



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, BHISHO)**

**CASE NO:920/2021**

**In the matter between:**

**M[...] M[...]**

**PLAINTIFF**

**And**

**MEMBER OF THE EXECUTIVE COUNCIL  
FOR THE DEPARTMENT OF HEALTH,  
EASTERN CAPE**

**DEFENDANT**

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**JUDGMENT**

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**ZONO AJ:**

***Introduction***

[1] This matter was duly set down for trial on 20 May 2024. The allocation of a trial date and set down was a sequel to the following incidences.

1. On 01 September 2022 the court granted an Order in terms of Rule 33(4) of the Uniform Rules of Court, separating the issue of liability from that of *quantum*. The matter was then ordered to proceed on merits on the date of the trial, with the issue of *quantum* being postponed *sine die*. Apparently, this court granted an Order by agreement in terms of which the defendant was found liable to pay the

plaintiff all such damages as the plaintiff in both her personal and representative capacities may prove as a result of the negligent treatment of the plaintiff and her minor child, A[...] M[...] (who was born on [...] 2016) by the defendant's employees. *Quantum* was postponed *sine die* to a date to be arranged with the registrar. This Order was taken on 31 March 2023.

- [2] On 20 May 2024 the parties sought to stand the matter down as they were finalizing settlement negotiations on *quantum*. On 21 May 2024 the parties came before me with a draft order which they said it is taken by consent. We agreed that it will be made an Order of court on record in the open court.
- [3] Both parties indicated that they sought audience on a crisp issue relating to the manner or method of payment of costs of Carers or caregiving. The defendant expressly indicated that they have no issue with the duty to pay costs of Carers or care giving, but they have to be paid on installments or on staggered payments.
- [4] On arrival in court, after submissions had been made on behalf of the plaintiff, the counsel for the defendant, in his submissions, sought to renege from the agreement indicated to me in Chambers. The submissions were that the defendant does not agree to the amounts set out in the draft order. Upon serious probe by the court, counsel for the defendant confirmed that the Order is by agreement, but he disagree with the lumpsum payment of the amounts set out in the draft order. The counsel for the defendant was at pains show reference to the lumpsum payment in the court order. He contended for payment thereof in instalments or staggered payments. The defendant's counsel could not even lay the basis for such contention, notwithstanding

my invitation to support the contention. The Order sought by consent was ultimately granted.

*Costs of Carers or “caregiving”*

[5] The counsel for the defendant shifted his focus to the costs of Carers or caregiving. He disputed the amounts of costs of Carers or caregiving. This dispute was not the kind or nature of dispute the parties agreed to seek resolution of in court. Their agreement was that they would seek court’s intervention **only** on the method of payments of costs of Carers or caregiving. The dispute raised by the defendant about the amount of the costs of Carers or caregiving has no basis in fact.

[6] Firstly, paragraph 12 of the Court Order sought by consent on 21 May 2024 reads as follows:

“12. *The parties record that it is not necessary for the plaintiff to call any expert witness to confirm any joint minutes, as the joint minutes are accepted as true and correct in all respects.*”

[7] Paragraph 8.2 of the Pre-trial minute duly signed by the parties on 17 April 2024 reads as follows:

“8.2 *The parties agree that the joint minutes and the facts agree (sic) upon by the experts in the joint minutes are admitted and entered into the record of proceedings as evidence.*”

[8] Paragraph 17 of the same Minute is worded as follows:

**“FUTURE MEDICAL EXPENSES**

17. *The parties agree that the actuarial calculations of Gert Du Toit, 15 March 2024, has calculated the child’s interim future hospital and medical costs and related expenses*

*to the sum of R16 737 267.00 and that this calculation is strictly based on the binding joint minute of the parties' expert and constitutes a fair compensation in respect of the child's interim future hospital and medical costs and related expenses."*

[9] The actuarial report of Gert Du Toit referred to in the pre-trial minute is located at pages 162 to 173 of the Plaintiff's Medico-Legal Reports for Quantum experts. Annexure 5 of the report at page 171 constitutes Detailed Results of Medical Expenses. Items Nos. 18 to 23 of annexure 5 deal with the **care** of the minor child. The items dealing with the Carers or caregiving (items 18-23) are agreed to by the parties' experts. The figures set out in items 18-23 of annexure 5 are too, agreed to. Mr Cole SC advised the court that the total amount of costs relating to Carers or caregiving amounts to **Eight Million Six Hundred and Sixty Thousand Five Hundred and Eighty-Two Rands (R8 660 582.00)**.

[10] The contents of paragraphs 6 to 9 above demonstrate vividly clear that there is absolutely no basis for the defendant to contend that she does not commit and agree to any amount in respect of the caregiving. There is clear basis that there was an agreement on the amounts set out in items 18 to 23 of annexure 5 of actuarial calculations of Gert Du Toit. In what follows I deal with the binding nature and legal effects of the pre-trial and joint minutes.

### *Discussion*

#### *Pre-trial Minute*

[11] With regard to the pre-trial minute, there is an authority for proposition that parties are bound by the admissions made in the pre-trial minute and a party is not entitled to resile from an agreement deliberately reached at the pre-trial conference<sup>1</sup>. An attempt by the defendant to resile from the pre-trial minute duly signed by the parties must be

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<sup>1</sup> Price *NO v Allied-JBS Building Society* 1980 (3) SA 874 (A) at 882D - H; *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2010 (4) SA 122 (SCA); 2010 (4) ALL SA 23 (SCA) at para 6.

given a dim view. In paragraph 8.2 and 17 of the pre-trial minute the parties agreed that the joint minutes and facts agreed upon by the experts in their joint minutes are admitted. It is also admitted that the actuarial calculations of Gert Du Toit is strictly based on the **binding joint minutes** of the parties' experts and **constitutes a fair compensation** in respect of the child's interim future hospital and medical costs and related expenses. It has been demonstrated above that the calculations in respect of the costs of the Carers or caregiving (including figures set out therein) have been agreed to. Defendant's refusal to commit to the agreed facts is without merit and is unsustainable.

#### *Experts' Joint Minute*

[12] Sutherland J had the following to say in *Thomas v BD Sarens (Pty) Ltd*<sup>2</sup>:

[10] *Where litigants in a damages dispute give due notice to call an expert who is to adduce facts and to give an opinion, such notice binds the litigant who gives that notice. It is not open to that litigant to impeach its own expert witness unless and until it clearly repudiates all, or some, of the expert's contribution.*

[11] *Where the experts called by opposing litigants meet and reach agreements about facts or about opinions, those agreements bind both litigants to the extent of such agreements. No litigant may repudiate an agreement to which its expert is a party, unless it does so clearly and, at the very latest, at the outset of the trial. It is self-evident that do so at so late a stage is undesirable because it may provoke delay, but that is a practical aspect not touching on any principle. It is conceivable that very exceptional circumstances might exist that allow a litigant to repudiate an opinion later than this moment, such as fraudulent collusion, or some other act of gross misconduct by the expert, but such considerations do not bear extrapolation for present purposes.*

[12] *Where experts are asked or are required to supply facts, either from their own investigations, or from their own researches, and an agreement is reached with the other party's experts about such facts, such an agreement on the facts enjoys the same de facto status as facts that are expressly common cause on the pleadings or facts agreed in a pre-trial conference or in an exchange of admissions.*

[13] *Where two or more experts meet and agree on an opinion, although the parties are not at liberty to repudiate such an agreement placed before the court, it does not follow that a court is bound to defer to the agreed opinion. In practice, doubtlessly rare, a court may reject an agreed opinion on any of a number of grounds all amounting to the same thing; ie the proffered opinion was unconvincing. (Menday v Protea Assurance Co Ltd 1976 (1) SA 565 (E) at 669B-E.) The rationale for not affording a litigant the same free hand derives purely from the imperative of orderly litigation and the fairness due to every litigant to know, from the beginning of a trial on a premise that an issue is resolved only to find it is challenged.”.*

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<sup>2</sup> *Thomas v BD Sarens (Pty) Ltd* [2012] ZAGPJHC 161(12 September 2012) at paras 10-13.

[13] It has been alluded to above that the defendant only raised the repudiations referred to above during argument of the case. It was also after the consent order had been granted, where upon expert witnesses had been released. No exceptional circumstances had been shown to support her intention to resile from the agreement of the parties' experts. Experts' agreement are referred to in the signed pre-trial minute and are considered by the parties to be binding. I am therefore entitled to accept matters agreed upon by the parties<sup>3</sup>, as I hereby do.

*Public Health Care defence*

[14] The defendant raises in her amended plea a Public Health Care defence. However, in the pre-trial minute, the parties agreed that the issue of costs of Carers or caregiving do not form part of the public health care defence. Paragraphs 5 of the pre-trial minute signed by the parties on 17 April 2024 provides as follows:

“5. *In this regard, the parties agree that the issues listed below do not form part of the Public Healthcare defence and that there be separated in terms of rule 33(4) from issues relating to the public healthcare defence in general and be dealt with separately at the hearing of the matter on 20 May 2024:*

5.1 .....  
5.2 .....  
5.3 .....  
5.4 .....  
5.5 *the costs of Carers*  
5.6 .....  
5.7 .....  
5.8 .....  
5.9 *The costs associated with registration/management of a Trust.*”

[16] It worths repetition that the parties agreed and advised me that:

16.1 The defendant's liability to pay costs of Carers or caregiving is not an issue;

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<sup>3</sup> *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) at paras 64 – 66; *Krebs v Road Accident Fund* (2734/2020) [2023] ZAECQBHC 27 (25 April 2023) at para 39.

16.2 The dispute only relates to the method of paying the costs of the Carers or caregiving. The counsel for the defendant indicated that he will seek an order in terms of which defendant is directed to pay the costs of the Carers or caregiving in instalments or staggered payments.

[17] On the subject, the counsel for the defendant argued in court that the defendant seeks an order in terms of which the defendant is directed to pay only on production of an invoice. An argument was developed to the effect that the plaintiff must first incur costs and thereafter submit an invoice or voucher. This is tantamount and akin to payment of disbursements. This development was not exactly what I was told to be the issue for determination before commencement of the trial.

[18] I may at this juncture make, in passing, a general comment that the defendant during the hearing had a propensity of conducting a disorderly litigation. The litigation on behalf of the defendant was characterized by a disposition to ambush the other party and an inclination to renege from agreements entered into between the parties and their respective experts without notice.

[19] The plaintiff argued that there is no basis for the order sought by the defendant. Once the liability is acceded to, all the damages must be paid. The argument was developed to say payment in instalments is an option only if the public healthcare defence is not excluded. In this case, the public healthcare defence is excluded, so the argument went, therefore there is no basis for the payment in instalments or staggered payments.

[20] The defendant having been invited to make submissions to the above, it was only contended that if the court decides to grant the lumpsum payment "so be it". It depends on the court, so the argument went. Whatever this means I find that the defendant did not make submissions to counter-veil plaintiff's submissions.

[21] The plaintiff referred the court to the provisions of State Liability Amendment Act 14 of 2011 as well as to the Public Finance Management Act No.1 of 1999. It is necessary that the two enactments be interpreted by using the relevant principles of interpretation.

[22] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>4</sup> Wallis JA held that:

“[18] ..... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[23] I now turn to the provisions of State Liability Amendment Act<sup>5</sup>. Section 3 of the Act deals with the **satisfaction of final court orders sounding in money**. Subsections 2 to 5 thereof provide as follows:

- “2. The state attorney or attorney of record appearing on behalf of the department concerned as the case may be, must, within seven days after a court order sounding in money against a department becomes final, in writing, inform the executive authority and accounting officer of that department and the relevant treasury of the final court order.
- (3) (a) A final court order against a department for the payment of money must be satisfied—
  - (i) within 30 days of the date of the order becoming final; or
  - (ii) within the time period agreed upon by the judgment creditor and the accounting officer of the department concerned.

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<sup>4</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

<sup>5</sup> State Liability Amendment Act No.14 of 2011.



- (b) (i) *The accounting officer of the department concerned must make payment in terms of such order within the time period specified in paragraph (a)(i) or (ii).*
- (b) (ii) *Such payment must be charged against the appropriated budget of the department concerned.*
- (4) *If a final court order against a department for the payment of money is not satisfied within 30 days of the date of the order becoming final as provided for in subsection (3)(a)(i) or the time period agreed upon as provided for in subsection (3)(a)(ii), the judgment creditor may serve the court order in terms of the applicable Rules of Court on the executive authority and accounting officer of the department concerned, the State Attorney or attorney of record appearing on behalf of the department concerned and the relevant treasury.*
- (5) *The relevant treasury must, within 14 days of service of the final court order as provided for in subsection (4), ensure that—*
  - (a) *the judgment debt is satisfied; or*
  - (b) *acceptable arrangements have been made with the judgment creditor for the satisfaction of the judgment debt, should there be inadequate funds available in the vote of the department concerned.”*

[24] It admits of no doubt that the empowering provision requires that the payment of money in terms of a final court order must be made within thirty (30) days of the order becoming final<sup>6</sup>. The provision does not open a room for staggered payment or payment in instalments. Provisions imposing time limits and restrictions (without giving the court a power of extension) are as a rule peremptory<sup>7</sup>. Secondly, the use of the word “**must**” in the text demonstrates the imperative nature of the provision<sup>8</sup>. Everything done after the prescribed time is null and void<sup>9</sup>. Peremptory provision requires exact compliance for it to have the stipulated legal consequences and any purported compliance falling short of that is a nullity. Non-compliance with peremptory provision results in a nullity<sup>10</sup>.

[25] It is prudent to cross-reference the provisions of section 3(3)(a)(i) of State Liability Amendment Act 14 of 2011 to the provisions of section 38(1)(f) of the Public Finance Management Act No.1 of 1991 which provides that:

<sup>6</sup> Section 3(3)(a)(i) of Act 14 of 2011.

<sup>7</sup> LAWSA Vol 25 Part 1 (Joubert) page 401 para 366.

<sup>8</sup> *Maguma v Station Commander Fleet Street Police Station & Others* (EL683/2023) [2024] ZAECELLC 8 (19 March 2024) at para 51.

<sup>9</sup> GM Cockram: Interpretation of Statutes, 3<sup>rd</sup> Ed page 161.

<sup>10</sup> *Shalala v Klerksdorp Town Council & Another* 1969 (1) SA 582 (T) at 587 A – C.

“1. The accounting officer for a department:

(f) must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period.”

[26] The provision requires that the defendant must *pay all money owing* within the prescribed time. A trite presumption that a legislature is presumed to know the law is applicable in this matter. When the legislature was enacting section 3(3)(i) of the State Liability Amendment Act 14 of 2011, requiring that final order must be satisfied by the department concerned within thirty (30) days of the order becoming final, was aware of the provisions of section 38(1)(f) of the Public Finance Management Act No.1 of 1999 which also require that the accounting officer of the department must settle or *pay all money owing* within the prescribed time. Therefore, I am persuaded that the prescribed time referred to in the Public Finance Management Act is the thirty (30) days referred to in the State Liability Amendment Act. A contrary interpretation may result in absurdity<sup>11</sup>, especially that they are both dealing with payment by a government department concerned. Both sections must be read conjunctively to give proper context<sup>12</sup>.

[27] Reference to the phrase *pay all money owing* in section 38(1)(f) of Act 1 of 1999 is a strong indication that there is no room for payment in instalments or staggered payments. Contrary interpretation may lead to absurdity.

[28] However, both enactments provide for an exception to the general and controlling sections which were under discussion above. There is an instance where, or a circumstance under which a final order and money owing may not be paid within thirty (30) days or within the prescribed time.

[29] Section 3(3)(a)(ii) of the State Liability Amendment Act 14 of 2011 provides that:

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<sup>11</sup> *Cool Ideas 1186 CC v Hubbard & Another* 2014 (4) SA 479 (CC) at para 28.

<sup>12</sup> *Maguma v Station Commander Fleet Street Police Station supra* at para 25.

“(3) (a) A final court order against a department for the payment of money must be satisfied

—  
(ii) **within the time period agreed** upon by the judgment creditor and the accounting officer of the department concerned.”

[30] Section 38(1)(f) of the Public Finance Management Act 1 of 1999 provides that:

“38 (1) The accounting officer for a department, trading entity or constitutional institution—

(f) **must settle all contractual obligations and pay all money owing, including intergovernmental claims, within the prescribed or agreed period”**

[31] For the accounting officer of the department concerned to escape the strict provisions of section 3(3)(a)(i) of the State Liability Amendment Act and section 38(1)(f) of the Public Finance Management Act, there must be an agreement in place between the judgment creditor and the accounting officer of the department concerned. In the absence of an agreement between the parties no deviation from the strict and imperative provisions aforesaid is permitted. Deviation in circumstances where there is no agreement may be null and void.

[32] In this case, it is known that no agreement was reached as contemplated in the empowering provisions between the parties to pay otherwise than in terms of section 3(3)(a)(i) of the State Liability Amendment Act.

[33] The necessary pre-condition for the payment otherwise than in terms of section 3(3)(a)(i) of State Liability Amendment Act is the existence of an agreement between the judgment creditor and the accounting officer of the department concerned. Under common law, necessary pre-conditions that must exist before an administrative power can be exercised, are referred to as *jurisdictional fact*. In the absence of such pre-conditions or jurisdictional facts, so it is said, the administrative authority effectively has no power to act at all<sup>13</sup>. This proposition finds application in this case. I am now

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<sup>13</sup> *Kimberly Junior School & Another v Head of the Northern Cape, Education Department & Others* 2010 (1) SA 217 SCA; 2009 (4) SA ALLSA 135 SCA at para 11.

satisfied that the defendant has not made out a case for payment otherwise than, in terms of section 3(3)(a)(i) of the State Liability Amendment Act read with section 38(1)(f) of the Public Finance Management Act. There is no justification for payment in instalments or staggered payments.

[34] It has been held that a prayer for periodic payments constitutes a special defence to the “once and for all rule”<sup>14</sup>. The defence aforesaid must be pleaded and evidence to substantiate the defence. I therefore find that marshalling a defence of this nature from the bar cannot assist the defendant. No factual basis is established for the deviation from the provisions of the State Liability Amendment Act<sup>15</sup>.

[35] The primary function of the courts is to ensure that those who are charged with the duty to perform public functions in terms of legislation act within the parameters of the law<sup>16</sup>. Courts have a duty to ensure that the limits to the exercise of public power are not transgressed. A repository of power may not exercise any power or perform any function beyond that conferred upon it by law and must not misconstrue the nature and ambit of the power<sup>17</sup>. Kampempe J in *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* held that<sup>18</sup>

“[1] State functionaries, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, and has long been enshrined in our law.”

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<sup>14</sup> *MEC for Finance, Economic Development, Environmental Affairs and Tourism & Others v Legal Practice Council & Others* 2023 (2) SA 266; 2022 (3) ALLSA 730 at para 62.

<sup>15</sup> *Phumla Stafana-Sohopi v MEC for Health* (unreported) Bisho Case No. 330/2019 delivered on 13 December 2022 at para 11.

<sup>16</sup> *Mwelase v Minister of Social Development & Others* (Case No. 74/16) [2018] ZAECMHC 16 (22 March 2022) at para 25; Baxter: Administrative Law page 305.

<sup>17</sup> *Fedsure Life Assurance Ltd & Others v Greater Johannesburg Transitional Metropolitan Council & Others* 1999 (1) SA 374 (CC) at para 56-58.

<sup>18</sup> *Head of Department, Department of Education, Free State Province v Welkom High School and Another; Head of Department, Department of Education, Free State Province v Harmony High School and Another* 2014 (2) SA 228 (CC) at para 1.

## Conclusion

[36] The defendant seeks an order in terms of which the amounts granted in the court order handed up and granted by consent on 21 May 2024 be paid in four (4) equal instalments. That is apparent in the defendant's heads of argument filed on 22 May 2024. The defendant effectively seeks variation of the court order granted on 21 May 2024. The default position is that the amount granted on 21 May 2024 is payable within thirty (30) days of granting of the Order.

[37] Rule 42(1)(a) of the Uniform Rules of court provide that:

***“42 Variation and Rescission of Orders***

- (1) *The court may, in addition to any other powers it may have, mero motu or upon the application of any party affected, rescind or vary:*
- (a) *An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;*
  - (b) *an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;*
  - (c) *an order or judgment granted as the result of a mistake common to the parties.*

[38] There is nothing in the whole tenor of defendant's heads of argument, where the application is made, showing that the order of 21 May 2024 was erroneously sought and granted in the absence of the defendant. Instead it appears that the order was taken by consent upon offer having been tendered by the defendant and accepted by the plaintiff. No submission is made relating to the existence of ambiguity, error or omission in the order. The defendant does not submit that there is a mistake common to parties.

[39] In any event, those submissions are ill-fated, for there is no application made in terms of the subrule. The Rule requires that an application must be made on notice to any party affected<sup>19</sup>. It would be in that application that the evidence required would be

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<sup>19</sup> Rule 42(2) of the Uniform Rules: Erasmus: Superior Court Practice, 2<sup>nd</sup> Ed page D1-565.

led. As things stand, there is no evidence to support this application including the fact that the defendant does not have sufficient fund. During oral submissions in court the defendant made no submissions about the department's lack of sufficient funds. It arises for the first time in the written heads of argument requested by the court.

*The costs associated with registration/management of a Trust*

[40] It was agreed during the pre-trial conference that the aforesaid costs would be determined during this hearing. These costs are calculated on the basis of 7.5% of the total amount of the costs of the caregivers which costs of caregivers is the amount of **R8 660 582.00**. The total amount of costs associated with registration or management of a Trust on the basis of the abovementioned formular is **R649 543.65**. It is on the basis of this formular that the counsel for the plaintiff submitted that these costs are linked to and/or associated with the costs of the care giving. No submissions were made by the defendant on this subject, both during the oral submissions and in the heads of argument. There is no justification for not granting these costs.

*Costs*

[41] On 21 May 2024 I granted costs of suit against the defendant in favour of the plaintiff. I granted those costs during the same hearing in which the issues led to the preparation of this judgment were argued. Huge part of the costs of this matter will be dealt with and be taxed in terms of the court order of 21 May 2024. I am of the view that the plaintiff is entitled to such costs as may not be covered by the court order of 21 May 2024.

*Order*

[42] **In the result I make the following Order:**

- 1. The Defendant shall pay the plaintiff the amount of R8 660 582.00 in respect of the minor child's claim and/or special damages for caregivers.**
- 2. The defendant shall pay the plaintiff the amount of R649 543.65 for the established, registration and management of a trust to be established for the benefit of the minor child, which amount is calculated on the basis of 7,5% of R8 660 582.00 being the minor child's total award.**
- 3. The abovementioned amounts as referred to in paragraphs 1 and 2 above shall be paid within 30 days of the date of this order together with interest thereon at the prevailing legal rate calculated from 30 days of the date of the order to date of final payment thereof.**
- 4. The Defendant shall pay the costs of suit, that are not covered by the court order of 21 May 2024 together with all reserved costs, if any, and together with interest thereon at the legal rate from a date 30 days after *allocatur* and/or agreement to date of payment, which costs will furthermore include:**
  - 4.1 the costs of two counsel, where utilized, on scale C in terms of rule 67A.**
  - 4.2 the costs of preparing for consultations and trial;**
  - 4.3 the travelling and accommodation expenses, if any, of the Plaintiff's legal representatives attending consultations with witnesses and court;**
  - 4.4 The reservation fees, if any, together with the qualifying fees, if any, of the Plaintiff's expert witnesses in respect of whom notices in terms of rule 36(9)(a) and (b) have been filed of record.**

5. The aforementioned amounts are to be paid to the trust account of the Plaintiff's attorneys of record, Dayimani Inc, with the following details:

Account Name: [...]

Bank: [...]

Account number: [...]

Branch Code: [...]

Reference: [...]

6. The net balance remaining after paying and recovering all costs and expenses for which the Plaintiff is liable, including her fees as between attorney and own client, will be dealt with as follows:

6.1 M Dayimani Inc. Attorneys are directed to cause a Deed of Trust, to be named the "A[...] M[...] TRUST" to be registered by the Master of the High Court incorporating the provisions normally to be found in an *inter vivos* trust within a reasonable period from the date of payment of this order, or within such time as directed by the Master, with the following additional provisions;

6.2 The Trustee to be appointed, or their successor in title, will, if possible, be a corporate Trustee and shall have the powers of assumption;

6.3 In the event of it not being possible to appoint a corporate Trustee, the Trustees to be appointed, or their successor in title, will, insofar as is reasonably possible, consist of three Trustees, being the Plaintiff, a



**Chartered Accountant and an Attorney, and shall have the powers of assumption;**

- 6.4 The Trustees shall be exempt from furnishing security;**
- 6.5 The Trustees shall hold and administer the trust fund for the benefit of A[...] M[...];**
- 6.6 The Trustees shall apply the net income of the trust fund for the maintenance and benefit of A[...] M[...] and, if at any time it is not adequate for the purpose, the capital thereof;**
- 6.7 The Trust shall terminate on the death of A[...] M[...], alternatively in accordance with the strict terms of the Trust Deed;**
- 6.8 The provisions of this paragraph shall, in accordance with the provisions of the Trust Property Control Act of 1988, as amended, be subject to the approval of the Master of the High Court;**
- 6.9 This order must be served by the Plaintiff's attorney on the Master of the High Court.**

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**A.S ZONO**

**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES:**

**For the PLAINTIFF** : **ADV COLE SC with ADV NTIKINCA**

**Instructed by** : **M. DAYIMANI INC.**

**NO.4 GREENAN STREET**

**BEREA**

**EAST LONDON**

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**For the DEFENDANT** : **ADV FRANS**

**Instructed by** : **STATE ATTORNEY**

**OLD SPOORNET BUILDING**

**NO. 17 FLEET STREET**

**EAST LONDON**

**REF: 1025/21-P11 (MRS TONGO)**

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**OFFICE OF THE PREMIER**

**32 ALEXANDRA ROAD**

**KING WILLIAMS TOWN**

**Matter heard on** : **20 & 21 MAY 2024**

**Judgment Delivered on : 27 MAY 2024**