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

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 22473/2012

[1] REPORTABLE: NO
[2] OF INTEREST TO OTHER JUDGES:NO/YES
[3]REVISED.

_____ _____
Date **WHG VAN DER LINDE**

In the matter between:

N P obo N E — Plaintiff

and

The Member of the Executive Council for
For Health of the Gauteng Provincial
Government — Defendant

J U D G M E N T
On the separated issues

Van der Linde, J:

[1] This trial action is for the quantum of damages to be awarded to the plaintiff on behalf of her minor son who, when he was born on [redacted] September 2006, was left with cerebral palsy as a result of the negligence of the medical staff at the Chris Hani Baragwanath Hospital. The Gauteng Department of Health, for whom the defendant is nominally cited, is vicariously responsible for the negligence of the employees at the hospital. An order by Moshidi, J on 24 April 2017 determined liability in favour of the plaintiff, and deferred the remaining issues for later adjudication.

[2] When the matter was called this past Monday, 4 February 2019, plaintiff's counsel opened her case. In the course of the opening it appeared that there was potential for a separation of issues under rule 33(4). The court adjourned after lunch on the basis that an application for separation would be prepared that afternoon and launched the next day.

[3] When the matter was called on Tuesday, 5 February 2019 plaintiff's counsel moved a separation application by agreement between the parties. Some enquiries satisfied me that the application was appropriate, and I made an order in the terms suggested by the parties. The matter was then adjourned by agreement till Wednesday, 6 February 2019 for the parties to prepare heads of argument on the separated issues. The court reconvened on 6 February and heard argument for the most part of the day. It adjourned, and this judgment was prepared to be given at 11h30 the next day, 7 February 2019.

[4] The three issues separated are the following. First, having regard to the order of Moshidi, J, is it open to the court to order that the defendant renders services and medial and related items instead of paying the plaintiff an amount in money? Here paragraphs 4A.6 to 4A.18 of the plea as amended are affected.

[5] The second and third issues are whether either s.66 of the Public Finance Management Act 1 of 1999, or regulation 8.2.3 promulgated under that Act, respectively, or both, preclude the court from ordering that the state renders services and medical and related items in the future, or pays the claim in instalments in the future, as pleaded by the defendant. Paragraphs 4A.6 to 4A.18, and 4A.19 to 4A.36 of the plea are implicated here.

[6] The first issue involves an interpretation of the order of Moshidi, J. I was informed from the Bar that the matter was argued before his lordship on a stated case basis. The order appears at page 57 of the pleadings bundle. The learned judge, acting under rule 33(4), first separated the issue of liability from the issue of the determination of the quantum of the claim. He then postponed sine die the issue of the determination of the quantum of the plaintiff's claim. Next he directed the defendant *"to pay to the plaintiff 100%"* of the plaintiff's agreed or proven damages. The words in italics are the contentious ones.

[7] The defendant's plea as formulated in the stated paragraphs is that the defendant is in a position to render the hospital, medical and related services that form part of the plaintiff's claim at state hospitals at an acceptable quality, and the court should therefore order the defendant to ensure that such services are rendered in that way instead of damages being paid. It asks the court to develop the common law, so as to enable the defendant to fulfil its constitution obligation under s.27 of the Constitution. The plaintiff argues that there is no scope in law for these contentions; in other words, she is effectively submitting that that defence is excipiable as disclosing no defence. The plaintiff's argument is based both on the doctrine of res judicata and on an interpretation of the express words of the order, specifically the words, "to pay."

[8] As I see it, the defence of res judicata implies at least that an earlier court will have decided the very issue raised on its merits. Here that has by definition not occurred. Moshidi, J expressly separated the quantification of damages from the liability issue; and he decided only the liability issue. There is no written judgment; but the learned judge's separation of the liability issue from the quantification issue, and the court's endeavour of deciding only the former and deferring the latter, seems to me to be destructive of the defence of res judicata so far as it pertains to the quantification issue.

[9] Take the issue of payments in instalments, a defence raised by the defendant later on in its plea, and an issue again dealt with below. The wording in the Moshidi, J order of "to pay" cannot preclude an argument that his lordship did not decide that the damages must necessarily be paid in one lump sum. So it seems to me that the *"text, context and purpose"* (a concept on which I expand below) of the court order was that his lordship concerned himself only with the question of liability, and not in any way with the question of the quantification of the damages. The replication of res judicata therefore cannot succeed.

[10] The second point argued by the plaintiff underscored the clear language of the order, and in particular the words, "to pay". Here the plaintiff relied on **COOPERS & LYBRAND AND OTHERS v BRYANT,**[1] in which the court stressed what it referred to as the *"Golden Rule"* of interpretation, which was that the ordinary grammatical meaning of words was to be applied, unless it led to absurdity.

[11] This judgment was indeed the vade mecum of interpretation for many years. But that changed relatively recently with the judgment of the same court in **BOTHMA-BATHO**

[1] **1995 (3) SA 761 (A)**.

TRANSPORT (EDMS) BPK v S BOTHMA & SEUN TRANSPORT (EDMS) BPK,[2] which expressly held that Bryant was no longer consistent with our law. This is what that court said (emphasis supplied):

"[12] That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is 'essentially one unitary exercise'. Accordingly it is no longer helpful to refer to the earlier approach."

[12] What may, with respect, be added to this new approach, is the role played by the Constitution in the interpretation process. As was said in **SATAWU AND ANOTHER v GARVAS AND OTHERS,**[3]

"[37] This court has previously held that an interpretation of a statutory provision that gives rise to an absurdity or irrationality should be avoided where there is another reasonable construction which may be given to that provision. In other words, where a legislative provision is reasonably capable of a meaning that keeps it within constitutional bounds, a court must, through the use of legitimate interpretive aids, seek to preserve that provision's constitutional validity. Thus, to the extent that it is possible, s 11(2) must be interpreted in a manner that yields a rational meaning and preserves its validity, so that the purpose it was enacted to serve is realised."

[13] This interpretative approach has been described as a consideration of the *"text, context and purpose"* of the instrument being examined; see **BETTERBRIDGE (PTY) LTD v MASILO AND OTHERS NNO.**[4] See also **NATAL JOINT MUNICIPAL PENSION FUND v ENDUMENI**

[2] **2014 (2) SA 494 (SCA)**.
[3] **2013 (1) SA 83 (CC)**.
[4] **2015 (2) SA 396 (GP)**.

MUNICIPALITY;[5] **AMCU AND OTHERS v CHAMBER OF MINES OF SOUTH AFRICA AND OTHERS:**[6]

"*All interpretations of law are themselves in a sense 'factual': certain textual and other sources (for example, statutes, common and customary law) are excavated and marked out as factually 'law', in contradiction to non-law. But this process itself involves a contextual analysis of those sources. See in this regard Natal Joint Municipal Pension Fund v Endumeni Municipality* **2012 (4) SA 593** *(SCA) ([2012]* **2 All SA 262***;* **[2012] ZASCA 13)** *para 18. Indeed, interpretation and application are simultaneous and intricated. The most imaginative exponent of this insight is Ronald Dworkin. See Dworkin Law's Empire (Harvard University Press 1986) at vii: 'Legal reasoning is an exercise in constructive interpretation' in which we advance 'the best justification of our legal practices as a whole'."*

[14] Applying this approach to the court order, instead of fixating on the words "to pay", seems to me to justify the inference that the Moshidi court deliberately turned its attention away from the quantification of the defendant's obligation to compensate the plaintiff in respect of her damages. In the context, it seems to me rather that the words "to pay" is loose language for the concept that the defendant was being order to compensate the plaintiff for all of her damages, no matter what that may come to.

[15]Put differently, the focus of that paragraph of the court order was not to deal with how the damages should be compensated, but rather with whether the defendant was at all liable to compensate the plaintiff. That issue was separated out for prior determination, and that issue was determined fully in favour of the plaintiff.

[16]The first issue is thus decided in favour of the defendant.

[17]The second and third issues implicate not only the plea that the court should order the defendant to render medical and related services to the plaintiff in lieu of a monetary

[5] **2012 (4) SA 593 (SCA) at [18].**
[6] **2017 (3) SA 242 (CC) at footnote 28 per Cameron, J.**

compensation; they implicate also the plea that if the defendant is ordered to pay monetary compensation, the appropriate portions of such compensation should be paid in instalments and only for so long as the injured boy is alive.

[18]It will be appreciated that the plea potentially raises potentially other aspect of our law, such as the transmissibility of damages, patrimonial and non-patrimonial, an aspect which was fully examined by a full court of this seat of the Gauteng Division in **NKALA AND OTHERS v HARMONY GOLD MINING CO LTD AND OTHERS.**[7]

[19]As to the imperative to develop the common law, this is what the Nkala full court said about a court's duty in that regard (emphasis supplied):

"[199] In South Africa this responsibility to reform and refocus the common law in order to keep it 'abreast of current social conditions and expectations' is entrenched in the Constitution, with the added obligation that the judges do so in a manner that it is consistent with, and gives expression to, the rights articulated in the Bill of Rights. Sections 8(3) and 39(2) of the Constitution explicitly enjoin the court to develop the common law to the extent that it is necessary to make it consistent with the values enshrined in the Constitution, especially those explicitly mentioned in the Bill of Rights. Thus, it is the constitutionally imposed duty of this court to develop the common law in order to harmonise it with the Bill of Rights. The development must reflect the 'spirit, purport and objects of the Bill of Rights'. We are duty-bound to develop the common law so that it does not 'deviate' from the 'spirit, purport and objects of the Bill of Rights'. It is a duty we cannot abdicate."

[20]It is necessary, for a decision on the second and third points, to quote s.66 and Treasury Reg.8.2.3 of the PFMA (emphasis supplied):

"66 Restrictions on borrowing, guarantees and other commitments

(1) An institution to which this Act applies may not borrow money or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind that

[7] **2016 (5) SA 240 (GJ) at [176] ff.**

institution or the Revenue Fund to any future financial commitment, unless such borrowing, guarantee, indemnity, security or other transaction-

(a) is authorised by this Act;

(b) in the case of public entities, is also authorised by other legislation not in conflict with this Act; and

(c) in the case of loans by a province or a provincial government business enterprise under the ownership control of a provincial executive, is within the limits as set in terms of the Borrowing Powers of Provincial Governments Act, 1996 (Act 48 of 1996).

[Para. (c) added by s. 37 (a) of Act 29 of 1999 (wef 1 April 2000).]"

"8.2 Approval of expenditure [Section 38(1)(f) and 76(4)(b) of the PFMA]

8.2.1 An official of an institution may not spend or commit public money except with the approval (either in writing or by duly authorised electronic means) of the accounting officer or a properly delegated or authorised officer.

8.2.2 Before approving expenditure or incurring a commitment to spend, the delegated or authorised official must ensure compliance with any limitations or conditions attached to the delegation or authorisation.

8.2.3 Unless determined otherwise in a contract or other agreement, all payments due to creditors must be settled within 30 days from receipt of an invoice or, in the case of civil claims, from the date of settlement or court judgement."

[21]The competing arguments here were put up against the backdrop of what was described as two common law rules: the once and for all rule, and the rule that damages must be determined in a globular amount, and then paid in one tranche. The plaintiff argued that any future development of the common law pursuant to s.173 of the Constitution in the manner suggested by the defendant's plea and as presaged by the Constitutional Court in **MEC FOR**

HEALTH AND SOCIAL DEVELOPMENT, GAUTENG v DZ OBO WZ [8] was precluded by these statutory provisions.

[22]Specifically, the argument was that the compensation of a plaintiff by the rendering of services into the future, as well as the payment of any money compensation in instalments payable into the future, are precluded by the express provisions of s.66 of the PFMA which require that "any transaction" involving future commitment is to comply with the provisions of that section; and by the express provisions of reg.8.2.3 requiring that all payments due to creditors must be settled within 30 days from the date of court judgement.

[23]In regard to the development of the common law in the way the defendant sees it, Froneman, J said in DZ (footnotes omitted):

"[44] In logic and principle compensation in a form other than money does not appear to be incompatible with the aim of making good 'the difference between the actual position that obtains as a result of the delict, and the hypothetical position that would have obtained had there been no delict'. To require compensation in money as the 'measure of all things' therefore appears to be an evaluative normative choice. Does the common law's choice in this regard offend the normative underpinnings of our legal order?

[45] In general terms this seems doubtful. Neither the Constitution nor the realities of modern life oblige us to find that money cannot be the measure of things. But it is arguable that the fundamental right of everyone to have access to healthcare services and the state's obligation to realise this right by undertaking reasonable measures introduce factors for consideration that did not exist in the pre-constitutional era. Aligned to this is 'the ever-increasing shift from the classical model of individual loss-bearing towards a collectivisation of losses' that is reflected in the 'gradual absorption of [delict] law, or at least large parts of it, into the modern social-security system'.

[46] The 'once and for all' rule is derived from English law and is said to be so entrenched in our law that it is not possible to oppose it on historical grounds. But, as in the case of the entrenched rule that compensation must always be paid in money, the Constitution does not

[8] **2018 (1) SA 335 (CC).**

absolve us from interrogating our history and whether the legal norms of the past still fit in with those of the Constitution."

[24]These same sentiments were expressed in regard to payment of a money award in instalments in the future. And the learned Justice concluded:

"[56] We must remind ourselves again of the context in which the argument for development of the common law is made here. We are not called upon to decide the fate of the 'once and for all' rule in all personal injury cases arising from medical negligence. The most important future imponderable is the ultimate one: death. Periodic payments subject to a 'top-up/claw-back' will give less speculative expression to the general principle of compensation for loss. And the likelihood of a dependant's claim, which might present problems in other cases, is less, if not entirely absent, here.

[57] We have seen, in this regard, that any development of the common law requires factual material upon which the assessment whether to develop the law must be made. Here that factual material is absent. The only possible factual foundation for an argument that the common law must be developed is the mere fact that WZ was born in a public healthcare institution and that is where the medical negligence occurred. This is woefully inadequate to ground development of the common law in the manner sought by the Gauteng MEC. The appeal must fail, for that reason.

[58] But the failure of the appeal does not mean that the door to further development of the common law is shut. We have seen that possibilities for further development are arguable. Factual evidence to substantiate a carefully pleaded argument for the development of the common law must be properly adduced for assessment. If it is sufficiently cogent, it might well carry the day."

[25] It must be accepted then that the scope for development of the common law in this specific field of delictual liability exists, but that – self-evidently – the endeavour cannot be mounted without a case in fact having been made for it. And that is what the defendant seeks to do, and what the plaintiff says is precluded by the two statutory provisions on which she relies.

[26] As I see it, applying the approach of text, context and purpose, neither provision relied upon by the plaintiff set out to limit the power of courts to apply the law as they find it, including as they might develop it, in the field of quantifying delictual damages. The text does not say

so; the context does not add anything; and certainly the purpose of the two provisions was not to attain that consequence.

[27]As to text: take s.66 of the PFMA. It concerns itself with “transactions” to which relevant institutions are parties. Now undoubtedly “transaction” is a word of wide import, but it can hardly be suggested that it includes a court judgment and order, if only for the reason that the former implies consensual activity on the part of the institution concerned and the latter not. Take reg. 8.2.3: it does not say anything about what a court order might or might not entail. What it says, is that – whatever the court order says – the obligation in the court order must be satisfied within 30 days of the date of the court order. There is scope for the proposition that that applies only when the court order is silent as to when payment must be made, so that if the court order says payment must be made within ten days, that must be complied with. But that question need not be explored further, because it was not addressed before me.

[28] As to context: s.66 seeks to regulate any freewheel borrowing or the entering into of other commitments by state institutions. It therefore seeks to impose financial constraints on government. Its focus is not the imposition of constraints on orders that courts of law may make. Reg.8.2 is concerned with the approval of expenditure, and the timeous payment of debts. It has nothing to do with limitations on order a court may make.

[29] As to purpose: s.66 aims to achieve responsible government, not to hamstrung courts. And reg.8.2.3 is no different.

[30] For these reasons the plaintiff’s submissions concerning the reach of the two contentious statutory provisions cannot be accepted, and the second and third separated issues must

also be decided in the defendant's favour. Since the separation and the issues are part of the trial, I make no order as to costs.

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

(a) The terms of the order of Moshidi, J dated 24 April 2017 do not preclude this court from ordering that the defendant renders services and medical and related items instead of paying to the plaintiff an amount of money.

(b) S.66 of the PFMA does not preclude this court from making orders that the state renders services and medical and related items in the future, or pay the claim in instalments in the future, as pleaded by the defendant in paragraphs 4A.6 to 4A.18, and 4A.19 to 4A.36.

(c) Reg.8.2.3 of the Treasury Regulations promulgated under the PFMA does not preclude this court from making orders that the state renders services and medical and related items in the future, or pay the claim in instalments in the future, as pleaded by the defendant in paragraphs 4A.6 to 4A.18, and 4A.19 to 4A.36.

(d) No order as to the costs of the application for separation of issues, and as to the determination of the separated issues, is made.

WHG van der Linde
Judge, High Court
Johannesburg

Date argued: 06 February 2019
Date judgment: 07 February 2019

Counsel for the Plaintiff

Adv. N van der Walt, SC

With him
Adv. P Uys

Instructed by

Wim Krynauw Attorneys
Plaintiff's Attorneys
6th Floor, Marbe Towers
208/212 Jeppe Street
Johannesburg
Tel: 011 955 5454
Fax :011 9552547
Ref:MEC 0007/LS/RB/LW

Counsel for the Defendant

Adv. V Soni, SC
With him
Adv. L Mtukushe

Instructed by

The State Attorney

Defendant's Attorney

10th Floor, North State Building

94 Albertina Sisulu Street

Johannesburg

Tel: 011 330 7785

Fax: 011 330 7185

Ref: T Mantlhwa/P50/PM/4488/12/P50/pm