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NOT REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO),**

CASE NO. 240/2014

In the matter between:

N P D

First Plaintiff

Y P D represented

by ADVOCATE SANDA MLALANDLE N.O.

as duly appointed curator *ad litem*

Second Plaintiff

and

**MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH: EASTERN CAPE PROVINCIAL
GOVERNMENT**

Defendant

JUDGMENT IN RE QUANTUM

HARTLE J

Introduction:

[1] The second plaintiff, assisted in these proceedings by Advocate Mlalandle as curator *ad litem* (“*the curator*”), came before this court for the determination of the quantum of certain heads of damages arising from the negligence of the medical and/or nursing staff at the Dora Nginza Hospital (“*the hospital*”). The complained of negligence was committed during her birth, resulting in her having suffered a brain injury with ensuing cerebral palsy.

[2] The first plaintiff originally sued in her personal and representative capacity as the mother and guardian of the second plaintiff who attained majority in 2024. Given the second plaintiff’s serious physical and cognitive disabilities, a curator was appointed to represent her in the pursuit of the recovery of her own damages.

[3] Liability was settled in favour of the first plaintiff in terms of an order of this court granted on 22 March 2022. In accordance with that order, the defendant was found liable for the proven or agreed damages suffered by her in both her personal and representative capacities.

[4] The parties agreed unequivocally at a pretrial conference held on 18 February 2025 that the issues for resolution by this court would concern only the quantification of the second plaintiff's claims for loss of earnings and her adapted accommodation requirements, external (vehicular) mobility, and caregiving needs.

[5] The issue of the remainder of both plaintiffs' claims for future medical expenses, as per the parties' agreement, is to be determined in a subsequent hearing in which the defendant's pleaded public healthcare defence will loom large.

[6] It was brought to the court's attention during the plaintiff's opening address that the defendant, when signing the pretrial minutes after the earlier conference, unilaterally purported to delete the issue of caregivers which it had been agreed would be determined at the present hearing, as opposed to later on when the public healthcare defence is expected to receive especial consideration. From the minutes of a later meeting held between the parties on 7 March 2025 it appeared that the defendant remained hopeful that she might ringfence this expense as one covered by an undertaking to pay for such services as and when they arise under the ambit of the public healthcare defence pleaded by her.

[7] Despite the fact that the determination of the defendant's undertaking to pay defence resorts more conveniently under the separate determination of the defendant's public healthcare defence, the curator indicated that he would persist

with the claim for the rendering of private caregiving services to the second plaintiff as a trial issue in the present hearing. The defendant did not argue against the proposition, neither did she ask for any directive in this regard.

[8] The separation of issues along the lines agreed upon by the parties in the initial conference appeared as an afterthought to be ill-considered, regard being had to the fact that the undertaking to pay defence cannot as a constituent part of, or as an adjunct to, the public healthcare defence (the consideration of which the parties have agreed to defer) be extricated therefrom.

[9] The defendant was however confident that she could press on for such relief on the basis of her understanding that the common law has already been developed to automatically permit of an undertaking to pay remedy being substituted in the place of a lumpsum damages award in respect of cerebral palsy cases arising from the negligence of medical staff in hospitals falling under her control. The defendant's expectation in this respect stems from this court's judgment in *TN obo BN v Member of the Executive Council for Health, Eastern Cape (TN)*¹ in which, according to her understanding of its import, the common law was developed for all like cases so as to accommodate the public healthcare and undertaking to pay remedies provided for therein.²

[10] In the course of the parties' pretrial discussions, the future expenses under contention in the present hearing were conceded by the defendant as reasonable and necessary, but with the last minute reservation expressed on her behalf of some

¹ (36/2017) [2023] ZAECHC 3; 2023 (3) SA 270 (ECB) (7 February 2023).

² See prayer 19 of the court's order in TN under the heading: "DEVELOPMENT OF THE COMMON LAW", read together with prayers 9 to 12 thereof which envisage the practical implementation of the undertaking to pay remedy.

of these being “*too high*”, and capable of being reduced.³ She had a solution in mind for this dilemma. In respect of the second plaintiff’s mobility expenses claim (which the defendant preferred to refer to as the “*transport claim*”), she proposed that the Department pay the costs of the purchase of the first motor vehicle together with adaptations upfront, with the remainder of this reasonably anticipated expense being revisited afterwards in terms of an undertaking to pay for upgrades as and when the need arises.

[11] In respect of the agreed accommodation costs, the defendant qualified at the final pretrial conference that because she considered this outlay “*too high*”, she might, “*as a possibility*”, seek a contingency deduction of 20% from the amount costed under this head of damages.

[12] These reservations expressed on her behalf, in keeping with her obvious agenda to keep the cash lumpsum that falls to be awarded for the medical expenses under consideration to a minimum, set the tone for the cross examination of the witnesses called on behalf of the second plaintiff who in the trial set out to prove her entitlement to these heads of damages on the customary basis enunciated in *Ngubane v South African Transport Services* (“*Ngubane*”).⁴

³ With hindsight it appears that it would have been more appropriate to have included the separate claims of the second plaintiff presently under consideration under the wider ambit of future medical expenses, because it is likely that at the later hearing the defendant’s pleaded defences will receive due and proper consideration by the leading of evidence. In any event, the defendant persisted with her view that the common law has already been developed to permit of her tender of an undertaking to pay as opposed to the payment of a lump sum award, this on the premises of the court’s order in *TN*. Another possibility would have been for the tender to be made in answer to a rule 34A claim for an interim payment whilst the uncertainty around the form of the order in *TN* and the arguments around the issue of the development of the common law in respect of like cases prevails.

⁴ 1991 (1) SA 756 (A) at 784 C- F and at 785 C – D.

[13] Based on the relevant joint minutes of the parties' respective experts and the agreed actuarial calculations flowing therefrom, the parties were at least agreed that the second plaintiff's claims in respect of the heads of damages under consideration were reasonably projected as follows:

Loss of earnings	R1 896 101.00. ⁵
External Mobility (vehicular)	R1 763 596.00.
Housing and Accommodation	R2 343 990.00.

[14] Significantly the curator conceded on behalf of the second plaintiff that the calculations by the defendant's actuaries in respect of the three sub-sets would prevail over her own, which came in lower than the calculations by the actuaries employed on the second plaintiff's behalf. The curator likewise proposed that the lesser of the two actuarial calculations be accepted for purposes of the agreed mobility costs. On the issue of accommodation the defendant's actuaries' calculations were greater than the second plaintiff's. In that respect the parties settled on the lesser figure.

[15] Also agreed in respect of the second plaintiff's claim for loss of earnings is that it is reasonable that a contingency deduction of 15% be made against the accepted actuarial calculation by the defendant's experts, the lesser of the two experts' projections of her loss in this respect, which was computed in the sum of R2 230 707.00.

[16] Since the parties agreed to defer the determination of the claims for the bulk of the remaining future medical expenses under the scope of the public healthcare

⁵ This amount reflected here is the nett of the agreed contingency deduction of 15%. See paragraph 15 below.

defence, the defendant tendered an interim payment of R50 000.00 towards the fees of a case manager in the meantime.

[17] The parties were further *ad idem* that a trust should be established consequent to the granting of the award anticipated at this juncture of the proceedings to manage the money award on the second plaintiff's behalf. This came with the necessary concession by the defendant to pay the costs associated with its establishment and the costs of managing it at the customary rate of 7.5% of the total amount of damages that fall to be awarded at this time.

[18] The parties however remained at odds on the subject of the caregivers although not in respect of the projected cost of such services. The defendant insisted upon limiting her tender to the provision of an undertaking to pay these costs as and when they arise (without intending to lead any evidence thereanent as I will shortly elaborate upon), whereas the curator indicated that he would push on and adduce evidence for the second plaintiff's part that would establish her loss for this head of damages assessed at private medical sector rates,⁶ payable upfront according to the "*once and for all*" common law damages rule.⁷

[19] I should add, in respect of the premise of the latter head of damages that the parties were at least agreed that caregivers were necessary around the clock to

⁶. See *Ngubane* at 784 C – F as to the parameters within which the plaintiff is required to establish her damages.

⁷ 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 component of the rule 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; *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 [14] - [16].

attend to the second plaintiff's special needs for the rest of her expected lifetime,⁸ the only point of difference entailing the defendant's expert recommending three caregivers, working alone in 8 hour shifts as opposed to the defendant's expert suggesting a different division of labour. The parties were agreed however that the actuarialized compensation in this respect amounts to R5 453 433.00.

The second plaintiff's testimony:

[20] In respect of the second plaintiff's caregiving needs and requirements, the curator led the evidence of Sue Anderson, a nursing expert.

[21] She testified generally about the physical and mental condition of the second plaintiff. Of importance - these premises not being in contention between the parties at all, the second plaintiff is severely disabled, immobile, with numerous contractures and scoliosis, suffers epilepsy and is incontinent (bladder and bowel). She weighs 40kgs.

[22] Ms. Anderson recommended the use of two day caregivers because of the second plaintiff's weight. She opined that the second plaintiff cannot be safely managed and cared for by a single day caregiver but must necessarily be assisted by a second caregiver during the day to assist with the heavy lifting. She explained that the second plaintiff would further require a night caregiver to turn her while she sleeps, change her nappies, and provide such further care as may be required during the night shift.

⁸ The second plaintiff's total life expectancy was agreed at 32.8 years. She was at the time of trial 19 years.

[23] She gave evidence regarding the costing for the three caregivers required on the basis contended for by her, which went unchallenged by the defendant.

[24] The first plaintiff also testified to give a context to the second plaintiff's condition, the relevant circumstances pertaining to the management of her severe disability, and the family's current living arrangements. The cross examination did not challenge the gist of her evidence concerning the need for the special outlay of services required to manage the second plaintiff's severe disability but, rather uncomfortably, implied that the need for a night-time assistant could be dispensed with on the basis that she herself might pitch in and render night-time care.⁹ Also suggested to the first plaintiff, despite her strong indication to the contrary that she was desirous of establishing accommodation away from her parental home, is that it is distinctly possible, because of the second plaintiff's strong bond with her grandmother and the fact of the family having lived at her grandmother's house for all nineteen years of the second plaintiff's life, that the first plaintiff may be disinclined to use the benefit costed for accommodation adjustments on behalf of daughter if awarded the full actuarialized compensation in this respect.¹⁰

[25] In the presentation of the second plaintiff's case the several medico legal reports of the implicated experts were introduced into evidence and marked as accepted exhibits in the trial.

The defendant's case:

⁹ The purpose of this line of questioning was no doubt to establish a context in which it could later be argued that a contingency deduction of 20% against the total projected cost of such services ought to be applied.

¹⁰ The contention pressed in on in this regard too is that given the strong likelihood that the money ringfenced for this expense may not be applied in the intended manner, a deduction of 20% was reasonable to apply.

[26] The defendant did not lead any evidence to support her expert's recommendation of three caregivers per day working alone in eight-hour shifts, neither in general why she felt it justified that the total compensation award payable in monetary terms be attenuated in the respects contended for, namely by way of a standalone undertaking to pay (in the case of the expenses of the caregivers on an invoice basis) and, in respect of the transport claim, as and when the need may arise, confirmed by the respective case managers, and then procured by the Department.¹¹

[27] Indeed the defendant closed her case without leading any evidence at all. Pursuant to this election Mr. McKelvey acting on behalf of the curator urged upon this court to find that this amounted to her abandoning her reliance on the public healthcare defence in the respects sought to be relied upon concerning the few heads of damages presently under consideration.

[28] As articulated elsewhere, however, this election exercised on the defendant's behalf was premised on the firm belief that no evidence at all is required to be led because the court has spoken in *TN* and that the import of that decision is that a court can, instead of ordering the defendant to pay a lump sum money award, merely apply the developed common law by directing the Department to provide an undertaking to procure the medical service or supply in the private health care sector whenever it is required or to reimburse the plaintiff, or any trust or other entity established for the injured party's benefit, for such expenses reasonably

¹¹ That this was the basis on which the defendant hoped to avert the payment of a lumpsum award appears from the draft order that was presented on her behalf.

incurred in procuring that service or supply within 30 days of presentation of an invoice for it.¹²

The legal principles:

[29] In *Ngubane*¹³ the appeal court dealt with the onus on a plaintiff in the position of the second plaintiff suing in an Aquilian action to prove her damages for future medical expenses as follows:

‘Though the onus of proving damages is correctly placed upon the plaintiff ... 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 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 excessive’

¹² This appears from paragraph 19 of the order granted in *TN* which is expressed as follows:

“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.”

¹³ *Supra* at 784 C- F and at 785 C – D.

‘Thus, in the instant case the respondent was required to adduce evidence – a *voldoende getuienisbasis* in the words of Jansen JA – in support of its contention, that is to say, that for the next 35 years, or for some shorter period, medical services of the same, or an acceptably high, standard will be available to the appellant at no cost or for less than that claimed by him’

[30] The judgment of *Ngubane* and the principles laid down therein have been confirmed by the Constitutional Court in *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* (“DZ”).¹⁴ The principles also received consideration and were applied in *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* (“MSM”).¹⁵

[31] In *Mashinini v Member of Executive Council for Health and Social Development Gauteng Provincial Government*¹⁶ (“Mashinini”) the Supreme Court of Appeal came to grasp with the concept of the onus in an action for damages such as the present one in the context of the public healthcare defence being raised by the Gauteng Health Department. It repeated the acceptance of the *Ngubane* approach as follows:

“[13] The Constitutional Court in *MEC for Health v DZ* endorsed the approach that was adopted by this Court in *Ngubane* when faced with the ‘public healthcare defence’. It expressed the view that *Ngubane* was authority for allowing a defendant to produce evidence that medical services of the same or higher standard, at no or lesser cost than

¹⁴ 2018 (1) SA 335 (CC) at [21].

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

¹⁶ 2023 (5) SA 137 (SCA).

private medical care, will be available to a plaintiff in future. It stated: 'If that evidence is of a sufficiently cogent nature to disturb the presumption¹⁷ that private future healthcare is reasonable, the plaintiff will not succeed in the claim for the higher future medical expenses.'”

[32] In *A.W obo M.U.W v Member of the Executive Council for Health, Eastern Cape* (“*AW*”)¹⁸ the court analysed the Constitutional Court’s decisions in *DZ* and *Member of the Executive Council for Health, Gauteng Provincial Government v PN* (“*PN*”)¹⁹ respectively, as well as that of *MSM* which evidently informed the court’s decision in *TN*²⁰, in order to track the development of the common law “*once and for all*” damages rule in like cases and, where applicable, its implementation through the remedies found suitable in substitution of lumpsum money awards.

[33] The reason for this is that the present defendant similarly in *AW* referenced *TN* as authority for the proposition that the court has already developed the common law in respect of cerebral palsy cases and that it fell to it only to apply the law on the basis of the *stare decisis* principle without having to lead the same evidence again to warrant the incremental changes in the interests of justice considerations that according to the defendant required it.

¹⁷ This presumption stems from a passage in *Erasmus v Davis* 1969 (2) SA 1 (A) at 9E-G referenced in *Ngubane* in which the court observed that: “*The onus rests on plaintiff of proving, not only that he has suffered damage, but also the quantum thereof. Where, however, a plaintiff leads evidence which establishes the reasonable and necessary cost of repairs to his vehicle damaged in a collision, proof of such cost would, in my judgement, ordinarily be prima facie proof that payment to him of such cost would place him financially in the same position as he would have been in had the collision not occurred. If on all the evidence adduced at the trial there is nothing to show that the reasonable and necessary cost of repairs might exceed the diminution in value, the prima facie proof may become proof by a preponderance of probabilities and the plaintiff has then succeeded in proving his damages...*”

¹⁸ (288/2019) [2025] ZAECBHC 15 (27 June 2025) at paragraphs [111] – [52].

¹⁹ (CCT 124/20) [2021] ZACC 6; 2021 (6) BCLR 584 (CC) (1 April 2021).

²⁰ (36/2017) [2023] ZAECBHC 3; 2023 (3) SA 270 (ECB) (7 February 2023).

[34] In the present matter Mr. Nyangiwe sought to prevail upon this court (although arguing prior to the decision in *AW*) that the second plaintiff's claim is on all fours with that of *TN* in which the undertaking to pay defence was developed, although he and counsel representing the defendant in *AW* seem to have missed the important distinction that the court did not order the undertaking to pay as a standalone remedy in that matter, but in tandem with or under the auspices of the public healthcare defence.²¹ He strongly submitted that this court is bound by the finding in *TN* unless it finds it to be wrong, albeit on his understanding that a standalone undertaking to pay was in the reckoning by the court in *TN*.

[35] As indicated above the defendant's contention is that such a remedy ought to ensue not only in respect of the caregivers' costs in this instance, but also with regard to the provisioning of motor vehicles to meet the second plaintiff's mobility needs in the future if and when the need for replacement vehicles arise.

[36] It is unnecessary to repeat the court's full discussion in *AW* (which presents a ready answer to the question whether this court is expected to merely apply the "*developed common law*" in *TN* without further ado by permitting standalone undertakings to be substituted in place of lumpsum prospective damages as a universally accepted new rule),²² except perhaps to focus on some of the conclusions reached therein that bear on the present matter.

[37] Before doing so it is perhaps apposite to sound the warning, as this court did in *AW*, that *TN* is under appeal to the Supreme Court of Appeal and that a judgment

²¹ *AW, Supra*, at [59] – [62].

²² The answer is "No".

is currently awaited, although I am of the opinion that it is unlikely to impact upon the view that I take in this matter.²³

[38] Before I highlight what in *AW* is relevant to be repeated here, I commence with a brief analysis of the defendant's pleaded case.

The defendant's pleadings:

[39] The tenor of the defendant's plea is that the Department can as a first premise provide all the medical treatments, modalities, equipment and services required by the second plaintiff free of charge and at an appropriate standard in hospitals under its control. The defendant contends however that inasmuch as the Department cannot provide such services, it should be the master of procuring such services as the second defendant needs but which are not available in the public healthcare sector. As a further alternative the defendant seeks to be permitted, instead of paying any lumpsum payments to the second plaintiff in lieu of a lumpsum award, to provide an undertaking to pay for services that she may require as a result of her injuries only as and when the need or eventuality arises, or to reimburse her (or the trust to be established in her interests as the case may be) in respect of the expenses incurred on her behalf in the private healthcare sector, upon conditions to be determined by this court.

[40] In the draft order submitted to this court during closing arguments, Mr. Nyangiwe proposed, in respect of the second plaintiff's accommodation costs; her projected loss of earnings; and the costs of the administration of the trust, that the

²³ *AW, Supra*, at [52].

total mitigated loss which he urged upon this court to find proven in the form of a lumpsum, should, further, be payable in two instalments. The first within 30 days,²⁴ and the second within six months of the first payment being made.

[41] Concerning her claim for the costs of the caregivers, his draft order proposes that the defendant shall pay these amounts “*as and when presented with monthly invoices as the draw down from the total amount in respect of these items*”.

[42] As for the second plaintiff’s “*transportation claim*”, the draft order makes provision for the payment of an amount of R655 000.00 (entailing the costs for the purchase and adaption of the necessary first motor vehicle to be provided), to be paid within thirty days of this court’s order, and the purchase of the second motor vehicle to be provided only if necessary in the future on the basis of the envisaged undertaking to pay.

[43] The requested deferment of the payment of the lumpsum where applicable accords with the defendant’s formal plea that she be permitted to pay any damages sounding in money in instalments over a period of three years because of the Department’s critical financial constraints and lack of ability to afford to pay lumpsum compensation.

[44] Further, although the draft order proposed by the defendant shares the vision of the establishment of a trust to benefit the second plaintiff in respect of capital payments as conceptualised by the second plaintiff’s legal representatives, it purports to introduce the significant difference of the inclusion of “*top up*” and

²⁴ These are evidently calendar days.

“*claw back*” clauses, which kind of arrangement was made provision for in the order granted by the court in *MSM* without even so much as having hinted in the pretrial processes that she would ask for such relief.²⁵

The analysis in AW of the development of the common law through the cases to permit of payment in kind instead of lumpsum payments to avert a constitutional crisis:

[45] To return to the discussion in *AW*, whilst the Constitutional Court in *DZ* opened the door for the common law to be developed to remediate the impact of damages awards in medical negligent claims against the public healthcare authorities on their ability to discharge their constitutional obligation to provide access to healthcare for everyone the court in *AW* reiterated the clear prerequisite that any development of the common law (obviously premised on a properly pleaded case therefor) requires factual material upon which the assessment to develop it must be made. This requirement has been stressed in a number of cases before our courts on the subject.

[46] Mr. Nyangiwe’s riposte to this clear expectation is that the evidence required to develop the common law in the respects which *TN* engaged with, and especially concerning cerebral palsy cases, has already been led and all that remains is for this development to be applied in cerebral palsy cases.

[47] The second feature of *AW* is to emphasize that the kind of development of the common law implicated by the public healthcare defence relied upon by the defendant that seeks to compensate the second plaintiff differently than by way of

²⁵ See footnote 9 in *AW*, concerning this mechanism that also came up for discussion in *DZ*.

the payment of a lumpsum and as eventualised in *MSM* and *TN*, does not resort within the existing principles of the law of delict. This means that if standalone remedies are to be crafted such as envisaged in the context of the defendant's public healthcare defence beyond what the court determined was permissible in *MSM* and *TN* respectively as wholesale package deals as it were, this should necessarily entail a development of the common law.

[48] The third feature is that a development of the common law for the common reason indicated in all the cases discussed in *AW*, namely that the Department does not have the resources to meet the exorbitant claims for damages for cerebral palsy cases without compromising its constitutional obligations to provide adequately for the healthcare of other health users of its services, *by the provision of an equitable alternative payment remedy*, is not necessarily indicated in every such like case. It calls for an appropriate case (substantiated by adequate evidence) for the common law to be developed or for different remedies to be fashioned to meet the exigencies of the challenges coming at the relevant health department concerned.²⁶ However even ticking that box, an in-kind order departing from the common law norm of a lump sum payment will not bind a court in another matter to follow suit. Instead, each matters' suitability will be determined on the evidence before the court.

[49] In this respect, it was emphasized in *AW* that despite the order granted in *TN*, this did not mean that it followed automatically that a departure from the common law principles is necessarily warranted in every cerebral palsy case.

²⁶ See *MSM* at [204] and [205]; *AW* at [21].

[50] The fourth feature of *AW* was to especially highlight that the undertaking to pay remedy that the defendant presently relies on (on the basis of what the court ordered in *TN*) is not one that was intended by that court to provide in isolation. Indeed, the court in *TN* especially concluded that both the public healthcare defence and the undertaking to pay remedies should be developed together as they operate in tandem.²⁷

[51] The very extensive plea of the defendant was supplemented on 12 October 2021. It preceded the judgment in *TN* but it certainly postdates those of *DZ*, *PN* and *MSM* where a development of the common law to allow for what the defendant has in mind were changes certainly seen envisaged as coming, or possible.

[52] The plea is well articulated and covers a range of remedies to counter the eventuality that the defendant fears most, which is that it will be rendered bereft of huge sums to meet its day to day constitutional obligations to other citizens equally entitled to public healthcare services.

[53] The fallacy though is that the defendant imagines that based only on the findings of *TN* and the evidence led in that matter, that this court can for the common reason of the drain on the Department's resources intended for all health users, reach in and tweak the compensation awards to conveniently alleviate the pressure on the Department's purse in the several ways postulated in argument and as posited in the draft order presented on behalf of the defendant without a single jot of evidence. In proposing that the court do so, the defendant ostensibly

²⁷ *Supra* at [167].

overlooks the fact that the hospitals concerned in *TN* could cater for the specialised needs of the child according to a bespoke or especially curated plan that she was able in that instance to prove the Department was capable of implementing in every respect. The same situation does not apply here. The standalone undertakings to pay appeared to be to be a mere afterthought and a clutching at straws.

[54] As indicated above the defendant simply led no evidence in support of her defences in this round of the proceedings. Whilst the faint cry is heard that the payment of lumpsum compensation ought to be attenuated in the manner contended for the constitutional good of all public healthcare users, the defendant cannot hope to succeed with her defence in such regard without the necessary evidence being put up.

[55] Co-incidentally, a party seeking to develop the common law (where applicable) is also required to give notice in terms of rule 16A (1) of the Uniform Rules of Court of his/her intention to raise a constitutional issue, lest an interested party as envisaged by the sub-rule may wish to be admitted to the proceedings as *amici curiae* so that they can advance submissions in regard thereto.

[56] It was unfortunate that the defendant imagined that she achieve what she hoped for without any evidence at all, either to countervail the *prima facie* case established on behalf of the second plaintiff that the projected expenses costed by the experts at private healthcare rates would place her in the same position that she would have been in but for the hospital's staff's negligence, or to prevail upon the court to “develop” the common law by issuing standalone undertakings in lieu of

lumpsum payments, by ordering payment thereof to be made in instalments, or by reimbursing the second plaintiff “*upon invoice*”.²⁸

[57] The top up and claw back provisions of the trust proposed in the defendant’s draft order also represent a drastic break with the customary provisions of such a trust instrument that have thus far been permitted by the courts only in matters where the parties have consented thereto through extensive settlement negotiations.

[58] The public healthcare defence and its constituent parts raised by the defendant can only be entertained by a court after hearing relevant and appropriate evidence on the particular issue. In the absence thereof, the court is left with no other option but to apply the normal common law principles and expectation of a lump sum payment.

[59] Even accepting (for purposes of argument) that *TN* has developed the common law as suggested and that it is not necessary for this court to do so again (a proposition that the Supreme Court of appeal may well determine in the defendant’s favour in the defendants appeal to it against the decision in *TN*), the defendant is still expected to adduce cogent and appropriate evidence as to the suitability of the proposed alternative undertaking and how it will work in practice.

[60] I assume that in the final round of these proceedings the defendant does intend to adduce evidence both in support of the fact that the rest of the services

²⁸ See in particular *AW* at [84] –[85] referencing the failed attempt by the Gauteng Health Department to attempt something similar 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).

can be provided in the public healthcare sector (hence at no or at a lesser cost to her than in the private healthcare sector), as well as in support of the public healthcare defence raised by her, more especially regarding the suitability of the remedies which she proposes should be substituted in the place of a lumpsum damages award for the services required. Indeed Mr. Nyangiwe prefaced in his closing arguments that this court is not presently required to deal with the suitability of the hospital providing the balance of the required medical treatment to the second plaintiff, but that the defendant would cross that bridge as it were when she arrived at the postponed hearing. This amounts to an acknowledgement, even premised on the defendant's understanding of the application of *TN*, that it is not expecting a copy and paste application of the fit in that scenario to the facts of the present claim for the balance of the future medical expenses.

[61] In my view the current issues for consideration should have remained under the compass of all the anticipated future medical expenses. This may have obviated the quandary the defendant faces in this separated hearing, hoping to controvert the second plaintiff's *prima facie* case made out for her entitlement to the loss suffered by her for three subsets of her claim for future medical expenses in the form of a lumpsum payment, on the basis of argument alone.

[62] On the issue of the fact that proof is required and the nature of it, at least two other judgements of this Division bear mentioning.

[63] In *Phumla Stafana-Sohopi v The MEC for Health ("Sohopi")*²⁹ the parties in a like claim for damages settled liability and quantum, but could not agree on the

²⁹ Unreported judgment of Smith J of the Bhisno High Court in case no 330/2019, delivered on 13 December 2022.

method of payment. The defendant, averring financial difficulties and the inability to pay the damages in one lump sum, proposed to pay the damages in instalments. The plaintiff rejected this offer. In determining the issue whether the defendant should be permitted to pay the damages in instalments, it was contended on her behalf that it is public knowledge that the Department is in a financially precarious position and consequently unable to pay damages awarded against it in a lump sum. Counsel for the Defendant referred in this regard to *MEC for Finance, Eastern Cape and others v Legal Practice Council and Others* (“*MEC for Finance*”),³⁰ in which the court acknowledged the Department's precarious financial situation, describing it as a “*cause for concern*”.

[64] Counsel for the defendant (in *Sohopi*) made capital of this acknowledgement in *MEC for Finance* that the defendant had demonstrated the severe fiscal constraints imposed on the Department against its acceptance that a system of periodic payments is not irreconcilable with the high value that the Constitution ascribes to socio-economic rights. He argued that since it is a “*matter of public knowledge*” that the Department's financial position is so precarious that it is unable to pay monetary awards in one lump sum, his client was not required to lead any evidence in this regard. The defendant consequently contended for the development of the common law principles regarding the award of damages which would permit the payment of damages in instalments.

[65] The court did not agree with these submissions. It noted that the court's comments in *MEC for Finance* regarding the Department's precarious financial

³⁰ (2091/2021) [2022] ZAECKMHC 58; [2022] 3 All SA 730 (ECG); 2023 (2) SA 266 (ECMk) (21 June 2022)

position were made by it in the context of the circumstances of that matter. It qualified that “*they cannot be applied by rote to all cases where such a defence has been pleaded*”. Further and in any event, in the light of the relatively small sum of damages awarded in the matter before it, at least in a fiscal context, the court observed that it was inconceivable that the defendant would be able to establish inability to settle the judgement debt in a lump sum.

[66] The court was further mindful of counsel for the plaintiff’s submission before it that a prayer for periodic payments constitutes a special defence to the “*once and for all*” damages rule which has to be properly pleaded. In *MEC for Finance* the court had also emphasized that evidence must be led to substantiate such a defence and that it must, “*after consideration of all the relevant evidence craft an appropriate remedy for the individual plaintiff*”. The court furthermore cautioned that “*each individual case must be considered on the basis of the particular circumstances pertaining to it.*” Further, and in any event, so the court went on, the defendants liability to comply with court orders sounding money is stipulated for in section 3 (a) of the State Liability Act, No. 20 of 1957, which provides 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 judgment creditor and the accounting officer of the department concerned. The court held that since the plaintiff did not agree to different time periods for the settlement of the judgment debt that the defendant was accordingly compelled in terms of the statutory injunction to pay the debt within 30 days of the order becoming final. It held further that the defendant had also not established a factual basis for the contented development of the common law or deviation from the provisions of the State Liability Act. It thus concluded

that it was not at liberty to grant the order allowing the defendant to settle the judgement debt in instalments.

[67] In *BN obo AN v Member of the Executive Council for the Department of Health Eastern Cape*³¹ the court was similarly invited to determine whether the defendant should be permitted in law to satisfy a final court order sounding in money in periodic payments - citing the same dilemma of its being in a precarious financial position and having to contend with an ever- diminishing equitable share of the national revenue as well as the reason sought to be promoted in the present action and several other like cases that payment of a lump sum of the agreed damages would materially and detrimentally impact the Department's ability to discharge its statutory and constitutional obligations to provide access to health care for everyone, and to deliver public health care services to the inhabitants of the Eastern Cape province. Also contended for in that matter is that it would be in the interests of all persons who require access to public health care services that the compromised damages be paid in instalments. Similarly, the defendant adduced no evidence to support the relief sought by her.³² The court emphasized that a prayer for periodic payments as an alternative way of satisfying a final court order sounding in money (which is how a standalone undertaking to pay may well be construed) is a special defence that must be pleaded and evidence led to establish

³¹ (1013/2021) [2025] ZAECMHC 20; [2025] 3 All SA 420 (ECM) (25 March 2025), at [13].

³² The court noted what sort of evidence would be essential to be led in this respect, as follows:

“This evidence, according to Mr. *Bodlani*, would be in relation to:

- (a) How the lumpsum payment, specifically in medical negligence claims and not in other claims against it, materially and detrimentally impacts on its ability to discharge its obligations.
- (b) What shortfalls it incurred in the financial year and their impact on its ability to discharge its obligation to provide access to healthcare to everyone in the Eastern Cape Province.
- (c) The effect of the historic payout of excessive amounts for medico-legal claims over the years on the Eastern Cape Government's equitable share of national revenue in the medium-term economic framework, the accruals and payables.
- (d) The dire implications of any budgetary shortfalls on the Eastern Cape Department of Health's ability to render health services.”

the defendant's entitlement to the claim of making payment of damages in instalments. It was satisfied though that the law permits an alternative to a lumpsum payment norm "*where a case has been made for such relief*". However, the court concluded that no case had been made out before it:

"[33] Whether the defendant has, in this matter, made out a case for an order that she pays the agreed damages in periodic payments is the question I turn to next. In this regard, it was contended on behalf of the plaintiff that since no evidence has been led by the defendant to substantiate the relief it seeks, her case in that regard must fail.

[34] Regarding how the defence of periodic payments must be asserted, the court, in *MEC Finance*³³ went further and said:

'[69] The prayer for periodic payments constitutes a special defence to the "once and for all" rule, which must be properly pleaded. Evidence must be led to substantiate the defence and the court must, after consideration of all the relevant evidence craft an appropriate remedy for the individual plaintiff. This will require an assessment of medical evidence as to the nature and condition of the injured party, the extent of the immediate need, which would vary from one victim to another, the time of the likely future need and the extent and time of the relevant instalments. Each individual case must be considered on the basis of the particular circumstances pertaining to it.'

[35] That the defendant, in its plea, pleaded the defence of periodic payments of any award of damages is not subject to any controversy. However, in the stated case presented, there are no agreed facts between the parties regarding, inter alia, the extent of the AN's immediate need, and what the proposed first instalment will be able to cover of the agreed damages. Neither are there any facts which provide a factual basis for the contention that the defendant makes that paying the lumpsum of the agreed damages in this case will materially and detrimentally impact its ability to discharge its statutory and constitutional obligations of providing access to health care to the inhabitants of the Eastern Cape Province.

[36] Smith J, in *Phumla Stafana Sohapi v MEC for Health*, reiterated that factual basis must be laid for the deviation from statute which a party contends for.³⁴ The Learned Judge cautioned against mechanically applying to all cases involving medical malpractice the approach of an acceptance as a general position that the Department of Health's precarious financial position is public knowledge, and therefore no evidence need be led to substantiate the defence of periodic payments. The Learned Judge put it this way:

'The comments regarding the department's precarious financial position cannot be

³³ Supra

³⁴ Supra at

applied by rote to all cases where such a defence has been pleaded. . .³⁵

[37] The defendant has agreed to compensate the plaintiff not in kind as in the sense of the public health care defence, but in monetary terms to the extent agreed by the parties in the draft order that I was presented with. A general, unsubstantiated assertion regarding her budgetary constraints and obligation towards other beneficiaries of the right enshrined in section 27 does not assist her. This is not to say it is not acknowledged that the defendant's coffers continue to be significantly affected by the extent of medical malpractice litigation. But as Eksteen J observed in *MEC Finance*, it is quintessential of any enterprise that the payment of its debt will result in less money for the implementation of its business.

[38] Therefore, without any evidential basis for the periodic payments contended for, it cannot be just to accede to the defendant's request in this case, for that would mean that AN's interests have arbitrarily been relegated to insignificance. For this reason, the defendant's request for an order that she pays the agreed damages set out above in instalments must be turned down."

[68] The final conclusion highlighted above commends itself to me.

[69] Absent any evidence on the suitability of the proposed standalone remedy of the two proposed undertaking, there is no reason to depart from the common law approach regarding the proof of the second plaintiff's claim in this respect. It is not known where the money will come from and if there will be money in future to pay for these expenses. There is simply no evidence before the court that the undertaking sought by the defendant suits the needs of the second plaintiff, or that demonstrates that a lump sum payment upfront is unreasonable and inappropriate, or that provides an assurance that the undertakings will promptly be reimbursed.³⁶

[70] In short, there is no evidence before the court which displaces the *prime facie* evidence of the second plaintiff for compensation of her agreed mobility costs

³⁵ I have referenced this observation under the discussion above of the *Sohopi* matter.

³⁶ *AW, Supra*, at [84] –[85]. I mention as an aside that although both parties referred me to the reasons furnished in *S M v Member of Executive Council for Health, Eastern Cape Province* (1433/2015) [2024] ZAECHMHC 15 (18 March 2024) in respect of the Department's failure to have succeeded in persuading the court that it should be permitted to put up caregiving services itself in *lieu* of paying a lump sum in respect of such services, the undertaking conceptualised *in casu* is of an entirely different nature.

and caregiving services (at the actuarialized projection of these) to be paid in a monetary award upfront.

Contingencies:

[71] On the issue of the contingencies which Mr. Nyangiwe suggested should be applied (as an alternative to accepting his proposition that this court can instead of ordering the defendant to pay a lumpsum permit her to furnish the standalone undertakings to pay), I am satisfied concerning the second plaintiff's proven accommodation costs, that this is an imminent expense and that no contingency deduction ought to be made thereagainst in this respect.

[72] Regarding the mobility/transport expenses, however, I am inclined to agree that a contingency factor should be applied against the prospect that the second plaintiff may not require an upgrade of her first motor vehicle during her lifetime. In this regard I am satisfied that a contingency deduction of 15% is reasonable against the amount which is nett of the proven cost of the first motor vehicle and its adaption.

[73] So confident was the defendant in her belief that an undertaking to pay for caregiving services on an invoice basis was for the mere asking, that no contingency deduction was proposed in respect of the projected award for these anticipated services. However these needs were costed conservatively and there is no room for such services to be dispensed with, which in the private sector come at a considerable premium. There is no reason in my view to adjust this loss.

Conclusion:

[74] The failure of the defendant to lead any evidence in support of its defences (the public healthcare defence and standalone undertakings to procure and or pay for services) precludes this court from entertaining any aspect of the defendant's pleaded defences. Contrariwise, I am satisfied that the second plaintiff has established that she is entitled to all the agreed and proven damages set out above, payable in a lump sum monetary award.

Order:

[75] In the premises, and with the assent of the curator who confirmed that the order proposed is in the second plaintiff's best interest, the following order issues :

1. The defendant shall pay the second plaintiff the amount of R12 191 393.00 which is made up as follows:
 - 1.1 Loss of earnings – R1 896 101.00
 - 1.2 Accommodation/Housing – R2 343 990.00
 - 1.3 Mobility – (1) R655 000.00
(2) R942 307.00³⁷
 - 1.4 Interim case manager's fee – R50 000.00
 - 1.5 Caregivers – R5 453 433.00
 - 1.6 Costs of administration of trust
@ 7.5% of total monetary award – R850 562.00.³⁸

³⁷ The lesser actuarial figure is R2 343 990.00 minus the immediate outlay for the first motor vehicle of R655 000.00 leaving a balance of R1 108 596.00. A contingency deduction of 15% is applied against the net amount of R 942 306.60, rounded off to the nearest rand.

³⁸ The total monetary award is R 11 340 831.00.

2. The amount referred to paragraph 1 shall be paid within 30 calendar days of this order.

2.1. In the event that the defendant fails to pay the amount referred to in paragraph 1, within 30 calendar days of the order, the defendant shall be liable to pay interest thereon at the prescribed rate of interest.

3. The Defendant shall pay Second Plaintiff's costs of suit (on the High Court scale) to date hereof, such costs to include:

- 3.1. the costs of two counsel (Scale C).
- 3.2. the costs attendant upon the obtaining of payment of the full sums including any interest referred to in paragraphs 1, 2, 3 and 4.
- 3.3. the costs associated with the appointment of a *curator ad litem* for and on behalf of the second plaintiff as well as the costs associated with the creation of the trust referred to herein.
- 3.4. the costs incurred in obtaining the medico-legal reports including supplementary reports, addendums, actuarial reports and joint minutes, as well as, where necessary, the qualifying, attendance, reservation and preparation fees of:

Sue Anderson (Nursing)

Retha Milne (mobility expert)

Tabisa Caga (Occupational Therapy)

Bulelani Ketsekile (Architect)

Dr Robert Campbell (Life Expectancy)

A Sakonda (Industrial psychologist)

Tsebo Actuaries (Actuary)

4. The defendant shall pay interest on the aforesaid costs at the current prescribed legal rate of interest from date of *allocatur* or agreement to date of payment thereof.

5. The amounts referred to in paragraph 1, and any interest referred to in paragraph 2.1; all costs referred to in paragraph 3; and interest referred to paragraph 4, shall be paid to the second plaintiff's attorney's trust account with account details as follows:

ABN ATTORNEYS TRUST ACCOUNT

BANK: FIRST NATIONAL BANK

ACCOUNT NO: 6[...]

BRANCH: VINCENT, EAST LONDON

6. The net balance remaining, after recovery of all amounts owing in terms of this order and payment of all costs and expenses for which the Plaintiffs are liable, shall be dealt with on the basis that the Second Plaintiff's attorneys shall transfer the said net balance thereof to the "Y... P... D... Trust"³⁹, which trust shall be established and registered in accordance with the terms set out herein:

- 6.1 within 60 calendar days from upliftment of this order the trust shall be established in accordance with the Trust Property Control Act No. 57 of 1988, such Trust to be a "*special trust*" as defined in Section 1 of the Income Tax Act, No. 58 of 1962 (as amended) and to report to this court for further direction should the necessary letters of authority not have been issued within 6 months hereof.

- 6.2 to pay all monies, to be held in trust for the benefit of the second plaintiff (hereinafter referred to as "*the beneficiary*"), to the trust upon registration of the trust.

7. The trust instrument shall make provision for the following:

- 7.1 That the beneficiary shall always be the sole beneficiary of the trust.

- 7.2 That the trustee(s) and their successors are to provide security to the satisfaction of the Master.

³⁹ The full moniker of the trust to be established is withheld to protect the identity of the vulnerable second plaintiff.

- 7.3 That the powers of the trustee(s) shall specifically include the power to make payment from the capital and income for the reasonable maintenance of the beneficiary, or for any other purpose which the trustee(s) may decide to be in the beneficiary's interest, and if the income is not sufficient for the aforesaid purpose, that the trustee(s) may utilise capital.
- 7.4 That the ownership of the trust property vests in the trustee(s) of the trust in their capacity as trustees.
- 7.5 Procedures to resolve any potential disputes, subject to the review of any decision made in accordance therewith by this Honourable Court.
- 7.6 The exclusion of all benefits (income and/or capital) accruing to the second plaintiff as beneficiary of the trust from any community of property and/or accrual system in any marital regime.
- 7.7 That the amendment of the trust instrument be subject to the leave of this Honourable Court.
- 7.8 The termination of the trust upon the death of the beneficiary, in which event the trust assets shall pass to her estate.
- 7.9 That the trust property and the administration thereof be subject to an annual audit.
8. Until such time as the trustees are able to take control of the capital amount and to deal therewith in terms of the provisions of the trust, the second plaintiff's attorneys are authorized and ordered to pay from the capital amount:
 - 8.1. Any reasonable payments that may arise to satisfy any reasonable need for treatment, therapy, care, aids, equipment or otherwise that may arise.
 - 8.2. Such other amounts as reasonably indicated and/or required for the wellbeing of second plaintiff and/or which are in her best interests.
 - 8.3. The attorneys shall be entitled, only to the extent that the beneficiary's primary reasonable needs indicated in paragraphs 8.1 and 8.2 above are not compromised, to make payment of expenses incurred in respect of accounts rendered by expert witnesses as identified in this order as well as counsel's fees from the aforesaid funds held by them for the benefit of the second plaintiff.

- 8.4. The attorneys shall be entitled, only to the extent that the beneficiary's primary reasonable needs indicated in paragraphs 8.1 and 8.2 above are not compromised, to payment from the aforesaid funds held by them for the benefit of the second plaintiff of their fees in accordance with their written fee agreement.
9. Until such time as the trust is established, the aforesaid award shall be paid to the second plaintiff's attorneys to be invested in an interest-bearing account in terms of section 86 of the Legal Practice Act, No. 28 of 2014 and in due course to account fully to the trustees appointed, of all costs, fees, expenditure and/or disbursements paid from the award once the Trust has been registered and the balance of the award is paid over.
10. The issue of the plaintiffs' remaining claims for future medical expenses is postponed *sine die*.

B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING : 10 & 13 March 2025
DATE OF JUDGMENT : 14 October 2025

Appearances:

For the plaintiff: Mr. C McKelvey together with Mr. B Ndamase instructed by ABN Attorneys, East London (Mr. Nyeniso).

For the defendant: Mr. X Nyangiwe instructed by The State Attorney, East London c/o Shared Legal Services, King William's Town (Mr. Mgujulwa).