

SOUTH AFRICA / JUDGMENT

Van Reenen v Lewis and Another (2302/2014) [2019] ZAFSHC 55 (14 May 2019)

[2019] ZAFSHC 55

COURT

Free State High Court, Bloemfontein

BEFORE

Naidoo

CASE / FILE NUMBER

2302/2014

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IN

**THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case No:

2302/2014

In the

matter between:

ILSE

ERNA VAN

REENEN

Plaintiff

and

DR PIERRE GERHARDUS LEWIS

First Defendant

LIFE ROSEPARK

HOSPITAL

Second Defendant

JUDGMENT

CORAM:

NAIDOO J

HEARD ON:

28 -31 August 2018; 4 -15 February 2019

DELIVERED ON: 14 May 2019

INTRODUCTION

- [1] Prior to 29 June 2011, Ilse Erna Van Reenen (the plaintiff) was an active, independent and healthy 66 year old woman, whose assistance was pivotal to running the sheep farm in Noupoot, near Colesberg, which she and her husband owned.

Her complaint appears to have been ongoing back pain. On the advice of the neurosurgeon treating her, she underwent spinal surgery on 29 June 2011. There were serious complications after the spinal operation, which resulted in her now living a severely debilitating

life. She has lost control of her bladder and bowel functions, and cannot walk unassisted. She uses a walking frame, with wheels, to assist her to walk, but does so with great difficulty. The condition she suffers from now is called Cauda Equina Syndrome (CES). This is a problem or dysfunction of the Cauda Equina, which is a collection of the spinal nerves in the lower back resembling a horse's tail. Hence the term Cauda Equina (Latin for horse's tail).

- [2] The neurosurgeon who treated the plaintiff is the first defendant, Dr Pierre Gerhardus Lewis, who performed the operation at Life Rosepark Hospital in Bloemfontein (the second defendant), who is a member of the Life Healthcare Group (Pty) Ltd. Plaintiff's post-operative care was managed by the nursing staff employed by the second defendant. The plaintiff

issued summons against the first and second defendants, claiming damages she suffered as a result of her post-operative care in the second defendant's hospital. Adv WP De Waal represented the plaintiff, Adv ST Farrell represented the first defendant and Adv W Bezuidenhout represented the second defendant.

BACKGROUND

- [3] The trial commenced on 28 August 2018 and continued until 31 August 2018, when it was postponed for further hearing to the period 4 –15 February 2019. The trial proceeded for eleven (11) days in total and the final two days

were utilised for arguments in respect of costs.

- [4] The plaintiff led several expert witnesses, including the expert neurosurgeons, Dr WA Liebenberg and Dr JJ Du Plessis. The latter was in fact, the expert of the first defendant, after whose testimony the plaintiff closed her case; the plaintiff also led the evidence of a nursing expert. The first defendant commenced his testimony on 12 February 2019 and, after intensive and extensive cross-examination, concluded such testimony on 13 February 2019. At the end of the testimony of the first defendant on the 11th day of trial (13 February 2019), the plaintiff withdrew her claim against him, and the costs of the first defendant were reserved for determination at the end of the trial. The second defendant consented to the withdrawal of the action against the first defendant. Mr Farrell as well as the first defendant

were excused from attendance at the further proceedings, including the argument on costs.

- [5] Mr Farrell's standpoint on the first defendant's costs was that the plaintiff withdrew the action against the first defendant and was liable for his costs, unless the plaintiff succeeded in arguing that the second defendant should pay the first defendant's costs.

After an adjournment, at the request of the second defendant, to enable it to reconsider its position, Mr Bezuidenhout informed the court that the second defendant concedes 100% liability in respect of the plaintiff's proven or agreed damages arising

from the Cauda Equina Syndrome, together with the plaintiff's costs on a party and party scale, such costs to include the costs consequent upon the employment of senior counsel and the expert witnesses called by the plaintiff. A written agreement to this effect was handed up by the parties. The tender in respect of costs was not acceptable to the plaintiff, with the result that the arguments on costs ensued on 14th and 15th February 2019.

ISSUES

- [6] The issues that this court is tasked with determining are

6.1 The appropriate scale of costs as between the plaintiff and the second defendant, namely whether it should be on the scale of party and party or attorney and own client, alternatively, attorney and client.

6.2 The appropriate scale of costs in respect of the first defendant and who is to pay these costs.

THE LAW

- [7] It is well established in our law that the general rule regarding costs is that the unsuccessful party pays the costs of the successful party on the party and party scale. The determination of an appropriate costs order is in the discretion of the court, which discretion is usually informed by a number of factors in order that such discretion be exercised judiciously. Erasmus in Superior Court Practice, D5-6, states it succinctly as follows: In leaving the court a discretion, the law contemplates that it should take into consideration the circumstances of each case, carefully

weighing the issues in the case, the conduct of the parties and any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair and just between the parties. This is particularly so if the court intends on departing from the general rule. There is a duty on a litigant to avoid conducting litigation in such a manner that it unduly protracts a case or unduly causes an escalation in costs.

- [8] It is also well established that vexatious conduct, even if it was not intended to be vexatious but has the effect of being vexatious, may well be the basis for an order awarding costs on an attorney and client scale. Where a litigant was able to, but fails to take steps to curtail proceedings and thus causes an escalation in costs, he may similarly face the prospect of paying costs on the attorney and client scale, on the basis that his conduct was

unreasonable. (See LAWSA, Volume 10, Third Edition, 284). In this regard, the dictum of the court in Johannesburg City Council v Television & Electrical Distributors (Pty) Ltd and Another 1997(1) SA 157 (A), is apposite. The court, citing with approval the remarks of the courts in the matters of Phase Electric Co (Pty) Ltd v Zinman's Electrical Sales (Pty) Ltd 1973(3) SA 914 (W), In re Alluvial Creek Ltd 1929 CPD 532 at 535 and

Hyperchemicals International (Pty) Ltd and Another v Maybaker Agrichem (Pty) Ltd and Another 1992(1) SA 89 (W) at 101G-102D, said:

"It was not disputed that in appropriate circumstances the conduct of a litigant may be adjudged 'vexatious' within the extended meaning that has been placed upon this term in a number of decisions, that is, when such conduct has resulted in 'unnecessary trouble and expense which the other side ought not to bear'. Naturally one must guard against censuring a party by way of a special costs order when with the benefit of hindsight a course of action taken by a litigant turns out to have been a lost cause".

- [9] In the Phase Electric case, a messenger in the applicant's firm negligently failed to properly file or bring to the attention of any of the firm's members that a letter of demand it sent to the respondent had been returned and had not been delivered to the respondent. The applicant, unaware that the letter had not been delivered, then proceeded to obtain a provisional liquidation order against the respondent. The court held that:

"The conclusion that their action was due to the negligence of a member of their staff, in a general sense, by not ensuring that the registered letters returned to his firm were put on the proper files, or retained at all, is however, inescapable. The returned letter seems to have been completely lost. For this negligence the attorneys are responsible and it does not assist their client, as against the respondent, to say that no responsible member of their firm had sight of the returned letter. Through someone's clear neglect in their office, they did not know about it. In the result the respondent was put to much expense and was inevitably subjected to great embarrassment. The effect of this neglect was therefore that the proceedings against the respondent were vexatious although they were not intended to be such".

- [10] In the Hyperchemicals case, the court expressed a similar view with regard to the vexatious effect of proceedings, and as in the Johannesburg City Council matter, also cited with approval the remarks of Gardiner JP at p535 in the Alluvial Creek case referred to above, where he said:

"An order is asked for that he pays the costs as between attorney and client. Now sometimes such an order is given because of something in the conduct of a party which the Court considers should be punished, malice, misleading the court and things like that, but I think the order may also be granted without any reflection upon the party where the proceedings are vexatious, and by vexatious I mean where they have the effect of being vexatious although the intent may not have been that they should be vexatious".

In my view, the concluding remarks in the above extract are equally pertinent to the present case:

“There are people who enter into litigation with the most upright purpose and a most firm belief in the justice of their cause, and yet whose proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear”.

- [11] Although the purpose of an award of costs on the attorney and own client scale was the subject of the court’s remarks in *Sentrachem Ltd v Prinsloo* 1997 (2) SA 1 (A), my view is that such remarks apply equally to costs on the attorney and client scale, given the current practices in the taxation of such bills of cost. The court said that an award of costs on an attorney and own client scale against the unsuccessful party

must be seen as an attempt by the court to go a step further than the usual order of costs between attorney and client, in order to ensure that the successful party is relieved of the burden of paying all the reasonable costs of litigation. The court cited with approval the matter of *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging* 1946 AD 597 at 607, where Tindall JA said:

“The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special

considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation. Theoretically, a party and party bill taxed in accordance with the tariff will be reasonably sufficient for that purpose. But in fact a party may have incurred expense which is reasonably necessary but is not chargeable in the party and party bill. Therefore in a particular case the Court will try to ensure, as far as it can, that the successful party is recouped. I say “as far as it can” because there may be a considerable difference between the amount of the attorney and client bill which a successful party is bound to pay his own attorney and the amount of an attorney and client bill which has been taxed against the losing party”

[See also *Friederich Kling GmbH v Continental Jewellery Manufacturers* 1995 (4) SA 966 (C), where the court cited with approval the cases of *Alluvial Creek* and *Nel v Waterberg* above]

- [12] Uniform Rule 10(3) provides for various circumstances under which different or separate defendants may be joined in one action. The joinder of the first defendant was not an issue and was raised only in relation to costs, the argument, in essence, being that the 2nd defendant was not joined to the proceedings by the 1st defendant, who sought no indemnification for or a contribution to his costs from the 2nd defendant. There was no lis between him and the second defendant and the latter should not be held liable for his costs. The plaintiff, who withdrew the action against him should be liable for payment of the first defendant’s costs. I will refer further to this aspect later in this

judgment.

- [13] The matters of *Rabinowitz and Another NNO v Ned-Equity Insurance Company Ltd and Another* 1980(3) SA 415 (W), and *Body Corporate of Dumbarton Oaks v Faiga* 1999(1) SA 975 (SCA), dealt with the payment of the costs of a successful defendant by an unsuccessful defendant. In *Rabinowitz*, the plaintiff sued the two defendants for damages arising out of the death of her husband in a glider accident. The action against the first defendant was based on a life insurance policy and against the second defendant in terms of an aviation accident policy. The court also dealt with the issue of misjoinder of the second defendant and whether it impacted on the costs order to be made. At the end of the plaintiff's case, an order for absolution from the instance in favour of the second defendant was refused, on the basis that the first defendant may well prove its case that the second defendant was, in fact, liable. In the final analysis, having found the joinder of the second defendant by the plaintiff to be reasonable, the court held that the first defendant had failed to disprove the plaintiff's prima facie case against it. The consequence was that the second defendant was kept in the trial unnecessarily, and justice demanded that the first defendant should pay the costs of the second defendant unnecessarily incurred by it.
- [14] In *Dumbarton Oaks*, the plaintiff fell out of a lift and suffered injuries as a result of tripping in the lift which did not stop level with the floor on which she disembarked from the lift. She sued the Body Corporate and the company who maintained the lifts in that building for her damages. The appeal court rejected the basis on which the trial court found in favour of the plaintiff. The trial court also ordered absolution from the instance against the second defendant and directed the first defendant to pay half the costs of the second defendant. The appeal court found that on a substantial issue, the plaintiff had failed to prove her case against both defendants. While the court has a discretion to make the costs order that the trial court did, this would typically be where the unsuccessful defendant makes common cause with the plaintiff to pin the blame on the defendant who was eventually successful. The court found that such a situation did not prevail in the *Dumbarton Oaks* case. To the extent that the first defendant made common cause with the second defendant, it was successful. The court held that there was no basis to order a party (in this case the first defendant), which was successful on an issue, to help the unsuccessful party (the plaintiff) pay the costs of another successful party (the second defendant). The court cited, with approval, the approach in *Rabinowitz* with regard to the costs of the successful defendant being paid by the unsuccessful party.

PLAINTIFF'S ARGUMENT FOR ATTORNEY AND OWN CLIENT

COSTS

[15] The plaintiff seeks an order against the second defendant for payment of her reasonable attorney and own client costs of the action on the High Court scale from the date of filing of its first plea on 8 May 2015, such costs to include the costs related to securing experts witnesses and all other related costs. The plaintiff also seeks an order that the second defendant

pay the first defendant's reasonable attorney and own client costs on the High Court scale, together with the same attendant costs as she seeks on her own behalf.

[16] The plaintiff bases her claim for attorney and own client costs largely on the manner in which the second defendant approached and conducted the litigation in this matter. Mr De Waal asserted that although the intention of the second defendant may not have been vexatious, the effect of its conduct was. He raised several grounds to indicate that the court should deviate from the general rule that costs follow the result and that such costs are usually awarded on a party and party scale. I will tabulate a few of those grounds and refer to others, where necessary, later in this judgment. He asserted that Uniform Rule 10(4)(b)(ii) expressly provides that where a defendant has been reasonably and correctly joined, the unsuccessful defendant, depending on the circumstances of the case, may have to bear the costs of the successful defendant. As I indicated earlier the second defendant raised no dispute regarding the reasonableness or correctness of the joinder of the first defendant in the action, and I can find no reason to hold otherwise. The joinder of the first defendant, for this matter, will be dealt with in relation to the issue of who should bear his costs.

[17] The plaintiff asserted that the second defendant was not honest and sincere in its defence. To this end the court's attention was drawn to the second defendant's first plea, which was served on 8 May 2015. The second defendant's defence as contained therein was that its nursing staff assessed the plaintiff's motor and sensory functions every two hours as prescribed by the first defendant. It emerged from the evidence and records relating to the post-operative care of the plaintiff, kept by the second defendant's nursing staff that no sensory assessments were done, and the first defendant did not prescribe any

particular protocol regarding the plaintiff's post-operative care. The second defendant also alleged that the plaintiff's

complaints were raised at 1h25 on 30 June 2011, whereas there are recordals of complaints and weakness in her legs on four occasions on 29 June 2011. It also emerged that the observations and findings of the nursing staff were not reported to the first defendant until 1h25 on 30 June 2011, when the plaintiff complained of weakness in her legs and excessive pain. The second defendant alleged that the complaints of the plaintiff were reported to the first defendant, immediately upon her making them.

[18] The second defendant amended its plea in September 2017, and its defence was tempered somewhat to indicate that the nursing staff followed a care and treatment programme prescribed by the first defendant. During cross-examination of the first defendant by the second defendant, it was, however, put to him that he prescribed no treatment and care programme. The allegation

was also made in the plea that the nursing staff reported the developing symptoms of the plaintiff timeously to the first defendant, after observing such. Their notes and records reflect that the call to the first defendant was in reaction to the plaintiff's

complaints. The second defendant, so the plaintiff argues, based both its pleas on untruths and allowed room to adjust its version as the trial proceeded. The plaintiff pointed out that shortly after the incident in 2011, the nursing staff was unable to give the first defendant an explanation for the events of 29 June 2011, which lead to the second operation that was necessary to evacuate the haematoma that had formed at the site of the operation performed on the plaintiff the previous afternoon. In spite of this, the second defendant proceeded to defend the matter, putting the plaintiff and the first defendant to great irrecoverable expense.

[19] The parties held a pre-trial conference on 14 August 2018. The pertinent questions, for current purposes, asked of the second defendant were whether it admits that its nursing staff were obliged to monitor motor and sensory functions in the

plaintiff's legs. The second defendant admitted the obligation to observe motor function, and avoided answering the query relating to the obligation in respect of the sensory function. The second defendant also admitted that the nursing staff was aware of the mild weakness in both the plaintiff's legs on the four occasions recorded on 29 June 2011. The second defendant further avoided answering whether the first defendant was informed of such weakness prior to the call made to him at 1h25 on 30 June 2011. The second defendant also refused to or avoided answering the question whether it admits the correctness of its nursing records and notes.

[20] The plaintiff's testimony, corroborated by that of her son, accorded with the notes and records of the second defendant's nursing staff. It was confirmed by the first defendant, and Drs Liebenberg and Du Plessis that there was a high probability that the plaintiff's complaints were made on 29 June 2011 and not 30 June 2011, as the second defendant attempted

to suggest in denying the plaintiff's version.

[21] The plaintiff asserted that the second defendant made up its version as the case progressed. There was a noticeable absence of its direct version being put to the plaintiff's witnesses. The attempt to convey that the plaintiff's complaints were made on 30 June 2011, as opposed to 29 June 2011 did not accord with its own records. The experts also relied on those records in compiling their expert summaries and joint minutes. Furthermore, the second defendant attempted to put forward the version, very late in the trial, that the weakness in the plaintiff's legs, as recorded by the nursing staff at 20h00 on 29 June 2011 was tantamount to a

normal neurological assessment. This was not raised with any of the experts, who all opined that the change in plaintiff's condition from normal to weakness in the legs at 20h00 was after the assessment by the first defendant at 19h00 and should have been reported to the first defendant (which was not done). If this was the second defendant's version from the outset, it ought to have been raised earlier in the trial. This is a further indication of the fabrication of the second defendant's version.

[22] The plaintiff revealed that it made three formal attempts to settle the matter by making secret Common Law offers to the second defendant, in order to avoid a costly and protracted trial. The first offer was made on 17 August 2018 (one week prior to the commencement of the trial), to the first and second defendants to each accept 50% liability for the plaintiff's proven or agreed damages, and each to pay 50% of the plaintiff's reasonable party and party costs on the High Court scale, which costs should include costs related to the employment of senior counsel and securing expert witnesses. The offer invited both defendants to make any reasonable counter offer or to engage with the plaintiff in negotiations on any reasonable alternative basis to settle the matter. The first defendant was amenable to the settlement but the second defendant refused to settle and did not engage the plaintiff as requested.

[23] The plaintiff did not mention it in argument, but the papers contain the secret offer made by the plaintiff to the first defendant on 27 August 2018 (2 days after the trial commenced), to accept liability for so much of the plaintiff's

damages as the second defendant is found not liable for, limited to a maximum of 50% thereof, together with a costs order. The acceptance of the offer was conditional upon the first defendant agreeing to testify on behalf of the plaintiff and making available, Dr JJ Du Plessis, specialist neurosurgeon, to the plaintiff as an expert witness. No mention was made of the first defendant's reaction to this offer or whether any agreement was reached between the plaintiff and the first defendant. What appears clear is that Dr Du Plessis was indeed made available to the plaintiff as an expert witness.

[24] The second offer to the second defendant was made on 3 September 2018, shortly after the trial was adjourned on 31 August 2018. The plaintiff proposed that the second defendant accept 100% liability for the plaintiff's damages together with liability to pay 100% of the plaintiff's party and party costs, on the High Court scale, including the costs as contained in the first offer. The plaintiff also proposed that the second defendant accept liability for 100% of the first defendant's

party and party costs on the High Court scale, which the court considers fair in relation to the trial that was partly heard from

28-31 August 2018. This offer also contained an offer to make a reasonable counter offer or engage the plaintiff in settlement

negotiations. The second defendant refused to accept this offer, saying it was premature to form a view on the outcome of the trial,

and pointing out the audi alteram partem rule. The second defendant invited the plaintiff put forward an alternative settlement proposal.

[25] The third secret offer to the second defendant was made on 12 February 2019, when the trial was well under way and the first defendant was due to testify. The plaintiff proposed that the defendant accept 80% of her damages and her party and party costs, together with 50% of the difference between the party and party and attorney and client costs. Alternatively the second defendant accept 80% liability for the plaintiff's damages and costs as determined by the court. The second defendant made a counter offer of 65% of the damages, which was not acceptable to the plaintiff.

SECOND DEFENDANT'S COUNTER ARGUMENTS RE: COSTS

[26] The second defendant sets out in its Heads of Argument various factors which motivated it to accept liability on 13 February 2019 for the plaintiff's damages. These include:

- a. The withdrawal, on day 8 of the trial, of approximately 11 grounds of negligence which the plaintiff had alleged against the second defendant;
- b. The "unconventional" step of the plaintiff calling the first defendant's expert as her own witness, and the consequent evidence elicited as a result;
- c. The withdrawal by the plaintiff, on day 8 of the trial, of the bulk of the grounds of negligence alleged against the first defendant;
- d. The service on the defendants by the plaintiff of an extensive

Notice of Intention to Amend (its Particulars of Claim), introducing a further ten grounds of negligence against the first defendant, which imputed negligence against the second defendant. [The Notice was, however, not filed and the amendment was not formally sought].

- e. The first defendant conceded every proposition put to him by counsel for the plaintiff in cross-examination, and placed the blame for what happened (to the plaintiff) on the nurses employed by the second defendant, leaving the second defendant to defend nurses not only against the allegations levelled against them by the plaintiff but also by the first defendant;
- f. The effect of this is the probability that the court would ultimately favour the corroborated versions of the plaintiff and the first defendant over that of the nurses;
- g. The real risk of not completing the evidence in the allotted time, leading to a further postponement of the matter.

[27] Mr Bezuidenhout reiterated that the court should depart from the norm that costs are usually awarded on a party and party scale, only in exceptional circumstances, which are absent in this case, and asserted that this is an argument on costs

and not on merits. He further asserted that it was not open to the plaintiff to have made the secret offers, as the Uniform Rules of Court do not provide a mechanism for the plaintiff to make an offer to settle her case. Mr De Waal pointed out during his address that the common law allows for the making of such an offer and cited the English case of *Calderbank v Calderbank* [1975] 3 All ER 333 (CA) (*Calderbank*) as the origin in practice of making such offers. Mr Bezuidenhout conceded this. In *Calderbank*, the court said that in cases which are not covered by the rules of court permitting secret offers, it saw no reason, in principle, why a litigant should not be allowed to make a settlement offer “without prejudice save as to costs”, and to rely on such an offer in support of the costs order he seeks, after judgment has been delivered. *Calderbank* was approved and followed in the English case of *Cutts v Head* [1983] EWCA Civ 8; [1984] 1 All ER 597 (CA), as well as by courts in other Commonwealth countries such as Canada, New Zealand and Australia, where it was accepted that a *Calderbank* offer can be made by a plaintiff.

Both counsel referred to the case of *AD and Another v MEC for Health and Social Development, Western Cape* 2017(5) SA 134 (WCC) (the *AD* case), in which the *Calderbank* case was approved. Mr Bezuidenhout contended that important requirements set out in *Calderbank* were not met by the plaintiff in her secret offers. I shall return to this aspect later.

[28] Mr Bezuidenhout argued that the second defendant was entitled to hear what the first respondent’s evidence would be and, taking into consideration the *audi alteram partem* principle, it should not be vilified for continuing with the trial to the point that it did. The defence of the second defendant was not unreasonable, and it had the right to pursue its case. He dealt extensively with the assertions and allegations in the plaintiff’s heads of argument, responding to each point raised by the plaintiff. I will deal with these, if necessary, in the course of the evaluation of the matter.

EVALUATION

[29] While this court’s task is to determine an equitable costs order, that exercise must, of necessity, involve traversing the history of the matter as far as may be necessary, the conduct of the parties and the merits of the matter, to the extent necessary. I am uncertain what Mr Bezuidenhout intended to convey by his remark that “we are dealing with costs and not merits”, which was not explained further. If he intended to say that the merits could not or should not be considered, then that is not entirely correct.

[30] All the plaintiff’s hospital records would have been in the second defendant’s possession when it filed its plea in May 2017, and it would have had to consult with the nursing staff involved in the post-operative care of the plaintiff before filing the original plea and prior to amending its plea in September 2017. The amendment to the plea in September 2017 presents a different picture regarding the manner in which the plaintiff’s complaints and condition came to be reported to the first defendant, to that in the original plea. By the time the pre-trial conference was held on 14 August 2018, the parties must

have been fully aware of what their respective cases were (bearing in mind that this was approximately two weeks before the trial

commenced), and would have appraised their legal representatives accordingly. It is difficult, therefore, to view the failure on the part of the second defendant to answer pertinent questions posed by the plaintiff, in a positive light. It was well within the knowledge of the second to have answered the questions relating to sensory observations in respect of the plaintiff, as the hospital records would have indicated whether or not this was done. As it turned out, the evidence revealed that sensory observations were not, in fact, done. Similarly the reluctance of or refusal by the second defendant to admit the correctness of its own records is telling.

[31] Had the second defendant adopted a candid approach, with a genuine desire to resolve the matter expeditiously or to curtail issues (as Mr Bezuidenhout asserted in argument), then the questions referred to would have been answered appropriately. When regard is had to the general consensus among the expert neurosurgeons that admission of a patient with spinal surgery to an Neurological Intensive Care Unit (NICU), would be primarily to monitor the neurological status of the patient with the aim of preventing neurological complications, the significance of the plaintiff's question regarding sensory observations becomes obvious. In the joint minutes of the neurological experts as well as the nursing experts they agreed that the post-operative nursing care

in respect of the plaintiff was unsatisfactory.

[32] In my view, the second defendant would have had knowledge very early in the matter that sensory observations were not done, indicating to it that the care of the plaintiff fell far short of the required standard by nursing staff in a Neurological

ICU, and its attempt to side-step this crucial aspect is regrettable. In spite of this knowledge, it pushed on with its defence of the matter, forcing the plaintiff and first defendant to proceed with the trial. Even if the second defendant were to argue that it had been misled by its nursing staff, the reasoning and findings in the Phase Electric case *supra*, are applicable in this case. The second defendant's continuance with the trial on the reliance of wrong information will not avail it as such conduct would be regarded as vexatious, having caused the plaintiff and first defendant to be put through unnecessary trouble and cost.

[33] Although the plaintiff's witnesses were extensively cross-examined by the second defendant, its version was not directly put to the witnesses. The manner in which the cross-examination was conducted was an attempt to show that the plaintiff's version, as narrated by her and her witnesses was improbable, rather than put its own version to the witnesses and thus expose that version to the court (which it was expected to do). Even at the end of the plaintiff's case, there was uncertainty as to what exactly the second defendant's version was. By contrast, the plaintiff embarked on a comprehensive opening address,

from which her case and her version were very clear. The first defendant indicated that his defence was set out in the papers, and this was borne out by the cross-examination of the plaintiff's witnesses. Even at that stage the stance of the second defendant was that the issues it disputes will emerge from its cross examination "and if and when we enter into the defendant's case". This attitude typified the approach of the second defendant, throughout the trial, causing the plaintiff and the first defendant to continue with the trial, as there was no clarity about the second defendant's case. This caused the trial to be drawn out quite unnecessarily. An example is the second defendant's denial from the outset that plaintiff suffered CES, and it persisted with this denial up to the point when it conceded liability. The cross-examination of the witnesses by the second defendant dealt almost exclusively with the events of the 29 June 2011 and the assessments by the nursing staff during that evening up to the early hours of 30 June 2011, when the second operation had to be performed to evacuate the haematoma.

[34] This resulted in the plaintiff's leading evidence extensively on the fact that the plaintiff did indeed suffer CES as a result of post-operative care, rather than focusing the evidence on the events of 29-30 June 2011. A further instance of the second defendant's ambivalent approach to this matter, which not only caused uncertainty but contributed to the protraction of the trial, is the difference in the original plea and the amended plea, regarding the post-operative treatment plan and care implemented by its nursing staff. The initial version was that the first defendant prescribed two-hourly observations, the amended

version was that a treatment plan prescribed by the first defendant was followed, and ultimately it was put to the first defendant that he prescribed no plan at all. The plaintiff had no option but to proceed with the trial until it heard the first defendant's

version, before it withdrew the action against him. The withdrawal of the action against the first defendant came after he was

cross-examined by the second defendant, from which the latter's changed version regarding the care and treatment plan for the plaintiff became apparent. The first defendant, likewise, was obliged to testify.

[35] I turn now to deal briefly with the reasons listed by the second defendant for its concession of liability on 13 February 2019, as well as its submission regarding the Calderbank offers made by the plaintiff. The second defendant was no doubt placed in a difficult position when the plaintiff withdrew the action against the first defendant, in that the withdrawal metaphorically pushed the second defendant into a corner, with its back to the wall and with no room to manoeuvre. The second defendant can hardly complain if the plaintiff, who was put to considerable time and expense to proceed with the trial, adopted measures (astutely so) to counter the conduct of the second defendant.

[36] In my view there is no merit in the submission that the "unusual" step that the plaintiff took of calling Dr Du Plessis (the first defendant's expert) as her witness, was a factor which could have motivated the second defendant to concede liability, nor could the evidence of the first defendant, who made several concessions in favour of the plaintiff. The first defendant's

version was clear from the time he filed his plea and, throughout the trial, from his cross-examination of the plaintiff's witnesses. In any event, if the second defendant's intention in raising this aspect is to suggest that the first defendant's evidence is not credible because of the concessions made, this was never put to him by the second defendant, in order for him to explain or to defend his credibility. The court need pay no further heed to that ground. Dr Du Plessis' views and particularly his criticism of the nursing staff were abundantly clear from his expert summary and from the joint minute of the expert neurosurgeons. His evidence could not have come as a surprise. An expert witness, in any event, is an independent witness called for the court's benefit, so that whichever party calls him does not alter his evidence or impact upon the veracity thereof. Mr De Waal was candid about the plaintiff's intention in calling Dr Du Plessis as her witness, namely that it was aimed at bringing maximum pressure to bear on the second defendant.

[37] With regard to the plaintiff's withdrawing several grounds of negligence against the second defendant, this was done before the secret offer made by the plaintiff on 12 February 2019. It is also noteworthy that the grounds of negligence that were withdrawn related to the lack of training and competence of the second defendant's nursing staff. This was done to curtail proceedings and to assist the second defendant so that evidence regarding the qualifications and competence of its nursing staff did not have to be led. I am of the view that this is hardly a ground that can be regarded as motivation for the second defendant's capitulation and acceptance of liability. The withdrawal of certain grounds of negligence by the plaintiff against the first defendant and the proposed amendment of the plaintiff's particulars of claim, the latter of which never saw the light of day, are completely without merit and need not detain us further. I also find no merit in the submission that the second defendant was motivated to accept liability in order to avoid a further postponement of the matter. This simply does not ring true.

[38] With regard to the Calderbank offers made by the plaintiff, the second defendant asserts that such offers cannot be made at the stage of hearing the merits of a matter but only at quantum stage, as was done in the AD case *supra*. It also asserts that those offers are not valid because certain requirements (as set out in the AD case) were not met by the plaintiff in this case. As correctly pointed out by Mr De Waal, the court in the AD case was referring to factors which are considered in Commonwealth

cases. The court in that matter undertook a comprehensive examination and analysis of the Calderbank case, its application in other English cases and the position in other Commonwealth jurisdictions. It also examined the English law regarding "without prejudice"

communications and the effect thereof. For clarity in respect of Mr Bezuidenhout's objections regarding the plaintiff's

non-compliance with the requirements set out in Calderbank, it may be useful to quote paragraph 61 of the AD judgment:

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

[39] In paragraph [43], the court had this to say:

“[43] As I have said, in England and other Commonwealth jurisdictions it has been held that the privilege attaching to without prejudice

communications does not bar the production of so-called Calderbank letters in relation to costs. In order to be admissible for that purpose, the offer must explicitly state that it is made without prejudice 'except in relation to costs' (or words to similar effect). In *Cutts* the court drew a distinction between communications which are unqualifiedly without prejudice and those which are without prejudice 'except in relation to costs'. The rule that without prejudice communications are inadmissible was said to be based partly on public policy and partly on the agreement or understanding conveyed by the use of the phrase 'without prejudice'. The considerations of public policy largely fall away once the substantive issues between the parties have been determined. The inadmissibility of without prejudice communications thereafter rests mainly on the agreement or understanding conveyed by the words 'without prejudice'. If these words are expressly qualified by the phrase 'except in relation to costs', there are no reasons of policy to treat the communication as inadmissible for purposes of determining a just and equitable costs order. On the contrary, the public policy of encouraging settlements would be better served if litigants appreciate the risk of adverse costs orders if they disregard reasonable offers of settlement.” (my underlining).

[40] The court considered the question whether our law in respect of without prejudice communications should permit the same exception that has been recognised in England and other Commonwealth jurisdictions. The court's view was that “there is no reason why our law, based as it is on English law, should not recognise the same exception as has found favour in England and other Commonwealth jurisdictions. The considerations of public policy in favour of settlements and discouraging costly litigation are as compelling now as they ever were.” The court also expressed the view that Uniform Rule 34, which permits a defendant to make a secret tender does, not expressly or by implication provide that a secret tender made by a plaintiff outside the Rules cannot be relied upon when it comes to costs, The court ultimately concluded that there is no bar to the acceptance in our law of the admissibility of Calderbank offers. I am in agreement with the views and conclusions of the court in the AD case, which find application in the present case.

- [41] I find therefore, that the secret offers made by the plaintiff in this matter are Calderbank offers. In determining whether they are admissible, I refer to the underlining in paragraph [40] above, in the extract from the AD case – “or words to similar effect”. The offers made by the plaintiff do not use the specific words, “without prejudice save for costs”, but, in my view, words of similar effect were employed. Each offer was couched in terms from which it can be inferred that the offer was without prejudice except for the costs, in that the second defendant was placed on notice not to disclose the offer to the court at any stage before judgment. It is also clear that the offer in respect of costs was to be disclosed to the court after judgment for the purpose of considering an appropriate costs order. In the circumstances, I find that the offers made by the plaintiff are admissible.
- [42] The various attempts by the plaintiff to settle this matter from as early as a week before the commencement of the trial in August 2018 are indicative of the realisation of the enormous cost implications of a protracted trial and the need to contain those costs as far as possible. By contrast, the defendant did not even attempt to engage with the plaintiff in settlement negotiations, but rejected the offers without any further ado. The first respondent was willing to settle on the basis suggested in the first secret offer, when the costs would have been considerably lower than when the second and third offers were made. The third offer was made at a time when the proverbial writing was on the wall for the second defendant, one day before the second defendant capitulated. Even then the second defendant did not seriously engage the plaintiff in settlement negotiations but made an unreasonable counter offer which was unacceptable to the plaintiff. The first defendant was, thereafter, obliged to testify.
- [43] The offer on 12 February 2019 was a fair and reasonable offer where the second defendant was asked to accept liability for 80% of the plaintiff’s damages, together with costs as proposed in the offer, with an alternative to accept the offer in respect of liability for the plaintiff’s damages and a costs order as determined by the court. The important consideration in respect of this offer is that the defendant would have received a 20% reduction in respect of all heads of damages claimed by the plaintiff. Given the evidence that was led up to that point, the second defendant’s refusal to accept that offer is indicative of an intransigent and high handed approach to the litigation in this matter. While the defendant was entitled to be heard and to exercise its rights in this regard, its conduct had the effect of protracting the trial unreasonably and unduly, and escalating costs quite considerably. In a situation such as this, there are bound to be substantial costs which the plaintiff will have to pay but which are irrecoverable in a party and party bill of costs.
- [44] In my view the conduct of the second defendant falls within the extended meaning of ‘vexatious’ (as articulated in *Johannesburg City Council, Hyperchemicals and Alluvial Creek supra*), in that it amounted to being vexatious even if the second defendant had not intended to be. I also hold the view that what I have outlined above, makes this is a fitting matter for the court to award the plaintiff costs on an attorney and client scale. The remarks of the court in *Nel v Waterberg supra*, are directly applicable in this matter and I align myself with

those remarks. The second defendant is a member of the Life Healthcare Group (Pty) Ltd, a very large company in the health services sector, that has great financial muscle and is able to afford expensive litigation. The plaintiff is an elderly woman with limited resources who had to wait approximately four years after she issued summons, for her matter to be heard. I also note that the incident occurred approximately seven years prior to the date when the trial commenced. The plaintiff was obliged not only to attend court with great physical discomfort, but she was also obliged to

testify about intensely personal health problems, which clearly caused her great embarrassment.

[45] The plaintiff seeks a costs order against the second defendant on the attorney and client scale from the date of filing of its first plea on 8 May 2017. In my view, although the second defendant would have been aware, at the time of filing its plea, that evidence it possessed in order to defend the matter may have been less than supportive of its case, it was still

entitled to proceed in order to test the plaintiff's and first defendant's case, and itself to be heard. In my view that knowledge of its case, coupled with the first secret offer made by the plaintiff on 17 August 2018, was the tipping point in respect of when its liability to pay costs on an attorney and client scale should be calculated. It was at that stage well within its contemplation that the strength of its case was such that it ought to have entertained the settlement proposals put forward by the plaintiff. It is therefore my view that costs on the attorney and client scale should be granted from 17 August 2018. The order foreshadowed is the way the court is able to ensure that, given the circumstances of the parties and of the case, it makes a costs order that is fair, just and equitable.

[46] With regard to the first defendant's costs, the remarks made in respect of the second defendant's conduct, vis-à-vis the plaintiff, would also apply to the first defendant. He was willing to settle the matter at an early stage but the refusal by the second defendant to settle forced him to stay in the trial and continue. I align myself with the approach in the Rabinowitz case *supra*. I am of the view that the second defendant, as the unsuccessful party, who accepted 100% liability should also pay the costs of the first defendant. In determining the scale on which such costs should be awarded, I am of the view that all the arguments put forward on behalf of the plaintiff and the court's consideration in respect thereof cannot extend to the first defendant. Mr De Waal merely asserted that the submissions he made in respect of a costs order for the plaintiff also apply to the first defendant. In my view, such submissions were germane only to the plaintiff and, save for the first defendant being obliged to remain in the trial as a result of the conduct of the second defendant, I am not persuaded that I should depart from the norm of granting costs on the party and party scale in respect of the first defendant.

[47] In the circumstances, I make the following order:

47.1 It is declared that the second defendant is liable for 100% of the proven or agreed damages suffered by the plaintiff as a result of the cauda equine syndrome which she sustained on 29 June 2011 and its sequelae based thereon that the signs and symptoms of an epidural haematoma would have been reported to and acted upon by Dr Lewis, the first defendant, at 20h00 on 29 June 2011, which action would have entailed surgical evacuation of the haematoma;

47.2 The second defendant is ordered to pay the plaintiff's party and party costs of the action, on the High Court scale, up to and including 16 August 2018 , and from 17 August 2018, the plaintiff's reasonable attorney and client costs on the High Court scale, which costs shall include:

47.2.1 the costs (including the full day fees) consequent upon the employment of senior counsel for each day of trial, including any day on which the matter was stood down, and including the drafting of heads of argument;

47.2.2 the costs of obtaining medico-legal reports and any addenda thereto from Dr WA Liebenberg and Professor EL Stellenberg (the experts), the costs of verifying expert summaries, the costs of attending to joint expert meetings, procuring the joint minutes of such meetings, and the costs of preparing for and attending trial;

47.2.3 the costs of preparation for and attending trial by Dr JJ Du Plessis;

47.2.4 the travelling and accommodation expenses of the experts and Dr Du Plessis;

47.2.5 the costs of consultations between the plaintiff's legal representatives and the experts in Cape Town in preparation for trial, including the reasonable travelling costs occasioned thereby;

47.3 The second defendant is ordered to pay the first defendant's party and party costs of the action on the High Court scale, such costs to include those aspects mentioned in paragraphs 48.2.1 to 48.2.5 above, mutatis mutandis, where applicable;

47.4 Any and all costs ordered to be paid in terms of this order shall bear interest at the prescribed statutory rate of 10,25% per annum a tempore morae calculated from the date of affixing of the Taxing Master's allocator, or date of agreement in respect of costs, to date of payment

S. NAIDOO, J

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