REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 01663/14

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ✓

9/5/19 .....

In the matter between:

Koagile: Olerilwe Daniel — Plaintiff

and

PRASA — Defendant

Judgment on postponement

Van der Linde, J

[1] The plaintiff sues the defendant for damages caused as a result of injuries he sustained when he boarded a train owned and operated by the defendant. He now applies for the postponement of the trial and that application is opposed by the defendant. I infer from the material to which I was referred by agreement between the parties, specifically a report by a Ms Gibson, that the plaintiff has suffered a severe and permanent debilitating brain injury. One can thus infer that the claim is a substantial one.

[2] Generally, if a bona fide reason is furnished for such a postponement, and if the defendant will not be unduly prejudiced by a postponement, such an application is granted, provided of course there is any point in the postponement. As will appear, it is this latter aspect which forms the basis of the opposition to the postponement application.

[3] In Erasmus, Superior Court Practice, Vol 2, pp D1-552A, the following is said about postponements (footnotes omitted):

"The legal principles applicable to an application for the grant of a postponement by the court are as follows:

(a) The court has a discretion as to whether an application for a postponement should be granted or refused. Thus, the court has a discretion to refuse a postponement even when wasted costs are tendered or even when the parties have agreed to postpone the matter.

(b) That discretion must be exercised in a judicial manner. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. If it appears that a court has not exercised its discretion judicially, or that it has been influenced by wrong principles or a misdirection on the facts, or that it has reached a decision which could not reasonably have been made by a court properly directing itself to all the relevant facts and principles, its decision granting or refusing a postponement may be set aside on appeal.

(c) An applicant for a postponement seeks an indulgence. The applicant must show good and strong reasons, i e the applicant must furnish a full and satisfactory explanation of the circumstances that give rise to the application. A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics, and where justice demands that he should have further time for the purpose of presenting his case.

(d) An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. If, however, fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement even if the application was not so timeously made.

(e) An application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

(f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of the court will be exercised; the court has to consider whether any prejudice caused by a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanism.

(g) The balance of convenience or inconvenience to both parties should be considered: the court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not."

[4] In considering this application I bear these principles in mind. Here the accident happened a long time ago, on 27 October 2012, and that could be reason enough to refuse the postponement. But Mr Raubenheimer, who appeared for the defendant, did not rely on that ground to oppose the application. And, as it happened, the parties had in any event agreed

that the question of quantum would not be decided now, so that there would not have been finality this week in any event.

[5] Had the trial run this week, there would have been finality concerning the question of liability. Postponing the trial therefore postpones finality on that part of the case. There are known disadvantages to the postponement of an action, and the old adage of Justice Delayed is Justice Denied is real. Witnesses' memories about events inevitably fade. Witnesses die, if not unnatural causes. Or witnesses may become unavailable for other reasons.

[6] Against that must be weighed the reasons for the postponement. The plaintiff himself is, I infer, available to testify, and so too a corroborating witness. Normally, the plaintiff will be the most critical factual witness for the merits of his case. One knows from experience in like cases that the severest of injuries occur in a moment's inattention, or misjudgement. But here, given the plaintiff's alleged injury, it is said that his recollection may be compromised. And it is this feature that forms the basis for the postponement.

[7] Mr Van der Spuy for the plaintiff based his application for the postponement on the need for having to call expert evidence to prove the fact of the plaintiff's brain damage. He envisages that the fact of the plaintiff's brain damage is relevant to the merits of the case, because it will explain why the plaintiff is not able to recall the events leading to his injuries in any detail.

[8] In this regard I was referred to the report of Ms Gibson, the intended witness. She is a psychologist with special interest in neuropsychological and educational assessment of adults and children. I had specific regard to the following aspects of her report. In paragraph 4.1 at page 9 of her report, Ms Gibson reported that the plaintiff was quiet and withdrawn, and would only speak when asked a direct question. He was found to have extensive neurocognitive deficits consistent with severe brain injury, such as an extremely low rate of response, slow information processing, very poor ability to cope with complexity, impulse control difficulty, and deficits in numerous specific domains such as attention, mental tracking, information processing, learning, memory and problem-solving.

[9] His deficits are accepted as genuine. In paragraph 4.3.10 of her report, Ms Gibson said that the test profile is consistent with severe brain injury, and that the plaintiff was found to have numerous neurocognitive deficits. These include executive difficulties, such as a weak inhibition of impulsivity. There is a tendency to concrete thinking and a concrete attitude which is consistent with frontal lobe damage. Further, there is a problem with rate of response, with learning, and – importantly for present purposes - with his rate of response.

[10] There is also, equally important, difficulties with recall and memory, and a problem with his ability to retrieve information from his memory store. He has a problem to with verbal concept formation, non-verbal reasoning, and verbal fluency. Ms Gibson concludes that there is strong medical evidence that the plaintiff sustained a severe to very severe brain injury from which long-term and permanent neuro-sequelae would be expected.

[11] The riposte by Mr Raubenheimer to this argument, is that Mr Van der Spuy is seeking to immunise the plaintiff from criticism for being a poor witness. His argument is that, either the plaintiff is able to bring himself within the provisions of section 9 of the Civil Proceedings Evidence Act, 1965; or he is not.

[12] That section provides as follows:

> ***"9 Incompetency from insanity or intoxication***
>
> *No person appearing or proved or to be afflicted with idiocy, lunacy or insanity, or to be labouring under any imbecility of mind arising from intoxication or otherwise, whereby he is deprived of the proper use of reason, shall be competent to give evidence while so afflicted or disabled."*

[13] And, so the submission went, the plaintiff is unable to bring himself within the ambit of the statutory provision, because he is not afflicted with idiocy, insanity, or imbecility of mind. That being so, there would be no point is proving the alleged brain damage and its sequelae for purposes of the merits part of the case and therefore there would be no point in granting a postponement.

[14]Is that a valid objection? As I see it, a distinction has to be drawn in principle between the competence of a witness to testify at all, and therefore to be compellable, on the one hand; and on the other hand the question as to the weight to be added to the evidence of a witness who is who is competent and compellable to testify, and who in fact testifies.

[15]DT Zeffert and AP Paizes, The South African Law of Evidence, 3rd ed, p.1014 put it as follows: *"Questions of competency and the procedure to be followed in dealing with a witness who is competent should not be confused. They are discrete notions which the judicial officer should keep distinct."*

[16]Likewise, the authors of Juta's e-publication, Principles of Evidence, 4th ed, contend at ch 22 p 452: *"Therefore, a person who is affected to some extent but still endowed with the proper use of his reason, which enables him to convey his observations in an understandable way to the court, will be a competent witness."*

[17]In this case it is not suggested that the plaintiff is not competent and not compellable. After all, the plaintiff is litigating in his own name, and not in the name of a curator ad litem. The expressed intention is actually to call the plaintiff to testify in his own cause. Section 9 of the Act therefore seems to me to be of no application, at least not at this stage of the proceedings.

[18]The real question is simply whether the evidence of Ms Gibson would be admissible, were she to be called; or whether it would be inadmissible for irrelevance. If the proposition is, as I believe it is, that the plaintiff has a poor memory, and that that condition is a function of the brain injury he sustained, then I do not believe the envisaged evidence would be irrelevant.

[19]It is well-known that the viva voce evidence of a witness is considered from the tripartite perspective of credibility, reliability, and probability. These three aspects are considered together but, when all three are evenly balanced, probability swings it. If a witness' evidence appears unreliable but in truth this is a function of poor recollection or inadequate faculty, and not of doubtful credibility, then evidence supporting that consequence must surely be

relevant. It will still be an issue as to whether Ms Gibson's evidence on that score will be credible, reliable and probable.

[20]That brings one to why a postponement is needed at all in order to call Ms Gibson, given that the uniform rules relating to advance notice of an expert witness had in fact been complied with. I understood from the Bar that at the pre-trial conference that was held on 4 April 2019, the parties agreed that they would ask the court to separate "merits and quantum", as these agreements are colloquially put. It was not suggested than that Ms Gibson would be called on the merits part of the case. In consequence the defendant did not prepare to deal with Ms Gibson, either by engaging own expert witnesses on this score or otherwise.

[21] It follows that the postponement must be granted. Costs are an issue. The plaintiff asked that they be reserved or be in the cause. The defendant asked that the plaintiff pays them. The plaintiff has caused the postponement by its failure to make it clear early on that it would call Ms Gibson on the merits, and so it must pay the costs wasted as a result of the postponement.

[22]In the result I make the following order:

(a) The trial of this action is postponed sine die.

(b) The plaintiff is directed to pay such costs as are wasted as a result of the postponement.

WHG van der Linde
Judge, High Court
Johannesburg

Date application: 7 May 2019
Date judgment: 9 May 2019 (8 May being a public holiday)

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