



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 8042/2007

In the matter between:

NOSISANA MERCY TEKETE

First Plaintiff

NTOMBIZODWA JENNETE VAROYI

Second Plaintiff

TSHEPHISO JAMES TEKETE

Third Plaintiff

and

MINISTER OF SAFETY AND SECURITY

Defendant

QUANTUM JUDGMENT

Andrews AJ

Introduction

[1] The Plaintiffs instituted action against the Defendant for damages arising out of a shooting incident which occurred on 2 October 2005 in Khayelitsha, Cape Town, Western Cape when Mr Johannes Tekete (“the deceased”), was shot by a member of the South African Police Service and who later died on 31 December 2005 as a consequence of his injuries. The deceased, at the date of his death, was married in

community of property to the First Plaintiff and was the father of the Second and Third Plaintiffs.

[2] Judgment on liability was handed down on 12 December 2019 where Samela J, found the Defendant to be liable to the Plaintiffs for loss of support as a consequence of the shooting of the deceased, by a member of the South African Police Service at Site C, Khayelitsha.

[3] The matter proceeded before this Court for the determination of quantum. The crisp issue for determination was essentially the amount of damages, more particularly in relation to loss of support, the Defendant is liable to pay to the Plaintiffs. There is no dispute regarding the actual loss in respect of the claim for funeral expenses. After considering the evidence on quantum, the court handed down the following order on 7 May 2024:

'In the result, the following order is made:

- 1. The matter is adjourned sine die;*
- 2. The Court directs the parties to instruct ARCH Actuarial Consulting CC to calculate the loss of support in respect of the First, Second and Third Plaintiffs on the following terms:*

(a) That the Plaintiffs were dependent on the deceased's income at the time of his death on 31 December 2005;

(b) The Plaintiffs' dates of birth are:

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|-------------------------------|-------------------------|
| <i>(i) First Plaintiff:</i> | <i>29 April 1968;</i> |
| <i>(ii) Second Plaintiff:</i> | <i>16 October 1995;</i> |
| <i>(iii) Third Plaintiff:</i> | <i>23 May 2003.</i> |

(c) The deceased's income and probable career path would have been as follows:

- (i) The deceased would have earned R41 500 per annum as at 31 December 2005;*
- (ii) The deceased's income would have progressed to a current amount of R150 000 per annum as per the 2024 values;*
- (iii) The deceased's income would have progressed to an income of R218 000 per annum as per the 2024 levels at the age of 45 years;*
- (iv) Increases would have been coupled with earnings inflation;*
- (v) The deceased would have retired at the age of 65 years.*

(d) The First Plaintiff's income at the time of the deceased's death is determined to be R1350 per month.

(e) The Second and Third Plaintiffs' dependency age is determined to be 18 years.

(f) General contingencies of 5% for past loss of support and 10% for future loss of support are to be applied.

3. The matter is to be re-enrolled upon receipt of the actuarial report to deal with the remaining issues on quantum and costs.

4. Costs are to stand over for later determination.

Actuarial Loss of Support Calculation

[4] Pursuant to the foregoing Court Directions, the parties instructed Arch Actuarial Consulting CC to calculate the loss of support in respect of the First, Second and Third Plaintiffs. An actuarial report dated 8 May 2024 was prepared which

quantified the present value of the loss of support suffered by the Plaintiffs after contingencies in the amount of R1 436 937 calculated as follows:¹

(a) First Plaintiff	R965 658
(b) Second Plaintiff	R111 867
(c) Third Plaintiff	R359 412.

[5] The Defendant does not challenge or dispute the loss of support computation recommended by the Actuary and the concomitant relief sought by the Plaintiffs, in relation thereto.

Costs

[6] The issue of costs was held over, as costs in my view cannot be dealt with on a piecemeal basis. The following cost considerations require determination:

- (a) The costs of the trial on merits;
- (b) The Calderbank Offer;
- (c) Rule 67A.

(a) Costs of the trial on merits

[7] Samela J, in the judgment handed down on 12 December 2019, ruled that the issues of the costs of the hearing of the matter in respect of the merits be determined at a later stage.

¹ Actuarial Report: Arch Actuarial Consulting CC, 8 May 2024.

[8] Counsel on behalf of the Plaintiffs contended that the Defendant should be held liable for the costs relating to the merits trial on a party-and-party scale, which costs should include the costs of counsel together with the costs of the expert witnesses, Dr Linda Liebenberg (pathologist) and Miss E P Van Wyk (forensic examiner).

[9] The orders sought by the Plaintiffs in relation to the costs of the trial are in keeping with the accepted legal principle that costs ordinarily follow the event and is in my view appropriate.

(b) The Calderbank Offer

[10] At the outset of the hearing the Court's attention was drawn to the fact that the Plaintiffs had previously provided the Defendant with a Calderbank Offer. It was submitted that the said offer will be disclosed to the Court, if so required, following the judgment in this matter. The Plaintiffs indicated that argument will be presented, in the event that the amount awarded by the Court is in excess of the Calderbank Offer, to motivate why the Plaintiffs would be entitled to costs on the attorney and client scale as from when the Calderbank Offer was served on the Defendant.

[11] Counsel on behalf of the Plaintiffs placed on record that the Plaintiffs sent a formal Calderbank offer to the Defendant on 3 October 2022, notifying the Defendant of the willingness to settle the issue of costs in respect of the merits on a party-and-party scale.² The Plaintiffs indicated that they were not intent on pursuing this Calderbank Offer.³

² Plaintiffs' submissions in respect of the quantum of costs, para 10, page 4.

³ Plaintiffs' submissions in respect of the quantum of costs, para 11, page 4 and Annexure "A".

[12] A second Calderbank offer was served on the Defendant on 13 December 2022, in terms of which the Plaintiffs indicated that they were willing to accept settlement of their claims on the following basis:⁴

- (a) Defendant to pay the total capital amount R540 098;
- (b) Payment to be made within 14 calendar days of the acceptance of the offer;
- (c) The Defendant to pay the Plaintiff's taxed or agreed party-and-party costs on the High Court scale, which costs were to include the costs of Counsel and the costs of the experts.

[13] Reference to what has been termed as "The Calderbank Offer" emanates from a judgment of the English Court of Appeal in **Calderbank v Calderbank**⁵. Rogers J, as he then was, in the seminal judgment of **AD v MEC For Health** ⁶ quoted what Cairns LJ stated in this regard that:

*'...he saw no reason in principle why, in cases not covered by the rules of court permitting secret offers, a litigant should not be permitted to make a settlement offer "without prejudice save as to costs" and rely on such offer, once judgment has been granted, in support of a particular cost order. This view was approved and acted upon in Cutts v Head [1984] 1 All ER 597 (CA). The courts in Australia, New Zealand and Canada have followed suit. In some jurisdictions the rules relating to secret offers have been amended to fill the gaps where Calderbank offers previously operated. In these jurisdictions it is accepted that a Calderbank offer by a plaintiff can, after judgment, be adduced in support of a request for what we would call attorney/client costs.'*⁷

[14] Rogers J, after considering how English law and other Commonwealth jurisdictions approached "without prejudice communications", concluded that he saw

⁴ Plaintiffs' submissions in respect of the quantum of costs, para 12, page 4 and Annexure "B".

⁵ [1975] 3 All ER 333 (EWCA).

⁶ 2017 (5) SA 133.

⁷ At para 41.

no reason ‘*why our law, based as it is on English law, should not recognise the same exception as has found favour in England and other Commonwealth jurisdictions. The considerations of public policy in favour of settlements and discouraging costly litigation are as compelling now as they ever were.*’⁸(my emphasis)

[15] In principle, Calderbank offers, which are akin to Rule 34 offers, are admissible in relation to costs and may be disclosed to the Court for that purpose after judgment has been handed down.⁹ In *casu*, it is uncontroverted that the respective offers made by the Plaintiffs were without prejudice offers, as contemplated in ***Calderbank v Calderbank*** (*supra*)¹⁰. Thus, the disclosure of the two “without prejudice offers” as per Annexures “A” and “B”, respectively, after judgment has been pronounced becomes now become a crucial consideration, in light of the history of this matter and submissions by the Plaintiff in this regard.

[16] It was submitted that the Plaintiffs properly placed the Defendant at risk with its timeous Calderbank offer, reserving explicitly the issue of costs and the scale thereof. Counsel on behalf of the Plaintiffs furthermore contended that the Defendant was guilty of allowing litigation to proceed when it could and should not have done so, and by incurring costs at the expense of public funds.¹¹ It was further mooted that the Plaintiffs will be out of pocket in the recovery of the costs on a party-and-party scale should they not be awarded costs on an attorney-and-client scale.

⁸ At para 50.

⁹ *AD v MEC For Health* (*supra*), at para 60.

¹⁰ See also *Van Reenen v Dr Lewis & Life Rosebank Hospital* (case no: 2302/2014) [2019] ZAFSHC 55 (14 May 2019), para 8 ‘*It is well established that vexatious conduct, even if it was not intended to be vexatious, may well be the basis for an order awarding costs on an attorney and client scale. Where a litigant was able to, but fails to take steps to curtail proceedings and thus causes an escalation in costs, he may similarly fact the prospect of paying costs on the attorney and client scale, on the basis that his conduct was unreasonable.*’

¹¹ Plaintiffs’ submissions in respect of the quantum of costs, para 22, page 7.

[17] In response, Counsel for the Defendant argued that the court is to take into consideration that the State Attorneys Office is “dysfunctional” and that there were logistical challenges in the process of securing instructions. It was further mooted that the Plaintiffs will not in essence be prejudiced as they are receiving substantially more compensations to that contained in the Calderbank offer. Furthermore, it was submitted that the effect of making a punitive costs order would in effect result in more money being taken from the fiscus. Counsel on behalf of the Defendants requested that the cost order be ordinary costs on a party-and-party scale.

[18] Counsel on behalf of the Plaintiffs in response, contended that the argument proffered by the Defendant cannot be regarded as an excuse insofar as it relates to the State Attorneys offices being in disarray. It was emphasised that the court is to have regard to the fact that the offer that the Plaintiffs wish to pursue, was made on 13 December 2022 and nothing was done. In essence, the Plaintiffs ought not to be prejudiced because the State Attorneys do not have their proverbial house in order. Counsel on behalf of the Plaintiff strongly argued that it is precisely for this reason that the court should send a clear message by awarding costs on a punitive scale.

[19] Rogers J, in **AD v MEC For Health** (*supra*), succinctly sets out the considerations and guidelines in contemplating a Calderbank offer on costs as follows:

‘As to the effect of a Calderbank offer on cost, 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. 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 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.*¹²

[20] The chronology of the litigation paints a stark picture of a family who, after having lost the breadwinner of the family at the hands of a member of the South African Police Services in 2005, have waited almost 17 years for closure after instituting action in 2007. There were at least 12 court hearings in the action on the merits leading up to judgment and another 7 court hearings in respect of quantum. This type of protracted litigation cannot be in the public interest and neither can it serve the interest of justice. It is precisely for this reason that public policy considerations frowns upon costly litigation. It therefore follows that protracted cases cause an escalation in costs; which may have been curtailed had the Calderbank offer been considered.

[21] Whilst this is the starting point, a one size fits all approach could never have been envisaged as is evident from the list of considerations illuminated by Rogers J. It would therefore be incumbent of this court to also acknowledge that matters are distinguishable, being informed by plausible reasons why matters cannot be finalised within the shortest possible period of time. I am unable to comment on the reasons for the delays during the trial on the merits, but in relation to the trial on quantum it was evident that there were reservations expressed by the Defendant as

¹² At para 61.

to the deceased's former employment in the South African Police Services. Further information came to light during the quantum trial that necessitated further investigation. This information was not known to the Defendant at the time when the Calderbank offer was made on 13 December 2022. Furthermore, issues raised by the Defendant during the hearing of the quantum trial were relevant to considering what the deceased's income and probable career path would have been. Other unknowns included, a determination of the First Plaintiff's income at the time of the deceased's death, which differed from what was projected by the Industrial Psychologist, Dr Hannes Swart. The Defendant's own expert, who was eventually not called to testify also differed in certain respects with the Plaintiff's expert.

[22] It therefore begs the questions whether the Defendant was ultimately vexatious or unreasonable by not considering the Calderbank offer. In this regard, was the Defendant in a position to have made a counter-offer in the circumstances presented in this matter and could there have been further meaningful engagement between the parties in the circumstances of this case? On a realistic assessment of this matter, it is my view that settlement could not be approached simplistically, given the unique facts of this matter. The court did not get the impression that the Defendant was opposed to settlement, it was ultimately a question of whether the parties could meet each other at a reasonable point. Litigation in my view, was thus unavoidable and as such, I cannot find any reason why the Defendants should be sanctioned with a punitive cost order when information came to light at a very late stage of the proceedings.

[23] Finally, the resources of the litigants are also a pivotal consideration. It is trite that the matter of cost remains in the discretion of the court. It is therefore

incumbent on this court, in exercising its discretion to carefully weigh the issues, the conduct of the parties and unique circumstance of this matter which may have a bearing on the issue of cost to ultimately make an order that would be fair, just and reasonable.

[24] After considering the arguments by the parties, I am of the view that imposing a punitive cost order against the State Attorney in the circumstances of this case would be misplaced and inappropriate for the reasons set out earlier.

(c) *Rule 67A of the Uniform Rules of Court*

[25] Rule 67A(3) which came into effect on 12 April 2024, requires that part-and-party costs in the High Court be awarded on Scale A, B or C, respectively. This amendment applies prospectively in relation to work done on a matter after 12 April 2024. Rule 67A addressed itself only to awards of costs as between party-and-party with the purpose to exercise control over the rate at which counsel's fees can be recovered under such an award.

[26] Counsel for Plaintiffs and Defendants were *ad idem* on the appropriate scale. I find no reason to differ from them in this regard and accordingly order that Counsel's fees be taxed on a Scale "B" given the clearly identified features of this case that were unusually complex, important and valuable to all the Plaintiffs who have patiently waited for closure.

Order

[27] In the result, the following order is made:

1. The Defendant is ordered to pay to the Plaintiffs the sum of R1 436 937 (One million four hundred and thirty-six thousand nine hundred and thirty-seven rand) by means of electronic transfer to the Plaintiffs' Attorneys of record, within 14 (fourteen) court days from date of this order, which amount is calculated as follows:
 - (a) For the First Plaintiff the sum of R965 658 (nine hundred and sixty-five thousand six hundred and fifty-eight rand);
 - (b) For the Second Plaintiff the sum of R111 867 (one hundred and eleven thousand eight hundred and sixty-seven rand);
 - (c) For the Third Plaintiff the sum of R359 412 (three hundred and fifty-nine thousand four hundred and twelve rand).
2. The Defendant is to pay to the First Plaintiff the sum of R10 270 (Ten thousand two hundred and seventy rand) for funeral expenses by means of electronic transfer to the Plaintiffs' Attorneys of record within 14 (fourteen) court days from date of this order;
3. The Defendant is ordered to pay the Plaintiffs' costs relating to the merits of the of trial on a party-and-party scale, which costs should include the costs of counsel together with the costs of the expert witnesses, Dr Linda Liebenberg (pathologist) and Ms EP van Wyk (forensic handwriting examiner), which cost shall include the trial costs incurred for the following trial dates including the dates of postponements which were 2 March 2017, 6 March 2017, 7 March 2017, 2 May 2017, 4 May 2017, 14 August 2017, 4 December 2017, 7

December 2017, 26 March 2018, 28 March 2018, 29 March 2018 and 13 August 2019, respectively;

4. The Defendant is ordered to pay the Plaintiffs' costs incurred for the quantum trial on a party-and-party scale for the following trial dates including dates of postponement which were, 23 November 2023, 30 November 2023, 13 March 2024, 14 March 2024, 17 April 2024, 22 April 2024 and 20 May 2024; which costs shall include the costs of Counsel together with the costs of the experts, Dr Hannes Swart and Arch Actuarial Consulting CC.
5. In terms of Rule 67A(3), it is ordered that the recovery of Counsel's fees following 12 April 2024 is directed to be on Scale "B".

ANDREWS, AJ

APPEARANCES:

Counsel for the Applicant:

Advocate E Benade

Instructed by:

Lester and Associates

Counsel for the Respondent:

Advocate Van J van der Schyff

Instructed by:

The State Attorney

Heard on: 20 May 2024

Delivered: 22 May 2024

This judgment was handed down electronically by circulation to the parties' representatives by email.