

SOUTH AFRICA / JUDGMENT

M.M obo A.M v Member of the Executive Council for Health, Eastern Cape Province (530/2017) [2022] ZAECBHC 30 (5 October 2022)

[2022] ZAECBHC 30

COURT
Eastern Cape High Court, Bhisho

BEFORE
Hartle

CASE / FILE NUMBER
530/2017

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

CASE NO. 530/2017

In the matter between:

M[....]1 M[....]2 OBO A[....]

Plaintiff

M[....]2

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, EASTERN CAPE PROVINCE

Defendant

JUDGMENT IN RESPECT OF QUANTUM

HARTLE J

- [1] In a prequel to the present trial before me, Tokota J issued an order in the plaintiff's favour pursuant to a trial on the merits in which proceedings the issues of liability and causation were separated from quantum.
- [2] The claim was one arising from the negligence on the part of the hospital staff at the Frontier hospital in the Eastern Cape in the course of delivering the plaintiff's son on 8 September 2015, which resulted in the child suffering from cerebral palsy.
- [3] The plaintiff's wife (the child's mother) had instituted the proceedings both in her personal capacity and on behalf of her minor child in a representative capacity. She however died on 9 December 2018. It appears from the judgment on the merits that the present plaintiff, who is the child's father and who was married to the initial plaintiff, applied on the date of the hearing to be substituted in her place. At the time of the application no formal amendment to the pleadings was made but counsel appearing for the defendant had no objection to his substitution at the time. The notice of substitution of the father that foreshadowed the application dated 16 January 2019 heralded his indication to substitute his late wife in his representative capacity instead as the father and natural guardian of the child who was then still alive.
- [4] There was certainly no suggestion that he would be pursuing his wife's personal claim for general damages after her death, which entitlement by all accounts then fell away or at least was not an issue before me in the quantum trial.
- [5] On the basis of the claims that were before him, Tokota J found that the defendant's employees had acted negligently in handling the mother's labour and had failed in their duty to prevent injury to the couple's baby.
- [6] In consequence the following order issued in respect of the merits:
- "1. The defendant is liable to pay such damages as may be proved by the plaintiff, in his representative capacity and as the guardian on behalf of his minor son, A[....] M[....]2, arising from the medical negligence of the defendant's employees that occurred in September 2015."*
- [7] The determination of quantum was postponed sine die.
- [8] Ironically, on the date that the merits judgment was delivered, namely 15 December 2020, the child also died.
- [9] After his death, the plaintiff filed amended particulars of claim.
- [10] In an introductory paragraph to the particulars of claim it is alleged that he "institutes this action in his representative capacity as father and the representative of the estate of the late A[....] M[....]2, a male born on 08 September 2015, who died on 15 December 2020."

[11] In paragraph 7 of the particulars of claim, after advertizing in the previous passage to the fact that Tokota J had found that the medical practitioners, nursing staff and employees who has been involved in the rendering of medical services to the deceased and the child were liable to pay (Sic) the plaintiffs proven or agreed damages, the plaintiff purported to recount certain personal consequences suffered by him as a result of the defendant's employees' breach, alternatively negligence. His own negative

experiences had never been pleaded up to that point and evidently presented a whole new claim. It further evidently set the stage for the plaintiff to lead the expert testimony of a clinical psychologist, Mr. Ian Meyer, as to his suffering and the need as a

result to undergo psychotherapeutic intervention. The justification for such need and the costing thereof were consequently also

foreshadowed in an expert notice and report filed by the plaintiff qualifying Mr. Meyer in this respect.

[12] No consequences to the child arising from the established negligence of the hospital staff, relevant to a claim for general damages supposedly vesting in the deceased estate, were pleaded at all.

[13] In paragraph 8 of the particulars of claim the plaintiff purported to claim general damages on the following premise:

"8. General damages

As a result of the Defendant's breach of the agreement, alternatively negligence, the plaintiff in his personal and representative capacities has suffered damages in the amount of R 500 000.00, which has been calculated as follows below for General damages for emotional shock and trauma, pain and suffering."

[14] In the concluding prayer, it is repeated that he claims payment of the sum of R 500 000.00 for general damages "in his personal and representative capacity".

[15] He also alleged an entitlement to claim payment in the sum of R 300 000.00 for past medical expenses purportedly incurred during the lifetime of A[...], but this claim was not persisted with or at least there was no suggestion that it was one requiring the court's attention.

[16] The defendant on the pleadings emphatically denied the plaintiff's personal claim or that she was liable to him in any amount, putting him to the proof thereof. With reference to paragraph 1.2 of the final amended particulars of claim, apart from admitting the obvious, which is that the present plaintiff was indeed the father of the child, the defendant in her plea denied the "balance"

leaving it up to the plaintiff to also prove that he was representing the estate of his deceased child and what the nature of its claim, if any, was.[1]

[17] As an aside the Plaintiff was not formally joined in the action in his capacity as representative of the late child's estate which presents a different and distinct capacity than the one in which he had substituted his late wife as a guardian acting on the child's behalf while the latter was still alive. Although it was not strenuously contested during the quantum trial that the plaintiff had been appointed as the executor of his son's estate, Mr. Kunju, who appeared on behalf of the defendant refuted in any event that there was a reason stated in the particulars of claim for the plaintiff to have involved himself in the action in this capacity at all. During the course of the plaintiff's testimony, he also objected to the admission into evidence of the master's letters of executorship issued to him authorizing him to liquidate and distribute the child's estate on the basis that this document had not been discovered during the pretrial processes.

[18] Prior to the trial proceeding before me the matter went through its necessary pre-trial paces. In the party's joint practice note dated 5 April 2022, under the rubric of "Issues for Determination", the parties' legal representatives formulated the trial issues requiring resolution as follows:

"(a) The quantification of the plaintiff's damages in her personal and representative capacity with references to:

- General damages for the plaintiff in his personal capacity.
- Past loss of income
- Loss of income as at the time of the death of the minor."

(Emphasis added)

[19] In the trial preparation checklist also signed off on 5 April 2022, the same issues are listed for determination by the trial court.

[20] Preceding this, in the party's pretrial minute dated 7 February 2022 the issues for determination were also discussed and minuted in the introductory paragraph as follows:

"The Plaintiff would like to record that the issues for determination have been narrowed because of the death of the minor child, and in view thereof the heads of damages which are to be determined are as follows:

1. 2.1 general damages for the Plaintiff in his personal capacity;
1. 2.2 past loss of income; and
- 1.2.3 loss of income as at the time of the death of the minor child.

Plaintiff: agreed

Defendant: agreed."

[21] In paragraph 2 of the same conference minute the issues for determination are similarly repeated as follows:

“The issues for determination of the Plaintiff’s damages in respect of his claim for general damages, loss of income and future medical expenses.

The award for the damages shall be argued based on comparative awards, future medical expenses shall be based on the actuarial calculation by the actuary.”

[22] In the core bundle that was placed before me, the plaintiff ostensibly relied on several expert reports, most of which pertain to future medical expenses and modalities that the child would have required arising from the established negligence of the defendant’s

servants, but for his death.[4] Additionally, as indicated above, the plaintiff filed an expert notice and report in respect of Mr. Meyer that presaged his testimony

in respect of the plaintiff’s purported personal claim that the legal representatives appeared to agree would be the focus at the quantum hearing.[5] Nay a word was said by the plaintiff (or at least not pertinently so) that he was intent on pursuing a claim for general damages for the child nomine officio. Perhaps if he had, the subject of his authority to represent the estate may have generated a discussion around the defendant’s

view that there was nothing appearing from the pleadings that suggested that such a pursuit was forthcoming or alternatively that

documentary proof that he represented the estate should be provided and/or his legal standing in this regard proved. The defendant might also have volunteered her assessment that the plaintiff’s claim in his personal capacity was unsustainable or that there was an issue with his pleadings, this despite the ostensible agreement between the parties at the pretrial conference that such a claim would form the focus of the trial.

[23] It was only much later, on the fourth day of trial and at the stage of closing arguments, that a concession came from Mr. McKelvey who appeared for the plaintiff that the latter’s supposed personal claim was not competent and had certainly not been within the contemplation of the judgment and order of Tokota J. Indeed, it could not have been as it had not been pleaded at that point and was only conceived of after the child’s death. He also fairly conceded that the plaintiff’s claim in his representative capacity no longer existed at the point of the child’s death, and that the only claim that did, or could, exist would have been the claim in his official capacity as executor or representative of the estate.

[24] Despite the lack of formal substitution or joinder of the plaintiff nomine officio as executor of the estate, Mr. McKelvey held out for the child’s claim for general damages which he referred to as the “residual” claim. He submitted (at least before the concession referred to in paragraph [23]) that this claim was distinguishable from the plaintiff’s claim envisaged in paragraph 7 of the particulars of claim which he had alleged was being pursued in his personal capacity. He pointed out that the claim for general damages was stated to have

been pursued in two distinct capacities, firstly in his personal capacity and secondly in his representative capacity which was co-incidentally qualified in paragraph 1 as including the formal representation of his son's estate. He purported to suggest that it was open to interpretation that the claim in paragraph 8, for general damages, envisaged both his own emotional shock and trauma as well as the pain and suffering of his deceased child which he was qualified to pursue *nomine officio*. He further submitted that the parties' representatives in the pretrial procedures had clearly had this in mind when agreeing what the issues were for determination by this court, although with respect this does not seem quite apparent from the pre-trial minutes, case management checklist or joint practice note filed in the matter.

[25] Mr. McKelvey submitted that the "estate claim" was properly before me and had to be determined, he suggested in the estate's favour, based on the expert testimony of Dr. Campbell and Ms. Grace Hughes as well as the lay testimony of the child's aunt, Ms. Mgwadleka as to the child's experience of pain - to the extent that he probably could appreciate pain despite the fact that his condition was classified as a grade 5 extreme level of cerebral palsy, and the loss of amenities suffered by him, ironically obviously more devastating as a result of that very classification. (I do not intend to repeat their testimony here,

given the view I take herein.)

[26] He argued based on the limited detail that co-incidentally emerged during the quantum hearing concerning the child's experience of his very brief life that an award of R 500,000.00 would represent a fair estimate of the child's suffering under the rubric of general damages since he had endured substantial levels of pain, suffering and disablement, with a devastating loss of the amenities

of life.[6] He submitted further, despite no clear basis for this having been indicated in the pleadings, that the child's claim (which unfortunately does not suggest itself from the amended particulars of claim) would have passed to his estate given that he had died after *litis contestatio* according to the established practice of recognizing such claims despite the death of the litigant. [7]

[27] Mr. Kunju argued conversely that the pleadings did not support the claim for general damages on behalf of the estate that the plaintiff purported to develop through the evidence presented at the trial. He emphasized that the sequelae relied upon in the pleaded case bore only upon the plaintiff's personal claim that was belatedly abandoned. The claim for past medical expenses was also irrelevant. The defendant had gone no further than meeting the pleaded case and in her plea was justified in calling upon the plaintiff to prove his case in which regard he submitted the plaintiff had dismally failed.

[28] Leaving aside the time and effort wasted on the plaintiff's personal claim, Mr. Kunju complained that the testimony adduced on the plaintiff's behalf had gone far beyond the ambit of the pleaded case and indeed what the parties had agreed in the rule 37 conference the issues were that had to be determined. The expert reports filed had also not properly heralded the case that

surprisingly evolved concerning the estate's purported entitlement to general damages for pain and suffering and loss of

amenities of life suffered by the deceased child. If I accepted any of this testimony, so his argument went, it would be to the obvious prejudice of the defendant who was neither obliged, nor ready, to answer the plaintiff's imagined so-called residual claim.

[29] In any event he did not believe, because of the obvious extent of the cognitive damage suffered by the child as a result of the cerebral palsy, that the evidence established that he would have subjectively appreciated the pain or that it was appropriate to order compensation in favour of the estate at all.

[30] Although I challenged Mr. Kunju quite extensively on the passive stance adopted by the defendant in watching and waiting for the plaintiff's case to fail,[8] a proper introspection of the pleadings reveals their deficiency inter alia to have establish a premise for the residual claim contended for by Mr. McKelvey. Firstly, it was obvious that the present plaintiff had introduced a whole new claim in his personal capacity that had not been there before and which he correctly abandoned, albeit on the fourth day of trial. Secondly, expect for the stand-alone reference in paragraph 8 of the amended particulars of claim to the conclusion that he had suffered damages in a representative capacity as well, there was nothing else in his pleaded case to suggest that the defendant might have to deal with another claim prosecuted on behalf of the child's estate and/or that she would have to counter the suggestion that the child had suffered appreciable pain or compensable loss of amenities under the rubric of general damages in his own right as a transmissible claim to his estate. One also looks in vain for the necessary formal substitution or joinder of the child's father in his capacity as executor of his late child's estate. Further I take Mr. Kunju's point that the parties had not agreed that such a claim in all its nuances would be the focus of the trial though it appears that the legal representatives were somewhat confused by whose claim was to be determined and in what capacity. Additionally, the expert notices and reports do not speak to that kind of causation (concerning the "estate claim"), because it was not an issue on the pleadings.

[31] As an aside, before conceding that the personal capacity claim of the plaintiff was ill conceived, Mr. McKelvey had requested an amendment to the pleadings but only to rectify the misconception that that claim was not on the table by the insertion of the phrase "in his personal capacity" in place of "in his representative

capacity as father”. This request was ultimately not persisted with for obvious reasons, but unfortunately neither was there any formal supplementation forthcoming in respect of the supposed residual claim in the name of the estate.

- [32] The unexpectedness of such a claim being in the offing came to the fore when I questioned Dr. Campbell about the lack of any information regarding how the child had died, who had cared for him after his mother had passed, what the quality of his life was before his death and how his situation had deteriorated. I indicated the necessity of gaining a sense of how the cerebral palsy condition had impacted his life and his circumstances. This prompted a late supplementation of the plaintiff’s case, without any application to join the plaintiff in his personal capacity as executor and to amend the particulars of claim, to in effect introduce sequelae that had not been pleaded or had come under the spotlight as it were before.
- [33] I believe that Mr. Kunju’s objection during the course of Dr. Campbell’s testimony to the introduction of documentation that had not been discovered during the pretrial processes (in support of the supplemented estate case) was also justified in these strange circumstances where the plaintiff’s case was self-evidently developing as the trial proceeded.
- [34] The prejudice to the defendant by permitting the spontaneous supplementation (without any formal application to amend) is obvious.

Mr. Kunju pointed to the fact that the defendant had most significantly been denied the opportunity to lead expert evidence especially as to the extent to which the child was able to appreciate pain or had full insight into his plight and an appreciation of his loss as a result of his condition so as to put him in the “twilight situation” envisaged in *NK obo ZK v MEC Health*.^[9]

- [35] Even if it were so that the child may have suffered appreciable pain, this case was not properly before me, and it is not for me to find the damages proven which the plaintiff contended for up in the air and on behalf of an estate that was not properly before me.
- [36] As for the issue of costs, despite my suggestion to Mr. Kunju on a number of occasions during the trial that a certain mutuality had been expected from the defendant to ensure that the trial issues had been properly identified and shortcomings pre-empted, the ultimate responsibility fell to the plaintiff to ensure that his pleadings were in order. The wasted costs were further essentially all attributable to the personal claim of the plaintiff that was abandoned on the final day of the trial and there is no question in my mind that the plaintiff will have to bear these wasted costs.
- [37] He could have been under no illusion, once the quantum trial commenced, that his case was defective in the respects complained of since Mr. Kunju made his objections known throughout the proceedings quite forcibly. It is a pity though that those representing the parties before the hearing commenced did not apply their minds concerning what the real issues were that remained to be determined (*locus standi* remarkably been one of those), in the interests of shortening the proceedings and the costs more effectively.

- [38] The issue of the costs of the separated issue of quantum arising before the child's death is an extant issue that needs to be addressed but possibly in a separate application or by agreement between the estate and the defendant. Mr. McKelvey fairly noted that various expert reports were obtained in order to establish the child's claim for damages that the child's father, and his mother before her death, both acting as his guardian, would have been entitled to incur in order to prove the quantum of the established claims predicated on their success in the merits trial. It is not unreasonable that these were incurred with that probable success in mind long before the date of delivery of the judgment of Tokota J which coincided with the date of the death of the child since merits and quantum were being dealt with separately. The fact that the child died when he did does not exonerate the defendant from having to pay the costs of obtaining such reports as were necessary to quantify the child's claims while he was still alive. Unless the parties agree, the taxing master will no doubt filter which of these were reasonably commissioned, necessary and conduced to the anticipated proof of quantum predicated on the plaintiff's success on the merits that would have been followed by a quantum hearing in the ordinary course but for the child's death.
- [39] For obvious reasons the issue of these is not before me and the estate's interests not represented or covered under the general assertion in par 1.2 of the particulars of claim that the plaintiff is the representative of the child's estate. That is a different matter.
- [40] Mr. Kunju was opposed to the costs of these reports being recovered but in the context of them being irrelevant in the abortive or putative trial before me.
- [41] The interests of the estate (properly represented) should however not be compromised by this anomaly.
- [42] In the result I issue the following order:
1. The plaintiff's claim in his personal capacity, and in his purported capacity as executor of the estate of late child, are dismissed with costs.
 2. The issue of the costs of the separated issue of quantum arising before the child's death is postponed sine die.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 9, 10, 11 & 12 May 2022

DATE OF

JUDGMENT:

5 October 2022*

*Judgment delivered at 10h30 on this date by email to the parties.

APPEARANCES:

For the plaintiff: Mr. C McKelvey instructed by Enzo Meyers Attorneys, East London (ref. Mr. Meyers).

For the defendant: Mr. V Kunju SC instructed by The State Attorney, East London (Mr. Mgujulwa).

- [1] The duly appointed executor is the legal representative of the deceased estate and any proceedings by and against it must be in the name of the executor acting in his official capacity. (See *Du Toit v Vermeulen* 1972 (3) SA 848 (A)). The general rule is that it is for the party instituting proceedings to allege and prove its locus standi, and the onus of establishing it, rests on that party. It ought to appear ex facie from the founding papers/particulars of claim that the parties have the necessary legal standing. (See *Mars Inc. v Candy World (Pty) Ltd* [1990] ZASCA 149; 1991 (1) SA 567 (A) at 575, *Kommissaris v Binnelandse Inkomste v Van der Heever* 1993 (3) SA 1051 (SCA) at par 10.)
- [2] The agreeing parties were seemingly referring to the mother of the child. It is hard to discern exactly what they had in mind at the time since she had long since passed; her personal claim was evidently not being persisted with; and the present plaintiff had already been substituted, at least in his capacity as guardian in respect of the child who by then had also passed.
- [3] This “agreement” is equally confounding. It may however have created the perception that the defendant accepted the premise for a personal claim by the father. Evidently no thought was given to the further capacity in which the plaintiff was purporting to act on behalf of the estate or what claims, if any, vested in the estate.
- [4] I surmise that these were included to motivate the plaintiff’s entitlement nomine officio to the costs of prosecuting the matter in respect of the separated issue of quantum.
- [5] In recognition that the plaintiff’s claim in his personal capacity was abandoned (see paragraph [23] above), counsel acknowledged that the costs of qualifying Mr. Meyer could certainly not be recovered.
- [6] Mr. McKelvey in this regard relied upon the judgments of *NK obo ZK v MEC for Health, Gauteng* 2018 4) SA 454 (SCA); *C S (obo T G S) v MEC for Health, Gauteng* (274/2009) GPPHC (6 August 2015); *Mngomeni v MEC for Health, Eastern Cape* (1972/2014) ECLD (Mthatha) (20 June 2017); *MSM obo KSM v MEC: Health Gauteng* 2020 (2) SA 567 (GJ); and *N T Hlubi v MEC for Health, Gauteng Province* (57301/2015) (8 February 2021).

- [7] Mr. McKelvey referred to the matter of Jankowiak and Another v Parity Insurance Co Ltd 1963 (2) SA 286 (W) in which the court held – “I have therefore come to the conclusion that, litis contestatio having taken place before the death of the deceased, the claim for general damages was transmitted to the estate of the deceased”.

See also Potgieter v Rondalia Assurance Corporation of SA Ltd 1970

- (1) SA 705 (N); Government of the Republic of South Africa v Ngubane 1972 (2) SA 601 (A) at 608 H; Potgieter v Sustein (Edms) Bpk 1990
- (2) SA 15 (T) and Minister of Justice and Correctional Services v Estate Stransham-Ford (531/2015) 2016 ZASCA 197 (6 December 2016) at par [19].
- [8] See in this regard my comments made in Tyibilika v MEC for Health, Eastern Cape Province (579/2013) [2021] ZAECBHC 38 (30 November 2021) at par [7].
- [9] (216/2017) [2018] ZASCA 13; 2018 (4) SA 454 (SCA) (15 March 2018).

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