

SOUTH AFRICA / JUDGMENT

## Khabu and Others v Matlosana City Council and Another (56948/2014) [2021] ZAGPPHC 502 (4 August 2021) [2021] ZAGPPHC 502

COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse van Nieuwenhuizen

CASE / FILE NUMBER

56948/2014

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### Source record

IN THE

HIGH COURT OF SOUTH AFRICA(GAUTENG DIVISION, PRETORIA)

REPUBLIC

OF SOUTH AFRICA

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

DATE:

4 AUGUST 2021

Case

Number: 56948/2014

SINAH

JULIA KHABU

First

Applicant/First Plaintiff

OTLOLENG

JOSEPH KEIKABILE

Second

Applicant/Second Plaintiff

MAMELLO

KHABU

Third

Applicant/Third Plaintiff

And

MATLOSANA

CITY COUNCIL  
First  
Respondent/First Defendant  
NDLOVU  
PLANT HIRE CC  
Second  
Respondent/Second Defendant

## JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] This is an application for the reconsidering of a cost order granted by this court on 21 February 2021.

[2] The action instituted by the plaintiffs was for the payment of damages suffered as a result of the death of Tshehla Famen Khabu (“the deceased”) that was caused by the caving in of a trench during excavation work carried out on the behest of the first defendant (“the Municipality”). The second respondent,

Ndlovu Plant Hire CC (“Ndlovu”) was cited as the third defendant in the action in its capacity as the employer of the

excavator operator who dug the trench.

[3] By agreement between the parties the issues pertaining to merits and quantum were separated and the trial proceeded only on the question of merits.

[4] In the judgment handed down on 21 February 2021, this court made the following order:

*“1. The first defendant is held liable for the plaintiffs’ agreed or proven damages.*

2. The first defendant is ordered to pay the plaintiffs’ costs.

3. The claim against the third defendant is dismissed with costs.”

[5] The relief claimed herein is directed at the aforesaid order and is two-fold:

[5.1] it firstly pertains to the scale of costs from the date on which the plaintiffs made an offer of settlement to the Municipality; and

[5.2] secondly to costs in respect of the second respondent.

[6] The relief is premised on the findings contained in the judgment of 21 February 2021 and the judgment should be read together with this

## judgment.

[7] Only the Municipality opposes the relief claimed herein and for ease

of reference the plaintiffs and the Municipality will be referred to as “the parties”.

#### Issue in dispute

- [8] The parties are ad idem that this court may reconsider the cost order on the principle of a secret common-law offer to settle. The principle entails that a party that has made a reasonable offer of settlement prior to the trial, which was not accepted, may apply that it be reimbursed for the costs it had incurred thereafter.
- [9] In casu the plaintiffs made a secret offer of settlement to the Municipality on 21 September 2020, more than a month before the trial.
- [10] The offer entailed that the plaintiffs were prepared to accept 85% of their proven or agreed damages.
- [11] The offer was not accepted, which resulted, after four days of trial, in the order that the Municipality is 100% liable for the plaintiff’s proven or agreed damages.
- [12] In view of the aforesaid common cause facts, the only issue in dispute is whether the principle should be applied in the present matter.

#### Submissions by parties and discussion

##### Secret offer of settlement

- [13] Prior to considering the submissions by the parties, it is apposite to note that the relief claimed by the plaintiffs, although couched in normal “punitive” cost order terms is not in the true sense punitive, but rather aimed at reducing the irrecoverable costs (costs over and above costs on a party and party scale) that the

plaintiffs had to incur due to the Municipality’s alleged failure to probably consider the secret offer made by the plaintiffs.

- [14] The underlying principle being that considerations of public policy encourage settlements and discourages costly litigation.
- [15] It is for this reason that the plaintiffs, in support of the relief, rely on the principle enunciated in *Singh and Another v Ebrahim* (413/09) [2010] ZASCA 145 (26 November 2010) at paragraph [89], to wit:

*“...A party who thinks an offer ambiguous (...) is obliged to explore and clarify the matter rather than to litigate. If he fails to take a simple and elementary precaution to ensure that avoidable litigation is avoided, he cannot complain of an adverse cost order if the outcome of the trial is against him.”*

- [16] Although the *Singh* matter pertains to an offer made by a defendant in terms of Rule 34(1), I agree with Mr De Waal SC, counsel for the plaintiffs, that the principle applies equally in circumstances where a plaintiff has made a reasonable offer to avoid the unnecessary incurring of costs associated with litigation.

- [17] In *AD and Another v MEC Health and Social Development, Western Cape Provincial Government* 2017 (5) SA 134 WCC, the following factors were taken into account when reconsidering a cost order in circumstances where a secret offer was made:
- [17.1] whether the defendant has engaged in reasonable attempts to settle;
  - [17.2] 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;
  - [17.3] whether the plaintiff allowed the defendant a reasonable time to consider the offer;
  - [17.4] the extent of the difference between the amount of the offer and the amount of the ward;
  - [17.5] the nature of the proceedings and the resources of the litigants.
- [18] In casu the Municipality did not engage the plaintiffs in an attempt to settle at all. Save for the fact that the offer was not accepted, there is no evidence to indicate that the Municipality responded with a counter or any other sort of offer. It simply did nothing.
- [19] In an attempt to explain its inaction, the Municipality in its answering affidavit submits that the plaintiffs did not, at the time that the offer was made, have a “meritorious” case. This submission is according to the Municipality borne out by the “lengthy issues” that had to be determined at trial.
- [20] The Municipality’s liability for the damages suffered by the plaintiffs as a result of the demise of the deceased was based on a wrongful and negligent act. Wrongfulness entailed that the Municipality had a legal duty to act and failed to do so.
- [21] The evidence established that the Municipality, as the “contractor” in terms of the regulations applicable to excavations, had a legal duty to ensure that the excavation was done in a safe manner.
- [22] According to the evidence of Mr Van Schalkwyk (“Van Schalkwyk”), the owner of Ndlovu, Mr Breedt (“Breedt”), an employee of the Municipality was fully appraised and accepted the Municipality’s duty in this respect.
- [23] Breedt, although available at court, was not called to testify to dispel this evidence of Van Schalkwyk. In the premises, this court must accept that the Municipality was aware that it had a legal duty to prevent harm to befall the plaintiffs.
- [24] As far as negligence is concerned, the expert, Mr Du Preez’s evidence, set out in detail, the safety precautions that have to be taken when one embarks on the type of excavation that was done. The fact that the Municipality did not take the safety precautions should have been common cause. A summary of Mr Du Preez’s evidence was in the Municipality’s possession prior to the trial and at least when the offer of settlement was made.

- [25] During trial Mr Du Preez's evidence was not seriously disputed nor was contradicting evidence of another expert tendered. It remains unclear why the Municipality did not admit that the excavation was done in an unsafe manner.
- [26] Be that as it may, the Municipality, at least when it received the offer, should have known that the excavation was not safe.
- [27] There was conflicting evidence in respect of the lowering of the deceased into the unsafe trench.
- [28] The plaintiffs' witness, Mr Nkhuku ("Nkhuku"), testified that their employer, Mr Van Schalkwyk, instructed the deceased to get into the scoop of the arm of the excavator for purposes of being lowered into the trench.
- [29] Mr Van Schalkwyk denied this allegation in the strongest terms and I found that the deceased decided on his own volition to be lowered into the trench.
- [30] As set out supra it was not denied that Breedt was in charge of the excavation, which entailed that he provided instructions to the operator of the excavator where and how deep to dig. Breedt had the duty to ensure that the excavation was done in a safe manner.
- [31] Notwithstanding the aforesaid, Breedt allowed the deceased to be lowered into the unsafe trench. Due to the unsafe manner in which the trench was excavated, a wall of the trench caved in, which led to the deceased being buried under the sand and to his ultimate demise.
- [32] This evidence was available to the Municipality and as set out supra the Municipality did not tender any evidence to deny its liability.
- [33] In the result, the Municipality should have engaged with the plaintiff in respect of a possible settlement of the matter.
- [34] The 85% offer was in the circumstances patently fair and if accepted, would have saved the Municipality 15% of the amount of damages that still needs to be determined.
- [35] The offer was made a month before trial and afforded the Municipality more than enough time to carefully consider the offer in view of the evidence available at the time.
- [36] The consequences of the Municipality's failure to do so was echoed in the Singh matter supra, to wit: "If he [it] fails to take a simple and elementary precaution to ensure that avoidable litigation is avoided, he cannot complain of an adverse cost order if the outcome of the trial is against him [it]."
- [37] The nature of the proceedings is a claim in delict against a State institution. The difference in resources of the litigants is self-evident.
- [38] Mrs Khabu the first plaintiff, is the widow of the deceased and the second and third plaintiffs are his children. The deceased was the breadwinner of the family and the financial hardship that befell the plaintiffs due to his untimely death is unimaginable.

- [39] On the other hand, the Municipality has the resources to collect revenue through taxes, levies and the like.
- [40] In the answering affidavit filed on behalf of the Municipality, the Municipality bemoaned the dire financial straits it was in. Firstly, this should have been all the more reason for the Municipality to seriously consider and accept the offer in the prevailing circumstances.
- [41] Secondly and as stated supra, the Municipality has the means to generate revenue. The fact that the revenue is not properly managed, should not prejudice the plaintiffs. This is eminently a matter where justice and public policy demands that the Municipality should be held liable for the unnecessary costs occasioned by its failure to accept a patently reasonable offer. Such an order will follow.

#### Costs of Ndlovu Plant Hire CC

- [42] The plaintiffs rely on the provisions of Rule 10(4)(b)(ii) for the relief claimed in respect of the costs of Ndlovu. The rule provides that the court may order an unsuccessful defendant to pay the costs of a successful defendant. The Municipality alleged that the plaintiffs' damages were caused by the wrongful and negligent conduct of the excavator operator. The plaintiffs joined Ndlovu as a defendant in the action and based their claim against Ndlovu on its vicarious liability for the conduct of the excavator operator.
- [43] Due to the control Breedts had over the excavator operator's conduct, I found that Ndlovu was not vicariously liable for the conduct of the operator of the excavator.
- [44] For the reasons advanced in respect of the secret offer of settlement and in exercising my discretion in terms of Rule 10(4)(b)(ii), I deem it fair and reasonable that the Municipality be held liable for Ndlovu's costs on a party and party scale.

#### Costs

- [45] The plaintiffs' prayed for an order that the costs of this application also be awarded on an attorney own client scale for the same reasons advanced in respect of the secret offer of settlement. Should the court award party and party scale costs, the plaintiffs will be responsible for the costs over and above the party and party scale costs.
- [46] The necessity to bring this application, furthermore, flows from the fact that the Municipality did not act reasonably when it received the plaintiffs' secret offer of settlement.
- [47] In the result and in the exercise of my discretion in this regard, a cost order as prayed for will follow.

#### ORDER

- [48] In the premises, I grant the following order:
1. The plaintiffs' application for reconsideration of the costs is granted.

2. Paragraphs 2 and 3 of the order granted on 1 February 2021 relating to costs and related aspects are replaced with the order set out below:

*“1. The First Defendant is declared to be liable for the plaintiffs’ taxed or agreed party and party costs of the separated issue pertaining to liability on the High Court scale up to 21 September 2020 and thereafter on the scale as between attorney and own client, which costs shall include, but not necessarily be limited to the following and subject to the discretion of the taxing master where such a discretion exists, the following:*

1.1 The fees consequent upon employment of senior counsel, including the full day fees for 2, 3, 4 and 5 November 2020 and 7 December 2020;

1.2 The fees and costs of heads of argument prepared by counsel;

1.3 The costs of obtaining an expert engineer’s report and any addenda thereto from Mr W du Preez, a civil engineer, the costs

of his attendance at consultations in preparation for trial and his qualifying and reservation fees consequent upon his attendance at the trial (not limited only to the day on which he testified);

1.4 The travelling and subsistence expenses, if any, of all witnesses who were present at court on 2 and 3 November 2020;

1.5 The costs of employing an interpreter on 2 and 3 November 2020;

1.6 The costs, fees and expenses consequent upon, pertaining to or flowing from the joinder of the erstwhile second defendant and the

third defendant (which costs shall be considered to be costs in the cause for purposes of the judgment of Hattingh AJ of 8 March 2018 and which shall include the reserved costs of the plaintiffs’ opposed application to amend to introduce the issue of vicarious liability of the defendants pursuant to their notice in terms of Rule 28(1) of 15 April 2020);

1.7 The reserved costs, if any, of the trial set down for 27 May 2020.

2. The first, second and third plaintiffs and Mr Thamsanqa (“Jomo”) Nkhukhu are declared necessary witnesses.

3. The first defendant shall pay the third defendant’s taxed or agreed party and party costs of the separated issue pertaining to liability on the High Court scale (including the reserved costs, if any, of the trial set down for 27 May 2020 but excluding the reserved costs of the plaintiffs’ opposed application to amend to introduce the issue of vicarious liability of the defendants pursuant to their notice in terms of rule 28(1) of 15 April 2020).

4. The first defendant shall pay the plaintiffs’ taxed or agreed attorney and own client costs of this opposed application on the High Court scale which shall include, but not be limited to, the full day fee of senior counsel for 17 June 2021 and preparation of heads of argument.”

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD PER COVID19 DIRECTIVES: 17th of June 2021

DATE DELIVERED PER COVID19 DIRECTIVES: 4th of August 2021

## APPEARANCES

Counsel for the Applicants/Plaintiffs:

Advocate De Waal SC

Instructed by:

Adams and Adams Attorneys

Counsel for the First Respondent/Defendant: Advocate S. Laka

Instructed by:

Labethe Attorneys

Counsel for the Second Respondent/

Third Defendant in the court a quo: Advocate M.G. Hitge

Instructed by:

Meyer, Van Sittert and Kropman Attorneys

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