IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

CASE NO. 36/2017

Reportable	**Yes / No**

In the matter between:

T[…] N[…] obo B[…] N[…] **Applicant / Plaintiff**

and

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, EASTERN CAPE **Respondent /Defendant**

JUDGMENT

ZILWA J

[1] In this matter the applicant ("plaintiff") had instituted a damages claim against the respondent ("defendant"). The claim is for compensation for damages sustained by the plaintiff's minor child arising from medical negligence by the

defendant's personnel at Cecilia Makiwane Hospital in their handling of the delivery of the plaintiff's baby in that hospital.

[2] The defendant had opposed the action and filed its plea in pursuit of such opposition.

[3] In the fullness of time the defendant, acting on legal advice, conceded liability for the damages incurred by the plaintiff's minor child and informed the plaintiff's attorneys accordingly. The concession on liability culminated in an order being taken by agreement before Van Zyl DJP on 14 November 2018. Since the interpretation of such court order forms the basis of the present proceedings it is essential to quote its provisions in full, which are as follows:

> **"IN THE HIGH COURT OF SOUTH AFRICA**
> **EASTERN CAPE LOCAL DIVISION – BHISHO**
>
> **Case No. 36/17**
>
> **BHISHO: WEDNESDAY 14 NOVEMBER 2018**
> **Before the Honourable Mr Justice Van Zyl (DJP)**
>
> In the matter between:
>
> **T[…] N[….]** **PLAINTIFF / RESPONDENT**
> **and**

THE MEMBER OF THE EXECUTIVE COUNCIL

FOR THE DEPARTMENT OF HEALTH IN THE

EASTERN CAPE **DEFENDANT / APPLICANT**

Having heard Adv. A D Schoeman SC with Adv. X Stemela for the Plaintiff and Mr S Mgujulwa for the Defendant and having read the papers filed of record,

IT IS ORDERED THAT:

1. The issue of liability is separated from the issue of quantum.

2. The Defendant is liable for all such damages as the Plaintiff in her representative capacity may prove arising from the negligent treatment, as more fully set out in the Particulars of Claim, of her during the labour and birth of her child B[…] who was born on 22 December 2011.

3. The issue of quantum is postponed, for a date in the third term 2019.

4. The Defendant is further directed to pay the Plaintiff's costs of suit, such costs include:

   (a) the costs of two counsel;
   (b) all reserved costs, if any;
   (c) the costs of preparing for consultations and trial;
   (d) the costs of the hearing on 14 November 2018 including Counsel's day fees;
   (e) the travelling and accommodation expenses of the Plaintiff's legal representatives attending consultation with witnesses and in attending court;
   (f) the reservation and appearance fees, if any, of the plaintiff's expert witnesses.

5. The Registrar is directed to enrol the matter for case management."

[4] Subsequent to the granting of the court order of 14 November 2018 the defendant (MEC for Health, EC) served and filed a Notice of Intention to Amend her plea. The envisaged amendment entailed the introduction of the so-called D Z defences that arose from and were introduced as a result of the judgment of the Constitutional Court in *Member of the Executive Council for Health and Social Development, Gauteng v D Z obo W Z*[1] on 31 October 2017 and which introduced the so-called public health system defences in respect of quantum (more about these defences later).

[5] The applicant did not oppose the intended amendment, which was then effected and filed of record on 20 March 2019 as predicated in the Notice of Intention to Amend.

[6] On 2 October 2019 the plaintiff replicated to the defendant's amended plea, taking issue with the defendant's introduction of the D Z defences in her amended plea and contending that the issue of the defendant's liability and the basis thereof are *res iudicata* by reason of the court order issued on 14 November 2018.

[1] 2018 (1) SA 335 (CC); [2017] ZACC 37.

[7] It is that contention by the plaintiff, which is refuted by the defendant, that culminated in the parties bringing the present application in terms of Rule 33(4) of the Uniform Rules of Court as a stated case for adjudication by this Court of the parties' conflicting contentions with regard to the import and meaning of the court order.

[8] After I had granted an order for separation of issues as jointly sought by the parties the agreed issue for this Court's determination as set out in the stated case is the interpretation of the court order of 14 November 2018 (the order) and to decide whether or not it precludes the defendant from pursuing the D Z defences as set out in her amended plea in the quantum portion of the trial. The plaintiff contends that the order precludes the defendant from so doing, while the defendant contends otherwise. The task of this Court in these proceedings is to determine the correct interpretation of the order that forms the subject matter of the parties' competing interpretations.

[9] The plaintiff's submission is that I should interpret the order as rendering the defendant's liability and the basis thereof *res judicata* in that it precludes the Court from adjudicating any issue and granting any relief and seeking development of the common law that has the effect of not paying common law lump sum damages to

the plaintiff's minor child (the minor) in terms of the *"once and for all"* principle, but, instead, to render services and provide goods, to procure services and goods in the public or private health care centres, to reimburse the minor for expenses incurred for such services and / or to make periodic payments of any damages awarded.

[10] On the other hand, the defendant's contention is that there is no basis for the interpretation contended for by the plaintiff. The D Z defences require the development of the common law so that the defendant may, in lieu of lump sum damages, either:

(i) provide the medical services that the plaintiff requires in the public care sector free of charge at a reasonable or appropriately high standard (the so-called *"public health care defence"*); or

(ii) if the defendant cannot provide the medical services that the plaintiff requires in the public health care sector, then the defendant undertakes to pay for such services in the private health care sector, as and when the plaintiff obtains such services (the so-called *"undertaking to pay"* defence).

The common law will require development if the D Z defences are permitted since, currently, it requires an unsuccessful defendant to pay damages to a successful plaintiff on a *"once and for all"* basis in one upfront lump sum amount, representing the net present value of the future medical costs, adjusted where appropriate for the

probability of their being required. As it presently stands common law requires payment of damages in money, not in kind.

[11] In support of its contended interpretation of the court order the applicant submits that the clear and unambiguous words of the order, in conjunction with the contextual setting or background thereto and the purpose thereof, points to its only conceivable meaning being that the introduction of the D Z defences subsequent to its granting is precluded and that it envisaged payment of proven common law lump sum monetary damages on the basis of the once and for all principle.

[12] The applicant further argues, in support of its interpretation of the court order, that:

12.1 From the outset the minor child's claim is a delictual common law claim for payment of monetary damages in a lump sum once and for all basis.

12.2 Judgment in the D Z matter was delivered on 31 October 2017 and the present defendant in that matter was admitted as *amicus curiae*. The public health care defence and the undertaking to pay defence

were already contemplated in pending trials by the defendant, hence it had joined as *amicus* in the matter.

12.3 The defendant's counsel had drawn a memorandum on 28 August 2018 wherein he suggested the amendment of the defendant's plea in this matter to introduce the D Z defences to mitigate the quantum of damages in respect of this claim. He recommended that the plaintiff's attorney be advised in writing as soon as possible of such proposed amendment.

12.4 The defendant's attorney addressed a letter to the plaintiff's attorney on 3 September 2018 advising, *inter alia*, that instructions were being sought to concede the defendant's liability (merits) insofar as the claim of the minor child is concerned. The advice proffered and the instructions sought were without prejudice to the defendant's rights generally and were not to be understood as a concession or admission of any component whatsoever of the damages allegedly suffered and their quantification. The letter further stated that the defendant intends to amend her plea in that regard.

12.5 On 11 October 2018 the defendant's attorney confirmed to the plaintiff's attorney his instructions to concede defendant's liability for the minor's claim and to amend the plea accordingly and in the

further respects alluded to in his letter of 3 September 2018. After various telephonic discussions between the attorneys in the period between 11 October and 14 November 2018 concerning, *inter alia*, the terms of the draft order, the order was taken.

12.6 Subsequent to the order the plaintiff's attorney claimed an interim payment in terms of Rule 34A in respect of the minor's medical needs in monetary damages, which was disputed by the defendant's attorneys in their responding letter. The parties eventually agreed for payment of general damages by the defendant in an agreed amount.

12.7 Since the defendant's attorneys in their letter to the plaintiff's prior to the taking of the order had failed, contrary to their counsel's recommendation, to advise the plaintiff that the amendment to their plea referred to in the letter would entail the introduction of the D Z defences, the plaintiff would have no knowledge of that fact. In any event the contemplated amendment was a mere possibility and not a foregone conclusion and it was dependent on the outcome of an investigation on the ability of the defendant to comply with the allegation that one or more of her facilities could be able to actually provide the services or supplies necessary.

12.8 The Court was not informed of the intended amendment to introduce the D Z defences or it would not have declared the defendant unconditionally liable for all damages if it had intended to leave the door open to the defendant to raise the D Z defences. The defendant's approach is tantamount to an impermissible variation, amendment or setting aside of the order without claiming relief and making out a case for it in terms of the Rules or under common law.

12.9 The oral testimony of the applicant's attorney, Mr Booi, who was the primary author of the order, showed that he was not aware that the defendant intended to raise the D Z defences when he crafted the draft that culminated in the court order. This was proved by the fact that shortly after the taking of the order he had pursued an interim payment on the understanding that the defendant's concession of liability covered all the common law damages in their normal form.

12.10 The fact that Mr Booi had not objected to the defendant's Notice of Intention to Amend where the introduction of the D Z defences was expressly indicated is of no moment since Mr Booi had testified that this was his first encounter with such complex defence. As a result of that he had sought advice from the plaintiff's then counsel,

Advocate Schoeman SC, who advised him not to object because the plaintiff would not be able to demonstrate prejudice.

12.11 The background facts and the context in which the order was drafted and granted, given the clear and unambiguous words thereof, the contextual setting or background thereto and the purpose thereof, is conceivable only of a meaning that the introduction of the D Z defences is precluded. The quantification of the claim as formulated in the particulars of claim in terms of the order is all proven common law lump sum once and for all monetary damages.

12.12 This Court should interpret the order in a similar way that the Supreme Court of Appeals interpreted the court order in *Phakama Ngalonkulu v The Member of the Executive Council for Health of the Gauteng Provincial Government*[2], which precluded the raising of the D Z defences in that matter.

[13] In her opposition of the declaration sought by the plaintiff, the defendant has argued that:

13.1 The text used in the court order does not preclude the defendant from raising the D Z defences. It only decided the issue of liability.

[2] (217/2019) [2019] ZASCA 66 (17 June 2020)

The issue of the determination of quantum was held over for later determination. At the date of the granting of the order the Constitutional Court had already accepted that the Court may well develop the common law to accommodate the D Z defences, hence the issue of quantum that was to be determined later by a Court would not be limited to a lump sum amount in monetary terms.

13.2 The nature of the relief that was to be sought at quantum stage would be decided by the Court hearing the quantum aspect of the case and the order in issue does not prevent the defendant from raising the D Z defences. The order should be interpreted in accordance with the Constitution, including *inter alia*, section 34 of the Constitution, which entrenches the defendant's right of access to court. Sections 8(1), 8(3)(a) and (b), 39(1) and 39(2) impose Constitutional duties on the courts when interpreting the Bill of Rights and developing the common law. Section 173 of the Constitution gives the High Court the inherent power to develop the common law in accordance with the interests of justice. Courts are required to prefer constitutional interpretations over unconstitutional interpretations. In this case, a constitutionally compliant interpretation of the order would neither preclude the defendant from raising the D Z defences nor preclude the High Court from

considering them and developing the common law if persuaded to do so.

13.3 The *Ngalonkulu* judgment relied upon by the applicant is distinguishable on the facts.

13.4 Mr Booi could not be correct in his oral evidence in contending that his immediate reaction to the letter of 11 December 2018, where the D Z defences were first expressly mentioned, was that those defences were precluded by the order as *"that horse had bolted"* and he was confused that there would be an attempt to raise the D Z defences at that stage. Mr Booi had at least 5 opportunities to raise his alleged understanding of the order and to point out to the defendant that (on his version) it precluded the D Z defences, namely:

(i) By responding to the letter of the 11 December 2018;

(ii) By referring to it in support of his application for an interim payment as precluding the raising of the defences;

(iii) By objecting to the notice in terms of Rule 28;

(iv) By objecting to the amendment when it was filed;

(v) In his letter of 22 March 2019 in response the to the State Attorney's letter of 19 March 2019.

His failure to do so can only be interpreted to mean that at the time the order was taken he never had in his mind that the D Z defences were precluded by the terms of the order. Moreover his failure to pursue the application for an interim payment relating to medical costs and his acceptance of payment in respect of the general damages only is consistent with his acceptance that the defendant was entitled to raise the D Z defences.

[14] It was further argued on behalf of the defendant that most of the evidence of Mr Booi in fact supported the defendant's case when he made the following concessions:

(i) That either party was entitled to seek to amend their plea at any time until judgment;

(ii) That the plaintiff had recently amended its particulars of claim to depart substantially from the amount of its own claim for future medical expenses;

(iii) That already on 25 May 2017 the parties had agreed to separate merits from quantum and that during the lead up to the order and at the time of the making of the order the parties were dealing with the merits only, not with quantum;

(iv) That the plaintiff's legal team was informed before 14 November 2018 that there would be an amendment of the plea relating to quantum and that the letter of November 2018 conveyed that the State Attorney had instructions to concede the merits in respect of the minor child and to amend the plea;

(v) That there was no communication at court from Mr Mgujulwa, the defendant's attorney, that the defendant was not proceeding with her amendment and there was no abandonment of the defendant's constitutional rights at the court appearance on 14 November 2018;

(vi) There was no agreement to limit the quantum Judge's constitutional powers at the court appearance and that the word *"all"* in paragraph 2 of the order is there to signify the absence of contributory negligence;

(vii) Nothing in the court order detracts from any party's right to amend the pleadings;

(viii) Mr Schoeman SC opined that there was no basis to object to the amendment of the plea. If the order in any way precluded the raising of the D Z defences Mr Schoeman would have been the first to advise Mr Booi to object to the amendment as he was familiar with the D Z defences. The point about the exclusion of the D Z defences by the order was suggested by the plaintiff's present Senior Counsel, who was not on brief at the relevant time.

[15] The respondent finally argued that the conspectus of the oral evidence shows that neither the parties in formulating the draft order, nor the court in granting the order, contemplated or intended that the defendant would be precluded from raising the D Z defences.

[16] With those conflicting contentions and submissions by the parties it becomes essential to take a closer look at the law that governs the interpretation of court orders.

[17] The law on interpreting court orders has evolved with the law on interpreting contracts, statutes, documents and other instruments. In *Firestone South Africa (Pty) Ltd v Genticuro A G*[3] the Appellate Division defined the proper approach as follows:

> "The basic principles applicable to construing documents also apply to the construction of a Court's judgment or order. The Court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well known rules . . . Thus, as in the case of a document, the judgment or order and the Court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the Court that gave the judgment or order can be asked to state what its subjective intention was in giving it . . . Of course, different considerations apply when, not the construction, but the correction of a judgment or order is sought by way of an appeal against it or otherwise . . . But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the Court's granting of the judgment or order may be investigated and regarded in

[3] 1977(4) SA 298; [1977] 4 All SA 600 (A).

order to clarify it; for example, if the meaning of a judgment or order granted on appeal is uncertain, the judgment or order of the Court *a quo* and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persist, other relevant extrinsic facts or evidence are admissible to resolve it."

[18] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] Wallis JA referred to the significant developments in the law relating to the interpretation of the documents in a number of different jurisdictions and confirmed the present state of the law in this regard as follows:

"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 ordinarily 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

[4] 2012 (4) SA 593 (SCA) para [18].

> instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make 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."

[19] In *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [5] Wallis JA, writing for the court, expressed himself as follows:

> "Whilst the starting point remains the words of the document, which are the only medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is *"essentially one unitary exercise"* . . ."

[20] The effect of these judgments is that a Court first looks to the plain meaning of the order in order to ascertain its meaning. If there is ambiguity in the meaning then the Court is entitled first to consider extrinsic evidence *"surrounding or leading*

[5] 2014 (2) SA 494 (SCA) at para [12].

to the order". If there is still ambiguity in the meaning, the Court is entitled to consider *"other relevant extrinsic"* evidence.

[21] Where a court order takes the form of a settlement agreement and being made an order of court, application of the basic principles relating to the interpretation of contracts will also come into play in interpreting the order.[6]

[22] Difficulties may arise in distinguishing between:

(i) extrinsic evidence *"surrounding or leading to the order"* and *"other relevant extrinsic"* evidence; and

(ii) *"background circumstances"* and *"surrounding circumstances".*

When such issues arose in the interpretation of contracts, the Supreme Court of Appeal in *KPMG Chartered Accountants (SA) v Securefin Limited and Another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA); [2009] 2 All SA 523 (SCA), at para 39 developed and simplified the approach as follows:

> "First, the integration (or parole evidence) rule remains part of our law" . . . If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning . . . Second, interpretation is a matter of law and not of fact, and, accordingly, interpretation is a matter for a Court and not for witnesses

[6] See *Eke v Parsons* 2016 (3) SA 37 (CC) at para [30].

> (or, as said in common law jurisprudence, it is not a jury question . . .). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent . . . Fourth, to the extent that evidence may be admissible to contextualise the document (since *"context is everything"*) to establish its factual matrix or purpose or for purposes of identification, *"one must use it as conservatively as possible"* . . . The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances". The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms *"context"* or *"factual matrix"* ought to suffice."

[23] The above approach has been affirmed in a number of other cases. In *Independent Institute of Education (Pty) Limited v KwaZulu-Natal Law Society and Others*[7] the Constitutional Court recently expressed itself as follows:

> "While maintaining that words should generally be given their ordinarily grammatical meaning, this Court has long recognised that a contextual and purposive approach must be applied to statutory interpretation. Courts must have due regard to the context in which the words appear, even where *"the words to be construed are clear and unambiguous"*.

[7] 2020 (2) SA 325 (CC) at para [41].

[24] Having identified the applicable law all that remains is to apply it to the facts of this case.

[25] As indicated above and as the statement of the agreed facts and issues to be decided show, the issue for adjudication by this Court is whether the court order of 14 November 2018, declaring the defendant liable *"for all such damages as the plaintiff in her representative capacity may prove arising from the negligent treatment, as more fully set out in the particulars of claim, of her during the labour and birth of her child Bukho who was born on 22 December 2011"*, precludes the defendant from invoking the D Z defences as pleaded in her amended plea.

[26] My reading of the order is that all it did was to hold the respondent liable for the plaintiff's proved damages referred to in the order; nothing more and nothing less. It makes no reference at all to the manner in which such liability is to be discharged. It does not deal at all with the quantum aspect of the claim, which it specifically postponed for a date in the third term of 2019. Besides holding the defendant liable for all the damages that the plaintiff may prove in paragraph 2 thereof it does not order payment as a manner of discharging such liability. The word *"payment"*, is only mentioned in paragraph 4 of the order where the defendant is directed to pay the plaintiff's costs of suit.

[27] Paragraph 1 of the order separates the issue of liability from the issue of quantum. Liability refers to the party that is found to have been responsible for the harm in issue and it creates an obligation on such party to provide the appropriate remedy for the harm caused. That is the only aspect that was decided and ordered in paragraph 2 of the court order. Quantum, on the other hand, refers to the nature of the remedy that the Court that deals with quantum may decide and order the responsible party to provide. The court order in issue does not deal at all with that part of the claim and it postponed it for a later date for determination by another Court.

[28] Given the separation of the issue of liability from the issue of quantum in paragraph 1 of the order the Court that dealt with the issue of liability had divested itself of any power to decide anything pertaining to the appropriate remedy as that issue is quantum related.

[29] Paragraph 2 of the order ascribed liability on the defendant for all such damages as the plaintiff . . . may prove. The use of the word *"all"*, read in context, conveys that there was no contributing causal negligence by the plaintiff or any other party as a joint wrong doer. This is a merit-related issue and it has absolutely

nothing to do with quantum or the manner in which the liability is to be discharged. The use of the words *"may prove"* postulate proof by the plaintiff of the entitlement to a remedy in future (quantum related) proceedings, not the proceedings before the Court on 14 November 2018. It specifically puts the *onus* on the plaintiff to prove her damages arising from the defendant's negligent conduct that found the basis of the order. Once again it makes no reference to the mode or manner of the defendant's settlement of such proved damages for which it had been held liable.

[30] Of course in the course of the plaintiff trying to prove her damages at the quantum stage of the proceedings it will always be open to the defendant to challenge such proof or to subject it to any necessary probity. In the course of so doing nothing in the order precludes the defendant from invoking the D Z defences.

[31] The applicant's submission that the word *"quantum"* and the word *"damages"* signify that the remedial component of the claim is limited to a determination of lump sum monetary damages is, in my view, without basis. In the *D Z* case the Constitutional Court found that common law could be developed to recognise payment in kind, thereby accepting that quantum could, in an appropriate well-

pleaded case, be determined without reference to money and include other forms of material compensation. That dictum by the Constitutional Court was the applicable law at the time the court order was made and it can reasonably be assumed that, since it had been in vogue for just over a year at the time, it was known both to the Court that granted the order as well as to the parties' respective Counsel. The D Z defences contemplate both monetary compensation as well as compensation in kind. The development of the common law envisaged therein would allow payment in kind, whereby medical services and supplies would replace monetary damages. It also envisages that the defendant may only pay for medical services and supplies that cannot be provided in the public health care sector at the appropriate standard, as and when the medical services and supplies are required to be provided, not by way of upfront lump sum (the "undertaking to pay" defence). This defence in effect involves payment of money damages, but only in the amounts invoiced when a private health care sector service provider invoices for the required medical services or supplies. The defence also envisages a development of common law that would allow the defendant to pay monetary damages in a series of instalments, not in a lump sum.

[32] The order in issue make no reference to a *"lump sum"*, a *"single amount"*, *"common law damages"*, *"money damages"*, *"monetary damages"*, *"to the*

exclusion of the Constitution", *"to the exclusion of Constitutional remedies"*, or *"the like*".

[33] At any point in the proceedings before judgment (on quantum) either of the parties is entitled to apply to amend their pleadings[8]. The approach of the courts to amendments was described by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Another*[9] as follows:

> *"Amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless an amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs",* or *"unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed.*"

[34] The liberal approach to allowing amendments is justified on the basis that it enables the Court and the parties *"to obtain a proper ventilation of the dispute between the parties"*[10]. That liberal approach in the constitutional era enjoys the backing of section 34 of the Constitution.

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[8] Cilliers, Loots and Nel: **Herbstein and Van Winsen The Civil Practice of the High Courts of South Africa**, Juta 5th edition page 675 and the authorities at footnote 6.

[9] 2005 (6) BCLR 529 (CC).

[10] *Trans-Drakensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd* 1967 (3) SA 632 (D) at 638.

[35] The entitlement by each of the parties to amend would have been well known both to Van Zyl DJP in granting the order as well as to the legal representatives (at least their Counsel) on each side. There is nothing that indicates any intention on the part of the Judge or the parties' legal representatives to deprive the defendant of the right to amend before the quantum phase of the proceedings had even started.

[36] On the facts of this case the intention on the part of the defendant to amend her plea preceded the order and it was communicated to the plaintiff at least twice in writing, before the order was taken. As already stated, by 14 November 2018 the D Z judgment had been handed down and available for just over year, it having been handed down on 31 October 2017. It had been reported in the Butterworths Constitutional Law Reports[11] in December 2017. It had been reported in the South African Law Reports in February 2018, hence readily available both to the Court and the legal teams.

[37] In the stated case the plaintiff seeks a declarator that in terms of the court order this Court is precluded from adjudicating any issue and granting any relief aimed at seeking development of the common law that has the effect of

[11] 2017 (12) BCLR 1528 (CC).

recognising the D Z defences. The effect of that interpretation sought to be placed on the court order by the plaintiff requires that in presenting and adjudicating the defendant's case on the remedy common law, to the exclusion of the Constitution, should be applied.

[38] In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte the President of the Republic of South Africa and Others*[12] the appellants sought to do the same in the context of administrative law. The Constitutional Court emphatically rejected this approach, saying –

> "[43] Mr Bertelsmann . . . contended that common law grounds of review can be relied upon by a litigant and, if this is done, the matter must then be treated as a common law matter and not a constitutional matter.
>
> [44] I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."

[12] 2000 (2) SA 674 (CC).

[39] Section 8(1) of the Constitution provides that "The Bill of Rights applies to all law, and binds the legislature, the executive, judiciary and all organs of State."

[40] In the *D Z* case the Constitutional Court pointed out that:

> "Personal injury claims involve the fundamental right to freedom from all forms of violence and security of the person and bodily integrity (section 12(1)(c) and (2) of the Constitution); when applying a provision of the Bill of Rights to a natural or juristic person a Court may develop the rules of the common law to limit the right in accordance with the limitations clause (section 8(3)(b)); when developing the common law every Court must promote the spirit, purport and objects of the Bill of Rights (section 39(2)); and everyone has the right to have access to healthcare services, which the State must take reasonable legislative and other measures within its available resources, progressively to achieve (section 27(1) and (2))."[13]

[41] Both parties in their pleadings implicate rights in the Bill of Rights as well as other sections of the Constitution and they raise constitutional issues. In those circumstances if the defendant makes out a proper case that the common law in this case requires development under the Constitution, and properly pleads that case as she has done in the amended plea, the Court, in keeping with the D Z

[13] Footnote 3. See also: *Khumalo v Holomisa* 2002 (5) SA 401 (CC), at paras [31] to [33]; *Amodi v Multilateral Motor Vehicle Accidents Fund* 1998 (4) SA 753 (CC), at para [31].

judgment, must do so. Section 8(1)(3)(a) and 39(2) of the Constitution compels it so to do.

[42] The interpretation of the court order contended for by the plaintiff is that the Court that deals with the quantum aspect of the claim should not hear the defendant in relation to her pleaded defences in the amended plea. The defendant is sought to be precluded from leading the aforementioned evidence and not to have an opportunity to explain why she is of the view that the common law should be developed to allow for the D Z defences despite the fact that she has amended her plea so as to incorporate such defences, without objection by the plaintiff. Such procedural unfairness cannot be countenance by this Court.

[43] *In De Beer NO v North Central and South Central Local Council and Others (Umhlatuzana Civic Association Intervening)*[14] the Constitutional Court held that the right of access to courts in section 34 of the Bill of Rights, is a fair hearing right which affirms the rule of law and explained it as follows:

> "The right to a fair hearing before a Court lies at a heart of the rule of law. A fair hearing before a Court as a prerequisite to an order made against anyone is fundamental to a just and credible legal order. Courts in our country are obliged to ensure that the proceedings

[14] 2002 (1) SA 429 (CC), at para [11].

> before them are always fair. Since procedures that would render the hearing unfair are inconsistent with the Constitution Courts must interpret the legislation and Rules of Court, where it is reasonably possible to do so, in a way that would render the proceedings fair. It is a crucial aspect of the rule of law that court orders should not be made without affording the other side a reasonable opportunity to state their case."

[44] The interpretation of the court order contended for by the applicant would, in my view, and in the context of what is set out above, be unconstitutional.

[45] In advancing its submissions the applicant has called to aid the dictum in the judgment in the *Ngalonkulu* matter where the phrase *"shall pay the plaintiff 100% . . . of her agreed or proven damages"* in a court order declaring the defendant in that matter liable, was considered as precluding the defendant from raising the D Z defences. In my view, the wording of the court order in that case is clearly different from the wording engaged in the court order in issue herein. Accordingly, this case is clearly distinguishable from the *Ngalonkulu* case. As already stated, the court order in issue herein makes no reference to *"payment"* in the relevant paragraph that deals with liability (paragraph 2). In upholding the appeal and concluding that the order was to be interpreted as precluding the D Z defences in *Ngalonkulu* the SCA reasoned as follows:

> "The Judge making the separation order was 'restricted to a consideration of the then prevailing common law, namely the 'once and for all' rule that damages could not be paid in instalments. At that stage the decision of the Constitutional Court in D Z had not yet been delivered. The order was drafted and agreed upon by the parties with the knowledge that monetary damages were claimed as per appellant's particulars of claim and that such damages would be payable in a lump sum. The plea for the development of a common law or any plea that services could be rendered was neither raised, let alone pleaded at that time."

The facts are different in the present case scenario.

[46] The plaintiff seeks a declarator that the issue of the defendant's liability and the basis thereof are *res judicata* by reason of the order issued by the Honourable Justice Van Zyl (DJP) on 14 November 2018.

[47] In *National Sorghum Breweries Ltd (t/a Vivo African Breweries) v International Liquor Distributors (Pty) Ltd*[15] the SCA set out the requirements for a defence of *res judicata* as follows:

> "The requirements for a successful reliance on the exception were, and still are, *idem actor, idem reus, eadem res, and eadem causa petendi*. This means that the exception can be raised by a defendant in a later suit against a plaintiff who is *"demanding the same*

[15] 2001 (2) SA 232 (SCA) at 239F – H.

> *thing on the same ground"* . . .; or which comes to the same thing, *"on the same cause for the same relief"* . . . or which also comes to the same thing, where the same issue had been adjudicated upon . . ."

[48] In order to successfully raise *res judicata* the previous determination must have been in relation to, at the very least, the same issue or cause (ie *eadem causa petendi*). This cannot apply to the facts of this case since the court order in issue was in respect of merits (liability) only. The issue of quantum was postponed to a later date. No argument or issue relating to quantum was considered by the Court that granted the order. The Court presiding over the quantum issue will not address the same issue (merits) or cause that was dealt with by the merits Court. Only the issue of liability is *res judicata* and not the quantum or remedial issue. The issue at quantum stage is completely different to that which was raised and determined when the court order in issue was made, hence the aspect of *res judicata* cannot possibly find any application on the facts.

[49] The textual and contextual reading of the order, taking into account all the circumstances surrounding its drafting and granting, simply do not allow the interpretation of the order contended for by the plaintiff. There is nothing in the text of the order or the context in which it was sought and granted that precludes

the respondent from raising the D Z defences or the Court from considering a development of the common law as envisaged in the D Z judgment.

[50] For the above reasons I am in agreement with the respondent's interpretation of the court order that –

50.1 The issue of the defendant's liability and the basis thereof, are not *res iudicata* by reason of the order of 14 November 2018;

50.2 The defendant is not precluded from raising the D Z defences as formulated in paragraphs 6.2.2, 6.2.3 and 9.1 (read with paragraphs 7 and 8) of the amended plea, that she is not liable for the monetary damages as claimed by the plaintiff in her particulars of claim and that she is therefore at liberty to prove that the common law should be developed as pleaded.

[51] With regard to the issue of costs the plaintiff has submitted that even in the event of my finding against it on the separated issue I should deviate from the general rule that the costs follow the event and either order the (successful) defendant to be liable for both parties' costs, or order the costs to be in the cause. I have carefully considered the plaintiff's submissions on this aspect. However,

taking into account all relevant considerations I have, in the exercise of my discretion on this issue, not been persuaded to deviate from the general rule that costs should follow the result in this matter.

[52] In the result,

51.1 The relief sought by the plaintiff in paragraphs 2.6.1 to 2.6.4 in the Statement of Agreed Facts and Issues to be Decided is dismissed;

51.2 The remaining issues in dispute, including the relief sought by the defendant in her amended plea, are referred to trial;

51.3 The plaintiff is ordered to pay the reasonable taxed or agreed party and party costs of this application on the High Court scale, such costs to include the costs consequent upon the employment of two Counsel including their full day fees, the framing of and preparation for and adjudication of the separated issue (including the various drafts of the proposed stated case exchanged, the list of agreed facts and heads of argument).

P ZILWA

JUDGE OF THE HIGH COURT

BHISHO

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Instructed by:		State Attorney Office of the Premier 32 Alexandra Road **KING WILLIAM'S TOWN**
Date Heard:		03 August 2020
Judgment Delivered:		17 November 2020