



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 886/2023

In the matter between:

TASHREEKA OLIVER NO

APPELLANT

and

MEC FOR HEALTH: WESTERN CAPE

PROVINCIAL DEPARTMENT OF HEALTH

RESPONDENT

Neutral citation: *Oliver NO v MEC for Health: Western Cape Provincial Department of Health* (886/2023) [2025] ZASCA 45 (17 April 2025)

Coram: MOCUMIE, KGOELE, SMITH and UNTERHALTER JJA and MUSI AJA

Heard: 17 February 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date and time for hand-down is deemed to be at 11h00 on 17 April 2025.

Summary: Delict – medical negligence – damages – amendment of pleadings after *litis contestatio* – whether amendment of a claim for special damages interrupted *litis contestatio* rendering a claim for general damages not transmissible – divisibility of special and general damages cause of action – one indivisible cause of action – material amendments – *litis contestatio* interrupted – development of common law governing the transmissibility of non-patrimonial claims for general damages – pleadings inadequate for the proposed development.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town
(Mantame J, sitting as court of first instance):

- 1 The appeal is upheld with no order as to costs.
 - 2 The order of the high court is set aside and is replaced with the following order:

‘(a) The plaintiff is granted leave to further amend their particulars of claim within 30 days from the date of this order.
(b) The costs are reserved.’
 - 3 The matter is remitted to the high court to determine whether the common law rule regarding the non-transmissibility of non-patrimonial damages (general damages) after *litis contestatio* should be developed on the facts of this matter.
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JUDGMENT

Kgoele JA (Mocumie, Smith and Unterhalter JJA and Musi AJA concurring)

[1] The issue in this appeal relates to the transferability of a non-pecuniary claim (general damages) to the estate of Mrs Wareldiah Oliver (the deceased), who was substituted by the Executor of her estate, Ms Tashreeka Oliver, the appellant. The appeal is with the leave of this Court against the order granted on 27 October 2022 by the Western Cape Division of the High Court, Cape Town (the high court). The appeal arises from a dispute between the respondent, the Member of the Executive Council for Health, Western Cape (the MEC) and the appellant, regarding certain

amendments proposed by the appellant to her claim. The high court ruled that the amendments sought by the appellant re-opened *litis contestatio*, rendering her claim for general damages not transferable to her estate.

[2] The appeal comes about as a result of an action instituted by the deceased against the MEC for damages arising out of the alleged negligence of the medical staff in her employ. The deceased contended that the negligent treatment by the hospital staff led to the amputation of her leg. Initially, the deceased claimed compensation for:

- 2.1 Past and future medical and hospital expenses in the amount of R2 220 000.
- 2.2 Loss of earnings in the amount of R50 000; and
- 2.3 General damages in the amount of R950 000.

[3] The decision of the high court was based on agreed facts (a stated case) submitted by the parties. Therefore, only a summation of the facts relevant to the appeal is necessary. Prior to her death, the deceased amended her particulars of claim several times. Material to this appeal are the last two amendments. The first of these amendments was made before the pleadings closed in January 2016, when the City of Cape Town was joined. Long after the pleadings were closed, the deceased amended her particulars of claim on 4 October 2017 by increasing her claim for future medical expenses and hospital expenses (special damages) from R2 175 000 to R6 105 000. The amendments brought the total amount claimed for damages to R7 155 000. The deceased passed away five days thereafter, on 9 October 2017, before the expiry of the 15 days stipulated in Rule 28(8) of the Uniform Rules of Court, being a period within which the respondent could have filed its response to the amended plea.

[4] The passing of the deceased sparked a dispute between the parties as to whether the latter amendments interrupted *litis contestatio* and, if so, whether the deceased's claim for general damages had fallen away upon her passing on 9 October 2017. In the stated case presented to the high court, three issues were identified for determination. The first issue was whether the amendments by the deceased of her particulars of claim on 4 October 2017 had the effect of re-opening the pleadings, with the result that *litis contestatio* fell away. If the first issue was to be answered in the affirmative, then the second issue arises, which is whether the deceased's claim for general damages was transmissible to her estate. The third issue is whether the common law should be developed based on the facts of this case to render the general damages claim of the deceased transferable, which arises only if the appellant fails on the first two.

[5] Before the high court, the thrust of the MEC's argument was that claims for general and special damages constitute a single cause of action. As a result, the amendments of the claim for special damages rendered the earlier achievement of *litis contestatio* to fall away because they were material. Further, even though the deceased passed away before the MEC could reply, *litis contestatio* was not revived. As a result, her claim for general damages could not be transmitted to her estate. On the other hand, the appellant contended that our law allows a person who suffers patrimonial and non-patrimonial loss to claim redress for both in the same action, provided that the requirements of those causes of actions are satisfied. However, the argument continued, this does not detract from the principle that these are two distinct causes of action, and hence the amendment of the claim for special damages did not affect the transmissibility of the claim for general damages.

[6] As an alternative to the above, the appellant contended that if the court does not find in her favour, the common law should be developed on the facts of this case to cover the transmissibility of the non-patrimonial damages. According to the appellant, this would give full effect to the spirit, purport, and object of the Bill of Rights. In opposition to the alternative suggested, the MEC maintained that the facts of this case do not justify the extension of common law principles governing the transmissibility of general damages.

[7] As already indicated, the high court ruled in favour of the MEC. It reasoned that the amendments were substantial and material, in addition to having the effect of redefining the issues. Further, it found that if the appellant's submission is accepted, the deceased's claim for special damages would be transmissible to her estate on the facts of this case, and that, would be tantamount to a blanket and open-ended reward for her delays in finalising her litigation. Regarding the development of the common law, the high court found that no case was made by the appellant as there were no factual allegations indicating glaring inconsistencies with the stated constitutional provisions or an indication that the common law rule falls short of the spirit, purport, and objects of the Bill of Rights.

[8] The effect of the proposed amendments to the pleadings, namely, whether they revived *litis contestatio* achieved in January 2016, remains a contested issue in the appeal. If they did, then the appellant's claim for non-patrimonial damages is non-transmissible, and therefore, the next question is whether the common law principles governing the non-transmissibility of non-patrimonial damages after *litis contestatio* could be developed on the facts of this case.

[9] The common law rule governing the transmissibility of non-patrimonial claims for general damages to a deceased's estate is well-settled, as stated by this Court in *Minister of Justice and Correctional Services and Others v Estate Stransham-Ford*.¹ However, the contentious issue regarding the proposed amendment originates from the fact that the amendment sought relates to the quantum of the claim for special damages, not general damages. Two further issues arise from this set of facts. First, whether the two claims, one for patrimonial loss and the other for general damages, constitute one indivisible cause of action. I hasten to indicate that it was only during the arguments before us that counsel for the appellant, correctly so in my view, conceded that many decisions of this Court have held that these claims are indivisible, as they form part of one cause of action. As a result, the need for this Court to further analyse this issue fell away. The second issue that remains is whether *litis contestatio* falls away when pleadings are amended subsequent to it being achieved. I turn to deal with this issue.

[10] Whether *litis contestatio* has been reached is a matter dealt with in rule 29(1) of the Uniform Rules of Court (the rules), which prescribes when pleadings are considered to have closed. However, rule 29 is silent as to what the effect of an amendment brought after this is. However, in *Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni)*,² this Court recognised that amendments to pleadings might alter the scope of the litigation, with consequences for *litis contestatio*. It stated:

‘The answer is that when pleadings are re-opened by amendment or the issues between the parties are altered informally, the initial situation of *litis contestation* falls away and is only restored once

¹ *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) para 19.

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) para 15.

the issues have once more been defined in the pleadings or in some other less formal manner. That is consistent with the circumstances in which the notion of *litis contestatio* was conceived.’

[11] Relatedly, Kruger J in *K.J.S v M.J.S*,³ taking a cue from *Endumeni*, expanded on this issue and explained that an amendment must be material to undo the earlier achievement of *litis contestatio*.⁴ This is in line with the maxim *de minimis non curat lex* (ie, the law does not concern itself with trivialities). In simple terms, a non-trivial amendment will be immaterial. In my view, the decision is sound. It was also endorsed in *Ngubane v Road Accident Fund*⁵ and is also consistent with *Endumeni*. This brings me to the key question: are the amendments material?

Materiality of amendments

[12] Before us, the appellant remained resolute that, contrary to the high court's finding, the amendments were not material and had not significantly redefined the issues to the claim for general damages. In its heads of arguments, the appellant argued that the correct approach is not to look at the scope of the increased quantum, as the high court did, but also, whether they were material. Gravitating from this axis, and in an attempt to persuade this Court to accept the proposition that the amendments did not redefine the issues, the appellant's counsel elevated the materiality test. She submitted that: ‘The test is that the claim for general damages is transmissible unless there is an amendment to the plea that ‘*fundamentally*’ alters the nature of the dispute between the parties (the fundamental rule test)’. The appellant's counsel submitted that, regardless of her earlier concession regarding the indivisibility of the cause of action upon which the appellant relied, the amendments

³ *K.J.S v M.J.S* [2015] ZAKZDHC 43; 2016 (1) SA 64 (KZD); [2015] 3 All SA 85 (KZD).

⁴ *Ibid* para 16.

⁵ *Ngubane v Road Accident Fund (Ngubane)* [2022] ZAGPJHC 275; 2022 (5) SA 231 (GJ) para 34.

did not fundamentally change the issues in both claims, and therefore, *litis contestatio* was not affected. The result is that the general damages are transferable.

[13] This proposition cannot be correct for the following reasons. Apart from the fact that the quantum of special damages substantially increased by approximately 117 percent from the original claim, the amendment set out 41 previously unpled procedures the appellant would allegedly have been required to undergo in the future; the amendment included previously unmentioned *sequellae* allegedly arising from the MEC's employees negligence, giving rise to further claims for the treatment of such injuries; the concomitant pain and suffering, including loss of amenities of life that the appellant would have suffered as a result of the newly introduced *sequellae* from the amendments, if subsequently established by the evidence, would have as a result, substantially informed not only the appellant's increased claim for future medical expenses, but also her claim for general damages.

[14] In my view, the amendments significantly altered and expanded the issues that have a bearing on the damages suffered by the appellant that would go to trial. They are material, and would require a response in an amended plea.

[15] The upshot is that the legal effect of the proposed amendments of the particulars of the claim on 4 October 2017 was that the initial *litis contestatio* achieved in January 2016 fell away. Thus, when the appellant passed away on 9 October 2017, *litis contestatio* had not yet been achieved. It follows from the common-law principles applicable to the transmissibility of general damages that on 9 October 2017, her claim for general damages occasioned by her bodily injuries was extinguished and could not be transmitted to her estate. The high court's decision cannot be faulted in this regard.

Development of the common law

[16] The high court also refused to develop the common law rule applicable to the non-transmissibility of claims for general damages as an alternative to the finding in favour of the MEC on the first issue as prayed by the appellant. That court concluded that no proper case was made for developing the common law.

[17] In support of this ground, the appellant submitted that the common law rule regarding the transmissibility of general damages should be developed by the creation of a qualification, on the facts of this case, that the appellant's claim for general damages occasioned by the deceased's bodily injury was not extinguished, but instead would be transmitted to her estate. The bases proffered were that the deceased passed away after *litis contestatio* was first achieved; the amendments to her particulars of claim were prompted by and founded upon reports from experts who had been jointly appointed as part of settlement negotiations; the amendments did not affect the claim for general damages; and did not change the issues in dispute. The reliance on these facts as submitted was that they are peculiar and warrant the common law to be developed to accord with the spirit, purport, and object of the Bill of Rights.

[18] As to how the common law should be developed, the appellant's counsel, in an attempt to answer a question from this Court, proposed three different approaches: (a) the extension of *litis contestatio* on the facts of this case; (b) the adoption of the rule in *Nkala and Others v Harmony Gold Mining Company Limited and Other*⁶ (ie abandon the *litis contestatio* rule); and (c) the adoption of the new elevated test 'the fundamental change rule'.

⁶ *Nkala and Others v Harmony Gold Mining Company Limited and Others* [2016] ZAGPJHC 97; [2016] 3 All SA 233 (GJ); 2016 (7) BCLR 881 (GJ); 2016 (5) SA 240 (GJ) para 243.

[19] The MEC opposed these propositions and instead proposed an alternative order that this Court ought to make due to the inadequacy of the pleadings, including the absence of any evidence relating to the proposed development of the common law. The MEC's counsel urged this Court to uphold the appeal and replace paragraphs 2, 3, and 4 of the high court's order with an order granting the appellant leave to amend her particulars of claim within 14 days. In addition, the MEC submitted that no order should be made regarding the costs of the appeal.

[20] Our common law does not permit the transmission to the deceased estate a claim for general damages or non-patrimonial loss occasioned by bodily injury if the claimant dies before *litis contestatio*. If the appellant's contention is accepted, developing our common law rule by adding the qualification the appellant is propounding would permit such transmission before *litis contestatio*.

[21] The point of departure is that the appellant did not plead precisely how the common law should be developed to allow the transmission of the claim for general damages into her estate. The suggestions were only made during arguments. But this is not the end of the difficulties with the appellant's case as pleaded. As the submissions before this Court crystallised, it became apparent that further essential requirements relating to the development of the common law were also not pleaded. In my view, the paucity of the averments as the law requires deprives this Court, as a court clothed with appellate jurisdiction, of the ability to properly analyse the merits of these proposals.

[22] Although the high court dismissed the appellant's contentions, its reasoning regarding the development of the common law is somehow flawed. First, the appellant cannot solely shoulder the blame for the inadequacy of the pleadings.

Second, it was, in my view, too harsh in its approach to dismiss the matter when it gave its blessing to the specification of the issues without requiring that the development of the common law issue be properly pleaded. The law relating to the development of the common law is clear. It requires adherence to the steps set out in *Mighty Solutions v Engen Petroleum Ltd and Another (Mighty Solutions)*.⁷ Froneman J, in the majority decision of *MEC for Health and Social Development, Gauteng v DZ obo WZ (DZ obo WZ)*,⁸ wrote:

‘To start the enquiry one must be clear on (1) what development of the common law means; (2) what the general approach to such development is; (3) what material must be available to a court to enable the development; and (4) the limits of curial, rather than legislative, development of the common law.’

[23] The third difficulty with the high court’s finding is that the arguments made before it – and eventually to this Court – were predicated on a ‘bare bones’ stated case for all the issues raised. No evidence was led. Even though the limited facts established by the stated case attempted to satisfy the first requirement mentioned in *DZ obo WZ*, the pleading does not at all, as indicated earlier, go further to establish the other requirements. They fall far short.

[24] Our courts have lamented on several occasions requests to develop the common law principles in a factual vacuum. In *H v Fetal Assessment Centre*,⁹ a practical illustration of the latter difficulty in circumstances dissimilar to those of the present case can be observed. There, applying this Court’s judgment in *Stewart and Another v Botha and Another*,¹⁰ the high court upheld an exception to the

⁷ *Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum and Another (Mighty Solutions CC)* [2015] ZACC 34; 2016 (1) SA 621 (CC) 2016 (1) BCLR 28 (CC) para 38.

⁸ *MEC for Health and Social Development Gauteng v DZ obo WZ (DZ obo WZ)* [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018 (1) SA 335 (CC) para 27.

⁹ *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC) para 14.

¹⁰ *Stewart and Another v Botha and Another* [2008] ZASCA 84; 2008 (6) SA 310 (SCA); [2009] 4 All SA 487 (SCA).

particulars of claim in an action for damages against the Centre brought by the mother of a child born with down syndrome, on behalf of the child, and so had dismissed the claim. The action was based on the Centre's alleged wrongful and negligent failure to warn the mother, who had consulted the Centre during her pregnancy, that there was a high risk of the child being born with down syndrome. The child alleged that had the mother been warned, she would have chosen to undergo an abortion. The child claimed special damages for past and future medical expenses and general damages for disability and loss of amenities of life. The Centre excepted to the claim as being bad in law and not disclosing a cause of action recognised by our law. The child so represented contended that the common law should be developed to recognise the claim.

[25] The Constitutional Court considered the potential viability of the child's claim in our law, ie, whether our common law may possibly be developed to recognise it, and, having done so, concluded that the child's claim is not necessarily inconceivable under our law. The Constitutional Court, however, held that the exception 'was not the proper procedure to determine the important factual, legal and policy issues that may have a decisive bearing on whether the common law should be developed to allow the child's claim to be accommodated in the particular circumstances of this case'.¹¹ It upheld the appeal, set the high court's order aside, and replaced it with an order granting the plaintiff leave to amend the particulars of claim.¹²

[26] Factual evidence to substantiate a carefully pleaded argument for the development of the common law must be properly adduced by the claimant for

¹¹ Op cit fn 9 para 78.

¹² Ibid para 83.

analysis by a court. If it is sufficiently cogent, it might well carry the day. In the matter before this Court, only an effort was made to secure some fact-specific relaxation of the common law from the facts agreed upon by the parties in the stated case. The high court, therefore, erred in its approach by dismissing the development of the common law rule on the basis of a stated case. It was denied an opportunity to determine whether a well-defined development of the common law is warranted.

[27] In addition to the fact that a case for the proposed development of the law ought to have been properly formulated, an exposition of the range of possible developments, as already indicated, which might include what the appellant proposed by way of submission before us, had to be made. The high court had a duty to explore the parameters of what the development of the common law might entail. It did not. Unfortunately, the lack of precision regarding the proposed development was not cured by the parties' stated case. The high court was consequently not placed in a position to consider whether the common law should be developed, and if so how. This Court is in the same position.

[28] The high court also failed to insist on proper adherence to the notice of the comment procedural as required by rule 16A (1). The notice that the appellant issued on 17 November 2021 did not state with precision how the common law should be developed to permit the transmission of the appellant's claim of general damages. Given the importance of this matter and the interests of various other potential parties in the development of the common law in this regard, among others, the potential *amici curiae*, including the Road Accident Fund, the South African Police Service, the National Department of Health, the Provincial Department of Health in our other eight provinces, municipalities, and non-governmental organisations, a more than the perfunctory notice was required. That, in turn, may have alerted the

interested parties to the proposed development and enabled them to be admitted as such in the proceedings, if necessary.

[29] Lastly, the record contains no evidence of the broader consequences of the development of the common law sought by the appellant. This Court is thus asked to develop the common law in a factual vacuum despite the self-evidently wide ramifications for personal injury claims under the common law contended for by the appellant. For example, the evidence may show that the ramifications of any common law change are such that the separation of powers principle would be best served by leaving it to the legislature to decide whether a change is necessary and, if so, what it should be.¹³ As the Constitutional Court stated in *DZ obo WZ*, ‘development of the common law cannot take place in a factual vacuum’¹⁴ and ‘any development of the common law requires factual material upon which the assessment whether to develop the law must be made’.¹⁵ Moreover, evidence is indispensable to enable the high court to make informed findings concerning the wider consequences of the proposed change of the law and to take those consequences into account, as it is obliged to do.¹⁶

[30] For these reasons, I agree with the alternative order suggested by the MEC. I therefore conclude that, as a result of the fact that the proposed development of the principles of common law by the appellant – albeit from the bar – warrant proper consideration, the alternative order suggested by the MEC should, in the interest of justice, be made by this Court. An appropriate order in the circumstances of this

¹³ *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC); 2002 (1) SACR 79 (CC) para 36. See also *Masiya v Director of Public Prosecutions, Pretoria and Another* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC); 2007 (2) SACR 435 (CC) para 31; *Nortje v Road Accident Fund and Another* [2022] ZAKZDHC 2; 2022 (4) SA 287 (KZD) paras 46–48; *Ngubane* paras 37–39.

¹⁴ *DZ obo WZ* para 28.

¹⁵ *DZ obo WZ* para 38.

¹⁶ *Mighty Solutions* para 38.

matter is, therefore, to remit the matter to the high court to have these issues adequately formulated, pleaded, and ventilated and, furthermore, to permit the high court to ensure that proper notice is given.

[31] The following order is made:

- 1 The appeal is upheld with no order as to costs.
- 2 The order of the high court is set aside and is replaced with the following order:

‘(a) The plaintiff is granted leave to further amend their particulars of claim within 30 days from the date of this order.

(b) The costs are reserved.’
- 3 The matter is remitted to the high court to determine whether the common law rule regarding the non-transmissibility of non-patrimonial damages (general damages) after *litis contestatio* should be developed on the facts of this matter.

A M KGOELE
JUDGE OF APPEAL

Appearances

For the appellant:

N Stein

Instructed by:

Malcolm Lyons & Brivik Inc., Cape Town

Matsepes Attorneys, Bloemfontein

For the respondent:

A M Breitenbach SC with M Ipser

Instructed by:

State Attorney, Cape Town

State Attorney, Bloemfontein.