

SOUTH AFRICA / JUDGMENT

# M.M v MEC for Education, Mpumalanga Province (A11/2023) [2023] ZAMPMBHC 68 (17 November 2023)

[2023] ZAMPMBHC 68

## COURT

Mbombela High Court, Mpumalanga

## BEFORE

Greyling-Coetzer, TV Ratshibvumo, JH Roelofse

## CASE / FILE NUMBER

A11/2023

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## Source record

## SAFLII

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## Policy

## FLYNOTES:

## CIVIL

PROCEDURE – Separation of issues – Liability from quantum

– Student

fatally stabbed at school – Claim for damages founded on respondents' duty of care and emotional shock and trauma –

Negligence conceded – Whether respondent liable to compensate appellant for shock suffered by death of his son –

Failed to prove that he sustained detectable psychiatric injury – No liability for mere shock or

trauma without proof of a

detectable psychiatric injury – Court a quo was not called upon to merely deal with issue

of negligence – It was to

determine liability – Finding of liability disposes of everything bar quantum of damages

– Appeal dismissed –

Uniform Rule 33(4).

IN

THE HIGH COURT OF SOUTH AFRICA  
MPUMALANGA  
DIVISION, MBOMBELA (MAIN SEAT)  
APPEAL  
CASE NUMBER: A11/2023  
COURT  
A QUO CASE NUMBER: 497/2019  
(1)  
REPORTABLE: YES/NO  
(2)  
OF INTEREST TO OTHER JUDGES: YES/NO  
(3)  
REVISED.

DATE:

SIGNATURE:

In  
the matter between:-  
M[...]  
M[...]  
Appellant  
and  
MEC  
FOR EDUCATION, MPUMALANGA PROVINCE  
Respondent

## JUDGMENT

GREYLING-COETZER AJ

- [1] This appeal has its origin in a tragic incident that occurred on 23 January 2018 at Senzangkhona Secondary School, when the appellant's son, a learner at that school, was fatally stabbed by a classmate. The appellant (plaintiff in the court a quo) unsuccessfully sued the respondent (defendant in the court a quo), claiming R3 million in non-patrimonial damages for emotional shock he alleged he had suffered due to the negligent breach of a duty of care on the part of the educators of the said school.

### The Claim

- [2] The appellant's claim was founded on the respondent owing a duty of care, towards the deceased, founded on the constitutional obligation upon the respondent as a functionary of the State exercising public power, and being responsible for the protection and advancement of the rights enshrined in the Constitution.

- [3] It was alleged that the respondent, breached this duty of care through the educators acting negligently. It was alleged that as a result of the wrongful and negligent conduct by the educators the deceased died and the appellant suffered emotional shock, depression and post-traumatic stress disorder, founding a claim for R3 million in non-patrimonial compensation.

#### Pre-trial agreement

- [4] Prior to the commencement of the trial, the parties on 18 July 2022, concluded a pre-trial minute in terms of which the parties agreed to separate ‘merits’ from ‘quantum’. Consequentially they agreed that the matter would proceed on the merits only, and quantum was to be postponed sine die.

#### Proceedings in the court a quo

- [5] At the commencement of the trial during September 2022, and pursuant to the court a quo making certain findings in respect of the special pleas raised by the respondent, an application was made from the bar in terms of Uniform Rule 33(4). The issues to be separated were identified to be that of ‘liability’ and ‘quantum’. The court a quo granted the application on said terms.
- [6] It is apposite to mention at this juncture that the appeal record was incomplete when the matter was first set down. It did not contain the application for separation in terms of Rule 33(4) order, submissions made by the parties. Consequentially the appeal court ordered the parties to approach the court a quo for the purpose of reconstructing the missing portion of the record. In doing so the appeal court ordered as follows: -

*“The parties are ordered to approach the trial court so that a reconstruction of the missing portion of the record, specifically*

that portion of the record where the appellant contends it had made an application from the bar, can be done. The reconstruction shall include contentions by both parties when the issues to be separated were identified; the description of the issues requested to be separated; the court’s order as to which issues were separated and reasons”.

- [7] Reconstruction was undertaken during June 2023. The post fact reconstructed portion of the record was submitted to the appeal court and recorded the following relevant extracts:

#### 7.1 Per the appellant: -

*“Issues that were to be separated were, first, the court had to deal with the issues of liability, that is negligence and then the issue relating to injury and the amount for damages were to be postponed sine die...”*

...

*“The parties identified the issues to be separated, meaning that it was the issue of liability, that is negligence and then the injury and the issues relating to that (sic) amount be awarded for damages to a (sic) postponed side die.”*

7.2 Per the respondent: -

*“When the trial commenced from the Bar and with regard to housekeeping issues, my learned friend stated clearly that merits and quantum be separated and we continue with the issue of merits, which determines liability and then the issue of quantum be postponed sine die”.*

7.3 Per the court a quo:

*“the merits were separated from quantum and as the parties are saying, merits were identified as per liability and quantum as quantum as it is referred to”.*

- [8] The court a quo proceeded to state “for the purpose of the reconstruction it was recorded that the separation was the separation of liability from quantum”. Both legal representatives confirmed same.
- [9] Having agreed to separation per the pre-trial minutes and subsequent order of separation set out above, the plaintiff presented and relied on evidence by two witnesses in support of the claim. The first was Mr. R[...] B[...] (Mr. B[...]), a friend of the deceased and fellow learner at the school. Thereafter the evidence of the appellant was presented.
- [10] The evidence of Mr. B[...] related to the events as they unfolded on the tragic day when the deceased was stabbed by a fellow learner. Secondary to this, evidence was presented in respect the school premise, how it was secured, measures employed and a similar incident that took place three years prior.
- [11] The evidence of the appellant as presented related to how he obtained knowledge of the incident, the subsequent death of the deceased, his emotional state on receipt thereof, on viewing the deceased body and his conduct and hardships since receiving the report and thereafter.
- [12] Pursuant to the evidence being led on behalf of the appellant and the respondent, closing arguments were received by the court a quo. The relevant portions can succinctly be summarized as follows:

12.1 on behalf of the appellant and in support of a favorable finding, that the appellant needed to prove that he suffered emotional shock and that that such emotional shock was suffered the minute he was told that the deceased was stabbed, that chances of survival were slim and that he was bleeding profusely. The appellant’s condition changed the minute he heard that the deceased was injured. It was submitted that the appellant had proven that he suffered emotional shock and that there was no evidence that was led by the defendant to dispute that. The respondent only concentrated on the aspect of negligence. The court a quo was urged to admit the evidence on his emotional shock and that it should find that the defendant was negligent in not preventing this incident from happening as it should have had foreseeability.

12.2 on behalf of the respondent and calling for dismissal in that the appellant failed to prove emotional shock and negligence. It was contended that there has to be a very close relationship between the emotional shock, and negligence. It extensively dealt with how emotional shock ought to be interpreted or defined to found liability and the requirement that emotional shock should not be for a short period but be prolonged.

12.3 in response to engagement by the court a quo about the nexus between shock and negligence; it was argued on behalf of the appellant that negligence of the defendant is intertwined with the death of the plaintiff's child. The death came as a result of the negligence and the death caused emotional shock. it is a chain of events where negligence can't be separated from shock.

[13] The oral closing arguments were further supplemented by both parties filing written submissions. On behalf of the appellant the court a quo was asked to accept that there was a link between the appellant's physical and emotional state, and the respondent's negligence. On behalf of the respondent, it was submitted that the disputed issues in the matter were whether the respondent was negligent and whether the appellant suffered emotional shock. It was submitted that the appellant had failed to establish negligence and that he suffered emotional shock. It was further contended that he failed to prove factual causation.

## Judgment

[14] The court a quo, in its judgment, defined the issues for determination to be (a) whether the educators' conduct, in relation to the death of the deceased, amounts to negligence; (b) whether the appellant suffered shock caused by the death of the deceased; and (c) whether a claim for such shock is available to the appellant. Differently put, whether the respondent is liable to compensate the appellant for the shock suffered – if any.

[15] The court a quo found that the educators were negligent, and held that the next enquiry was to establish whether the respondent would be held liable for the shock that the appellant alleges he suffered. In the latter respect the court a quo found that the appellant failed to prove, on a balance of probabilities, that the kind of shock suffered is not mere nervous shock or trauma. Therefore, the appellant failed to prove that he had sustained a detectable psychiatric injury. Consequentially the court a quo concluded that there is no liability for mere shock or trauma without proof of a detectable psychiatric injury. The claim was dismissed with costs.

## Ground of appeal

[16] The appellant appeals against the whole judgment and order. Fundamentally only one ground of appeal is relied on, although it is couched between various statements as presented in the notice of appeal: Being that the court a quo erred in dismissing the claim based on the finding that the appellant failed to prove that he suffered emotional shock owing to the fact that the issue of merits and quantum was separated, and the effect of separation being that negligence pertains to merits and emotional shock pertains to

quantum.

- [17] The aforesaid was expressed somewhat amplified in the application for leave to appeal. There it additionally contended that the court a quo was only called upon to decide on negligence on the part of the respondent.

#### Cause of action

- [18] The causing of an actionable emotional shock is treated in practice as a specific form of delict, which may result in patrimonial or non-patrimonial loss. In *Bester v Commercial Union*[1] it was confirmed that a plaintiff who suffers from negligently inflicted nervous shock[2] which results in psychiatric or psychological injuries is entitled to claim under the *Lex Aquilia*.
- [19] There is generally an acceptable distinction between primary and secondary victims of emotional shock. Briefly, emotional shock suffered by a primary victim is usually accompanied by physical injuries. Whereas in the case of a secondary victim, emotional shock is not usually accompanied by physical injuries as the secondary victim would typically witness or hear of the shock causing event.[3]
- [20] To found a successful claim and recover compensation on the basis of the causing of emotional shock as a delict, be it as a primary or secondary victim, all five elements of a delict must generally be present[4], namely; (a) conduct;[5] (b) wrongfulness;
- (c) fault[6]; (d) causation; and
- (e) harm or loss.[7] Proof of negligence is but one of the elements of a plaintiff's cause of action for compensation.
- [21] This was restated in *MTO Forestry (Pty) Ltd v Swart NO*[8] where the Supreme Court of Appeal held that "as the appellant's claim is founded in delict, it had to establish first, the conduct of the respondent of which it complained; second, the wrongfulness of that conduct; third, fault on the part of the respondent (in this case in the form of negligence); fourth, that it had suffered harm; and fifth, a causal connection between such harm and the respondent's conduct that is the subject of its complaint".
- [22] The conduct be it an omission or commission would normally lead to injury or death of the primary victim which could result in said victim suffering emotional shock or a secondary victim suffering emotional shock upon hearing of the incident or seeing the effect; the latter being the case in the present matter. The conduct must cause harm or prejudice in the legally reprehensible or unreasonable manner to be regarded as wrongful.[9] As in a case of emotional shock, the wrongfulness typically lies in the infringement of a plaintiff's right to physical and mental integrity.[10]

- [23] It was held in *Bester* (supra) that in order for the conduct to be wrongful, the harm caused by the conduct must be reasonably serious, of a particular duration and must affect a person's health.[11] Based on the well-known rule of *de minimis non curat lex* insignificant emotional shock of a short duration, with minimal effect on a person's health, will generally not be found actionable.[12] In such instances it can either be because the infringement is not regarded as wrongful, or because the quantification of the loss is insignificant.
- [24] As in the present case, the element of fault is in the form of negligence. It can however also be in the form of intention. In respect of this element, the considerations of whether the reasonable person in the position of the wrongdoer would have foreseen the reasonable possibility of the conduct causing the emotional shock, and would have taken reasonable steps to prevent such harm from occurring, are relevant. In respect of a secondary victim, such as the appellant herein, the question of reasonable foreseeability of harm would more appropriately relate to the element of legal causation, as opposed to in respect of a primary victim where it is more appropriate to consider under the element of negligence.[13]
- [25] It was held in *Barnard v Santam Bpk*[14] that not only must it be proved that the conduct of the wrongdoer was negligent, but also that the negligent conduct of the wrongdoer was the legal cause of the harm suffered. Factual causation must obviously also be present, but it is mostly assumed and not directly proven.[15]
- [26] In respect of the element of harm or loss, the harm or loss suffered due to the occurrence of the delict needs to be proved. As held in *Road Accident Fund v Sauls*,[16] "it must be accepted that in order to be successful a plaintiff in the respondent's position must prove, not mere nervous shock or trauma, but that she or he had sustained a detectible psychiatric injury."
- [27] Severity of the resulting harm or psychiatric injury and the susceptibility to harm of the secondary victim are issues relating to the quantum of the claim. This will ordinarily require some sort of expert evidence to be presented to prove the extent, duration, severity and prognosis in respect of the harm experienced.

#### Separation of issues

- [28] Rule 33(4) provides that "if, in any pending action, it appears to the court *meru motu* that there is a question of law or fact which may conveniently be decided either before any evidence is led or separately from any other question, the court may make an order directing the disposal of such question in such manner as it may deem fit and may order that all further proceedings be stayed until such question has been disposed of and the court shall on the application of any party make such order unless it appears that the question cannot conveniently be decided separately".

- [29] The effect of an order separating the merits and quantum, or for that matter that any question be so separated, is that the issues on the pleadings or questions so separated would be resolved in separate and self-contained trials. An order made by the court after the first trial is a final decision. Practically this means that only the issues that were separated and not postponed, would be issues properly before a court for determination. Should a court then proceed with issues not properly before the court, the court would be misdirecting itself, as it would be making findings on issues not before it.
- [30] The question then begs whether that is what transpired in this appeal when the court a quo found that the appellant had failed to prove emotional shock to establish liability in respect of the respondent.
- [31] The point of departure in such an enquiry is to establish what the parties agreed on and what the court sanctioned in terms of the order for separation. Although that agreed to be separated per the pre-trial minute and being 'merits' and 'quantum' was not identical if compared to the order of separation at the commencement of the trial, being 'liability' and 'quantum', the difference is imperceptibly and therefore excusable. It's not uncommon although problematic, that the words 'merits' and 'liability' are used interchangeably as can be seen from *Tolstrup NO v Kwapa NO*[17] where the court similarly equated 'liability' with 'merits'.
- [32] The more involved determination is what was meant with the words 'merits' and 'liability' as used. In *Road Accident Fund v Krawa*[18] the court expressed that the use of definitions found in standard or legal dictionaries do not provide much assistance in attempting to attribute a 'usual' meaning to the words 'liability' or 'merits' and 'quantum' or 'damages'. Van Zyl J in *Krawa* (supra) further held that it is undesirable to attempt to attribute a usual meaning to these terms. A preferred approach is rather to determine their meaning from the context in which they are used, the reason being that words are often controlled by the context and certain terms may as a result have different meanings in different contexts. In casu, the meaning of the words should not only be determined from the context they were used in the pre-trial minute and during the oral application for separation but it is also calls to be considered in the context of that events that played out during the trial, the evidence lead, the arguments made orally and written at the conclusion of the trial.
- [33] Content must accordingly be given to the terms used by the parties in a particular case in the context of their pursuit to achieve a separation of issues for trial as a first stage of the determination and as a second stage, through the respective conduct in the court a quo in achieving the purpose of proving and challenging the claim. In order to do so a brief overview of the relevant portions of the pleaded case is apposite.
- [34] In paragraph 5 of the amended particulars of claim, the appellant proceeded to lay the factual basis for the incident that occurred on the fatal day. This speaking to the element of conduct. In paragraph 6 the duty of care was pleaded, and that the duty of care was breached by a failure to take steps with a reference to paragraph 7. It is accepted that the

reference to paragraph 7 was incorrect and ought to read paragraph 6.3. The appellant proceeded to plead that the fatal stabbing of the deceased was due to the negligence of the respondent and the educators, by the failures set out in paragraphs 6.5.1 to 6.15. The aforesaid paragraph thus dealt with fault.

[35] Although in an ungainly manner, in paragraphs 7 and 8 the appellant proceeded to lay the basis for wrongfulness, causation and harm by pleading as follows: -

*“7 As a result of the wrongful and negligent conduct by the members of the defendant, and as a result of the plaintiff’s son’s death, the plaintiff suffered emotional shock, depression and PTSD, which was occasioned by the following:*

7.1 The news of the deceased’s sudden death.

7.2 The sight of the deceased’s lifeless body lying in the hospital bleeding.”

*“8 As a result of the deceased’s death the plaintiff suffered emotional shock and*

post traumatic street (sic) disorder (PTSD), grief, depression disorder and funeral costs and expenses which condition was aggravated by the fact that:

8.1 the deceased’s (sic) was evacuated to hospital by the ambulance after a long time.”

[36] In paragraph 9, the monetary value of the damages suffered was pleaded.

[37] With that as background and against the agreement in the pre-trial minute and as reflected in the reconstructed portion of the record it is clear the court a quo was to determine the ‘merits’ equating to ‘liability’.

[38] As held in the Karwa (supra) matter, where the issues for trial are not defined but simply divided without reservation into two separate and distinct compartments, then it is, as a matter of logic, simply an exercise of elimination.[19] In other words, what does not form part of the issues which are to be considered in the more limited enquiry relating to damages, must form part of the issues that were to be considered in respect of merits. Therefore, all those issues and the factual allegations made in support thereof, that have nothing to do with the enquiry relating to damages, were before the court in respect of merits. This view finds support in the reconstructed portion of the record.[20]

[39] In Tolstrup (supra) it was held that “a finding of liability (which is the equivalent of ‘the merits’) clearly disposes of everything bar the quantum of damages, ...” The court proceeded to state that quantum would not include the consideration of defenses on the merits, be the defenses raised by way of special plea, such as lack of jurisdiction, non-locus standi, prescription or the like, or substantive defenses such as absence of negligence, mistaken identity, contributory negligence and so on, all of which relate to whether damages are payable. Once that is out of the way, the parties can concern themselves with how much is payable.[21] Is that what the court a quo was tasked to do pursuant to ordering separation of ‘liability’ from ‘quantum’?

[40] In the further submissions called for by the appeal court, the appellant contended that separation of liability from quantum means that the court first deals with issues of liability or merits, which comprises the conduct, wrongfulness and negligence, and the court therefore postponed the issue of injury or the causation of the damages arising from the negligent and wrongful conduct of the respondent or its employees. This was in contrast to what was submitted by the appellant in its oral heads of argument filed prior to the order for reconstruction. Therein the appellant submitted that the court was tasked with only dealing with negligence. This was aligned with that set out in the application for leave to appeal.[22] Unlike ‘merits’ and ‘liability’, the word ‘negligence’ is not an acceptable substitute for ‘merit’ or ‘liability’. But denotes a fragment of the latter two words.

[41] In the matter of Karwa (supra) the court proceeded to state the following:-

*“... the meaning that must be attributed to the terms ‘merits’ or ‘liability’ and ‘quantum’ or ‘damages’*

is to be determined with reference to the context in which those terms are used. Where they are used by the parties in an attempt to achieve a separation of issues as they arise from the factual allegations made in the pleadings in an action for damages in terms of s 17(1) of the Act, their use is in a procedural context, the aim being the shortening of proceedings and the avoidance of unnecessary costs. It bears no relation to the enquiry relating to the different elements which constitute a delict or which are necessary to complete a plaintiff’s cause of action. To put it differently, the elements or ingredients of a delict or a cause of action are not to be equated with the questions which arise from determination when there is a separation of issues for trial on the pleadings, or whether the terminology used to achieve such a separation. For instance, ‘liability’ as that term is used in the context of the law of delict would only arise when all the elements of a delict, including dam num (loss or damage), are present. Yet as I shall indicate hereunder, where the question of liability and the question of damages are separated for purposes of trial those issues which pertain to the existence of loss or damage forms part of a separate enquiry.”

[42] Although I am in agreement with aforesaid the matter at hand is distinguishable considering that the separation had been achieved; what thus remains to be considered in giving meaning to the words used is how it was applied by the parties in the court a quo.

[43] After the order for separation was granted, separating liability from quantum, the appellant proceeded to lead the evidence of Mr. B[...] in respect of the happenings on the day when the deceased was stabbed at the school. This evidence spoke to and was presented to prove what was pleaded in paragraphs 5 and 6 of the amended particulars of claim, being conduct and fault. If negligence was the only issue to be decided as contended by the appellant in the oral heads of argument that would have been the end of the trial.

[44] But thereafter, the evidence of the appellant was presented. The appellant testified about how he obtained knowledge of the incident, and subsequent death of the deceased, his emotional state on receipt of the report, on viewing the deceased body and his conduct and state of wellness from receiving the report and thereafter. He testified in respect of his physical experience of numbness and weakness, his inability to drive and to properly see.

He testified that after seeing the deceased body and injuries inflicted, he consulted a medical practitioner. He testified that to date he was unable to stand the sight of similar injuries to that which he witnessed on the deceased. He testified that as a result of the emotional state that he found himself in, pursuant to the death of the deceased, he lost 25kg. He also testified about his relationship with the deceased and the time they spent together; whether he has since received counselling, which was confirmed in the negative. He testified that he enquired from the respondent pertaining to the availability for counselling. Pursuant to this the appellant's case was closed, more particularly it was expressly stated that the appellant's case, as far as merits of the case are concerned, was closed.

[45] The singular conceivable reason why this evidence would have been presented and would have been required to be lead is to prove that which is alleged in paragraph 7 and 8 of the amended particulars of claim, being wrongfulness, causation and harm.

[46] The respondent then presented its case and the parties addressed the court in closing argument. As foreshadowed in the earlier part of this judgment and against the background of the evidence lead it was submitted on behalf of the appellant that he "...needs to prove that he suffered emotional shock. When do you suffer emotional shock is the question. The minute he is told that your son has been stabbed, chances of survival are slim, he is bleeding profusely...

...Mr M[...] has proven beyond, not on a balance of probabilities, beyond a reasonable doubt that he suffered emotional shock and there is no evidence that was led by the defendant to show that he did not suffer emotional shock. The defendant only concentrated on the aspect of negligence only. So, I will submit that Mr M[...]’s evidence on his emotional shock should be admitted by the court, and the court should also find that the defendant was negligent in preventing this incident from happening and the defendant should have had foreseeability....

...We submit my lord the plaintiff has proven his case and the court should find in favour of the plaintiff and then that the cost shall include cost the (sic) employment of two counsel.”

[47] The respondents’ argument followed a similar path when it was submitted that: “...I will my lord submit that there has to be a relationship, a very close relationship between the emotional shock, as well as negligence....

....So, I submit my lord that the plaintiff has failed to prove, one, emotional shock, secondly it has failed to prove negligence in the form of breach of duty, I mean duty of care.”

[48] On behalf of the respondent it was extensively dealt with how emotional shock ought to be interpreted or defined to found liability and the requirement that emotional shock should not be for a short period but be prolonged.

[49] In reply, it was restated: “.... But the evidence here is clear. It was shock. The minute after the plaintiff was told about the injuries, severe injuries of his child he changed immediately, that’s shock. Grief is when someone has already died but shock starts from the minute, he heard that your child has, is severely injured, perhaps it’s a shock to you, or what happened? He said I did not expect my child to be injured.....

.....I am saying based on the evidence of the plaintiff it is clear that it was shock in the sense that it happened, his condition changed the minute he heard that the child was injured.”

[50] Questioned by the court in respect of the nexus between shock and negligence. It was argued on behalf of the appellant that “negligence of the defendant is intertwined with the death of the plaintiff’s child. The death came as a result of the negligence and the death caused emotional shock, it’s a chain of events, there are intertwined. You can’t separate the negligence from shock. Because as a result of the negligence if the court finds that there was negligence led to the death, and the death led to the shock of the plaintiff. So, there is no way Mr Laballo can separate the three.”

[51] The oral closing arguments were further supplement by written heads of argument by both parties. The heads of argument on behalf of the appellant proceeded to deal with the legal position in respect of negligence, whether the respondent had foreseen the possibility of its conduct, injuring another in his person, causing patrimonial loss, reasonable steps to be taken to in order to guard against the occurrence and the respondent’s failure to take said steps. In conclusion it was submitted that the court a quo must accept that there is a link between the appellant’s psychological and emotional state and the respondent’s negligence. Further that the harm suffered by the appellant could have been prevented by the educators but wrongfully and negligently failed to do so.

[52] In the heads of argument submitted on behalf of the respondent, the issues in dispute were identified as whether the appellant suffered emotional shock as a result of the death of the deceased, and whether the death of the deceased was caused by the negligence of the respondent’s educators and/or the school management. In conclusion it was submitted that the appellant failed to prove factual causation.

[53] At no point during the trial, nor during the argument or exchange with the court a quo did either of the parties raise an objection to the issues dealt with the evidence lead or arguments advanced. All concern was content. It is only now post an adverse finding that the court’s conduct in dealing with whether emotional shock was proven, is bemoaned on the basis that the court a quo employed an incorrect categorization of what was to be dealt with under ‘merits’ and what pertains to ‘quantum’.

[54] As alluded to herein above, to give meaning to the term ‘separation of merits and quantum’, not only the pre-trial minutes, application from the bar for separation and the ruling in respect thereof, but also the manner in which the trial was conducted and the evidence placed before the court, and arguments pursuant thereto, are instructive.

- [55] When the court a quo proceeded to adjudicate upon the matter, it did so on the issue of liability. Same was founded on the evidence placed before it, which evidence spoke not only to the issue of negligence, but to all that was pleaded as set out above, inclusive of that which was pleaded in paragraphs 7 and 8 of the amended particulars of claim. That was the evidence that was presented in line with the agreed and sanctioned separation.
- [56] The conclusion is unavoidable that the court a quo was not called upon to merely deal with the issue of negligence, nor can it be faulted for the finding in respect of emotional shock. It was to determine liability, as held in Tolstrup (supra) that “a finding of liability (which is the equivalent of ‘the merits’) clearly disposes of everything bar the quantum of damages.” Having so concluded, the appeal must fail.
- [57] Lastly, and as a parting note the importance of precision, accuracy and clarity when parties or the court employ the mechanism of separation as envisaged in Rule 33(4) must be stressed. In the majority of cases as in the present the duty on both the parties and the court to purposefully apply Rule 33(4) is overlooked.
- [58] As held in Absa Bank Ltd v Bernert,[23] “it is imperative at the start of a trial that there should be clarity on the question that the court is being called upon to answer. Where issues are to be separated, Rule 33(4) requires the court to make an order to that effect. If for no reason but to clarify matters for itself a court that is asked to separate issues must necessarily apply its mind to whether it is indeed convenient that they be separated, and if so, the questions to be determined must be expressed in its order with clarity and precision”.
- [24]
- [59] It is for this very reason that the Supreme Court of Appeal, almost 20 years ago, in Denel (Edms) BK v Vorster,[25] dealing with separation of issues, held that “... where the trial court is satisfied that it is proper to make such an order and in all cases, it must be so satisfied before it does so – it is the duty of that court to ensure that the issues to be tried are clearly circumscribed in its order so as to avoid confusion. The ambit of terms like ‘merits’ and ‘the quantum’ is often thought by all the parties to be self-evident at the outset of a trial, but, in my experience, it is only the simplest of cases that the initial consensus survives. Both when making rulings in terms of Rule 33(4) and when issuing its orders, a trial court shall ensure that the issues are circumscribed with clarity and precision.” The aforesaid was again reiterated by the Supreme Court of Appeal in Odinfon (Pty) Ltd v Reynecke.[26]
- [60] In Adlem and Another v Arlow[27] it was made clear that the adoption by the parties and the sanctioning by the court of an informal procedure based on Rule 33(4)
- is not acceptable. Separation of issues ought to be done by reference to specific paragraphs of the pleadings. In the matter of Tolstrup (supra), as in the present appeal, this did not happen. With a measure of certainty had the separation taken place in a formal manner, with reference to the pleadings, issues such as raised in this appeal can be avoided.

[61] Insofar as costs of the appeal are concerned, the appellant was unsuccessful and there exists no reason to depart from the usual rule that cost should follow the result.

[62] For these reasons the following order is proposed:-

1. The appeal is dismissed with costs.

D GREYLING-COETZER

Acting Judge of the High Court

I agree

TV RATSHIBVUMO

Judge of the High Court

JH ROELOFSE

DATE OF JUDGMENT: 17 November 2023 FOR APPELLANT: Adv. DP Mogagabe with Adv. BJ Modada Instructed by JM Modiba Attorneys c/o TP Radebe Attorneys FOR RESPONDENT: Adv. Leballo Instructed by State Attorney (Pretoria)

[1] 1973

(1) SA 769 (A) at 776D-777A, 781H

[2] As a synonym for emotional shock

[3] 2015

(78) THRHR pg181, Ahmed and Steynberg; See also Hing v Road Accident Fund 2014

(3) SA 350 (WCC) par [16]

[4] Law Society of South Africa and Others v Minister for Transport and Another 2011

(1) SA 400 (CC) par [25]

[5] The conduct (be it in the form of omission or commission) of the wrongdoer would typically lead to the death or injury of a primary

victim, as in this case of the deceased, which could result in a secondary victim, being the appellant in this instance, suffering

emotional shock upon hearing or seeing the effects

[6] In the form of either negligence, intention unless strict liability finds application for example claims founded on the action de pauperie

[7] Neethling and Potgieter Law of Delict 4

[8] 2017

(5) SA 76 (SCA) at par [12]

[9]

Neethling and Potgieter Law of Delict 33

[10] The infringement can be physical or non-physical, non-physical referencing mental or psychological injuries

[11] Bester (supra) at 769G

[12]

Neethling and Potgieter Law of Delict 287

[13] In Barnard v Santam Bpk [1998] ZASCA 84; 1999

(1) SA 202 (SCA) at 210C the general observation was made that it is irrelevant from a practical point of view whether reasonable foreseeability is tested within the context of negligence or legal causation.

[14]

[1998] ZASCA 84; 1999

(1) SA 202 (SCA)

[15] Barnard (supra) at 215D

[16] 2002

(2) SA 55 (SCA) at 61I-J

[17] 2002

(5) SA 73 (W) at 77F

[18] 2012

(2) SA 346 (ECG)

[19] Par [30]

[20] Regard should be had to the fact that this portion of the record was reconstructed, essentially post-fact, and after the grounds of appeal had been formulated

[21] Tolstrup (supra) 77F-G

[22] See par [17] hereof

[23] 2011

(3) SA 74 (SCA)

[24] At par [21]

[25] 2004

(4) SA 481 (SCA)

[26] 2018

(1) SA 153 (SCA)

[27] 2013

(3) SA 1 (SCA) at par [5]

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