Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

Not Reportable

CASE NO: 2728/19

In the matter between:

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

and

N[…] S[…] obo A[…] S[…] **Respondent/Plaintiff**

Neutral citation: *Member of the Executive Council For The Department of Health, Eastern Cape v N. Sofuthe obo A. Sofuthe* (Case no 2728/19)

Coram: NHLANGULELA DJP

Delivered: 25 April 2024

Summary: Application for condonation granted - application for leave to appeal refused - applicant to pay costs.

ORDER

It is ordered that:

(a) The application for condonation for the late filing of the application for leave to appeal the judgment of 4 July 2023 is granted.

(b) The application for leave to appeal the judgments of 4 July 2023 and 20 July 2023 are refused.

(c) The applicant to pay the costs of the applications for condonation and leave to appeal, including the costs of two counsel.

JUDGMENT

NHLANGULELA DJP

[1] These proceedings concern two applications. They are the application for leave to appeal the judgments delivered on 4 July 2023 and 20 July 2023; and the application for condonation of a delay in bringing an application for leave to appeal the judgment of 4 July 2023. The judgments were granted in favour of the respondent.

[2] The application for leave to appeal was opposed strenuously. The application for condonation is not opposed. I am satisfied that it is in the interest of justice to grant the application for condonation for the late filing of the application for leave to appeal the judgment on separation and amendment that was delivered on four 4 July 2023. Accordingly, the condonation will be granted. The costs will follow the result of the application for leave.

[3] The first judgment concerned the applicant's application for leave to separate the determination of the issue of quantum from the determination of the newly pleaded defences. The second concerned the assessment of the amount of damages to be paid by the applicant, the merits of the action having been settled on the basis that the applicant was 100% liable to pay damages that arose from negligent medical treatment of the respondent and her minor child.

[4] The relief that the applicant had brought was two pronged. It had sought leave to amend the plea to introduce the DZ defences[1] (the Public Health and Instalment Payment defences) so that the compensation awarded to the respondent is reduced to the extent that the applicant would provide treatment at the public hospital and/or liquidate the amount of proven damages in instalments over some time.

[5] It is necessary to set out here-under the provisions of paragraph 1 of the order that was granted on 20 July 2023. It reads:

" *Amounts that were agreed between the parties:*

(a) Occupational therapy	R3 663 100
(b) Physiotherapy	R1 285 522
(c) Orthotist	R1 501 778
(d) Speech therapy	R 890,931
(e) Dietician	R 274 942
(f) Dentist	R 253 547
(g) Neurology	R 221 184
(h) Orthopaedic joints	R 322 775
(i) Educational psychology	R 345 632

[1] The defences are enunciated in *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA335 (CC) (abbreviated as DZ).

(j) Loss of earning capacity R 1 175 947

(k) General damages R2 200 000

Plus those amounts not agreed to:

(l) For the caregiver and a relief attendant employed to care for the minor child from age 7 to 18 years; including three (3) caregivers employed to care for the minor child from age 19 years until the end of his lifetime- R9 452 410

(m) For housing- R 962 000

Grand Total R22 549 768."

[6] The above-quoted paragraph 1 of the order shows that a large chunk of damages had been agreed to between the parties at the time when evidence was led towards the assessment of a reasonable amount for the heads of damages in subparagraphs (l) and (m) of the order. The issue of liability under those heads had already been agreed to based on actuarial reports in exhibits "E" and "F" that had been prepared by expert witnesses for the plaintiffs (respondent) and defendant (the applicant) respectively. In other words, the court was called upon to only determine the reasonableness of the amount of damages to be awarded in respect of caregiving and housing. Based on this, the application for leave to appeal is premised on the award in the sum of R10,414,410 out of the total amount of R22,549 768.

[8] In deciding the amount of damages payable for caregiving and housing, I did what was asked of me to do. That is, to assess the damages based on the agreed amounts and those amounts that were proved by oral and documentary evidence; hence the judgment that I delivered on 20 July 2023. When doing this the notice to amend had been issued, but the prosecution thereof was not in sight.

[9] The application for leave is based on the main ground that since the delivery of the judgment of the Constitutional Court in the case of *DZ* the court was enjoined to grant the application for separation and amendment. For not granting it, there is a reasonable prospect that the judgment of 4 and 20 July 2023 will be set aside on appeal. The opposing arguments that leave be refused as granting it will cause an injustice is premised on the following reasons, *inter alia*:

(a) The applicant is guilty of inordinate delay in prosecuting the application for separation and amendment.

(b) A separate determination of the DZ defences (the particulars of which remain unknown) on the face of the agreed award of damages in subparagraphs (a) to (k) cannot be workable as that will amount to a rescission of the existing judgment and irremediable prejudice to the respondent.

(c) The award of damages for caregiving and housing was assessed reasonably.

[10] In this matter, summons were issued on 1 August 2019. From that date up to and including the date of delivery of judgment on 20 July 2023, the application for amendment was never pursued beyond the mere filing of a notice to amend. In the absence of any hurdle being pointed out as standing in the way of the bringing of the application to amend, it cannot be said that a person other than the applicant itself is guilty of inordinate delay. The final decision on the contested issues of caregiving and housing, together with the agreement on other aspects of quantum as described in subparagraphs (a) to (k) put paid to litigation between the parties on both issues of merits and quantum. With ‘horses having bolted’, it would be unreasonable, inconvenient and costly to cancel the judgments and restart a trial on issues that are no longer in contention.

[11] The submission that the case of *Mashinini* v *MEC for Health, Gauteng Provincial Government*[2] was not applied in this case is misplaced. It is applicable, but subject to the qualification in *The Member of the Executive Council for Health of the Gauteng Division Government v PN*[3] that applications for leave to introduce the DZ defences must be carefully pleaded and proved by evidence. For such defences to be entertained in the context of developing the common law, the provisions of Rule 28 of the uniform rules and the stringent legal principles evolved by the courts around that rule over the years must be applied.. So, the amendment of pleadings to introduce the DZ defences cannot override or suspend the application of the rules of court. In this case, the applicant ignored the principle that, *inter alia*, an amendment of pleadings ought to be done within a reasonable time, and a delay in making an application for it must be explained satisfactorily.

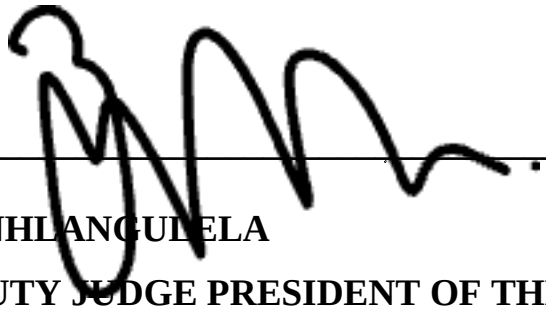
[12] The attack against the judgment on quantum does not have merit. The applicant did not only concede liability, but it went further to commit to the amount of damages to be paid by it in respect of the heads of damages listed in (a) to (k) of the order. It went further to commit to such damages as would be fixed by the court at the trial in respect of caregiving and housing issues that were, strictly speaking, inextricably linked to the heads of damages that were already agreed to. Proper evidence led and assessed on a balance of probabilities guided the court in arriving at the amount of damages as it did. I remain persuaded that the applicant's application is a sham. It is a lame excuse designed to masquerade the agreement it made to pay as a refusal of access to the court to introduce DZ defences. In any event, the DZ defences were not pleaded and proved by the applicant in this case.

[2] *Mashinini* v *MEC for Health, Gauteng Provincial Government* (Case No:33/2021)[2023] ZASCA 53 (18 April 2023)
[3] *The Member of the Executive Council for Health of the Gauteng Division Government v PN* (CCT 124/20) [2021] ZACC 6; 2021 (6) BCLR 584 (CC) (1 April 2021 at para [26].

[13] There is merit in the opposition to the application for leave to appeal. In terms of s 17(1)(a)(i) and (ii) of the Superior Courts Act 10 of 2013, for the appellant to succeed in the application for leave to appeal, the grounds on which the application is based must show a reasonable prospect of success; or show a compelling reason why the appeal must be heard. On the consideration of the fact that neither of the two tests have been met in these proceedings, the application for leave to appeal must fail.

[14] The following order is granted:

(a) The application for condonation for the late filing of the application for leave to appeal the judgment of 4 July 2023 is granted.
(b) The application for leave to appeal the judgments of 4 July 2023 and 20 July 2023 is refused.
(c) The applicant to pay the costs of the applications for condonation and leave to appeal, including the costs of two counsel.



ZM NHLANGULELA
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Appearing for the applicant/defendant:	Advocate Van der Linde SC
Instructed by:	Norton Rose Full Bright South Africa Inc c/o Smith Tabata Attorneys Mthatha.

Appearing for the respondent/plaintiff:	Advocate Dugmore SC
With:	Advocate Sambudla
Instructed by:	M. Dayimani Inc
	Mthatha.