

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 2035/2014

N. M. obo

Plaintiff

K. M.

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR DEPT. OF HEALTH, E CAPE, PROVINCE

Defendant

JUDGMENT

BROOKS J

[1] The plaintiff is an adult woman who is resident at Z., Mqanduli, Eastern Cape. On 29 July 2014 she issued a combined summons against the defendant on the basis that he is nominally liable for all wrongful acts committed by persons

acting in the course and scope of their employment by the Eastern Cape Department of Health, including those employed at Z. Hospital.

[2] The plaintiff pursues her claim both in her own capacity and in her capacity as the mother and the natural guardian of her minor child K.. It is based upon allegations that employees of the defendant employed at Z. hospital acted negligently whilst under a legal duty of care to render medical services to the plaintiff.

[3] The cause of action relied upon by the plaintiff arises from the circumstances pertaining to the plaintiff's presentation at Z. Hospital on 4 August 2010, 5 August 2010, 6 August 2010 and 7 August 2010. The allegations range from a denial of emergency medical treatment for the plaintiff who was in labour at the time to a failure to act timeously in response to prolonged labour and concomitant foetal distress.

[4] It is alleged that during the plaintiff's unnecessarily prolonged labour and prior to K.'s delivery by belated caesarean section, K. suffered an hypoxic ischemic injury to the brain. The resultant brain damage has caused permanent spastic cerebral palsy and epilepsy. In her personal capacity the plaintiff alleges that she suffered from psychological shock and trauma as a result of the negligence on the part of the defendant's employees and the damage which it caused to K.'s brain, requiring the plaintiff to seek professional help from a psychiatrist or psychologist. She seeks an appropriate award of damages accordingly. In her representative capacity the plaintiff seeks an award of damages as compensation for further medical expenses, future loss of earnings and general damages.

[5] In due course, the defendant entered an appearance to defend the action and filed a plea. Special pleas of prescription and a non-compliance with the provisions of section 3 (2) of Act 40 of 2002 were raised. In addition thereto the defendant denied the allegations of negligence on the part of his employees and denied that the plaintiff had suffered any damages.

[6] On 6 September 2016, more than two years after the issue of summons the matter came before Alkema J on the civil trial roll. The defendant sought a postponement of the trial. It is apparent from the terms of the order granted by agreement that the defendant was not ready for trial. The matter was postponed to 30 November 2016 for trial. The defendant was ordered to file his expert reports by no later than 30 September 2016 and also to pay the wasted costs occasioned by the postponement. These costs included the costs of two counsel, the reasonable travelling and accommodation costs of the plaintiff's legal representatives incurred in attending court and consulting with the plaintiff's witnesses and the reservation fees or qualifying expenses, if any, of the plaintiff's expert witnesses.

[7] The necessity for the defendant to seek a postponement on 6 September 2016 seems rather strange. In a report prepared by a clinical psychologist on behalf of the defendant, which is dated 29 March 2018, reference is made amongst the list of documents perused by the author to two medico-legal reports furnished by the defendant. The first is a medico legal report prepared by Dr Yatish Kara, dated 8 May 2016. The second is a medico legal report prepared by Dr SA Koranteng, a specialist obstetrician and gynaecologist, which was dated

20 June 2016. Presumably both reports were available to the defendant well before 6 September 2016.

[8] On 30 November 2016 the matter appeared again on the civil trial roll. An order was made by Notununu AJ. It was not made by agreement between the parties. The terms of thereof are as follows:

- “1. The issue relating to liability is separated from the issue relating to *quantum*;
2. having regard to the particulars of claim as amended and the medico legal reports of Professor Smith, Professor Lotz, Professor van Toorn, Professor Odendaal, Dr Kara and Dr Koranteng and the joint minute between Professor Smith and Dr Kara, the defendant is liable for all proven damages suffered by the plaintiff in both her personal and representative capacities, as mother and natural guardian of the minor child, K., arising from the negligent treatment of the plaintiff and K. at Z. Hospital;
3. The issue relative to *quantum* is postponed *sine die* for later determination by the above honourable court;
4. The defendant is ordered to pay the plaintiff’s costs of suit together with interest thereon at the prevailing prescribed rate from date of taxation or agreement to date of payment, such costs to include:
 - 4.1 all reserved costs; if any;
 - 4.2 the costs attended upon the employment of two counsel where such counsel were employed;
 - 4.3 the travelling and accommodation expenses of the plaintiff’s legal representatives incurred in the consultations with witnesses and in attending court;
 - 4.4 the travelling expenses, reservation and appearance fees, if any, together with costs of the preparations of the reports and

consultation and qualifying fees, if any, of the following expert witnesses:

- Professor van Toorn
- Professor Lotz
- Professor Smith
- Professor Odendaal.”

[9] I am advised by Mr Dugmore who, together with Mr Sambudla, appeared for the plaintiff, that during March and early April 2017 the plaintiff was called upon to present herself, together with K., for medical examinations and assessments for the purposes of preparing medico legal reports for the defendant which addressed the *quantum* of her claims. These were held in KwaZulu-Natal and Gauteng. The inconvenience to the plaintiff, who had to ensure the safety and comfort K. whilst travelling far from her rural home in the Eastern Cape in order to attend these consultations, must have been considerable. Be that as it may, the accuracy of the assessment of the time frame is borne out by the content of the medico legal reports which were eventually filed.

[10] In accordance with the case flow management procedures in place in this court, the parties were directed to attend a case management conference before a judge on 19 May 2017. It is apparent from the minute of that conference that the parties indicated that they were both ready for trial. Accordingly, the judge who presided over the conference certified that the matter was ready for trial and directed the registrar to allocate a trial date to the matter.

[11] On 19 September 2017 the first conference in terms of rule 37 of the Uniform Rules of Court was convened *inter partes* in order to address the issue

of the *quantum* of the plaintiff's claims. The minute of that conference is filed of record. It discloses that the defendant "is not in a position to make a settlement proposal at this stage". It also states that the defendant "is not in a position to admit the following plaintiff's expert reports at this stage." A full list of the plaintiff's experts is then given. What follows is a recordal that "[t]he defendant will revert".

[12] The minute of the first conference held in accordance with the provisions of rule 37 of the Uniform Rules of Court also records that the plaintiff had been referred to experts "whose reports have not yet been filed". What follows is a comprehensive list of fifteen experts. It is recorded that a further conference will be held "if necessary".

[13] On 23 January 2018 the plaintiff's attorney of record served a notice of set down upon the defendant's attorney of record. This was followed by a notice of set down issued by the registrar and served upon the parties' attorneys of record. In terms thereof the matter was enrolled for trial on *quantum* on 2 May 2018.

[14] Notwithstanding the fact that a year had passed since the plaintiff and K. were assessed by the defendant's extensive panel of experts and the reference to the existence of their reports in the minute of the conference held in terms of rule 37 of the Uniform Rules of Court on 19 September 2017, it is apparent that the defendant had failed to comply with the time frame prescribed in the provisions of rule 36 (9) of the Uniform Rules of Court.

[15] With the imminent approach of the trial date the plaintiff sought a further conference in terms of rule 37 of Uniform Rules of Court. It was initially scheduled for 23 April 2018 but at the instance of the defendant it was re-scheduled to 24 April 2018. In a letter bearing that date the defendant's attorney was advised by the plaintiff's attorney that the plaintiff's medical experts were remaining on stand-by to engage with the defendant's experts in order to produce joint minutes. Again the defendant failed to attend the pre-trial conference, prompting a letter to be addressed by the plaintiff's attorney in which the obvious prejudice to the plaintiff is recorded. Importantly, the letter places on record the fact that as at 24 April 2018 ten expert reports had still not been filed. It is apparent from the content of the letter that a small number of expert reports had been served and filed during "the last week before the trial date". It must be recorded that 27 April 2018 and 1 May 2018 were both public holidays flanking an ordinary weekend. The letter requested immediate delivery of the outstanding reports and rescheduled the conference to the following day, 25 April 2018.

[16] The agenda furnished by the plaintiff's attorney for the rule 37 conference on 25 April 2018 recorded in unambiguous terms the prejudice caused to the minor child K. by the defendant's inattention to the matter. It recorded the prejudice to the plaintiff's legal team caused by the defendant's non-compliance with the provisions of rule 36 (9) of the Uniform Rules of Court and his apparent preference for ambushing the plaintiff in her attempt to litigate meaningfully and responsibly by the late and erratic provision of the defendant's expert reports. The agenda concludes with an indication that in the circumstances the plaintiff's legal team reserved the right to object to the production and use of the expert reports at the trial, requiring the defendant's legal representative to satisfy the court that reference should be had thereto.

[17] It is evident that on 25 April 2018 a meaningful and fruitful conference was held in terms of rule 37 of the Uniform Rules of Court. Counsel for both the plaintiff and the defendant attended the conference with their respective instructing attorneys. The defendant was also assisted by the presence of a costs consultant, who was permitted by agreement between the parties to participate in the deliberations. The minute of the conference records that after a consideration of applicable case law and legal principles and the plaintiff's claims, the latter should be settled in a particular manner. It is specifically recorded that the settlement is of general damages and is reached "as a compromise".

[18] For present purposes it is important to set out the legal position relating to compromise. The agreement reached during the pre-trial conference was an agreement in which the legal teams for both parties were engaged. The agreement effectively settled the matter and involved "a give and take" between the parties resolving issues in dispute in the interest of expedition, saving inevitable costs and, ultimately, of justice.¹

[19] Consensual agreements reached by parties at a conference held in terms of the provisions of rule 37 of the Uniform Rules of Court, including the more comprehensive consensual agreements, compromises, fall to be recognised and enforced. The principles applicable are those generally applicable to agreements where parties are represented by an attorney or by counsel. The underlying principle has been expressed by the Supreme Court of Appeal² as follows:

¹ MEC FOR ECONOMIC AFFAIRS, ENVIROMENT AND TOURISM, EASTERN CAPE v KRUIZENGA AND ANOTHER 2010 (4) SA 122 (SCA) *paras* [6]-[22]

² HLOBO v MULTILATERAL MOTOR VEHICLE ACCIDENTS FUND 2001 (2) SA 59 (SCA) *para* [10].

“... A compromise (or transactio) arrived at between litigants is a well-established measure. Our courts encourage parties to deal with their disputes in this way and the rules decree that compromises must be sought. When concluded such a compromise disposes of the proceedings...What is more, in this country...the conduct of a party's case at the trial of an action is in the entire control of the party's counsel. Counsel has authority to compromise the action or any matter in it unless he has received instructions to the contrary. In England his apparent authority to compromise cannot be limited by instructions unknown to the other party... Counsel's general authority in South Africa is similar... At the stages prior to the assumption of control by counsel the attorney of record stands in the same position...”

[20] In *George v Fairmead (Pty) Ltd*³ it was held that the proper approach is to take into account the fact that there is another party involved. As Fagan CJ⁴ said:

“They [that is our Courts] have, in effect said: Has the first party - the one who is trying to resile - been to blame in the sense that by his conduct he has led the other party, as a reasonable man to believe he was binding himself.”

[21] Moreover, a legal practitioner has ostensible authority to compromise⁵.

[22] In *Dlamini v Minister of Law and Order and Another*⁶ Friedman J provided a useful historical analysis of the applicable principles:

“The settlement, which was arrived at, was arrived at by counsel and attorneys purporting to act on behalf of the respondents. It would seem to be reasonably clear that counsel, who had been properly instructed to appear on behalf of a litigant, has implied authority to conclude a settlement or compromise of the litigation on behalf of his client, provided he acts bona fide in the interests of his client. This proposition appears to be well entrenched in England. Perhaps the earliest leading case on the subject is the decision of the Court of Appeal in the case of Matthews and Another v

³ 1958 (2) SA 465 (A) at 471A – D.

⁴ at 471B.

⁵ *HLOBO V MULTILATERAL MOTOR VEHICLE ACCIDENTS (SUPRA); IVORAL PROPERTIES (PTY) LTD v SHERIFF OF CAPE TOWN* 2005 (6) SA 96 (C).

⁶ 1986 (4) SA 342 (D) 346I *ET SEQ.*

Munster (1887) 20 QB 141 (CA) ((1886-90) All ER Rep 251). In that case counsel, acting on behalf of the plaintiffs, had settled an action for malicious prosecution on behalf of his clients with counsel for the defendant. The defendant had not been present when the settlement was arrived at and, on coming to Court later, endeavoured to repudiate the settlement. It was held, however, that although the defendant was not present when the settlement was made he had not put an end to the relationship of advocate and client which existed between himself and his counsel, that his counsel had complete authority in the case and that he, the defendant, was bound by the settlement.

The judgment of Lord ESHER commences by discussing in general terms the authority of counsel to conduct a case in Court and of counsel's authority while so conducting a case to exercise power over all matters, not only directly relevant to the proceedings but also collateral to it. He concludes by saying:

'One of the things that must properly belong to the management and conduct of the trial must be the assenting to a verdict for a particular amount and upon particular terms. In the present case the amount was 350 and the terms were that all imputations should be withdrawn. It is impossible to say that such an arrangement must be an unreasonable one. Counsel may see that if the case goes to the jury a verdict for a very large amount will be given. If the client is in Court and says 'I will not agree to those terms', his counsel ought to say 'Then I will no longer act for you any longer' and ought to leave him to conduct his own case. If the client allows the negotiation to go on and makes no audible objection the settlements will be binding upon him because he has not withdrawn the authority of his counsel and made that withdrawal known to the other side. But I wish to repeat that, although the authority of counsel is unlimited until it is withdrawn, the Court retains control over his proceedings. In the present case the client was not present in the Court at the time the settlement was come to and therefore could not have put and did not put an end to the relationship of advocate and client which existed between himself and his counsel, but he comes now and says 'I do not like what my counsel has done for me and I ask the Court to set it aside.' There is no symptom of any injustice having been done, counsel exercised his judgment to the best of his ability in the matter, and I have no doubt did what was really best for his client.'

The judgments of BOWEN LJ and FRY LJ were to similar effect. Matthews' case appears to have been consistently followed. Certain exceptions, if I might call them that, to the general rule thus enunciated have emerged in later cases, but these so-called exceptions are no more nor less than the application of general principles of contract. Where, for example, counsel has express instructions not to effect a settlement, he cannot do so in defiance of such express instructions, since - and this is common to all forms of contract - any implied terms must always give way to express terms to the contrary.

The decision in Matthews' case appears to have been followed in our Courts in the early case of Mfaswe v Miller (1901) 18 SC 172. Although the judgment in Matthews' case is not referred to in the judgment of

BUCHANAN ACJ, it was quoted in argument and the relevant principles as stated by BUCHANAN ACJ appear to have been more or less a repetition of what was said in Matthews' case. Similarly, in the case of Klopper v Van Rensburg 1920 EDL 239, Matthews' case was cited with approval, and a litigant in that case was held to be bound by a compromise effected by his counsel at a time when he was not present. At 239 GANE AJ, after referring to the English rule and to Matthews' case, said:

'Though I know of no case in which this has been definitely held in South African law, the trend of our practice in the State as given to an advocate in Roman Dutch law justify me in taking the position of an advocate in this respect to be as good as that of an English barrister. The offer plainly made on 12 March was accepted on 16th, when a security nothing less than gilt-edge was offered. I consider that such offer and acceptance bind the applicant who, to the present moment, has not objected to the security as such and has not suggested any better way of dealing with the rather difficult position than C that adopted by the respondent.'

In the case of R v Matonsi 1958 (2) SA 450 (A) the Appellate Division had occasion to deal with a somewhat related situation, namely a decision by counsel not to call an accused in a criminal case. Whilst that position may be and probably is distinguishable from the present one, what is important is that in Matonsi's case Matthews' case, as well as the earlier English case of Swinfen v Lord Chelmsford (1860) 29 LJ (Ex) 382 upon which Matthews' case relied, was cited with apparent approval. In addition, and at 456, SCHREINER CJ agreed with the view expressed by GANE AJ in Klopper's case to the effect that there is no distinction between the position occupied by an advocate in the Roman Dutch legal system to that occupied by a barrister in the English legal system.

.....

In the circumstances it seems to me to follow that, the matter having been settled, the respondents have not demonstrated any basis for either repudiating or resiling from that settlement."

[23] In MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another⁷ the Supreme Court of Appeal authoritatively stated the position as follows:

"[6] It is important to reiterate what was said at the outset - the issue in this matter is whether the appellant may resile from agreements made by his attorney, without his knowledge, at a rule 37 conference. The judgment does not deal with agreements reached outside of the context of conducting a trial in the normal course of events. The rule was introduced to shorten the length of trials, to facilitate settlements between the parties, narrow the issues and to curb costs. One of the

⁷ (Supra).

methods the parties use to achieve these objectives is to make admissions concerning the number of issues which the pleadings raise. Admissions of fact made at a rule 37 conference, constitute sufficient proof of those facts. The minutes of a pre-trial conference may be signed either by a party or his or her representative. Rule 37 is thus of critical importance in the litigation process. This is why this court has held that in the absence of any special circumstances a party is not entitled to resile from an agreement deliberately reached at a rule 37 conference. And when, as in this case, the agreements are confirmed by counsel in open court, and are then made a judgment or order of a court, the principle applies with even more force.

[7] *It is settled law that a client's instruction to an attorney to sue or to defend a claim does not generally include the authority to settle or compromise a claim or defence without the client's approval. The rule has been applied to a judgment consented to by an attorney without his client's authority and also when the attorney did so in the mistaken belief that his client had authorised him to do so. This principle accords with the rule in the law of agency that where an agent exceeds the express or implied authority in transacting, the principal is not bound by the transaction.*

[8] *But there appears to be some uncertainty in the way this principle has been applied. Midgley observes that our courts, under the influence of English law, have distinguished between settlements made outside of and those made during the course of litigation - and appear to have accepted that the power to settle a claim is one of the usual and customary powers afforded a legal representative in the latter instance. So, in *Mfaswe v Miller*, an attorney's clerk compromised a claim on the day of the trial before the client had arrived at court. He did so fearing that if the client did not arrive in good time, default judgment may be given against him. Thereafter the client sued his attorney for the full amount of the original claim. The court said that the clerk had accepted the compromise 'in the exercise of the discretion vested in an attorney'. And because he had acted in good faith, and was not negligent, the court held that the attorney was not liable to the client in damages. *Alexander v Klitzke* provides an interesting example of an attorney's general authority. The defendant had alleged that his attorney's general authority did not empower him to accept the plaintiff's tender of settlement, but the court disagreed, saying:*

'The authority of a power of attorney which is filed by the client, to carry his case to final end and determination, does include authority to make a bona fide compromise in the interests of his client, and at any rate, if a client wishes to repudiate such a compromise made on his behalf, then I certainly think that the repudiation should be a timeous one.'

In Klopper v Van Rensburg, in an ex parte application for a temporary interdict to restrain the sale of usufructuary property, and in answer to a question from the court, counsel stated that if security were given by the respondent for the value of the property sold, that would meet the case. When the respondent thereafter tendered security, and the applicant rejected it, contending that counsel had no authority to agree to a tender of security, the court held that he was bound by his counsel's offer, as the latter 'was only doing his plain duty (to) his client. He was making an offer in his client's best interests, and an offer which he had every right to make.'

[9] *However, recently, in Hawkes v Hawkes and Another the court seemed to adopt a different approach by placing emphasis on whether the agreement concluded was in the client's best interests, rather than on the discretion exercised by the client's legal representative. It held that where an advocate gave an undertaking to the court on behalf of his client without having a mandate to that effect, in the attorney's absence and contrary to his client's best interests, and also in conflict with his mandate to oppose an interdict sought against his client, the client was not bound thereby. This approach resonates with the view adopted in Bikitsha v Eastern Cape Development Board and Another, where an attorney, before summons had been issued, without having his client's consent, advised his opponent that his client was prepared to waive the 'prescriptive period'. In holding the client not bound by his attorney's waiver, the court noted that 'for acts of great prejudice an attorney needs a special mandate' and '(a) general mandate does not authorise an attorney to act in a manner adverse to his client's interests'.*

[10] ...

[11] *To summarise, it would appear that our courts have dealt with questions relating to the actual authority of an attorney to transact on a client's behalf in the following manner: attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client. However, the instruction to an attorney to sue or defend a claim may include the implied authority to do so, provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interests.*

....

[15]

[16] *It is well established that to hold a principal liable on the basis of the agent's apparent authority, the representation must be rooted in the words or conduct of the principal, and not merely that of his agent. Conduct may be express or inferred from the 'particular capacity in which the agent has been employed by the principal and from the usual and customary powers that are found to pertain to such an agent*

as belonging to a particular category of agents'. It may also be inferred from the 'aura of authority' associated with a position which a person occupies, at the principal's instance, within an institution.

[17] *Properly understood, the representation from the principal in this case relates only to the appointment of the State attorney to defend the claim and to instruct counsel in this regard. The further conduct relied on is not that of the principal, but of the agent himself, and cannot in and of itself bind the principal. The respondents' true case is that by appointing the State attorney to defend the claim, the appellant represented to them, and they reasonably believed, that the State attorney had the usual and customary powers associated with the appointment. These included instructing counsel to defend the claim, to draft the plea and to attend all pre-trial procedures, including rule 37 conferences. In other words the appellant represented to the respondents and the outside world that the State attorney had the authority not only to conduct the trial, but also to make concessions at the conferences and to conclude the settlement agreement from which he now wishes to resile.*

....

[20] *I accept that in this matter, by agreeing to the settlement, the State attorney not only exceeded his actual authority, but did so against the express instructions of his principal. As opprobrious as this conduct was, I cannot see how this has any bearing on the respondents' estoppel defence. The proper approach is to consider whether the conduct of the party who is trying to resile from the agreement has led the other party to reasonably believe that he was binding himself. Viewed in this way it matters not whether the attorney acting for the principal exceeds his actual authority, or does so against his client's express instructions. The consequence for the other party, who is unaware of any limitation of authority, and has no reasonable basis to question the attorney's authority, is the same. That party is entitled to assume, as the respondents did, that the attorney who is attending the conference clothed with an 'aura of authority' has the necessary authority to do what attorneys usually do at a rule 37 conference - they make admissions, concessions and often agree on compromises and settlements. In the respondents' eyes the State attorney quite clearly had apparent authority.*

[21] *Mr Buchanan submitted further that to allow the estoppel defence where an attorney exceeds his or her authority could lead to grave injustices and that for policy reasons the estoppel defence should not be allowed in these circumstances. There are two answers to this submission. First, Plewman JA specifically recognised the*

competence of the defence in the passage quoted above in Hlobo, albeit in an obiter dictum. And this court will not lightly depart from a view it has previously expressed, even if only obiter. Secondly, because estoppel is a rule of justice and equity, it is open to a court to disallow the defence on this ground. It was not suggested that it would be either unjust or inequitable to allow the defence in the circumstances of this case. Indeed, the contrary is true. The prejudice to the respondents if the defence is not upheld is evident - even with the appellant's tender to pay the respondents' wasted costs. The respondents and their counsel prepared for trial on the basis of the concessions and on the issues which remained in dispute - not on the merits or on the heads of damages which were agreed upon. Moreover, the appellant has after all this time not even established a defence. To allow the appellant to resile from these agreements, made over a period spanning 18 months, would defeat the purpose of rule 37, which encourages settlements, and severely hamper the conduct of civil trials. It would mean practically that attorneys can no longer assume that their colleagues are authorised to make important decisions in the course of litigation without the principal's independent confirmation. This cannot be countenanced."

[24] In my view, upon an application of the legal principles set out extensively in the preceding paragraphs, it is clear that the issue of general damages was settled at the conference held in accordance with the provisions of rule 37 of the Uniform Rules of Court on 25 April 2018.

[25] At that conference and in respect of the remaining heads of damages, future loss of earnings and future medical and related expenses the parties' legal representatives were pragmatic in their approach. They chose to be guided by the terms of a settlement negotiated very recently in a matter which they considered to be comparable. In adopting this approach, the plaintiff's legal team indeed were compromising her claims.

[26] The defendant's legal team undertook to revert to the plaintiff's legal team by twelve noon on the following day, 26 April 2018, in respect of an overall settlement of the matter.

[27] Before the conference was adjourned the plaintiff's legal team recorded that the plaintiff would not countenance any further delays in the finalisation of the matter and, should the defendant seek a postponement of the trial, this should be done by way of a substantive application on notice, thereby enabling the plaintiff to oppose the application for a postponement on 2 May 2018.

[28] It is common cause between the parties that on 26 April 2018 Mr Ngadlela, who appeared on behalf of the defendant, sent a memorandum to the defendant as undertaken at the conference held the previous day. A copy thereof was handed in by agreement between the parties when this matter eventually proceeded. Mr Ngadlela informed the court that the defendant had acknowledged receipt of the memorandum.

[29] Notwithstanding the reservation of rights expressed on behalf of the plaintiff on 25 April 2018, it is apparent from the record that on 2 May 2018 the matter was postponed by the Judge President to 11 May 2018 "for settlement purposes". The defendant was ordered to pay specified wasted costs. The order was issued by agreement between the parties and in the absence of a substantive application for postponement being presented on behalf of the defendant. I was informed by Mr Dugmore that the plaintiff had little option but to agree to a postponement because, given the nature and extent of the agreements reached on the 26 April 2018, the plaintiff had expected that the matter would be settled in

its entirety on 2 May 2018 and, in order to minimise the costs payable ultimately by the defendant, the plaintiff had not brought her expert witnesses to court.

[30] On 11 May 2018 the matter was again before court for the purposes of settlement. For the same reasons as before, the plaintiff's medical experts were not in attendance. There had still been no substantive response to the memorandum sent by Mr Ngadlela to the defendant on 26 April 2018. Having heard argument, Jolwana J issued an order in the following terms:

- “1. The matter is hereby postponed to 16 May 2018, at the instance of the defendant, to further enable the defendant's legal representatives to obtain instructions to settle the *quantum* of the plaintiff's damages in accordance with the advices made and recommendations made by the legal representatives on 26 April 2018;
2. A rule nisi is hereby issued calling upon the Director General of the Department of Health, Eastern Cape, to show cause, if any, returnable on the 16 May 2018, why an order contemplated in the pre-trial minute dated 25 April 2018, a copy of which is attached hereto as annexure “A”, and the draft order premised thereon and attached hereto as annexure “B”, should not be made an order of court;
3. The defendant shall pay the costs of and relating to 11 May 2018, including the wasted costs occasioned by the postponement on an attorney and client scale and such costs to include the costs consequent upon the employment of two counsel.”

[31] On 16 May 2018 the matter came before this court. Mr Dugmore handed in a copy of a letter which had been received by his instructing attorney after close of business on the previous day. It was written by the attorney who was responsible for the conduct of the matter as an employee in the

Office of the State Attorney, Mthatha, the defendant's attorney of record. The relevant portion thereof reads as follows:

"As you will appreciate, the matter was postponed to tomorrow the 16th day of May 2018, for Superintendent General for the Department of Health to come and testify why instructions cannot be furnished.

We have been in constant contact with the department regarding same. We have been advised that, the Superintendent General has not been able to consider the matter and he is out of office for some of the Departmental duties. Once again, we have been requested to request for another indulgence to enable him to furnish us with proper instructions regarding the finalization of the matter.

Furthermore, we have been requested to apologize on behalf of the Superintendent General who will not be able to attend court tomorrow as he is out of the office and that the order came to client's attention on Friday 11th May 2018, when there have been pre-arranged office duties from his department. In doing so, he is in no way trying to ignore the court order is not anyway trying to be contemptuous of the court order dated 11th May 2018.

In view of the above we request your client to give us further indulgence of three weeks to get proper instructions from client."(sic)

[32] Although the claim is made on behalf of the Superintendent General that he is not trying to ignore the court order or to be contemptuous of the court order issued on 11 May 2018, it is difficult to avoid coming to the conclusion that this is precisely the attitude adopted thereto. There was no formal response from the Superintendent General, either by the way of affidavit or letter, addressing the issue embodied in the *rule nisi*. Nor was the fact that the Superintendent General elected to prioritise his "pre-arranged office duties" over an order of this court better explained. Moreover, absolutely no attempt was made to communicate anything about the defendant's response to the memorandum sent to him on 26 April 2018 and the reasons for his failure to communicate thereafter with his legal

team. Considerations of formality aside, the court regards the defendant's apparent disinterest in this matter in a most serious light.

[33] Mr Ngadlela confirmed the correctness of Mr Dugmore's address on the sequence of events that led to this matter being in court on 16 May 2018. He also stated that since 25 April 2018 he had done everything possible to cement the agreement reached at the pre-trial conference. In this he had received no cooperation from the defendant. Indeed, he was obliged to appear in court without an instructing attorney as the member of staff of the Office of the State Attorney who was responsible for handling the matter had not presented himself at court and could not be contacted either on his office telephone or on his private mobile phone, which had been switched off. This is a lamentable abandonment of duty on the part of an officer of the court who is on record as an attorney in a matter proceeding in court. No matter how great the embarrassment caused by his client's attitude to the matter might be, this is not an acceptable excuse for a failure to appear in court.

[34] Completely abandoned by his instructing attorney and his client and unarmed without a substantive application for postponement, Mr Ngadlela could only concede that indeed the Superintendent General had failed to show cause why an order contemplated in the pre-trial minute of 25 April 2018 and expressed in the draft order should not be granted.

[35] It is important to endorse the manner in which Mr Ngadlela approached this matter. It is apparent from the documentation filed of record, including the orders made hitherto, that Mr Ngadlela has discharged his duties as the defendant's counsel with diligence and efficiency. The integrity displayed in his transparent handling of the challenges he has faced surrounding and since the

April pre-trial conference in this matter is commendable. The unwavering correctness of the manner in which he has discharged his duties as an officer of this court places him above reproach.

[36] Regrettably, the manner in which the defendant has conducted his defence in this matter calls for comment of a different kind. It is a matter for great concern that the highly unsatisfactory manner in which the defendant has conducted this litigation is not unique to this matter. Indeed, it is the over-riding characteristic demonstrated in at least two other matters of a similar nature which appeared on the civil trial roll of this court this week. An extract from a previous judgment delivered by this court in another similar matter⁸ addresses the issue as follows:

“In setting out the lengthy history of the litigation between the parties the court has not consistently made observations of direct censure in relation to the reasons why the matter could not proceed in a more efficient, professional and expeditious manner. It is sufficient to state at this point that in my view the full history of the litigation indeed reveals a single thread which is deserving of censure. The defendant litigates with public funds and must do so responsibly and honourably.⁹ At every point the defendant has demonstrated sloth and apparent disinterest in this matter. So marked and costly has this supine attitude towards the plaintiff’s case been at times that it is difficult to avoid a conclusion that the defendant’s conduct of the litigation from the outset, has been indubitably vexatious and reprehensible. Particularly given the tragic circumstances in which the plaintiff and her minor child now find themselves and seek legitimately to relieve to some measure by adequate redress and compensation, such conduct on the part of the defendant is reprehensible. It has had a pronounced effect of inhibition on the plaintiff’s constitutional rights of access to justice. There is no doubt that apart from the

⁸ NOMVO SIDULWINI v MEC FOR HEALTH, EASTERN CAPE PROVINCE, ECHCM case no 2336/2013, (7 November 2017) *para* (82)

⁹ MHLATSHENI v ROAD ACCIDENT FUND 2009 (2) SA 401 (ECD) at paras [16] – [17]; THE MINISTER OF SAFETY AND SECURITY v ADDITIONAL MAGISTRATE, N MOLO N.O AND KEITH CHIPPS. [2013] ZAECGHC 89, unreported judgment of Roberson J concurred in by Plasket J and dated 23-08-2017

unnecessary additional psychological burden upon the plaintiff caused by all the obstacles placed upon the path of her litigation, including that of delay, she stands to be burdened financially by increased and unnecessary attorney and client costs. No valid reason exists why she should be so burdened.”

Alarming, there appears to be an emergence of something of a trend on the part of the defendant to content himself with the conduct of this sort of litigation in an indifferent, inefficient and expensive manner.

[37] The following statements by Bertelsmann J in a similar matter¹⁰ are appropriate to the circumstances in this matter:

“The defendant is an organ of state. The sole purpose of its existence is service to the public by providing health care (and possibly also education). Such healthcare should normally be rendered in an efficient manner unless the state’s resources do not permit such service: *Soobramoney v Minister of Health, KwaZulu-Natal 1988 (1) SA 765 (CC) (1977 (12) BCLR 1696; [1997] ZACC 17) paras 11, 31 and 36*. There is no suggestion in the pleadings or the evidence that the defendant did not have the resources available to render effective healthcare that would seem to have been nothing more than routine.”

and

“As far as the costs of the action are concerned, the plaintiff and her child were left in the lurch by an organ of state. They were treated without empathy and without compassion. In this court the defendant decided to play a role that was essentially obstructive... Under the circumstances it would be iniquitous to expect the plaintiff to bear any portion of her own costs. As a mark of its disapproval of the defendant’s approach to the matter the court will therefore award the plaintiff attorney and client costs.”

¹⁰ NZIMANDE v MEC FOR HEALTH, GAUTENG 2015 (6) SA 192 (GP) paras [19] and [27].

[38] The circumstances of this matter demonstrate unequivocally a gross infringement of two basic human rights entrenched in the Constitution.¹¹ The first is the denial of access to adequate and effective healthcare experienced by the plaintiff at Z. Hospital in Mqanduli. The cause of the infringement was negligence and inefficiency on the part of the employees of the defendant over whom he had somewhat remote control but for which he is responsible in the discharge of his constitutional mandate. The result of the infringement was an unnecessary injury to an unborn child with devastating, permanent consequences. The second infringement is the denial of access to justice which characterises the defendant's conduct of this matter. The cause of this infringement lies much closer to home. Both infringements amount to a serious dereliction by the defendant of his constitutional duties.

[39] The defendant has shown no cause why an order should not be made in accordance with the draft order transmitted to him under cover of the order of this court issued on 11 May 2018. The content of the draft order sets out compensation for the plaintiff which is appropriate, fair and reasonable.

[40] The following order will issue:

1. The defendant is ordered to pay to the plaintiff in her representative capacity on behalf of K. the sum of R16 915 093.78 as and for damages within 30 calendar days of the date of this order.
2. In addition to paragraph 1 above, the Defendant shall pay the Plaintiff, in her representative capacity as mother and natural guardian of K. M., the sum of R1 268 632.03 being 7.5% of the amount awarded to the Plaintiff, in terms of paragraph 1 above, for the costs occasioned for the establishment, registration, administration and management of the Trust to be established for the benefit of K. in terms of paragraphs 6 and 7 below, together with interest thereon at the legal rate from 30 calendar days of the date of this order;

¹¹ CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996

3. The defendant is ordered to make payment to the plaintiff in her personal capacity the sum of R375 000.00 as and for damages within 30 calendar days of the date of this order.
4. In the event of the defendant defaulting in respect of any payment as aforesaid the defendant is ordered to pay interest on the outstanding sum at the legal rate from 30 days of this order to the date of payment.
5. The defendant is ordered to pay the costs of suit in respect of both merits and quantum, such costs to include the costs of two counsel, such costs to be on the scale as between attorney and client in respect of all attendances and appearances subsequent to 11 May 2018 and such costs to include:
 - 5.1 The costs of travelling and subsistence of plaintiff and his legal representatives for purposes of consultations with plaintiff's experts, rule 37 conferences and trial at full legal rate;
 - 5.2 The costs of all rule 37 conference proceedings, including the costs of counsel in respect of the attendance at full legal rate thereof, where applicable;
 - 5.3 The costs of report, supplementary report, completion of joint minutes, qualifying expenses (if any) and day reservation fees (if any) in respect of all of plaintiff's experts in respect of whom rule 36 (9)(a) and (b) notices were filed, including the following experts:
 - 5.3.1 Ms Grace Hughes;
 - 5.3.2 Ms Sue Anderson;
 - 5.3.3 Ms Lizanne Strydom;
 - 5.3.4 Ms Mandy Read;
 - 5.3.5 Dr V Amaidas;
 - 5.3.6 Dr. Leon Rajah;
 - 5.3.7 Dr. Gagik Hakopian;
 - 5.3.8 Ms Elmarie Van Der Merwe;
 - 5.3.9 Ms Tabisa Caga;
 - 5.3.10 Mr Zola Macingwana
 - 5.3.11 Ms Barbara Donaldson;
 - 5.3.12 Prof R Solomons;
 - 5.3.13 Independent Actuaries; and
 - 5.3.14 Ms Nontsikelelo Masilo
 - 5.4 The costs of travelling and subsistence in respect of plaintiff's expert witnesses for purposes of trial, if any;

5.5 Interest on costs at the legal rate from date of allocatur to date of payment

6. The attorneys of record are ordered to establish a Trust for the benefit of K. M. within 6 months of the date of this order, and to be named the "K. M. Trust", the proceeds of this action to be held in Trust pending such establishment and the nett proceeds of the action after the deduction of taxed attorney own client costs are to be deposited to the credit of such Trust.

7. The terms of such Trust are to include:

7.1 The proposed trustees shall be a chartered accountant, attorney and the plaintiff to be appointed by the Master or failing which, by this Court and shall provide written consent to act in the Trust as trustee.

7.2 If the proposed trustees are unable or unwilling to accept appointment or for any reason becomes unable to continue to act once having been appointed, then the Master of the High Court will in his sole discretion be entitled to appoint another trustees.

7.3 The trustees are not required to furnish security for the administration of the assets of the Trust and shall provide adequate Professional Indemnity insurance cover in terms of paragraph 7.14 of this order.

7.4 The trustees shall administer the Trust subject to the powers and terms, which follow.

7.5 The trustees must in writing accept his / her / their appointment as such and the benefits and duties conveyed by the trust deed, and acknowledge receipt of the donation in terms of which the Trust will be established.

7.6 The trustees may at any time in writing appoint additional trustees, or one or more trustees to succeed any or all of them, or one or more agents with powers of substitution and delegation, to perform any acts on their behalf. If ever there is no trustee, the person who keeps the books of the Trust or any beneficiary may call a meeting of the beneficiaries, assisted by their guardians if applicable, which meeting shall appoint a trustee or trustees, failing which the Master will appoint a trustee.

7.7 A trustee shall cease to act as such if he / she / they resign, or becomes mentally disturbed or ill, or alcoholic, or incompetent or unable to act as trustee, or being a body corporate, it is liquidated. If any trustee ceases to act, the remaining trustee/s shall continue to act and shall have full powers in terms thereof.

7.8 In administering the trust, the trustees shall follow such procedure as they deem fit. Proper books of account shall be kept. The trustees may appoint an auditor for the Trust, but are not obliged to do so. The proposed primary representative of trustees shall have the sole signing powers on all banking accounts and shall have the power to vito any

decision. Nevertheless, he shall consult with the other trustees, if any, as to any distributions.

7.9 Any trustee who is a professional person shall be entitled to perform professional work for the Trust to charge reasonable professional fees for such services over and above the fees allowable to the trustee as set out in the Administration of Estates Act, no. 66 of 1965. The Master of the High Court is entitled to call for taxation of any fees so charged.

7.10 The trustee / s have the power to perform in the name of the Trust or in their own name on behalf of the Trust, any acts and enter into any contracts and undertake any obligations, whether commercial or otherwise, which may be done by a natural person of full legal capacity, which powers include but are not limited to the following:

7.10.1 To purchase or acquire in any way stock-in-trade, plant, machinery, land, buildings, agencies, shares, debentures and every other kind of description of movable and immoveable property;

7.10.2 To manage, insure, sell, lease, mortgage, dispose of, give and exchange, work, develop, build on, improve, turn to account or in any way otherwise deal with its undertaking or all or any part of its property and assets;

7.10.3 To apply for, purchase or buy any other means acquire, protect, prolong and renew any patents, patent rights, licenses, trademarks, concessions or other rights and to deal with and alienate them;

7.10.4 To borrow money;

7.10.5 To secure the payment of monies borrowed in any manner including the mortgaging, seeding and / or pledging of property;

7.10.6 To lend money to any person or company;

7.10.7 To invest money in any manner;

7.10.8 To open and operate banking accounts and to overdraw such accounts;

- 7.10.9 To make, draw, issue, execute, accept, endorse and discount promissory notes, bills of exchange and any other kind of negotiable or transferable instruments;
 - 7.10.10 To enter into indemnities, guarantees and suretyship and to secure payment thereunder in any way;
 - 7.10.11 To form and have an interest in any company or companies for the purpose of acquiring the undertaking or all or any of the assets or liabilities of the company or for any other purpose which may seem, directly or indirectly, calculated to benefit the Trust, and to transfer to any such Trust or company the undertaking or all or any of the assets or liabilities of the Trust;
 - 7.10.12 To take part in the management, supervision and control of the business or operations of any other company or business and to enter into partnerships;
 - 7.10.13 To make donations;
 - 7.10.14 To undertake and execute any Trust;
 - 7.10.15 To act as principals, agents, contractors or trustees;
 - 7.10.16 To pay gratuities and pensions and establish pension schemes, profit-sharing and plans and other incentive schemes; and
 - 7.10.17 To enter into contracts anywhere in the world and to execute any contracts, deeds and documents in any foreign country.
- 7.11 The trustees may determine their own procedure, and in the absence of unanimity in the event that there is more than one trustee, the decision of the majority shall be binding.
 - 7.12 The assets of the Trust may be held in the name of the Trust.
 - 7.13 The trustees have an absolute and unlimited discretion in all matters relating to the Trust but they may not act contrary to this order and the trust deed to be drafted in accordance herewith.
 - 7.14 The primary representative of trustees and his successor or successors shall be required to provide adequate professional indemnity insurance cover, proof of which must be furnished to

the Master of the High Court annually on the anniversary of the signature hereof and on condition NFB is a member of the Fiduciary Institute of South Africa.

- 7.15 The trustees shall not be personally liable to the beneficiaries for any trust losses, except caused by gross negligence or deliberate wrong.
 - 7.16 The trustees shall under no circumstances be personally liable to creditors of the Trust.
 - 7.17 The beneficiaries, who for income and capital, are K. Mvumbi and any of their biological or legally adopted children for whom they would be responsible for in law to maintain in support.
 - 7.18 No asset, capital or income of the Trust will vest in any beneficiary until such is actually paid over, handed over or delivered by the trustee to the beneficiary. No capital or income benefit to which any beneficiary is or may become entitled by virtue of this Trust deed shall, prior to actual payment or transfer thereof by the trustee to the beneficiary, be capable of being ceded, assigned or pledged, or transferred in any way, or be capable of attachment by any creditor or trustee of a beneficiary upon insolvency, unless the trustees consent thereto in writing.
 - 7.19 Any asset or money which a beneficiary receives pursuant to this trust deed shall not form part of any joint estate and shall not be subject to any marital power.
 - 7.20 The primary representative of trustees shall be obliged to call for a full and proper accounting in respect of all monies paid by the defendant to the plaintiff on behalf of the beneficiary whether by way of capital, interest or cost and will have the power, in the name of the plaintiff to demand taxation of any bill of costs or to make any demand or to institute any action for the payment of what is determined to be lawfully due to the Trust subject to paragraph 6 above.
 - 7.21 The trust deed can only be amended in writing with the leave of this Court.
 - 7.22 The Trust will terminate on the death of the beneficiary referred to in paragraph 6 above and the nett assets of the Trust after the discharge of all liabilities are to form part of and to be paid to the estate of such beneficiary.
- 8 The plaintiff's attorney is ordered to serve a copy of this order on the Head of Department of the defendant and accounting officer and on the Director General of the Provincial Treasury within 14 days of the date of this order.
- 9 The aforementioned damages and costs are to be paid into the trust account of the plaintiff's attorneys, Sakhela Inc, the details of which are as follows:

Name of account	:	Sakhela Incorporated
Bank name	:	First National Bank
Account Number	:	[...]
Branch code	:	250109

RWN BROOKS
JUDGE OF THE HIGH COURT

Appearances

On behalf of the plaintiff:	Adv Dugmore SC and Adv Sambudla
Instructed by	Sakhela Inc. Plaintiff's Attorneys, 74 Madeira Street Mthatha

On behalf of the defendant:

Adv ND Ngadlela

Instructed by

State Attorney

Defendant's Attorneys

94 Sissons Street

Fortgale

Mthatha

Date heard:

16 May 2018

Date delivered:

24 May 2018