

**IN THE HIGH COURT OF SOUTH AFRICA, NORTHERN CAPE DIVISION,
KIMBERLEY**

Reportable
Case No: 2250/2016

In the matter between:

D[...] C[...] A[...]

OBO NM

FIRST PLAINTIFF

S[...] J[...]

SECOND PLAINTIFF

and

MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF HEALTH,
NORTHERN CAPE PROVINCE

DEFENDANT

Neutral citation: *DC A[...] and Another v Member of the Executive Council for the
Department of Health: Northern Cape Province* (Case no.
2250/2016) (31 May 2024)

Heard: 30 January 2024

Delivered: 31 May 2024

Judgment

Phatshoane DJP

Introduction

- [1] The plaintiff, Ms D[...] C[...] A[...], is before this Court with an application for the reconsideration of two costs orders that I made on 15 March 2023 and 11 August 2023. Essentially, she seeks relief pursuant to a secret offer to settle that she made on 25 January 2023, that the party and party costs as contained in the consent order of 15 March 2023 be up to and include 25 January 2023 and that an award of costs on an attorney and client scale be made with effect from 26 January 2023 onwards. This form of relief is not provided for in the Uniform Rules of this Court. However, it was contended for plaintiff that based on her right of access to justice, the relief sought is akin to that available to a defendant who has made a secret offer to settle as provided for in rule 34 of the Uniform Rules of this Court. The key issue being whether the defendant, the Member of the Executive Council (MEC) for Health, Northern Cape, ought to bear the actual expenses the plaintiff incurred because he rejected the plaintiff's first secret offer, on the same basis as the plaintiff would have been held liable to bear the defendant's expenses for not accepting his reasonable offer made in terms of rule 34.
- [2] The plaintiff's principal argument for the reconsideration of costs hinges on the *Calderbank* principle which has its origin from the longstanding English Court of Appeal decision in *Calderbank v Calderbank*.¹ The issue in *Calderbank* was whether a party could in a 'without prejudice' communication in which an offer of settlement had been made, reserve that party's right to waive the confidential (that is, the 'without prejudice') nature of the offer in order to rely upon it for the purposes of making an application for indemnity costs. Cairns LJ held that that was permissible.
- [3] Originally the *Calderbank* offer was thought to find application only in matrimonial matters where no payment into court procedure was available. The position

¹ [1975] 3 All ER 333 (CA).

changed following the English Court of Appeal decision in *Cutts v Head*.² There, Oliver LJ emphasised the following passage in *Computer Machinery Co. Ltd. v. Drescher* [1983] 1 W.L.R. 1379 by Sir Robert Megarry V.C:

"In my view, the principle in question is one of perfectly general application which is in no way confined to matrimonial cases. Whether an offer is made 'without prejudice' or 'without prejudice save as to costs,' the courts ought to enforce the terms on which the offer is made so as to encourage compromises and shorten litigation. The latter form of offer has the added advantage of preventing the offer from being inadmissible on costs, thereby assisting the court towards justice in making the order as to costs..."

And at 610, Oliver LJ said:

"I think that it must now be taken to be established that the *Calderbank* formula suggested by Cairns L.J. is not restricted to matrimonial proceedings but is available in all cases where what is in issue is something more than a simple money claim in respect of which a payment into court would be the appropriate way of proceeding. . ."

The practice of making offers of compromise on *Calderbank* terms has since been widely accepted beyond England. For example, Hong Kong, Singapore, New Zealand, Ireland, Canada, and Australia, all recognise the *Calderbank* offers. Such offers are also firmly entrenched in international arbitration practice.³

- [4] The principle in *Calderbank* was *res nova* in our law until fairly recently when few South African decisions acknowledged the plaintiff's common law right to make a secret offer "without prejudice save as to costs" to a defendant and to later, after

² [1984] 1 All ER 597 (CA) at 608–609.

³ See Article by Benjamin Kasep- (Barrister-at-Law), '*Calderbank Offers*'; Available at <<https://13wentworth.com.au/wp-content/uploads/2019/01/calderbankoffers.pdf>> and the authorities cited therein.

judgment, avail itself of costs not recoverable in the ordinary course against such a defendant, should the Court have made an award in excess of that tendered.⁴ In *AD & Another v MEC for Health and Social Development, Western Cape*⁵ (the *AD* matter) Rogers J considered two discrete questions namely (i) whether a *Calderbank* letter is admissible at all in relation to costs; and (ii) if so, what effect the letter has on the court's discretion as to costs. The court held, on good authority, that in order to be admissible such an offer must explicitly state that it is made without prejudice 'except in relation to costs' (or words to similar effect). If the words 'without prejudice' are expressly qualified by the phrase 'except in relation to costs', there were no reasons of policy to treat the communication as inadmissible for purposes of determining a just and equitable costs order.

- [5] Rogers J further held that the public policy of encouraging settlements would be better served if litigants appreciated the risk of adverse costs orders if they disregarded reasonable offers of settlement. He then concluded that in principle *Calderbank* offers were admissible in relation to costs and could be disclosed to the court for that purpose after judgment has been given. As to the effect of a *Calderbank* offer on costs, Rogers J said:

“(T)he Commonwealth cases emphasise that a plaintiff who has made such an offer is not entitled to attorney/client costs merely because he made a secret offer which was less than what the court awarded. The court must consider whether the defendant behaved unreasonably, and thus put the plaintiff to unnecessary expense, by not accepting the offer or making a reasonable counter-offer. Factors mentioned in the Commonwealth cases are whether the defendant has engaged reasonably in attempting to settle; whether the plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for the best conceivable outcome; whether the plaintiff allowed

⁴ See for example: *AD & Another v MEC for Health and Social Development, Western Cape* 2017 (5) SA 134 (WCC); *Van Reenen v Lewis and Another* [2019] JOL 44811 (FB); and *RNT obo DORM and Another v Amanfo and Another* (2011/1359) [2024] ZANWHC 91 (27 March 2024).

⁵ *Ibid* paras 42-43 and 60.

the defendant a reasonable time to consider the offer; the extent of the difference between the amount of the offer and the amount of the award; and the nature of the proceedings and resources of the litigants.”

- [6] The plaintiff’s secret offer to settle has its genesis in the common law and, in my view, consideration of such offers ought to be infused in the Court’s power to regulate its own process. I could find no reason why a plaintiff, who makes an offer without prejudice except in respect of costs, ought not to be afforded the same rights, flowing from a *Calderbank* offer and the benefit of law, as afforded to a defendant in terms of rule 34, which would place such a plaintiff in the same position which a defendant occupies in the context of an offer made to avoid litigation and in certain cases, the significant expense thereof. The public policy and public interest consideration which form the basis for penalising a plaintiff with costs, for not accepting a defendant’s reasonable offer, must logically find application where a defendant fails to accept a plaintiff’s reasonable offer to settle.

Background

- [7] The plaintiff made a secret offer to settle to the defendant on 25 January 2023, some 13 court days before the trial (the first secret offer). The offer sets out the following notices:

“TAKE NOTICE FURTHER THAT the defendant is invited to make any reasonable counteroffer or to engage in negotiation with the plaintiff on any reasonable alternative basis of settlement or to request an extension of the *spatium deliberandi* insofar as he may reasonably require such extension. . .”

And

“TAKE NOTICE FURTHER THAT the plaintiff shall disclose this offer to the court at the appropriate time if indicated, after judgment for purposes of

consideration or reconsideration of any costs order made or to be made, regardless whether the ultimate award exceeds this offer or not.

TAKE NOTICE FURTHER THAT the plaintiff shall seek an appropriate costs order against the defendant, including (but not limited to) costs on an attorney and client and own client basis or an attorney and client basis or on any other basis which will ensure recovery of so much of the otherwise irrecoverable costs but for this offer as the court may deem meet, should it appear that the offer should have been accepted or that the defendant should have engaged the plaintiff on reasonable alternative settlement negotiations but did not do so.”

- [8] The Full Court of the Supreme Court of Western Australia cautioned of offers made shortly before the trial in *Maclean v Rottnest Island Authority*⁶ in these terms:

“[T]he Court should not encourage the use of a Calderbank letter delivered shortly before trial when the other party might reasonably be expected to have their minds on a number of matters. The use of a Calderbank letter is an aid to the administration of justice and should be encouraged. Its use as an indiscriminately wielded tactical weapon should be discouraged.”

Whether a *Calderbank* offer served late in the proceedings will give rise to indemnity costs will depend heavily on the surrounding circumstances.⁷

- [9] In the first secret offer the plaintiff extended an invitation to the defendant to resolve the question of quantum by conceding an amount of R18 950 000 of her proven or agreed damages suffered in her representative capacity and on behalf of NM, the minor child, flowing from the hypoxic-ischaemic brain injury suffered by NM at birth plus interest on the capital sum and party and party costs.

⁶ [2001] WASCA 323 para 36.

⁷ Benjamin Kasep- ‘*Calderbank Offers*’, above n 3.

- [10] The first secret offer was open to acceptance until 10h00 on 08 February 2023 unless the plaintiff extended it at the defendant's request. The defendant did not accept the offer. Instead, on 07 February 2023, he made a counter-offer in terms of rule 34(1) and (5) for an amount of R17 464 123.20 and further called upon the plaintiff to make a counter-offer if his offer was unacceptable. One of the caveats to the defendant's counter-offer was that the offer stood to be disclosed to the court, after judgment, for purposes of reconsideration of any costs order made.
- [11] On the eve of the trial, 12 February 2023, the plaintiff made its second 'without prejudice' secret counter-offer of R22 million. On the same date the defendant responded to the plaintiff's second secret offer with a further counter-offer for an amount of R18 932 651.03. The plaintiff rejected the offer as being substantially less than a reasonable amount.
- [12] The trial was set down to commence on 13 February 2023 for a period of two weeks until 24 February 2023 and for a further week from 13 March to 17 March 2023. This notwithstanding, the parties resolved certain parts of the plaintiff's claim at the commencement of the trial and other parts on 15 February 2023. The trial was postponed to 13 March 2023.
- [13] In the interim, the plaintiff brought an application for the payment of R9 574 902 pending the finalisation of the trial, which concerned those heads of damages and numerous items in respect of future medical expenses which had been settled between the parties. The latter application was set down for hearing when the trial resumed on 13 March 2023. However, it was not entertained as envisaged but was withdrawn because the parties engaged in further settlement negotiations which resulted in the full and final settlement agreement concluded on 14 March 2023 to the effect that the defendant would pay the plaintiff's claim for damages in the amount of R20 million in certain agreed instalment. On 15 March 2023 the settlement agreement which contained an order as to costs on

party and party scale was made an order of this Court including costs of various experts and those for the employment of two counsel.

- [14] The issue of interest payable on the capital amount was postponed for argument to 09 May 2023. Following argument, in a well-considered judgment, I ordered the defendant on 11 August 2023 to pay mora interest at the rate of 10.75% per annum on the capital sum of R20 million calculated from 15 March 2023, the date of the consent order, to the date of final payment. The defendant was further ordered to pay the plaintiff's costs of adjudication of the aspect of interest on party and party scale which costs included costs consequent upon the employment of two counsel.

The plaintiff's argument

- [15] It was argued for the plaintiff that she and NM are entitled to be indemnified against irrecoverable costs to the fullest extent possible which can only be achieved if the Court was to order the defendant to bear attorney and client costs from the date of the first secret offer, 25 January 2023. It was contended that the indemnifying costs (attorney and client costs) she seeks were not punitive costs in the ordinary sense based on some objectionable conduct on the part of the defendant, albeit are often associated with some form of punishment or disapproval by the court. The association is unintended and incorrect.
- [16] Insofar as there may have been some objectionable conduct on the part of the defendant in the present case, it was argued, this would be no more than just a factor for the court to consider in the exercise of its discretion. Even if the defendant had acted in an exemplary or commendable manner but with an unreasonable assessment of the risk the indemnity costs would have to be awarded to the plaintiff. It was argued that exceptional circumstances ought not to be extant for such costs to follow as would be the case if traditional punitive costs were awarded.

[17] It was further argued for the plaintiff that the assessment of her claim, on her version, indicated that NM's damages were probably in excess of the settled figure of R20 million. Any irrecoverable costs, so it was argued, were likely to significantly erode the award that NM would receive. It was further argued that the plaintiff's first secret offer was a substantial discount which the defendant ought to have accepted to obviate the adjudication of the residual question on irrecoverable costs.

[18] It was further contended that the defendant acted with impunity and elected to oppose the main action for an extended period. When its tactics did not bear fruit, it settled in the face of the inevitable adversity of paying a larger award. The defendant ought not to be allowed, so it was argued, to enjoy the benefit of escaping the probable irrecoverable costs. It was argued that the minor child was prepared to sacrifice a significant portion of 'his award' to escape the dire effects of irrecoverable costs without the advantage of the defendant's deep pockets. The defendant's conduct, it was argued, caused the plaintiff to incur significant expense in enforcing NM's rights to a valid, fair and justifiable claim. In addition, so it was argued, the defendant has not conducted himself with the utmost probity; that his conduct of the litigation was vexatious and therefore there appeared to be no reason why the plaintiff and NM should bear their irrecoverable costs.

The defendant's argument

[19] The defendant raised no less than five points *in limine* in answer to the application for reconsideration of costs but pressed ahead with only three. These points *in limine* are interwoven with the merits of the application and in fact the defendant largely referred to his points *in limine* in response to almost all of the averments as set out in the plaintiff's founding affidavit. The first attack against the application is that the first secret offer contained an invitation to the defendant

to make a counter-proposal or engage in negotiations with the plaintiff or to request an extension of the *spatium deliberandi* as the defendant may reasonably require. The offer would expire on 08 February 2023 and thereafter it would not be open for acceptance save with the plaintiff's written consent.

[20] The defendant contends that insofar as he made a counter-proposal, which the plaintiff rejected, this resulted in the expiry of the plaintiff's first secret offer because its acceptance period had never been extended. Consequently, so it was contended, the plaintiff cannot rely on her first secret offer for purposes of the reconsideration application. The plaintiff's second secret offer of R22 million, it was argued for the defendant, superseded the first secret offer. The second secret offer exceeded the final settlement figure of R20 million thus it was inconsistent with the *Calderbank* principles. The plaintiff's conduct, in bringing the present application, it was argued, amounted to an abuse of court process.

[21] The defendant's second point *in limine* pivots on the *res judicata* legal doctrine. It was argued that the Court did not deliver judgment or make an award after consideration of the evidence. The consent order issued was premised on the agreement which settled the capital sum and costs thus the matter was *res judicata* which left no room for reconsideration of costs. It was argued with reference to the decisions in *Eke v Parsons* ⁸ and *Gollach & Gomperts (1967) (Pty) (Ltd) v Universal Mills & Produce Co (Pty) Ltd & Others* ⁹ that the consent order brought finality to the *lis* between the parties. The settlement agreement, it was argued, eliminated the underlying dispute. Where, as here, a settlement agreement was made an order of the Court the parties were bound thereby. It was impermissible for a party to litigate on issues that were finalised because that would never bring finality in the litigation, so ran the argument.

⁸ 2016 (3) SA 37 (CC) para 31.

⁹ 1978 (1) SA 914 (A).

[22] The defendant's third point *in limine* is to the effect that the Court is *functus officio* apropos any aspect of the interest judgment handed down on 11 August 2023. The plaintiff had argued for costs on a punitive scale during the hearing on interest which the Court refused to grant. It was contended that she ought to have availed herself of an appeal against the costs in the ordinary scale as awarded in the interest judgment if she was aggrieved thereby. She acquiesced in the judgment. Consequently, no factual or legal basis existed for the plaintiff to seek reconsideration of those costs. In any event, it was argued, the question of costs on the interest judgment was also *res judicata* and I had no authority to amend my final order.

[23] On the merits the defendant contended that the plaintiff had not shown that he displayed vexatious or mala fide conduct which would warrant costs on an attorney and client scale. It was further argued that the defendant made numerous attempts to settle various heads of damages with the plaintiff and thus he ought not be punished for his efforts. On 14 February 2023, seven days after the defendant made his first counter-offer, in response to the plaintiff's second secret offer, the defendant made a further offer of R18 932 651.03, just about R17 000 less than the plaintiff's initial first offer of R18 950 000. This counter-offer, it was argued, the plaintiff had been unwilling to consider. Instead, it was argued, the plaintiff had then shifted the goalposts and demanded R22 million on the basis of what she regarded as comprehensively detailed and motivated information.

The discussion

[24] Central to the defendant's preliminary attack to the application is that it traversed issues which were *res judicata*. It is trite that the Court has the common law jurisdiction to reconsider costs on the basis of facts which a party was prohibited from presenting which are brought to its attention after judgment. On reconsideration of the costs the court will exercise its discretion anew with the

advantage of the knowledge of the secret offer and award such costs it deems appropriate.

- [25] It should first be considered whether the plaintiff's first secret offer is admissible in relation to the reconsideration of costs. If it is, then it ought to be determined whether the defendant acted reasonably by rejecting the plaintiff's first secret offer or by not making reasonable counter-offers or reasonably engaging in early attempts to settle the dispute and thus ought to be mulcted in "indemnity costs" or irrecoverable costs (attorney and client costs) being the actual expenses incurred in the litigation as opposed to what a party can tax and recover on a party and party basis.
- [26] The admissibility of the first secret offer poses no difficulties because, in my view, the offer complies with the requirements articulated in the *AD* matter.¹⁰ For instance, it was expressly made without prejudice save as to costs. It makes plain that the plaintiff would disclose the offer to the court after judgment for purposes of reconsideration of costs and that the plaintiff would seek an appropriate costs order against the defendant, including (but not limited to) costs on an attorney and client so as to recover so much of her irrecoverable costs. The defendant's counter-offers were also subject to similar caveats. On a reading of the offers and counter-offers made by both parties it is clear that they both intended to devolve the risk of substantial costs of litigation upon each other if either of them elected not to accept what was 'reasonably' offered.
- [27] On the view I take of this matter, it is not necessary to discuss at any great length whether the second secret offer superseded the first and the legal effect of such a proposition. The answer to the question whether the second secret offer rendered nugatory the first must surely be in the negative. This is so because the second secret offer leaves no room for any suggestion that it consigned to the

¹⁰ *AD & Another v MEC for Health and Social Development, Western Cape*, Above n 4.

past the first secret offer because to it had been inserted the following text: “without derogating in any way from any right which the first plaintiff has or may have in terms of her initial common law secret offer, and with full retention of such right(s).” The words employed admits of only one construction - the defendant was unequivocally put on notice of the plaintiff’s intention to press ahead with the application for reconsideration of costs based on the first secret offer. Otherwise put, this was an indication that, if a settlement offer is unreasonably refused, then the defendant would be at risk of a subsequent application for a costs order on an attorney and client scale based on the primary secret offer.

[28] A much more controversial aspect of the present case, which in truth, as I see it, is the nub of this case, is the last agreement concluded between the parties on 14 March 2023, which led to the consent order of 15 March 2023. The question is what weight should the Court attach to this. The settlement of R20 million was dealt with in terms of three agreements. The first was concluded on 13 February 2023 for R5 100 971. The second on 15 February 2023 for R957 902 which included the R5 100 971 and the balance on 15 March 2023 which brought the total claim to R20 million as set out in the consent order.

[29] The consent order which incorporates the agreement between the parties specifically decrees that the plaintiff is entitled to costs on party and party scale. In *Eke v Parsons*¹¹ it was observed:

“[31] The effect of a settlement order is to change the status of the rights and obligations between the parties. Save for litigation that may be consequent upon the nature of the particular order, the order brings finality to the *lis* between the parties; the *lis* becomes *res judicata* (literally, ‘a matter judged’). It changes the terms of a settlement agreement to an enforceable

¹¹ 2016 (3) SA 37 (CC).

court order. The type of enforcement may be execution or contempt proceedings. Or it may take any other form permitted by the nature of the order. That form may possibly be some litigation the nature of which will be one step removed from seeking committal for contempt; an example being a *mandamus*.”

And Ad para 36:

“[36] In sum, what all this means is that even with the possibility of an additional approach to court, settlements of this nature do comport with the efficient use of judicial resources. First, the original underlying dispute is settled and becomes *res judicata*. Second, what litigation there may be after the settlement order will relate to non-compliance with this order, and not the original underlying dispute. Third, matters that culminate in litigation that precedes enforcement are fewer than those that don’t.”

[30] It is axiomatic that consent orders are products of discussions between the parties and are not conceived through a judgment of the court following consideration of the evidence. The plaintiff argued that in the context of this case it was irrelevant that the consent order followed as it did and not after an independent assessment of all the evidence at the end of a trial which ran its full course. The consent order, so it was argued, did not finally resolve the question of reconsideration of costs. The defendant’s stance, on the obverse of the coin, is that the litigation ended when he finally agreed to offer, in full and final settlement of the claim, the amount of R20 million plus costs in the ordinary cause.

[31] It is highly contentious whether the plaintiff’s attorneys, during the final stages of negotiation, on 14 March 2023, expressed the view that the plaintiff would persist with her intended application to seek a reconsideration of the costs on the basis of the first secret offer to settle. It is trite that an applicant who seeks final relief in

motion proceedings must, where there is a dispute of fact, accept his or her opponent's version unless those allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.¹²

[32] The plaintiff's attorney, the deponent to the founding affidavit, avers that during the settlement discussions of 14 March 2023 he conveyed to the defendant's attorney that the plaintiff would abandon its contemplated application for reconsideration of the costs if the defendant was prepared to pay an amount of R21 million. He stated that the defendant declined to accept the proposal which meant that this application would follow. The defendant's divergent position is that there would have been no settlement reached on 14 March 2023 had the parties agreed that the plaintiff would still pursue the reconsideration of costs. The defendant's deponent stated that such proposition would have defeated the purpose of the settlement of the dispute. In any event, he intimated, there would have been no reason why the parties would not have disclosed the disagreement on costs to the Court as they did on the question of interest payable on the capital when the consent order was issued. In his view, the plaintiff is precluded from revisiting a settled issue.

[33] On the approach I wish to adopt, it is not necessary to determine whether the dispute is genuine or bona fide. What lies at the heart of the application is whether the plaintiff is entitled to invoke reconsideration of the costs where her claim was settled by agreement which included an order of costs. Counsel for the plaintiff referred me to no less than nine foreign case-law. *Findlay v Railway Executive* [1950] 2 All ER 969 (CA); *Calderbank v Calderbank* [1975] 3 All ER 333 (CA); *Cutts v Head* [1984] 1 All ER 597 (CA); Singapore case of *SBS Transit Ltd* (formerly known as Singapore Bus Services Limited) *v Koh*

¹² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E – 635C; see also *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at Para 12.

Swee Ann [2004] 3 SLR(R) 365; [2004] SGCA 26; the Canadian case of *Mosher v Reimer* 2004 ABQB 496; Supreme Court of Victoria case in *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* [2005] VSCA 298; 13 VR 435; the Supreme Court of Western Australia in *Mount Lawley Pty Ltd v Western Australian Planning Commission* [2006] WASC 82; and *Atton v National Mutual Life Association of Australasia (No 2)* [2007] NSWSC 348.

[34] The above foreign case-law discusses the *Calderbank* principles in the context of disputes which had been fully adjudicated and judgment given. They do not directly bear on the question of reconsideration of the costs where the claim was settled by agreement which included an order of costs. In *Edwards Madigan Torillo Briggs Pty Ltd v Stack* [2003] NSWCA 302 (*EMTB*) the New South Wales Court of Appeal was confronted with a situation where, following four or five days of the hearing, there had been some settlement agreement with a number of defendants. One of the defendants, *EMTB*, whilst prepared to have judgment in its favour contended for costs against the plaintiff on an indemnity basis or alternatively on party and party basis. The decision of the trial judge in refusing indemnity costs in that case was upheld on appeal because the *Calderbank* offers had been made at an early stage of a complex litigation and so the plaintiff had not been afforded a fair opportunity to consider them. In addition, the Court reasoned that the 14 days *spatium deliberandi* provided for in the offers was much less than that specified in the rules and therefore unreasonable. I have here to do with a wholly different case. *EMTB* was not concerned, as here, with a case where costs formed part of the settlement agreement.

[35] Counsel for the plaintiff's submission that the principles which have been developed concerning rule 34, stretching over many decades, serve a useful purpose in reconsidering costs applications, where a plaintiff's *Calderbank* offer comes under scrutiny, is manifestly good. In the context of rule 34 it has authoritatively been said that where the plaintiff accepts an offer that includes a tender of costs up to the date when the offer was made, the court has no

discretion to award the plaintiff further costs incurred after that date.¹³ In *Erasmus v Santam Insurance Ltd and Another*¹⁴ Flemming DJP said:

“If an offer is made in settlement of both the claim and costs, acceptance brings an end to all pre-existing entitlements. The litigation itself is at an end.”

And at 896D he said:

“A third consideration is that settlement has a core of contractual offer and acceptance. Procedural rules are not the place to qualify the operation of contractual principles.”

At 898D-E he went on:

“The present defendant, in tendering costs to the date of the tender, did not offer costs incurred at a later date. Nor on any special basis such as attorney and client costs, costs of two counsel, or any other addition to liability for costs which, in the absence of a special addition, does not attach to an order for payment of 'costs' or an offer to pay 'costs'.”

[36] In my view, litigants must be afforded the opportunity to negotiate in good faith and encouraged to settle their disputes whenever it is possible. To ripen into a contract, it is necessary that the offer be accepted by the offeree.¹⁵ There can be no question here that the defendant unequivocally accepted the last offer that resulted in the consent order. The principles adverted to in *Erasmus v Santam Insurance* (supra), whilst not directly addressing the Calderbank offer, apply equally to the present matter - acceptance of an offer encompassing both the claim and costs terminates all pre-existing entitlements and effectively concludes

¹³ See Cilliers, Loots and Nel *Herbstein & Van Winsen-The Civil Practice of the High Courts of South Africa*, 5 ed (Juta & Co Ltd, Cape Town 2009). Vol 1 at 627 (and the authorities cited therein).

¹⁴ 1992 (1) SA 893 (W) at 895H-896.

¹⁵ *Bloom v The American Swiss Watch Company* 1915 AD 100 at 102.

the litigation. To my mind, it is impermissible for the plaintiff to now invoke a *Calderbank* offer to seek a special costs order after the grant of a consent order inclusive of costs.

[37] Even if I am wrong in concluding as I did, there is another reason why the application should fail. In exercising its discretion on reconsideration of costs a court must have regard to all relevant considerations which should be determined on a casuistic basis. The Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)*¹⁶ held that it is neither possible nor desirable to give an exhaustive list of the relevant circumstances. A court considering a submission that the rejection of a *Calderbank* offer was unreasonable should ordinarily have regard at least to the following factors –

- (a) the stage of the proceeding at which the offer was received;
- (b) the time allowed to the offeree to consider the offer;
- (c) the extent of the compromise offered;
- (d) the offeree's prospects of success, assessed as at the date of the offer;
- (e) the clarity with which the terms of the offer were expressed;
- (f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.

[38] In *Hazeldene's* (supra) the VSCA approved what Redlich J said in *Aljade and MKIC v OCBC*¹⁷ that it was not necessary to establish misconduct by the offeree before the rejection of the offer could be viewed as unreasonable. The lack of

¹⁶ [2005] VSCA 298; 13 VR 435.

¹⁷ [2004] VSC 351.

merit in the manner a party has conducted its case is not a prerequisite for costs on attorney and client basis to issue. It bears mentioning that the parties critiqued each other's conduct of the litigation and some serious aspersions were cast. No worthwhile purpose will be served to have regard to the details. It suffices that criticism levelled were unhelpful to either of the parties' case.

[39] As observed by Rogers J in the *AD* matter, the commonwealth cases emphasise that a plaintiff who has made such an offer is not entitled to attorney/client costs merely because he made a secret offer which was less than what the court awarded. The court must consider whether the defendant behaved unreasonably, and thus put the plaintiff to unnecessary expense, by not accepting the offer or making a reasonable counter-offer.¹⁸

[40] To recap, the trial commenced on 13 February 2023 on the question of quantum because liability had already been conceded almost five years prior to the trial. It is common cause that the parties had appointed various experts. In particular, the plaintiff engaged no less than 15 experts in various fields and several items had been placed in dispute. The claim involved an estimation of what was mostly future damages. As I see it, due to the intricate nature of the dispute numerous offers and counter-offers were inevitable. In fact, both parties afforded each other the opportunity to make such counter-offers. It counts against the plaintiff that the defendant had in response to the plaintiff's second secret tender, offered her R18 932 651.03, sufficiently close to her first secret offer of R18 950 000. This was rebuffed as the plaintiff had then offered an amount of R22 000 000.

[41] It is a favourable consideration that the trial itself did not run to its completion in light of negotiations that went about behind the scene which resulted in the settlement. Insofar as genuine attempts, aimed at amicably resolving the dispute, had been ongoing for quite some time characterised by various offers and

¹⁸ *AD & Another v MEC for Health and Social Development, Western Cape*, Above n 4 at para 61.

counter-offers, it is difficult to discern that one of the parties should be mulcted in irrecoverable costs. I say this fully appreciative of the hardship that may well befall the plaintiff and NM having to bear their own irrecoverable expenses. However, the plaintiff did not discharge the onus that rested on her of showing that the rejection of her first *Calderbank* offer was unreasonable.¹⁹

- [42] It can hardly be argued, in my view, that the defendant had failed to engage or did not respond constructively to the plaintiff's proposals or moved at a glacial pace that is to be frowned upon. Indeed, the situation may have been different had the defendant been rigid and employing dilatory tactics. I am unpersuaded that the defendant had throughout the negotiation phase displayed unreasonable conduct in its independent estimate of the value of the case or assessment of the risk as to costs should the litigation ensue to finality. In the end, the back and forth negotiations yielded positive results and stymied what could have been a protracted and arduous trial. On the foregoing exposition, the application for reconsideration of costs must fail.
- [43] I had been urged to make an attorney and client costs order in the interest judgment that was adjudicated separately following the consent order based on the plaintiff's first secret offer. The argument on reconsideration of costs in respect of the interest judgment attracts a similar reasoning as in the main application for reconsideration. It follows that the argument on costs, in respect of the interest judgment, must also falter.
- [44] On the question of costs of the reconsideration application, the defendant urged that they be on a punitive scale against the plaintiff because the application constituted an abuse of the court process. In my view, the plaintiff had an arguable case and was at pains to vindicate NM's right to what she believed to

¹⁹ The applicant for indemnity costs bears the onus of showing the rejection of a *Calderbank* offer was unreasonable. – see Benjamin Kasep- (Barrister-at-Law), '*Calderbank Offers*', above n 3, at p.25E (and authorities cited therein) - *MGICA (1992) Pty Ltd v Kenny & Good Pty Ltd* (1996) 70 FCR 236, 240; *Spa v Downer EDI Rail Pty Ltd* [2007] NSWSC 1292, [8] .

have been the just and equitable outcome of the case on costs. To this end, I am not swayed that her conduct is deserving of censure. Costs shall follow the result on the ordinary basis. An order is therefore made.

Order:

1. The application for reconsideration of costs is dismissed with costs on party and party scale.

PHATSHOANE DJP

Appearances:

For the first plaintiff	Adv WP De Waal SC (with Adv CH Botha)
Instructed by:	Elliot Maris Attorneys, Kimberley.

For the first defendant:	Adv RT Williams SC (with Adv S Mahomed)
Instructed by:	Robert Charles Attorneys & Conveyancers, Kimberley.