

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Case Number: 2015/28120

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO

DATE 05/08/2024	SIGNATURE
-----------------	-----------

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT	Applicant
--	------------------

And

N[...] J[...] S[...] obo N[...] P[...] N[...]	Respondent
--	-------------------

In re:

N[...] J[...] S[...] obo N[...] P[...] N[...]	Plaintiff
--	------------------

And

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT	Defendant
--	------------------

JUDGMENT

FISHER J

Introduction

[1] This is an interlocutory application brought by the defendant in terms of rule 33(4) for separation of issues in an action for damages caused by the defendant in the birth process of the child on behalf of whom the action is brought.

[2] It is not in dispute that the actions of the defendant's employees resulted in the child sustaining brain injuries which are collectively known as cerebral palsy (CP). The child was born on 02 September 2009.

[3] The issue of liability was settled on the basis that the defendant is 100% liable for the child's damages

[4] The defendant seeks that quantification of the plaintiff's claim for damages for medical negligence be heard and decided separately from the issue of whether the defendant is able to provide the future medical expenses that have been decided as being reasonable and necessary, in terms of its plea. This latter plea it calls the Public Healthcare Defence (PHD). In essence it is a plea of mitigation of damages.

[5] The submission by the defendant is that its case on the PHD can only be conveniently run if the requirements of the child are first and separately determined.

[6] The application is opposed on behalf of the plaintiff.

Relief sought

[7] In essence, it is sought that the determination of the damages due to the plaintiff be determined in two phases.

[8] The first phase is to determine the child's life expectancy; the costs of her transportation; and the reasonable and necessary future medical treatment and services which will be required by the child in light of her condition.

[9] The second phase is, essentially, for the running of the PHD although it includes some relief relating to a trust to be formed for the child.

[10] The central issue to be determined in the second phase is as follows:

“ 3...whether the defendant is capable of providing the hospital, medical and related interventions and equipment in the public sector at the same or an acceptably high standard compared to that in the private sector or at a reasonable standard in respect of the following elements of the plaintiff's claim, namely:

3.1 The occupational therapy, therapeutic equipment, mobility aids and assistive or adaptive devices;

3.2 The physiotherapy and related therapeutic equipment and assistive aids;

3.3 The speech and language therapy and related devices and aids, including augmentative and alternative communication (AAC);

3.4 The dietic consultations and associated treatment;

3.5 The orthopaedic treatment;

3.6 The ENT treatment;

3.7 The paediatric treatment;

3.8 The orthotic requirements;

3.9 The urological treatment;

3.10 Dental treatment;

3.11 The biochemical (pathology) and radiological investigations;

- 3.12 The nursing requirements and care (excluding caregiving);
- 3.13 Case management; and
- 3.14 Any other elements of the plaintiff's claim which have not been specifically described but which require determination."

The arguments

[11] The defendant seeks to suggest that the PHD is a novel "incorporation" into our common law. Its argument proceeds on the basis that the availability of this new defence creates evidential challenges which can only be dealt with conveniently on the separated basis contended for. It argues that, if this separation is not allowed, the trial will become unduly lengthy and costly due to superfluous, speculative, and undirected evidence having to be led because the needs of the child have not been determined. It argues that once such needs are determined in the first stage the defendant can tailor its evidence to such needs, thus shortening the trial and requiring less expert evidence.

[12] In essence, the defendant asserts that a trial, the nature of which routinely dictates a two stage separation of liability from quantum must now – in light of this "new" PHD - be run over, not two, but three stages.

[13] Reliance is placed by the defendant on *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government*¹ (MSM) which is cited as authority for the proposition that when the "PHD" is run it is conveniently separated as proposed.

[14] The plaintiff disputes that there is anything novel or special about the defence and denies that it dictates that a separated procedure is indicated.

¹ *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* (4314/15) [2019] ZAGPJHC 504; 2020 (2) SA 567 (GJ); [2020] 2 All SA 177 (GJ) (18 December 2019)

[15] She contends that the submission pertaining to the lengthening of the trial by the leading of superfluous and speculative evidence because of a lack of determination of the needs of the child upfront, fails to take into account that expert agreement on such needs has already been reached on a number of aspects. What is more, she argues, still further agreement by experts will, in all likelihood, be forthcoming prior to trial as this is in the nature of this type of litigation.

[16] She points out that a split trial will lead to unconscionable delay in light of the trial rolls being congested and the prospect of an appeal after the first stage.

[17] She raises further that the issues of need and requirement to meet the need are not discrete and that evidence in relation to both issues is best determined together.

Applicable legal principles

separation

[18] The legal principles pertaining to separation are relatively trite. The procedure is aimed at facilitating the convenient and expeditious disposal of litigation.

[19] The word “convenient” in rule 33(4) conveys not only the notion of facility or ease or expedience, but also the notion of appropriateness and fairness.² It is not the convenience of any one of the parties or of the court, but the convenience of all concerned that must be taken into consideration.³

[20] In *Denel (Edms) Bpk v Vorster*⁴, the SCA (per Nugent JA) warned that in many cases where separation is sought, once properly considered, the issues will be found to be inextricably linked even if, at first perusal they may seem discrete.

² *Tshwane City v Blair Atholl Homeowners Association* 2019 (3) SA 398 (SCA) at 414F–G

³ *Id* at 414 F-G

⁴ *Denel (Edms) Bpk v Vorster* 2004 (4) SA 481 (SCA) at 485A–B

It held further that, even if the issues were discrete, the litigation as a whole was often best served by ventilating all the issues at one hearing.

[21] A trial court is entitled to reconsider the separation order and, if it is satisfied that it would not be convenient for the issues identified in the separation order to be determined separately from and before the other issues, to rescind the order.⁵

“PHD”

[22] In relation to the, so called, “PHD” , reliance on *MSM*⁶ is misplaced. It is settled law that the raising of this issue is no more than a raising of mitigation of damages which has always been available under the existing common law.

[23] In *MEC for Health and Social Development, Gauteng v DZ obo WZ*⁷ the Constitutional Court held that it was open to a defendant to produce evidence that medical services of the same or higher standard, at no or lesser cost than private medical care, will be available to a plaintiff in future and that, if the evidence was of a sufficiently cogent nature to disturb the presumption that private future healthcare is reasonable, the plaintiff will not succeed in the claim for the higher future medical expenses.⁸ It was made clear that this defence was in the realm of existing Aquilian principles.⁹

[24] With these principles in mind, I turn to a discussion of the arguments raised.

Discussion

⁵ *NCS Resins (Pty) Ltd v Allan* (unreported, ECGq case no 2708/2016 dated 30 August 2022) at paragraphs [8] and [15].

⁶ Supra note 1.

⁷ *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) (2017 (12) BCLR 1528; [2017] ZACC 37) .

⁸ Id at para 16

⁹ See also *Mashinini v MEC for Health, Gauteng* 2023 (5) SA 137 (SCA) at 25

[25] Every application for a separation has to begin with the pleaded issues.

[26] In Denel¹⁰ it was made clear that it is the duty of the court that grants a separation to ensure that the issues to be tried are clearly and precisely circumscribed in order so as to avoid confusion.

[27] The claim for future medical and other accommodations is pleaded as follows:

“8.4[the child] required and will require various modalities of therapy, special adaptive aids and devices, specialized schooling, permanent and continuous care, the details of which are set out hereunder;...

9.1 Future Hospital, Medical and Related Expenses: R35 000 000

9.1.1 This amount is an estimated amount based on the reports of the Plaintiffs experts in respect of whom Notice has been given in terms of the Rules of Court and reflects a projected amount which the Plaintiff will in the future incur in respect of hospital, medical and related expenses in her representative capacity for and on behalf of her minor child in treatment of the sequelae referred to in paragraph 8.2, 8.4, 8.5, 8.6 and 8.8 supra.

9.1.2 The estimated amount could change and will be refined in more detail, once the final report/ calculation of the Plaintiffs Actuary has been received.”

[28] It is this claim which the defendant seeks be determined first and separately from its mitigation defence.

[29] It seems to me that much of the lack of certainty as to the reasonable needs of the child complained of by the defendant is attributable to the failure of the parties to comply with the rules relating to particularity in pleading.

¹⁰ Supra note 4 at para 3.

[30] Rule 18 (10) provides that

“a plaintiff suing for damages shall set them out in such manner as will enable the defendant reasonably to assess the quantum thereof: Provided that a plaintiff suing for damages for personal injury shall specify his or her date of birth, the nature and extent of the injuries, and the nature, effects and duration of the disability alleged to give rise to such damages, and shall as far as practicable state separately what amount, if any, is claimed for —

(a) medical costs, hospital costs and other similar expenses and how these costs and expenses are made up;

(b) ...” (My Emphasis)

[31] The general reference in the particulars of claim to the R35 million being “an estimated amount based on the reports of the plaintiffs experts “ and reflecting “a projected amount which the Plaintiff will in the future incur in respect of hospital, medical and related expenses in her representative capacity for and on behalf of her minor child...” renders the pleading of this claim far from clear and precise.

[32] The reference to expert evidence does not constitute pleading.

[33] This is not, however, grounds for a separation.

[34] A defendant faced with pleadings which may not give the particularity required to mount a defence, has various options open to it – including the taking of an exception or the setting aside of the pleading as irregular under rule 30.

[35] The defendant has not availed itself of either of these options. Furthermore, it does not appear that further particulars have been sought at this stage.

[36] I agree with Mr Coetzer, who appeared for the plaintiff, that the particularising of the treatment modalities required and their costs will allow for the necessary narrowing of issues on the mitigation defence.

[37] I agree, also, that the separating of an action of this nature into three distinct hearings is neither convenient nor indicated.

[38] Expert agreement has already been reached on a number of aspects which are determinative of the child's needs. If the trial preparation phase, including the determining of the pleaded issues through requests for further particularity, is properly undertaken it is likely that more agreement will be reached.

[39] I accept the plaintiff's assertions that the issues of need and requirement to meet the need are unlikely to be discrete. It seems to me that evidence in relation to both issues is best determined together.

[40] I accept also that to separate quantum into two stages will result in unconscionable delay for a vulnerable child and those caring for her.

Conclusion

[41] In the circumstances, the plaintiff has succeeded in showing that the proposed separation is neither convenient nor likely to lead to expedition or a saving of costs and that the delay which it would occasion would prejudice the child unduly.

Order

[42] The application for separation is thus dismissed with costs.

**FISHER J
JUDGE OF THE HIGH COURT
JOHANNESBURG**

This Judgment was handed down electronically by circulation to the parties/their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 05 August 2024.

Heard:	13 June 2024
Delivered:	05 August 2024

APPEARANCES:

Applicant's counsel:	Adv H Cassim
Applicant's Attorneys:	State Attorney Johannesburg
Respondent's Counsel:	Adv M Coetzer
Respondent Attorneys:	Wim Krynauw Attorneys