IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D11635/2015

In the matter between:

MARISSA NORTJE	Plaintiff
and	
ROAD ACCIDENT FUND	Defendant
MINISTER OF HEALTH; MINISTER OF POLICE	
MINISTER OT TRANSPORT	Interested Parties

ORDER

I make the following order:

1. The plaintiff's claim is dismissed.
2. There is no order as to costs.

JUDGMENT

Date Delivered:

Masipa J:

Introduction

[1] This matter was set down for trial to run from 25 to 27 May 2020 on the issue of quantum in accordance with the order by D Pillay J dated 24 March 2017 at a case flow management hearing. At a further rule 37 conference on 7 May 2020, the parties agreed that it was convenient to separate the issues of transmissibility of the general damages claim of the Late Richard Daniel

Nortje to his estate. The parties agreed that the resolution of this single issue would result in the settlement of the claim by the defendant.

[2] It was further agreed that this issue was a matter for legal argument which could be dealt with by way of written submissions. Consequently, it qualified as a matter which was capable of being dealt with as an opposed motion on the papers without the need for oral evidence. Consequent upon this the parties submitted written arguments. Upon considering the matter, it appeared that the relief sought by the plaintiff raised constitutional considerations which could affect several parties. As a result, a rule 16A notice was called for and issued with a directive that it be specifically served on three government ministries being the Ministers of Health, Police and Transport. The ministries filed joint heads of argument. There were further written arguments submitted by the plaintiff and defendant.

Facts

[3] The plaintiff Marissa Nortje sues in her capacity as executor of the estate. Richard Daniel Nortje is the widower of the deceased who passed away in November 2011. The defendant is the Road Accident Fund a juristic person established in terms of the Road Accident Fund Act 56 of 1996 and is sued on the basis that in terms of the Act it is responsible for damage in the form of personal injuries sustained as a result of a motor vehicle accident.

[4] On 19 November 2011, a motor collision occurred between vehicles driven by the deceased and Tracy Mary-Anne Horton (‘Ms Horton’). In the particulars of claim it is alleged that the sole cause of the collision was the negligence of Ms Horton. Further, that as a result of that collision, the deceased suffered a fracture of the left proximal femur. The deceased underwent several medical procedures at King Edward Hospital and required medical treatment in the form of orthopaedic intervention, provision of anal disc and was under anti-inflammatory treatment. He was unable to work at his pre-accident vocational level and suffered loss of earnings including future loss and incurred medical expenses. It is also alleged that the deceased suffered pain, shock and discomfort, loss of amenities of life and permanent

disfigurement. The plaintiff's claim as set out in the particulars of claim is for a payment in the sum of R807 198.

[5] In its plea, the defendant denied that the collision ever occurred and pleaded that it had no knowledge of any negligence arising from Ms Horton and of any injuries sustained by the plaintiff. The defendant contended that the deceased was the sole cause of the collision under the same or similar circumstances of negligence as purported to have been that of by Ms Horton. Alternatively, that if the court found that Ms Horton was negligent, the defendant contended that the deceased contributed to the collision and was negligent. Accordingly, that the damages suffered by the plaintiff should be apportioned in terms of the Apportionment of Damages Act 34 of 1956.

The issue to be determined

[6] The issue to be determined is whether the deceased's claim for general damages is transmissible to his estate if the deceased dies pre-*litis contestatio*.

Submissions by Counsel

[7] Mr *Sacks* for the plaintiff sets out the background of Roman law preventing the transmissibility of certain claims to or against the heirs of a deceased while allowing the transmissibility of others. In general, claims *in rem* could be transmitted whilst those in *personam* could not be transmitted. This meant that the transmissibility of claims for or against the heir of the deceased litigant was allowed after *litis contestatio* and such transmissibility was not affected by the nature of the claim.

[8] In the matter of *Executors of Meyer v Gericke* (1880) Foord 14 at 16, the court observed as follows:

'It is further admitted that such an action, even if instituted during the lifetime of both parties, cannot be continued after the death of either party unless the stage known as the *litis contestatio* has been reached'.

[9] In *Pienaar & Marais v Pretoria Printing Works Ltd & others*, 1906 TS 654, the court that held that:

'…a personal action for libel cannot be ceded. It perishes on the death of the person libelled, and it does not even pass to his heirs unless the action had been commenced before his death and had reached the stage of *litis contestatio*. That was so decided in *Executors of Meyer v Gericke*, in accordance with the weight of Roman-Dutch authority.'

All subsequent cases had followed this approach.

[10] Mr *Sacks* argued however that South African law has since shifted from this approach as a result of the judgment of *Nkala & others v Harmony Gold Mining Co Ltd & others* 2016 (5) SA 240 (GJ). In *Nkala,* the court took the opportunity to reconsider the issue and noted in para 185 that the claim for non-patrimonial damages also referred to as general damages is a claim for the personal injury sustained in the form of pain and suffering, loss of amenities of life and for disfigurement. The court went further to state at para 186 that the claim however does not fall within the scope of the *lex aquilia* but is brought simultaneously with the aquilian action because the facts relied upon to establish it are the same as those relied upon for the patrimonial loss claim in terms of the *lex aquilia*. Although there is no scientifically calculable economic or monetary value, Roman-Dutch authorities have placed a monetary value in the form of solatium to the plaintiff such as compensation or reparation for the wrong suffered.

[11] It is trite that an executor can sue for any patrimonial loss suffered by the deceased before his death as well as the funeral expenses. The dependants of the deceased can also sue for any patrimonial loss they suffer as a result of the premature death of their financial provider. See *Lockhat's Estate v North British & Mercantile Insurance Co Ltd* 1959 (3) SA 295 (A) at 304B-C. However, neither could sue for any personal injury such as pain and suffering, loss of amenities of life or disfigurement. An exception to that rule is that a claim could be transmitted where the deceased had commenced action and the claim had reached the stage of *litis contestatio* before his death. See para 188 of *Nkala*.

[12] According to Mr *Sacks* the court in *Nkala,* reconsidered the legal position in light of modern day practise and developed the common law to suit

the times as entrenched in s 8(3) read with s 39(2) of the Constitution. Section 39(2) of the Constitution enjoins the court to develop the common law to the extent necessary to make it consistent with its enshrined values.

[13] He argued further that the right of litigants to bodily integrity is vindicated by compensation in the form of general damages by the wrongdoer. The benefit acquired therefrom is shared by their dependants. To deny the opportunity to transmit such right to their estate removed that right. Accordingly, he submitted that as set out in *Nkala* para 200, the common law needed to be developed to the extent that it was incompatible with the Constitution.

[14] A distinction was made between *Nkala* and *Van der Merwe v Road Accident Fund & another (Women's Legal Centre Trust as amicus curiae)* 2006 (4) SA 230 (CC). In *Nkala* para 202, the majority of the court noted that in *Van der Merwe*, there was no comment made on the constitutional compliance of the common law rule precluding the transmissibility of general damages pre-*litis contestasio.* Mr *Sacks* submitted that what *Van der Merwe* did was to describe non-patrimonial loss.

[15] In *Nkala,* the court concluded that an injustice would eventuate if general damages that would have been due to the deceased is not transferred simply because he succumbed before the case he brings or intended to bring reached the stage of *litis contestatio*. The court observed at para 213 that loss of general damages will be borne by the widow and dependants of the deceased, as they would have benefited, had the primary provider not died pre-*litis contestatio.*

[16] At para 220 of *Nkala,* the court developed the common law as follows:

'1. A plaintiff who had commenced suing for general damages, but who has died, whether arising from harm caused by a wrongful act or omission of a person or otherwise, and whose claim has yet to reach the stage of litis contestatio, and who would but for his/her death be entitled to maintain the action and recover the general damages in respect thereof, will be entitled to continue with such action, notwithstanding his/her death; and

2. The person who would have been liable for the general damages if the death of the plaintiff had not ensued remains liable for the said general damages, notwithstanding the death of the plaintiff so harmed.

3. Such action shall be for the benefit of the estate of the person whose death had been be caused.

4. A defendant who dies while an action against him has commenced for general damages arising from harm caused by his wrongful act or omission, and whose case has yet to reach the stage of litis contestatio remains liable for the said general damages, notwithstanding his death, and the estate of the defendant shall continue to bear the liability, despite the death of the defendant.'

The court in para 221 concluded that the only way to cure the common law of arbitrariness, irrationality and unreasonableness was to develop it.

[17] It was submitted that *Nkala* ought to be followed in this matter and that the reasoning of *Nkala* is sound and in accordance with the development of the common law to bring it in line with the values enshrined in the Constitution. The plaintiff sought an order that the deceased's claim for general damages be transmitted to his estate notwithstanding the fact that he died prior to *litis contestatio.* Paragraph 16 above distinguishes *Nkala* from the present matter since *Nkala* dealt with instances where a litigant dies after the commencement of the action.

[18] Mr *Naidoo SC* for the defendant argued that the court should not follow the *Nkala* judgment since it was not set law. This argument is flawed and was based on the fact that Mr *Naidoo* relied on the dissenting judgment in *Nkala* which indicated that the incremental development of the common law had a knock-on effect and must take into consideration that a declaration that general damages as transmissible to the deceased estate even prior to *litis contestatio* was of considerable gravity. This was because it affected other areas of law including litigation in Road Accident Fund matters.

[19] He argued that, in the present case, the plaintiff's claim was distinguishable from *Nkala* since the action was instituted after the death of

the deceased. Accordingly, this court should follow set law being that the effect of *litis contestatio* is to freeze the plaintiff's rights at that moment.

[20] Uniform rule 29(1) which deals with the consideration of whether pleadings have closed and provides as follows:

'(a) either party has joined issue without alleging any other new matter, and without any further pleading;

(b) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed.

(c) the parties agree in writing that the pleadings are closed and such agreement is filed with the Registrar; or

(d) the parties are unable to agree as to the close of pleadings, and the court upon the application of a partied declares them closed.'

[21] Mr *Naidoo* argued that in *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 608H, the court endorsed the reasoning that in our law, the claim for pain and suffering is neither transmissible where the death of the injured person occurs before *litis contestatio* nor is it capable of being transferred by cession at any stage before the pleadings are closed. See also *Hoffa, NO v SA Mutual Fire & General Insurance Co Ltd* 1965 (2) SA 994 (C) at 955C-D.

[22] Mr *Naidoo* submitted that in *Milne, NO v Shield Insurance Company Ltd* 1969 (3) SA 352 (A) at 358C, the court found that a claim for non-patrimonial loss suffered by the deceased is transmitted to his estate if *litis contestatio* has taken place prior to his death. This was however not what was in issue on appeal. The issue in this matter. The court had to decide whether an amendment of pleadings could be effected after *litis contestatio* where the patient on whom the claim was based died post litis contestation. In *Jankowik & another v Parity Insurance Co Pty (Ltd)* 1963 (2) SA 286 (W) at 290D-E were it was stated that if *litis contestatio* had been reached at the time of the death of the deceased then his claim for general damages had transmitted to his estate. In *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA) at [38] – [39], the court held that a claim for pre-natal injuries where a child dies shortly

after birth lapses unless action has been instituted and the stage of *litis contestatio* has been reached.

[23] In *Jansen Van Vuuren NNO v Kruger* 1993 (4) SA 842 (A), the court upheld the appeal where the plaintiff claimed general damages for defamation but died during his trial. It allowed for the substitution of the deceased by the executor of his estate and awarded general damages. *Litis contestatio* does not affect the course of action, it merely allows for the transmissibility of the claim for general damages to the estate of a party dying after *litis contestatio* is reached. Mr *Naidoo* therefore submitted that based on these authorities, the plaintiff was not entitled to general damages.

[24] In respect of development of the common law, Mr *Naidoo* submitted that in *Nkala,* Windell J, in her minority judgment stated that the development of the common law ought to be restricted to class actions. I do not agree with the preference given to class actions over individual litigants. If there is a basis for the development of the common law, this should be done looking at the tests set out in numerous authorities which are dealt with further on in this judgment. In my view differentiating between litigants should not be a criterion. He stated at para 240 that social justice and the advancement of human rights and freedoms are described as the 'leitmotif of our Constitution… The question is whether these values human dignity, equality and non-discrimination) are advanced by acknowledging and perpetuating the distinction the common law draws between the transmissibility of actions for pain and suffering before and after *litis contestatio*…'

[25] In *MEC for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) para 27, the court dealing with the development of common law set out the enquiry as the following:

'(1) what development of the common law means; (2) what the general approach to such development is; (3) what material must be available to a court to enable the development; and (4) the limits of curial, rather than legislative, development of the common law'.

[26] Mr *Naidoo* submitted that the present case advocates for change in the common law altogether. He argued that regard should be had to *Carmichele v Minister of Safety and Security* & another *(Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) paras 54-56 which reads as follows:

'[54] . . . The influence of the fundamental constitutional values on the common law is mandated by s 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.

[55] This requires not only a proper appreciation of the Constitution and its objective, normative value system, but also a proper understanding of the common law. We have previously cautioned against overzealous judicial reform. The proper development of the common law under s 39(2) requires close and sensitive interaction between, on the one hand, the High Courts and the Supreme Court of Appeal which have particular expertise and experience in this area of the law and, on the other hand, this Court. Not only must the common law be developed in a way which meets the s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm.

[56] There are notionally different ways to develop the common law under s 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law. Before the advent of the IC, the refashioning of the common law in this area entailed "policy decisions and value judgments" which had to "reflect the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people." A balance had to be struck between the interests of the parties and the conflicting interests of the community according to what "the *[c]*ourt conceives to be society's notions of what justice demands." Under s 39(2) of the Constitution concepts such as "policy decisions and value judgments" reflecting "the wishes . . . and the perceptions . . . of the people" and "society's notions of what justice demands" might well have to be replaced, or supplemented and enriched by the appropriate norms of the objective value system embodied in the Constitution.' (Footnotes omitted.)

[27] Mr *Naidoo* submitted that the facts in the current case do not satisfy the criteria set out in *Nkala* and consequently that any attempt at this stage to develop the common law would amount to development in a vacuum as suggested in para 33 of *Carmichele* where it was argued that there is a constitutional obligation on all courts to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights.

[28] In *Mighty Solutions CC t/a Orlando Service Station v Engine Petroleum Ltd & another* 2016 (1) SA 621 (CC) para 39 dealing with the development of the common law, the requirements were set as follows:

'*(a)* determine exactly what the common-law position is; *(b)* then consider the underlying reasons for it; and *(c)* enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must *(d)* consider precisely how the common law could be amended; and *(e)* take into account the wider consequences of the proposed change on that area of law.'

[29] Applying the general approach to the development of the common law under s 39(2), Mr *Naidoo* submitted that the relevant grounds which ought to be present are as follows:

1. There must at least be an action which has commenced whether by certification or otherwise, see in this regard *Mahaeeane & another v Anglo Gold Ashanti Limited* 2017 (6) SA 382 SCA at para 34;
2. The rule cannot offend section 39 to the constitution and that they can be no impediment relating to actions that have already been instituted;
3. That if there was to be a development of common law and evidence is led its development in order not to offend section 39(2) would undoubtedly be confined to matters where action has already been instituted;
4. A consequence of the proposed change would undoubtedly lead to severe financial prejudice to various government departments alternatively suicide.

[30] Mr *Naidoo* further submitted that s 39(2) and s 173 of the Constitution are instructive, pronounce the jurisdiction of the courts and their inherent powers to protect and regulate their own process. Additionally, they enjoin courts to develop the common law taking into account the interest of justice.

[31] The defendant also relied on an article by M S Khan 'Are Close of Pleadings now Irrelevant? An Evaluation of the Impact the *Nkala* Judgment has on *Litis Contestatio*' 2019 (22) *PER/PELJ* 1 which concluded that according to *Nkala* in terms of the transmissibility of claims for general

damages to the deceased estate, it seemed that the close of pleadings is irrelevant if litigation has already commenced.

[32] It was further submitted that the issues for consideration by the court were being conflated. This was based on whether *Nkala* is applicable in circumstances of this case and if it is not and distinguishable then the order sought by the plaintiff must be dismissed. In this regard, Mr *Sacks'* argued that the plaintiff is seeking relief that the common law be developed further than *Nkala* to allow claims for general damages which were not instituted when the deceased was alive to be instructed and prosecuted to finality on the merits. If the plaintiff seeks the development of common law as was suggested in *Nkala* in respect of the facts and circumstances of this case she would have to take into account, the approach for the development of common law was set out in *MEC for Health.* If the relief sought was similar to that in *Nkala*, then in my view, there would be no need to develop the common law and the plaintiff would succeed in her claim.

[33] It was argued that in applying the principles set out in *MEC for Health* para 31, if this court is to engage in the exercise of developing the common law it would have to consider the following:

(1) the present common law position;
(2) its underlying rationale;
(3) whether the rule offends s 39(2) of the Constitution;
(4) if it does offend to consider how development in accordance with s 39(2) ought to take place; and
(5) to consider the wider consequences of the proposed change on the relevant area of law.

[34] Mr *Naidoo* submitted that this court can seek guidance from *MSM obo KBM v MEC for Health, Gauteng* 2020 (2) SA 567 (GJ) where the court was asked to develop the common law in respect of periodic payments arising out of medical negligence matters and in particular cerebral palsy and stated as follows:

‘[42.3.1] as a preliminary issue, consider whether the MEC has placed sufficient evidence before the court to provide the necessary factual support for the development of this rule in the present case. If not, the enquiry need go no further;
[42.3.2] only if I find that the MEC has provided the necessary factual support to develop the common law, will I have to apply my mind to the further considerations listed immediately above’.

[35] I accept the test set out in *MSM* to be correct. Having considered the facts of the matter, I am of the view that there is insufficient factual support for the development of the common law. Accordingly, the enquiry should end there. I however deal with other submissions made by counsel for the sake of completeness.

[36] It was submitted that a further consideration on whether to develop the common law should be had to the South African Law Commission’s comments which are the following:

‘For a developing country such as South Africa, where the right of access to health care services is constitutionally guaranteed and must be progressively realised, higher spending on health care is a positive sign. However, the same budget which provides for actual health care services is also used to pay out medico-legal claims. The increase in payments for medico-legal claims means that money has to be diverted away from the delivery of health care services, which further reduces the funding of an already severely burdened system. From case law and the example of the Road Accident Fund (RAF) legislation, it is clear that an urgent need exists to deal with this problem.’

See SALC Issue Paper 33, Project 141 ‘Medico-Legal Claims’ para 2.20 at 15-16.

[37] While I note the comment, it does not mean that medico-legal claims for deserving litigants should be curtailed where such are timeously instituted. The defendants who are mainly employers or government institutions must carry the responsibility of its negligent acts or that of those in its employ acting in the course and scope of their employment.

[38] Mr *Naidoo* argued that there is insufficient evidence to support the development of the common law in this instance and accordingly, the defendant sought the following order:

1. A declaration that the plaintiff's claim for general damages in respect of the death of the deceased is not transmissible to the estate of the deceased;
2. In the absence of factual evidence supporting the development of common law and having regard to section 39(2) and 173 of the Constitution, the court declines the invitation to develop common law and that there be no order as to costs.

[39] Mr *Broster SC*, who participated in these proceedings as the amici submitted that the arguments raised in this matter were addressed in *Nkala* which found the development of the common law to be necessary. He argued that the plaintiff overlooks the fact that the defendant is an organ of state and that the proposed extension of the common law will have far reaching effects. Further, that nothing is said about the widespread consequences imposed by the change in the area of law. He referred to *MEC for Health* and argued that there was no information on the frequency of similar situations arising in matters. Also, that the court was not advised of the annual additional costs to the Road Accident Fund if the common law was developed, as suggested by the plaintiff. It was accordingly argued that no coherent answer could be given to the fifth requirement set out in *MEC for Health.* While I accept Mr *Broster*, having adopted the test set out in *MSM*, I do not deem it necessary to deal with this issue.

[40] Mr *Chithi* for the intervening parties submitted that the proposed development of the common law in this matter had a huge potential to affect a number of state departments, This would include amongst others the National Prosecuting Authority which is usually sued for malicious prosecutions tied to unlawful arrests at the instance of the police. It also includes municipalities which are usually sued for slips and fall on pavements and buildings, unlawful arrest and detention at the instance of Metropolitan Police and medical negligence in respect of Clinics which are under their authorities. A further party who may be affected is the Minister of Justice and Correctional Services

who would usually be sued for acts and omissions which occur on inmates while in custody.

[41] He submitted that the current matter must be considered within its factual matrix. The court must consider the following:

1. That the plaintiff must have commenced suing;
2. The claim has yet to reach the state of *Litis contestatio;*
3. But for the deceased's death, he would have been entitled to initiate the action; and
4. She would have been entitled to continue with such action.

See: *Nkala* at 220.

[42] In respect of the current case, it was submitted that the damages action commenced or was instituted after the death of the deceased. There is therefore no justifiable controversy of a constitutional nature either between the plaintiff and the defendant or as against interested parties. This is because *Nkala* has foreclosed on the constitutional issue which the plaintiff seeks to raise and brought the matter to an end. This is not correct since *Nkala* dealt with a different scenario where action had already commenced.

[43] It was submitted that the case is not justiciable since it does not present any existing or live controversy which should exist for the adjudication of a matter since courts should avoid giving advisory opinion on obstruct propositions of law. See *POPCRU v SACOSWU & others* 2019 (1) SA 73 (CC) paras 43-44 among other judgments. In view of what I said in the preceding paragraph, I disagree with Mr *Chithi*. The issue sought to be determined while it relates to the development of the common law goes further than *Nkala*.

[44] Mr *Chithi* submitted that the constitutional challenge by the plaintiff which seeks to develop the common law to make provision for the commencement of an action even after the death of the deceased is taking the issues too far. Mr *Chithi* accordingly submitted that the plaintiff's constitutional challenge should be dismissed with costs since it has no foundation. Indeed, the issue goes beyond *Nkala*. However, there may be

some merit in it. It however fails because there are insufficient grounds to justify the development of the common law. In the event that the court did not agree with the submission for dismissal it was submitted that s 39(2) read with s 173 of the Constitution was a starting point.

[45] It was submitted that there are fundamental tentacles which would entitle this court to act in any given circumstances, one being that superior courts are the protectors and the expanders of the common law and that they have a power to develop the common law in order to reflect the changing social, moral and economic make up of society. These powers are constitutionally authorised and must be exercised within the prescripts and ethos of the constitution. See *S v Thebus & another* 2003 (6) SA 505 (CC) para 31.

[46] Similarly, Mr *Chithi* relied on *Carmichele* para 36 where it was stated that in dealing with the development of the common law:

'…judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary. In this regard it is worth repeating the dictum of Iacobucci J in *R v Salituro*, which was cited by Kentridge AJ in *Du Plessis v De Klerk*: "Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless there are significant constraints on the power of the judiciary to change the law . . . in a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform . . . The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society"'. (Footnotes omitted.)

This phrase is well put and relevant to the current circumstances where the relief sought by the plaintiff has far reaching consequences for several parties.

[47] In *Masiya v Director of Public Prosecutions, Pretoria & another (Centre For Applied Legal Studies &another, Amici Curiae)* 2007 (5) SA 30 (CC) para 30 Nkabinde J stated as follows:

'…The development of the common law on the other hand is a power that has always vested in our Courts. It is exercised in an incremental fashion as the facts of each case require. This incremental manner has not changed, but the Constitution in s

39(2) provides a paramount substantive consideration relevant to determining whether the common law requires development in any particular case. This does not detract from the constitutional recognition, as indicated above, that it is the Legislature that has the major responsibility for law reform. Courts must be astute to avoid the appropriation of the Legislature's role in law reform when developing the common law. The greater power given to the Courts to test legislation against the Constitution should not encourage them to adopt a method of common-law development which is closer to codification than incremental, act-driven development'.

[48] Mr *Chithi* argued further that the approach adopted by Windell J in *Nkala* is consistent with the guidelines which the Constitutional Court proposed and therefore that it is the approach which should be preferred. He submitted that it was tempting to agree with the submissions by the amici that the issue is one which might call for a legislative intervention rather than the development of the common law. While I do not agree with the judgment of Windell J, like Mr *Chithi*, I am of the view that the argument of Mr *Broster* on legislative intervention may be the appropriate route.

[49] It was submitted that the court in *RM v Mokgethi & another* 2019 (1) SACR 511 (NWM), developed the common law in an incremental way as advocated by the Constitution when it held that the first defendant as executrix of the deceased estate was liable for the patrimonial and non-patrimonial damages instituted against the deceased estate by the plaintiff who was assaulted and raped by the deceased before the latter's death. The victim claimed general damages from the defendant who died before the claim would be finalised and the court allowed her to proceed with her claim against the deceased estate. The facts of this case are distinguishable from the current matter.

[50] In *Elman Naidoo N.O v The Minister of Safety and Security & another* (1421/2011) (2019) ZAECPEHC8 (12 March 2019) the plaintiff substituted the deceased who had instituted his claim in respect of general damages and *contumelia* for alleged unlawful detention on 24 May 2011 and died on 8 July 2015. The court had to determine whether or not an amendment of a claim for

non-patrimonial (general damages) arising from an alleged unlawful detention affected the transmissibility of a claim. It held that an amendment to the pleadings which was after *litis contestatio* did not affect the re-opening of the pleadings. The amendment did not undo a claim which was already transmitted to the deceased's estate.

[51] It was submitted that *Nkala* and *Naidoo* developed the common law only in relation to those cases and did not propose wholesale development. In terms of the principles of stare decisis, both these judgments are not binding on this court but are persuasive in value.

[52] It was submitted further that if the common law was developed in a manner posed in *Nkala* or should the plaintiff be proposing a constitutional challenge in relation to a claim which had not yet been instituted at a time of the death of the deceased such would have the following consequences:

1. It would open flood gates on already overstretched legal system which is inundated with cases for medical negligence, unlawful arrest and detention and malicious prosecution and motor vehicle claims;
2. It would adversely affect the defendant's right in terms of Rule 36(1) of the Uniform Rules of Court;
3. It has a potential to result in high volumes of fraudulent claims which are mostly uncovered after close of pleadings and in other instances during cross-examination after the commencement of the trial.

[53] Mr *Chithi* argued that the plaintiff has not laid any foundation for the development of the common law. Further, that the plaintiff cannot use *Nkala* as a foundation for her case as her position is distinctly different to the one contemplated in *Nkala.* What is clear is that the authorities relied on by Ms *Naidoo SC* and Mr *Chithi* relate to instances where legal proceeding commenced before the death of the deceased. They are all clearly distinguishable from the current matter. In my view therefore, the plaintiff cannot rely on *Nkala* as authority for the relief she seeks. In order to succeed in her claim, she ought to have satisfied the test set out in *MSM*. I find that she has failed to do so and accordingly, her claim should fail.

[54] It is submitted therefore that the constitutional challenge should be dismissed with costs.

[55] On the issue of costs, I am of the view that there was merit in the issue which the plaintiff raised and that the issue needed to be considered. This was not a waste of the court's time and the time of the defendant and intervening parties. Accordingly, the plaintiff should not be lumped with a cost order.

Order

[56] Having considered the matter, I make the following order:

3. The plaintiff's claim is dismissed.
4. There is no order as to costs.

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Masipa J

APPEARANCE DETAILS:

For the Applicant:	Mr D J Saks
Instructed by:	Askew Martin & Adrain Inc. Attorney (Durban)
For the Defendant:	Mr V M Naidoo SC with Mr M Sibisi
Instructed by:	Ntsoane Attorneys (Hatfield, Pretoria) Harkoo, Brijlal & Reddy Inc. (Durban)
For the Interested Parties:	Mr M M Chithi
Instructed by:	The State Attorney, KwaZulu-Natal
Amicus Curiae:	Mr L B Broster SC
Judgment delivered on:	04 February 2022