

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

CASE NO.: 4831/2023

In the matter between:

NASIPHI THUKUTHEZI

1st Plaintiff

LILITHA THUKUTHEZI

2nd Plaintiff

and

ESKOM HOLDINGS SOC LIMITED

Defendant

JUDGMENT

Zono AJ:

Preface

“ The determination of legal fees is an ancillary and subsidiary component of civil litigation. The purpose of an award of costs to a successful litigant is to indemnify him for the expense to which he has been put through having been unjustly compelled to initiate or defend litigation, as the case may be. Owing to the operation of taxation, however, such an award is seldom a complete indemnity. A costs order is not intended to be compensation for a risk to which litigant has been exposed, but a refund of expenses actually incurred”¹.

Introduction

¹ *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467 at 488; *Payen Components South Africa Ltd v Bovil Gaskets* CC 1999 (2) SA 409 (W) 417.

[1] This matter was duly enrolled for determination of quantum as the issue of liability was finally determined by this court² on 11 November 2025. The aspect of the quantum that was left for court's determination is preponderantly referred to in the Joint Practice Note filed by the parties on 29th May 2026³. General damages were not determined in the judgment of Molony AJ referred to above. However, the joint practice note and roll call trial preparation checklist envisages that the general damages and special damages (loss of earning capacity) would be dealt with simultaneously.

[2] The matter was duly set down for trial on 18th March 2026. The matter did not proceed on that day and it was resultantly postponed in terms of the order dated 19th March 2026 to a date to be arranged with the registrar, with costs reserved. I will deal with the reasons for the postponement of the matter hereinafter when dealing with the costs occasioned by such postponement. The matter was, again, duly set down for trial on 15th June 2026. It worths mentioning that registrar's notice of allocation of trial date addressed to the parties is dated 21st April 2026; whereas the plaintiff's notice of set down for the same date of 15th June 2026 was duly delivered on 25th May 2026. Parties' preparations for the trial were presumably started on or about these two dates aiming at the trial date of 15th June 2026.

[3] In addition to the parties' submissions in court on 15th June 2026, the court was favoured with defendant's "*offer of settlement in terms of Rule 34(1) and Rule 34(5) dated 05th June 2026*", which offer was followed by "*plaintiff's acceptance of offer of settlement in terms of Rule 34*". I will come back to deal

² As per Molony AJ's defendant was found liable for 100% of plaintiff's proven or agreed damages in both her representative and personal capacity stemming from the injuries sustained by Lilitha in incident on 12 July 2022; the issue of quantum is postponed *sine die*.

³ Para 9 thereof.

with the terms of the respective documents later in this judgment. However, the parties were *ad idem* that the terms of the settlement agreement be made an order of court⁴. What remained unresolved were reserved costs as per court order of 19th March 2026 and costs of set down for trial on 15th June 2026. I now set out to deal with those costs in my judgment.

General Legal Principles and analysis

[4] The purpose of an award of costs to a successful litigant is to indemnify him for expense to which he has been put through having been unjustly compelled to initiate or defend litigation, as the case may be⁵. The award of costs rests upon the object of reimbursing a person for costs to which he was wrongly put. That underlies the basic principle that a successful party should get its costs⁶. It appears that a successful litigant is entitled to his or her costs or expense to which he or she has been put through having been pushed to participate in a litigation.

[5] This court in *Nkume*⁷ Nhlangulela J as he then was (the now AJP and the DJP) made the following *dictum*:

“9 It would then appear that the real issue for determination is one of costs. To that end I must have regard to all the affidavits filed towards the merits of the application. Of course there will be no need for the Court to decide who the winner is as the merits of the application have become academic. See: Gamlan Investments (Pty) Ltd and Another v Trilion Cape (Pty) Ltd and Another 1996 (3) SA 692(C) at 700G-J. The proper approach is to utilize the materials available and decide the issue of costs on broad general lines and not the lines that would necessitate a full hearing of the merits that have already been settled. See: Jenkins v SA Boiler Makers, Iron & Steel Workers & Ship Builders Society 1946 WLD 15, Gamlan, supra, at page 701A-C

⁴ Payment of R8 200 000.00 (Eight Million, Two Hundred Thousand Rand) by the defendant to the plaintiff in full and final settlement.

⁵ Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa, Fifth Edition, Vol 2 Page 951

⁶ *Mancisco and Sons CC (in liquidation) v Stone* 2001 (1) SA 168 (W) at 181 F.

⁷ *Nkume v FirstRand Bank Ltd t/a First National Bank* 2012 (4) SA 121 (ECM) Para 9.

and Nxumalo And Another v Mavundla And Another 2000 (4) SA 349 (D) at page 355F. In the circumstances the universal rule that a party who succeeds should be awarded costs cannot apply. In the exercise of the Court's discretion, I have to consider the manner in which the parties conducted themselves in this application, both before and after the application was brought. See: First National Bank of Southern Africa t/a Wesbank v First East Cape Financing (Pty) Ltd 1999 (4) SA 1073 (SE) at 1079-1080. And see generally: Herbestein and Van Winsen, The Civil Practice of the High Courts in South Africa, 5th Edition at 961; Union Government (Minister of Railways and Harbours) v Heiberg 1919 AD 477 at 484; Griffiths v Mutual & Federal Insurance Co Ltd [1993] ZASCA 121; 1994 (1) SA 535 (A) at 549A-D; Graham v Odendaal 1972 (2) SA 611 (A) at 616. I must also consider which of the parties took unnecessary steps or adopted a wrong procedure, any misconduct by a party and any other relevant factors. See: De Villiers v Union Government (Minister of Agriculture) 1931 AD 206 at 214."

[6] Dukada J, in a separate matter of *Nkume*⁸ observed as follows:

"4. The adverse information that the applicant mainly complained about has now been expunged by the first respondent. It seems to me that the merits in the orders mentioned in paragraph 1 above are live only for the question of costs. Sometimes a judgment for costs involves a decision on the merits (see Bedeaux v McChesney 1939 WILD 128 at 132; Develing v Central White Lime Works 1912 WLD; Cats v Cats 195 (4) SA 375 © 379 and Anthony Johnson Contractors (Pty) Ltd v D' Oliveira 199 (4) SA 728 (C) 733 C-D).

In order to find justification for second respondent to be ordered to pay costs of this application, in my view, I have to establish whether second respondent supplied the adverse information to the first respondent and, if so, whether such conduct was unlawful."

It appears herefrom that merits of the case are not distant and separable from the determination of the issue of costs.

[7] The first port of call should be the contents of the defendant's offer of settlement and what is contained in the plaintiff's acceptance of offer of settlement. After making an offer of settlement of plaintiff's claim of **R8 200 000,00 (Eight Million, Two Hundred Thousand)** the defendant in its offer of settlement made the following offer regarding costs:

⁸ *Nkume v Transunion Credit Bureau (Pty) Ltd and Another* 2014 (1) SA 134 (ECM) Para 4.

“The defendant agrees to pay the plaintiff ‘s taxed or agreed party and party costs on the appropriate High Court scale only up to and including 05 June 2026, subject to the following conditions:

(a) The defendant shall not tender any costs towards the trial set down for 15 June 2026” (sic).

The literal and grammatical reading of this offer demonstrates that the defendant was intent on tendering all plaintiff’s costs except the costs for set down of trial on 15th June 2026. The wording of the offer of settlement conduces only to an interpretation that the defendant tendered all plaintiff’s costs with the exclusion of only a specifically mentioned scope of costs.

[8] The maxim of interpretation “*Exclusio unius est inclusio alterius*” finds application in this matter. Express mention of one thing is an exclusion of the other.⁹ The defendant expressly and specifically mentions in its offer of settlement the extent and the scope of costs it is not intending to tender. In its words in paragraph (a) thereof it categorically refuses to tender any costs towards the trial set down for 15th June 2026. Nothing in this offer of settlement excludes the reserved costs referred to the court order of 19th March 2026. The offer was conceivably inclusive of the reserved costs aforesaid. The court, under the circumstances, should ordinarily have been requested to determine only the costs that relate to the trial set down on 15th June 2026, if that offer of settlement is anything to go by. The costs exclusion embodied in the offer of settlement seemingly put paid to the reserved costs referred to in the court order of 19 March 2026. In court, on 15th June 2026, things were plainly different. Reserved as per court order of 19 March 2026 were glaringly contentious. I underscore the fact that in the offer of settlement, nothing is said about the reserved costs in terms of the court order of 19th March 2026. The offer of settlement can only be constructed to tender the reserved costs aforesaid as the exclusion is express, specific and pertinent to the costs of set down of trial for

⁹ *Ndaba v Ndaba* 2017 (1) ALL SA 33 (SCA); 2017 (1) SA 342 (SCA) Para 51.

15th June 2026. The tender was conceivably inclusive of the reserved costs referred to in the court order of 19th March 2026.

[9] Accepting the offer the plaintiff recorded the following:

“Kindly take notice that, without prejudice, the plaintiff hereby accepts the tender of settlement dated 5 June 2026 made and communicated to the plaintiff on 5 June 2026 by the defendant to settle the plaintiff’s claim, in full and final settlement on the terms enunciated therein” (sic).

This acceptance, unequivocally limits itself to the first part of the offer of settlement which dealt with the plaintiff’s claim against the defendant.

The acceptance of offer says nothing about the issue of costs. That is clear when one closely looks and deals with the first part of the offer of settlement which reads as follows:

*“Kindly take notice that without prejudice, the defendant hereby offers to pay to the plaintiff, the sum of **R 8 200 000.00 (Eight Million Two Hundred Thousand Rand and Zero cents)** in full and final settlement of all claims between the parties” (sic).*

It is in the light of the two documents which constitute agreement between the parties, I conclude that the agreement was only in respect of the settlement of plaintiff’s claim and not costs. It is so that the issue of costs was dealt and referred with in the defendant’s offer of settlement, but was never got to be accepted in the plaintiff’s acceptance of offer. No further probe by the plaintiff was made regarding the defendant’s failure to deal in its acceptance document with the costs. The ineluctable conclusion flowing from that is simple that the defendant accepted that its offer regarding the issue of costs was not accepted. That does not discount the fact that the defendant had always intent on tendering the reserved costs referred to in the order of 19th March 2026. Even if I am wrong on this conclusion, the parties approached this court on the basis and from the premise that the parties have settled the plaintiff’s capital or principal claim but have not found each other on the question of costs. From

time to time when making their submissions they referred to a trite principle that costs are in the discretion of the court.

[10] To close and seal the issue of the agreement¹⁰ it is imperative to refer to the interpretational tools available to the court when seeking to ascertain the intention of the parties. Wallis JA in *Endumeni*¹¹ remarked as follows:

“[18]..... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The ‘inevitable point of departure is the language of the provision itself’, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[11] The offer of settlement was made in the context of an upcoming trial which was set down to proceed on quantum as it is manifest in the Molony AJ’s judgment and on the practice note. The principal issue for determination was the plaintiff’s claim (quantum). The purpose of the settlement aimed only at that purpose.

¹⁰ Which is an offer and acceptance.

¹¹ *Natal Joint Municipality Pension Fund v Endumeni Municipality* 2012 (4) SA 593 at 603 Para 18.

[12] The plaintiff's letter dated 12th June 2026 was seemingly delivered simultaneously with the plaintiff's acceptance of offer of settlement. The essence of the letter seeks to negotiate the question of costs. The plaintiff sought to persuade the defendant to agree to costs, including the reserved costs referred to in the court order of 19 March 2026. This manifestly demonstrates that the plaintiff laboured under the impression that the costs were not part of the costs tendered in terms of the offer of settlement. That was a wrong impression. This put paid to the question whether costs were part of the agreement. They were not. That is put plain by paragraph 12 of the letter which plainly reads as follows:

"12. If the parties cannot agree on this issue, then the provisions of Rule 34(11) in so far as costs is considered may be placed before court for determination. Ultimately, in terms of Rule 34(11) the issue of costs falls within the discretion of the court and thus where parties cannot agree on the point of costs.

13. Then on 15 June the issue of costs shall be determined and the court will be requested to make an order in respect of the issue of costs. As for the substance part - the quantum and its acceptance thereof, no issue arises, thereat" (sic).

[13] Rule 34(11) of the Uniform Rules of court (URC) provides thus:

"(11) The fact that an offer or tender referred to in this rule has been made may be brought to the notice of the court after judgment has been given as being relevant to the question of costs."

Costs may be decided separately from the capital or principal claim. The parties herein always had an intention to deal with specified excluded costs separately from the plaintiff's capital or principal claim. Their intention (especially the plaintiff) is consistent with the purport and spirit of Rule 34. The primary purpose of the rule is to settle plaintiff's claim. The rule is, therefore, designed to enable a defendant to avoid further litigation, and failing that to

avoid liability for the costs of such litigation. The rule is there not only to benefit a particular defendant but for the public good, generally, as well¹².

[14] The award of costs is a matter wholly within the discretion of the court of first instance. In *Wixley*¹³ the following observation was made:

“The issue as to what order of costs would be appropriate in the circumstances of a particular case falls primarily within the discretion of the court of first instance. It is trite law that this court on appeal will not interfere with costs orders made by such a court, unless It had failed to exercise a proper judicial discretion.”

The judicial discretion must be exercised on the grounds upon which a reasonable person could have come to the conclusion arrived at¹⁴

[15] In *Powell*¹⁵ Constitutional Court delivered an important unanimous judgment concerning costs. In the course of his judgment Ackerman J remarked with approval that:

“3. The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted, is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytical accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only the nature of the litigants and the nature of the proceedings. I mention these examples to indicate that the principles which have been developed in relation to the award of costs are by their nature sufficiently flexible and adaptable to meet new needs which may arise in regard to constitutional litigation. They offer a useful point of departure. If the need arises the rules may have to be substantially adapted; this should

¹² *Naylor v Jansen* 2007 (1) SA 16 (SCA) at 22 I to 23 A-C

¹³ *Beinash v Wixley* 1997(2) ALL SA 241; 1997 (3) SA 721(A)

¹⁴ *Jordan v New Zealand Insurance Co Ltd* 1968 (2) SA 238 (E) at 245 C-D

¹⁵ *Ferreira v Levin No and Other; Vryenhoek and Others v Powell No and Others* 1996 (2) SA 621 (CC); 1996(4) BCLR 41(CC) Para 3

however be done on a case by case basis. It is unnecessary, if not impossible, at this stage to attempt to formulate comprehensive rules regarding costs in constitutional litigation.”.

With that useful background I deal with the costs occasioned by the postponement in terms of the court order of on 19th March 2026 and costs resulting in the set down of the matter for hearing on 15th June 2026.

Costs of 18-19 March 2026

[16] There is no dispute that the matter was duly set down for trial for herein on 18th March 2026. As a corollary to that the parties especially the plaintiff prepared himself for that trial to proceed. I was informed by Mr Zilwa from the bar that, witnesses including expert witnesses were arranged, consulted and or transported for trial that would start on 18th March 2026. On the morning of the 18th March 2026, the plaintiff was furnished with an offer of settlement. That offer required a thorough consultation not only between the plaintiff and the legal representatives, but also with experts and their reports. That took the whole day of 18th March 2026. When it was clear to all and sundry that the matter could not proceed as the offer was rejected by the plaintiff, the parties agreed to postpone the matter with costs reserved. The draft order by consent was brought to court on 19th March 2026, hence the order is dated 19th March 2026. All of these facts are common cause. In the light of the above, the costs in issue are for the 18th March 2026.

[17] The defendant argued that the plaintiff must be deprived of the costs of 18th March 2026 referred to in the order of 19th March 2026, on the sole basis that the matter was not postponed at its instance. The defendant further argues

that the plaintiff, after the rejection of the offer could have called his witnesses and was within his right to proceed with the matter notwithstanding that such commencement of the trial would result in the matter being part-heard. The defendant, however, does not submit that the wasted day of 18th March 2026 was not as a result of the consideration of the offer of settlement presented on the date of trial. It could not lie on the defendant's mouth or lips that such specific day could have been utilized whilst at the same time the plaintiff was still considering the contents of the offer of settlement. I therefore cannot see how the defendant was not responsible for this matter not proceeding on 18th March 2026. This matter did not proceed on 18th March 2026 on the sole basis that the defendant presented its offer for consideration by the plaintiff on the morning of the trial date and the plaintiff necessarily had to consider the offer of settlement. It would be irresponsible and unreasonable of the plaintiff to simply reject the offer and employ a dismissive attitude towards it without having considered it.

[18] The plaintiff strongly contended that there was nothing prohibiting the defendant from making that offer far before the trial date of 18th March 2026. Notwithstanding those submission, no response was proffered by the defendant explaining the impediment to timeously offer to settle. It is plaintiff's contention that timeous offer to settle could have allowed both parties to ventilate and engage fully with the offer to settle and even afford the plaintiff an opportunity to make a counter offer for consideration by the defendant. That did not eventuate due to time constraints. A party who, without a reason, wait until the advent of the trial date, makes an unreasonably low offer of settlement should not escape costs of the wasted days when its offer was being considered. That conduct, as it is prevalent in our jurisdiction, especially in the Road Accident Fund (RAF) and medical negligence matters, should be viewed as a litigation

strategy to delay the speedy finalization of the matter. That hits at the heart of the provisions of section 34 of the Constitution which inherently requires speedy resolution of the disputes. It is therefore the courts obligation to resolve parties dispute without delay¹⁶. Any stratagem employed to delay the proceedings and to hamper the court from exercising its constitutional mandate relating to its judicial authority,¹⁷ should be visited with costs.

[19] To pay credence to the sentiments made above about the last minute offer, the defendant improved the offer it made on 18th March 2026. On 05th June 2026, when this matter had already been set down for trial on 15th June 2026, the defendant made a better and an acceptable offer. In this instance the offer was made in no less than ten (10) days before the trial date, and the defendant must be commended for that responsible and genuine effort to resolve the matter. However, that was not enough as I will show herein below. As a result of that genuine effort the plaintiff's capital or principal claim was amicably settled¹⁸. However, more needed to be done. Parties are implored to refrain from the practice, propensity and conduct of attempting to settle the matter when there is already a trial date; at the time when expenses and costs have already been incurred to set the matter down and some arrangements and preparations for the trial date have been made. Settlement of the matter must be effortless and inexpensive; otherwise costs shall be mulcted against the offending party. No party should be put out of pocket because of the late offers, which should otherwise have been made earlier.

¹⁶ Section 237 of the Constitution provides that: All Constitutional obligations must be performed diligently and without delay.

¹⁷ Section 165(1) provides that: Judicial Authority of the Republic is vested in the courts.

¹⁸ Save for the question of costs.

[20] The plaintiff was a successful party herein and there is nothing brought before me to suggest that the plaintiff, as a successful party should not be awarded costs of 18th March 2026, save for defendant's submission that the matter was not postponed at its instance. There is no merit in the submission as I have explained above. The defendant is liable to pay the reserved costs of the 18th March 2026

[21] It is prudent to restate that the defendant's resistance in court to pay the reserved costs of 18th March 2026¹⁹ is an afterthought and is very much opportunistic. The defendant's offer of settlement, by all account, in every interpretation and for all intents and purposes meant to include in its tender the reserved costs of the 18 March 2026, hence the exclusion therein only referred and related to the costs towards the trial set down on 15th June 2026. Such frivolous tactic of change of mind is disappointing and vexing. It is exacerbated by the fact that it was based on no legal and meritorious grounds. Scarce Judicial resources should be utilized sparingly and should be reserved for deserving matters.

Costs after 05th June 2026

[22] The defendant argues that it should not be mulcted in costs occasioned after 05th June 2026. This argument stems from the fact that the defendant made its offer on 05th June 2026, therefore it considers itself to be not liable for the costs after the date of offer. This argument misses the point and is without merit in a number of respects. Firstly, the offer of settlement was made available to the plaintiff's legal representatives and not to the plaintiff directly and personally. That would ordinarily necessitate arrangements to consult and

¹⁹ embodied in the court order of 19th March 2026.

consultations to be held with the client and the relevant experts. The offer of settlement would trigger some talks with certain experts as this matter involves quantum, a specialised aspect of the case. A rhetoric question is, how would all of these have been achieved without incurring costs? for example, telephonic consultation costs and disbursements arising from consultation with experts and their reports. In a nutshell the offer and its communication inevitably necessitated incurrence of costs by the plaintiff for it to achieve the desired consequences. Ms Brauns for the defendant informed the court from the bar that the offer of settlement was intended to be made an order of court from the beginning. That was not gainsaid by Mr Zilwa for the plaintiff. Parties are commended for that information. From this concession it is clear that parties knew from the beginning that Counsel were to be robed in for the sole purpose of coming to court to apply for the terms of their agreement to be made an order of court. Another aspect that necessitated the incurrence of costs is Rule 34(6) of URC that requires that an acceptance of offer, like the offer of settlement, must be in writing. Drawing of pleadings, notices, documents and any other court processes is chargeable and recoverable under Rule 70 of the URC. The above is justified by the fact that the acceptance was tendered only on 12th June 2026. Under these circumstances the fact that the offer was made on 05th June 2026 is insufficient to deprive the plaintiff costs post 05th June 2026 up to and including 15th June 2026. Nothing stands on the way of granting the costs incurred after 05th June 2026 up to and including 15th June 2026. I find no basis for the plaintiff to be deprived of his costs, especially on the grounds relied upon. I reiterate that the defendant did not only anticipate, but also knew that costs would be incurred after 05th June 2026 for consultations, drawing documents, notices and court process and for attending and appearance in court. Costs incurred after an offer to settle are necessarily recoverable.

[23] Although the general rule is that the successful party should be awarded costs, the court can, in the exercise of its discretion, deprive a successful party of costs wholly or partly. It may even order such party to pay the whole or a portion of the costs incurred by the unsuccessful party. The court should however, not be astute to deprive a successful litigant of any costs²⁰. The grounds on which the court will be justified in departing from the general rule are circumscribed. The court may depart from the general rule in circumstances where, *inter alia*, (1) *the successful party has made or is making excessive demands*; (2) *impugned conduct*, (3) *has taken an unnecessary step or adoption of a wrong procedure*, (4) *has indulged in misconduct*²¹. Some other factors are necessary to be taken into account when considering to deprive a successful party of the costs are the following: vexatious proceedings or that the successful party has propelled a vexatious litigation; negligence of a successful party or where a successful party has engaged in a negligent conduct; the moral obligation of the successful party in that ethical consideration connected with the matter may enter into the exercise of the court's discretion, the conduct of the legal practitioner; the achievement of technical success only²², Point raised by the court itself etcetera. In this case none of the factors enumerated above were part of the argument advanced by the defendant to justify court's decision to deprive the plaintiff of his costs of this litigation.

All Costs

²⁰ *Feinsten and another v Taylor* 1962 (2) SA 54 (W) at 56B-C

²¹ Hebbstein and Van Winsen: The Civil Practice of the High Courts of South Africa, Fifth Edition, Volume 2, Pages 961-967

²² There are diverse views on this aspect. They include deprivation of costs, non-deprivation and even payment by successful party of an unsuccessful opponents costs: *Oesrich v General Accident fire and Life Assurance Corporation Ltd* 1928 OPD 105; *Rouxville Municipality v Haupt* 1909 ORC35; *Cape and Transvaal Land and Finance Co Ltd v De Velliers* 1926 CPD 59;

[24] The parties are *ad idem* that the plaintiff, as a successful party should be awarded costs of this litigation, bar the ones debated above. About the ones that are subject of this judgment the court was requested to exercise its discretion in terms of Rule 34(11) of the URC. I have found that the plaintiff is entitled to his entire costs, such to include costs occasioned by the postponement of the matter on 18 March 2026 (as per the court order of 19th March 2026) and the set down of the matter for trial on 15th June 2026. Mr Zilwa for the plaintiff requested this court to grant costs of two Counsel. He submitted that an issue of quantum is a complex matter with a lot of medical and expert evidence to unravel and unscramble. No contrary submission was made by the defendant in this regard. I agree with these submissions. Both parties requested that the terms of their agreement be made an order of court.

[25] During argument in court, conflicting submissions were made on a trite and ancillary issue about what constitutes legal costs. Divergent views were aired about whether disbursements form part of the legal costs. In his submissions Mr Zilwa contended for a proposition that qualifying fees of experts do not form part of the legal costs and that there should be an order of court specifically awarding those costs. There is no merit in this proposition. In a recent delivered judgment in the Supreme Court of Appeal of *Palmer*²³ Smith JA, when referring to recoverable legal costs had this to say:

“[9] South African law recognises that a costs award is intended to indemnify the successful litigant for expenses necessarily incurred in the litigation. It is not meant to confer a profit. As a general rule, recoverable costs are therefore limited to amounts actually paid or liabilities actually incurred, as explained in Texas Co. There is, however, an established exception for attorneys who act in person. Such attorneys may recover costs on the same footing as if they had instructed another attorney, provided the items claimed are necessary and not fictitious. That exception has been recognised in several decisions, including Texas Co and Knoll v Van Druten and

²³ *Bandara Investments CC and Another v Palmer and others CC and others* (205/2024); 613/2024) [2026] ZASCA 85 (19 June 2026) Para 9.

Another. It follows that an attorney may not claim fees for instructing or consulting with himself or herself, because such items are fictitious and unnecessary.”

It is therefore plain from the foregoing that amounts actually paid and liabilities incurred form part of recoverable legal costs.

[26] On the conspectus of all this I am of the considered view that the parties’ terms of agreement deserved to be made an order of this court. There was no justification for deviation from the general rule that costs should follow the result. I made some unfavourable findings in the preceding paragraphs about the defendant’s conduct which attracts costs on a higher scale. I am inclined to grant plaintiff’s costs on scale C. In granting costs for employment of two Counsel and on scale C, I took into account not only the complexity of the matter but also the value of the claim²⁴ or the settlement amount.

[27] What aggravates against defendant’ case in so far as the costs are concerned is the fact that the defendant is a state owned entity (SOE) which is an organ of state²⁵. The defendant exercises power in terms of electricity Regulation Act of 2006 (the legislation). The manner in which the defendant dealt with this court in so far as it relates to the costs referred to in the court order of 19th March 2026 militates against a costs order in its favour and it attracts a higher scale as I will demonstrate. It worths repetition that the defendant in its offer of settlement intended to tender costs referred to in the court order of 19th March 2026. Without any justification the defendant changed the tack and decided to instruct its Counsel to oppose costs they initially tendered. It is crucial for the organ of state or state owned entity to neither be

²⁴ Rule 67A(3) of the Uniform Rules of Court

²⁵ Section 239 of the Constitution defines an organ of state to mean *inter alia* “ ..., any other functionary or institution-

(i)...

(iii) exercising a public power or performing a public function in terms of any legislation”

coy nor to play fast and loose with the truth. It is their duty to take the court into their confidence and fully explain and provide tangible reasons for their actions and conduct.

[28] In *Kalil*²⁶ the SCA strongly remarked as follows:

“30....Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. n the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance...”

The defendant, when settling an action arising from the legality of their conduct (legal duty or duty of care), should have taken this court into its confidence about the reserved costs referred to in the court order of 19th March 2026. It should not have opposed the award of those costs in favour of the plaintiff in circumstances where it initially sought to tender those costs. The defendant unnecessarily inundated this court with a duty to determine the award of costs which it intended to tender. The defendant as an organ of state has a constitutional duty to assist and protect the court to ensure *inter alia* its accessibility and effectiveness²⁷, is conduct in so far as the reserved costs referred to in the court order of 19th March 20026, was an antithesis to these aspirations. Costs on a higher scale against the defendant are indeed justified.

[29] It is important to rehash the defendant’s conduct of spuriously arguing in this court that it was not liable for the costs referred to in the court order of 19th March 2026. That conduct marked the amount of frivolity with which the defendant sought to approach this court. Frivolity attracts high scale of costs to mark court’s displeasure of the litigant’s conduct. The plaintiff unequivocally

²⁶ *Kalil NO and Others v Mangaung Metropolitan Municipality and Others* 2014 (4) ALL SA 291 (SCA); 2014 (5) SA 123 (SCA) Para 30

²⁷ Section 165 (4) of the Constitution

tendered those costs and in this court argued against the offer it initially made. That was uncharacteristic of the organ of state. No one is allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold; to approbate and reprobate²⁸. I then underscore that the defendant veered from its constitutional obligation to assist and protect the court²⁹. Remarks by Cameron J in *Kirland*³⁰ are apposite, especially that the defendant is a primary agent of the Constitution. It was held *inter alia* that:

“[82] All this indicates that this Court should not decide the validity of the approval. This would be in accordance with the principle of legality and also, if applicable, the provisions of PAJA. PAJA requires that the government respondents should have applied to set aside the approval, by way of formal counter-application. They must do the same even if PAJA does not apply. To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly”.

There is higher duty on the state organ to respect the law and act bona fide. It must do it right and properly. It was improper of the respondent to conduct itself in the manner it did.

Order

[30] In the result I make the following order:

30.1 The defendant is liable to pay the plaintiff an amount of

R8 200 000. 00 (*Eight Million Two Hundred Thousand Rand*)

²⁸ *Hlatshwayo v Mare and Deas* 1912 AD 242; *Dabner v South African Railways and Harbours* 1920 AD 383 at 594-5.

²⁹ Section 165(4) of the Constitution

³⁰ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd* 2014 (5) BCLR (CC), 2014 (3) SA 481 (CC) Para 82.

Only) as and for damages in full and final settlement of all plaintiff's claim arising from plaintiff's electrocution on 12th July 2022.

29.2 The defendant is directed to pay the amount referred to in paragraph 30.1 above on or before the expiry of Thirty (30) days of this order.

29.3 The defendant is liable to pay all plaintiff's costs of suit including the reserved costs referred to in the court order of the 19th March 2026 and costs attendant upon the employment of two Counsel for hearing of the matter on 15th June 2026, such costs to be paid on scale C.

A.S ZONO

JUDGE OF THE HIGH COURT (ACTING)

APPEARANCES:

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Matter heard on

: 15 June 2026

Delivered on

: 30 June 2026