Reportable:	YES / **NO**
Circulate to Judges:	YES **/ NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NO: 2011/1359

In the matter between:

R N T (o.b.o D O R M)	**First Plaintiff**
M K L A (o.b.o D O R M)	**Second Plaintiff**
and	
Dr Kofi Ofori Amanfo	**First Defendant**
Itokelle Clinix Private Hospital	**Second Defendant**

JUDGMENT

NOBANDA AJ

Introduction

1. The applicant (plaintiff) brought an application for the reconsideration of the cost order granted on 3 August 2023 against the first and second defendants after judgement in a trial where both defendants were held jointly and severally liable for 100% of plaintiff's proven or agreed damages arising from a brain injury suffered by the plaintiff's daughter (D) during birth (the judgement).

2. The basis for the application is that when judgement was given on the costs against the defendants, the Court was unaware of the common law secret offer of settlement that the plaintiff had made to both the defendants before trial which offer the defendants rejected.

3. The plaintiff seeks that paragraph (b) and (b) (v) of the order dealing with costs be amended and the defendants be ordered to pay jointly and severally the one paying the other to be absolved the following:

   (i) *"(b)…the plaintiff's taxed or agreed party and party costs on the High Court scale up to and including 11 March 2023 (sic) and from 12 March 2023 (sic) the plaintiff's taxed or agreed attorney and own client costs on the High Court scale, such costs to include:…;*
   (I assume the plaintiff meant 11 March 2020 and 12 March 2020 respectively).

   (ii) *(v) The costs of the postponement on 18 March 2020;"*

   (iii) The cost of this application on the attorney and own client scale.

4. Additionally, the plaintiff seeks an order for costs against the second defendant only occasioned by a semi-urgent application instituted by the plaintiff for the Court's directives on how to proceed with this application in light of the second defendant's application for leave to appeal the judgment. I will deal with this issue later in the judgement.

5. Only the second defendant is opposing this application. The first defendant has filed a notice to abide by the decision of this Court.

6. For the sake of convenience, the parties will be referred to herein as they are referred to in the judgement. This judgement should be read together with the judgement of 3 August 2023.

Background facts

7. On 3 August 2023, after a protracted trial, this Court gave judgement wherein it held both defendants, jointly and severally the one paying the other to be absolved, 100% liable for plaintiff's agreed or proven damages in her personal and representative capacities on behalf of her late husband and her daughter D for damages arising from a hypoxic ischaemic brain injury and its *sequelae* suffered by D at birth on 30 January 2007.

8. Two court days before the commencement of the trial on 16 March 2020, on 11 March 2020, the plaintiff made a common-law secret offer of settlement for both defendants, jointly and severally, to concede 85% liability for plaintiff's agreed or proven damages including agreed or party and party costs. The defendants did not accept the plaintiff's offer. The trial commenced on 16 March 2020 and on 18 March 2020 at the behest of the second defendant (the hospital), the matter was postponed. Due to the country's lockdown occasioned by the COVID 19 pandemic, the trial did not proceed. The trial resumed and ran intermittently from 23 November to 9 December 2021; 10 to 26 August 2022; 25 to 27 January, 9 to 10 March and 27 to 28 March 2023 when the matter was finalised.

9. During the 2020 interval, on 31 July 2020, the first defendant (Dr Ofori) and the hospital individually made the following offers to the plaintiff:

    9.1 Dr Ofori offered to pay the plaintiff an all inclusive amount of R1.5M (one million five hundred rands) interest-free in 24 equal monthly instalments in full and final settlement of the plaintiff's claim both in her personal and representative capacities;

    9.2 The hospital made a tender in terms of rule 34 of the Uniform Rules of Court (the Uniform Rules), offering to pay 20% of plaintiff's proven or agreed damages and 50% of plaintiff's

taxed or agreed party and party costs separately and severally from Dr Ofori (the first offer).

10. The plaintiff rejected both offers. Thereafter, the trial resumed on 23 November 2021. The trial continued intermittently thereafter as indicated. Sometime thereafter, after the conclusion of the testimony of the hospital's nursing expert witness Dr Harris, the hospital made the plaintiff a second rule 34 tender/offer in terms of which the hospital increased its first offer of 20% to 50% on the same terms as its first offer except for adding certain wasted costs. The offer was delivered to the plaintiff's attorneys on 9 January 2023 even though it was dated 15 December 2022 (second offer).

11. On 17 January 2023, it appears the parties' legal representatives held discussions about the possible settlement of the matter. This led to a virtual roundtable meeting on 19 January 2023 wherein the hospital reiterated its second offer. The plaintiff rejected the offer and instead reopened the offer of 11 March 2020.

12. The plaintiff followed up with a formal written offer on the same terms save for including additional costs incurred after the resumption of the trial and the wasted costs occasioned by the postponement on 18 March 2020. Both defendants again rejected the plaintiff's offer. It appears no further discussions or counter-offers were made by either defendant. As a result, the matter resumed and continued for a further seven days.

Applicable legal principles

13. The purpose of the reconsideration of costs application (reconsideration application) is for the court to revisit the costs order granted after judgement where the offeree rejected a secret offer of settlement which turned out to have been reasonable considering what the court ultimately awarded in the judgment. Depending on the circumstances of the case, the offeree's rejection of the offer may be considered to have been unreasonable thereby entitling the offeror to costs over and above what the court had awarded in the judgment.[1]

[1]AD and Another v MEC for Health and Social Development, Western Cape 2017 (5) SA 133 (WCC); Van Reenen v Lewis and Another (2032/2014) [2019] ZAFSHC 55 (14 May 2019); Khabu & Others v Matlosana City Council & Another (56948/2014) [2021] ZAGPPHC 520 (4 August 2021)

14. Rule 34 of the Uniform Rules makes provision for the defendant in such circumstances. It provides for the plaintiff to pay, to some extent, the defendant's costs incurred after the plaintiff's unreasonable rejection of the defendant's reasonable offer to avoid further litigation. No similar provision exists in our rules where the plaintiff had made a similar secret offer of settlement to the defendant. Only recently have our Courts acknowledged the plaintiff's common law right to make a secret offer of settlement to the defendant to avoid further litigation.[2]

15. In the leading case of ***AD*** *(supra*), Rogers J considered whether the plaintiffs' secret offer referred to as the Calderbank offer by the plaintiffs was admissible as such offers are made '*without prejudice'* and what effect those offers have on the Court's discretion on costs. To that end, Rogers stated thus:

"… Calderbank offer [is] with reference to the judgment of the English Court of Appeal in Calderbank v Calderbank [1975] 3 All ER 333 (CA). In that case Cairns LJ said that he saw no reason in principle why in cases not covered by the rules of court permitting secret offers, a litigant should not be permitted to make a settlement offer ' without prejudice save as to costs' and to rely on such offer, once judgement has been granted in support of a particular cost order. This view was approved and acted upon in Cutts v Head & Another [1983] EWCA Civ 8; [1984] 1 All ER 597 (CA).The courts in Australia,… New Zealand… and Canada… have followed suit. In some jurisdictions the rules relating to secret offers have been amended to fill the gaps where Calderbank offers previously operated. In these jurisdictions it is anticipated that a Calderbank offer by a plaintiff can, after judgement, be adduced in support of a request for what we would call attorney/client costs." [3]

16. After considering how the Courts in England and other Commonwealth jurisdictions dealt with public policy considerations on Calderbank offers, Rogers J concluded that since our law of evidence is based on English law as at 31 May 1961, he saw no reason why our law should not recognise the admissibility of Calderbank offers which were made without

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[2]Ibid; Kabe v Nedbank Ltd [2019] JOL 43024 (LC)
[3]At [41]

prejudice 'except in relation to costs' or words of similar effect in support of a particular cost order after judgment.[4] (Cognisance to be taken that Calderbank offers may be utilised by the defendants as well).

17. It is now accepted by our Courts that Calderbank offers can be utilised by the plaintiffs to request costs over and above costs on the party and party scale and on attorney and client or attorney and own client scale where the defendant has unreasonably rejected the plaintiff's offer. The main aim being to reduce the plaintiff's irrecoverable costs incurred after the defendant refused to accept the plaintiff's reasonable secret offer[5]. The underlying principle being that considerations of public policy encourages settlements and discourages costly litigation.[6]

18. This same principle underlies rule 34 offers. In ***Naylor and Another v Jansen***[7] ***(Naylor)***, the Supreme Court of Appeal *per* Cloete JA stated that:

"The purpose of the rule is clear, it is designed to enable a defendant to avoid further litigation and failing that, to avoid liability for the costs of such litigation. The rule is then not only to benefit a particular defendant, but for the public good generally as Denning LJ made clear in Finlay v Railway Executives:
'The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing plaintiffs to go on trial at their own risk generally as to costs'.

19. In ***Singh and Another v Ebrahim***[8]***(Singh)***, the Supreme Court of Appeal reiterated this principle in the following terms:
'An offer in terms of Rule 34(1) is a mechanism established by the Rule for the effective settlement of disputes…If [a party] fails to take a simple and elementary precaution to ensure that avoidable litigation is avoided, he cannot complain of an adverse costs order if the outcome of the trial is against him'.

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[4]At [[42]-[42] and [47]-[50]
[5]AD (supra); Van Reenen (supra); Khabu (supra)
[6]AD at [41]; Khabu at [13]-[14]
[7] 2007 (5) SA 16 (SCA) at [13]
[8](413/09) [2010] ZASCA 145 (26 November 2010) at [89]

20. In the English Court of Appeal case of ***Cutts v Head & Another***[9] ***(Cutts)*** Fox LJ dealing with a Calderbank offer put it thus:
'If a party is exposed to a risk as to costs if a reasonable offer is refused, he is more rather than less likely to accept the terms and put an end to litigation. On the other hand, if he can refuse reasonable offers with no additional risk as to costs, it is more rather than less likely to encourage mere stubborn resistance.'

21. The award of costs over and above the party and party costs (indemnity costs) based on the Calderbank offer is however not automatic. It is an established principle in Commonwealth jurisdictions that the award of indemnity costs is not based only on the fact that the offer 'beat' the award made by the Court.[10] The offeror still has to demonstrate that the rejection of the offer was unreasonable in all the circumstances of the case.[11] In Australia, Calderbank offers are distinguished from offers of compromise regulated by the Uniform Civil Procedure Rules 2005 (the UCPR).[12] The latter carries a presumptive entitlement to indemnity costs while no such entitlement applies to the former.[13] Hence the necessity for the Calderbank offeror to demonstrate to the Court that the rejection of the offer was in the circumstances unreasonable, to persuade the Court to depart from awarding the ordinary party and party costs and award instead indemnity costs.[14]

22. Accordingly, the effect of the Calderbank offer on costs is for the Court to consider whether the offeree behaved unreasonably in rejecting the offeror's offer or making an unreasonable counter-offer thereby causing the offeror to incur unnecessary expenses.[15] In determining whether the rejection of the offer was unreasonable or otherwise, the Court considers *inter alia*,: the

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[9]1984] 1 All ER 597 (CA) at p315
[10]See: AD (supra) at [61]; Miwa Pty Ltd v Siantan Properties Pte Ltd (No.2) [2011] NSWCA 344 at para 8; Advanced National Services Pty Ltd v Daintree Contractors Pty Ltd [2019] NWSDC 105 at [28]-[29]; Mersal v Georges River Council (No.2) [2021] NSWDC 480 at [17]
[11]Ibid
[12]Miwa (No.2) at paras 6-8; Mersal (No.2) at [13]-[18]; Scott v Bodley No.3 [2023] NSWSC 284 at [31]
[13]Ibid; Daintree Contractors at [56]
[14]Miwa (No.2) at paras 8-12; Mersal (No.2) at [17]; Commonwealth of Australia v Gretton [2008] NSWCA 117 at [13]; Daintree Contractors at [28]-[29]
[15]AD (supra) at [61]

stage of the proceedings at which the offer was received; the offeree's prospects of success assessed as at the date of the offer; the clarity with which the terms of the offer were expressed and whether the offer foreshadowed an application for indemnifying costs in the event of the offeree rejecting it[16].

23. Other relevant factors the Courts consider include, whether the defendant had engaged reasonably in attempting to settle; whether the plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for the best conceivable outcome; whether the plaintiff allowed the defendant a reasonable time to consider the offer; the extent of the difference between the amount of the offer and the amount of the award; and the nature of the proceedings and resources of the litigants.[17]
The list is by no means a closed list.

Issues in dispute

24. Whether the defendants' rejection of the plaintiff's Calderbank offer of 11 March 2022 repeated in January 2023 was unreasonable. Further, whether the timeframe (*spatium deliderandi*) of four (4) calendar days and two (2) court days provided to the defendants by the plaintiff to consider the offer was reasonable.

Submissions

25. Mr De Waal for the plaintiff averred that the plaintiff's Calderbank offer to the defendants to accept 85% of liability towards the plaintiff's proven or agreed damages 'beat' the 100% liability that was awarded by the Court. Accordingly, the rejection of that offer by the defendants was unreasonable.

26. Mr Joubert on behalf of the hospital disputed that the rejection of that offer by the hospital was unreasonable. He contended that from the outset, the hospital had not only denied liability *in toto* but had also pleaded in the alternative, contributory negligence against Dr Ofori. He argued that the hospital was entitled to reject

[16]Hazeldene's Chicken Farm Pty Ltd v Victorian Work Cover Authority (No.2) [2005] VSCA 298 at [25]; Miwa (No.2) at para 12; Commissioner of State Revenue v Challenges Listed Investments Ltd (No.2) [2011] VSCA 398 at [8]
[17]AD at [61]; Khabu at [14]

the plaintiff's offers and propose instead the above-mentioned counter-offers on the basis that the obstetric experts of both the plaintiff (Prof Coetzee) and the hospital (Prof Lombaard) agreed in their joint minute that the injury to D was as a result of hyperstimulation of the uterus caused by the injudicious use of syntocinon at or around 20:45 at the behest of Dr Ofori, prior to D's birth.

27. In addition, the nursing expert witnesses for both the plaintiff (Prof Nolte) and the hospital (Dr Harris) agreed in their joint minute that a reasonable doctor would not have prescribed the administration of syntocinon in the presence of foetal distress and/or uterine hyperstimulation.

28. Mr Joubert further averred that based on the testimonies in chief of Drs Harris and Koll the hospital's obstetric expert, Dr Ofori became 'the captain of the ship' when he arrived in hospital later that day prior to D's birth. As such, Dr Ofori became solely responsible for plaintiff's labour and not the hospital's nursing/midwifery staff.

29. On these bases, Mr Joubert submitted that the hospital's counter- offer of 20% increased to 50% was reasonable in the circumstances.

30. Mr Joubert further contended that a timeframe of two court days provided by the plaintiff for the defendants to consider the plaintiff's offer was unreasonable.

31. Finally, Mr Joubert submitted that based on the dispute of facts in the application, the plaintiff has failed to make out a case for the order sought and accordingly, the application ought to be dismissed. Mr Joubert relied on the principle enunciated in the *Plascon Evans*[18] case cited by the Supreme Court of Appeal in the *Zuma*[19] case for his submission.

Discussion

(a) The stage of proceedings at which the offer was made/received

[18]Plascon–Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635

[19]National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)

32. It is said *'that the response of the offeree must be assessed at the time the offer was made and not with the benefit of hindsight resulting from a known outcome recorded in the judgment.'*[20]

33. It is common cause that the plaintiff made the Calderbank offer to the defendants on 11 March 2020 before the trial commenced on 16 March 2020. The defendants rejected or refused to accept the offer. It is further common cause that the Calderbank offer by the plaintiff was less than the award made by the Court on 3 August 2023.

34. Mr Joubert's reliance on the nursing experts' joint minute and the obstetrics' joint minute to reject plaintiff's offer is conveniently selective. Additional to those joint minutes were the plaintiff's neonatologist expert opinion of Prof Smith who from the outset, set out grounds upon which he concluded that the foetus suffered intermittent or sub-acute hypoxia over a prolonged period. Based on that Prof Smith opined that the administration of syntocinon at 20:45 was merely the proverbial 'straw that broke the camel's back '. Following that expert report was a joint minute of the hospital's own expert Prof Cooper with Prof Smith where they both agreed that it was not possible to be confident that an asphyxial event did not occur during the non-monitoring period of the plaintiff's labour, prior to Dr Ofori's arrival.

35. Additionally, in the very joint minute of the nursing experts Mr Joubert relies upon, the very experts agree that based on the hospital's own records, the management of plaintiff's labour on the day was sub-standard. The hospital's records in that regard are both very telling and patently unreliable at the same time. They expose the poor management of plaintiff's labour on the one hand especially insofar as the monitoring of the FHR is concerned while on the other hand, they record different and conflicting information about the plaintiff's labour progress. There were further other ostensible alterations of the hospital records after D's birth. This on its own should have alerted the hospital of the high risk of continuing with litigation.

36. Mr Joubert's reliance on the joint minutes also fails to take cognisance of the fact that the plaintiff was not only Dr Ofori's patient but also the hospital's. The plaintiff booked herself into the hospital and paid a sum of money for the hospital's services. The

[20]Miwa at para 11

nursing/midwifery staff of the hospital had a legal duty to oversee that plaintiff's labour progressed unhindered in addition to and independently from Dr Ofori's legal duty.

37. The hospital had already admitted in its plea that it had such a duty. It would be a sad day in the history of healthcare that hospitals, let alone private hospitals who are paid huge sums of money to provide healthcare to patients, would disavow their responsibilities to care for their patients on the basis that the patients' doctors are present in the hospital.

38. Moreover, the hospital's legal duty to care for its patients is not limited to the hospital's professional staff but also to provide proper functioning equipment. There is also uncontroverted evidence, (undisputed because the hospital failed to call a witnesses to contradict Dr Ofori's evidence that was confirmed by the plaintiff), that the suctioning machine to suction D after birth was not working. As a result, Dr Ofori had to go to the next room to get a proper functioning apparatus thereby delaying the resuscitation of D who had secondary apnoea at birth.

39. The additional reliance by Mr Joubert on Dr Harris' evidence in chief to reject plaintiff's offer also conveniently disregards the concessions she made under cross examination conceding that the nursing/midwifery staff also had a duty to monitor plaintiff's labour regardless of Dr Ofori's presence. Likewise, Dr Koll's concession that if there was an arrangement between Dr Ofori and the midwifery staff to monitor the plaintiff's labour contractions during the final stage of labour, then the midwifery staff had the obligation to do so, regardless of Dr Ofori's presence.

40. Regarding the plea of contributory negligence, as evident from the plea, contributory negligence was not attributed to the plaintiff, let alone D, but was between the defendants *inter se*. Suffice to state that implicit in that plea, the defendants appreciated the risk that they might be held liable for D's injury, only the extent of such liability was unascertainable. Mr De Waal contended, correctly so, that the plaintiff needed to prove only 1% (the proverbial 'one percenter') of causal negligence against the defendants for the Court to hold both defendants jointly and severally liable for 100% of plaintiff's proven or agreed damages which invariably was what transpired.

41. All the above information, other than the testimonies of the witnesses was available to and at the disposal of the defendants, in particular, the hospital when the plaintiff made the secret offer on 11 March 2020, prior to the commencement of the trial on 16 March 2020. The defendants should have been alerted to the high risk of continuing with the trial especially considering the nature of the action and the level of proof (1%) that the plaintiff required to succeed. The hospital could and should have made a proper assessment of its case and the risks inherent in running a trial of this nature.

42. Accordingly, the alleged reliance by Mr Joubert on a plea of denial of negligence *in toto* and contributory negligence against Dr Ofori to reject the plaintiff's Calderbank offer of 11 March 2020 was misconceived.

(b) Were the defendants offered sufficient time to consider the offer (*Spatium deliberandi)*

43. I agree with Mr Joubert that the *spatium* of two court days provided by the plaintiff for the defendants to consider the offer was unreasonable. The plaintiff set the matter down for trial in June 2019, long before the trial commenced. For the plaintiff to then make the offer of settlement four calendar days and two court days before the trial commenced and giving the defendants only two days within which to respond was grossly unreasonable.

44. Mr De Waal, correctly so, did not dispute the unreasonableness of the time frame provided to the defendants to consider the offer. Instead, he relied on the principle enunciated in *Singh (supra)* where the Supreme Court of Appeal concluded that the *spatium deliberandi* is irrelevant where the offer was never accepted. Mr De Waal argued that the defendants never accepted the offer but instead made unreasonable counter-offers that were never accepted by the plaintiff.

45. The Supreme Court of Appeal in *Singh* was dealing with the 15 day period provided by rule 34 (6) within which the defendant is required to keep the offer open and for the plaintiff to accept it. The Court held that that period becomes relevant only if the plaintiff accepts the offer or attempts to accept it after the expiry date. If however the offer is never accepted, the plaintiff has no

cause to complain.[21] I see no reason why the same principle should not be applicable to the plaintiff's Calderbank offers.

46. The defendants rejected the plaintiff's offer and were never going to accept it considering especially the hospital's attitude before and after the offer was re-opened in January 2023. Considering what I have adverted above when the offer was first made, even after the plaintiff and Dr Ofori closed their case and after Dr Harris' concessions under cross examination, the hospital still refused to accept the plaintiff's offer when it was re-opened in January 2023, understandably with some adjustments to costs. Instead, the defendants resumed and continued with the trial which took a further seven days, four of which were for argument, to finalise.

47. Accordingly, I find that the *spatium deliberandi* was not relevant as contended by Mr De Waal, as the defendants particularly the hospital, never accepted and were never going to accept the plaintiff's Calderbank offer. Therefore, the hospital has no cause to complain that the *spatium deliberandi* was unreasonable.[22]

48. In light thereof, I find that not only has the plaintiff made out a case for the reconsideration of the cost order of 3 August 2023, the plaintiff has also demonstrated that in the circumstances of the case, the defendants were unreasonable in rejecting the plaintiff's reasonable offer of 11 March 2020.

49. Accordingly, I find Mr Joubert's reliance on the *Plascon-Evans* principle to have the plaintiff's case dismissed, without merit. There is no relevant dispute of facts in this case that attracts the application of the principle enunciated in *Plascon-Evans*. On the contrary, most if not all the facts that pertain to this application are common cause between the parties. As such, the *Plascon-Evans* principle as contended by Mr Joubert is not only irrelevant but also inapplicable.

Indemnifying costs/attorney and client or attorney and own client costs

50. Mr De Waal submitted that as a result of the defendants' unreasonable rejection of the plaintiff's reasonable secret offer, as vindicated by the award of the Court, the plaintiff had to incur

[21] At [88]
[22] Ibid

further cost of litigation to pursue the litigation to finality. The party and party costs awarded by the Court on 3 August 2023 are insufficient as they will not cover the plaintiff's irrecoverable costs. The Court should instead award the plaintiff costs on an attorney and own client or attorney and client scale to cover plaintiff's irrecoverable costs, otherwise the plaintiff's capital amount will be significantly eroded since the plaintiff, in particular the minor, will be required to cover the difference utilising the capital amount.

51. Furthermore, Mr De Waal submitted that the minor is indigent and severely disabled. The hospital on the other hand is a private hospital which is financially strong probably also with indemnity insurance paid for by the patients (including the plaintiff) on admission to cover such cases. Hence, the hospital's financial strength to continue with a protracted trial in spite of the plaintiff's reasonable secret offer, at the expense of the plaintiff and in particular the minor.

52. Calderbank offers enliven the court's discretion to award indemnity costs. Once the offeror has demonstrated that the rejection of the offer was unreasonable in the circumstances, it appears to me that the Court has to exercise its discretion in favour of awarding the offeror, in this case the plaintiff, indemnity costs. This is based on considerations of public policy to encourage settlements and discourage litigants from pursuing avoidable litigation thereby causing their opponents to unjustly and unnecessarily incur further litigation costs.

53. As observed by Abadee DCJ in *Daintree Contractors (No.2) (supra)*, public policy considerations make the Court inherently desirous to exercise its discretion to award indemnity costs in a way that *'(a) vindicates the expectations of litigants when they make reasonable offers (rejected by their opponent(s)) that they may be entitled to a cost order on an indemnity basis…and (b) encourages litigants in future matters to engage in sensible attempts to compromise a dispute*.'[23]

54. Some Commonwealth jurisdictions like Australia have the Rules of Court that provide for the award of "indemnity costs."[24] No such rules exist in our Uniform Rules. Hence, in the South African

[23]At [31]
[24]Rule 42.5 of the Uniform Civil Procedure Rules 2005 (New South Wales, Australia)

context, indemnity costs are expressed as attorney and client or attorney and own client costs.[25]

55. Mr De Waal suggested that these costs be referred to as *'indemnity costs'* awarded on attorney and own client or attorney and client scale in order to distinguish them from the traditional punitive costs. Mr Joubert disagreed, contending that since there are no such costs in our law, naming these costs 'indemnity costs' as suggested by Mr De Waal would amount to the Court making new law.

56. I disagree with Mr Joubert. The purpose of awarding these costs is precisely to 'indemnify' the plaintiff of those costs unjustly incurred as a result of the defendants' unreasonable rejection of the plaintiff's reasonable offer. At present in our law, these costs can only be awarded at the scale of attorney and client or attorney and own client scale.[26] That however does not detract from the fact that they are *'indemnity costs'* since plaintiff has already been awarded party and party costs. They flow naturally from Calderbank offers.

57. Accordingly, in my view, naming these costs precisely what they are will circumvent the need for the Courts to attempt to bring them within the meaning of 'punitive costs' including even within the extended meaning of 'vexatious' [27] as their award is not dependant on the offeree's conduct and can be awarded regardless of the offeree's conduct. It will further clarify the Court's reasons for awarding such costs without the need to explain and distinguish them from traditional punitive costs.[28] That way, punitive costs will retain their original meaning distinct and separate from indemnity costs.

58. The claim *in casu* is mainly on behalf of the minor who suffered brain damage during birth that resulted in her suffering from Cerebral Palsy. The plaintiff's claim in her personal and representative capacity on behalf of her deceased husband is merely secondary. It has been almost 17 years since the minor

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[25]AD (supra) at [61]; Van Reenen (supra) at [7]-[8]; Khabu (supra) at [8]
[26]Ibid
[27]Cf Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd 1997 (1) SA 157 (A); Van Reenen (supra) at [30]-[32]
[28]See: Khabu (supra)

suffered the injury and its *sequelae* and it took approximately 12 years for the matter to be finalised.

59. As indicated, the nature of this matter was such that it was capable of and should have been settled. No defence was raised by the defendants against the plaintiff in her personal capacity, let alone the minor D. The Calderbank offer by the plaintiff for the defendants to accept 85% liability of the plaintiff's proven or agreed damages was reasonable in the circumstances considering that the Court found the defendants 100% liable for such damages. There was no reason for the plaintiff, in particular D to incur further litigation costs. Based on what is already adverted above, the proverbial writing was on the wall.

60. The plaintiff, particularly D, is therefore entitled to be indemnified of all reasonable costs incurred after the offer was rejected by the defendants. It will not only be unfair but also *contra bonos mores* to expect the minor to cover those costs utilising the capital amount which she desperately needs in her condition. Considerations of public policy demands that the plaintiff be vindicated by the award of indemnity costs for having made a Calderbank offer to curtail the proceedings.[29]

61. South Africa has become a very litigious nation as borne out by the backlog of cases in all different levels of our Courts still waiting to be heard. One only needs to observe the amendments to the Uniform Rules in particular, relating to Judicial Case Management in terms of rule 37A and rule 41A that seek to curtail protracted litigation and encourage settlements. Rule 41A (9)(b) also makes provision for the court to consider any offers or tenders made in terms of sub-rule (8)(d) during mediation or sub-rule (2) notices when considering costs. As indicated by Rogers J in the *AD (supra)*, considerations of public policy are more compelling now more than ever in favour of settlements and discouraging costly litigation.[30]

62. In the premises, I find that the plaintiff is entitled to indemnity costs based on the Calderbank offer of 11 March 2020 that was rejected by the defendants. To that end, I am inclined to award the plaintiff indemnifying costs calculated at the scale of attorney and own client scale calculated from the day after 11 March 2020.

[29]Daintree Contractors (No.2) at [31]
[30]At [50]

Inadvertently, it follows that but for the rejection of the plaintiff's offer, the issue of the postponement of the trial on 18 March 2020 would not have arisen. The plaintiff is therefore also entitled to those costs.

Costs of the urgent application

63. The plaintiff contends that but for the second defendant's unreasonable refusal to agree to the proposal that the Court consider the reconsideration application first and finalise it prior to hearing the second defendant's leave to appeal, the plaintiff would not have brought the semi-urgent application for directives by the Court. The second defendant insisted that both applications be heard simultaneously.

64. From the correspondence between the plaintiff's and the second defendant's attorneys, it is evident that the parties could not reach a consensus on how to proceed with the two applications. The second defendant sought that the applications be heard simultaneously for convenience while the plaintiff held a contrary view. The plaintiff was of the view that by separating the two, duplication of costs can be avoided particularly in the event of either party seeking to appeal the reconsideration order. In that event, such party could include that application to be heard simultaneously with the application for leave to appeal.

65. It appears from the correspondence that the second defendant's attorneys proposed that since the parties could not agree on the course of action, the plaintiff's attorneys should instead write to me directly for directives. The plaintiff resorted to bring the application instead on the basis, Mr De Waal asserted, that the plaintiff anticipated a dispute before me that was going to be difficult to resolve as there would not have been a proper application before me.

66. It is trite that the issue of costs is within the court's discretion which discretion must be exercised judicially upon consideration of all the facts of the case. In essence, it is a matter of fairness to both sides.[31]

[31]Gelb v Hawkins 1960 (3) SA 687 (A) p 694A; Norwich Union Fire Insurance Society Ltd v Tutt 1960 (4) SA 851 (A) p 854C

67. I am not satisfied that the plaintiff had no other option other than to bring the urgent application for directives as asserted by Mr De Waal. It is within the nature of litigation when parties are unable to agree on how to proceed with a particular course of action that the one party would approach the Court for directives. In that instance, the applicant would normally only seek costs against the respondent, except in exceptional circumstances, in the event of opposition and usually after warning the respondent that such costs would be sought on an attorney and client or attorney and own client scale. I am not privy to any such exceptional circumstances and/or warning to the second defendant by the plaintiff's attorneys.

68. In any event, the second defendant did not oppose the application but indicated that it will only oppose the issue of costs should the plaintiff seek costs against it.

69. I see no reason why this Court should award costs, let alone on attorney and own client scale, against the second defendant. The second defendant was entitled to desire that both applications be heard simultaneously inasmuch as the plaintiff was also entitled to hold a contrary view. That however is not sufficient reason for the second defendant to be mulcted with costs, let alone attorney and own client costs.

70. The plaintiff's attorneys could and should have written to me directly for directives as suggested by the second defendant's attorneys and observe the second defendant's reaction thereto. I am not convinced by Mr De Waal's argument that the plaintiff anticipated an opposition thereto by the second defendant. On the contrary, writing to me directly for such directives was a proposal by the second defendant's attorneys. As such, I am not persuaded that the second defendant would have opposed such a request by the plaintiff.

71. On the basis of fairness, I am not inclined to award these costs against the second defendant.

72. In the result, I make an order in the following terms:

1. The plaintiff's application for reconsideration of costs granted on 3 August 2023 is granted;

2. Paragraph (b) of the Order of 3 August 2023 is amended to read as follows:

"(b) The defendants are ordered to pay, jointly and severally the one paying the other to be absolved, the plaintiff's taxed or agreed party and party costs on the High Court's scale up to and including 11 March 2020, and from 12 March 2020, the plaintiff's taxed or agreed attorney and own client costs on the High Court's scale, such costs to include:…

(v) The costs of the postponement on 18 March 2020".

3. The defendants are ordered to pay, jointly and severally the one paying the other to be absolved, the costs of this application on the scale as between attorney and own client scale, such costs to include:

3.1 full day fees of Senior Counsel for the duration of the argument of this application; and

3.2 the costs of drafting heads of argument.

4. The application for the urgent application costs is dismissed.

5. The plaintiff is ordered to pay the second defendant's costs occasioned by such opposition.

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PL NOBANDA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING	**: 22 and 26 January 2024**
DATE OF JUDGMENT	**: 27 March 2024**
COUNSEL FOR THE PLAINTIFF	**: Adv WP De Waal SC**

COUNSEL FOR THE 1ST DEFENDANT : No Appearance

COUNSEL FOR THE 2ND DEFENDANT : Adv S Joubert SC

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