**Case No: 361/98**

# IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

**REPORTABLE**

**In the matter of:**

| | |
|---|---|
| **LEONIDAS SOUZOU MICHAEL** | **First Appellant** |
| **THELMA MICHAEL** | **Second Appellant** |

**and**

| | |
|---|---|
| **LINKSFIELD PARK CLINIC (PTY) LIMITED** | **First Respondent** |
| **DR HUGH M THOMAS** | **Second Respondent** |

| | |
|---|---|
| **CORAM:** | **Howie, Farlam JJA and Chetty AJA** |
| **Date Heard:** | **19 February 2001** |
| **Date Delivered:** | **30 March 2001** |

Medical negligence alleged ‘ case for adverse costs order against successful defendant’ referral to Health Professions Council.

**JUDGMENT ON COSTS**

THE COURT

**[1]** Pursuant to our order of 13 March 2001 the parties have filed written

submissions as to costs. It is clearly common cause that on the basis of our findings in respect of the second defendant's dishonesty this Court is at large on the matter of costs and is not bound by the trial Court's decision refusing a special costs order.

**[2]** Broadly, the argument for the plaintiffs is that the second defendant misled the plaintiffs into suing the first defendant. It is said that he did so by alleging that the Lohmeier had not functioned and by conspiring with Sister Glaeser and Sister Montgomery to obtain the first defendant's documentation concerning the apparatus. Reliance is also placed on his affirmative answer to a pretrial question, namely, whether the patient's heart rate would have been restored sooner had a functional defibrillator been available at an earlier stage of the resuscitation process. Accordingly the plaintiffs seek an order requiring the second defendant to pay the first defendant's costs and their costs incurred as against the first defendant. In addition, the plaintiffs contend that the second defendant should pay at least fifty per cent of their costs incurred as against him and, moreover, on the scale as between attorney and own client.

**[3]** On behalf of the first defendant it is submitted that the second defendant should pay one half of its trial and appeal costs. This contention is based on the second defendant's having persisted, until as late as his evidence in the trial, in attempting to show that the Lohmeier had not functioned.

**[4]** For the second defendant it is urged that the possible relevance of a rapid decline from tachycardia to cardiac arrest was not a feature of the plaintiffs' case either as pleaded or presented in evidence and that it only emerged in Professor Fourie's evidence (for the first defendant) that such a decline tended to implicate propranolol. It is submitted that the second defendant's false allegation of a period of normality preceding arrest only extended the duration of the trial by some five days, being roughly half the time for which he was cross-examined. Justice would therefore be served, it is said, by depriving him of his costs for five days of the trial and by ordering him to pay the plaintiffs' costs for five days.

**[5]** It is beyond question that the circumstances of a case may warrant an order, in the exercise of the court's discretion, depriving a successful party of costs partially or entirely, and even warrant an order requiring the successful party to pay the unsuccessful party's costs - again, partially or

entirely.

**[6]** The reprehensibility of the second defendant's conduct in the various respects found in our earlier judgment, in our view, undoubtedly demands special costs orders. At the same time one's natural reaction to that conduct must not lead to a loss of perspective. The trial was about the issue of the cardiac arrest and, to a lesser extent, the issue of the resuscitation process. Those two issues were interlinked in that resolution of the first was not independent of resolution of the second. Elements of both had to be examined before it was possible to determine whether the arrest was caused by cocaine toxicity or propranolol. Undeniably, the bulk of the trial was taken up by the second defendant's "scientific" defence that cocaine toxicity was to blame. That defence "foreshadowed clearly enough in pre-trial reports and disclosures" was ultimately successful. On the other hand, what was successfully disproved by the plaintiffs "but only at the appeal stage" was his false "factual" defence that, in essence, a significant period of normality separated the administration of propranolol from the cardiac arrest.

**[7]** It is not possible to assess with any accuracy the quantum of time which the "factual" defence occasioned as regards preparation, documentation and court hours. It was not, of course, limited simply to the alleged period of normality. Much court time was also taken up by related enquiries as to dilution of the propranolol, size of syringe, site of administration, speed of administration, size of dose, examination of the chart and additional notes and discussion of medical literature. A great deal of that would have been unnecessary had the second defendant told the truth from the outset. But it must be remembered that had he done so the rapid decline aspect would have provided the plaintiffs sooner with, arguably, their strongest point and no doubt still have prompted some evidence and argument relative to the effects and risks of propranolol. However, reverting to what was, as opposed to what might have been, it seems to us, on a rough and ready approximation, that the false "factual" defence took up, all told, one-fifth of the trial.

**[8]** The seriousness of the second defendant's presently relevant conduct is not simply that that time was wasted. It lies in the fact that he deliberately put up this defence knowing it was false and knowing that the plaintiffs would have no other authoritative source of information as to what led to the cardiac arrest. It cannot possibly assist him that the rapid decline aspect was not part of the plaintiffs' case as pleaded or presented. It was absent precisely because of his dishonestly contrived entries and allegations. The plaintiffs were in serious jeopardy of this false defence succeeding. It passed muster with the trial court, after all.

**[9]** As regards the joinder of the first defendant, while the plaintiffs must in the beginning have been influenced by the second defendant's allegation that the Lohmeier was not working, it became plain during the trial, if not before, that the falling digital display was a normal feature and that a variety of tests had shown the apparatus to be in sound working order. Despite this evidence, and the evidence of Dr Fayman, their own witness, that the patient's body reaction was the same in response to both defibrillators, they chose to continue pursuing the action against the first defendant. It could conceivably be said, one supposes, that the opportunity still existed of extracting from the second defendant evidence implicating the Lohmeier. But before he ever testified it would have been plain to the plaintiffs' legal representatives what the worth of his word was. The acid test, we consider, is that even late into the argument on appeal the plaintiffs' counsel were still contending for dysfunction of the Lohmeier, but by now basing their case solely on the possible inference to be drawn from its unsuccessful use compared with the successful use of its substitute. Nothing in the conduct of the plaintiffs' case suggests that they would readily have released the first defendant from joinder if they had only known of the second defendant's negligent ignorance of the Lohmeier's functions.

**[10]** For these reasons we do not think that either the plaintiffs' or the first defendant's respective arguments in quest of full, or half, payment of the latter's costs by the second defendant can prevail.

**[11]** What we do consider to be fair and reasonable, however, is to order him to pay one-fifth of the plaintiffs' trial costs. Furthermore, the first defendant's legal representatives were necessarily required to remain in court while the false "factual" defence was explored and it would not be right for the plaintiffs to have to bear the costs occasioned by that attendance. However, rather than have the second defendant pay them what they owe the first defendant in that respect it is simpler to order him to pay one-fifth of the first defendant's costs.

**[12]** As a mark of this Court's disapproval of the second defendant's conduct those costs payable to the plaintiffs and the first defendant will be trial costs, not merely the costs relative to one-fifth of the time the case took in court. In addition, the costs payable will be payable on the scale as between attorney and own client.

**[13]** We propose to order further that the second defendant be deprived of one-fifth of the costs payable to him by the plaintiffs.

**[14]** As for the costs of appeal, it could well be said that in obtaining those costs orders the plaintiffs have achieved substantial success. Given the length of the trial and the enormous costs that it must have entailed, the

success achieved by the appellants must be substantial in monetary terms. However, it is significant that in seeking leave to appeal the plaintiffs raised only one ground in their notice of application in respect of costs and that was based on the premise that they should have succeeded on trial. Leave was granted in accordance with the notice. It is understandable, therefore, why no reference to costs in the event of appellate failure was made in the plaintiffs' heads of argument and why the matter of a special costs order had to await this Court's findings. There can also be little doubt in all the circumstances that had the second defendant, in response to the application for leave to appeal, offered the plaintiffs the costs relief they are now due to get, they would have persisted in appealing on the merits.

**[15]** We take all that into account. What cannot be lost sight of, however, is that the appeal was prolonged by argument on the second defendant's credibility and his "factual defence". The subject was dealt with in both the plaintiffs' and the second defendants heads and, although minimally referred to by the latter's counsel, it was canvassed in depth by the plaintiffs' counsel for virtually the whole of the first morning of the two-day hearing. It was an issue on which the plaintiffs have been successful and on which the second defendant did not offer to relent. In terms of time, roughly speaking, the issue involved about one-quarter of the appeal hearing. We have come to the conclusion therefore that the plaintiffs should be accorded some costs relief on appeal. We have considered limiting that relief by reference simply to the amount of court time taken but, in line with our approach to the trial costs, think that we should mark our disapproval by making the second defendant pay one-quarter of the plaintiffs' appeal costs and by depriving him of one- quarter of his appeal costs.

**[16]** It remains to add that the costs, the indicated portions of which will be payable to the plaintiffs, will include the costs of two counsel.

**[17]** As regards the costs in respect of the further written submissions which the parties have presented, it seems to us proper to order that these be paid by the second defendant, including the costs, in the plaintiffs' case, of two counsel.

**[18]** Finally, also pursuant to our earlier order, the second defendant's counsel has advanced the submission that we should not refer the judgment to the Health Professions Council. He urged that the second defendant had incurred considerable expense in successfully defending himself against allegations of negligence and that the adverse finding of the trial court and this Court were themselves punitive, as were the special costs orders. In addition, said counsel, the second defendant had not practised

in South Afica as an anaesthetist for over three years and the prospect of his again being a defendant in a medical negligence case here was remote.
**[19]** We consider that referral is advisable. It is, in our view, in the interests of the medical profession and the public that the Council should be apprised of our findings and give consideration to what steps, if any, it deems appropriate in the light of those findings and the factors urged upon us by the second defendant's counsel.
**[20]** The order we make is as follows:

1. The appellants are ordered to pay the first respondents' costs of appeal and three-quarters of the second respondent's costs of appeal.
2. The second respondent is ordered to pay one-quarter of the appellants' costs of appeal, such costs to include the costs of two counsel.
3. The costs in respect of the written submissions on the question of costs are to be paid by the second respondent, including, in the case of the appellants, the costs of two counsel.
4. The order of the court *a quo* is amended by adding to it the following:

   "The aforegoing is subject to the following:

   1. The second defendant is ordered to pay one-fifth of the plaintiffs' costs, such costs to include the

costs of two counsel and the costs occasioned by the declaration, hereby made, of Professor Koorn and Professor Moyes and Messrs J Ruiter, M S Southern and T C Downes as necessary witnesses.

2. The second defendant is ordered to pay one-fifth of the costs of the first defendant.

3. The costs payable in terms of paragraphs 1 and 2 are to be paid on the scale as between attorney and own client.

4. It is ordered that the costs payable by the plaintiffs to the second defendant shall be limited to four-fifths of the second defendant's costs."

5. The Registrar is hereby directed to forward a copy of each of this Court's judgments in this matter to the Health Professions Council for such action as it considers appropriate.

...............................................

HOWIE JA

..............................................

FARLAM JA

.........................................

CHETTY AJA