



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

Of interest
CASE NO. 856/2019

In the matter between:

A[...] Q[...] obo

I[...] Q[...]

Plaintiff

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH, EASTERN CAPE PROVINCE**

Defendant

JUDGMENT

LAING J

[1] This is an action for damages resulting from the negligence of the medical practitioners and nursing staff at the All Saints Hospital, situated in the district of Ngcobo. The plaintiff sued in her personal and representative capacity as mother and

natural guardian of her son, IQ, who experienced complications at birth on 24 September 2006, resulting in cerebral palsy.¹

[2] The issue of liability has already been determined in favour of the plaintiff. The issue of quantum has been partly settled or resolved.² The claim for future hospital care, medical and related expenses, remains in dispute.

Background

[3] In its amended plea, the defendant relied upon defences that have emerged from recent litigation in the field of medical negligence. The first defence was what is commonly referred to as the public healthcare remedy. To that effect, the defendant denied that the plaintiff and IQ would suffer damages in the amount claimed because future care was available from the public healthcare sector at no cost and at an acceptable standard; alternatively, the defendant tendered the provision of care at a public healthcare institution. The second defence was the undertaking-to-pay remedy. It lies at the heart of the present matter and is set out below:

‘... 9.3.3 Alternatively to paragraph 9.3.2,³ 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, the defendant undertakes, at her, alternatively, the plaintiff’s election, to—

(a) 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

(b) reimburse the plaintiff, or any trust established for the benefit of her minor child, for expenses reasonably incurred in the private healthcare sector in procuring the future medical care that is not so available in the public

¹ Since IQ’s having attained majority, he has been represented by a *curator ad litem*.

² The defendant is liable for payment of, *inter alia*, general damages, as well as loss of earnings claimed by the plaintiff in her representative capacity.

³ The paragraph in question referred to the first defence, i.e. the public healthcare remedy.

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

(‘the undertaking to pay remedy’).

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

9.4.1 so as to accommodate the public healthcare and undertaking to pay remedies as contemplated in paragraphs 9.3.2 and 9.3.3 above respectively;

9.4.2 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;

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

(a) 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

(b) where a court does not so order, the defendant provides an undertaking to—

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

(ii) 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.

9.5 In the circumstances, and subject to paragraph 9.3.1 above,⁴ it is just and equitable that, to the extent that the plaintiff proves that her minor son requires the future medical care, this court makes an order to provide it under the public healthcare remedy and/or the undertaking to pay remedy as pleaded in paragraphs 9.3.2 and 9.3.3, along with the further relief provided for below and in the defendant's counterclaim.'

[4] Subsequently, the defendant recognised that reliance could no longer be placed on the first defence as IQ now resides in the Western Cape. The defendant was constrained to fall back on the second defence.

Issues to be decided

[5] A key issue for determination is the defendant's argument that the common law has been developed under recent case law to accommodate the undertaking-to-pay remedy. If not, then the defendant points out that the consequences would be as follows: it would be necessary for her to call the same witnesses and present the same evidence in each case where the defence in question was pleaded; another court might reach a different conclusion; the process would, overall, lead to further costs and delay; judicial resources would be spent unnecessarily on an issue that had already been decided; and the doctrine of *stare decisis* would be violated inasmuch as the decision in *TN obo BN v Member of the Executive Council for Health*⁵ was binding.

[6] The plaintiff contends, of course, that the common law has not been developed as argued by the defendant. She goes on to assert that the defendant has also failed to plead why it should be so developed, given the facts (or lack thereof) in the present matter.

⁴ The reference is to the relevant portion of the defendant's plea in terms of which she asserted that future medical care was available from the public healthcare sector at no cost and at an acceptable standard.

⁵ 2023 (3) SA 270 (ECB).

[7] The above issue marks the dividing line between the parties' respective positions and informs the discussion that follows. It is necessary, at the outset, to summarise the most relevant recent case law that informs the subject.

Legal framework

[8] As a point of departure, the Constitutional Court introduced the possibility of the development of the common law in *MEC for Health and Social Development, Gauteng v DZ obo WZ*.⁶ In that regard, Froneman J confirmed the continued application of two key principles that underpin the law of delict: (a) damages are to be awarded in money 'because money is the measure of all things';⁷ and (b) the plaintiff must claim in one action all damages flowing from one cause of action, i.e. the 'once and for all' rule.⁸ This was explained further as follows:

' . . . What can be drawn from these authorities is that, in relation to delictual claims, the "once and for all rule" is to the effect that a plaintiff must generally claim in one action all past and prospective damages flowing from one cause of action. The corollary is that the court is obliged to award these damages in a lump sum, the object of which is to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions. It is buttressed by the *res judicata* principle, the purpose of which is to prevent a multiplicity of actions based upon a single cause of action and to ensure that there is an end to litigation.'⁹

[9] The court rejected the argument that delictual compensation need not sound in money, and that the 'once and for all' rule did not relate to the quantification of damages. It did, however, accept the possibility that, within the context of a claim for future medical expenses, a defendant could challenge a claim for damages on the basis that the amount claimed was unreasonable because the plaintiff was more likely to use public healthcare which was as good as and cheaper than private

⁶ 2018 (1) SA 335 (CC).

⁷ Para 14, citing *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A), at 782D – F.

⁸ Para 15, citing *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A), at 835C – H.

⁹ Para 16.

healthcare.¹⁰ The court referred to *Ngubane v South African Transport Services*,¹¹ remarking that:

‘[the decision] 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 proving of damages.’¹²

[10] Importantly, any development of the common law, said Froneman J, required factual material upon which an assessment to that effect could be made. There was no such material in the case before the court. The learned judge went on to say, however, that:

‘ . . . 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 argument are arguable. Factual evidence to substantiate a carefully pleaded argument for the development of the common law must be properly adduced for assessment. If it is sufficiently cogent, it might well carry the day.’¹³

[11] It is apparent from *DZ* that a court must be satisfied that both the pleadings and the evidence support the development of the common law. If not, then the existing and well-established principles of awarding damages in money and the ‘once and for all’ rule continue to apply.

[12] Shortly after *DZ* came the decision of Keightley J in *MSM obo KBM v MEC for Health, Gauteng*.¹⁴ The case dealt with a claim brought on behalf of a child with cerebral palsy for future medical expenses based on the cost of private healthcare services. The defendant pleaded that the relief was unreasonable and alleged that most of the services could be provided by a public healthcare facility at the same or

¹⁰ Para 18.

¹¹ 1991 (1) SA 756 (A).

¹² *DZ*, para 21.

¹³ Para 58.

¹⁴ 2020 (2) SA 567 (GJ).

better level of service and at a lower cost. Consequently, argued the defendant, the court ought not to award a lump-sum payment but should rather order the facility to provide the services in question; in other words, the court should order compensation in kind. Furthermore, argued the defendant, the court should award damages that were payable periodically in relation to any non-identified services

[13] Keightley J found that it was necessary, in the wider interests of justice, to develop the common law to permit orders for compensation in kind for future medical expenses.¹⁵ The learned judge made it clear, however, that whether to do so would always depend on the evidence presented in each case.¹⁶ There was, similarly, no reason why the common law could not be developed in relation to the 'once and for all' rule.¹⁷ Keightley J held, however, that there was insufficient evidence to justify an order for periodic payments of the compensation to which the plaintiff was entitled.¹⁸

[14] A few years later, in *Member of the Executive Council for Health, Gauteng Provincial Government v PN on behalf of EN*,¹⁹ the Constitutional Court confirmed that the common law could be developed to allow for the public healthcare and undertaking-to-pay defences. This could be achieved with the support of 'factual evidence to substantiate a carefully pleaded argument'.²⁰ The court emphasised, however, that this did not mean that the individual interests of the claimant were relegated to insignificance; he or she had to be afforded an appropriate remedy and compensated fairly for loss suffered. The healthcare authority was, nevertheless, entitled to lead evidence on the desirability and practical implications of a development of the relevant common law rules.²¹

[15] The Supreme Court of Appeal subsequently addressed the subject in *Mashinini v MEC for Health, Gauteng*.²² In that regard, Zondi JA held that *MSM* did not develop the common law to accommodate the public healthcare remedy. The learned judge found that the defendant in that matter had merely discharged an

¹⁵ Para 194.

¹⁶ Para 197.

¹⁷ Para 203.

¹⁸ Para 204.

¹⁹ 2021 JDR 0564 (CC).

²⁰ Para 26, citing *DZ*, para 58.

²¹ Para 29.

²² 2023 (5) SA 137 (SCA).

evidential burden by showing that the costs of private healthcare services, claimed by the plaintiff, were unreasonable and unnecessary. The order for damages ultimately excluded such costs. Zondi JA went on to state that:

‘In essence, this was not an order which went beyond the common law, but one consented to by the defendant in that matter on the basis that this would result in the monetary award being reduced. In that regard, Keightley J erred in holding that she was developing the common law. The order that she granted was one based on delictual principles.’²³

[16] At about the same time as the decision in *Mashinini*, Griffiths J decided the matter of *TN*.²⁴ In that regard, the court considered a claim for future medical expenses, to which the defendant had pleaded both the public healthcare and the undertaking-to-pay remedies. Griffiths J observed, with reference to the above authorities, that:

‘ . . . once a prima facie case has been established by the plaintiff apropos her claim for damages, and where the defendant pleads an extension of the common law as in the present matter, the defendant bears an evidentiary onus to rebut the prima facie case put up by the plaintiff.’²⁵

[17] The court interpreted *DZ* as having confirmed that neither the ‘money damages’ rule nor the ‘once and for all’ rule conflicted with the constitutional value system. Nevertheless, the issue had to be dealt with on a case-by-case basis. *TN*, said Griffiths J, was such a case; there was sufficient evidence to decide that the common law principles in question offended the Bill of Rights.²⁶ The court went on to find that, based on the evidence led, it was in the interests of justice for the common law to be developed. This would provide courts with a broader remedial framework that included the public healthcare and the undertaking-to-pay remedies when adjudicating medical negligence claims.²⁷

²³ Para 25.

²⁴ See n 5 above.

²⁵ *TN*, para 24.

²⁶ Para 159.

²⁷ Para 166.

[18] Whereas *TN* is currently on appeal, the defendant relied extensively upon the decision for purposes of the present matter. The relevant principles emerging from the authorities mentioned earlier will be applied in the discussion that follows.

The defence pleaded

[19] The immediate difficulty facing the defendant is her abandonment of her first defence, as pleaded, viz the public healthcare remedy. In *TN*, Griffiths J stated that it was self-evident this should be developed together with the undertaking-to-pay remedy. If the remedies were not granted in tandem, then their respective efficacies would be substantially reduced.²⁸ This was an issue considered, too, by the court in *AW obo MUW v Member of the Executive Council for Health, Eastern Cape*,²⁹ where facts like those in the present matter presented themselves. The mother of a child with cerebral palsy sued the defendant for damages arising from the negligence of medical staff at a hospital in Mthatha. The defendant pleaded both the public healthcare and the undertaking-to-pay remedies, but abandoned the former when the plaintiff and her child relocated to KwaZulu-Natal. In that regard, Hartle J referred to *TN* with approval, confirming that the remedies should operate in tandem to maximize the defendant's opportunity not to have to part with lump-sum payments that crippled the budget, to the prejudice of other public healthcare users.³⁰ The defendant's abandonment of the public healthcare remedy in the present matter serves, at the very least, to undermine her pleadings. There is, however, a more fundamental problem, as will be explored further.

[20] At trial, the defendant relied exclusively on her second defence, viz the undertaking-to-pay remedy. The basis of her plea was that *TN* had developed the common law to accommodate the remedy in question. This meant that the 'money damages' and 'once and for all' rules were not the key determinants for a just and equitable order, as envisaged under sections 38 and 172 (1) (b) of the Constitution. Furthermore, no claim could be made for the award of 'lump-sum' damages where the defendant had undertaken to procure medical supplies or services from the

²⁸ *TN*, para 167.

²⁹ 2025 JDR 3182 (ECB).

³⁰ Paras 79 – 80.

private sector or to reimburse the plaintiff for any expenses reasonably incurred in that regard. The defendant also pleaded that, to the extent that IQ required future medical supplies or services, it would be just and equitable for the court to grant relief that encompassed the remedy.

[21] On a proper reading of *TN*, it cannot be said that the court developed the common law, in general, to accommodate the undertaking-to-pay remedy. It did so merely in relation to the facts presented in that matter. As Griffiths J pointed out, whether to develop the common law could only be decided on a case-by-case basis.³¹ This was consistent with the *obiter* finding of the Constitutional Court in *DZ* and it remains the position until sufficiently cogent argument based on a properly pleaded case and supported by a clear body of factual evidence succeeds in opening the door a little wider to further development of the common law.

[22] Consequently, the basis for the defendant's plea in the present matter is flawed. She was required to have pleaded why, in this case, the common law should be developed to allow the defendant to avoid the usual application of the 'money damages' and 'once and for all' rules. This was simply never done.

The evidence presented

[23] The parties agreed at trial that R 5 210 525 was a reasonable amount in relation to the claim for future medical expenses. There was no need for the plaintiff to adduce evidence to that effect.³²

[24] The defendant, for her part, called the Chief Director: Clinical Support Services, Mr Kidwell Matshotyana. The witness stated that he was part of a team set up by the defendant to manage the implementation of the public healthcare and undertaking-to-pay remedies. The team comprised several senior officials in the Eastern Cape Department of Health (ECDOH), met weekly, and reported monthly to

³¹ See n 26 above.

³² *DZ*, para 20, citing *Ngubane*, 784E -G.

the Head of Department. In cases where ECDOH had been ordered to provide medical services, the team had devised a system for doing so, and monitored the implementation plan accordingly. There were three cases in that regard, including *TN*, all of which involving a plea that incorporated the undertaking-to-pay remedy and an order to that effect. Mr Matshotyana was unaware of any non-compliance. A policy guideline as well as a draft protocol were being developed. Mr Matshotyana acknowledged that there was not yet any cooperation agreement between the various provinces for the implementation of the remedies pleaded. Consequently, ECDOH was unable to offer medical services required by IQ at a facility in the Western Cape. ECDOH would, nevertheless, undertake to make payment for the child's needs.

[25] Under cross-examination, Mr Matshotyana explained that ECDOH's priority was the care of the child. He accepted that it was likely that IQ would depend on private healthcare services; he also accepted that an order could not be enforced against the Western Cape public healthcare authorities; and he accepted that there were problems with Eastern Cape private healthcare service providers because of non-payment.

[26] The defendant also called the Chief Director: Management Accounting and Integrated Budget Planning, Mr Sean Frachet. He stated that the provision of medical supplies and services, pursuant to an undertaking-to-pay order, would be coordinated in accordance with interaction between a private case manager, appointed by the plaintiff, and a public case manager, appointed by ECDOH but based in the Western Cape. The case managers would jointly prepare and submit a care and management plan by 30 June, setting out the supplies and services to be provided to the plaintiff and her child during the succeeding financial year.

[27] The witness went on to explain ECDOH's budgetary and financial planning processes, including its use of a medium-term expenditure framework (MTEF) for the funding of specific healthcare objectives. National and provincial legislation, accompanied by estimates of revenue and expenditure, underpinned the development of a three-year MTEF in relation to the allocation of funding to provinces and departmental programmes. Furthermore, an annual estimate of

provincial revenue and expenditure (EPRE) provided the provincial legislature with comprehensive details of how ECDOH and other departments planned to spend the funds allocated to them. Mr Frachet said that ECDOH's budget, as contained in the EPRE, was broken down by programme, economic classification, and 'standard item' (eg payments for medicines, surgical sundries, etc). ECDOH required an appropriation vote from the provincial legislature before it could receive funding for identified programmes and sub-programmes. Amongst the eight programmes that informed ECDOH's budget was Health Care Support Services. The Head of Department had obtained approval, on 15 June 2023, for the creation of a new sub-programme thereunder, called the Medico-Legal Compensatory Services Sub-Programme. This was designed to accommodate the undertaking-to-pay remedy. It meant that funds could be ring-fenced for ECDOH to procure or pay for the medical supplies and services envisaged in terms of any order made in relation to the remedy pleaded under a medical negligence claim. Subsequently, ECDOH had appropriated an amount of R 105 million for the new sub-programme, covering the 2024/2025 financial year. Of this amount, R 65 million had been appropriated for medical supplies and R 20 million for consumable supplies. The funds were tagged as 'specifically and exclusively appropriated' with the implication that they could only be used to give effect to the remedy. This ensured the enforceability of any order in that regard.

[28] Mr Frachet was confident that the funds were sufficient. He stated that IQ's likely costs would be in the region of R 1 042 000 per annum, but subject to a lifetime of five years as calculated by various experts. The above approach had already been adopted for at least two cases, including *TN*, where the total amount budgeted for the implementation of the remedy during the 2024/2025 financial year was R 573 636. It was anticipated that further settlements reached or orders made during the 2025/2026 financial year, incorporating the remedy, would cost approximately R 1 100 000 each. The budgeted amount of R 105 million was more than enough to cover such cases. In the unlikely event that the funds were insufficient, the shortfall could be addressed through an adjustments budget.

[29] The witness acknowledged that approval for the sub-programme in the ECDOH budget was valid for only two financial years. This was because the relevant

national authorities were still engaged in the implementation of changes to the Uniform Budget Programme Structure to address medico-legal claims across the nine provinces. He added, however, that significant progress had been made. It was anticipated that the necessary changes would be achieved for the 2026/2027 financial year, resulting in all provincial departments of health having a budgetary mechanism for ring-fencing funds to give effect to the undertaking-to-pay remedy.

[30] Mr Frachet explained that orders against ECDOH for lump-sum payments created budgetary instability. In that regard, funding had to be reprioritised, drawing resources away from healthcare needed elsewhere. The specifically and exclusively appropriated nature of funds allocated to the sub-programme promoted stability, allowing periodic payments to be made during the remaining lifetime of someone in IQ's position. During cross-examination, the witness admitted that no budgetary provision had been made for lump-sum payments; an order to that effect meant that funds had to be redirected, depleting available resources that were intended for other healthcare priorities. There was, however, budgetary provision for periodic payments made in terms of the remedy; these were considerably more manageable. He was aware of problems regarding the payment of a service provider who had been appointed in TN, but was unable to comment on the details. He was, moreover, unaware of a recent matter in which the court had ordered periodic payments but where ECDOH had failed to comply, resulting in the issuing of a writ for R 4 115 858.³³

Discussion

[31] During argument, counsel for the defendant referred to *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)*³⁴ as authority for the development of the common law in the present matter. In that regard, the Constitutional Court recognised that, in cases where the common law was deficient in promoting constitutional objectives, it was implicit in section 39 (2) of

³³ *Stretch NO obo LT v Member of the Executive Council for Health, Eastern Cape* (unreported, case no. 196/2019, Eastern Cape Division, Makhanda) (19 September 2023).

³⁴ 2002 (1) SACR 79 (CC).

the Constitution,³⁵ read with section 173,³⁶ that the courts were under a general obligation to develop it appropriately.³⁷ The Constitutional Court was careful to point out, however, that not each and every case where the common law was involved required a court to embark upon an independent exercise to decide whether development was needed and how this was to be done.

[32] The Supreme Court of Appeal referred to *Carmichele* several years later in *Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Zulu*.³⁸ The matter concerned an appeal regarding the development of the common law to modify the ‘once and for all’ rule for the payment of a child’s future medical expenses. In that regard, the appellant contended for an order that would permit payment as and when such expenses arose, like the undertaking-to-pay remedy in the present matter. Swain JA held as follows:

‘The common law would have to be developed by the abolition of the ‘once and for all’ rule and not merely its modification, where damages are claimed in respect of future medical expenses. To determine whether a development of the common law is desirable, the correct approach is that “there are two stages to the enquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the objectives of s 39 (2) of the Constitution, requires development. This enquiry requires a reconsideration of the common law in the light of s 39 (2). If this enquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39 (2) objectives”.’³⁹

[33] Within the context of a constitutional right of access to healthcare services,⁴⁰ DZ introduced the possibility of the development of the common law in relation to the payment of orders for future medical expenses. The decision appeared to recognize

³⁵ Section 39 (2) provides that, when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

³⁶ Section 173 stipulates that courts have inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.

³⁷ *Carmichele*, para 39.

³⁸ 2016 JDR 2242 (SCA).

³⁹ Para 9, citing *Carmichele*, para 40.

⁴⁰ Section 27 (1) (a) of the Constitution indicates that everyone has the right to have access to healthcare services; section 27 (2) requires the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of such right.

that, at least in some respects, there was a need to develop the ‘money damages’ and ‘once and for all’ rules. To the extent that the first stage of the *Carmichele* enquiry (*why* there should be development) may have been answered, it is the determination of the second stage (*how* this should happen) that has proved vexingly elusive. As *DZ* made clear, the question turns on whether a party has, in this regard, properly adduced sufficient factual evidence to substantiate a carefully and cogently pleaded argument. Absent these requirements, the defence cannot succeed.

[34] The principles were reiterated in *MEC for Finance, Eastern Cape and Others v Legal Practice Council and Others*,⁴¹ where a full bench, per Eksteen J, held as follows:

‘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.’⁴²

[35] In the present matter, Mr Frachet presented compelling evidence for why the implementation of the undertaking-to-pay remedy was warranted from a financial management perspective. It would ensure stability in the preparation and administration of ECDOH’s budget. The specifically and exclusively appropriated nature of the funds allocated to the Medico-Legal Compensatory Services Sub-Programme prevented the complications caused by having to comply with lump-sum payment orders, which inevitably entailed the shifting of funds originally allocated to other healthcare objectives. The reasoning was never seriously challenged in cross-examination. Similarly, it was never disputed that the allocated amount R 105 million was enough to cover periodic payments for existing and anticipated cases during both the 2024/2025 and 2025/2026 financial years.

⁴¹ 2023 (2) SA 266 (ECMk).

⁴² Para 69.

[36] Of concern, nevertheless, was Mr Frchet's indication that approval for the sub-programme was valid for only two financial years. Despite assurances that the relevant national authorities were making progress in the implementation of changes to budgetary structures so that medico-legal claims could be addressed uniformly by all provincial departments of health, there was no evidence that this could be accomplished by the time the above approval lapsed. No-one from either the National Health Council or the National Department of Health could support or confirm Mr Frchet's assertions in that regard. The implications of all this for the plaintiff remain unknown.

[37] Crucially, however, what was missing from the defendant's evidence were practical details of precisely how the remedy would be implemented. From the draft order provided by counsel for the defendant, it was apparent that the provision of medical supplies and services would be jointly coordinated by private and public case managers, to be appointed by the respective parties. This had not yet been done. There was no indication as to when the appointments would be finalised, what terms of reference would apply, and how exactly the defendant would procure the numerous supplies and services listed in annexure 'A', considering that this would need to be done in compliance with its supply chain management policy or similar regulatory instrument. The potential bureaucratic complexities and delays are daunting. Regarding the proposed alternative, it is simply unreasonable to expect the plaintiff or any trust established for IQ's benefit to shoulder the costs of supplies or services procured from either the private or public healthcare sector, pending the defendant's reimbursement thereof. As the Supreme Court of Appeal remarked in *Zulu*:

'Numerous practical difficulties which impinge upon [the] claimants' right of access to healthcare services are readily apparent. Where emergency treatment is required the appellant's obligation to make payment only within 30 days of the presentation of a quote, would in most cases frustrate vital treatment. Where the appellant declined to accept the quote, the claimant would be forced to institute action. The result would be a plethora of actions against the appellant with the concomitant denial of medical treatment to claimants. It

is no answers to these concerns for appellant's counsel to submit that they could be allayed by carefully crafted court orders.⁴³

[38] The worrying prospect of non- or delayed payment to service providers was put squarely by the plaintiff's counsel to the defendant's witnesses in the present matter — without a satisfactory answer. There was also the distinct possibility of disagreement between the case managers regarding the contents of either the care and management plan or annexure 'A', necessitating mediation or further litigation. To this must be added the complications resulting from IQ's residence outside the province. In that regard, Mr Matshotyana conceded that an order was enforceable only against ECDOH, not the Western Cape public healthcare authorities; he admitted that there was no cooperation agreement between the provinces for the implementation of the remedies pleaded.

[39] In *Mhlatshana v Member of the Executive Council for Health, Eastern Cape Province*,⁴⁴ Govindjee J observed that:

'Everyone has the constitutional right to have access to healthcare services. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Plans, however laudable, must be reasonable in their conceptualisation and implementation, as detailed by the Constitutional Court in *Government of the Republic of South Africa v Grootboom*.⁴⁵ In support of legislative measures, it has been held that the formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.'⁴⁶

[40] There are, in the end, too many unanswered questions. The evidence presented by the defendant in relation to the feasibility of the undertaking-to-pay remedy was beset by too many unknowns to be sufficient for purposes of the present

⁴³ *Zulu*, para 11.

⁴⁴ (1433/2015) [2024] ZAECHMHC 19 (18 March 2024).

⁴⁵ 2001 (1) SA 46 (CC).

⁴⁶ *Mhlatshana*, para 24.

matter. The potential success of its implementation remains far from clear,⁴⁷ let alone fair and equitable, as the defendant contended.

Relief and order

[41] Notwithstanding the possible direction in which the common law will evolve, it is important to restate the underlying principles that have a bearing on the present matter. The claim arises from a wrongful and culpable act that resulted in harmful consequences.⁴⁸ As Nicholls AJA stated in *Premier, Western Cape v Kiewitz*:⁴⁹

‘Delictual damages have been defined as the “monetary equivalent of damage awarded to a person with the object of eliminating as fully as possible his or her past as well as future damage”.⁵⁰ It is trite that the primary purpose of awarding delictual damages is to place the injured party in the same position as they would have been in, absent the wrongful conduct. As a general rule, restitution in kind is prohibited where patrimonial loss, such as past and future medical expenses, past and future loss of income and loss of support, has been suffered as a result of personal injury.’⁵¹

[42] The above principles mark the point of departure for the present matter. It cannot be said, however, at journey’s end, that the defendant has presented either the pleadings or the evidence to justify the development of the common law. As previously noted, *TN* did not develop the common law, in general, to accommodate the undertaking-to-pay remedy. It was restricted to the facts of that case. The defendant’s pleadings in the present matter are based on an entirely incorrect premise, with the result that a carefully and cogently reasoned argument for why the ‘once and for all’ and ‘money damages’ rules need to be developed, in this case, is conspicuously absent. Whereas the defendant’s evidence went some way towards

⁴⁷ Govindjee J remarked in *Mhlatshana*, para 25, that: ‘Much of what was presented was in hope and anticipation of what might be possible in future. Absent any proof of the pudding, it amounted to nebulous crystal-gazing of the over-optimistic variety.’ The same could almost be said in the present matter.

⁴⁸ See J Neethling and J M Potgieter *Law of Delict* 8 ed (2020) at 255.

⁴⁹ 2017 (4) SA 202 (SCA).

⁵⁰ J Neethling et al *Law of Delict* at 280.

⁵¹ *Kiewitz* para 4, citing *Standard Chartered Bank of Canada* (n 7 above), at 782

demonstrating why the common law should be developed, it fell considerably short of indicating how this was to be done.

[43] Regarding costs, the matter is of a complex nature, involving the determination of important constitutional issues. Scale C is appropriate. The plaintiff's employment of two counsel is, moreover, entirely justified. The only remaining issue is the plaintiff's claim for loss of earnings in her personal capacity. This was never addressed at trial and seems to have been overlooked by the parties; the plaintiff has, however, never abandoned her claim. It would be in the interests of justice for the issue merely to be separated from the rest of the matter, for determination in due course.

[44] Consequently, an order is made in terms of annexure 'X', attached.

JGA LAING
JUDGE OF THE HIGH COURT

Appearances

For the plaintiff: Adv Du Plessis SC with Adv Zilwa

Instructed by: ABN Attorneys
2 Marlborough Road
Selborne
EAST LONDON
Ref: Nyenyiso
Tel: 071 964 5763
abnattorneys@gmail.com
admin@abnattorneys.co.za
c/o Phiwokuhle Nyobo Inc.
100 Alexandra Road
QONCE
Tel: 060 638 0755
nyobopk@gmail.com

For the defendant: Adv Mnqandi

Instructed by: The State Attorney
Old Spoornet Building
17 Fleet Street
EAST LONDON
Ref: 2048/19 – P9 (Mr Maqambayi)
c/o Office of the Premier
No. 32 Alexandra Road
QONCE

Dates heard: 17 - 19 February 2025.

Date delivered: 18 November 2025.

ANNEXURE 'X'



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

CASE NO: 856/2019

Before the Honourable LAING J

In the matter between:

**ADV MLALANDLE obo
I[...] Q[...]**

Plaintiff

and

**THE MEC, DEPARTMENT OF HEALTH
EASTERN CAPE PROVINCIAL GOVERNMENT**

Defendant

ORDER

IT IS ORDERED THAT:-

1. The defendant shall make payment to the plaintiff in the sum of R5 601 315.00 (five million, six hundred and one thousand, three hundred and fifteen rands) calculated as follows:
 - 1.1. R5 210 525.00. (five million two hundred and ten thousand, five hundred and twenty-five rands) for future hospital and medical related expenses.
 - 1.2. R390 790.00 (three hundred and ninety thousand, seven hundred and ninety rands) being 7.5% of the amount R5 210 525.00. (five million two hundred and ten thousand, five hundred and twenty-five rands) for the costs of a trustee to manage the plaintiff's funds in terms of the Trust Property Control Act 57 of 1958;
2. The payment referred to in paragraph 1 shall be made into the trust account of **ABN Attorneys**, held at **FIRST NATIONAL BANK**, account number: 6[...], for the sole benefit of the plaintiff, I[...] Q[...], pending the establishment of a trust.
3. The defendant shall pay interest on the aforesaid sum at the prescribed rate of 11,75% per annum from 30 days from date hereof to date of payment.
4. The defendant shall pay the plaintiff's costs of suit, as taxed or agreed, on the High Court scale C. Such costs shall include:
 - 4.1 The reasonable taxable reservation, preparation and qualifying fees, all medico-legal reports, joint minutes and addendums thereto, preparation for consultations and consultations for trial on 17, 18 and 19 February 2025; travel and attendance fees (if any), for the employment of the following experts:

- 4.1.1 Dr Andrew Redfern (Paediatric Neurologist);
- 4.1.2 Ms Grace Hughes (Physiotherapist);
- 4.1.3 Dr Kara Hoffman (Audiologist);
- 4.1.4 Bosman Orthotist and Prosthetics Inc.;
- 4.1.5 Sakonda Inc. (Industrial Psychologist);
- 4.1.6 Ms Phumelela Mthembu (Dietician);
- 4.1.7 Dr M.E.C Kalane (Clinical Neuropsychologist);
- 4.1.8 Dr M.E Mayat (Dentist);
- 4.1.9 JBK Architectural Designs CC;
- 4.1.10 Ms Sue Anderson (Registered Nurse);
- 4.1.11 Ms Ncumisa Ndzungu (Occupational Therapist); and
- 4.1.13. Tsebo Actuaries.

- 4.2 The costs of senior and junior counsel employed on behalf of the plaintiff, including their preparation and attendance fees for pre-trial conferences and for the costs of appearances of counsel for the duration of the trial;
- 4.3 The reasonable taxable costs of the plaintiff's attorney for the preparation of pre- trial minutes, travelling, preparation for and attendance at pre-trial conferences;

- 4.4 The reasonable taxable costs of preparing trial bundles (if any);
- 4.5 The plaintiff's travel costs to attend the defendant's and plaintiff's expert medico-legal assessments;
5. The plaintiff's attorneys shall be entitled to make payment, from the above funds, in settlement of all expenses incurred in respect of accounts rendered by the expert witnesses and counsel employed on behalf of the plaintiff.
6. The plaintiff's attorneys shall be entitled to payment from the above funds of their attorney-own-client fees in accordance with the applicable written contingency fee agreement.
7. The plaintiff's attorneys, i.e. **ABN Attorneys**, are directed:
- 7.1 pending the creation and registration of a trust, to invest the award (less fees and disbursements) in an interest bearing account in terms of section 86 of the Legal Practice Act 28 of 2014, and to make payment of all reasonable expenses or disbursements for the benefit of I[...] Q[...], as a trustee would have been able to do, should such expenditure or disbursement be regarded as reasonably necessary; and
- 7.2 to pay to the trust, once established, all monies held in trust by them for the benefit of I[...] Q[...], less fees and disbursements relating specifically to his claim, as agreed, taxed or assessed.

BY ORDER OF THE COURT

REGISTRAR

