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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, BHISHO)

CASE NO: 288/2019

REPORTABLE

In the matter between:-

AW obo MUW Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, EASTERN CAPE Defendant

In re the negligence of the staff at the Holy Cross Hospital, Mthatha

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JUDGMENT IN RE QUANTUM

HARTLE J

Introduction:

[1] The plaintiff in this action is the mother and legal guardian of a minor boy ("*M*") who suffers from cerebral palsy which he sustained as a result of the negligence of the staff at the Holy Cross Hospital in Mthatha where he was born.

[2] The issue of liability was determined on 29 November 2022 in favour of the plaintiff. The defendant was ordered by this court to pay to her 100% of her proven and agreed damages arising from such negligence.

[3] Following upon this order, the issue of general damages for the plaintiff in both her personal and representative capacities was disposed of as well as M's claim for future loss of earnings and earning capacity.

[4] On 25 March 2024 further heads of damages were settled including the costs of housing and related expenses to accommodate M's permanent disability, the provisioning of a motor vehicle, and the costs relative to the appointment of a case manager, leaving to be determined upon trial only the question of the range of medical and related services that M will reasonably require as a result of his condition for the rest of his expected lifetime, as well as the manner of payment of these future expenses given the defendant's amended plea that raised the public healthcare and undertaking to pay remedies.

[5] These costs were itemized in a document (Annexure "C") presented to this court. They total the sum of R10 333 353.00. The plaintiff asserts that this amount represents the fair and reasonable costs of such anticipated services and the nominal extent to which her patrimony has been diminished by the delict in respect of their necessary provision.[1]

[6] Indeed, there is no contest that the treatment, modalities, therapies and adaptive aids for M, which the various experts agreed are essentially required in the

[1] It is not the mere injury and its future consequences that justify an award of damages, but the actual diminution in the claimant's patrimony. The claimant's patrimony after the delict must be less than it would have been had the delict never occurred. See *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* ("*DZ*") (CCT20/17) [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC) (31 October 2017) at [22]. See also *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* (98/03) [2004] ZASCA 24; 2005 (1) SA 299 (SCA) (1 April 2004) at [15].

future to meet every exigency to cater for his severe disability, have been fairly and reasonably costed at rates applicable to the private healthcare sector.

[7] The plaintiff prepared a draft order representing these agreed upon amounts plus the related trust costs to protect the award, calculated on the capital amount at the customary rate. She asks that this amount be paid by the defendant to her attorneys as a lump sum award in accordance with the provisions of Section 3(3)(a)(i) of the State Liability Act, No. 20 of 1957.

[8] The legal expectation according to this provision is that a final court order against a state department for the payment of money must be satisfied within 30 days of the order becoming final, or within the time period agreed upon by the judgement creditor and the accounting officer of the department concerned.

[9] The defendant however has a different expectation regarding the manner of payment based on her having filed an amended plea in which she raised the "*public healthcare defence*" (according to which claims for future medical expenses against public healthcare authorities may be satisfied through the provision of medical services in the public healthcare sector)[2] as well as an "*alternative*" (sic) that the defendant should be permitted, where the provincial Department of Health ("*the Department*") cannot itself provide the required services or items that M will reasonably require, to itself procure such services or items in the private healthcare sector as and when needed, or to reimburse the plaintiff in circumstances where she is obliged to first incur these expenses herself.[3] (As I will elaborate upon further below the public healthcare defence was abandoned as an option by the time of trial, leaving only what the parties referred to as the "*curtailed plea*" to be determined by this court).

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[2] This is how the court in *DZ* characterized the first of the two "*future defences*" of the defendant who had been joined in the appeal as an *amicus*. The second "*undertaking to pay defence*" entails that medical services and supplies that cannot be provided in the public sector are paid for when they arise in the future.

[3] This plea is similar to the Gauteng MEC's amended plea that she had raised in *DZ*, in which she contended that she did not have to pay future medical expenses in a lump sum. Her alternative was an undertaking to pay service providers directly, within 30 days of presentation of a written quotation, for future medical expenses as and when they might arise. She contended that the common law allowed her to do this, and that, if it did not, that the Court should develop the common law in this respect.

[10] The plaintiff does not accede to any departure from the normative prospect that she be paid the agreed damages which have been calculated on the customary basis and in money terms in accordance with accepted common law rules and, more especially, she does not wish to be placated by an undertaking to be indemnified for these expenses after they have been incurred.

The relevance of the Constitutional Court's decisions in "*DZ*" and "*PN*", the development of the common law "*once and for all*" rule in "*MSM*", and this court's decision in "*TN*":

[11] The defendant's amended plea incorporating both constitutional defences resembles one taken in a like action for damages initiated by a mother on behalf of a minor child born at a public hospital also resorting under the Department's control, where the child suffered a brain injury during the birth and developed spastic quadriplegic cerebral palsy. In that matter too the severe injuries suffered by the child were found to have been the result of negligence on the part of the hospital staff. In *TN obo BN v Member of the Executive Council for Health, Eastern Cape ("TN"),*[4] the court was called upon to determine an appropriate remedy to compensate the plaintiff for her damages premised upon such a plea that entailed "*a novel combination of remedies not falling within the common law rules*."

[12] As pointed out by the court in its opening remarks in the judgment, the defendant (the self-same defendant as in the present action), in advancing various arguments in support of her plea, had contended that instead of draining the public healthcare system of a massive lump-sum award for potential future medical care that the child may or may not ultimately use, the Department wished to provide such care to him as and when he would need it, if not by the Department directly, then paid for in the private sector as the need therefor would arise in the future.[5]

[13] The court in *TN* recognized that in the normal course and based on the common law as it then stood, the remedy availing the plaintiff would subsist in the

[4] (36/2017) [2023] ZAECBHC 3; 2023 (3) SA 270 (ECB) (7 February 2023).
[5] See paragraph [3] of the judgment.

payment of a lump sum duly assessed in accordance with the common law rules relating to the payment of her various heads of damages.[6] However, the "*winds of change*" were already blowing concerning the need to consider alternative ways of reimbursing a plaintiff for damages rather than in the conventional manner by the payment of a lump sum award as was brought into sharp focus by the Constitutional Court in *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* ("*DZ*")[7] in the specific context of the potential impact of damages awards in medical negligence claims against public healthcare authorities on their ability to discharge their constitutional obligation to provide access to healthcare to everyone.[8] In that matter, guardians of the entrenched rule that compensation (calculated prospectively) must always be paid in money, were encouraged to look afresh at the question whether the legal norms of the past still fitted in with those of our Constitution. This was in part due to the defendant in the present matter joining together with the Member of the Executive Council for Health, Western Cape, as *amici curiae* (friends of the court) in the appeal to ensure that the decision in *DZ* might not later prevent her from raising the same constitutional defences presently in contention in the action before this court.[9]

[14] In an academic discourse on the subject, since there was no factual foundation in *DZ* on which to determine if it was appropriate to develop the common law "*once and for all*" rule or to change the existing model of compensation, represented in the form of the payment of money, the Court concluded equivocally

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[6] The common law once and for all rule requires that a claimant must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment, that is the end of the matter. The full import of the rule is explained in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 835C-H. The second rule there intended is that The purpose of an Aquilian claim is to compensate the victim in money terms for his loss because "*money is the measure of all things*". Standard Chartered Bank of Canada v Nedperm Bank Ltd [1994] ZASCA 146; 1994 (4) SA 747 (A) at 782 D-F; *DZ* at [14] -[16].

[7] (CCT20/17) [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC) (31 October 2017).

[8] The challenge that this problem presents, and the possible need to develop the common law to ameliorate its affect, is what engaged the jurisdiction of the Constitutional Court to hear the appeal.

[9] The MEC for Health in the Western Cape was equally concerned not to be frustrated in introducing different mechanisms she was devising to deal with claims against public healthcare providers for alleged negligence. She, for example, proposed to make damages awards conditional on the establishment of a ring-fenced trust administered by a case manger and a trustee who can ensure that the award is only used for its intended purpose: meeting the child's future medical expenses. The deed constituting each trust would include provisions providing for the "*topping up*" of the fund if it became depleted as well as the reversion of the balance in the fund to the State upon the child's death. Though this model had been sanctioned by the High Court in settlement orders, the MEC did not want to be caught short of asking for the common law "*once and for all*" rule to be developed in those matters where agreement could not be reached with the relevant plaintiffs.

with its eminent answer to the question what to make of the common law position as follows :

> "Although the "once and for all" rule, with its bias towards individualism and the free market, cannot be said to be in conflict with our constitutional value system, it can also not be said that the periodic payment or rent system is out of sync with the high value the Constitution ascribes to socio-economic rights. There is no obvious choice at this highest level of justification. What appears to be called for is an accommodation between the two. Is that possible?".[10]

[15] As to the proposed accommodation, and although the Court expressed a preference in favour of law reform by the legislature, it offered that the resolution of the dilemma (of deciding which of the two payment choices fared more favourably) may lie "*in leaving the choice at the level of each individual case, depending on which form of payment will best meet its particular circumstances.*"

[16] The Court concluded with the important observation concerning the limitations that it was faced with regarding the argument for the development of the common law made before it, namely that any such development requires factual material upon which the assessment whether to develop the law must be made, which had been '*absent*" in that scenario and or "*woefully inadequate to ground development of the common law in the manner that had been sought by the Gauteng MEC*".[11]

[17] Despite dismissing the appeal, the Court however laid down the foundation for the development of the affected common law rules in the future in the following seminal passage:

> "But the failure of the appeal does not mean that the door to further development of the common law is shut. We have seen that possibilities for further development are arguable. Factual evidence to substantiate a carefully pleaded argument for the development of the common law must be

[10] At [58].
[11] What had been contended is that the defendant did not have to pay the future medical expenses in a lump sum. Her alternative was an undertaking to pay service providers directly, within 30 days of presentation of a written quotation, for future medical expenses as and when they arose.

properly adduced for assessment. If it is sufficiently cogent, it might well carry the day."

[18] The Court also declined the invitation in *Member of the Executive Council for Health, Gauteng Provincial Government v PN ("PN")*[12] to develop the common law "*once and for all*" rule at the behest of the present defendant who had joined those proceedings too as an *amicus,* on the basis that the significant implications of the proposed development of the rule at issue ought to entail the leading of "*extensive evidentiary material and the presentation of legal arguments of some magnitude*" that was not before it. The main issue in that matter was one of the interpretation of an order of the Gauteng High Court in which the question arose whether the interpretation preferred by the plaintiff respondent had the effect that the MEC may not lead evidence at the quantum stage of a like action to support an argument for the development of the common law.

[19] The Court repeated its opinion expressed in *DZ* on the balancing of the competing interests between a plaintiff to be fairly compensated in a delictual claim for damages and a defendant such as the present one to present evidence of the desirability and practical implications of the development of the affected common law rules as follows:

"In *DZ* Froneman J opined that the common law rule that damages must be paid in one lump sum may be reflective of a pre-constitutional era where individual loss-bearing was prioritised, and the right of access to healthcare services did not exist. This does not mean the individual interest of the respondent and similarly placed individuals must be relegated to insignificance. Each must be afforded an appropriate remedy and compensated fairly for loss suffered. But in that process the applicant – who is well-placed to assist the High Court in balancing these competing interests – is entitled to lead evidence on the desirability and practical implications of a development of the affected common law rules. Since Moshidi J's order is

[12] (CCT 124/20) [2021] ZACC 6; 2021 (6) BCLR 584 (CC) (1 April 2021)

reasonably capable of an interpretation that permits the applicant to lead this type of evidence in the High Court, that interpretation should be preferred."[13]

[20] In *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* ("*MSM*")[14] the High Court took up an invitation to develop the common law, in the first instance, to permit it to make an order of damages that does not sound wholly in money and to include an order of compensation in kind. In essence, the MEC's case before that court was that some of the future medical requirements of the minor child, K, could be provided to her by the Charlotte Maxeke Johannesburg Academic Hospital, and that the level of service she would receive there would be equal to that she would otherwise receive in the private healthcare sector. The relevant MEC contended that he should not be ordered to pay damages based on the costs of these services in the private healthcare sector. Instead of a damages award for these future medical expenses sounding in money, he asked the court to order that the hospital provides the services to the child. In the second instance, the court was asked to order, insofar as any monetary award was expected to be made, that it be payable by way of periodic payments, rather than in one lump sum.

[21] In respect of the second instance the court noted that this involved a more extensive development of the "*once and for all*" rule and whereas the MEC had pleaded for this development, his plea "*was not supported by sufficient evidence*". Indeed, no witnesses had addressed the questions of in what amounts, and at what intervals, the envisaged periodic payments would be made, and how this would affect the actuarial calculations. In the circumstances, the court did not consider it necessary to address the question of whether the "*once and for all*" rule should be

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[13] At [29]. See *also Member of the Executive Council for Finance, Economic Development, Environmental Affairs and Tourism (Eastern Cape) and Others v Legal Practice Council and Others* (2091/2021) [2022] ZAECMKHC 58; [2022] 3 All SA 730 (ECG); 2023 (2) SA 266 (ECMk) (21 June 2022) in which the court noted at [68] that *DZ* and *PN* have given a clear indication of "*the likely development of the common law in this field*", but that the Court had emphasized that "*this does not mean that the individual interest of* [a plaintiff] *and similarly placed individuals must be relegated to insignificance. Each must be afforded an appropriate remedy and compensated fairly for the loss suffered*".

[14] (4314/15) [2019] ZAGPJHC 504; 2020 (2) SA 567 (GJ); [2020] 2 All SA 177 (GJ) (18 December 2019).

developed to permit periodic payments in this case but remarked that "*that question must wait until a proper case is presented on the issue*".[15]

[22] In respect of the first instance, the court in a thorough and pedantic manner followed the approach recommended in *DZ* step by step and concluded in favour of the MEC that a proper case had been made out on the pleadings and evidence to develop the common law to permit a court to consider an order of compensation in kind in an appropriate case where the plaintiff suffers from cerebral palsy as a result of negligence committed in a public hospital.

[23] It ought to be emphasized that although *MSM* was not appealed against, it has come up for criticism by the Supreme Court of Appeal in *Mashinini v Member of the Executive Council for Health and Social Development Gauteng Provincial Government* ("*Mashinini*")[16] on the basis that the order which it made was "*not an order which went beyond the common law, but* (was) *one consented to by the defendant in that matter on the basis that this would result in the monetary award being reduced*." In other words, so the court in *Mashinini* noted, the order that *MSM* granted was "*one based on delictual principles*," in accordance with the *Ngubane* principle.[17]

[24] Although the "*payment in kind*" package deal especially crafted by MSM in the interests of justice has as an essential feature of it that the treatment (that is the identified and ring-fenced services that the hospital in question was held to be able to provide and to be able to source or procure under its own budget) would be akin to the level of care and treatment that the child would receive in the private healthcare sector and be available at no or lesser cost than the cost of the private healthcare claimed by the plaintiff, suggesting thereby that it would follow, according to ordinary delictual principles, that the defendant had succeeded in establishing on

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[15] *MSM* at [204] and [205].
[16] (335/2021) [2023] ZASCA 53; 2023 (5) SA 137 (SCA) (18 April 2023).
[17] *Ngubane v South African Transport Services* ("*Ngubane*") (92/1989) [1990] ZASCA 148 (28 November 1990). As was clarified by the Constitutional Court in *DZ* at [21] "*Ngubane is authority for allowing a defendant to produce evidence that medical services of the same or higher standard, at no or lesser cost than private medical care will be available to a plaintiff in future. If that evidence is of a sufficiently cogent nature to disturb the presumption that private future healthcare is reasonable, the plaintiff will not succeed in the claim for the higher future medical expenses. This approach is in accordance with general principles in relation to the providing of damages.*"

the "*voldoende getuienisbasis*"[18] that concerned it[19] that the projected future medical expenses claimed were unreasonable or excessive, the court particularly noted that the "*mitigation of healthcare costs defence*" that is consistent with the *Ngubane* approach indeed accords with existing common law principles and that no development of the common law would be necessary in making a determination on that defence. However, it was constrained to go further in considering what the MEC had prayed for beyond the confines of the ordinary because of the financial predicament that was at play, hence the court's careful explanation in this regard that explains the context in which it felt obliged to develop the common law:

> "29. However, it is important to draw a distinction between the mitigation of healthcare costs defence, on the one hand, and the public healthcare defence, on the other. What they have in common is that the defendant must adduce evidence to show that the plaintiff may access the future medical services to the same or higher standard in the public healthcare sector. *But they differ in an important respect: while the mitigation of healthcare costs defence falls within the existing principles of the law of delict, the public healthcare defence may not.*
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> 30. *This is particularly so if, in a case like the present, the MEC has raised the prospect of an order in kind, i.e. an order that obliges the MEC to render specific medical services to K at the Charlotte Maxeke Johannesburg Academic Hospital. An order of this nature goes beyond the existing common law rule that delictual compensation must sound in money. Accordingly, it would be necessary for a court to develop the common law to permit an order of this kind.*
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> ……
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> 32. In summary, then, in terms of our existing common law, a plaintiff who claims damages for the cost of future medical expenses bears the onus of establishing that the damages claimed (and hence the cost of the medical expenses) is reasonable. Generally, it will be accepted that the costs of the services offered in the private healthcare sector will be reasonable. However,

[18] *Ngubane*, *Supra*, at 785C-D.
[19] That is to show that an alternative or cheaper source of medical services is available to the claimant at no or at a lesser cost than claimed by him/her.

in order to counter the plaintiff's case in this regard, a defendant may adduce evidence to establish that the expenses claimed are not reasonable, based on the availability of the same medical services in the public sector at no or lesser cost to the plaintiff. On this basis, and in accordance with our existing common law, the defendant may either plead for the claim to be dismissed or reduced. No development of the common law is necessary in this scenario.

33. *However, if the defendant wants to go further and to plead either for an order that it render services in kind (the public healthcare defence) or for payment of the damages to be made in instalments, some development of the common law will be necessary.*"

(Emphasis added)

[25] The court also heralded what the process would entail, as follows:

"41. What process should be followed in making a determination in this regard? It is necessary as a preliminary step to determine what K's future medical and related needs are, what the claimed costs are of these services are, and which of these services are to be categorised as identified services for purposes of the public healthcare defence.

42. Thereafter, and based on my analysis of the *DZ* judgment, it seems to me that the proper approach to adopt is as follows.

42.1. The first question to consider is whether the MEC has placed sufficient cogent evidence before me to establish that, insofar as the identified services are concerned, they will be available in the future for K at the CMJAH, at the same or higher level and at no or less cost to her than those available in the private sector. If the MEC provides such cogent evidence, it will be important for two reasons:

42.1.1.It will rebut the plaintiff's case that her claim for the full cost of future medical expenses is reasonable.

42.1.2.In addition, it will establish an evidentiary basis upon which to consider whether this is an appropriate case in which to develop the common law insofar as the MEC's public healthcare defence is concerned.

42.2. The next question to consider is whether, based on that evidence, the MEC has established a need to develop the common law rule that currently

requires that compensation for future medical expenses must sound in money. In other words, has the MEC made out a case that the common law should be developed to permit an order that the identified services be rendered to K at CMJAH?"

[26] The court then went on to hear evidence of the specially fashioned package deal as it were, constituted by the multidisciplinary and holistic treatment plan and services that the relevant department would primarily provide under the auspices of the hospital, that went beyond the mere evidentiary question whether the evidence established an alternative and cheaper source of medical services that would be the result of her receiving treatment at that public institution instead of at the higher cost that had been claimed by her for these services rated at private healthcare rates. The curated plan would involve firstly the actual rendering of services in the designated hospital, failing which the identified services that could not be provided would be procured by the hospital under its own budget. This would mean that the relevant department would keep under its control the objective of the acquisition of cheaper services (the costs saving factor that is key in *Ngubane*), in the process precluding the burden on the relevant department having to part with vast sums of money and indeed forking out down the line only as and when such services would be required.

[27] To be clear that the court did not consider that the MEC had been intent on framing his defence only within Aquilian principles, which would not require any development of the common law, it set the tone for the premise upon which its ultimate development of the common law ensued as follows:

"73. The MEC pleaded, in his amended plea, that it would be unreasonable for the court to order that he be directed to pay to K the costs of her future medical expenses sourced from the private sector. In light of my finding on the factual evidence adduced, there is merit in this aspect of the plea. *However, it is not the end of the matter, as the MEC has gone further in his defence: he asks the court instead to make an order in kind, and to direct the MEC to make provision for her to access these services in the public healthcare sector.* As I have already discussed, this aspect of the MEC's

case requires a development of the common law. My finding on the evidence lays a basis for the next stage of the inquiry, viz. whether the MEC has made out a case for the development of the common law to permit an order in kind."

[28] The court clarified further what lay ahead for its consideration as follows:

"176. The MEC in this case pleaded his case for an extension of the common law on the basis of s173 of the Constitution, rather than s39(2) of the Constitution. In other words, the case he makes out is that there are wide interests of justice considerations that require a development of the common law to permit an order of compensation in kind in respect of K. Therefore, I will assume, for purposes of this case, that the common law rule that damages must sound in money, is not in conflict with our normative constitutional framework."

[29] Hence the court's consideration of the defendant's plea to permit an order of compensation in kind by balancing the competing rights of the plaintiff to seek fair reparation for the harm and of the State to manage its resources, impelled it in the direction of finding a different panacea that introduced flexibility for the presenting problem:

"179. While the existing common law rule that damages must sound in money may not be in direct conflict with this obligation (and I leave this question open), it seems to me that there is a clear constitutional imperative for the state to consider, and to pursue alternative means of making reparations in cases like the present. This is evident from the injunction placed on the state in s27(2) that it must take reasonable measures to achieve this right, and that it must do so progressively within its available resources: if reparation in kind achieves the purpose of making good the harm that has been inflicted, while at the same time acting as a measure to guard against a reduction in the state's resources, and hence its ability to meet its obligations under s27(2), this would seem to me to be a reasonable and compelling basis on which to consider developing the common law."

[30] Despite the court concluding in favour of the MEC that the development of the common law (to the extent that had been warranted) and the provision of the peculiar remedy was in the interest of justice,[20] the court sounded the important caution that has been expressed variously by our courts that such development is not necessarily indicated in every such like case, as follows:

> "192. However, I am not faced with the question of what will happen in the future and whether a roll-out will be feasible. As I have already indicated, my concern in this case is whether the common law should be developed to permit courts, in appropriate cases, to depart from the current position which restricts them to making orders of monetary compensation. A development of the common law by me will open the door to courts to consider making orders in kind in appropriate cases. However, if I find that K's case is an appropriate case in which to order compensation in kind, this will not bind a court in another matter to follow suit. This is something that each court faced with a similar defence will have to consider on the evidence before it. If the plan to roll out similar treatment for other litigants is not underpinned by proper resourcing, then it seems to me that a court would be justified in dismissing the defence when it is raised in those circumstances."

[31] In my view the criticism of *MSM* that ordering the MEC to provide the especially identified services to the child at the relevant hospital did not warrant the court's finding that it had developed the common law in granting that aspect of the relief, since such an order does not fall under the ambit of delictual relief, might benefit from a look at it from a different perspective and more especially with the fact in mind that the court intended to craft a different equitable remedy entirely to correspond with its finding that there were wider interests at play that necessitated the development of the common law as contemplated in section 173 of the Constitution.[21]

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[20] In terms of section 173 of the Constitution a High Courts are granted the inherent power to protect and regulate their own processes, as well as to develop the common law, while considering the interests of justice. See also paragraph [32] of *DZ*.

[21] This the court in *MSM* did by following the sequential steps articulated at [31] in *DZ.* See also paragraphs [32], [35]-[36] and [42-[44]

[32] The court in *DZ* was prescient of this kind of development of the common law in the following observation made by it:

> "[13] The Eastern Cape MEC's "public healthcare" defence may fall within the third proposition since it is based on an assertion that public healthcare provides as good, and cheaper, medical services as private healthcare.[22] *But it may also go outside this proposition if it is based on the contention that damages awards in medical negligence claims against public healthcare authorities must also be assessed against the impact they may have on healthcare budgets and the adverse effect they may have on the provision of access to public healthcare for everyone.*[23] Her alternative "undertaking to pay" defence and the "top-up/claw-back" mechanism of the Western Cape MEC may also be difficult to fit into the third category."

[33] Whilst the court in DZ stated that the "*third proposition*" referred to above is on a "*surer footing*" because of the *Ngubane* principle which the Supreme Court of Appeal in *The Premier, Western Cape N.O v Kiwietz ("Kiwietz")*[24] was not referred to (hence its observation that the conclusion in *Kiewitz* –"*that a mitigation defence of the kind raised in Ngubane offends both the "once and for all" rule and the delictual rule that delictual compensation must sound in money"* – cannot be sustained), the Court noted that it is only after assessing the evidence proffered on the adequacy of alternative future medical costs that a court can assess, "once and for all", whether the damages claimed have been proven reasonable.

[34] What it says next is important: "*If so, a lump sum assessment must be made of the future loss*."[25]

[35] This step was followed by the court in *MSM*.

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[22] Here the Court in *DZ* was referring to the proposition of the Gauteng MEC that it is open to a defendant to challenge the amount claimed as damages on the basis that the sum is not reasonable because the plaintiff is likely to use public healthcare rather than private healthcare, the former being as good as, and cheaper than, the latter. Allied to this, so the court noted, is the argument that claims for future medical costs may sometimes best be satisfied by the provision of actual medical services, rather than the payment of money. [12].

[23] This is exactly the kind of problem under scrutiny in all like actions.

[24] [2017] ZASCA 41; 2017 (4) SA 202 (SCA) at [13].

[25] At [23].

[36] If the application of the *Ngubane* test does not result in a finding that a lumpsum assessment ought to be made, the court in *DZ* suggested "*at least*" four possibilities that exist:

> "[24] If not, it appears that at least four possibilities exist. The first is that no damages for future medical expenses should be awarded if the evidence shows that the claimant is likely not to suffer *any* loss in the future. The second is that, if the evidence establishes only a *lesser* loss, then that sum must be awarded as the monetary damages. The third is that the assessed loss may be ordered to be paid in instalments. *The fourth is that the defendant be ordered to ensure the actual rendering of the medical services that it claims obviates or reduces the claimant's monetary loss*. The first two possibilities fall comfortably within the current law of monetary compensation that must be paid "once and for all". The latter two may not."
> (Emphasis added)

[37] Hence, while it is apparent that the ordinary delictual principles are certainly at the heart of the entire exercise, and that the solution for the problem under discussion may lie in the application of those principles as they have always been traditionally applied, creative mechanisms to meet the constitutional challenges under discussion, might impel a court in the direction of having to develop the common law as MSM considered it necessary, even if in the limited respects suggested. It seems though that the issue of the adequacy of medical care offered at provincial hospitals will always take centre stage once a claimant's future medical needs and expenses are identified and accepted.

[38] The approach followed in *MSM,* beginning with the accepted customary principles to be adopted in delictual claims of this nature and culminating in the equitable order which it made, would appear to constitute incremental development of the common law of the nature described in *K v Minister of Safety and Security*

("K").[26] Although the court accepted that the common law rule that damages must sound in money was not in conflict with the normative constitutional framework, it went on to find the existence of wider interests of justice considerations that required its further development.[27]

[39] Having been unsuccessful as an *amicus* in influencing the development of the common law "*once and for all*" rule before the Constitutional Court but having watched the trend of the like actions (more especially *MSM*), the defendant approached the case in *TN* with the specific object of similarly employing the steps spelt out in *DZ* so that the development of the common law rule that compensation be awarded in monetary terms could be considered on its own unique factual foundation, and an appropriate remedy equitably substituted in its place.

[40] Hence the court in *TN* heard evidence pertinently going to the issue of whether the public healthcare remedy could be sustained and whether the common law ought to be developed to allow damages in kind and/or to permit the plaintiff to be compensated by way of an undertaking to pay.

[41] Such evidence consisted firstly of factual evidence tendered by public servants in the employ of the defendant who sought to demonstrate to the court that senior staff existed within the Department, who had themselves treated the injured child, and who had the competence, capacity, qualifications, experience and responsibility for ensuring the proper care and treatment of him within their confines. The proposition was that the Department would continue to provide such care to him in the Frere and Cecelia Makiwane hospitals free of charge and in accordance with a bespoke treatment plan to meet his envisaged future medical care. They also testified as to the standard required relating to the delivery of certain medical services and supplies so as to assure the court what they were capable of offering instead of having to commit to payment of the conventional damages award that the plaintiff was holding out for.

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[26] (CCT52/04) [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) ; [2005] 8 BLLR 749 (CC); (2005) 26 ILJ 1205 (CC) (13 June 2005) at paragraph 16.
[27] See the suggested approach in *DZ* at [36].

[42] The defendant in *TN* also led the evidence of certain experts. A public finance economist testified regarding the extent to which the State's capacity to meet its ordinary financial and constitutional obligations is thwarted by the elevated financial challenges thrown at it unexpectedly by damages awards ordered by the courts in similar actions such as the present which are expected to be redeemed from within the available baseline of expenditure allocations to respective organs of State. In essence, so the witness explained, any such demand on its purse is a charge of equivalent value against the State's capacity to meet other critical social, economic or developmental obligations, more especially to be able to provide and improve health service delivery. This is especially true of the Eastern Cape, so he related, where almost the entire population is medically uninsured and approximately 6,726,000 people are reliant on public health services provided by the Department.

[43] He opined that an undertaking to provide services or to pay as and when expenses arise, rather than paying significant lumps sums, would rationally enable the Department, embattled by a rapid increase in medical negligence claims more so than any other province, to better match its actual expenditure to needs and to adapt those commitments over time if needed.

[44] Also confirming the detrimental impact on the delivery of health services by the Department spending an increasing portion of its annual budget on the settlement of medico-legal claims was the Chief Director, Integrated Budget planning of the Department. He lamented the fact that based on current trends in its contingent liabilities, settlements against the Department in like actions were likely to increase rapidly and at a rate faster than the annual increase in its budgeted resources. He anticipated that this out of control trend would in time overwhelm the Department's capacity to meet its health service delivery obligations. He opined that this crisis had rendered it necessary at the time of giving his evidence to give consideration to alternative avenues available to the State to meet medico-legal claims against the Department.

[45] The then head of the Department, who is also tasked with budgeting for the provision of necessary health care services in the province, added her voice to the

concern that lump sum payments were impacting negatively on its operating budget and that the outflow of funds from the Department's coffers for such claims was increasing exponentially year by year. She affirmed that each such payment comes with an "opportunity cost" to the Department and results in money being taken away from other services.[28] In her words, as the court noted, it is "*a never-ending downward tightening, ever tightening spiral if we continue to pay in this mechanism*." In her view, the Department's financial challenges in turn threatened the liquidity of the rest of the provincial government which she suggested ought to be ameliorated by a different expectation than the norm envisaged by the "*once and for all*" common law rule that requires damages awards to be paid in money.

[46] A forensic auditor employed by the Provincial Treasury testified as to his investigations into allegations of misconduct by individuals or their attorneys regarding medical negligence litigation and the failure of the vast proceeds to reach the plaintiffs who are the subjects of these claims either by virtue of success fees payable in terms of contingency fee agreements substantially reducing the benefit especially projected for use by the injured patient, the failure to establish the trusts created by the court to protect the proceeds either timeously or at all, or because of other irregularities in administering the damages awards.

[47] Guided *inter alia* by the powerful and persuasive support from the constitutional court in *DZ*, albeit by way of *obiter dicta*, that the common law "*once and for all*" rule, although not in conflict with our constitutional value system, is not beyond being developed provided that cogent foundational evidence is provided to support a move away from the evaluative normative choice that requires compensation in money as the "*measure of all things*", the court in *TN* was comforted by the fact that the resolution of the dilemma that the Department faced could be met by considering which form of payment would best meet the particular circumstances of each individual case rather than by implicating a wholesale rejection of the "*once and for all*" rule.

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[28] This concept is evidently an economic one. The witness is reported at [52] to have explained that opportunity cost refers to "*the things that might otherwise be done if spending was not allocated to any particular purpose*". The court in *TN* considered it relevant to the proceedings in the sense that by making an award "*there is a sense in which the court takes on that responsibility that otherwise would be exercised by a treasury".*

[48] Further, in recognizing the crisis that has evolved in the province by the alarming increase in medico legal claims against the Department according to the evidence presented, which the court accepted, it was alive to the important consideration that the fundamental right of everyone to have access to healthcare services and the State's obligation to realize this right by undertaking reasonable measures, that had not being on the blimp as it were in the pre-constitutional era, had introduced a worrying conflict of rights to be rationally contended with. (The court in *MSM* referred to this as "*a doubled-edged sword hanging over the state*").[29]

[49] Having careful regard to the evidence presented, the expectation of embracing a different constitutionally invested approach which was first raised as a prospect in *DZ* and *MSM'*s example commended itself to the court in *TN*. It reflected as follows regarding the important question asked of itself whether the evidence supported the development of the common law. It concluded affirmatively that it did, for the specific reasons indicated below :

> "[158] Particularly regarding the public healthcare defence, this case is, in many respects, on all fours with *MSM*. [30]Accordingly, the *dicta* of Keightley J in this regard are of equal application. Having studied her judgment in this regard, I agree with her analysis particularly as the evidence led in this case is largely supportive of the evidence led in that.
>
> [159] In *DZ*, Froneman JA's examination of the common law led to the obiter conclusion that neither the once and for all rule nor the money damages rule were in conflict with the constitutional value system. He added that this problem (which he categorized *in vacuo* as it were, i.e. without any evidence as not being *prima facie* offensive to the Constitution), should be dealt with on a case-by-case basis. This is such a case. We now have evidence. In addition to what was said in *MSM*, the evidence in my view discloses at least two obvious bases upon which such common law rules offend the Bill of Rights.

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[29] *MSM* at [186].
[30] It is for this reason that I have expounded fully on the import of *MSM* above.

[160] Firstly, it seems that all the witnesses ultimately accepted that the department is struggling financially for the various reasons which have been dealt with. That being so, heaping more "once and for all" claims on the department averaging approximately R30 million apiece, can only make the situation worse. This has the result that the department's ability to carry out its obligation of realizing access to health for everyone in terms of section 27(2) is increasingly under pressure. Dr Wagner and Mr Donaldson emphasized that the stress (and further potential for stress) on the department's finances has the result that 80 to 90% of the population of the Eastern Cape (the balance being serviced by private healthcare as they are insured) are not receiving the healthcare that they ought to be. As the situation is worsening year by year, in my view, this is offensive to the Bill of Rights.

[161] Secondly, as correctly pointed out by the plaintiff, whilst the Contingency Fees Act has not been found to be unconstitutional, in most run-of-the-mill cases where legal practitioners abide by the law, it has a salutary effect in that it allows indigent people to have legal representation albeit that they have to give up a percentage of the award ultimately given. Where that award is not very high and does not represent an important component of damages such as extensive future medical services for a severely compromised claimant, the 25% deduction for legal fees (or, hopefully, a lesser percentage if the Act is applied to its full extent) will not make a great difference to the claimant's quantum of damages. However, when dealing with CP cases such as this, it is common cause that a huge component of the damages award is represented by future medical expenses. This can account for R20 million or more of the claim. In the once and for all situation, this amount is carefully determined by actuaries so as to provide future medical services for the compromised child on an ongoing basis, hopefully for his or her life span. When one looks at the tendency of legal practitioners (according to the evidence led in this case) to take 25% of such claims, and sometimes more, this represents in the region of R5 million or more which punches a significant hole in the capacity of the once and for all monetary award to provide fully for the complainant. Indeed, the evidence of Mr Howes disclosed that more than 40% in some cases is taken up by lawyers' fees.

[162] If the CP child claimant lives to his or her life expectancy as calculated at the time the award is made, he will, in theory at least, run out of funds to provide the necessary medical services some time before reaching that point. This is more so if the child lives beyond its calculated life expectancy. It is therefore so that in cases such as this where large awards are made in accordance with the common-law once and for all principle, large deductions are made for legal services. These deductions are much larger than in cases where smaller awards are made and represent a reduction in the ability of the award to sustain the child over his or her lifespan. This places the awards which are consistently made in similar CP cases in a different category to the general run of the mill damages awards. This, to my mind, represents a further assault, if I may use the word, on the constitutional rights of such individual CP claimants and thus further offends the Bill of Rights, and the constitutional obligation imposed on the state under section 27 (2) to "take reasonable legislative and other measures within its available resources, to achieve the progressive realization of [healthcare services]".

[163] In this regard, it should be mentioned that the plaintiff has argued that the contrary would be true where a CP child does not live out its full lifespan. If he or she indeed were to live three quarters of his or her lifespan as ascertained at the time of the award, this would translate into him or her probably having enough funds therefrom to sustain the necessary medical services until the time of his or her death. However, in my view this argument is, to a degree, tautologous. The very purpose of ascertaining the longevity in advance is to try, insofar as is humanly possible, to ensure adequate compensation in the future. If it cannot be ascertained with any degree of accuracy, this is a further reason to consider jettisoning the once and for all rule in such cases. The purpose of such an award is to ensure that the child's patrimony is restored to the position it would have been had the cerebral palsy not occurred and, based on the once and for all rule, an attempt is thus made to provide sufficient funds to sustain the child as best possible and in accordance with best medical practice, during its anticipated lifespan. It would be wrong in these circumstances to assume that its lifespan would be 25%

shorter than that calculated by the experts to justify a large lump sum being paid in legal fees. Furthermore, once the funds do indeed run out sometime before the child's anticipated lifespan is reached, it is almost inevitable that the child's medical needs will be cast back upon the public healthcare service. This, in turn, will place more stress upon the public healthcare service despite it having paid out a large lump sum to avoid this very situation. Again, this reduces the capacity of the department to carry out its responsibilities in terms of the Constitution, which is offensive to the Bill of Rights.

[164] Before leaving this aspect, it should be mentioned that the plaintiff argued that the introduction of the constitutional remedies would result in reduced interest on the part of legal practitioners to take up the cases of CP claimants which would, in turn, affect their right of access to the courts. I do not regard this as a valid argument. I say so because of many reasons, the more important of which is the fact that if such were to happen, it would be an indictment on the legal profession. Also, the introduction of such defences does not eliminate partial lump-sum awards. For example, in the present matter, the lump sum award will amount to almost R4 million. This is still a sizable sum for the calculation of contingency fees. RAF cases attracting similar quantum awards, and indeed less, are regularly handled by legal practitioners on a contingency basis. It seems to me that this argument is spurious in these circumstances.

[165] In addition to the foregoing, in my view the evidence overwhelmingly establishes that there are other areas in which the common law rules conflict with the constitutional value system. In this regard reference is made to the rights of everyone under section 27(1)(a) and (2), together with the rights of all children under section 28(1)(c) and (2), and the right under section 9 (1) to equality before the law and to the equal protection and benefit of the law. In my judgment, the limited and incremental development sought in this case is therefore justified in terms of section 39(2).

[166] Section 173 also empowers the superior courts to develop the common law, taking into account the interests of justice. I am satisfied, based on the

evidence led in this case, that it is also in the interests of justice that the common law be developed so as to provide courts which adjudicate medical negligence claims with a broader remedial framework, including the remedies pleaded in this case.

[167] It seems self-evident that both the public healthcare and the undertaking to pay remedies should be developed together as they operate in tandem. The evidence discloses that the most expensive items inflating lump-sum damages awards are those such as caregivers which the state is unable to provide in kind. If the undertaking to pay remedy is not granted in tandem with the public healthcare defence, this will serve to substantially reduce its efficacy.

[168] The draft order proposed by the defendant in which development of the common law in this regard is articulated is in line with the Constitutional Court's direction in *Makate* which requires that changes to existing law be articulated with the same clarity as the rules and principles that they seek to replace. I thus conclude that a case has indeed been made out for the development of the common law as set out in the proposed draft order."

[50] For the sake of convenience, prayer 19 of the order granted by the court in *TN* that corresponds to its conclusion that a case had been made out to it for the development of the common law in the limited respects found, is repeated below:

"DEVELOPMENT OF THE COMMON LAW

19. The common law is developed –

19.1 so as to accommodate the public healthcare and undertaking to pay remedies provided for in this order;

19.2 so that the once-and-for-all rule and the rule that damages must sound in money, are neither the exclusive nor the primary rules for the determination of a just and equitable remedy in terms of sections 38 and 172(1)(b) of the Constitution, in a claim arising from harm negligently caused by a public healthcare practitioner, provider or institution;

19.3 so that no claim shall lie in respect of lumpsum money damages to the extent that –

19.3.1 any of the future medical services and medical supplies required by the Plaintiff (or the injured party) as a result of the injury are provided, by order of court, at a reasonable standard at a public healthcare institution; or

19.3.2 where a court does not so order, the Defendant provides an undertaking to –

(a) procure the medical service or medical supply required in the private healthcare sector so as to be provided timeously whenever it is required; or,

(b) reimburse the Plaintiff, or any trust or other entity established for the benefit of the injured party, for their expenses reasonably incurred in procuring the medical service or medical supply in the private healthcare sector, within 30 days of presentation of an invoice for it."

[51] As an important aside the judgment in *TN* is under appeal to the Supreme Court of Appeal, but I have set out in some detail the seminal findings made by the court by reason of the defendant's constitutional defences raised in the present matter, in order to highlight the necessary context.

[52] In this regard I align myself with the respectful approach adopted by Govindjee J in *SM v MEC for Health, Eastern Cape Province*[31] that it is neither necessary nor desirable to pronounce upon the impact of *TN* on the development of the common law and the significance of this finding for the province, especially since the circumstances of that matter are also distinguishable from the presenting circumstances of the matter at hand. I do however have to reflect on the pleaded relevance of *TN* to the present case.

The present matter:

[53] Although the remedies (the first arising upon the "*public healthcare defence*" and the second "*undertaking to pay*" being a corollary thereof) were expressed in *TN*

[31] (1433/2015) [2024] ZAECMHC 15 (18 March 2024) at [23].

to operate in tandem,[32] the defendant in the present instance pertinently abandoned her reliance on the primary public healthcare defence/remedy. The reason why she no longer wishes to persist with it as an equitable remedy, so Mr. Mapoma who appeared on her behalf explicated, is because the plaintiff has relocated with her child to Durban, KwaZulu-Natal.

[54] This notwithstanding, her alternative defence implicated by the undertaking to pay remedy according to which the conventional lumpsum award should as a matter of course be substituted on the pretext that the common law has already been developed in *TN*, remains and falls to be determined by this court.

[55] Reliance on the alternative remedy (dubbed the "*undertaking to pay*" remedy) is pleaded as follows in the curtailed plea:

> *"28. Alternatively to paragraph (27),*[33] *and only in the event of the Court finding that the future medical care or any component of it is not available in the public healthcare sector at a reasonable standard,*[34] *the defendant undertakes, at her, alternatively the plaintiff's election, to –*
>
> *28.2.1 either procure the future medical care that is not so available in the public healthcare sector, in the private healthcare sector whenever it is required; or*
>
> *28.2.2 reimburse the plaintiff, or any trust established for the benefit or her minor child, for expenses reasonably incurred in the private healthcare sector in procuring the future medical care that it is not so available in the public*

[32] See in this regard the observation of Griffiths J expressed in *TN* at par [167] that the undertaking to pay remedy ought to be granted in tandem with the public health care defence, otherwise "*this will serve to substantially reduce its efficacy*". Read in context it is necessary to keep the substantial expenses that are not receivable in the hospital and are therefore expected as a starting point to be payable in a lump sum, to a minimum, which effect is achieved by providing the undertaking instead, this being the whole purpose of the ameliorating, constitutionally justified, remedy. The benefit of the efficacy is the defendant's.

[33] Paragraph 27 of the amended plea asserts "*the public healthcare remedy"* which the defendant abandoned.

[34] Implicit in the defendant's abandonment of the primary healthcare defence and the given reason therefor, is that such future medical care or provisioning is, as a necessary premise for the undertaking to kick in, *unavailable* in the public health care sector. Technically speaking it properly still is available, although in a different province, but these issues of boundaries and individual budgets of each province and the hospitals under each provinces area of responsibility have not received the attention of our courts in an appropriate matter. This militates against an argument of general applicability of the development of the common law in individual cases decided by our courts.

healthcare sector, whenever it is required, within 60 days of presentation to the defendant of an invoice for it."

[56] Evidently the defendant expects that such a remedy should in principle and without further ado avail the Department because of her success in raising the constitutional defences in *TN*[35]. In this regard the plea goes on to assert that:

"29. *The common law was developed in TN obo BN v Member of the Executive Council for Health, Eastern Cape (36/2017) [2023] ZAECBHC 3; 2023 (3) SA 270 (ECB) (7 February 2023) –*

29.2.1 so as to accommodate the healthcare and undertaking to pay remedies as contemplated in paragraphs 27.2 and 28 above respectively;

29.2.2 so that the once-and-for-all rule and the rule that damages must sound in money, are neither the exclusive nor the primary rules for the determination of a just and equitable remedy in terms of sections 38 and 172(1)(b) of the Constitution, in a claim arising from harm negligently caused by a public healthcare practitioner, provider or institution;

29.2.3 so that no claim shall lie in respect of lumpsum, money damages to the extent that-

29.2.3.1 any of the future medical services and medical supplies required by the plaintiff (or the injured party) as a result of the injury are provided, by order of court, at a reasonable standard at a public healthcare institution[36]; or

29.2.3.2 where a court does not so order, the defendant provides an undertaking to -

29.2.3.2.1 procure the medical service or medical supply required in the private healthcare sector so as to be provided timeously whenever it is required; or,

29.2.3.2.2 reimburse the plaintiff, or any trust or other entity established for the benefit of the injured party, for their expenses reasonably incurred in procuring the medical service or medical supply in the private healthcare sector, within 30 days of presentation of an invoice for it.

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[35] (36/2017) [2023] ZAECBHC 3; 2023 (3) SA 270 (ECB) (7 February 2023).

[36] This subparagraph is not being proceeded with.

30 In the circumstances, it is just and equitable that, to the extent that the plaintiff proves that her minor child requires the future medical care, this court make an order to provide it under the public healthcare remedy and/or the undertaking to pay remedy as pleaded in paragraphs 27.2 and 28, along with the further relief provided for below".[37]

[57] It is apposite to demonstrate further how the defendant intended for the proposed remedy to operate on the assumption that this court might uphold what remains of her defence, as is indicated by the excerpt below from the proposed draft order that was presented to this court on her behalf to counter the plaintiff's draft predicated on the payment of these damages as a lump sum payment:

"1. The Defendant shall in respect of the medical services and the medical supplies listed in annexure "A" [38] at the Defendant's election –[39]

1.1 procure the medical service or medical supply required in the private healthcare sector so as to be provided timeously whenever it is required in terms of annexure "C"; or

1.2 reimburse the Plaintiff, or any trust established for the benefit of as, for their expenses reasonably incurred in procuring the medical

service or medical supply in the private healthcare sector, within 30 days of presentation of an invoice for these.

1.2.2 By no later than 30 June of each year, AS's[40] private case manager and the public case manager shall jointly submit to the Chief Financial Officer of the Department of Health, Eastern Cape, a care and management plan for the following financial year setting out the medical services and supplies to be provided to AS in terms of annexure "A" during the next financial year and the estimated cost of each item.

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[37] In this paragraph 30, only the part relating to the undertaking to pay remedy is being proceeded with.

[38] This should be a reference to annexure C, or at least the list is the same that was presented to the court by the plaintiff as comprising the total outlay of M's future medical expenses costed in the private health care sector. It thus refers to the whole gambit of services M reasonably and necessarily requires in the future.

[39] This is notably different from the plea that purports to at least recognize the plaintiff's election in this respect.

[40] This is clearly a copy and paste mistake wherever the child's moniker is referenced in the draft order.

1.2.3. Within 30 days of this order and, in subsequent years, by no later than 31 August in each year, the public case manager shall communicate to the Plaintiff, or any trust established for the benefit of AS's private case manager, the Defendant's election referred to in paragraph 1 above.

1.2.4. In order to access the medical services and medical supplies referred to in paragraph 1.1 and to claim reimbursement in terms of paragraph 1.2 the public case manager will act as liaison person."

UNFORSEEN DEVELOPMENTS

2. In the event of it becoming reasonably necessary for AS to receive any medical service or medical supply additional to that provided for in the annexure "A" as a result of AS's cerebral palsy at any point in the remainder of his life, the Defendant shall continue to as ordered as per paragraph 1 above.

3. Where it is reasonable to amend any provision of annexure "A", where for the purposes of paragraph 2 or otherwise, the parties may, by agreement Between AS's private case manager and the public case manager, provisionally amend annexures "A" without approaching a court provided that an updated, amended court order shall be placed before a judge in chambers every second year at the end of the financial year, to be made an amended order of court.

4. Absent agreement on any proposed amendment to annexure "A" either party may apply to this court for the variation of annexures "A" on good cause shown and/or for the enforcement of this order, provided that –

4.1 upon instituting any such proceedings, the party commencing the proceedings must refer the dispute to mediation in terms of Rule 41A the Uniform Rules of Court and the parties must –

4.1.1 conclude the minute and agreement contemplated in Rule 41A (4) (a) and (b) within five court days of service of the process commencing proceedings;

4.1.2 convene the first meeting in the mediation within ten court days of service of the process commencing proceedings;

4.1.3 address the first item for consideration in the mediation, the interim provision of medical services and medical supplies pending the outcome of the mediation, or failing that, the litigation; and

4.1.4 conclude the mediation within 30 ordinary days."

5. The Defendant shall bear all the attorney and client costs of any such proceedings and mediation, regardless of outcome, save where the court finds that the proceedings were not reasonably commenced by the Plaintiff or any person or trust acting on behalf of or in the interests of AS.

ADULT CARE

6. AS's private case manager and the public case manager shall meet no later than his 17th birthday and endeavour to agree on his care arrangement from the age of 18.

7. Failing agreement, the matter must be resolved in terms of paragraph 4 above.

PUBLIC CASE MANAGER

8. The Head of the Department of Health of the Eastern Cape Province shall appoint a suitably qualified person from the Department where AS receives the majority of his services and supplies, to perform the functions of public case manager provided for in this order.

9. The Defendant shall in respect of the medical services and the medical supplies listed in annexure "A" at the Defendant's election –

9.1 procure the medical service or medical supply required in the private healthcare sector so as to be provided timeously whenever it is required in terms of annexure "A"; or

9.2 reimburse the Plaintiff, or any trust established for the benefit of AS, for their expenses reasonably incurred in procuring the medical service or medical supply in the private healthcare sector, within 60 of presentation of an invoice for these.

10. By no later than 30 June of each year, AS's private case manager and the public case manager shall jointly submit to the Chief Financial Officer of the Department of Health, Eastern Cape, a care and management plan for the following financial year setting out the medical services and supplies to be

provided to AS in terms of annexure "A" during the next financial year and the estimated cost of each item.

11. Within 30 days of this order and, in subsequent years, by no later than 31 August in each year, the public case manager shall communicate to the Plaintiff, or any trust established for the benefit of AS's private case manager, the Defendant's election referred to in paragraph 9 above.

12. In order to access the medical services and medical supplies referred to in paragraph 9.1 and to claim reimbursement in terms of paragraph 9.2 the public case manager will act as liaison person."

[58] I should clarify additionally that although the plea and draft order especially envisage a right to the Department to procure services at the defendant's election which it cannot itself provide as a corollary of the public healthcare remedy, Mr. Mapoma assured this court during argument that the defendant was only persisting with that part of the plea that implicates the undertaking to pay remedy.

[59] It is immediately apparent that the standalone remedy that the defendant asks this court to order represents a striking difference from how it was intended to be of application in the *TN* scenario as I will shortly illustrate.

The issues for determination:

[60] The question that arises from the defendant's plea is whether the essential finding in *TN* that the common law is developed as the court considered it appropriate in that matter can or ought merely to be "*applied*" to the circumstances of the present matter on a *stare decisis* basis as the defendant contends for. The further question that occurs to me in any event is whether the undertaking to pay remedy, flung off from the primary healthcare remedy as the necessary tangent it was supposed to be in *TN*, can survive on its own as an independent remedy bearing in mind that in that matter it formed part of a tailored order especially crafted by the court to meet the exigencies of that situation.

[61] Although the defendant believes that the present case is "*on all fours*" with *TN* it appears to me that little thought was given to the impact of her abandoning the

primary health care defence and soldiering on with the slender remains of her constitutional defence without reimaging the peculiar relief sought, interrogating whether the common law should be especially developed to cater for an undertaking somewhat akin to that envisaged in section 17 (4) if the Road Accident Fund Act, No 56 of 1996, or to demonstrate even (on the defendant's insistence that a new rule came into being since TN) why she says that the facts pertaining to the present matter fall within the scope of that purported new rule.

[62] The plaintiff for her part does not agree with the pleaded assertion that the common law has already been developed in *TN* or that the import of that decision is of general application so that the defendant can insist on an alternative payment remedy as a matter of course. She maintains instead, and fairly so as I discuss below, that for such a defence to be able to be adjudicated upon and to seize the imagination of this court, she would as an essential premise have had to have pleaded why the common law ought to be developed in the peculiar circumstances of the present matter to permit the granting of the remedy contended for in place of a conventional damages award, which she has evidently not done.

The evidence:

[63] The plaintiff adduced no oral testimony in the matter and indeed it is accepted that none was required by her in the circumstances.[41] Since the total cost of M's medical expenses were agreed to be fair and reasonable, she closed her case confident that she has established that M deserves, on the customary basis upon which damages are assessed for future medical expenses in claims for personal injury, to receive private healthcare on the basis of the estimated costs supported by the common views of the relevant experts that they are reasonable and necessary.[42]

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[41] Neither was it necessary for her, after the defendant testified, to offer any rebuttal evidence concerning the remaining constitutional defence.

[42]This accords with the principle enunciated in *Ngubane* at 784C-F that: "*By making use of private medical services and hospital facilities, a plaintiff, who has suffered personal injuries, will in the normal course (as a result of enquiries and exercising a right of selection) receive skilled medical attention and, where the need arises, be admitted to a well-run and properly equipped hospital. To accord him such benefits, all would agree, is both reasonable and deserving. For this reason it is a legitimate - and as far as I am aware the customary - basis on which a claim for future medical expenses is determined. Such evidence will thus discharge the onus of proving the cost of such expenses unless, having regard to all the evidence, including that adduced in support of an alternative*

[64] The defendant tendered only the factual testimony of Mr. Kidwell Matshotyana who is employed by the Department as Chief Director of Clinical Support Services. He could not take the matter much further. Mr. Mapoma heralded in his opening address that the witness would testify, in his role as administrator, regarding "*the application of paragraph 28 … of the defendant's plea*".

[65] The witness related that the Department has a developing system in place to coordinate, monitor and oversee the implementation of the "*constitutional remedies*" that have thus far successfully been granted by this Court in, *inter alia*, *TN*. [43]

[66] In the event of the remedy prayed for availing the defendant in the present matter, so he sought to assure this court, it would be his obligation, as part of a team set up by the Department for these purposes, to capture the list of future medical expenses and set up an individual plan for the hopefully successful implementation of the anticipated order, evidently along the lines of the trial and error basis that has developed since the first such orders were granted by this court and in accordance with policy guidelines that are evolving.

[67] As an aside the parties agreed that the policy guidelines would not be introduced into evidence for failure on the part of the defendant to have discovered them, but also by reason of the fact that the protocol is not yet even in place. [44]

[68] Whilst the witness stated that he was unaware of any complaint against the Department that it had not complied with any of the three court orders "*where the*

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and cheaper source of medical services, it can be said that the plaintiff has failed to prove on a preponderance of probabilities that the medical services envisaged are reasonable and hence that the amounts claimed are not excessive. This approach conforms, in my view, to the requirements of proof in any claim for delictual damages."

[43] There are in fact only two other matters other than *TN* that resort under the group of "*special case*" plaintiffs managed under the auspices of the Department. These orders were however issued by agreement.

[44] The plaintiff also raised the concern that the document was either irrelevant or that she would be prejudiced by its admission given the defendant's plea (and her difference in this respect) that the common law has already been developed and needed only to be applied. On the other hand, if the defendant was holding out for a development of the common law, this was not the premise on the pleadings and the submission was that she should not be allowed after the fact and in the absence of a properly pleaded case for such a development, come in through the back door as it were.

undertaking to pay remedy" was ordered, in reality he did not offer any practical application of the so-called undertakings.

[69] As for the injured plaintiff being out of the province, he readily conceded that the Department had no experience of managing cerebral palsy cases outside of its area of responsibility.

[70] He suggested that any issues arising could however probably be worked out between the case managers. He acknowledged though that the case manger in mind in the draft order presented to the court was required to be in the same district where the child lived.

[71] He was unaware that the defendant had abandoned the public healthcare remedy. He further offered no advice regarding how an undertaking would work apart from an integrated special patient plan or even within the context of the roll-out of an existing plan.

[72] Notably absent from his account was any evidence why the remedy would enhance access to healthcare.

[73] Further, how the stand alone undertaking to pay, or rather to reimburse, was supposed to work was simply left to one's imagination. The witness did not explain, for example, as I expected of him to, how the defendant imagined the plaintiff could afford to pay for medical expenses out of pocket, and thereupon wait for reimbursement of these within 60 days of the presentation of an invoice.[45]

[74] Neither did the witness lead any evidence to discharge the evidential burden on the defendant to show that the costs of the private healthcare outlined in Annexure "C" were not reasonable or necessary in the circumstances of the matter.

Discussion:

[45] Sixty days are mentioned in par 28.2.2 of the plea but this is contrasted with 30 days mentioned in par 29.2.3.2.2 thereof. Days implicated in a court order would also be computed as court days, making the proposed period for repayment excessively long.

[75] As I have already indicated above the defence that remains, bare boned, was not helpfully pleaded and was doomed to fail at conception, at least at the point at which the defendant cast off reliance on that part of it pertaining to her public healthcare remedy.

[76] Whilst *TN* and *MSM* provide examples of how a carefully envisaged treatment plan can be held in the interests of justice to be suitable and appropriate in substitution of the payment of customary lump sum awards, the point was well taken by Mr. van der Walt who appeared on behalf of the plaintiff that the court intended, especially in *TN* which is of relevance for present purposes, for the undertaking to pay to operate in tandem with the especially devised plan of treatment.

[77] Self evidently the premise for the alternative "*undertaking to pay*" being triggered (as per the plea) is that the identified services and medical supplies required by the child is not available in the public healthcare sector at the desired standard, despite the special treatment plan or under its ambit. In this regard, all the indications were, until the primary public healthcare defence was abandoned, that the identified services would have been available but for the plaintiff's relocation to a different province.

[78] The point however is that their fictionally being "*unavailable*"[46] cannot automatically trigger the alternative undertaking in a situation where there is a relocation. The original thinking of the public healthcare remedy, undergirded by the undertaking to procure or to pay, is that the fall back on the procurement or undertaking options would only arise if there was a service or a supply that was not available, and as a final resort, but the entire effort is directed at maintaining the cheaper alternative to private healthcare costs, and avoiding having to fork out lump sums needed to provide for the healthcare of other citizens, or delaying these payments until later when they are strictly needed, as the case may be.

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[46] They are surely still notionally available in the private healthcare sector somewhere else in the country at least. The defendant needs to be more thoughtful about how special case patients may be received and adequately attended to and matters of budget and case managing handled across territorial borders. The situation would certainly be different, as Mr. van der Walt opined, if the injured patient was to move out of the country.

[79] In *TN* the warning sounded that the remedies should operate in tandem is evidently intended for the defendant's benefit, to maximise the opportunity for the Department not to have to part with lump sums that cripple its budget to the prejudice of others in need of public healthcare.

[80] This is not the defendant's motive here. She asks opportunistically, since she has missed that boat, to hang on to the undertaking to pay remedy to be used as a measure to deny the plaintiff to be properly redressed for the damage to her patrimony without coming in through the front door with a proper plea that explains why she is entitled to this remedy instead of the customary one, accepting that she cannot provide cheaper alternative care through the public healthcare services, and hoping in the process to avoid having to say or make out a case why the common law ought to be developed in these bizarre circumstances.

[81] Indeed the court in DZ noted the contention of the defendant herself that whilst the province's public healthcare defence required, at most, a limited development of the common law, the second "*undertaking to pay*" requires "*a more extensive development of the common law*".[47]

[82] There is simply no merit therefore in the submission on behalf of the defendant that the common law has already been developed in this scenario and must simply be applied.

[83] In any event it has been emphasized in every judgment of our courts on the subject that each case must be decided on its own merits and unique factual foundation.

[84] Co-incidentally, the court in *Member of the executive Council for Health and Social Development of the Gauteng Provincial Government v Zulu obo Zulu*[48] declined, for very good reasons, to develop the common law to permit the relevant department, instead of paying the monetary compensation sought in respect of

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[47] At [6].
[48] (1020/2015) [2016] ZASCA 185 (30 November 2016).

medical expenses of the plaintiff in a like action, to pay directly to the person/s who would provide services to the minor child within 30 days of presentation of a written quotation to its accounting officer. The sentiments expressed by the court in that matter may provide a useful indication to the defendant why the remedy postulated in the present matter, to reimburse the plaintiff for future medical costs paid out of pocket, is simply unworkable.

[85] There is quite a difference between asking the court to accept a plan that purports to save costs to operate as a remedy rather than paying a lumpsum, than asking it to permit the defendant instead of paying the lump sum to the plaintiff which she has *prima facie* established as being entitled to, without a jot of evidence that cheaper treatment is possible, to sit back and wait to be asked to reimburse by her once she has paid these expenses out of pocket. To my mind it is quite unconscionable for the defendant to imagine that the plaintiff would have any resources of her own to advance these kinds of payments, not to mention the hardship or calamity that may befall the child if he does not get the medical attention for his very serious condition that it is vitally agreed he needs.

[86] DZ and other subsequent cases on the subject confirm that a development of the common law cannot take place in a factual vacuum or without any factual foundation.[49] Given the peculiar nature of an "undertaking to pay" remedy as understood in DZ, the affected common law rules would certainly require evidence.[50] I can confidently determine that there is none here, though I am comforted by Mr. Matshotyana's enthusiasm and hope that the treatment plans curated in the successful matters where the constitutional defence was raised, are working to plan.

Conclusion:

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[49] At [28] and [57].

[50] At [24] where the Court highlights that the kind of possibility entertained does not resort comfortably within current law of monetary compensation that must be paid "once and for all", at [29] where it is stated that a common law rule is to be changed altogether, or a new rule is to be introduced (certainly implied by the standalone undertaking to pay remedy envisaged in the present instance) that it would usually be better for a court to make a decision "*only after hearing all the evidence so that the decision can be given in the light of all the circumstances of the case, with due regard to all relevant factors*." An example of what such relevant factors may entail are especially highlighted in *Member of the executive Council for Health and Social Development of the Gauteng Provincial Government v Zulu obo Zulu* (1020/2015) [2016] ZASCA 185 (30 November 2016), at [11], in which that health department sought a similar remedy which, needless to say, was denied.

[87] I am satisfied that the plaintiff has made out a case on a balance of probabilities that she is entitled to payment of the amount of damages as set out in the draft order below.

[88] The defendant's undertaking to pay defence (as framed) is rejected as bad in law for want of having raised a carefully pleaded argument for the development of the common law. There is in any event further no evidence to support a development of the common law in the manner contended for.

Order:

[89] In the result I issue the following order:

1. The Defendant shall pay the capital amount of R11 108 354.48 as full and final compensation to the Plaintiff in her representative capacity as mother and natural guardian of M ("*the minor*") for the delictual damages suffered by him as a result of severe birth asphyxia.

2. The total amount referred to in paragraph 1, is calculated as follows:

    2.1. Future medical expenses R10 333 353.00.
    2.2. Trust Costs calculated at 7.5% of the total capital amount in respect of paragraph 2.1, *supra*: R 775 001.48

3. The capital amount of R11 108 354.48 shall be paid by the Defendant to the Plaintiff's attorneys in accordance with the provisions of Section 3(3)(a)(i) of the State Liability Act, 20 of 1957 (as amended).

4. The amount referred to in paragraphs 2.1 to 2.2 above, shall be paid into the Trust account of the Plaintiff's Attorneys of record with the following details:

    Name of account : Sakhela Inc Attorneys

Bank	:	First National Bank
Acc No	:	6[...]
Branch Code	:	250109

who shall, after deduction of attorney and client's fees, costs and disbursements (including past medical - and paramedical expenses), retain same in an interest-bearing account in terms of Section 86(4) of the Legal Practice Act, No. 28 of 2014.

5. The Plaintiff's attorney shall thereafter pay the remaining amount into the Trust created in terms of the Court order of Zilwa J of 1 September 2023.

6. The Defendant shall pay the Plaintiff's taxed or agreed costs on the party and party High Court Scale, which include the costs of senior and junior counsel on Scale C, as above, to date hereof, such costs to include the following:

6.1 The costs of the reservation fees for trial for 21 January 2025 of:

6.1.1 Nursing Expert - Ms. Anderson
6.1.2 Dentist - Dr. Singh
6.1.3 Dietician - Ms. Read
6.1.4 Speech and Language - Ms. Thanjan
6.1.5 Physiotherapist - Ms. Hughes
6.1.6 Orthopaedic Surgeon - Dr. Decon
6.1.7 Orthotist - Mr. Nothling
6.1.8 Occupational Therapist - Ms. Caga
6.1.9 Urologist - Dr. Steyn
6.1.10 Actuary - Mr. Lootz.

6.2 The costs of the expert reports and appendices thereto, including consultations, reservation fees for trial for 21 January 2025 and qualifying fees of:

6.2.1	Rehabilitation and public Health services in the Eastern Cape	Dr. Campbell
6.2.2	Economist	Prof Van Den Heever.

6.3 The costs of senior and junior counsel, including but not limited to, preparation and associated trial costs for 21 January 2025, 22 January 2025 and 23 January 2025, attendances at pre-trial conferences and/or roundtable meetings.

6.4 The costs of junior counsel for the preparation and drafting of the revised Schedule in respect of Future Medical Expenses.

7. The Plaintiff shall serve the notice of taxation on the Defendant's attorneys of record and the Defendant shall be allowed a period of one calendar month to make payment of the taxed costs.

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B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : **20-24 January 2025**

DATE OF JUDGMENT : **27 June 2025**

Appearances:

For the Plaintiff: Mr. N van der Walt SC together with Ms. R Andrews, instructed by Sakhela Incorporated, East London (Ref Mr. Sakhela).

For the Defendant: Mr. S X Mapoma SC, instructed by The State Attorney, East London. (Ref Mr. M Maqambayi).