REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO:2013/16268

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

……………………………… **02 MARCH 2026**
SIGNATURE **DATE**

In the matter between:

N[…] M[…] N[…] Plaintiff
Obo B[…] N[…]

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT Defendant

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SUPPLEMENTARY JUDGMENT-COSTS

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 e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be10h00 on 02 March 2026.

MALUNGANA AJ

Introduction

[1] This is an application for reconsideration of the costs order premised on a secret offer, the so-called 'Calderbank offer', made by the plaintiff to the defendant prior to the commencement of the trial which served before me in October 2025.

[2] In a judgment delivered on 20 January 2025 I granted an order for the plaintiff, directing the defendant to pay the plaintiff the sum of R5 706 430,00, in respect of past medical and related expenses occasioned by the institutionalization of the minor child (B[…]) at Little Gems care facility ("Little Gems"). The Court also directed that the defendant would pay the plaintiff's agreed or taxed costs of action. However, the said order did not state the appropriate scale applicable with regard to the costs as required by Rule 67A(3). The rule, which came into effect on 12 April 2024 enjoins the Court to determine whether costs will either be on scale A, B or C, depending on the complexity or importance of the matter.

[3] The application for reconsideration is brought before me by way of a notice of motion. The main relief sought is formulated as follows:

(a) That paragraph 4 of the Order granted on the 20th of January 2025 be reconsidered and amended as follows:

'[4] *The Defendant shall pay the Plaintiff's taxed or agreed party and party costs on the High Court scale up to and including the 30th of September 2024, and from the 1st of October 2024 the Plaintiff's taxed or agreed attorney and own client costs on the High Court scale as indemnifying costs".*

(b) That the defendant be ordered to pay the costs of the application for consideration of costs on party-and-party High Court scale and, where appropriate and applicable, the fees of Counsel shall be taxed on Scale C.

[4] The Calderbank principle has now been fully embraced in our South African jurisprudence. Recently, few South African decisions acknowledged the plaintiff's common law right to make a secret offer/Calderbank offer "without prejudice save as to costs" to a defendant and to later, after judgment, avail itself of costs not recoverable in the ordinary course against such defendant, should the Court have made an award in excess of that tendered. In *AD & Another v MEC for Health and Social Deevlopment , Western Cape (the AD matter)* Rogers J said that the public policy of encouraging would be better served if litigants appreciated the risk of adverse costs orders if they disregarded reasonable offers of settlement.[1]

The justification for relief sought

[5] The facts relied upon by the plaintiff were, in a nutshell, as follows: The matter was set down on quantum as a long duration trial for a maximum of 15 days from the 7th of October 2024. The issues to be determined at the trial were the plaintiff's claim for past and future medical expenses, including the claims for loss of earnings and general damages. The claim for future medical expenses became settled in terms of the order granted on 11 October 2024 by way of stated case in terms of Rule 33(1).

[6] The claim for past medical expenses was, however, not settled resulting in the trial, in which the plaintiff had to lead oral testimony including the testimony of the witness who was abroad. As aforesaid, the trial in respect of these issues was handed down in favour of the plaintiff in the amount of R5 706 430.00, on 20 January 2025.

[7] According to the plaintiff, a secret offer was made by the plaintiff to the defendant to settle the matter in terms of Rule 34 of the Uniform Rules of Court. In that offer the plaintiff proposed to settle the matter in the amount of R5 470 290,00, plus the plaintiff's reasonable party and party costs, either agreed or taxed. The plaintiff' secret offer is shown in annexure "FA 2" attached to the founding affidavit. It was open for acceptance until the 30th September 2024.

[1] Du Toit N.O v ROAD ACCIDENT FUND (Case no. CA&R45/2023) (23 August 2024)at para 5.

[8] And now, the plaintiff contends that the defendant had implicitly rejected the aforesaid offer resulting in the trial that endured for four days, from the 7th to 11 October 2024. Eventually the court ordered the defendant to pay the plaintiff the sum of R5 706 430.00, which is R236 140.00 more than what the plaintiff was prepared to settle in terms of the secret offer. Furthermore, the plaintiff avers that if the defendant had accepted the plaintiff's offer the trial and the attendant costs could have been avoided.

[9] In seeking to demonstrate the unreasonableness of the defendant's rejection of her secret offer, the plaintiff added the following historical context. The plaintiff's claim for medical expenses initially rested on 4 pillars(a) the claim in respect of B[…]'s institutionalization at Little Gems since January 2018 to date of trial amounting to R1 317 580,00; (b) The claim in respect of B[…]'s 24/7, one-on-one caregiving by 365 Patient care Services ("365") since December 2015 to date of trial in the amount of R3 916 757.81; (c) The claim in respect of B[…]'s special feeds and nutritional supplement as a patient that is being PEG-fed since November 2015 to date of trial in the amount of R696 346,19.00, and (d) The claim in respect of miscellaneous expenses incurred from October 2015 to date of the trial in the amount of R147 407-06.

[10] During the trial the plaintiff abandoned certain parts of her claim for medical expenses, such as *food for carers* in the sum of R213 162.50; claim for *delivery charges* in the sum of R11 100,00; as well as the claim for miscellaneous amounting to R147 407.06. In this regard the plaintiff contends that it demonstrated her reasonableness and *bona fide* attempt at resolving the matter.

[11] Moreover, the plaintiff averred that the defendant's experts had conceded that the expenses incurred by the plaintiff were reasonable. In contrast the defendant's contention was that the actual expenses incurred were unreasonable. On this score, the defendant failed to discharge the evidentiary burden resting upon it that the expenses were not reasonable. Essentially, the defendant failed to prove that the plaintiff's claim was unreasonable.

Grounds of opposition

[12] The defendant opposes the relief sought in the notice of motion. It contends that its rejection of the plaintiff' secret offer was justified based on incomplete and illegible documents, ongoing disputes regarding the necessity and verification of services; amendment of the claim during the offer period; inflated items which were later abandoned at the trial, and the defendant's constitutional and statutory duty to protect public funds.

[13] The defendant further justified its rejection of the offer on the basis that the plaintiff had during one of the pre-trial meetings held on 19 September 2024, admitted that certain supportive documents were lost when a third party service provider was relocating. Accordingly, the evidentiary foundation required to assess the offer was incomplete. Moreover, the offer was only open for acceptance until the 30 September 2024.

[14] The defendant further contended that the abandonment of claimed items during the trial demonstrated that the items were unsupported.

Submissions made on behalf of the parties

[15] Arguing the defendant's unreasonableness in rejecting the Calderbank offer, counsel for the plaintiff submitted that this Court should award the indemnity costs for the plaintiff based on the following reasons:

(a) This Court had to determine whether the defendant was liable to compensate the plaintiff for the expenses incurred relating to the institutionalization and care of the minor child for a period of over 8 years following the severe brain injury caused by the negligence of the defendant. The expenses comprised of past hospital and medical expenses incurred amounting to R6 078 100.06. Following the compromises which was reached these expenses came down to R5 706 430,50.

(b) The plaintiff provided the Court with approximately 700 pages of invoices shown in section H on case lines, while the defendant did not even call a single expert witness to testify, nor attack a specific invoice produced by the plaintiff. This would have curtailed the proceedings, and save costs.

(c) Counsel for the plaintiff further submitted that the defendant failed to compel discovery of the relevant documents or inspect the original of the invoices and supportive documents despite being invited by the plaintiff in terms of the rules.

(d) The defendant had ample opportunity to consider the Caldebank offer which was made on the 15th of September 2024 but failed to engage reasonably in settlement negotiation or make at least a counter-offer.

(e) It was further submitted that the defendant was offered a fair discount on the realistic assessment of the case based on the invoices. The defendant had a responsibility to properly assess its case and the risk inherent in running a trial.

[16] Counsel for the defendant drew the Court's attention to various authorities dealing with the Calderbank principle, and the manner in which the Court's unfettered discretion in considering the cost aspect was has to be properly exercised. With specific reference to commonwealth cases from which the Calderbank principle was derived, counsel for the defendant argued that the plaintiff is not automatically entitled to attorney and client costs simply because it made a generous offer to the defendant, than an amount which the Court subsequently award. It must consider whether the defendant behaved unreasonably, and put the plaintiff to unnecessary expenses by not accepting the offer or making a reasonable counter-offer.

[17] In particular, counsel for the defendant pointed out that factors to be considered by the Court in the context of Commonwealth cases includes: (a) whether a plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for best conceivable outcome; (b) whether the plaintiff allowed the defendant a reasonable time to consider the offer; (c) the extent of the difference between the amount of the offer and the amount of the award and (d) the nature of the proceedings and resources of the litigants.

[18] In arguing the rejection of the plaintiff's Calderbank offer, defendant also placed reliance on *Toppi v Toppi* (No 4) [2025] NSWSC 1131. She submitted that the following factors have been found to be of relevance in determining whether the rejection was not unreasonable:

(i) all evidence not have been served at the time of the offer;
(ii) the full parameters of the dispute remaining uncertain at the time of the offer;
(iii) the offeror's case changing after the making of the offer;
(iv) the issues in dispute in the proceedings being complex.

Discussion and analysis

[19] In *Du toit N.O v The Road Accident Fund*[2] at paragraph [2], Phatshoane AJP held that:

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

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

[2] ADV AJ Du Toit N.O obo Mawethu Maxwell Nkuna. Case No.CA&R45/2023 (23 August 2024)

[20] In the present case, the defendant contends that it was not in a position to properly consider the plaintiff's offer due to lack of supporting documentation. It is not clear from the defendant's contention as to which documentary information within the context of the 700 invoices it required in order to consider the plaintiff's offer. As stated in the main judgment, there is nothing in evidence which was adduced during the trial to suggest that the defendant was having an issue with specific invoices for services rendered at Little Gems care facility. It remains my view that the trial that ensued in relation to the invoices was not an inevitability. It could have been staved off by requesting specific documentation from the plaintiff, or by simply invoking the provisions of the Rule 35(3) as argued by the plaintiff's counsel. The defendant flippantly relied on cross examination during the trial, and failed to produce any evidence in rebuttal of the plaintiff's invoices. The defendant failed to appreciate the consequences of going into trial without any evidence to present to the court.

[21] The argument that certain components of the plaintiff's claim were amended is completely misguided and unsustainable. There is only a small portion of the claim which was abandoned by the plaintiff, and the reason given was that the supportive information were lost when the third party relocated offices. If the defendant had identified certain invoices which were in dispute, it would be a different issue altogether. In comparison to the amount claimed, the abandoned amount remains neglectable.

[22] In paragraph 76, of *A.D and Another v MEC For Health and Social Development, Western Cape Provincial Government*,[3] ('the *AD case")* which counsel for the defendant also relied upon, Rogers J said:

> "[76] The plaintiff's argument is not merely that the defendant failed to accept a reasonable offer. They complain that the defendant at no stage made a globular counter-offer. That this is so is common cause. It is certainly surprising that the defendant did not take the precaution of protecting herself by making an offer. However, I cannot find that the failure to make a globular

[3] AD and Another v MEC for Health and Social Development, Western Cape 2017 (5) SA 134 (WCC)

counter-offer was unreasonable. The defendant's approach was apparently to engage in discussions on individual line items of the claim. Both sides appeared in argument to acknowledge that details of those discussions are privileged. I am this in not in a position to comment on whether their respective approaches on individual line items were or were not unreasonable. What can be said is that by the time the trial started some of the line items had been resolved while others were settled during the course of the trial." In the present case the defendant simply opted to run a trial, and there was no line items identified upon which the parties would engage in some sort of settlement negotiations. I need not repeat that no invoice provided by the plaintiff was disputed. It defies logic why the defendant would go into the trial without any case to present to the court."

[23] In *Itokolle-Clinix Private Hospital (Pty) Ltd v MNT obo Norm* (863/2024)(2025) ZASCA 193, the Court held at para 51 as follows:

"[51] In coming to its carefully reasoned conclusion, the high court had also considered the conduct of the hospital with regard to the Calderbank offer, and concluded with reference to this Court's decision, in Sigh and Another v Ebrahim, that the time for consideration of the offer (*spatium deliberandi)* only becomes relevant if the party to whom the offer is made accepts the offer, or attempts to accept it, after the expiry date. This was not the case here. The hospital did not complain that it needed more time to consider the offer. It simply rejected the offer, therefore the reasonableness of the *spatium deleberandi* was and is irrelevant."

[24] In the context of the factors mentioned in the *Toppi* judgment, *supra*, the defendant in the present case is in a better financial position in comparison to the plaintiff. Instead of utilizing its financial resources to conduct the relevant investigations into the or otherwise of the i it unjustly rejected the plaintiff's offer and did not even bother to formulate a counter-offer for the plaintiff to consider. Rodgers J emphasized the same consideration in the *AD* case. At the trial, the onus rested on the defendant to identify with a degree of exactitude, which of the invoices provided by the plaintiff did

not contain sufficient particularity to justify the plaintiff’s claim. Discovery procedures were available to the plaintiff to prove its defence.

[25] In the result, I uphold the plaintiff’s entitlement to indemnity costs based on the principle of Calderbank offer.

[26] There is accordingly an order in the following terms:

1. The application for consideration is granted.

2. Paragraph 4 of the order granted on 20 January 2025 is set aside and substituted with the following:

   (a) The defendant is directed to pay the plaintiff’s taxed or agreed party and party costs on the High Court Scale up to and including the 30th of September 2024, and from the 1st of October 2024 the plaintiff’s taxed or agreed attorney-and -own client costs on the High Court scale as indemnifying costs.

3. The defendant shall pay the costs of the application for reconsideration of costs on party-and-party scale, and where appropriate and applicable, the fees of Counsel shall be taxed on Scale C.

4. The above costs shall bear statutory interest at the applicable prescribed rate from date of agreement in respect of such costs or from the date of taxation to date of final payment.

P H MALUNGANA

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

Date of hearing: 04 December 2025

Date of Judgment: 02 March 2026

Counsel for the Plaintiff: Adv M Coetzer

Attorneys for the Plaintiff: Wim Krynauw Attorneys Inc.

Counsel for the Defendant: Adv M Tombela

Instructed by: State Attorney, Johannesburg.