FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 6176/2008

In the case between:

MAMIKI MERIE HOBE tbv N NKONE Plaintiff

and

PADONGELUKKEFONDS Defendant

JUDGEMENT: RAMPAI J

HEARD ON: 23 FEBRUARY 2010

DELIVERED ON: 8 APRIL 2010

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[1] The matter came before me by way of action proceedings. It was enrolled on 31 March 2009 for hearing over three days from Tuesday 23 February 2010 to Friday 26 February 2010 excluding the Thursday 25 February 2010. The plaintiff acts herein in her representative capacity as mother and natural guardian of a minor child, N N, a boy born on 21 Mei. The child's father, Mr Thabo Samuel Nkone, sustained fatal bodily injuries in a road accident which took place at Wesselsbron on 4 July 2006. The scene of the accident was on the main road to Bothaville.

[2] The plaintiff sues the defendant for the payment of the amount of R936 946,00 as compensation for loss of support her child has and will suffer as a result of the death of his father. She alleged, in her summons, that the death of the victim was occasioned by the sole negligence of a certain Mr Vorster in the driving of a motor vehicle with registration number DSS003NW.

[3] The action is defended. In its plea, the defendant denied the allegation that such an accident ever happened and required proof thereof. In the event of the court finding that such an accident did occur, then in that event, the defendant pleaded, in the alternative, that it was not occasioned by the alleged negligence of the insured driver.

[4] The parties, through their attorneys, held a pre-trial conference on 3 December 2009. The minutes thereof were filed on 14 January 2010. There were no meaningful proposals made for the settlement of the dispute. The respective stances of the parties as pleaded remained unchanged. The plaintiff maintained that the insured driver

was exclusively to blame for the accident. The defendant persisted denying the assertion that its insured driver was to blame as alleged or in any other manner whatsoever.

[5] On Monday 22 February 2010, a day before the hearing was due to begin, the plaintiff served and filed a formal action for the separation of the two main phases of a civil trial, viz. the merits and quantum. The plaintiff seeks the following relief according to the notice of motion:

> "1. Dat gelas word dat die geskilpunte uiteengesit in paragrawe 1 tot 5 van die Eiseres se Besonderhede van Vordering gelees met paragraaf 1 tot 4 van die Verweerder se Verweerskrif, geskei word kragtens die bepalings van Hofreël 33(4) sodat die meriete eerstens aangehoor word;
> 2. Die geskilpunt rakende die omvang van die quantum van die Eiseres se vordering staan oor vir latere beregting indien die geskilpunt met betrekking tot meriete ten gunste van Eiseres besleg word;
> 3. Dat die Respondent gelas word om die koste van die aansoek te betaal, alternatiewelik dat die koste van die aansoek koste in die aksie sal wees;
> 4. Verdere en/of alternatiewe regshulp."

The application was also set down for hearing on 23 February 2010.

[6] The defendant did not file any opposing papers. It seems to me that the defendant simply had no time to do so. On Tuesday the 23 February 2010 I obviously had to hear the interlocutory application first. Mr Zietsman, counsel for the plaintiff, asked me to partially adjudicate the dispute by determining the merits first; by deferring the quantum for later adjudication if I should adjudge the merits in favour of the plaintiff and by directing the defendant to pay the costs of the application or by ruling such costs to be costs in the action.

[7] Mr Fourie, counsel for the defendant, informed me that, firstly, the defendant did not oppose the relief sought in terms of prayers 1 – 3 of the plaintiff's notice of motion, secondly, that the defendant conceded the merits in favour of the plaintiff. Thirdly, that since the dispute was, by virtue of the defendant's concession narrowed down to quantum only, the defendant insisted that the plaintiff should

immediately present her case to prove the amount of her claim.

[8] Mr Zietsman, in his reply, argued that once the court makes an order for the separate adjudication of issues of merits on the one hand and issues of quantum on the other, the plaintiff was entitled to a break, if on the merits, the decision goes against the defendant but in favour of the plaintiff.

[9] The plaintiff did not have her quantum witnesses lined up and in attendance together with her merits witnesses. The defendant was well aware of their absence. Therefore the first issue is whether or not the plaintiff has shown good cause for the postponement of the action for the adjudication of the quantum issues some time in the future. The second issue is which of the parties should be held liable for the costs relating to such a postponement. The dominant impression created by the defendant's argument was that the second issue was really what the dispute was all about on Tuesday the 23 February 2010.

[9] As regards the motion proceedings, the plaintiff's application was unopposed. About ten weeks before the trial, the plaintiff requested the defendant to make proposals for the settlement of the action (vide par 3, rule 37 minutes) and to consent to the separation of issues (vide par 6 same minutes). The defendant's attorney undertook to obtain instructions and to revert to the plaintiff's attorney by no later than 11 December 2009. The undertaking was never honoured.

[10] At par 6 of the rule 37 minutes the following is recorded:

> "Eiseres het verweerder versoek om toe te stem daartoe dat 'n versoek tot die Agbare Hof gerig word ingevolge hofreël 33(4) om die geskilpunte rondom die meriete en kwantum te skei en gevolglik dat die geskilpunte betreffende paragrawe 3 en 4 van die besonderhede daarmee saamgelees paragrawe 3 en 4 van die verweerskrif allereers bereg word, terwyl al die ander geskilpunte oorstaan vir latere beregte.
>
> Verweerder het verneem om instruksies te bekom voor of op 11 Desember 2009. Die eiseres het die verweerder meegedeel indien hy sou versuim om te antwoord voor of op 11 Desember 2009 die eiseres 'n formele aansoek om skeiding van kwantum en meriete sal rig aan die Agbare Hof."

This then completes the prelude to the plaintiff's interlocutory application. It came as no surprise when the defendant chose not to oppose it. Accordingly the application had to be granted as unopposed in accordance with prayers 1 – 3 of the notice of motion.

[11] As regards action proceedings, Mr Fourie contended that the action was enrolled for the full hearing of the entire dispute, as that since the merits were no longer in dispute the plaintiff had no choice but to present her case on quantum with immediate effect.

He referred me to a certain unreported decision of the Free State High Court by my sister Van Zyl J. My efforts to find such a decision were fruitless. So were my efforts to reach counsel for precise and accurate details of the decision.

[12] Mr Zietsman contented that the defendant was precluded by the grant of the order in terms of rule 33(4) from calling upon the plaintiff to immediately prove her quantum because the defendant had conceded the merits of her claim. He

referred me to the case of **BAPTISTA v DIE STADSRAAD VAN WELKOM** 1996 (3) SA 517 (O) AT 520I – 521C and to that of **GROOTBOOM v GRAAF-REINET** 2001 (3) SA 373 (E) at 381H – 382B.

[13] I deem it necessary to quote rule 33(4):

> "4. If, in any pending action, it appears to the court *mero motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of, and the court shall on the application of any party make such order unless it appears that the questions cannot conveniently be decided separately."

[14] I now proceed to examine the undisputed facts or factual allegations. On 3 December 2009 the plaintiff sought the consent of the defendant to the separation of issues. The plaintiff made the request because both the merits and the quantum were still in dispute at that stage. The defendant's attorney apparently did not have instructions to instantly

respond to the request. He made an undertaking to obtain specific instructions from the defendant and to advise the plaintiff's attorneys of the defendant's attitude towards the separation in terms of rule 33. The plaintiff's attorney waited in vain for almost ten weeks. It seems to me the pre-trial conference achieved practically nothing of any value save to inflate the high legal costs. In many instances, one gets an impression, that practitioners seldom use the procedure in a meaningful manner.

[15] Quite often the real purpose for which the procedure was designed is undermined with impunity. This case is a typical example of that regrettable state of affairs. The conduct of attorneys in general as regards this procedure is lamentable. There are four core items of a conference in terms of rule 37 agenda: settlement proposals, material admissions, discovery of documents, and separation of issues. All these matters are intended to narrow the ambit of the dispute. The ultimate purpose of the whole exercise is to speed up the litigation process. None of these important matters were really addressed at the conference in question.

[16] It seems to me that if serious consultations between the practitioners and their clients were held before the conference, significant strides could have been made long before the trial towards the resolution of the dispute. The defendant would probably have conceded the merits and consented to the separation of the issues at the conference and there would have been no need for a formal application, and the present debate about the costs of the postponement would also probably not have arisen.

[17] The defendant defaulted on 11 December 2009. By the 12 December 2009 the plaintiff became aware that the required consent for the defendant to the separation of issues was still outstanding. The plaintiff's attorney had no reason to believe, and did not claim to, that the required consent would soon be given before the trial. In her supporting affidavit, the plaintiff's attorney gave no explanation as to why the application to have the issues separately adjudicated was delayed for nine weeks and only served and filed a day before the trial was due to start. I am inclined to think that the eleven hour launching of the application was done on purpose. It seems to have been a deliberate ploy to hit back

at the defendant for its failure to consent to the separation of issues. That did not go down well.

[18] I have a serious suspicion and it is a very strong suspicion, that the defendant did not take kindly to the late launching by the plaintiff of the application for the separation of issues. It seems to me that the defendant's intolerant attitude towards the issue of quantum was precipitated by an undercurrent desire to retaliate. By the look of things, the parties were out to ambush each other by way of procedural posturing. The swords were drawn when they appeared before me.

[19] Had the defendant not conceded delictual liability, the plaintiff would first have presented her case in respect of the merits after an order in terms of rule 33(4) had been made. The practical effect of the defendant's concession was that it greatly curtailed the proceedings, substantially reduced costs and saved valuable public time. But if the separation of issues meant what the defendant contended it meant then it would not have been necessary for the plaintiff to even seek the defendant's consent. The continuous flow of the proceedings without fragmenting interruption follows as a

matter of course unless the court intervenes in terms of rule 33(4). The adjudication of the merits in a civil trial is usually a cumbersome, protracted an expensive exercise.

[20] The defendant's concession has obviated the need to embark on that first phase of the civil hearing. Regrettably, the concession was not made in the earliest possible time within which it could have been made. The proposition that such concession accelerates the proceedings and anticipates the quantum phase of the trial seems to me to be a thin argument.

[21] Since the issues had been separated and the merits conceded, only the quantum remained an issue. Seeing that the plaintiff was not ready to present her case on quantum in the same day immediately following the defendant's admission of liability, the hearing obviously had to be postponed. The crux of the argument was which party should be held liable for the costs of such postponement. Mr Zietsman contended that such costs should be costs in the action but Mr Fourie contended that the plaintiff must be held responsible for the payment of the defendant's costs.

[22] In the instant case proof of quantum will entail presentation of various sorts of evidence in respect of the victim's legal duty to maintain the aforesaid minor child, the victim's remuneration details at the time of the fatal road accident, the compensation awarded to aforesaid dependant by the compensation commissioner if the victim was injured during the course and scope of his employment, the dependant's past loss of support, and the defendant's future loss of support calculated and presented by an actuary.

[23] The compilation of an actuarial assessment report, the reservation of an actuary intended to be called as an expert witness, the actuary's mode of travelling, the actuary's hotel accommodation, the duration of the actuary's court attendance, the actuary professional status, standing or profile and the actuary's length of absence away from his office – all these have huge financial implications for the plaintiff. It is often unwise to make such elaborate practical arrangements to secure the attendance of an actuary or any quantum witness before a court has ruled in favour of the plaintiff on the merits. Very strong practical and financial

considerations almost invariably dictate that such elaborate arrangements and consultations be held back pending the midway decision by the court on the merits. Here and everywhere it is an accepted practice, in third party claims, to have the merits and quantum separated in terms of rule 33(4) in order to deal with the issues pertaining to the merits first and to let the issues pertaining to quantum to stand over for later adjudication. See the obiter dictum by Lombard J in **BAPTISTA v DIE STADSRAAD VAN WELKOM** *supra* at 520C – E.

[24] Ms J M A Engelbrecht, the plaintiff's attorney, in her motivation for the separation of issues, alluded to practical problems which often plaque the simultaneous bringing to court of all the witnesses, in other words, quantum witnesses together with the merit witnesses.

At par 11 of the supporting affidavit she stated:

> "Dit is met eerbied onbillik om van die Eiseres *in casu* in haar verteenwoordigende hoedanigheid te verwag om daardie finansiële uitgawes aan te gaan ten einde al hierdie getuies na die

> Hof te bring onderwyl die aangeleentheid slegs vir drie dae geplaas is en daardie getuies letterlik in die hofgang sal moet rondstaan terwyl die dispuut met betrekking tot die meriete uitgepluis word. Die getuies se koste is substansieel, welke koste aangegaan moet word sonder dat die Verweerder se aanspreeklikheid gefinaliseer is."

It certainly makes no sound economic proposition to assemble expensive expert witness prematurely.

[25] The contention of the defendant meant that once a court had decided the dispute on the merits in favour of the plaintiff, the plaintiff was obliged to present her case on quantum at once. In developing that argument further Mr Fourie contended that the case as a whole was enrolled for adjudication over the aforesaid three day period. Since the separation order was made on the very first day and the merits conceded immediately thereafter, he contended that the allocated time had to be promptly used to deal with the still disputed issues of quantum.

[26] In my view the contention is untenable. If it were so, it would defeat the very basic purpose of rule 33. At the very heart of the rule, is the intention not only to curtail civil hearing

proceedings but also to minimise the costs of our civil justice system. To uphold the contention would render the separation order practically ineffective and inoperative. The costs of litigation would unnecessarily escalate. In a case where quantum expert witnesses are prematurely subpoenaed, but the plaintiff becomes unsuccessful on the merits, the quantum phase of the hearing automatically falls away. All the costs incurred relative to the quantum would become wasted costs. Such waste costs can be avoided. It makes perfect sense for a plaintiff to ask for a separation order and for the court to stay the hearing, let such plaintiff go home and afford him or her ample opportunity to prepare for the next round – the quantum phase of adjudication.

[27] In the matter between **FAIGA v BODY CORPORATE: DUMBARTON OAKS AND ANOTHER** 1997 (2) SA 651 (W) at 669H – I, A P Joubert AJ had this to say about a separation order:

> "A separation of issues in terms of the provisions of Rule 33(4), by its very nature, fragments a hearing. This undesirable feature is counterbalanced by the prospective advantage of a saving in

> costs. One of the great advantages of the Rule is that in matters of delict, depending on the outcome of the hearing on the merits, the issue of quantum might never arise. Also, in those instances where the plaintiff succeeds on the merits, the matter of quantum is often settled."

I am in agreement.

[28] In **GROOTBOOM v GRAAFF-REINET MUNICIPALITY** 2001 (3) SA 373 ECD at 382B Ponnan AJ, as he then was, expressed similar sentiments and quoted, with approval, the aforegoing passage by Joubert J. This is how he expressed himself:

> "Whilst I am in respectful agreement with those sentiments, I am also acutely aware of the onerous burden that litigation on this scale must place on the plaintiff's meagre financial resources."

Once again, I am in respectful agreement with the learned Judge. Financial considerations often inform the separation order as envisaged in the sub-rule.

[29] I hasten to point out that in both the **Faiga's** case and the **Grootboom's** case the debate was about the plaintiff's costs

incurred in determining the issue of liability. On behalf of the legal representatives of the plaintiffs the courts were urged that, if the courts, on the merits, came to respective decisions favourable to the respective plaintiffs, they should also immediately make awards of costs, in favour of the plaintiffs then and there. However, on behalf of the respective defendants the courts were urged to make no awards of costs at that juncture but rather to reserve decisions pertinent to the costs for later adjudication.

[30] In *casu* the debate is not precisely the same. It is somewhat different. It is about the costs involved in postponing the case in order to hear the issues of quantum later rather than instantly as Mr Fourie would have it. He had no problem against the awarding of costs incurred in adjudicating the issues relative to the merits. I am of the firm view that no case has been made out to justify sanctioning the plaintiff for her perceived failure to immediately proceed with the presentation of her case with regard to quantum. A separation order necessarily fragments the hearing into two distinct phases. The transition from the first phase to the second phase entails a break and not a trivial pause.

[31] Where, as in the instant case, the claim is not liquid or liquidated, but rather based on delictual damages which cannot be readily ascertained by a simple mathematical calculation, the interval or the transition between the primary phase of merits and the secondary phase of quantum often endures for long periods of time. It is extremely difficult if not simply impossible in a case like this for the plaintiff to cross such a bridge within only a few weeks or months. Any attempt to drastically narrow the separation interval as the defendant contended would render the separation order meaningless for all intents and practical purposes. Such frustration of the rule, the law will not countenance.

[32] It follows from the aforegoing that the plain could not be said to have been in default on account of her alleged unreadiness to present any evidence to prove the quantum of her damages on the very same day soon after the defendant had conceded the merits. Because she was not in default, no sound reason existed for her to be penalised. The mere grant of the separation order warranted the postponement of the proceedings. Upon the making of such

an order the items on the court agenda, in other words, the notice of setdown, were restricted to the issues concerning the merits. Upon the defendants making of the concession on the merits in favour of the plaintiff the agenda was exhausted. The business I was called upon to do for the day in respect of the case was done. Therefore the case had to be postponed. The plaintiff was not to blame for the postponement. The proceedings are now in suspense. In due course the plaintiff will break the transition phase by way of another notice of setdown. When such interval is over, I shall return to the bench to deal with the second phase of the proceeding. There will be new items on the second agenda. All of them will be about quantum issues.

[33] Mr Zietsman urged me to reserve the costs concerning the inevitable postponement for later adjudication. The postponement is inextricably linked to the determination of the quantum of damages. If the plaintiff wins the second round as well, she will be entitled to be awarded costs incurred in determining the quantum including the costs of the postponement in dispute. On the other hand, if the plaintiff loses the second round, which though unlikely is

nonetheless possible, then in that event the defendant will be entitled to be awarded costs incurred in determining the quantum including the costs of this very same postponement which is in dispute. A matter of costs involves the exercise of judicial discretion, requires consideration of all the relevant facts and a decision relative hereto should be fair and reasonable to all parties concerned. **BABTISTA v STADSRAAD VAN WELKOM** 1996 (3) SA 517 at 520E – F, per Lombard J.

[34] In the circumstances, I order as follows:

a. The defendant is held liable for the damages, if any, that the plaintiff's minor son N N has suffered and might suffer as a consequence of the fatal bodily injuries sustained by the minor's father Thabo Samuel Nkone in a road accident which happened at Wesselsbron on 4 July 2006.

b. The defendant is directed to pay the plaintiff's costs occasioned by this hearing in order to determine liability;

c. The matter is postponed *sine die*;

d. The awarding of the costs of the postponement is reserved for later adjudication.

M. H. RAMPAI, J

On behalf of plaintiff:	Adv. T. A. Zietsman Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of defendant:	Adv. J. A. Fourie Instructed by: Vermaak & Dennis BLOEMFONTEIN

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