SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA, JOHANNESBURG

Case No. 04/12338

In the matter between:

THE PREMIER OF THE GAUTENG PROVINCE Applicant/First Defendant

and

SHABBIR CARRIM First Respondent/Plaintiff
DR. GREGORY BASIEWICZ Second Respondent/Second Defendant

MEYER, J

[1] This is an application for leave to appeal to the Supreme Court of Appeal or to a Full Bench of the South Gauteng High Court against "two aspects of the judgment and the order" that I handed down on the 7th November 2008. They are the finding that the first defendant (applicant) is vicariously liable to the plaintiff (first respondent) for the negligent conduct of the second defendant (second respondent) and the finding and order that the first defendant must pay 30% of the second defendant's trial costs.

[2] In holding the first defendant vicariously liable, the common-law test for vicarious liability in deviation cases as laid down in Minister of Police v Rabie 1986 (1) SA 117 (A) and further developed in K v Minister of safety and Security 2005 (6) SA 419 (CC) has been applied to the facts of this case in the light of the spirit, purport and objects of the Constitution. The first defendant's contention that I "failed to appreciate that the usual enquiry would not suffice in this case" and its contentions relating to the plaintiff's "state of mind" and his "belief or awareness" is premised on its reliance on an alleged "private arrangement" between the plaintiff and the second defendant, which arrangement was rejected in my judgment insofar as the plaintiff's retroperitoneal surgery and his admission to the Chris Hani Baragwanath Hospital

from 20 – 27 May 2002 is concerned. The facts and probabilities relevant to the rejection thereof are extensively dealt with in my judgment and no purpose will be served in repeating them.

[3] There is, in my view, no reasonable prospect that another Court might come to a different conclusion on the aspect of vicarious liability or the findings made in arriving at such conclusion.

[4] I now turn to the grounds raised by the first defendant in support of its application for leave to appeal against the costs order.

[5] The first ground raised is that having regard to the formal complaints made by the plaintiff about the arrangement between him and the second defendant, the first defendant had a public duty to oppose the plaintiff's claim of vicarious liability. The alleged 'arrangement' between the plaintiff and the second defendant, if it existed, could at best for the first defendant only have tainted the plaintiff's first admission to the Chris Hani Baragwanath Hospital during the period 1 – 4 May 2002 for the purpose of the radical orchiectomy. The delictual acts for which liability was claimed, however, related to the plaintiff's retroperitoneal surgery and his admission to the Chris Hani Baragwanath Hospital from 20 – 27 May 2007 when the second defendant acted within the course and scope of his employment and duties with the first defendant in the treatment that he had given to the plaintiff and in performing the retroperitoneal surgery on the plaintiff.

[6] The second ground raised is to the effect that the conduct of the second defendant in abusing his position to unfairly secure benefits for himself and the plaintiff ought to have been taken into account in considering the award of costs. Any benefit that the second defendant secured for himself, at best for the first defendant, could only have related to the plaintiff's first admission to the Chris Hani Baragwanath Hospital during the period 1 – 4 May 2002 for the purpose of the radical orchiectomy. In recommending and performing the retroperitoneal surgery on 21 May 2002, the second defendant's subjective intention was not self-directed. He intended to serve the interests of the plaintiff alone.

[7] The third ground raised is that the first defendant was not given an opportunity to deal with the question of the costs of the second defendant. If this was indeed the position, then it was open to the first defendant, once it ascertained that it had been ordered to pay 30% of the second defendant's trial costs, to apply to be heard on the issue of costs if it maintained that it had not been heard thereon. In Union Government v Gass 1959 (4) SA 401 (A), at p 412 F – G, it was held:

> "For when a Court, without first hearing a party therein, awards costs against him, such award is always made upon the implied understanding that it is open to the mulcted party, or his counsel, to apply, within a reasonable time, to be heard on the issue of costs (see *Estate Garlick v C.I.R.,* 1934 A.D. 499 and especially at pp. 503 and 505)."

See also: Hart v Broadacres Investments Ltd 1978 (2) SA 47 (NPD), at pp 49H – 50B. No such application was made by or on behalf of the first defendant in this case.

[8] I am unable to find that the first defendant has reasonable prospects of success on appeal against the award of costs that has been made against it.

[9] In the result, the following order is made:

1. The first defendant's application for leave to appeal is refused.
2. The first defendant is ordered to pay the plaintiff's costs of opposing the application for leave to appeal, including the costs consequent upon the employment of senior counsel.
3. The first defendant is ordered to pay the second defendant's costs of opposing the application for leave to appeal.

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P.A. MEYER
JUDGE OF THE HIGH COURT

1 April 2009.