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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 33807/2021

DATE: 6 March 2026

(1)REPORTABLE: NO

(2)OF INTEREST TO OTHER JUDGES: NO

(3)REVISED:

Date: 6 March 2026

Signature:

In the matter between:

M[...], B[...] L[...] obo M[...], K[...]

Plaintiff

and

**MEC FOR THE DEPARTMENT OF HEALTH AND SOCIAL
DEVELOPMENT, GAUTENG PROVINCIAL GOVERNMENT**

Defendant

Coram: M Van Nieuwenhuizen, AJ

Heard on: 8 December 2025

Delivered: 6 March 2026

JUDGMENT RE DEFENDANT'S APPLICATION FOR LEAVE TO APPEAL

M VAN NIEUWENHUIZEN, AJ:

- [1] This is an application for leave to appeal to the Supreme Court of Appeal, alternatively the Full Court of the High Court, Gauteng Division, Johannesburg in respect of my “*whole judgment and order*” dated the 10th of February 2025.
- [2] For ease of reference, the parties are referred to herein, as in the action, i.e. the applicant as the defendant and the respondent as the plaintiff.
- [3] Although the notice of application for leave to appeal (“*the notice*”) refers to the “*whole judgment and order*”, this is not correct as conceded to by the defendant in argument. It is common cause that:
- [3.1] liability on the merits was conceded;
- [3.2] general damages, loss of earnings/earning capacity, and the actuarial quantification of future medical expenses on a private sector basis were agreed between the parties;
- [3.3] certain amounts have been paid.
- [4] The central issue of the application for leave to appeal is whether K[...]’s future medical costs should be paid in a lumpsum or whether the defendant should be allowed to render in-kind public services and effect period payments.
- [5] The Supreme Court of Appeal in *TN obo BN v Member of the Executive Council for Health of the Eastern Cape Government and Others*,¹ an appeal against *TN obo BN v MEC for Health, Eastern Cape*,² the Supreme Court of Appeal *inter alia* held that fundamental principles of the law of damages should be changed by the legislature rather than the Courts and that Judges should be mindful of the fact that the major engine for law reform should be the legislature and not the judiciary.

¹ (Case No. 383/23) [2026] ZASCA 14 (11 February 2026)

² 2023 (3) SA 270 (ECD)

The Supreme Court of Appeal held, as follows:

“The development of the common law is inappropriate

[45] *The starting point is Mighty Solutions in which the Constitutional Court said this:*

‘Before a court proceeds to develop the common law, it must (a) determine exactly what the common-law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.’

[46] *The High Court’s development of the common law – based on an obiter dictum in DZ – is superficially attractive, but in my judgment, unsound. The court neither considered the underlying reasons for the rule, nor the wider consequences of its radical development of the law of damages and the creation of new kinds of remedies. So drastic a reform, in my view, should not be made by judges.*

[47] *Fundamentally, the court disregarded the caution sounded in Carmichele – reiterated in Mighty Solutions:*

‘. . . “[j]udges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary”. The principle of separation of powers should thus be respected.’

[48] *As is evidenced by its judgment, the High Court did not consider the underlying reasons for the rule. In Evins, Corbett JA stated that the object of the rule is finality of litigation:*

‘The 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.’

[49] *The purpose of the rule, Corbett JA went on to say, is ‘to prevent a multiplicity of actions based on a single cause of*

action and to ensure that there is an end to litigation'. The rule is not immune from criticism, and lump sum compensation cannot be perfect compensation for the future. Despite this, a court is required, with the assistance of an actuary and other experts, to determine the amount of compensation not only for past, but also future loss. And the amount it determines is awarded once and for all:

' . . . no matter whether or not the envisaged basis for calculating the future loss or damage subsequently eventuates, the contemplated contingencies materialize, or any unforeseen events overtake the claimant, for example, his death earlier than expected.'

[50] *Since it is unreasonable, indeed impossible, to predict with accuracy the nature and extent of losses that may arise in the future, damages awarded will sometimes exceed actual future medical expenses; and at other times be less than those expenses. In other words, the rule frequently results in over- or under-compensation, particularly where the claimant survives beyond the life expectancy estimated at the time of trial; or alternatively, dies earlier. But this is not new. In retaining the rule as part of the common law, the courts have confronted the difficulties and reasoned that the benefits of the rule outweigh its shortcomings. In essence, the rationale for the rule is closure for the parties and judicial efficiency. The principle is that 'immediate certainty and finality are to be preferred above deferred precision'. And damages are awarded in a lump sum 'to prevent the repetition of lawsuits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions'.*

[51] *The rule thus ensures finality and protects parties against multiple, piecemeal actions for damages, thereby ensuring fairness to both parties. Defendants are not subject to potentially endless, intermittent and indeterminate claims, which are difficult to plan for. And plaintiffs are not required to*

bring claims every time they wish to obtain part of the relief, which a court has already granted them. Yet that is precisely the effect of the High Court's order. This also shows that the court failed to consider the wider consequences of its development of the common law.

[52] *The public healthcare remedy is a case in point. The defendant was ordered to provide the child, for the duration of his life, with all services, consultations, therapies, surgeries, supplies, supplements, medicines, devices and equipment at the following hospitals in the following order of priority: CMH, FH or a public hospital nominated by the public case manager in consultation with the child's private case manager (in which case the defendant must provide transport). These medical services and supplies are required to be of a reasonable standard. If the plaintiff fails to arrive with the child at a scheduled appointment for a medical service or fails to collect a medical supply, the defendant will be deemed to have complied with her obligations under the order.*

[53] *Arising from this remedy, there will certainly be disputes that a court will have to resolve on each occasion that a service, treatment, medication, device or equipment becomes unavailable – for whatever reason – and a dispute arises. The court will be called upon to decide: (i) whether the injury being treated or the medical supply sought is a consequence of the harm initially suffered by the child; (ii) whether the medical service or supply is of a reasonable standard; (iii) whether the defendant in fact failed to deliver the required service, medication or equipment; (iv) and whether that failure was wilful or negligent.*

[54] *The same applies to the undertaking to pay remedy. In terms of this remedy, the defendant was ordered, at her election, to procure medical services and supplies in the private healthcare sector, 'to be provided timeously whenever it is required', in relation to day-care and permanent residential facilities;*

caregivers; washing machines; and a private case manager and home visits by that manager. Undoubtedly, there will be disputes about whether the defendant exercised her election fairly, lawfully or reasonably; and whether medical services or supplies were required or rendered timeously.

[55] What all of this shows, is that open-ended remedies undermine finality, and repeated disputes increase legal costs. The result is continuous litigation, and an increased burden on the parties and the court system. And courts could become long-term administrators of public healthcare, rather than adjudicators.

[56] The rule is designed precisely to prevent these issues from ever arising. It does so at the cost of perfect accuracy in calculating damages, but for important reasons related to the administration of justice. Little wonder, then, aware of future uncertainty in assessing damages, this Court stated that '[n]o better system has yet been devised for assessing general damages for future loss'.

[57] The High Court neglected to consider the basic justifications for the rule, as well as the broader implications of its wholesale reform, as the discussion above makes clear. In addition, it disregarded the factors that it was obliged to take into account in accordance with Mighty Solutions.

[58] I turn next to the question that the rule – a fundamental principle of the law of damages – should not be changed by a court, but only by the legislature. The High Court stated that the Court in DZ 'did not, however, regard this consideration as closing the door on the development of the common law'. It noted that a draft bill had been presented to Parliament for the amendment of the State Liability Act to permit periodic payments and orders to provide treatment to an injured party in the public health sector. The court followed the approach in MSM, namely that a litigant does not have to wait for Parliament to adopt the amendment, since the rule is judge-made and it was appropriate for a court to develop it.

- [59] *But that is a misconception of the principle of separation of powers and the role of the judiciary. To begin with, in the case of DZ itself, Froneman J repeated the warning that the major engine for law reform is the legislature. The High Court embarked on a radical departure from an established principle in which controversial issues on resources and social policy were at stake. Such policy considerations are matters for Parliament, not the judiciary.*
- [60] *In this regard, the decision of the Supreme Court of Canada in Watkins, referred to in DZ, is instructive. There, the appellant, who was rendered a quadriplegic in a motor vehicle accident, was awarded a lump sum payment, which included damages for loss of earning capacity in the future and damages for future care. The Court of Appeal set aside the lump sum award for future care and ordered in its stead that the provincial government pay the plaintiff a monthly payment adjusted annually for inflation, subject to deductions for ongoing care which the plaintiff might receive from the provincial government. One of the issues was whether the Court of Appeal erred in substituting periodic payments for a lump sum award.”*
- [6] The SCA concluded in paragraphs 109 and 110 of the judgment that:
- “[109] *The High Court’s development of the common law in terms of ss 39 and 172 of the Constitution, is no ‘incremental development’: it constitutes structural reform of the law of damages. A radical change to the law of damages must be made by the legislature and be applied within a uniform national framework. Consequently, MSM was wrongly decided and should not be followed.*
- [110] *On the Department’s own version, the remedies are uncertain and insecure. This is inconsistent with the principle of law that a claimant must be fully (and effectively) compensated for the loss suffered as a result of the defendant’s delict. The High Court’s order is inappropriate; even well-intentioned judicial*

innovation can cause greater injustice where, as here, the court lacks institutional competence, and the efficacy of the remedies is doubtful. The appeal must therefore succeed.”

- [7] One of the main issues in the judgment of *TN obo BN v MEC for Health Eastern Cape*³ were whether the common law should be developed to accommodate the *DZ* defences. I referred to the aforementioned judgment and decided against following it.
- [8] The facts of this matter are on all fours, in material respects, with the facts of the *TN obo BN v MEC for Health, Eastern Cape* matter.
- [9] This Court’s finding is consistent with the Supreme Court of Appeal’s finding.⁴
- [10] Accordingly, no reasonable prospect exists that another Court may find in the applicant’s favour considering that the central issue in this matter has been decided by the Supreme Court of Appeal in its aforementioned recent judgment.
- [11] The application for leave to appeal is dismissed with costs on Scale C, including the costs of two counsel.

M VAN NIEUWENHUIZEN

*Acting Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for

³ 2023 (3) SA 270 (ECD)

⁴ In particular paragraph 110 of the SCA matter

hand-down is deemed to be on 6 March 2026.

HEARD ON:	8 December 2025
DATE OF JUDGMENT:	6 March 2026
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