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## ORDER

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**On appeal from:** Eastern Cape Division of the High Court, Mthatha (Brooks J sitting as a court of first instance).

1 The appeal is upheld, with no order as to costs.

2 The order of the high court is set aside and replaced with the following order:

‘The rule nisi dated 23 March 2020 is discharged, with no order as to costs.’

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## JUDGMENT

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**Goosen AJA (Dambuza, Molemela and Makgoka JJA and Chetty AJA concurring):**

[1] This appeal is against an order of the Eastern Cape Division of the High Court, Mthatha (the high court), confirming a rule nisi on 30 June 2020, which was granted on 23 March 2020. The respondent sued the appellant, the Member of the Executive Council for Health, Eastern Cape (the MEC) in her personal and representative capacities on behalf of her minor child. She claimed damages arising from harm caused to the minor child during birth at Mthatha General Hospital, a public health facility in the Eastern Cape, which falls under the MEC’s authority.

[2] The action commenced in July 2015. On 15 October 2019 Dawood J issued an order in terms of which the MEC was held liable for damages suffered by the respondent in both her personal and representative capacities. The

determination of quantum was postponed to 28 November 2019 ‘*for settlement purposes only.*’ (My emphasis.)

[3] On 28 November 2019 the matter came before Brooks J, who issued an order, by agreement, that:

- ‘1. The matter be and is postponed to 7 February 2020 *for settlement purposes.*
2. The defendant is directed to serve and deliver its expert reports on quantum on or before 05 December 2019.
3. The parties are directed to conclude joint minutes on 13 December 2019.
4. The parties are further directed to hold a further pre-trial conference on 17 January 2020.’

(My emphasis.)

[4] On 7 February 2020, the matter came before Mbenenge JP. Both parties were represented. The following order was issued:

- ‘1. The matter be and is postponed to 23 March 2020 *for settlement purposes.*
2. The parties are directed to hold a further pre-trial conference on a mutually convenient date.
3. The parties are directed to present to the court the aforesaid pre-trial conference minute on or before 13 March 2020.’ (My emphasis.)

[5] Following the postponement of the case to 23 March 2020, two pre-trial conferences were held. The outcome of each was recorded in a minute, the first dated 16 March 2020 and the second, 19 March 2020. The first minute records that the parties were represented by attorneys and counsel. In paragraph 3 it is stated:

- ‘3. The parties confirm that they are duly authorised to attend the conference to deal with the business raised therein and agree where agreements are reflected.’

[6] In paragraph 4 it is recorded that after extensive discussions and negotiations the parties reached agreement on a number of issues. These are set out in the remainder of paragraph 4 and paragraphs 5 to 9. A reading of the

minute indicates that certain adjustments were to be made to the actuarial calculations and for this purpose the pre-trial meeting was adjourned to 19 March 2020.

[7] The meeting of 19 March 2020 was a continuation of the earlier meeting. In paragraph 3 of the minute it is again stated that the attendance of ‘the parties’ is duly authorised. Paragraphs 4 to 8 contain details of the amounts agreed upon in the computation of damages by the relevant experts. Paragraphs 9 and 10 state:

‘9. The parties agree that the total value of the plaintiff’s claim is the sum of R23 16 489.00 and this sum is fair and reasonable and a compromise for the settlement of the plaintiff’s claim.

10. The parties recorded that the defendant’s legal representative will seek instructions to settle the plaintiff’s claim on the agreed sum.’

[8] The minute of the pre-trial conference was signed by attorneys for the plaintiff and the defendant, and filed. On 23 March 2020 the matter came before Griffiths J, who issued the following order:

‘1. The parties’ legal representatives are in agreement that a sum of **R22 716 489.00** represents a fair and reasonable quantum of damages in respect of **Hlelimina Mbokodi** and provisional agreement has been reached that an order incorporating this sum and in the usual ancillary terms should be granted.

2. The parties’ legal representatives are in agreement that a sum of **R450 000.00** represents a fair and reasonable quantum of damages in respect of the plaintiff in her personal capacity.

3. The defendant’s representatives do not currently have instructions to settle the matter in the aforesaid sums, now therefore, a *rule nisi* is issued by agreement calling upon the **Superintendent General of the Department of Health** to appear in this **Court on Wednesday, 15 April 2020 at 09h30** and show cause why an order should not be granted in favour of the Plaintiff in terms of the draft Order attached hereto marked ‘X’.

4. The service of this Order is to be effected on the **Office** of the **Superintendent General** and/or **Legal Services** of the Defendant by the Defendant’s Attorneys of record, **Mr Nqiwa**.

5. Failing the appearance of the **Superintendent General** as aforesaid a final Order will be issued.

6. The Defendant is to pay the costs relating to today's proceedings, including costs of two counsel and witnesses (if any), and the reasonable reservation charges in respect of plaintiff's witnesses (if any).'

[9] The Superintendent-General of the Department of Health, Dr Mbengashe, deposed to an affidavit setting out reasons why the rule nisi should not be confirmed. On 7 May 2020, the MEC filed a notice of intention to amend the plea. The proposed amendment envisaged the introduction of a defence in respect of the quantum of damages along the lines of what has come to be called the 'public health service' defence.<sup>1</sup> A notice of objection to such amendment was filed. So too was a replying affidavit responding to the affidavits filed by the MEC. The return date of the rule nisi was initially extended to 27 May 2020 and thereafter to 18 June 2020.<sup>2</sup> The matter came before Brooks J, who delivered his judgment on 30 June 2020 confirming the rule nisi and issuing an order in accordance with the draft that had been annexed to the order of Griffiths J.

[10] Brooks J confirmed the rule on the basis that an agreement had been reached by the legal representatives, duly authorised, pursuant to a court-directed settlement process. This appears to have been a reference to the fact that the matter had previously been postponed 'for settlement purposes'. He found that the context in which the rule came to be issued pointed to a firm and

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<sup>1</sup> See *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2018 (1) SA 335 (CC), in which the Constitutional Court left open the possibility of the future development of the common law 'once and for all rule' in relation to delictual claims for payment of damages in respect of future medical treatment.

<sup>2</sup> On 3 April 2020, Norton Rose Fulbright South Africa Inc., who it is common cause were appointed as new attorneys representing the MEC, wrote to Sakhela Incorporated, representing the respondent. They stated that they had been appointed but, due to the circumstances of the lockdown, had not yet been able to obtain the case file from the State Attorney or counsel who had been involved in the matter. In subsequent correspondence it was proposed that the case be postponed and the rule nisi extended, in accordance with a Practice Directive which regulated practice under the constraints of the national lockdown. On 14 April 2020 a notice of substitution of attorneys was filed.

binding agreement as its *causa*. An important element of the high court's reasoning concerned the adoption of a practice, in that court, to deal with persistent failures on the part of the MEC to fully and properly engage with litigation in similar matters, and the failure to furnish timeous instructions to the State Attorney. I will touch upon this briefly hereunder. The high court concluded that no reasonable basis had been demonstrated why the order should not be confirmed.

[11] Brooks J subsequently refused leave to appeal, but on further application, leave was granted by this Court. In doing so this Court raised the question whether, in the light of the fact that the legal representative did not have instructions to agree to the quantum, it was within the power of the high court to grant the rule nisi. This requires consideration of the rule nisi procedure, in general, and the nature and effect of the order granted on 23 March 2020.

### **The rule nisi procedure**

[12] A rule nisi is an order issued by a court, at the instance of a party, calling upon another party or parties to show cause on a stipulated date before that court why relief, as claimed, should not be granted. The procedure, which derives from English law, has been employed by our courts for well over a century.<sup>3</sup> Its use and development is underpinned by the principle that a court will not grant relief which impacts or constrains the rights and interests of a party without affording that party an opportunity to be heard (*audi alteram partem*). It is also premised on the acceptance that the interests of justice require the balancing of rights and interests to ensure that what is worthy of immediate protection is not prejudiced by the time it takes to hear all interested parties.

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<sup>3</sup> See *Setlogelo v Setlogelo* 1914 AD 221; see also *Grant-Dalton v Win and Others* 1923 WLD 180 at 185.

[13] The rule nisi is generally used in *ex parte* applications. Van Zyl<sup>4</sup> explains that,

‘This rule, or order, for after all it is really an order, is granted only on an *ex parte* application. This application should be by *petition setting forth fully all of the circumstances of the applicant’s cause of complaint, so as to induce the Court to grant his prayer*. He must [show] a good *prima facie* cause to entitle him to this rule, and a good reason must be assigned, or [shown] for the urgency of the application, and why it should be *ex parte* instead of serving the respondent with the notice of motion.’

[14] Since those observations were made, the practice relating to rules nisi has been used in various contexts. The essential character and purpose of the procedure, however, remains to ensure that (a) notice is given to an affected party; (b) a *prima facie* case is made out for the relief sought; and (c) such relief may be granted unless cause is shown why it should not be granted.<sup>5</sup>

[15] The authorities demonstrate that the use of the rule nisi procedure and its adaptation to new circumstances has occurred in a manner consistent with the principles of procedural law. In each instance, it has occurred in the context of application proceedings, requiring the granting of a rule nisi to be supported by evidence which warrants the granting of the rule.

### **The meaning and effect of the order of 23 March 2020**

[16] In this Court, it was accepted that the case was already on the trial roll and that the postponements were to successive dates on that roll.<sup>6</sup> The case was

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<sup>4</sup> G B Van Zyl, *The Judicial Practice of South Africa* Vol 1 4 ed at 401.

<sup>5</sup> *Safcor Forwarding (Johannesburg) (Pty Ltd) v Chairman, National Transport Commission* 1982 (3) SA 654 (AD) at 674H-675A; *National Director of Public Prosecutions v Mohammed* 2003 (4) SA 1 (CC) para 29; *Du Randt v Du Randt* 1992 (3) SA 281 (E) at 289E-F; *Ex parte St Clair Lynn* 1980 (3) SA 163 (W) at 164E-H. It should be noted that *Du Randt* was overruled by this Court in *MV Snow Delta: Serva Ship Ltd v Discount Tonnage* 2000 (4) SA 746 (SCA) para 6. *Du Randt* held that an interim interdict remains operative in the event of an appeal noted against an order discharging the rule on the return date. This court held that this is incorrect. The proposition, that a rule nisi should only be granted where there is sufficient justification in the evidence placed before the court, was not disturbed. See also *Ex parte Saiga Properties (Pty) Ltd* 1997 (4) SA 716 (E) at 720G -721A.

<sup>6</sup> The judgment of the high court confirms that the matter was postponed from time to time ‘on the trial roll’.

therefore before the trial court for adjudication of the quantum of the respondent's claim. Griffiths J would have had before him the case file for trial. This included the pleadings, notices qualifying experts and minutes of pre-trial conferences, including those of 16 and 19 March 2020.

[17] The trial, however, did not commence. No evidence was presented. No affidavits to support the requested rule nisi were submitted. The introductory portion of the order issued by Griffiths J states that he considered the documents filed by the parties and then issued the order in terms acceptable to the legal representatives who appeared before him. The documents referred to, doubtless, are those which ordinarily serve before a trial judge, excluding those that would need to be presented in evidence.

[18] The language employed in paragraphs 1 and 2 of the order is clear and unequivocal. Those paragraphs are not operative orders. They record facts, and no more. When read with what follows in the order, they provide a reason for the issuing of the order. They state that the legal representatives of the parties had, as between them, reached agreement on the quantification of the claim. In paragraph 3, it was specifically recorded that the MEC's legal representatives did not have instructions to settle the claim in those amounts.

[19] The meaning of these paragraphs could not be clearer. They mean that the agreements recorded in the minutes of 16 and 19 March 2020, were not agreements reached with authority to bind the MEC. The legal representatives who appeared on 23 March 2020 had attended those pre-trial conferences. It is in the light of these statements of fact that the minutes of 16 and 19 March 2020 are to be read.

[20] In this Court, it was argued, on behalf of the respondents, that the minutes must be interpreted in their broader context, as part of a sustained process of discussion and negotiation between representatives who were acting within the ambit of duly established mandates. On this basis, it was submitted that where it was recorded that the parties had agreed, this meant an agreement binding the principals had been reached. The argument, however, lost sight of the express language employed in the rule nisi and the qualification inserted in paragraph 10 of the minute of 19 March 2020. It is in this language that the nature and effect of the order of 23 March 2020 is to be found.

[21] Paragraph 10 of the minute records that '[t]he parties recorded that the [MEC's] legal representative will seek instructions to settle the [respondent's] claim on the agreed sum'. The word 'parties' as used in that paragraph, and indeed throughout the minutes, can only refer to the legal representatives. To hold otherwise would render the paragraph nonsensical. It would mean that the MEC, having reached agreement on the sum, wished to afford the MEC's representative an opportunity to obtain an instruction to agree to what had already been agreed.

[22] The terms of the order issued by Griffiths J indicate that he understood that the MEC's legal representatives had reached agreement with their opponents on the quantification of the respondent's claim, but that they did not have the authority to bind the MEC to that agreement. The representatives lacked actual authority and had asserted the limits of their authority. It was to address this fact that the rule nisi was issued. As is apparent from the terms of the rule nisi, it required the Superintendent-General to appear in court on the return date and show cause why the order should not be made. Provision was made for service of the order upon the Superintendent-General, and a warning was sounded that upon failure to appear, a final order would be made.

[23] It is important to highlight that the rule nisi called upon an official of the principal litigant to show cause why he was not giving instructions in accordance with the stance adopted by their legal representatives. Put differently, the order called upon the litigant to explain why the matter was not settled on the terms contained in the draft order.

[24] Two aspects bear emphasis. The first is that the trial issue concerned the quantification of the claim. Such quantification would ordinarily involve determination of the nature, extent and consequences of the harm suffered; the nature and extent of medical treatment and assistance required in the future to deal with the consequences of that harm; the reasonable costs of such treatment and assistance; and the capitalisation and discounting of those costs. In this case that would have required extensive expert evidence. None of that evidence was before the court. All that was before the court was an agreement between the legal representatives as to what was an appropriate assessment of the quantum. The rule nisi called upon the MEC to show cause why the quantification of loss should not be decided on the opinion of the legal representatives, without the court being able to satisfy itself that such determination was a proper basis to decide the case.

[25] The second, and more significant, aspect concerns litigant autonomy. The order required the litigant to provide some cognisable and reasonable explanation as to why he should not be bound by that to which his representative had, without authority, agreed. It must be borne in mind that on three occasions when the matter was postponed, on 15 October 2019, 28 November 2019 and 7 February 2020, it was for ‘settlement purposes.’ Brooks J specifically relied upon the fact that the court had ‘directed’ a settlement process to support his finding that the State Attorney was mandated and that an

agreement had been reached. A court is not entitled to direct parties to settle a dispute. It is a fundamental feature of our adversarial system that the parties act autonomously. They are entitled to have their justiciable disputes adjudicated by independent courts as guaranteed by s 34 of the Constitution. The parties to a dispute are primarily responsible for the conduct of the litigation. Their access to and use of the courts is subject to sanction only when it is vexatious or an abuse of process. Apart from the inherent jurisdiction to protect the dignity of the courts and to impose punitive cost sanctions for the manner in which litigation is conducted, the settlement of a dispute is entirely in the hands of the parties.

[26] The granting of the rule nisi was, in these circumstances, neither procedurally nor substantively within the power of the court. It could not, therefore, have been confirmed on the return date. For this reason it is not necessary to deal with the high court's reasons. However, one aspect, alluded to earlier, does require comment.

[27] The high court's criticism of the MEC's conduct in this matter was trenchant. It concerned the belated substitution of attorneys and the filing of a notice of intention to amend the plea. The high court considered that this conduct was not in good faith. It appears to me that the court's criticism was not without cause. The MEC has since abandoned the intention to amend the plea. The high court observed that the employment of the rule nisi procedure was not unique to this matter. The learned judge stated that recalcitrance and delay was a feature of the MEC's conduct of medical negligence litigation pursued against the Department. In many instances this involved the failure to give instructions timeously to their legal representatives. It was this systemic failure that had necessitated orders such as that issued in the present matter.

[28] It is lamentable that this situation persists despite the high court's criticisms raised in similar cases. There can be no doubt that the courts must intervene, procedurally, to facilitate the finalisation of cases in the face of dilatory, and even obstructive, conduct on the part of a litigant. However, the procedural intervention employed in this matter is not appropriate. Rules 37 and 37A of the Uniform Rules of Court deal extensively with case management of trial actions. Their purpose is to expedite enrolment and finalisation of cases. If, in the course of case management the case becomes settled, then an important object will have been achieved. If it is not settled, for whatever reason, and the plaintiff is ready to proceed, certification of the matter as trial ready and enrolment on trial would allow the plaintiff, who is *dominus litis*, to prosecute their case. It is then the function of the trial court to deal with the evidence presented and adjudicate the case. It is always within the authority of the trial court to deal with a dilatory and obstructive defendant by way of an appropriate punitive costs order, including costs *de bonis propriis*, where necessary.

[29] In the result the appeal must succeed. The MEC did not seek costs on appeal and accepted that upon discharge of the rule nisi, no order for costs should be made.

[30] The following order is issued:

1. The appeal is upheld, with no order as to costs.
2. The order of the high court is set aside and replaced with the following order:

‘The rule nisi dated 23 March 2020 is discharged, with no order as to costs.’

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GG GOOSEN  
ACTING JUDGE OF APPEAL

## Appearances

For the appellant	P J De Bruyn SC with M Morgan
Instructed by	Norton Rose Fulbright South Africa Inc, Cape Town Webbers Attorneys, Bloemfontein.
For the respondent	A G Dugmore SC with A Mdeyide
Instructed by	Sakhela Inc. Attorneys, East London Eugene Attorneys, Bloemfontein.