IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Not Reportable

Case no: CA&R 68/2023

In the matter between:

HA V[...] N[...] N.O

(obo Estate late JCLT L[...]) Appellant/Respondent in Cross-Appeal

and

THE MEC FOR HEALTH:

NORTHERN CAPE PROVINCE Respondent/Appellant in Cross-Appeal

Neutral citation: *HA V[...] N[...] N.O (O.B.O Estate Late JCL L[...]) v The MEC for Health, Northern Cape Province* (Case no: CA&R 68/2023).

Coram: Tlaletsi JP, Mamosebo ADJP et Lever J

Delivered: 02 May 2025

JUDGMENT

Tlaletsi JP and Lever J

1. The appellant in the main appeal is the Estate of the late J[...] C[...] L[...] T[...] L[...]. The said estate is represented by its duly appointed executor, Mr HA V[...] N[...] N.O. The said JCLT L[...] (hereinafter referred to as "J[...]") passed away on 16 June 2024. Prior to his passing, he was represented in these proceedings by his mother. For ease of reference, and to avoid confusion owing to the cross-appeal, the Estate shall be referred to as the "plaintiff" in this judgment. For the

same reasons, the respondent in the main appeal will be referred to as the "defendant" in this judgment.

2. The original claim was for medical negligence against the defendant arising out of the mismanagement of J[...]'s birth by servants of the defendant on 11 July 2011, which left him with a brain injury which led to quadriparetic cerebral palsy. The merits of the plaintiff's claim were settled on 02 November 2015. The damages remained to be ascertained, which is what the court *a quo* dealt with. O'Brien AJ, for the court *a quo*, handed down a judgment dated 01 July 2022.

3. The defendant sought leave to appeal that judgment. Subsequent to the application for leave to appeal brought by the defendant, the plaintiff sought: the reconsideration of the costs order in the 01 July 2022 judgment, due to information that could not be disclosed to the court before judgment, being the plaintiff's secret offer of the 21 October 2019; furthermore, and by way of an application, an order by virtue of the provisions of section 18(3) of the Superior Courts Act[1], to implement the order granted in the July 2022 judgment pending the finalisation of any application or petition for leave to appeal and any subsequent appeal; and a conditional application for leave to appeal. The defendant opposed these applications as brought by the plaintiff.

4. The section 18(3) urgent application came before Phatshoane DJP on 29 September 2022. The matter stood down until 30 September 2022, when the parties took what appears to have been intended as an interim order by consent.

5. The order of 30 September 2022, taken by consent, provided for what can only be considered as interim payments to be paid on specified dates totalling some R6 504 153.00 (six million five hundred and four thousand one hundred and fifty-three Rand). The said Order also provided the date on which the defendant was

[1] 10 of 2013.

to file his answering papers in the section 18(3) application as well as the date that the plaintiff was to file her replying affidavit and *inter alia* provided for an expedited date to be arranged with the Judge President for the argument of the section 18(3) application.

6. The opposing papers in the section 18(3) application, as well as in the reconsideration of costs application, were subsequently filed. After the replying affidavits were filed in both applications, the section18(3) application was heard by O'Brien AJ on 06 -07 December 2022. Judgment in the section 18(3) application was handed down on 24 February 2023. Judgment in the reconsideration of costs application was also handed down on 24 February 2023.

7. O'Brien AJ dismissed the section 18(3) application and ordered that each party pay their own costs. O'Brien AJ further ordered that attorney and own client costs may not be recovered from the capital amount awarded to the plaintiff.

8. The judgment that dealt with the reconsideration of costs application also dealt with the defendant's application for leave to appeal and the plaintiff's conditional application for leave to appeal. O'Brien AJ dismissed the reconsideration of costs application with costs; corrected certain arithmetical problems in the order dealing with the quantum award; dismissed the defendant's application for leave to appeal the quantum judgment with costs; and dismissed the plaintiff's conditional application for leave to appeal with costs.

9. The defendant's petition for leave to appeal was dismissed by the Supreme Court of Appeal on 20 July 2023.

10. Following the judgments of O'Brien AJ in both the section 18(3) application and the reconsideration of costs application, the plaintiff filed an application for leave to appeal, and the defendant filed a conditional application to cross-appeal. O'Brien AJ delivered his judgment in these applications for leave to appeal on the

07 December 2023 and made an order with the following effect: leave to appeal was granted to the plaintiff to appeal the dismissal of the application for the reconsideration of the costs order with costs; leave to appeal was granted to the plaintiff to appeal the costs order relating to the dismissal of the plaintiff's conditional application for leave to appeal; leave to appeal was also granted to the plaintiff to appeal the dismissal of its section 18(3) application with costs; and the defendant was granted leave to cross-appeal in relation to the costs of the section 18(3) application.

11. These are the appeals currently before this Court. It is evident from the records in the relevant proceedings that any order this Full Court makes will have no effect other than on the final liability for costs in the respective applications.

12. Turning now to consider the appeal in respect of the section 18(3) application. Prior to the enactment of section 18 of the Superior Courts Act, the legal position regarding the enforcement of orders pending an application for leave to appeal was governed by the common law.

13. Rule 49(11) of the Uniform Rules, which previously regulated the enforcement of judgments during the appeal process, has been repealed.[2] The common law position relating to the enforcement of a judgment despite a pending appeal has been replaced by section 18 of the Superior Courts Act ("the Act"). Section 18 of the Act reads as follows:

"18. ***Suspension of decision pending appeal***

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) . . .

[2] With effect from 22 May 2015.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1)-

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) . . . "

14. The position under the common law has been authoritatively set out by Corbett JA (as he then was) in the matter of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*[3] ("the South Cape case"). The intention behind the common law rule was to prevent irreparable harm to the party seeking to exercise its right to appeal.[4]

15. It is apparent from the wording of section 18 of the Act that prevention of irreparable harm to the party seeking to exercise its right of appeal is still the primary consideration. However, when one examines the differences between the common law rule and the requirements of section 18(1) as read with section 18(3) of the Act, the current position under section 18 is more onerous on the party seeking to enforce the relevant order pending the completion of the appeal process than it was under the common law.[5]

---

[3] 1977 (3) SA 534 (AD) at 544H-545H.
[4] *South Cape case*, above, at 545B.
[5] *University of the Free State v Afriforum and Another* 2018 (3) SA 428 (SCA) para 9 - 11.

16. The position under the common law before section 18 of the Act came to regulate the position when an order is put into effect whilst an appeal process was still pending gave the relevant High Court a broad general discretion as to whether to grant relief or not. This is no longer the case.[6]

17. Again, under the common law, where there was potential for irreparable harm to both parties should the order be put into effect before the appeal process was finalised, the court would weigh up the balance of hardship as one of the factors to be considered in making the decision relating to the enforcement of the order pending the finalisation of the appeal.[7] This balance of hardship is no longer a consideration under the provisions of section 18 of the Act. This is evident from section 18 itself.

18. The probability of success in the contemplated appeal process is not mentioned anywhere in the wording of section 18 of the Act. However, the SCA has determined that the prospect of success still plays a role.[8]

19. Turning now to the requirements to be established under the provisions of section 18 of the Act for an order that the execution of an order may be put into effect pending the finalisation of the appeal process.

20. It is evident from the provisions of section 18(1) that a person who seeks to put a judgment and order into effect before the finalisation of the appeal process must establish 'exceptional circumstances' to depart from the norm of an appeal process suspending the operation of such order pending the finalisation of the appeal. Reading section 18(1) together with section 18(3), the onus of

---

[6] *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) para 20.
[7] *South Cape case*, above fn 3, at 545F - G.
[8] *University of the Free State v Afriforum and Another*., above fn 5, para 14 – 15.

establishing such 'exceptional circumstances' would fall on the applicant. In this case, for the reasons set out above, referred to as the 'plaintiff'.

21. In addition to establishing 'exceptional circumstances' the applicant must, under the provisions of section 18(3), establish on a balance of probabilities that it will suffer irreparable harm if the order being the subject of an appeal is not put into effect and that the opposing party (the appellant) will not suffer irreparable harm if such order is put into effect.

22. In developing the law relating to the application of section 18, Sutherland J (as he then was) in the case of ***Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*** 2014 (3) SA 189 (GJ)[9], set out the position on determining 'exceptional circumstances', and I quote the relevant passages:

"[16] It seems to me that there is indeed a new dimension introduced to the test by the provisions of s 18. The test is twofold. The requirements are:

- *First, whether or not 'exceptional circumstances' exist; and*
- *Second, proof on a balance of probabilities by the applicant of –*
  - *the presence of irreparable harm to the applicant/victor, who wants to put into operation and execute the order; and*
  - *the absence of irreparable harm to the respondent/loser, who seeks leave to appeal.*

[17] What constitutes 'exceptional circumstances' has been addressed by Thring J in ***MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas, and Another*** *2002 (6) SA 150 (C), where a summation of the meaning of the phrase is given as follows at 156I-157C:*

'What does emerge from an examination of the authorities, however, seems to me to be the following:

1. *What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is*

[9] The "*Incubeta's case*".

excepted in the sense that the general rule does not apply to it; something uncommon, rare or different; "besonder", "seldsaam", "uitsonderlik", or "in 'n hoë mate ongewoon".

2. *To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
3. *Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the Court must decide accordingly.*
4. *Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*
5. *Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.'*

[18] Significantly, although it is accepted in that judgment that what is cognisable as 'exceptional circumstances' may be indefinable and difficult to articulate, the conclusion that such circumstances exist in a given case is not a product of a discretion, but a finding of fact.

[19] The survey of authorities addressed by Thring J included a broad range of circumstances, and his summation or compendium appears to be of universal application. Nevertheless, it seems to me, to be necessary to express caution about importing from one kind of enquiry into another kind of enquiry an understanding of a familiar phrase. It is important to appreciate that Thring J was not addressing the phrase in s 18 of the Superior Courts Act but in the provisions of section 5(a)(iv) of the Admiralty Regulation Act 105 of 1983, which confers a power on a competent court to direct an examination of various things in order to procure evidence.

[20] A given phrase in any statutory provision has a function specific to that provision and to that specific statute and the primary aim of the interpreter is to

discover the function it performs in that specific context. It may perform a different function in another statute and one must avoid being seduced by beguiling similarities.

[21] The context relevant to section 18 of the Superior Courts Act is the set of considerations pertinent to a threshold test to deviate from a default position, ie the appeal stays the operation and execution of the order. The realm is that of procedural laws whose policy objectives are to prevent avoidable harm to litigants. The primary rationale for the default position is that finality must await the last court's decision in case the last court decides differently – the reasonable prospect of such an outcome being an essential ingredient of the decision to grant leave in the first place. Where the pending happening is the application for leave itself, the potential outcome in that proceeding, although conceptually distinct from the position after leave is granted, ought for policy reasons to rest on the same footing.

[22] Necessarily, in my view, exceptionality must be fact-specific. The circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves. I am not of the view that one can be sure that any true novelty has been created by s 18 by the use of the phrase. . . .

[23] . . .

[24] . . . The proper meaning of that subsection is that if the loser, who seeks leave to appeal, will suffer irreparable harm, the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nonetheless show irreparable harm to itself. A hierarchy of entitlement has been created, absent from the South Cape case test. . .." (Emphasis supplied.)

23. The SCA in the matter of ***Tyte Security Services CC v Western Cape Provincial Government and Others***[10] took a more nuanced and less formalistic

[10] 2024 (6) SA 175 (SCA), ("*Tyte Security case*").

approach to the application of section 18(1) as read with section 18(3) of the Act. In the *Tyte case*, it was submitted before the SCA that each of the three requirements set out in section 18(1) and (3) were distinct, separate and self-standing. The response to this argument is important.

24. To some extent, the approach taken by the SCA in the *Tyte Security* case is a counter point to the approach taken in the *Incubeta's case* and some of the other authorities quoted above. In these circumstances, it is necessary to quote substantively from the *Tyte Security case* to understand what is required in the application of section 18(1) and (3).

25. The relevant passages responding to the argument that the three requirements that need to be established under the provisions of section 18(1) and (3) are distinct, separate and self-standing by the SCA in the *Tyte case* read as follows:

"[10] Whilst there are indeed statements in those judgments that would appear to support counsel's fundamental hypothesis, they seem to have been made in passing. They thus call for closer examination in this matter. An important point of departure, so it seems to me, is that consideration of each of the so-called three requirements is not a hermetically sealed enquiry and can hardly be approached in a compartmentalised fashion.

[11] It is important to recognise that the existence of 'exceptional circumstances is a necessary prerequisite for the exercise of the court's discretion under s 18. If the circumstances are not truly exceptional, that is the end of the matter. The application must fail and falls to be dismissed. If, however, exceptional circumstances are found to be present, it would not follow, without more, that the application must succeed. . ..

[12] . . .

[13] What constitutes irreparable harm is always dependent upon the factual situation in which the dispute arises, and upon the legal principles that govern the rights and obligations of the parties in the context of that dispute. It was accepted in Knoop that: 'the need to establish exceptional circumstances is likely to be

closely linked to the applicant establishing that they will suffer irreparable harm if the . . . order is not implemented immediately.' The same, I dare say, can be said of its counterpart, the absence of irreparable harm to the respondent. In that sense, the presence or absence of irreparable harm, as the case may be, can hardly be entirely divorced from the exceptional circumstances enquiry. It would perhaps be logically incoherent for a court to conclude, on the one hand, in favour of an applicant that exceptional circumstances subsist, but, on the other, against an applicant on either leg of the irreparable harm enquiry.

[14] The argument, as I have it, is that, as the language of s 18(3) is clear – it is for an applicant, in addition to exceptional circumstances, to prove on a balance of probabilities that it will suffer irreparable harm and conversely the other party would not. A court is thus required to undertake what would be in the nature of a tick-box exercise by enquiring into and satisfying itself as to the first, then the second and finally the third, in that order. Unless each box is successfully ticked, the applicant must fail. Here, so the argument proceeds, the high court failed to undertake such an exercise; had it done so, it could not permissibly have ticked the third box, consequently, the s 18 application should have failed. Even accepting that the legislature has employed the words 'in addition [to exceptional circumstances] proves on a balance of probabilities' in s 18(3), it would be passing strange that, if an applicant comes short in respect of either the second or third requirements, it would nonetheless still be able to successfully meet the exceptional circumstances threshold. The use of the words 'in addition proves' in s 18(3) ought not to be construed as necessarily enjoining a court to undertake a further or additional enquiry. The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court is alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in respect

of exceptional circumstances, as also irreparable harm, it does not have to do so in a formulaic or hierarchical fashion."[11] (references omitted; emphasis supplied)

26. In the ***Tyte Security*** case, as can be seen from the passages quoted above, the SCA recognises the fact that in most cases the irreparable harm would be subsumed into the 'exceptional circumstances'. In those circumstances, one would of necessity rely on the same facts to establish both requirements.

27. It is appropriate to mention at this juncture that the defendant's cross-appeal in relation to the costs of the section 18 application is motivated on the basis that the plaintiff had not established the requirements set out in section 18(1) as read with section 18(3). That on such a basis, the court *a quo* erred in ordering that each party should pay its own costs. The defendant sought an order setting aside the order made by the court *a quo* set out above and sought such orders substitution with an order that the plaintiff pay the defendant's costs in the section 18 application on an attorney and own client scale. Alternatively, that the defendant's costs be paid *de bonis propriis* on an attorney and own client scale. The defendant also sought certain related and ancillary relief in respect of the costs of such application, which it is not necessary to specify at this point.

28. It further emerged during the oral argument of this appeal that there was an agreement between the plaintiff and the defendant that the costs of the section 18 application would be awarded on an attorney and own client basis, regardless of which party was successful in the said section 18 application. This agreement was not disavowed by either party, and for present purposes, this court accepts that there was such an agreement.

---

[11] *Tyte Security case*, above fn 11.

29. The reasoning of O'Brien AJ relevant to the present appeal appears at paragraphs 32 to 36, as well as the order he made. It would be useful for present purposes to quote these passages of the section 18 judgment verbatim.

"32. In this litigation warfare, this court as the upper custodian of J[...], will consider his interests. Not only in common law but in our constitutional setting, the rights of individuals are guaranteed, and I am cognisant of that. Therefore, it is disingenuous to argue that J[...]'s condition has been the same before, during and after the trial.

33. It is beyond question that the mere fact that J[...] suffers from cerebral palsy is undisputed and that he needs treatment, which the defendant disputes only a portion, shows continuous harm that he suffers.

34. However, I have to consider that at least on 13 September 2021 [this date appears to be a typographical error which will be discussed below], the agreed amount was offered. Why this court still had to be saddled with arguments for two days together with heads of argument, notes and a letter is inexplicable. I shall regard J[...]'s permanent condition and how this matter has been dealt with after 30 September 2021 (another typographical error in respect of this date), when I make a costs order.

35. Returning to the application itself, in my opinion, the exceptional circumstances have fallen away on 30 September 2021 [again a typographical error concerning this date] because:

(a) the plaintiff abandoned the relief initially sought;

(b) the parties agreed to an amount totalled R6 504 153.00;

(c) this amount must be used to support J[...];

(d) the registration of the trust and the appointment of a trustee is not an impediment for the plaintiff's attorneys to pay any reasonable payments to satisfy J[...]'s needs, inclusive of treatment, care, aids or equipment that may arise;

(e) the court order of 1 July 2021 [again a typographical error in respect of the date of this court order] grants plaintiff's attorney the power to make reasonable payments;

(f) the court order of the 30 September 2021 [again a typographical error in respect of the date] does not impede or infringe upon this court's order allowing the plaintiff's attorney to make reasonable payments;

(g) for the above reasons, when the parties agreed to the amount, there was no reason for the plaintiff to proceed with this application. However, I accept that an order that the plaintiff pays the cost of this application will affect the capital amount awarded to J[...], which is not in his interests. Therefore, I shall make provision in the cost order for such eventualities (sic).

36. Because I intend to dismiss this application I do not deal with the alleged new case in reply, and the application to strike out.

37. I make the following order:

(a) the application is dismissed;

(b) each party to pay their own costs;

(c) for the benefit of the taxing master, I direct any attorney and own client costs may not be recouped from the capital amount awarded to the plaintiff."

30. Firstly, to clarify what appear to be typographical mistakes evident from the judgment of O'Brien AJ in the section 18 judgment quoted above. The date in paragraph 34 quoted above referring to the first time to offer of a payment of some R6.5 million can only refer to annexure "JLS2" to the answering affidavit in which the said offer was made for the first time. The said letter is dated 15 September 2022 and not 13 September 2021. Then in the same paragraph 34, O'Brien AJ refers to the conduct of the section 18 application after 30 September 2021. This can only be a reference to the Order granted by Phatshoane DJP on 30 September 2022. Then in paragraph 35 of the said judgment, O'Brien AJ again refers to the exceptional circumstances falling away on the 30 September 2021, again, this could only have been a reference to the Order of Phatshoane DJP on the 30 September 2022. Then, in paragraph 35(e), there is a reference to

a court order dated 1 July 2021. This can only be a reference to O'Brien AJ's own judgment on quantum dated 1 July 2022.

31. It is evident that O'Brien AJ was somewhat irritated by the conduct of the parties in this matter, but O'Brien AJ's remarks in paragraph 31 of his judgment places this question beyond doubt, this paragraph reads:
"In my attempt to set out the main facts together with the arguments, I have also considered all the papers and all the evidence. Burdening to this judgment with remarks, counter remarks, allegations, counter allegations, gratuitous insults, and unnecessary arguments is unnecessary. I have considered them all."

32. A lack of collegiality is indeed to be deplored and regretted. What is required is collegiality, a pragmatic assessment of the risks inherent in a client's case, married to a *bona fide* effort to curtail litigation in the client's interest. It may not always be possible to achieve this, but at least a *bona fide* effort must be made. The efforts by both parties to show the other in a bad light did not necessarily serve their respective client's best interests. At this point, nothing further will be said on this subject.

33. Ms Williams SC, who appeared for the defendant, pointed out that O'Brien AJ did not list his reasons for finding 'exceptional circumstances' as required by section 18(4)(i) of the Act. If one reads the passages of O'Brien AJ's judgment quoted above, it is evident that he considered the ongoing care and needs of J[...] as 'exceptional circumstances' in the particular circumstances of this case.

34. This court would have added that in circumstances such as the present case where profound personal injury was the basis for the claim, an actuarial calculation which is based on the need to invest the capital amount in a manner that would outstrip inflation by 2.5% (two point five per centum) is both an 'exceptional circumstance' and evidence of 'irreparable harm'. The SCA in the

Tyte Security case[12], establishes that the exceptional circumstances would usually be based on the same facts as the irreparable harm. The defendant had not established that he would suffer irreparable harm if the Order were put into effect. Particularly, in circumstances where the capital sum was to be paid into an attorney's trust account and the attorney had given a written assurance that whatever amount it had succeeded in diminishing the original capital award would be reimbursed to him. In these circumstances, all of the requirements of section 18(1) as read with section 18(3) have been established.

35. The Notice of Motion in the section 18 application was issued and served on the defendant on 13 September 2022. The first offer to pay the interim payment was only made after the said Notice of Motion was issued and served. The relevant offer did not tender costs, and this is evident from the letter written on behalf of the defendant dated 15 September 2022. The Order of Phatshoane DJP makes it clear that whilst the plaintiff accepted alternative relief on 30 September 2022, the issue of the cost of launching and prosecuting this application was unresolved and still very much alive.

36. The comments of O'Brien AJ in the passages quoted above show that this point relating to the costs being the real live issue for him to consider escaped him. He erred in not considering the matter before him in that light.

37. Further, O'Brien AJ overlooked the fact that the offer made by the defendant was only made after the Notice of Motion and Founding papers were drawn up and served on the defendant. Also, despite the plaintiff abandoning its primary relief in favour of alternative relief, it does not change the reality that, in essence, the plaintiff was still substantially successful.

---

[12] Above fn 11.

38. These are indeed the sort of misdirections that entitle this court to substitute its own discretion for that of O'Brien AJ.

39. The plaintiff has established that there were exceptional circumstances and that, on a balance of probabilities, it would have suffered irreparable harm and that the defendant would not suffer irreparable harm. Having regard to the agreement between the parties that whoever succeeded in the section 18 application, costs would be awarded on an attorney and own client basis, costs will be awarded on that scale.

40. For the very same reasons, the defendant's cross-appeal stands to be dismissed with costs.

41. In relation to costs of this appeal, both parties employed Senior Counsel with a junior. In these circumstances, it is appropriate that costs that are not awarded on an attorney and own client scale be taxed on scale C.

42. We now proceed to the appeal against the reconsideration of costs judgment and order. To recap, the plaintiff is appealing against the court *a quo'*s dismissal of the application for the reconsideration of the cost order made in the main judgment on 01 July 2022. The reconsideration application has its genesis from a secret offer that the plaintiff made to the defendant on 21 October 2019 with a view to settle the quantum of damages, the liability of which was already settled as far back as 02 November 2015.

43. The offer made to the defendant was for the latter to pay an amount of R18 000 000 as J[...]'s proven or agreed damages flowing from the brain injury suffered at birth. The defendant did not accept this offer. It however, made four without prejudice counter offers which were not accepted by the plaintiff on behalf of J[...]. In the result and pursuant to a trial, the court *a quo* ordered the defendant to pay an amount of R19 117 017-42 as the plaintiff's proven damages.

44. The reconsideration application was dismissed on 24 February 2023 by the court *a quo*. In essence, the plaintiff sought an order that the defendant bear those costs which are irrecoverable by the plaintiff in terms of the party and party costs order which the court *a quo* ordered on 01 July 2022. Such costs are to cover the period from 21 October 2019, being the date on which the secret offer was made, until the final judgment of the court *a quo* on 01 July 2022.

45. The grounds of appeal upon which the judgment and order of the court *a quo* is appealed are threefold. First, that the court *a quo* did not afford the parties, particularly the plaintiff as the losing party, an opportunity to be heard, especially where the court intended to dismiss the reconsideration application.

46. Secondly, that the applicable legal principles ought to have caused the court to exercise its discretion in favour of the plaintiff. Lastly, the public interest dictates that secret offers to settle be encouraged to address the cases that have flooded courts, effectively stifling the right of access to courts.

47. In the judgment, the court *a quo* remarked that the main ground the plaintiff requested the court to reconsider the cost order is that the defendant's conduct did not accord with the required ethical considerations. In that regard, the plaintiff contended, the defendant conducted the trial with irrelevant, insulting, unduly and lengthy cross-examination of the plaintiff's expert witnesses. Further, the defendant's attitude when its special defense fell flat, was obstructive concerning the claw- back provision in the trust deed, which underscores the defendant's unreasonable conduct.

48. Having referred to the relevant precedent and the evidence, the court *a quo* held that it could not be said that the defendant acted unreasonably; that when the defendant pleaded the public healthcare defence, it was fully entitled to it, moreover, that was after a Constitutional Court decision which opened up the

possibility of a public healthcare defence in cases where delictual damages are claimed. The court *a quo* acknowledged that the defendant conducted the trial in an abrasive manner. However, the court *a quo* held that such conduct is in line with the nature of our adversarial system. The court accepted that cross-examination may at times be aggressive and sarcastic, but that does not mean that it was unreasonable. The court *a quo* reasoned further that the defendant was entitled to explore the evidence of the plaintiff's expert witnesses, which resulted in the court *a quo* making specific findings, one of which was the contingency deductions and the issue of care. In the latter, the court *a quo* found that J[...] should not be given 24-hour care at the behest of the defendant. The court *a quo* concluded that the vigorous defence put up by counsel for the defendant cannot be described as unreasonable.

49. The plaintiff's application for the reconsideration of costs is based on what has become known as the *Calderbank* principle in our law. At the core of the principle is the recognition of an offer made by a plaintiff to be treated the same as an offer or tender made by the defendant in terms of rule 34 of the Uniform Rules. The real question is why a defendant should not be liable for the plaintiff's expenses for not accepting what turns out to be a reasonable offer made by the plaintiff, in the same way as the plaintiff who refuses to accept a reasonable offer of settlement made by the defendant. The position is that a plaintiff who presents a secret offer of settlement to the defendant and ultimately receives an award that is more than the secret offer, is entitled to approach the court for a reconsideration application in terms of which he seeks an order that the defendant pay irrecoverable costs from the date the secret offer was made until the date of the award. The applicability of the *Calderbank* principle is not in dispute in *casu*. It is therefore not necessary to discuss the origin of the principle and how it became part of our law.

50. In ***AD and Another v MEC for Health and Social Development, Western Cape*** [13],the court held that, in principle, *Calderbank* offers are admissible in relation to costs and can be disclosed to the court for that purpose after the judgment has been made.[14] Rogers J provided guidance thus:

"As to the effect of a Calderbank offer on costs, the Commonwealth cases emphasise that a plaintiff who has made such an offer is not entitled to attorney/client costs merely because he made a secret offer which was less than what the court awarded. The court must consider whether the defendant behaved unreasonably, and thus put the plaintiff to unnecessary expense, by not accepting the offer or making a reasonable counter-offer. Factors mentioned in the Commonwealth cases are whether the defendant has engaged reasonably in attempting to settle; whether the plaintiff was offering a fair discount based on a realistic assessment of the case rather than holding out for the best conceivable outcome; whether the plaintiff allowed the defendant a reasonable time to consider the offer; the extent of the difference between the amount of the offer and the amount of the award; and the nature of the proceedings and resources of the litigants."[15]

51. We emphasise that reconsideration of the order of cost is not there for the taking. An applicant is required to make out a case for such an order to be granted. Factors to be considered precedent to the order are as set out in *AD and Another v MEC for Health* referred to above. The list is not exhaustive. It all depends on the circumstances of each case.

52. The public interest factor in the use of *Calderbank* offers was recognized by this court in ***Du Toit NO obo Nkuna v Road Accident Fund*** [16] where Phatshoane DJP held:

---

[13] 2017 (5) SA 134 (WCC) - ("*AD and Another v MEC for Health").*
[14] *Ibid* para 60.
[15] *Ibid* para 61.
[16] (CA&R45/2023) [2024] ZANCHC 78; [2024] 4 All SA 476 (NCK) (23 August 2024).

"The use of Calderbank offers by plaintiffs is important in the context of the wider public interest to conserve and not waste public resources on unnecessary litigation. There is no rational basis upon which a plaintiff ought to be denied access to the benefits of a secret tender more so where the trial turns arduous and protracted. To risk promoting intransigence by a defendant with deep pockets in the face of a reasonable offer from a plaintiff by refusing to attach any effect to such an offer would not be in the public interest and certainly would defeat the dictates of justice and fairness as a plaintiff may be discouraged to pursue a legitimate case because of the risk of irrecoverable costs were it to be successful. The plaintiffs' use of secret offers should not be stifled but encouraged. In the judgment of this Court in DC Arends and Another v Member of the Executive Council for the Department of Health: Northern Cape Province it was held that consideration of the plaintiff's secret or Calderbank offer to settle ought to be infused in the Court's power to regulate its own process and that the public policy and public interest consideration which form the basis for penalising a plaintiff with costs, for not accepting a defendant's reasonable offer, must logically find application where a defendant fails to accept a plaintiff's reasonable offer to settle. The view expressed in Arends remains valid"[17].

53. The parties agree that they were entitled to make written and/or oral submissions before the court *a quo* and that they were not given that opportunity. This failure to afford the parties the opportunity to be heard is a misdirection on the part of the court *a quo*. On this basis alone this court's intervention is warranted to set the order in that regard aside.[18] It is notable that though the court *a quo* referred to the relevant authority in reconsideration of cost applications, it, however, misdirected itself in its approach in considering the application. The court *a quo* based its decision on the conduct of the defendant during the trial. The reasoning lost sight of the fact that the application is based on the failure to accept an offer

[17] *Ibid* para 9.
[18] *Transvaal Industrial Foods Ltd v B.M.M. Process (Pty) Ltd* 1973 (1) SA 627 (A) at 628 - 629D; see also *Motswai v Road Accident Fund* 2014 (6) SA 360 (SCA**)** para 59.

of settlement which later turned out to have been reasonable. If the offer was accepted there would not have been any need for a protracted trial that the plaintiff had to be subjected to.

54. The finding that the court *a quo* misdirected itself and that its order is to be set aside, would ordinarily require that the matter be referred to the court *a quo* for reconsideration. The parties are, however, of the view that referring the matter back to the court *a quo* would cause unnecessary delay and add additional costs to them. They correctly stated that this court is in as good a position as the court *a quo* was to determine the matter.

55. In our view, it would not be in the interest of justice to refer the matter back to the court *a quo*. It would also be inappropriate to refer the matter back to the court that has already expressed an opinion in the application by dismissing the application. The appeals before us are about costs, and the reconsideration application is closely linked to the other matters to be determined by this court. This court will therefore step into the position of the trial court and consider the reconsideration application afresh. The reasoning of the court *a quo* in dismissing the application would be, because of the misdirection and fundamental irregularity it committed[19], not be of relevance to the enquiry.

56. It is important to mention that a lot has happened between the time the application for reconsideration was launched and the hearing of the appeal. Some of the legal proceedings and processes that were pending at the time when the reconsideration application was decided by the court *a quo* have now been concluded. This aspect is important because it would have a bearing on some of the criticisms raised by the parties. Chief among these issues is the fact that the judgment of the court *a quo* is no longer the subject matter of an application for leave to appeal. The defendant's application for leave to appeal was refused. The

[19] *Serfontein v Bosch* 1930 OPD 75 at 78; *Shenker v Additional Magistrate, Wynberg; SA v Shenker* 1965 (3) SA 121 (C); See also *Brian Kahn Inc v Samsudin* 2012 (3) SA 310 (GSJ).

subsequent petition to the Supreme Court of Appeal has been dismissed. The quantum has now finally been determined.

57. There is one application that requires determination before we traverse the merits of the appeal on the reconsideration application. That is the application to lead further evidence on appeal by the defendant. The application is founded on the affidavit by Mr Stratford John Lemboe, who is the defendant's attorney of record. The purpose of the application is for this court to accept the affidavit of Mr du Toit. Mr du Toit is a practicing actuary whose report was attached to the answering affidavit of Mr Steyn in opposition to the reconsideration application. The affidavit was attached without a confirmatory affidavit of the author. The plaintiff objected to this procedure adopted by the defendant.

58. Section 19(b) of the Superior Courts Act 10 of 2013 empowers this court, when sitting as a court of appeal, to, in addition to any power as may specifically be provided in any other law, receive further evidence. The following requirements must be met for the court to admit further evidence on appeal:

(a). There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which is sought to be led was not led at the trial.

(b). There should be prima facie likelihood of the truth of the evidence.

(c). The evidence should be materially relevant to the outcome of the trial.[20]

It has been held that the party who seeks leave to adduce further evidence must satisfy the court that it was not due to any remissness or negligence on the party's part that the evidence in question was not adduced before the court below.[21] Every case must be decided on its own merit. Importantly, leave to allow

---

[20] Herbstein and Van Winsen: *Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa* (5th Edition- Jutastat e-publications, 2009) Ch39 – p1241-1242. (and the authorities cited therein).
[21] *South African Land Arrangements CC and others v Nedbank Limited* [2015] JOL 33330 (SCA) para 9; see also *De Aguiar v Real People Housing* (*Pty*) *Ltd* 2011 (1) SA 16 (SCA) para 11.

a party to lead further evidence on appeal is an exceptional remedy which is sparingly granted by the courts.[22]

59. The only explanation why the defendant did not file the affidavit by the actuary is that it relied on the procedure that was followed *in* ***AD and Another v MEC for Health and Social Development, Western Cape***[23]. The defendant contends that in terms of the procedure in that matter, no affidavit by an actuary was filed, and as such, it was not necessary for the affidavit by Mr du Toit to be filed. The defendant is requesting that the affidavit be admitted at this stage in so far as it may be necessary.

60. Reading the reference to the *AD v MEC* matter, there is no mention by the learned Judge that it is not a requirement that an actuary's report be filed with an affidavit by the author. It is trite that an expert report cannot just simply be filed without an affidavit by the expert witness disclosing his/her qualifications, his/her expertise, the method used and confirming the authenticity and truthfulness of the document alleged to have been prepared by him/her. Mr Lemboe does not meet any of the requirements for the defendant to be granted leave to lead further evidence. He does not explain why he could not obtain the affidavit when the document was filed. We find merit in Mr De Waal's submission that the evidence to be introduced raises a substantial dispute of opinion between the actuaries. There is a difference of opinion as to whether the calculations solely based upon CPI is the correct approach. This approach is to be contrasted with the report by Ms Barnard, who suggests that it is oversimplification to simply compare the original offer of R18M adjusted with CPI with the R19,17M award in July 2022, as Mr du Toit has done. She suggested a different methodology which does not rely on the lump sum. She takes the award and breaks it down into different heads of damages and calculates how each would be when the offer was made. The gist of the dispute is whether the secret offer is valued more than the final award

[22] *O' Shea NO v Van Zyl and Others NNO* 2012 (1) SA 90 (SCA) para 9 (and the authorities cited therein).
[23] 2017 (5) SA 134 (WCC), para 65.

when it was given by the court *a quo*. To resolve this dispute, more evidence will have to be presented. Mr De Waal contended that the evidence sought to be led is inadmissible and immaterial because Ms Barnard had already made the calculation on the amount that Mr du Toit gives an opinion on. For the above reasons, the leave to lead further evidence on appeal is refused.

61. The defendant resisted the reconsideration application on several grounds, which boil down to the following. First, it was contended that the plaintiff failed to show that the secret offer made on 21 October 2019 was less than the award made on 1 July 2022. It was contended that the plaintiff was required to place an actuarial report as evidence before the court to show what the secret offer was worth when the award was made.

62. Secondly, it was contended that when the secret offer was made, the defendant was inter alia still relying on the public healthcare defence. In terms of the public healthcare defence, the defendant had offered to provide future healthcare for J[...] at the local Robert Mangaliso Hospital. However, that defence was according to the defendant 'torpedoed' when J[...] was moved from Kimberley to Bloemfontein. As a result, the defendant could not guarantee healthcare for J[...] in another province. Because of this move, the public healthcare defence was abandoned.

63. The third reason advanced is that the period given to the defendant to accept the secret offer was unreasonable as only two days were allowed before the offer to settle would lapse. Finally, the defendant contended that the secret offer was more than the award of the court a quo.

64. It is not disputed that the letter containing the secret offer meets the requirements of being classified as such. It is further common cause that the offer therein made was not accepted by the defendant, and as a result, the trial on quantum had to proceed for a substantial period. These common cause facts open the way for us

to consider the grounds relied upon by the defendant in challenging the reconsideration application.

65. The first challenge is that the defendant was not given sufficient time (*spatium deliberandi*) to consider the secret offer. The secret offer was served on 21 October 2019 and was to expire on 23 October 2019 at 13:00. According to the defendant, the period was too short, and as a result, there was no offer to accept after the expiry time. There is no merit to this contention. It was open to the defendant if it genuinely wanted to consider the offer to have engaged the plaintiff and requested an extension of time if it was too short. This was possible since the notice "invited the defendant to make any reasonable counteroffer or to engage in negotiation with the plaintiff on any reasonable alternative basis of settlement . . .". Instead of acting on the invitation, the defendant elected to proceed with the trial, which was to run for 29 days. It is in our view senseless that if the defendant was open to considering settlement proposals, he would reject the offer because of not being given enough time to consider it. It would have been prudent to weigh the short *spatium* with the risk of a protracted trial costs the defendant would be exposed to should the offer be found reasonable. In addition, the first counteroffer made by the defendant was only two years later (22 October 2021).

66. This conduct is, in our view, not consistent with a party open to settling the matter at the first available opportunity. It is also not open to the defendant to claim that the period given was too short when it did not accept the offer. Of importance, the offer was made two days before the trial was to start. By that time, the parties were well prepared and ready for the trial. Both parties, by then, knew the case of the other and the nature and extent of the evidence to be tendered. It would therefore have been easier to weigh the risk of a full-blown trial against the offer made in the settlement and to make a counteroffer.

67. It was open to the defendant to have pursued the public healthcare defence against the plaintiff's claim. The enquiry is not whether the defendant believed

that the public healthcare defence had merit or would ultimately succeed. Rejecting a settlement offer on the basis that a particular defence would ultimately succeed is a risk undertaken by the defendant by proceeding to trial. If the defence is unsuccessful, such a defendant is not immune from being ordered to pay costs pursuant to a reconsideration of costs application. This will be the case particularly where there was no attempt to engage in a meaningful settlement process for a period of two years.

68. The main contention why the defendant seeks to persuade us to dismiss the reconsideration application is that the plaintiff has not shown that the secret offer was less than the award that was granted. In this regard, the defendant is relying on the actuarial report by Mr G du Toit attached to the answering affidavit. By this court not accepting the report by Mr du Toit, we are left with the fact that the secret offer was R18 000 000, and the award of the court *a quo* is R19 117 017-42. The secret offer is exceeded by the award. As regards the ***AD v MEC*** argument raised by the defendant, we do not believe that Rogers J laid an inflexible rule that in *Calderbank* offers the court should always take into account the time-value of money. What the learned Judge meant is that the time-value of money is 'one consideration in assessing whether the defendant acted unreasonably in refusing to accept an offer.' For the reasons set out above, the plaintiff's application for reconsideration should have succeeded in the court *a quo*.

69. The relief sought by the plaintiff is fully set out in the notice of appeal. We are, however, of the view that the plaintiff is entitled to attorney and client costs for the period from 21 October 2019, when the secret offer was made, to 01 July 2022, when the award was issued by the court *a quo*. As regards the costs on appeal, we order costs on party and party on scale C of the Rules.

70. **In the result, the following order is made**:

1. The appellant's appeal is upheld;

1.1. In these circumstances the order of the court a quo in the section 18 application is set aside and replaced with the following:

(a). "The plaintiff succeeds to the extent agreed in the order dated 30 September 2022.

(b). The defendant is ordered to pay the costs of the plaintiff's application in terms of section 18(3) of Act 10 of 2013 on the scale as between attorney and own client, such costs to include the reserved costs pertaining to 29 and 30 September 2022, the costs consequent upon the employment of two Counsel, the travelling and accommodation costs of Counsel if any, and the costs of drafting heads of argument (main heads of argument and heads of argument in reply."

1.2. Further, it is ordered that:

(c). The defendant is to pay the costs of this appeal, such costs to include the costs of employing two Counsel where two Counsel were in fact employed. Such costs are to be taxed on scale C.

(d). The defendant's cross-appeal on the costs of the section 18 application is dismissed.

(e). The defendant is to pay the costs of the cross-appeal, such costs to include the costs of employing two Counsel where two Counsel were in fact employed. Such costs are to be taxed on scale C.

2. The order of the court *a quo* dismissing the appellant's application for reconsideration of costs, is set aside and substituted with the following order:

2.1 The introductory portion of paragraph 5 of the order of the court *a quo* dated 1 July 2022 be and is substituted with the following introductory portion:

"5. The defendant shall pay the plaintiff's reasonable taxed or agreed party and party costs of the action pertaining to the issue of quantum up to and including 21 October 2019, and from 22 October 2019 to 1 July 2022 he shall be liable for such costs on the scale as between attorney and client, on

the High Court scale, which costs shall include but not be limited to the following."

2.2 Paragraph 5.5 of the order of the court *a quo* dated 1 July 2022 be and is
substituted with the following:

"5.5 The wasted costs occasioned by the postponement of the trial on 16 March 2021 that was set down for hearing from 8 March 2021 onwards."

2.3 The words "on the scale as between party and party" in paragraph 5.15 of the order of the court *a quo* dated 1 July 2022 be and are deleted so that it reads:

"5.15 the wasted costs occasioned by the standing down and the postponement of the trial that was set down from 25 October 2021, including preparation for the trial and the costs incurred from 25 October 2021 up to 29 October 2021 (both days included)."

2.4 The respondent be and is ordered to pay the appellant's costs of the reconsideration application on the party and party scale C. Such costs include the costs consequent upon the employment of two counsel where two counsel were so employed.

L.P TLALETSI
JUDGE PRESIDENT
NORTHERN CAPE DIVISION

L.G LEVER
JUDGE
NORTHERN CAPE DIVISION

I concur

MAMOSEBO ADJP

NORTHERN CAPE DIVISION

APPEARANCES:

On behalf of the Appellant:	**Adv. WP De Waal SC**
Assisted by	**Adv. CH Botha**
On the instruction of:	ELLIOTT MARIS ATTORNEYS
On behalf of the Respondent:	**Adv Williams SC**
On the instruction of:	STATE ATTORNEY, KIMBERLEY