**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Not Reportable**

Case No: 217/2019

In the matter between:

**PHAKAMA NGALONKULU obo EDINAYO NGALONKULU** **APPELLANT**

**and**

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT** **RESPONDENT**

**Neutral citation:** *Phakama Ngalonkulu v The Member of the Executive Council for Health of the Gauteng Division Government* (217/2019) [2019] ZASCA 66 (17 June 2020)

**Coram:** NAVSA, SALDULKER and DLODLO JJA and KOEN and MATOJANE AJJA

**Heard:** 11 May 2020

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h30 on 17 June 2020.

**Summary:** Delict – damages –admitted negligence by medical staff at hospital in relation to a birth resulting in child suffering from cerebral palsy-MEC seeking development of the common law so as to allow her, instead of paying assessed damages in one payment, to provide hospital, medical and related services and other items at State hospital, alternatively to secure them at a lower cost, alternatively to permit her to pay damages in future instalments–whether order by agreement, prior to amendment by MEC seeking such relief, precluded order sought by MEC-prior order directed MEC to 'pay the Plaintiff 100% of her agreed or proven damages-in circumstances specific to this case prior order precluding subsequent order sought by MEC.

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**ORDER**

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**On appeal from:** Gauteng Local Division, Johannesburg (Van der Linde J sitting as court of first instance)

1. The appeal is upheld with costs, including the costs of two counsel where employed.

2. The order of the court a quo is set aside, and the following order is substituted:

'It is declared that the terms of the order of Moshidi J dated 24 April 2017 precludes this court from ordering that the defendant renders services and medical and related items, instead of paying the plaintiff an amount of money, as pleaded by the defendant in paragraphs 4A.6 to 4A.18 of the plea, or paying such amount of money in future instalments, as pleaded in paragraphs 4A.19 to 4A.36 of the amended plea.

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**JUDGMENT**

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**Matojane AJA (Navsa, Saldulker, and Dlodlo JJA and Koen AJA concurring):**

## Introduction

[1] This appeal is against the following order of the High Court, Gauteng Local Division, Johannesburg:

'(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 related items instead of paying to the plaintiff an amount of money.
(b) S 66 of the [Public Finance Management Act 1 of 1999] (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) [Regulation] 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 the issues, and as to the determination of the separated issues is made.'

[2] The background, culminating in this order and giving rise to the present appeal is set out hereafter.

[3] The appellant instituted an action against the respondent during June 2012, claiming delictual damages from the respondent for injuries her minor son, Endinayo, suffered as a result of the now admitted negligence of medical staff at the Chris Hani Baragwanath Hospital. On 12 September 2006 due to prolonged labour and failure to timeously perform a Caesarian section Endinayo suffered perinatal asphyxia, which caused him to sustain severe brain damage resulting in cerebral palsy, mental retardation and epilepsy.

[4] On 23 August 2012, the respondent served and filed her plea. The plea was essentially a bare denial. Specifically, it did not contain anything related to the development of the common law: that the respondent be ordered, if found liable, to render medical and related services that might be required by Endinayo; or that the costs thereof, when required to be incurred, be paid in future instalments.

[5] The matter proceeded to trial in respect of the issue of liability only on the aforesaid pleadings, before Moshidi J in the Gauteng Local Division of the High Court, Johannesburg on 24 April 2017. The matter was argued on a stated case. Presumably after Moshidi J determined the extent of the respondent's liability to be 100%, the parties submitted a draft order to Moshidi J with the terms they wished to have recorded in the court order to be made in respect of the remaining issues. The terms of the draft order, which were all incorporated in the order that followed appear hereunder:

'1.The issue of liability is separated from the issue of the determination of the quantum of the Plaintiff's claim in accordance with the provisions of Rule 33 (4) of the Uniform Rules of Court;
2. The issue of the determination of the quantum of the plaintiff's claim is postponed *sine die;*
3. The defendant *shall pay* to the Plaintiff 100% (one hundred per cent) of her proven damages in her representative capacity for and on behalf of her minor child, Endinayo Ngalonkulu (from now on referred to as Endinayo") flowing from the neurological injury sustained by Endinayo on or about the 12th of September 2006 and the resultant cerebral palsy which Endinayo suffers from and its *sequelae;*
4. The Defendant shall pay the Plaintiff's costs of suit, such costs to include the following: (the order then set out detailed provisions regarding the payment of costs of inter alia experts, and the obligation to pay interest on costs).'(Emphasis added)

[6] The matter was thereafter enrolled for 4 February 2019 for a determination of the quantum of the appellant's damages. On 17 January 2019, the respondent, however, amended its plea to raise defences which the Constitutional Court in *MEC*

*for Health and Social Development, Gauteng v DZ obo WZ*[1] contemplated might possibly be raised by state defendants in appropriate instances, in the development of the common law.

[7] The amendments to the plea introduced by, inter alia, paragraphs 4A.6 to 4A.36, included that it was unreasonable to require the respondent to pay the amounts claimed in respect of hospital, medical and related services and items required by Edinayo from private healthcare providers when the State Health facilities could provide such services at the same standard at no cost to the appellant or Endinayo. The respondent pleaded that she was in a position to ensure that hospital, medical and related services and items that were recommended, would be rendered and supplied by her Department, or by private healthcare providers which her Department will secure, at a cost lower than the costs that the appellant claims in respect of such services and items. In conclusion, it was pleaded that taking into account the interest of justice, and acting in terms of s 173 of the Constitution, the court should develop the common law and should order that the respondent, instead of being required to compensate the appellant in money in respect of the hospital, medical and related services and items claimed for, be directed to ensure that the services are rendered, or the items are supplied. In broad outline, the respondent contended that the common law should be developed to allow for an order that the respondent compensate the appellant by providing the required medical services at state health facilities, as opposed to paying monetary compensation to acquire such services from the private sector. In the event that it was ordered that monetary compensation be made, it was pleaded that payment should be directed to be made in instalments, when required and incurred, as opposed to being paid in a lump-sum.

[8] The envisaged trial, to determine the quantum of damages to be awarded to the appellant on behalf of her minor son, came before Van der Linde J in the court a quo. He acceded to a request by the parties that an order be granted in terms of rule

[1] 2018 (1) SA (335) (CC) Froneman J held that the possibility for future development is not excluded and that structured payments of future medical expenses may well be permitted, provided that evidence is adduced to support a development of the common law. In the interim, it was held that the court is open to defendants disputing claims for future medical expenses on the basis that the plaintiff can obtain less expensive medical services at a public health facility, thereby also potentially alleviating the financial burden of these claims on the public sector.

33(4) separating the following issues for determination before any evidence was led: the first was whether, having regard to the order of Moshidi J, it was open to the court to order that the respondent renders services and medical and related items, instead of paying the appellant an amount in money; and the second and third were whether s 66 of the Public Finance Management Act 1 of 1999 or Regulation 8.2.3 of the Treasury Regulations promulgated under the PFMA respectively, or both, precluded the court from ordering that the state renders services and medical and related items in the future, or to make payment thereof in instalments.

[9] As is evident from the order set out at the commencement of this judgment the court below decided the first issue in favour of the first respondent. The court *a quo* found that there was an unjustified fixation on the words "*to pay*". It reasoned that Moshidi J deliberately turned his attention away from the quantification of the respondent's obligation to compensate the appellant in respect of her damages, and that the words "to pay" was simply loose language for an order that the respondent was to compensate the appellant for her damages, which were yet to be determined. It was held that the words to pay did not decide that the damages necessarily had to be paid in one lump sum. The court stated:

'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 in favour of the plaintiff'.

[10] As is apparent form the order set out in para 1 above, the court a quo also did not view the provisions of the PFMA or the Regulations to constitute a bar to the form of relief claimed by the respondent in her amended plea. It did, however, grant leave to appeal to this court. In light of the conclusion reached later in this judgment the reasons for the conclusions by the court below in relation to the PFMA and the Treasury regulations need not be explored. I shall, only in the briefest terms, deal with that aspect of the appellant's case later.

[11] I now turn to deal with the finding by the court below that the order by Moshidi J did not preclude the court from making the orders set out at the beginning of this

judgment. Before us the appellant's submissions in regard thereto was refined as follows: Neither party, when they agreed to the draft order, had anything else in mind other than if the appellant proved her damages she would be entitled to be paid in the ordinary course in one payment. This was evident from the draft order viewed as a whole and in context. Moshidi J, in turn, could not be taken to have had anything else in mind either. He had no plea to turn his attention to the common law being developed in order to accommodate that which the respondent belatedly sought in her plea. This court is thus called upon to determine whether the order should be so construed.

[12] The starting point is to determine the meaning of the phrase *shall pay the plaintiff 100% (one hundred per cent) of her agreed or proven damages …'* within the context within which the order was granted and having regard to the purpose for which the order was issued.[2]

[13] The court a quo erroneously explored the meaning of the term '*to pay*' in isolation, without regard to the context within, and the purpose for which the parties required that the terms of their draft order handed to Moshidi J, was to be made an order of court. At that stage, on the pleadings, no form of compensation other than monetary compensation in a lump sum was envisaged or contemplated. The term '*to pay*' was also not only used in regard to the payment of damages, but was also used in the wording of the cost order. The phrase to 'pay' accordingly did not allow for any interpretation, other than a payment in money. Had the parties intended something different, they would have said so in the draft which they required Moshidi J to make an order of court.

[14] As alluded to earlier, the matter was argued before Moshidi J on a stated case. Moshidi J was required to accept the statement of facts submitted to him by the parties and was further restricted to a consideration of the then prevailing common law, namely the 'once and for all' rule that damages could not be paid in

[2] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk*. 2014 (2) SA 494 (SCA). See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

instalments.[3] At that stage the decision of the Constitutional Court in *DZ* had not yet been delivered.

[15] The order was drafted and agreed upon by the parties with the knowledge that monetary damages were claimed as per the appellant's particulars of claim and that such damages would be payable in a lump sum. A plea for the development of the common law or any plea that services should be rendered was neither raised, let alone pleaded, at the time. Moreover, as a careful consideration of the draft order will show the order was more than just the standard one which separated quantum from liability. It extended to over two typed pages. It accepted liability on the part of the respondent for the costs associated with the obtaining of medico-legal reports in relation to four named expert witnesses. It accepted responsibility for costs on behalf of the defendant for the qualifying fees and preparation costs in respect of those witnesses and the costs of two counsel as part of 'costs of suit', presumably in relation to liability. Furthermore it provided for interest to be paid on taxed or agreed costs. This was a draft order that must have been carefully and consciously arrived at. Counsel on behalf of the respondent was constrained to concede before us that there must have been deliberate consideration of its terms by the respective legal representatives and that at that stage the plea now raised was not in contemplation. It is within that context that the meaning of the word 'pay' has to be considered, namely to give effect to the agreement of the parties. Pleas based on the decision by the constitutional court's decision in DZ have subsequently been raised in a number of cases. In the present case one is left with the impression that it was raised opportunistically.

[16] The meaning of the words *"shall pay the plaintiff 100% (one hundred per cent) of her agreed or proven damages"* construed in their ordinary grammatical sense, in the context and circumstances set out above, meant that respondent's liability and the manner of compensation had been finally adjudicated. Accordingly, the court a quo was simply required to quantify the appellant's damages. It was precluded from making any order other than that payment of the appellant's damages had to be in

[3] *DZ* para 59.

money, as the respondent had agreed, as per the draft order, to pay the appellant 100% of her proved or agreed to damages.

[17] 'We were referred to a number of judgments of the high court[4] which construed the word 'pay' in orders preceding an assessment of damages, after liability was established, to mean payment in the ordinary course. In other words that it meant payment in money all at once and not in instalments, and that the provision of medical services was not contemplated. No purpose is served by an analysis of those judgments. Each case is to be determined on its own merits.

[18] The parties were agreed that a decision on this point in favour of the appellant would be dispositive of the appeal. There is accordingly no need to consider the effect of the provisions of s 66 of the Public Finance Management Act[5] or the regulations, save to record that counsel on behalf of the appellant were rather muted.in relation thereto, advisedly so.

[19] When the quantum of the appellant's claim is being assessed there is nothing to prevent the respondent form proving that the necessary medical services of acceptable standard could be obtained at lesser cost. That would be in contestation, in the ordinary course, of the quantum claimed[6].

[20] Finally, it is worth noting that there is presently before Parliament a bill that will regulate claims of the kind in question, including dealing with the manner and time of payment. The legislature is arguably best suited to that kind of regulation.[7]

[21] In the result the following order issues:

1. The appeal is upheld with costs, including the costs of two counsel where used.

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[4] *Mshibi v The MEC for Health of the Gauteng Provincial Government* (GLD) – Case NO. 2012/32085. *Allee v The MEC for Health and Social Development of the Gauteng Provincial Government* (GLD) Case No.2013/44276. *Slabbert v The MEC for Health and Social Development* (GLD) – Case No. 2013/63333.

[5] Act 1 of 1999.

[6] See *Ngubane v South African Transport Services* 1991(1) SA 756 (A).

[7] State Liability Amendment Bill (B16-2018) published in Government Gazette No.41658 of 25 May 2018).

2. The order of the court of the first instance is set aside, and the following order is substituted:

‘The terms of the order of Moshidi J dated 24 April 2017 precludes this court from ordering that the defendant renders services and medical and related items instead of paying the plaintiff an amount of money, as pleaded by the defendant in paragraphs 4A.6 to 4A.18 of the plea.’

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**K MATOJANE**
**ACTING JUDGE OF APPEAL**

**APPEARANCES**

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