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

Reportable

Case No:CA&R45/2023

In the matter between:

ADV AJ DU TOIT N.O obo MAWETHU MAXWELL NKUNA APPELLANT

and

THE ROAD ACCIDENT FUND RESPONDENT

Neutral citation: *Du Toit N.O v The Road Accident Fund* (Case no. CA&R45/2023) (23 August 2024)

Heard: 29 April 2024 and 20 May 2024

Delivered: 23 August 2024

Quorum: Phatshoane AJP, Nxumalo J and Tyuthuza AJ

Judgment

Phatshoane AJP

[1] Pursuant to the judgment of the trial court in which party and party costs were ordered in favour of the appellant, Adv AJ Du Toit, in his capacity as *curator ad litem* appointed for Mr MM Nkuna (the patient), against the respondent, the Road Accident Fund, the appellant launched an application in the court a quo for the reconsideration of costs essentially seeking to recoup his irrecoverable costs

(attorney and client costs) with effect from 14 October 2020, the date on which he made a Calderbank offer to the respondent. This appeal is with leave of the court a quo (Eillert AJ) and concerns its refusal to grant the appellant a special costs order sought.

[2] The reconsideration of costs after judgment on the basis of a secret offer to settle or a Calderbank offer, which the plaintiff would have made to a defendant prior to the judgment being delivered, is a relief fairly new in our South African jurisprudence but one akin to that available to a defendant who has made an offer to settle as provided for in rule 34 of the Uniform Rules of this Court. Rule 34 is designed to enable a defendant to avoid further litigation or liability for the costs of such litigation. The Rule is there not only to benefit a particular defendant but for the public good generally.[1] The public good which is served by offers to settle was made clear in *Naylor and Another v Jansen*[2] by citing Denning LJ's remarks in *Findlay v Railway Executive*:[3]

> 'The hardship on the plaintiff in the instant case has to be weighed against the disadvantages which would ensue if plaintiffs generally who have been offered reasonable compensation were allowed to go to trial and run up costs with impunity. The public good is better secured by allowing plaintiffs to go on to trial at their own risk generally as to costs.'

[3] The *Calderbank* principle has its genesis in the landmark English Court of Appeal decision in *Calderbank v Calderbank.*[4] 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 or 'without

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[1] *Naylor and Another v Jansen* 2007 (1) SA 16 (SCA) para 13.
[2] Ibid.
[3] [1950] 2 All ER 969 (CA) at 972E – F].
[4] [1975] 3 All ER 333 (CA).

prejudice' nature of the offer in order to rely upon it for purposes of making an application for indemnity costs. Cairns LJ held that that was permissible.

[4] Originally the *Calderbank* offer was thought to find application only in matrimonial matters where no payment into court procedure was available. The position changed following the English Court of Appeal decision in *Cutts v Head.*[5] 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. . ."

[5] The practice of making offers of compromise on *Calderbank* terms has since been widely accepted beyond England.[6] Such offers are also firmly entrenched in international arbitration practice.[7] In some jurisdictions the offers are provided for

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[5] [1984] 1 All ER 597 (CA) at 608–609.
[6] For example, Hong Kong, Singapore, New Zealand, Ireland, Canada, and Australia, all recognise the *Calderbank* offers.
[7] 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 and the recent unreported judgment of this court in *DC Arends and Another v Member of the Executive Council for the Department of Health: Northern Cape Province* (Case no. 2250/2016) (31 May 2024).

in the Uniform Rules.[8] Recently, few South African decisions acknowledged the plaintiff's common law right to make a secret offer/Calderbank Offer "without prejudice save as to costs" to a defendant and to later, after 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.[9] In *AD & Another v MEC for Health and Social Development, Western Cape*[10] (the *AD* matter) Rogers J said 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.

[6] Admissions included in a statement by a person involved in a dispute, which are genuinely aimed at achieving a compromise, are protected from disclosure. Such admission may only be accepted into evidence with the consent of both parties. The rational of the rule is based on public policy which encourages the private settlement of disputes by parties themselves.[11]

To borrow from Innes J in *De Beers Consolidated Mines Ltd v Ettling*[12] this is 'a wholesome rule, and one which should be upheld.'

[7] In the *AD Matter* Rogers J narrowed down the enquiry into the admissibility of without prejudice offers to settle by posing a question whether our law in respect of without prejudice communications should permit the same exception that has been recognised in England and other Commonwealth jurisdictions. He considered that our law of evidence on without prejudice privilege had its origin on

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[8] Uniform Civil Procedure Rules 2005 – Rule 42.14 (New South Wales, Australia).

[9] 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) and the recent unreported judgment of this Court in *DC Arends and Another v Member of the Executive Council for the Department of Health: Northern Cape Province* (Case no. 2250/2016) (31 May 2024).

[10] *Ibid* paras 42-43 and 60.

[11] See Principles of Evidence, Schwikkard & Van Der Merwe, JUTA, 3rd ed, at p.322.

[12] 1906 TS 418 at 420.

the English law as at 31 May 1961 and had regard, inter alia, to the remarks by Trollip JA in *Naidoo v Marine & Trade Insurance Co Ltd*[13] where he said:

"According to various statutes in South Africa our Courts are in effect enjoined to apply the "without prejudice" rule as developed and expounded by the English Courts. I emphasize this here because, as will presently appear, the judicial and other views expressed in the USA and Commonwealth countries other than the UK appear to differ from the English view on a particular aspect of the rule that is crucial to the present case. If that is so, then undoubtedly the English view must prevail. The reason is that questions relating generally to the admissibility of evidence, which includes "without prejudice" communications, are now governed by s 42 of our Civil Proceedings Evidence Act 25 of 1965. That section applies the relevant law of evidence which was in force in the Republic on 30 May 1961, ie those provisions contained in the various Provincial statutes on evidence that were still in force on that date, although they were later repealed when the above Evidence Act 1965 came into operation on 30 June 1967 (see *Gentiruco AG v Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 617B - F)."

[8] Rogers J observed that English law, and accordingly South African law, allows some exceptions to the privilege which have developed with reference to the public policy underlying the without prejudice rule. He held the view that there is 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.[14] He concluded that in principle Calderbank offers are admissible in relation to costs and can be disclosed to the court for that purpose after judgment has been given. Rogers J's approach is juristically sound and ought to be endorsed.

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[13] 1978 (3) SA 666 (A) at 677F – H.
[14] *AD Matter* Ibid paras 47-60.

[9] The use of Calderbank offers by plaintiffs is important in the context of the wider public interest to conserve and not waste public resources on unnecessary litigation. There is no rational basis upon which a plaintiff ought to be denied access to the benefits of a secret tender more so where the trial turns arduous and protracted. To risk promoting intransigence by a defendant with deep pockets in the face of a reasonable offer from a plaintiff by refusing to attach any effect to such an offer would not be in the public interest and certainly would defeat the dictates of justice and fairness as a plaintiff may be discouraged to pursue a legitimate case because of the risk of irrecoverable costs were it to be successful. The plaintiffs' use of secret offers should not be stifled but encouraged. In the judgment of this Court in *DC Arends and Another v Member of the Executive Council for the Department of Health: Northern Cape Province*[15] it was held that consideration of the plaintiff's secret or Calderbank offer to settle ought to be infused in the Court's power to regulate its own process and that 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. The view expressed in *Arends* remains valid.

[10] The background to the litigation is fairly straightforward. The appellant issued summons against the respondent on 30 March 2010 for damages the patient suffered as a result of a severe head injury sustained when the patient was a passenger in a motor vehicle accident that occurred in the vicinity of Nababeep, Northern Cape, on 18 May 2007. Further pleadings were exchanged in the normal course and on 20 July 2017 the respondent conceded liability on the basis that the appellant would recover the patient's proven or agreed damages in terms of the Road Accident Fund Amendment Act, 2005.

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[15] Fn 9.

[11] Three years later and two months prior to the trial, on 18 September 2020, the appellant's attorneys addressed a detailed and motivated "without prejudice settlement proposal" under cover of an email to the respondent's claims handler in respect of which the respondent was requested to tender the total capital sum of R7 188 988.16. A follow-up email reminder of the settlement proposal was sent to the respondent's representatives on 02 October 2020. A certain Mr Rafi Mowzer of the respondent's Litigation Team Lead replied that Mr Donovan Frank would attend to the matter "as soon as humanly possible". The appellant did not receive any response from Messrs Frank and Mowzer.

[12] On 14 October 2020, six weeks before the commencement of the trial, the appellant's attorneys dispatched a formal 'Calderbank offer' of R7 188 988.16 to the respondent's claims handler which notified the respondent that the offer in question, absent its acceptance within a reasonable time, placed the respondent at risk of the payment of attorney and client costs in due course.

[13] The trial was set down before Mofokeng AJ on 24 to 27 November 2020. The appellant called two expert witnesses to testify as well as the patient's sister. He also relied on other expert reports filed and the joint minutes of the experts. Having heard evidence for the appellant and the patient, in default of the respondent's active participation in the proceedings, on 11 December 2020 the judgment was handed down in terms of which the appellant was awarded damages in the capital sum of R7 208 988.16, which marginally exceeded the Calderbank offer by some R20 000.00. Further consequential relief in respect of costs on party and party scale was also decreed.

[14] Mofokeng AJ noted in her judgment that Mr Rakgwale, the respondent's representative, was present in Court through-out the trial but took no part. Mr Rakgwale had, in addition, confirmed that the respondent was aware of that trial and informed the Court that the respondent's claims handler had submitted some executive summary to the respondent's Pretoria office for a mandate and

could not make an offer of settlement until he had received a mandate. It is not clear whether Mr Rakgwale is an admitted attorney with the right of appearance in the High Court.

[15] Seven days following receipt of the judgment, on 18 December 2020, the appellant's counsel directed an e-mail to Ms Sago, Mofokeng AJ's registrar, and to Mofokeng AJ which was copied to several other individuals including the respondent's representative, Mr Frank. The email reads in part:

> "As Judge Mofokeng will well know, the Defendant may place the Plaintiff at risk with a Rule 34 Offer/Tender (both in respect of liability and the apportionment thereof, and quantum), and should the Plaintiff fail to "beat" or better that Offer/Tender, the Plaintiff will be liable for the Defendant's costs up to and including the date upon which the offer was made.
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> The Plaintiff may also place the Defendant at risk with what is known as a 'Calderbank' Offer. Accordingly, will you kindly bring to Judge Mofokeng's attention the following attachments;
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> - The *Van Reenen v Rosebank Life Hospital* judgment (Free State Division, 14 May 2019), and in particular paragraphs 1-17, 22-34, 38-47, which succinctly sets out the position of Calderbank Offers placing the Defendant at risk with regards to what the Plaintiff is prepared to accept as a suitable settlement/compromise, and the consequent cost orders on an attorney-client scale when the Plaintiff has bettered what it was prepared to settle on against the Defendant;
> - The present Plaintiff's Calderbank Offer of R7 188 988,16, dated 14 October 2020;
> - Also attached hereto are the 'read-receipts' of the relevant RAF claims handlers (Mr Donovan Frank in particular who is referenced in Judge Mofokeng's judgment) to whom the Calderbank Offer was sent, and also dated 14 October 2020;
> - Judge Mofokeng's judgment and Order in the capital amount of R7 208 988,16;
> - The Plaintiff has thus not only been successful in proving his case, but the capital award has exceeded the Calderbank Offer by some R20 000,00;

- It is common cause that the Defendant was repeatedly engaged to try and settle this matter, and timeously. Significant costs have been incurred on behalf of Plaintiff to run a default judgment trial in Kimberly, and not all of those costs are going to be recoverable on a party and party scale;

In the circumstances, I respectfully request that Judge Mofokeng exercise her discretion in favour of the Plaintiff and grant the attached amended Draft Order, awarding the Plaintiff his costs on the attorney-client scale in view of the Court's judgment on capital beating the Calderbank Offer."

[16] The appellant's counsel directed a follow up e-mail on 13 January 2021 to Ms S De Villiers, the acting court manager. This prompted Mofokeng AJ to request Ms De Villiers to dispatch an e-mail dated 25 January 2021 to the parties, the effect of which was that she was disinclined to entertain the request for reconsideration of costs as contained in the appellant's e-mail of 18 December 2020 and repeated on 13 January 2021 (the Mofokeng AJ decision).

[17] Following the Mofokeng AJ decision above, which became central to this appeal, the appellant's legal team filed a substantive application for the reconsideration of costs on 25 February 2021 seeking an order that the respondent be held liable for the appellant's costs on an attorney and client scale from the date of service of the appellant's Calderbank offer upon the respondent. Eillert AJ considered that application on an unopposed basis. He also noted in his judgment that Mr Rakgwale, who had been present throughout the hearing of that application, had placed on record that "he did not have any instructions in the matter". Having heard argument, Eillert AJ handed down judgment on 17 December 2021 in which he ruled:

". . . I am therefore of the view that the plaintiff's offer of 14 October 2020 is not admissible at this stage of the judgment for the purposes of considering the question of costs afresh, or alternatively, cannot form the basis for a punitive costs order against the defendant herein.

. . . Given the extent of the quantum, the plaintiff was not offering a fair discount to the defendant, but was basically asking the defendant to pay what he was in any event claiming. Based upon a realistic assessment of the case, I would not have been able to find that the defendant was unreasonable in not reacting to the plaintiff's offer or not making a counter-offer".[16]

[18] Dissatisfied with Eillert AJ's conclusion, the appellant filed an application for leave to appeal on 07 January 2022. In determining whether to reconsider the question of costs the court must have regard to various factors, namely: whether the respondent behaved unreasonably and thus put the appellant to unnecessary expense by not accepting the offer or making a reasonable counter-offer; whether the respondent has engaged reasonably in attempting to settle; whether the appellant had offered a fair discount based on a realistic assessment of the case as opposed to holding out for the best conceivable outcome; whether the appellant allowed the respondent 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.[17] The list is by no means exhaustive as the trial court is entitled, in the exercise of its discretion, to consider factors which it may legitimately take into account. Eillert AJ was of the view, regard being had to the factors mentioned, that there were reasonable prospects that another court on appeal would come to a different conclusion. He therefore granted the appellant leave to appeal against the whole of his judgment and order on 16 September 2022.

[19] It is convenient at this stage to get out of the way the respondent's principal preliminary attack against the appellant's application for reconsideration of costs which hinges on the Mofokeng AJ decision of 25 January 2021 to the effect that she was disinclined to reconsider her order in respect of costs. The relevant part

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[16] *Du Toit obo Nkuna v Road Accident Fund* (454/2010) [2021] ZANCHC 66 (17 December 2021) paras 16-17.
[17] *AD & Another v MEC for Health and Social Development, Western Cape,* ibid - fn 9 para 61.

of the acting court manager's e-mail to the appellant's legal team, which incorporates the decision , reads:

> "The contents of your e-mail dated 13 January 2021 with attachments thereto has been forwarded to Mofokeng AJ.
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> She directed via email as follows:
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> > 'I have carefully considered the request and most [probably I] need [a] response from the fund(sic). Given the circumstances [in which] the default judgment was granted, I am of the view that the order granted should stand, the fund will raise all sorts of technicalities to rescind the judgment and/or delay [the] payment. In the best interest of the plaintiff I will not vary the order'."

[20] The nub of the respondent's preliminary point is that the Mofokeng AJ decision ended the *lis* between the parties on the reconsideration of costs. It was argued for the respondent that Mofokeng AJ considered afresh her costs order and chose to exercise her unfettered discretion by refusing to award the attorney and client costs to the appellant. It was further contended that Mofokeng AJ "stood by her party and party costs made on 11 December 2020 after she had been alerted to the appellant's Calderbank Offer." Her decision stands until it is set aside by a court of competent jurisdiction. Consequently, so it was contended, the only course open to the appellant was to seek leave to appeal Mofokeng AJ's order refusing to reconsider her costs order on the ordinary scale following her knowledge of the Calderbank offer and not to launch an ill-conceived substantive application that came before Eillert AJ.

[21] The respondent's argument suggests, without more, that the proceedings before Eillert AJ were non-sequitur if not a nullity as Mofokeng AJ had already decided the question of reconsideration of costs. It is therefore important to first consider whether the Mofokeng AJ decision constituted an order of this Court in a legal sense, definitive of the parties' rights and thus appealable. In determining the nature and effect of a judicial pronouncement, 'not merely the form of the order

must be considered but also, and predominantly, its effect'. A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[18]

[22] As already alluded to, the procedure for the court's reconsideration of costs pursuant to a Calderbank offer at the behest of a plaintiff is not provided for in the rules. However, rule 34(12) provides that if the court has given judgment on the question of costs in ignorance of the offer or tender (by a defendant) and it is brought to the notice of the registrar, in writing, within five days after the date of judgment, the question of costs shall be considered afresh in the light of the offer or tender. A plain reading of this suggest to me that the filing of extensive affidavits for the purpose of reconsideration of costs would not be necessary. However, in my view, nothing would impede an applicant to set out concise facts it may wish to draw to the court's attention, for purposes of reconsideration of costs, in an affidavit. In the end, what appears to be germane is that the offer or tender be brought to the notice of the registrar in writing.

[23] The e-mail communication which had been placed before Mofokeng AJ to reconsider her decision on costs may appear to be odd as the motion had not been set out in a formal notice. What further compounds the irregular manner in which the application had been brought is that its outcome was never embodied in a formal court order with the official stamp issued by the registrar of this court as the orders of this Court would. However, form cannot be allowed to triumph over substance. In this case, notice had been electronically dispatched to all interested parties, albeit defective, through the registrar's office, pertinently requesting Mofokeng AJ to reconsider the costs following her judgment on the

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[18] *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532-533.

basis of the Calderbank offer made. Mofokeng AJ considered the request and, without affording the parties a proper hearing, refused to change her initial finding on party and party costs. She also gave reasons for her decision although this may not have been convincing. Her final conclusion, in my view, was an order in a true legal sense, definitive of the parties' rights and thus appealable.

[24] It follows that the substantive application for reconsideration of costs which served before Eillert AJ was not necessary because the issues had already been decided. This notwithstanding, Eillert AJ came to the same conclusion as Mofokeng AJ in that he too refused the application. It is trite that an appeal does not lie against the reasons for the decision. It lies against the substantive order[19]. In *Tecmed Africa (Pty) Ltd v Minister of Health and Another*[20] Ponnan JA said:

> '(A)ppeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a Court of Appeal agrees with a lower court's reasoning would be of no consequence if the result would remain the same . . . .'

[25] As I see it, to the extent that the order by Mofokeng AJ and that of Eillert AJ were the same, the argument that the Mofokeng AJ decision ended the *lis* between the parties amounts to no more than a distinction without a difference – a fallacy to distinguish between two things where no discernible difference exists. The distinction in the orders is of no more moment so much so that even counsel for the respondent could not isolate them in that she sought to persuade us that "the appellant has failed to set out facts and exceptional circumstances which [would] justify this Court's interreference with Mofokeng AJ's order, made on 11 December 2020 and reaffirmed on 25 January 2021 and Eillert AJ's order made on 17 December 2021."

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[19] See *Medox Ltd v Commissioner, South African Revenue Service* 2015 (6) SA 310 (SCA) para 10; *Hyprop Investment Ltd and Others v NSC Carrier and Forwarding CC and Others* 2014 (5) SA 406 (SCA) para 21; *Cape Empowerment Trust Ltd v Fisher Hoffman Sithole* 2013 (5) SA 183 (SCA) para 39.
[20] 2012] 4 All SA 149 (SCA) para 17.

[26] On the aforegoing exposition it is eminently pragmatic and sensible to consider the merits of this appeal which, in any event, were fully ventilated. A court has 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 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.[21] Where the court has exercised a discretion in respect of costs the power of interference on appeal is circumscribed. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*[22] it was said:

> "When a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised —
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> 'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'.
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> An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court."

[27] In the *AD* matter Rogers J held, on good authority, that in order to be admissible a Calderbank 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.

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[21] See *DC Arends and Another v Member of the Executive Council for the Department of Health: Northern Cape Province* -fn 9 para 24.
[22] 2015 (5) SA 245 (CC); (2015 (10) BCLR 1199; [2015] ZACC 22) para 88.

[28] The admissibility of the Calderbank offer was not brought into question in this appeal. On the contrary, the respondent accepted that it had received the Calderbank offer from the appellant and that these types of offers are admissible in relation to costs and may be disclosed to the court for that purpose after judgment. However, it is important to mention that Eillert AJ found the Calderbank offer to have been inadmissible for purposes of reconsideration of costs because it had not been prefaced with the words "without prejudice save as to costs" nor were words to similar effect employed. The appellant's Calderbank offer dated 14 October 2020 is titled "the Plaintiff's Calderbank offer in terms of rule 34". The reference to Rule 34 in the notice was clearly incorrect as Eillert AJ correctly found. It also holds true that the appellant had not employed words to the effect that the offer was without prejudice save as to costs. However, in my view, the lack of the expression of the words was not reason enough to hold the Calderbank offer inadmissible. This is so because the offer had been preceded by the "plaintiff's without prejudice settlement proposal" dated 18 September 2020 which tendered the same settlement figure as contained in the Calderbank offer. In addition, the last paragraph of the Calderbank offer states:

> "BE PLEASED TO TAKE FURTHER NOTICE that should the above offer not be accepted by the defendant within a reasonable time and the eventual outcome is similar or less favourable to the defendant, the plaintiff will request that a punitive costs order be made against the defendant."

[29] The above notice, in my view, is indicative that the offer was without prejudice except in relation to costs because it was a bona fide attempt to settle the dispute and therefore privileged. Additionally, it sufficiently cautioned the respondent that the settlement proposal was likely to be disclosed to the Court in the event that the amount of damages the court awarded was more than the settlement figure offered. The respondent did not advance any prejudice in respect of the form or the substance of the offer and I can conceive of none.

[30] More significantly, it was argued for the respondent that it did not act in a manner which was susceptible to censure in the form of a punitive costs order in that it did not waste the court's time by conceding liability in July 2017 and opted for a day's trial in respect of the quantum. In any event, the R20 000 discount in the offer made was insignificant, so ran the argument.

[31] I wish to reiterate some of the policy objectives that underlie the award of special costs orders following the Calderbank offers derived from commonwealth cases. These includes *inter alia*: (1) to encourage the saving of private costs and the avoidance of the inherent risks, delays and uncertainties of litigation by promoting early offers of compromise by defendants which amount to a realistic assessment of the plaintiff's real claim which can be placed before its opponent without risk that its 'bottom line' will be revealed to the court; (2) to save the public costs which are necessarily incurred in litigation which events demonstrate to have been unnecessary, having regard to an earlier (and, as found, reasonable) offer of compromise made by a plaintiff to a defendant; and (3) to indemnify the plaintiff who has made the offer of compromise, later found to have been reasonable, against the costs thereafter incurred. Caution should also be exercised due to some other competing objectives of equal importance which is that potential litigants should not be discouraged from bringing their disputes to the Courts.[23]

[32] The commonwealth authorities are replete with reference to the principle that it is not necessary to establish misconduct by the offeree before the rejection of the offer could be viewed as unreasonable, as the respondent sought to exculpate itself from any misconduct. The lack of merit in the manner a party has conducted its case is not a prerequisite for costs on attorney and client basis to issue.[24] Rogers J observed in the *AD* matter that the commonwealth cases emphasise that

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[23] *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2)* [2005] VSCA 298 paras 21-22.

[24] In *Hazeldene's Chicken Farm v Victorian Workcover Authority (No 2)* (supra) at para 28- the Victorian Court of Appeal approved what Redlich J said *in Aljade and MKIC v OCBC* [2004] VSC 351.

a plaintiff who has made such an offer is not entitled to attorney and 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.[25]

[33] Accordingly, it is important to evaluate whether the respondent's rejection of the offer was unreasonable. What appeared to weigh with Eillert AJ in dismissing the appellant's application for reconsideration of costs was that his Calderbank offer was not a "*fair discount*" because of a marginal difference of R20 000 between his offer and the quantum the trial court awarded. It is so that the extent of the compromise offered is a factor to be considered amongst the panoply of other relevant circumstances to be weighed in assessing the reasonableness or otherwise of the respondent's conduct in rejecting the offer but by no means decisive. The court a quo incorrectly anchored its reasoning solely on what it considered to have been an unfair discount in respect of the offer that was made. This finding ignored that the appellant and the patient were still obliged to incur costs which would not have been recoverable in the ordinary course i.e. on the party and party scale in the event the trial proceeded to its conclusion.

[34] The respondent's conduct, as foreshadowed in the factual background which need not be repeated, demonstrates an imprudent refusal to respond to the appellant's reasonable Calderbank offer which had been made at least some six weeks prior to the trial. The respondent adopted a stance of being an inactive participant in a trial in respect of which it had no prospects of success. The unreasonable refusal to accede to a secret offer to settle is, by itself, a proper ground for the award of a special costs on attorney and client scale.[26] Eillert AJ accepted that:

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[25] *AD & Another v MEC for Health and Social Development, Western Cape,* (supra) Fn 9, para 61.
[26] *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No 2),* (supra) Fn 23, para 28.

"The defendant [respondent] in the matter at hand did not engage reasonably in attempting to settle the matter, in fact, the defendant failed to engage at all. As there is no version of the defendant before the court, I am left to wonder why that is. A plethora of cases have expressed scathing criticism against the Road Accident Fund for the manner in which it conducted litigation and this case could be added to the long list. The plaintiff also allowed the defendant a reasonable time to consider his offer."

[35] As I see it, the court a quo's above conclusion ought to have been the end of the enquiry on the unreasonableness of the respondent's conduct. The respondent is obliged to conduct itself with due recognition that its very reason for existence is 'to give the greatest possible protection ... to persons who have suffered loss through a negligent or unlawful act on the part of the driver or owner of a motor vehicle'.[27] In *Road Accident Fund v Klisiewicz*[28], cited by Maya JA in *Madzunye and Another v Road Accident Fund*[29] Howie JA said:

"The [Road Accident Fund] exists to administer, in the interests of road accident victims, the funds it collects from the public. It has the duty to effect that administration with integrity and efficiency. This entails the thorough investigation of claims and where litigation is responsibly contestable, the adoption of reasonable and timeous steps in advancing its defence. These are not exacting requirements. They must be observed."

[36] The appellant properly placed the respondent at risk with its timeous Calderbank offer and had reserved explicitly the question of its indemnifying costs. The respondent's overt failure to respond to the offer or alternatively, to make a counter-offer which would have ended the litigation and obviated the unavoidable escalation of costs is problematic. Instead, it allowed litigation to continue to its conclusion at considerable cost to the public purse and put its opponent to unnecessary trouble and expense which he ought not to bear. The required probity

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[27] *Daniels v The Road Accident Fund* 2011 JDR 0461 (WCC) para 14.
[28] Unreported Judgment of the SCA- Case No. 192/2001 (SCA) para 42.
[29] 2007 (1) SA 165 (SCA) para 17.

with which the respondent ought to approach claims does not permit this level of extreme laxity.

[37] In my view, the respondent's ineptitude warranted a departure from the ordinary rules as to costs. Insofar as the court a quo found differently its discretionary decision was plainly wrong and impels the conclusion that the discretion had not been properly exercised at all. It is on the aforegoing exposition that the appeal ought to be upheld with costs.

[38] What remains is the question of wasted costs occasioned by the postponement of 29 April 2024. Both parties filed affidavits explaining why they ought not to be mulcted in those costs. The appeal which had been set down for hearing on 29 April 2024 was postponed to 20 May 2024 to allow the appellant to supplement the record following the respondent's remonstration that a certain portion of the record, which largely formed the basis of its point in limine, had been omitted. This included the trial court's judgment on the merits and certain correspondence regarding the reconsideration of costs after the judgment had been handed down.

[39] In an attempt to escape liability for the wasted costs it was submitted for the appellant that the index to the record had been dispatched to the respondent on 09 December 2022 for it to indicate its acceptance of the contents. In the absence of a response, the record which corresponded with the index was filed on 21 December 2022. It was argued for the appellant that at no stage did the respondent object to the record or the index as filed, until belatedly, eight court days prior to the hearing of this appeal.

[40] The respondent countered that the appellant was informed through an e-mail dated 12 December 2022 that the deponent to the affidavit on costs, Mr Walleed Adams, was engaged in the matter. However, no further correspondence had been addressed to Mr Adams. The appellant's offices were closed on 14 December 2022 until 9 January 2023. The record and the index were filed on 21 December

2022, during that closure, without having afforded the respondent the opportunity to consider these documents.

[41] What the respondent's 12 December 2022 e-mail to the appellant reveals is that Mr Adams was "engaging with the attorney on the matter". This belies any suggestion that he was the responsible official whom the appellant had to contact for inputs on the record and the index as he sought to portray through his deposition. In truth, the Mofokeng AJ judgment on the merits and the written exchange between the court and the parties, following the delivery of that judgment, had been referred to and attached to the application that formed the basis for the reconsideration of costs which served before Eillert AJ. They clearly provided the background and chronology of facts and ought to have formed part of the initial record of appeal. The respondent's point in limine, raised for the first time on 16 April 2024, eight court days prior to the hearing of the appeal, pivots on this background information.

[42] It took the respondent approximately a year and four months following its receipt of the record on 21 December 2022 for it to complain about the insufficiency of the record on 16 April 2024 when it filed its heads of argument on appeal. In my view, the delay occasioned by the postponement of 29 April 2024 is attributable to both parties. This is so because the appellant, on the one hand, ought to have ensured that the complete record is filed with the registrar whereas the respondent, on the other, ought to have acted promptly in prosecuting this appeal by ensuring that it timeously brought to the attention of the appellant the need to include the record it intended to rely on for purposes of advancing its point in limine. That it belatedly decided to take the point in limine, during consultation with its counsel in preparation of hearing, ought not to avail it on the weight of authority which enjoins it to take reasonable and timeous steps in advancing its defence. The upshot of this is that each party must bear its own costs in respect of the proceedings of 29 April 2024. In the result, I make the following order.

Order:

1. The Appeal is upheld with costs including the costs of the application for leave to appeal.
2. The appellant, Adv A J Du toit, in his capacity as curator ad litem appointed for Mr MM Nkuna (the patient), and the respondent, the Road Accident Fund, are to bear their own costs occasioned by the postponement of 29 April 2024.
3. The order of the court a quo is set aside and in its place is substituted the following:

   "1. The application for reconsideration of costs is upheld with costs.

   2. The defendant is liable for the plaintiff's costs of the action on a party and party scale save for all the costs incurred with effect from 14 October 2020 (date of service of the Calderbank offer on the defendant) which the defendant shall bear on an attorney and client scale)."

[redacted]

PHATSHOANE AJP

Nxumalo J [redacted] and **Tyuthuza AJ** [redacted] concur in the judgment of Phatshoane AJP

For the appellant:	Adv PC EIA
Instructed by:	Elliot Maris Attorneys, Kimberley.
For the respondent:	Adv LX Dzai
Instructed by:	Office of the State Attorney, Kimberley.