against the backdrop of that knowledge. The basis of this contention, so argued the plaintiff, is that prior to 3 August 2010, the plaintiff had filed expert reports by Mr. Gideon de Kock, an Industrial Psychologist, whose report had been compiled during February 2009, Ms Zanele Khumalo, a Clinical Psychologist, whose report had been compiled during May 2009, Dr. S. Nadvi, a neurosurgeon, whose report had been compiled during July 2010. All three experts had referred to same kind of cognitive impairment which pointed to head injury.

Further, the defendant had also filed an expert report by Dr. Gian Marus, a neurosurgeon, whose report was complied during November 2009 and had by implication acknowledged that the plaintiff would be claiming for head injury as well. According to plaintiff, the defendant ought to have prepared for trial on this item (head injury) as well. It is on this basis that the defendant has to be ordered to pay wasted costs for the adjournment of trial on 3 August 2010.

- [5] Counsel for the defendant argued that the plaintiff's late amendment of his particulars of claim necessitated that the defendant had to prepare its case to meet the claim for head injury as well; that plaintiff's case was never based on head injuries; that it would be unfair to expect the defendant to speculate what plaintiff's case could be in relation to the said head injury; that reserving experts attracts additional costs for the defendant; that had defendant subpoenaed its expert (Dr. Marus) and then later finds that plaintiff was not amending his particulars of claim for the aforesaid head injury, then defendant would not have been able to claim the qualifying and reservation costs for such expert even if judgment was given in its favour. This would be on the

ground that defendant would have called a witness whose evidence would have been unnecessary. Therefore, plaintiff has to be ordered to pay the wasted costs.

- [6] It is common cause that there had been other amendments in terms of Rule 28 of the Uniform Rules, but that such amendments pertained only to the quantum of damages, increasing the amount claimed from R2 152 000 to an amount of R2 702 000 in respect of both special and general damages. It is also common cause that in all the Rule 37(4) deliberations the issue of possible or actual amendment in respect of the claim for head injuries was never raised. Even after the filing of Dr. S. Nadvi's report, dated 7 July 2010, specifying the head injury, the plaintiff did nothing to further amend his particulars of claim to include such a major aspect of his claim. In my view, this injury contributed to the severity of plaintiff's injury and to his hardships. Counsel for the plaintiff argued that the defendant is not entitled to take advantage of what is manifestly an oversight on the part of the plaintiff and that defendant ought to have foreseen that the plaintiff would seek an amendment (on 3 August 2010) and therefore ought to have prepared sufficiently for trial on

this aspect as well. I do not agree with such basis as it presupposes that defendant should speculate what plaintiff's intentions are.

[7] The defendant's application for postponement was not an unreasonable one in the circumstances. It arose from the plaintiff's application to amend his particulars of claim. Plaintiff submitted that it was as a result of oversight on his part that the amendment has not been sought timeously resulting in the application to amend being brought before court on the day of trial.

[8] Wasted costs of the day are in general paid by the party seeking an adjournment unless good cause is shown why such party should not pay the costs. However, that is not a general rule. The court has discretion, which discretion has to be exercised judicially. A party seeking a postponement is not necessarily the party responsible for the postponement and the consequent waste of the day. Wasted costs were defined in the case of **MBEKENI v JIKA** 1995 (1) SA 423 (TK) at 424 F – G as follows:

“Wasted costs' are additional costs incurred by a party through the fault of his opponent or costs previously incurred which have become useless by reason of his opponent's fault.”.

Plaintiff's admitted oversight points to his fault which resulted in the defendant seeking the adjournment.

- [9] The adjournment was occasioned by the late application to amend particulars of claim. Counsel for the plaintiff argued that defence counsel submitted before the Honourable Mr Justice Van der Merwe J that defendant would suffer no prejudice through the amendment. However, it is clear from the record of the transcript of the proceedings of 3 August 2010 that such prejudice referred to prejudice in terms of the amendment and not prejudice in regard to proceeding with the trial on 3 August 2010. I refer also to the decision in **PROTEA LIFE CO LTD v MICH QUENET FINANCIAL BROKERS EN ANDERE** 2001 (2) SA 636 (O) at 647 B – D where the court held the following:

“Uit die stukke blyk dit dat die uitstel genoodsaak was as gevolg van die laat beskikbaarstelling van die dokumente wat nie aanvanklik blootgelê is nie. Vir hierdie rede het die eiser

aanspreeklikheid aanvaar vir die verkwiste koste op die terme soos hierbo uiteengesit.”

The plaintiff correctly admits his oversight and should recognise that such oversight has caused the wasted costs to be incurred.

[10] Prejudice, although ordinarily the dominant component to be considered, is not the only factor when the issue of costs for postponement is to be determined. Other factors, as listed in Rule 41(3), are to be considered as well, notably the factor of whether the application for postponement was *bona fide* and not simply used as a tactical manoeuvre for the purpose of obtaining an advantage to which the defendant is not legitimately entitled. The defendant’s reason for applying for a postponement was to prepare for the “new case” of the head injury claim and to secure the attendance of the relevant expert. It cannot be said that such application lacked the necessary *bona fides*, regard being had to the circumstances of this case as a whole.

[11] From the analysis of all the evidence and submissions before

me it is undoubtedly the plaintiff's oversight that resulted in the late amendment. The plaintiff is the party responsible for the postponement and the consequent waste of the day.

[12] In the circumstances, it is ordered that:

12.1 the reserved costs of 3 August 2010 are hereby
unreserved;

12.2 the plaintiff is ordered to pay the wasted costs
occasioned by the adjournment on 3 August 2010.

MADAME JUSTICE N.H. RADEBE, AJ

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