THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1020/2015

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH AND SOCIAL DEVELOPMENT OF THE GAUTENG PROVINCIAL GOVERNMENT **APPELLANT**

and

DUMILE JUDITH ZULU OBO WANDILE MAQHAWE ZULU **RESPONDENT**

Neutral citation: *The MEC for Health and Social Development of the Gauteng Provincial Government v Zulu* (1020/2015) [2016] ZASCA 185 (30 November 2016)

Coram: Maya AP, Swain JA, Fourie, Dlodlo and Potterill AJJA

Heard: 16 November 2016

Delivered: 30 November 2016

Summary: Delictual damages – 'once and for all' common law rule – future medical expenses – lump sum award – section 39(2) of the Constitution – development of common law – payment of future medical expenses as and when required – no proof that access to healthcare services in terms of s 27(1) or s 28(1)*(c)* of the Constitution compromised by common law rule – law reform more appropriately dealt with by legislature. Contingency Fees Act 66 of 1997 – exclusion of award for future medical expenses from agreement – not permitted.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Francis J sitting as court of first instance).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Swain JA (Maya AP, Fourie, Dlodlo and Potterill AJJA concurring):

[1] The appellant, the Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government, was the defendant in an action instituted before the Gauteng Local Division, Johannesburg by the respondent, Ms Dumile Judith Zulu. Damages were claimed on behalf of the respondent's minor child, Wandile Maqhawe Zulu, on the ground that due to the negligence of the staff of the Chris Hani Baragwanath Hospital during her birth, she suffered brain damage.

[2] At the initial hearing on the issue of liability, Claassen J made an order on 29 July 2014 that 'the defendant shall pay the plaintiff's agreed or proven damages . . .' Prior to the further hearing to determine the quantum of the respondent's damages, the appellant amended her plea to include two further issues for determination. It is these issues that form the subject of the present appeal.

[3] The issues were pleaded as follows:

First issue

’12.1 The defendant admits that this Honourable Court found that she was liable for the admitted and / or proved damages sustained by the Plaintiff as a result of the negligence of the employees.

12.2 The defendant however pleads that she should be directed that instead of the monetary compensation sought in respect of medical expenses as set out in paragraph 9 of the Plaintiff’s amended particulars of claim, to pay directly to the person / s who will provide services to him within 30 days of presentation of a written quotation to its accounting officer.

12.3 In the event that it is found that the South African Law does not make provision for such relief and, only in that event, the defendant avers that the South African Law must be developed to make such provision.’

Second issue

’15 In the event that the Court were to find that the amounts claimed by the Plaintiff are both reasonable and are payable upon its order, the Defendant pleads that:

15.1 The Plaintiff has entered into a contingency fee agreement with its attorneys of record;

15.2 Such contingency fee agreement is in terms of Contingency Fee Act and such contingency fee agreement will reduce the amount that is due to the minor for his future medical care;

15.3 Furthermore the Defendant avers that the reduction of such future medical expense will put the child out of pocket and that it will not be in the best interest of the child.

15.4 In the circumstances the amount awarded for future medical expenses should not be part of the amount taken into consideration for the calculation, determination and payment of money in terms of the contingency fee agreement.’

[4] The amended relief that the appellant sought in consequence of these amendments was framed as follows:

‘WHEREFORE the defendant prays that:

(1) she should be directed that instead of the monetary compensation sought in respect of medical expenses as set out in paragraph 9.1 of the Plaintiff’s amended particulars of claim, to pay directly to the person / s who will provide services to the minor child within 30 days of presentation of a written quotation to its accounting officer.

(2) Alternatively that the amount awarded for future medical expenses should not be part of the amount taken into consideration for the calculation, determination and payment of money in terms of the contingency fee agreement(s).'

[5] On the third day of the hearing before the court a quo (Francis J) the quantum of the respondent's damages was settled between the parties in the amount of R23 272 303. Of this amount the sum of R19 970 631 was agreed as Wandile's future medical expenses. The additional issues were decided against the appellant and she was ordered to pay this amount to the appellant in her representative capacity. An application for leave to appeal was refused by the court a quo. The present appeal is with the leave of this court.

[6] The order sought by the appellant in substitution of the lump sum award made by the court a quo, is precluded by the common law rule that a person or his dependent, is only accorded a single, indivisible cause of action to recover damages for all the loss or damage suffered as a result of the wrongful act causing disablement or death.[1]

[7] It is trite that in this action 'the trial Court has to determine the *quantum* of damages or compensation for past and future loss or damage. It determines the latter by reasoned estimate, but sometimes by sheer speculation or even mere guesswork, doing the best it can on the available testimony. The amount it so determines is awarded once and for all, no matter whether or not the envisaged basis for calculating the future loss or damage subsequently eventuates, the contemplated contingencies materialize, or any unforeseen events overtake the claimant, for example, his death earlier than expected. . . .'.[2]

---

[1] *Casely, NO v Minister of Defence* 1973 (1) SA 630 (A) at 642C-D.

[2] *Marine & Trade Insurance Co Ltd v Katz NO* 1979 (4) SA 961 (A) at 970E-G.

[8] The appellant's response to this obstacle in the path of the relief claimed, is that the common law must be developed by this court to modify the 'once and for all' rule.[3] The grant of the order sought would permit the appellant to pay for the future medical expenses of Wandile as and when they may arise. Payment is, however, only to be made within 30 days of the appellant receiving a quotation from the person who will provide medical services to Wandile. That a quotation and not a statement or invoice is envisaged as a necessary precondition for payment, suggests that the appellant will have a discretion not only whether to approve the particular medical services, but also whether to make payment of the quoted 'price'.

[9] The common law would have to be developed by the abolition of the 'once and for all' rule and not merely its modification, where damages are claimed in respect of future medical expenses. To determine whether a development of the common law is desirable, the correct approach is that 'there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the objectives of s 39(2) of the Constitution, requires development. This inquiry requires a reconsideration of the common law in the light of s 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s 39(2) objectives'.[4]

[10] The sole basis upon which the appellant maintains that the common law must be developed, is that payment of the sum of R19 970 631 to the respondent will deprive other persons of much needed medical care. It appears that the appellant relies upon the provisions of s 27 of the Constitution, which provides for everyone's right of access to health care services. A concomitant obligation is imposed upon the

---

[3] This issue has been unsuccessfully raised by the appellant in a plethora of cases in the high court, too numerous for their individual citation in this judgment.

[4] *Carmichele v Minister of Safety and Security & another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) para 40.

State to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right in terms of s 27(2) of the Constitution.

[11] No evidence was led, however, by the appellant to show that a development of the common law, by the abolition of the 'once and for all' rule in cases where damages are claimed in respect of future medical expenses, would promote the constitutional right of access to health care services, relied upon by the appellant. It was also necessary to show how the appellant would make provision in its annual budget in the future for the indeterminate and intermittent claims of claimants in the position of Wandile, to ensure that their right to medical treatment would not be denied. Numerous practical difficulties which impinge upon these claimants' right of access to healthcare services are readily apparent. Where emergency treatment is required the appellant's obligation to make payment only within 30 days of the presentation of a quote, would in most cases frustrate vital treatment. Where the appellant declined to accept the quote, the claimant would be forced to institute action. The result would be a plethora of actions against the appellant with the concomitant denial of medical treatment to claimants. It is no answer to these concerns for appellant's counsel to submit that they could be allayed by carefully crafted court orders. There is accordingly no evidence to show that the 'once and for all' common law rule requires development in the manner suggested by the appellant. It has not been shown that the ability of the appellant to discharge the constitutional obligation of providing everyone with access to health care services, would be compromised by an obligation to pay damages for Wandile's future medical expenses, by way of a lump sum payment of R19 970 631.

[12] In any event, in exercising their power to develop the common law, judges have to be 'mindful of the fact that the major engine for law reform should be the

Legislature and not the Judiciary'. [5] 'The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society'. [6] The development of the common law sought by the appellant is not an incremental change, but one of substance and more appropriately dealt with by the legislature, being an issue of policy. Any legislated change in the common law rule could only be effected after the necessary process of public participation and debate.[7]

[13] This conclusion renders it unnecessary to consider two further issues raised by the respondent. These were whether the form of the order granted by Claassen J, as well as the provisions of Regulation 8.2.3 promulgated in terms of s 76 of the Public Finance Management Act 1 of 1999, precluded the grant of the relief sought by the appellant.

[14] The appellant, in support of an argument that patrimonial damages need not necessarily be calculated in money terms, relied upon a rule of indigenous law that cattle may be awarded as damages.[8] In the appellant's heads of argument it was submitted on this basis that the appellant could provide for the medical needs of Wandile. Where this was not possible, the appellant should be directed to pay the necessary medical costs. The obligation to compensate Wandile would be satisfied by the provision of the necessary medical treatment, and not by the payment of a monetary award. Counsel for the appellant, however, correctly conceded that this

---

[5] *Carmichele* supra para 36.

[6] *R v Salituro* (1992) 8 CRR (2d) 173; [1991] 3 SCR 654 cited by Kentridge AJ in *Du Plessis* & others *v De Klerk & another* 1996 (3) SA 850 (CC) para 61.

[7] The legislature performed a similar role by the introduction of s 17(4)*(b)* of the Road Accident Fund Act 56 of 1996, that allows future medical expenses of road accident victims, to be catered for by an undertaking to pay these expenses by the fund.

[8] Visser and Potgieter *Skadevergoedingsreg* 3 ed (2012) at 186 para 8.4 fn37. Reference is made to the cases of *Madolo v Munkwa* 1894 SC 181 and *Dantile v M'Tirara* 1892 SC 452, where cattle were awarded as damages in accordance with indigenous law.

was not an issue in the appeal. It had not been pleaded by the appellant, nor argued by either party and had not been considered by the court a quo. The appellant's case remained one where money was to be paid by the appellant to compensate Wandile, albeit in the future when medical treatment was required and the necessary quote provided. Accordingly whether indigenous law is of relevance in the present context, does not have to be considered.

[15] I turn to consider the alternative issue, namely whether it should be ordered that the amount awarded for future medical expenses, be excluded from the calculation, determination and payment of the amount due to the respondent's attorney, in terms of the contingency fee agreement. The appellant submits that as a result of the contingency fee agreement, the amount available for the future medical treatment of Wandile will be reduced, which is prejudicial to the interests of Wandile. In addition, if the reduced amount available for Wandile's future medical expenses is depleted, Wandile will nevertheless be entitled to treatment in public hospitals controlled by the appellant. The complaint is that the appellant will effectively pay twice for Wandile's medical treatment.

[16] The appellant ostensibly basis this claim upon the provisions of s 28 of the Constitution. Section 28(1)*(c)* provides that every child has the right to basic healthcare services, whilst s 28(2) provides that a child's best interests are paramount. What is immediately apparent, is that the right of Wandile to health care services, is not compromised by the provisions of the contingency fee agreement. The appellant accepts that if the fund provided for the payment of future medical expenses is depleted, Wandile will be entitled to treatment in a public hospital controlled by the appellant. It is not the appellant's case that this treatment will deprive other children of their right in terms of s 28(1)*(c)* to health care services. Indeed, no evidence was led by the appellant to prove that this would occur. The appellant's concern is solely a financial one.

[17] The appellant also relies upon what is referred to as the court's 'monitoring function' in terms of the Contingency Fees Act 66 of 1997 (the Act) to vary the

contingency fee agreement. The appellant's reliance upon a court's 'monitoring function' in terms of the Act is misplaced. It is clear that 'upholding agreements between a litigant and a third party who finances the litigation for reward is also consistent with the constitutional values underlining freedom of contract'.[9] In addition, s 2(2) of the Act provides that a practitioner's fees are determined by reference to '. . . the total amount awarded or any amount obtained by the client in consequence of the proceedings concerned. . .'. No power is granted to a court in terms of the Act to alter this amount which forms part of the contingency fee agreement. It should not be overlooked that had it not been for the contingency fee agreement, the respondent would not have been able to obtain the judgment on behalf of Wandile.

[18] In the result the following order is made:

The appeal is dismissed with costs including the costs of two counsel.

K G B Swain
Judge of Appeal

[9] *Price Waterhouse Coopers Inc & others v National Potato Co-operative Ltd* 2004 (6) SA 66 (SCA) para 44.

Appearances:

For the Appellant:	V S Notshe SC (with A Phetho)
	Instructed by:
	The State Attorney, Johannesburg
	The State Attorney, Bloemfontein
For the Respondent:	N Van der Walt SC (with M Coetzer)
	Instructed by:
	Wim Krynauw Attorneys, Johannesburg
	Martins Attorneys, Bloemfontein