REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case number: 17077/2012

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

26 NOVEMBER 2014 **R M ROBINSON**

In the matter between:

VUYUSILE EUNICE LUSHABA Plaintiff

and

THE MEC FOR HEALTH, GAUTENG Defendant

JUDGMENT

ROBINSON AJ

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A. INTRODUCTION

1. On 16 October 2014 this court made an order, declaring the defendant 100% liable for the plaintiff's damages arising out of the birth with disability of her son, Menzi Polite Lushaba and ordering the defendant to pay costs on an attorney and client scale. It also issued a rule, calling upon the defendant to show cause on Tuesday 28 October 2014, with affidavits filed by 23 October 2014,
   1.1. why he (it should have been she) should not be held personally liable de bonis propriis on the attorney and client scale, jointly and severally with the defendant, for the costs;
   1.2. alternatively, and should she be of the view that she should not be held personally liable, the defendant was called upon to identify such persons in the Department of Health of Gauteng, as well as such persons in the office of the State Attorney, who should be held personally liable for the costs as well as the reasons why they should be so held liable.
2. The affidavits contemplated in paragraph 136 of the order, being only filed on 27 October 2014, were accompanied by an application for condonation for the late filing thereof. There was no opposition from the applicant and the affidavits were admitted. Argument was presented to me on the issues arising from the rule *nisi* order on 28 October 2014 by Mr Latib appearing on behalf of the defendant. There was no appearance for the plaintiff.
3. Four persons deposed to affidavits in response to the rule *nisi*. These are:
   3.1. Mr Ezekiel Matlou, an attorney in the employ of the State Attorney and the person appointed to deal with this matter on behalf of the defendant;
   3.2. Mr Jabulani Macheke, a senior legal administrative officer employed in the legal services section of the department of health, Gauteng;

3.3. Dr Kgoposo Cele, a medical practitioner employed as a medico – legal advisor by the department of health, Gauteng; and

3.4. Ms Qedani Dorothy Mahlangu, the MEC for the department of health, Gauteng.

B. THE LITIGATION TIME LINE

4. The litigation time line is instructive. I list it below.
5. Summons was issued on 21 April 2012.
6. Notice of intention to defend was delivered on 31 May 2012.
7. Also on 31 May 2012 the defendant delivered a notice in terms of rule 36(4), calling upon the plaintiff to make available medical reports, hospital records, X – ray photographs or other documentary information of a like nature relevant to the assessment of the damages or compensation in respect of bodily injury alleged to have been suffered by the plaintiff. The plaintiff's attorneys responded by delivering what appears to be the neonatal records on 18 June 2012.
8. The plaintiff placed the defendant under bar by notice delivered on 15 August 2012.
9. The defendant delivered its plea on 22 August 2012.
10. On 20 September 2012 the plaintiff delivered its 35(1) notice. This was responded to by a discovery affidavit delivered by the defendant on 20 February 2013. Because the content of the discovery affidavit is of relevance in this matter, some reference is made to its content.

    10.1. Mr Macheke went on oath to state that the defendant has "*in his possession or power documents relating to the matters in question in this suit set forth in the First and Second Schedules hereto.*" Also under oath was claimed that neither the defendant nor his attorney

"*now or ever had in his possession, custody or power or in the possession, custody or power of any person on his behalf, any documents or copies or extracts from any documents relating to the matter in question in this action other than and except the documents set forth in the First and Second Schedule annexed hereto.*"

10.2. That was a startling claim to make, considering that the First Schedule consisted of

10.2.1. all pleadings and notices under case 12/17077;

10.2.2. three letters, being correspondence between the plaintiff's attorney to the defendant and her attorneys respectively.

10.3. The Second Schedule lists matters claimed to be confidential and makes no mention of hospital records. I do not understand how the MEC for Health can be said not to have hospital records of state hospitals under her jurisdiction under her power or control. The issue was not explained.

11. A notice to attend a rule 37 conference was delivered on 20 September 2012.

11.1. A pre - trial conference was held on 30 May 2013.

11.2. At this meeting Mr Matlou undertook to respond to the further issues raised in the rule 37(4) notice by 7 June 2013. He did not do so.

11.3. The plaintiff also indicated that it would send the defendant a written list of documents it required from the defendant, and also listed those documents at the meeting. The documents are clearly relevant. I list them below. The defendant undertook to indicate to the plaintiff by Friday, 7 June 2013 when it "*will be able to respond to this request.*" It

does not appear that it did so, considering the plaintiff had to bring an application to compel more than a year later.

12. The plaintiff's rule 35(3) notice was delivered on 27 July 2013. It requested:

    12.1. results of tests performed on Menzi;

    12.2. antenatal and labour – related records of the plaintiff relating to the birth of Menzi Lushaba;

    12.3. images and/or reports of the CT scan of Menzi's brain performed and requested on 28 August 2009.

    The plaintiff may have been forgiven expecting the defendant to discover these documents, particularly the antenatal and labour – related records of the plaintiff. The indifference of the defendant's advisors to these documents is one of the staggering features of this case.

13. On 1 August 2013 the summary of the opinion of Dr Arend van den Heever (the plaintiff's expert) was delivered to the offices of the State Attorney. This is the report that was contained in the Liability Bundle and in which Dr van den Heever lists the facts determinative of this case. The defendant's advisors did not brief Dr Mashamba with a copy of this report.

14. The plaintiff delivered her so - called "Liability Bundle", containing the medical records (including the crucial records of events on 30 June 2000 from 12h00 preceding and of the birth) and including the report of Dr van den Heever, to the office of the State Attorney on 23 August 2013 and filed it in court on that date.

15. Mr Matlou only instructed Dr Mashamba, the defendant's expert witness, to provide an expert opinion on 4 September 2013, with the trial set down for hearing on 13 September 2013.

15.1. The letter of instruction to Dr Mashamba requests him to advise whether, in his opinion, there was negligence by the medical staff that treated the mother of the child. It encloses the neonatal hospital records. For reasons not explained, neither the antenatal records; the labour records; the Liability Bundle nor the report of Dr van den Heever, containing the antenatal and delivery records, were provided to Dr Mashamba. Dr Mashamba was inadequately briefed as a result of which he was not placed in a position to advise adequately and meaningfully on the merits.

15.2. Despite being hampered by the absence of essential evidence, Dr Mashamba provided what passes for his report on 9 September 2013.

15.3. Mr Matlou and counsel consulted with Dr Mashamba on 11 September 2013, evidently sans the benefit of the crucial records. Despite the trial being set down for 13 September 2013, Dr Mashamba's report was not provided to the plaintiff. No explanation is provided for this.

16. Because of the unavailability of the plaintiff's experts, the trial of 13 September 2013 was postponed *sine die*. It was subsequently set down for 7 October 2014.

17. The defendant's expert report was provided to the plaintiff's attorneys on 3 October 2014.

17.1. In explanation of the late delivery of the defendant's expert report, Mr Matlou says that he instructed the messengers at the offices of the State Attorney to deliver the defendant's rule 36(9)(a) and (b) notice in respect of Dr Mashamba's evidence on 11 March 2014.

17.2. Mr Matlou appears not to have given further attention to the matter, as he only noticed on 3 October 2014, being the Friday before the commencement of trial, that the defendant's expert notices were not

reflected in the index to the plaintiff's bundle. Ostensibly it did not occur to him to consult Dr Mashamba afresh to obtain his views on the report of Dr van den Heever, nor to concern himself with the matter of a joint expert minute. The discovery that the report had not been filed caused him to prepare a new notice which he sent to the plaintiff's attorneys on 3 October 2014 with a copy of the report.

18. On 26 June 2014 the plaintiff's attorneys sent a telefax to the State Attorney, requesting a response to the rule 37 questions, Mr. Matlou not having made good on his promise to reply by 7 June 2013.

    18.1. Mr. Matlou did not respond to the fax of 26 June 2014.

    18.2. The plaintiff's application to compel the defendant to respond to the rule 37 questions was delivered on 30 July 2014. This, likewise, did not elicit a response from Mr. Matlou.

    18.3. The application to compel was heard on 13 August 2014, which led to the order of Makume J, compelling the defendant to respond.

    18.4. The defendant's answer to the rule 37 questions was eventually, more than a year after the promised date, delivered to the plaintiff on 18 August 2014. No acceptable explanation was provided for the failure to respond timeously, nor for the reason why the plaintiff was obliged to turn to the Court to compel the defendant to reply. Mr Matlou says that he was "*dealing with a number of matters and forgot to attend to the reply*".

        18.4.1. This answer is unsatisfactory. Attorneys deal, routinely, with a number of matters. But even if human error excuses the forgetfulness, it does not explain Mr Matlou's failure to respond to the request for compliance, received on 26 June 2014, nor to the application to compel

which was, on his own version, received on 30 July 2014. There was, in my mind, no reason to put the plaintiff to the expense of having to go to court to compel a response from the defendant.

18.4.2. Mr Matlou argues that the Rules impose no time frame on a response and that the plaintiff made no attempt to obtain a response before the 13 September 2013 set down. It is not clear what point Mr Matlou wants to make with these statements. If the suggestion is that these considerations render his failure to make good on his undertaking to respond by 7 June 2013, or that it was incumbent upon the plaintiff to drag the defendant to court to ensure compliance with each step preparatory to trial, then that is rejected.

18.4.3. Whilst it is so that rule 37 does not envisage a formal request to which there must be a formal reply,[1] the fact remains that Mr Matlou undertook to respond to the queries and to do so by a certain date. If he wanted to take a point that the queries should have been contained in a request for further particulars for trial, or that the request was filed out of time, thereby prejudicing the defendant in his preparation for the pre - trial, then he should have done so at the time. In any event, the purpose of a rule 37 conference is "*primarily to curtail the duration of a trial, narrow down issues, cut costs and facilitate settlements. Parties are required to attempt, in a bona fide manner, to reach settlement either on issues which could serve to shorten the proceedings or resolve the main issues.*"[2] The queries raised by the plaintiff were meaningful and required an answer. Nothing prevented the defendant

[1] *Kriel v Bowels* 2012 (2) SA 45 (ECP)
[2] *Kriel v Bowels* supra at [15]

from calling a further pre – trial conference to ensure a meaningful discussion of its answers to the questions put by the plaintiff.

19. On 23 July 2014 (more than a year after the delivery of the request) the plaintiff delivered her rule 35(3) application to compel. The application refers to the fact that not only did the defendant fail to respond to the rule 35(3) notice of 27 June 2013, it failed to respond to two letters sent by the plaintiff's attorneys on 1 August 2013 and 30 May 2014 respectively. The defendant did not explain this lack of responsiveness.

    19.1. The defendant's response to the rule 35(3) application merely has Mr Macheke claiming, under oath, that he does not have the documents and that the defendant does not know whether such documents exist in regard to the plaintiff. Again, a startling manner of dealing with the task at hand. Clearly, the antenatal and labour records must have existed, especially if the evidence of both experts as regards medical record keeping is taken into account. As it happens, we know the documents existed, as the plaintiff produced them, with the hospital she attended the likely, if not the only, source of those documents.

20. The trial was set down for hearing on 7 October 2014. On that day the matter had to stand down as the joint minutes between the experts had not been prepared, for obvious reasons. In the event the trial could only commence on 9 October 2014. The failure by the defendant and its representatives to comply with the pre – trial procedures had the regrettable consequence that two court days were wasted. The practise directions contemplate, for obvious reasons, that expert reports should be exchanged well in advance of the trial date. It is of the deepest concern that the

State Attorney and the defendant's advisors did not think fit to honour the rationale for an early meeting between the experts.

C. THE RULE *NISI* AFFIDAVITS

21. The contents of each of these affidavits are dealt with below in so far as they are relevant.

Mr Ezekiel Matlou

22. Mr Matlou is an attorney with right of appearance in the High Court. He practices as an attorney at the offices of the State Attorney in Market Street, Johannesburg. The State Attorney is the attorney of record for the defendant in this matter.
23. Mr Matlou admits to being "*involved in the decision to take this matter to trial*" and his affidavit professes to address the issue of "*whether it was unreasonable for the defendant to have contested the issue of negligence in this matter*".
24. Mr Matlou further addresses various instances where the State Attorney failed to comply with time periods. These include:
    24.1. failure to comply with the plaintiff's request for further particulars to the extent that the plaintiff was obliged to obtain a court order compelling the defendant so to comply;
    24.2. failure to file the defendant's expert summary timeously (it was made available the Friday before the trial commenced);
    24.3. Mr Matlou's failure to attend at the trial;
    24.4. the failure to brief defendant's counsel properly, such that he did not have a copy of expert reports.

25. Mr Matlou argues that the joint minute between Drs van den Heever and Mashamba "*significantly narrowed the issues in this matter*". This is of course, the precise point of these joint minutes and the very reason why it should be prepared timeously and not during the time set aside for trial, when expensive legal teams are waiting in the wings. His view is that the disagreement between the experts was confined to (1) the impact of early delivery on the outcome and (2) whether a caesarean section should have been performed as soon as possible after 12h00. But there is no relevant disagreement between the experts. The experts agreed that a caesarean section ought to have been done "*ASAP after 12h00 most likely with a better outcome*". The only difference is that Dr Mashamba did not agree that early delivery would have guaranteed a better outcome but that is not the test. An earlier meeting between the experts would and ought to have had the effect of having the defendant's advisors realise this significant fact.

26. As regards the reasons for the defendant's opposition to the plaintiff's claim on the merits Mr Matlou argues that both Dr Cele and Dr Mashamba were of the view that the plaintiff was treated reasonably and that the defendant had a good defence. These are, of course, conclusions. One searches in vain for the reasons for these conclusions which were reached in the absence of the relevant medical records. The expert report of Dr Mashamba discloses no defence on the merits. When I requested Mr Latib during argument to indicate the nature of the defence, he could not do so. This is not to reflect negatively on Mr Latib. His inability to do so is due to the absence of a defence. Mr Latib was constrained to submit that it was not incumbent upon an attorney such as Mr Matlou to question the bald assertion of experts such as Dr Mashamba that there is a defence. The argument

was also made that the extent of the plaintiff's claim of R17 million obliged the defendant to defend the case, also on the merits. I cannot agree with either submission. It is certainly essential that attorneys satisfy themselves that the reasons for an expert opinion support the expert conclusion to ensure that it would be defensible during trial. Further, the mere fact of a large quantum is no reason to defend a claim on the merits in the absence of a defence.

27. Mr Matlou explains the failure of an attorney to attend during the trial by him having to attend, after the first half of the first day of the trial, to "*family commitments as a result of the passing of my uncle*" on 10 October 2014. His absence from court on 9 October 2014 is due to him having to prepare for a matter which was to be heard on 10 October 2014.

Mr Jabulani Macheke

28. Mr Macheke, a senior legal administration officer employed by the defendant, is responsible for this matter on behalf of the plaintiff. The Legal Services department deals with all legal issues relating to the department. Among others, it requests the head of the institution where the incident in question occurred, to provide copies of the claimant's medical records related to the incident. His affidavit addresses the issues around the consideration or otherwise on the part of the defendant of the decision to defend the issue of liability. He also describes the process followed to determine whether the matter should be defended.

29. Upon receipt of the medical records, consultation with the relevant employees (doctors and nurses) takes place, with the legal administrator, the medico – legal advisor to legal services (being a qualified medical doctor), the attorney attending to the matter at the State Attorney and counsel (if available) attending to the consultation.

30. Mr Macheke did not deal with or explain his statements under oath that no medical records were in the possession or control of the defendant in this case, nor did he explain why or how the consultation could have taken place in any meaningful manner in the absence of the relevant medical records. One can only speculate as to the purpose of such a consultation and what reliance could be placed on what employees said when they did not have the benefit of the relevant records.
31. The legal administrator instructs the State Attorney but remains involved and is almost always present at court when the matter proceeds. The MEC is not involved in the decision to proceed or not.
32. Following the consultation, the medico – legal advisor, the legal administrator and the Deputy Director General decide whether the matter should be defended or conceded. The decision is revisited upon receipt of the advice of medical experts. Again, Mr Macheke did not trouble himself to explain how this was done in this case in the absence of indispensable documentation. He is, after all, on oath as stating that neither the defendant nor his (her) attorney "*ever had in his possession, custody or power or in the possession, custody of power* (sic) *of any person on his behalf, any documents or copies or extract from any documents relating to the matter in question in this action other than and except the documents set forth in the First an Second Schedule hereto.*" As I demonstrate elsewhere, neither the First nor the Second Schedule lists a single medical record. When specifically asked for the antenatal and delivery records, he went on oath that he did not know of their whereabouts.
33. As far as this case is concerned, Mr Macheke testifies that Dr Cele, a medico – legal advisor of the defendant and he consulted with the employees involved in

this matter at the Charlotte Maxeke Johannesburg Academic Hospital. After consultation and after further consideration of the facts, a decision was taken to proceed to defend the matter. Again, it is not explained how this happened in the absence of the relevant documents nor did he allude to the exact process followed whereby the decision was reached.

34. Mr Macheke nevertheless persists that his decision that the claim should be opposed on the merits was an informed one. He states:

> "*During September 2013, Mr Matlou who was the attorney handling this matter at the State Attorney, forwarded Dr Mashamba's report to me. Mr Matlou, together with counsel, consulted Dr Mashamba in Pretoria. In a subsequent consultation that I had with Mr Matlou, he indicated that Dr Mashamaba* (sic) *was confident that the defendant could successfully defend this claim. This confirmed Dr Cele and my view that the matter was defendable.*
>
> *I therefore fully considered the merits of the case and took a decision to proceed to defend the matter. I submit that the decision to defend was a rational and reasonable one. A decision not to defend this matter in light of the medical opinion would have been patently unreasonable. I would have had no basis for recommending that defendant settle the claim.*
>
> *I point out that I do not have any medical expertise. I therefore rely on medical expert opinion before a deciding* (sic) *to settle or to proceed to trial. In this case, I was given medical opinion that clearly supports a reasonable defence and there was no reason for me not to accept such opinion.*"

35. Neither Mr Macheke nor Dr Mashamba were in a position to "*fully consider(ed) the merits of the case*". The defendant only availed itself and its expert of the neonatal records. A full consideration was not possible in the absence of antenatal and labour records. The damage to Menzi did not occur after his birth. It occurred antenatally. Even for a layperson, the facts of this case are not insurmountable. They are relatively crisp.

35.1. A foetus needs the oxygen supplied through the wall of the uterus. When the placenta starts moving away from that life-giving source, danger lurks. The oxygen supply is threatened. Once a certain deprivation of oxygen occurs, the damage is irreversible.

35.2. From there the next step is self-evident. The process of the placenta separating from the uterine wall must not be permitted to continue. The baby must be gotten out without delay.

36. For this reason it would, as a matter of basic logic, be evident to professional laypersons, such as attorneys and legal advisors (and much more so for the medical advisor) that what occurred pre – birth was of the utmost importance. And yet all three professionals, Mr Matlou, Mr Macheke and Dr Cele, remained indifferent to the ante natal and labour records. No credence can, regrettably, be given to the protestations of either Mr Matlou, Mr Macheke or Dr Cele, that the matter was "*fully considered*".

37. Mr Macheke expresses the view that it was appropriate for the defendant to deliver Menzi two hours and fifteen minutes after the plaintiff arrived at the hospital. But Dr Jeebodh got Menzi out in just over 30 minutes of her first encounter with the plaintiff. Dr van den Heever says he needs just over 30 minutes to get a baby out in an emergency. No action (or omission) that permitted Menzi to progress to a severely brain damaged state in the care of the hospital could properly be termed "appropriate".

Dr Kgopiso Cele

38. Dr Cele is a medical practitioner employed as a medico – legal advisor at the defendant. He was, with Mr Macheke, involved in the decision taken on behalf of the defendant to defend the plaintiff's claim.

39. Dr Cele provides a similar exposition to that of Mr Macheke of the procedure followed to reach a decision to defend a claim or otherwise. The same absence of detail characterises his affidavit.

40. Dr Cele says that, in this case, he and Mr Machele (presumably Macheke) consulted the employees. Following consideration of what they had to say and consideration of the hospital record, he recommended that the defendant defend this claim. His recommendation was based on his assessment of the matter at that stage. It was influenced by the following factors:

    40.1. the plaintiff's symptoms at 12h00 suggested that she had been bleeding for an unknown period of time;

    40.2. the heart rate was 150 and irregular, with it not being known whether there were decelerations;

    40.3. at 13h00, upon reassessment and the performing of a sonar, it was found the plaintiff had abruption and a caesarean section was promptly booked;

    40.4. the baby was delivered at 14h20 by caesarean section. The time frame of 2 hours and 20 minutes after arrival is acceptable and within the norms and standards of a public hospital. WHO standards recommend that an emergency caesarean section be done within 45 minutes to an hour after a decision to perform a caesarean section is made. Considering that the caesarean was done 1 hour and 20 minutes after the decision was made, the performing of the caesarean was reasonable in the circumstances;

    40.5. it is unclear when the abruption occurred. Brain damage could have started at that time. Cerebral palsy is a known sequelae of abruption.

41. I am perplexed by the above. Dr Cele does not identify the hospital record considered, but it could not have been the antenatal or delivery records. Antenatal and delivery facts such as those referred to by Dr Cele are only evident from the antenatal records which Mr Macheke on behalf of the defendant went on oath to say he did not have (and which it did not provide to Dr Mashamba). This was both only in the rule 35(1) and 35(3) applications. I conclude that Dr Cele could not have been in possession of the antenatal or delivery records and thus he could not have had access, at the time of decision making, to those facts upon which he now says he relied to form his opinion.

42. Dr Cele's statement cannot be relied upon and is unsupported by the facts of this case:

> "*I was therefore of the view that based on the sequence of events, the defendant had a reasonable defence to the claim. In my view the plaintiff was managed appropriately.*
>
> *My recommendation to the department was to defend this matter. This recommendation was bolstered by Dr Mashamba's view that the defendant had good prospects of success in the matter.*"

43. Had he read the report of Dr Mashamba with any degree of attention, he would have noticed that Dr Mashamba (1) did not express an opinion on the absence or presence of negligence (2) listed no reasons for any such opinion and (3) could not form such an opinion because he did not have the relevant records. I deal with Dr Mashamba's report in some detail at a later stage in this judgment.

44. In any event Dr Cele's exposition of the facts of the case:

    44.1. ignores the proven and accepted facts.

44.1.1. No sonar was performed at 13h00. That only happened around 13h45 when Dr Jeebodh came on the scene.

44.1.2. At 13h00 the recommendation by the attending doctor was that plaintiff should be reassessed in four hours. Both experts considered that unacceptable in the joint minute.

44.1.3. No caesarean was booked at 13h00. In any event, "booking" a caesarean is not what was required. Doing the caesarean is what was required at 12h00. On that too, both experts were agreed. At the time she presented at the hospital, the plaintiff's symptoms were such that abruption was to be inferred. On that both experts were agreed. That means that, at 12h00, the diagnosis of abruption should have been made and the caesarean performed without delay. On that too, the experts are agreed.

45. I do not speculate on matters or theories not in issue in this case, such as the capacity of the hospital.

46. Dr Cele's opinion further:

46.1. ignores, in its entirety, the expert opinion of Dr van den Heever, the plaintiff's expert witness. Indeed, it appears that Dr Cele paid no heed to the opinion of Dr van den Heever in forming his opinion as to whether to defend.

46.2. ignores the fact that, at 150 bpm, the foetus would not have been brain damaged and abruption would be at a stage of 1 – 2 % of progression. This evidence by Dr van den Heever stands unchallenged. His speculation about whether there were decelerations or otherwise or to what stage the abruption had advanced by the time the plaintiff arrived

at the hospital is all irrelevant. The heartbeat of 150 tells us that Menzi arrived at the hospital with some considerable hope for his condition, provided the hospital did the necessary without delay.

46.3. provides no explanation for the failure to diagnose the plaintiff at 12h00, when the agreed medical view is that her symptoms were indicative of abruption and that abruption presents an extreme emergency.

The MEC

47. Ms Quedani Dorothy Mahlangu testified that, as the Member of the Executive Council for the Department of Health, Gauteng, she is constrained to rely on the divisions with her department. In this case this is the Legal Services department, where a legal administration officer is appointed to handle a specific matter, working with the department's medical advisor.

48. Ms Mahlangu is of the view that Mr Macheke and Dr Cele followed established departmental procedure and that their decision to proceed was confirmed by Dr Mashamba. It was not for the department, so she says, to have questioned Dr Mashamba's view that there was a defence. "*To have expected the defendant to have gone behind the evidence of Dr Mashamba is plainly unreasonable.*"

D. EFFECT OF THE EVIDENCE

49. Both the legal advisor, Mr Macheke, and the medico – legal expert, Dr Cele, claim to have consulted with the employees in question at the Charlotte Maxeke Hospital with knowledge of the relevant facts, having perused the hospital

records. Clearly, considering the repeated assertions under oath that the relevant documents were not to hand and the failure to provide them to Dr Mashamba, they could not have done so.

50. Not one witness claims to have had any regard to the evidence of the plaintiff's expert witnesses, nor to the Liability Bundle, nor do they make any effort to explain the joint expert report.

51. The heavy reliance placed on the view of Dr Mashamba that there was a defence to a charge of negligence is unfounded. Dr Mashamba had no access to a single relevant fact. His report discloses no ground of defence to negligence.

E. SUBMISSIONS ON BEHALF OF THE DEFENDANT

52. Mr Latib, on behalf of the defendant, filed heads of argument on 13 November 2014, addressing the *rule nisi* issues. This court has already found the defendant to have been negligent in its treatment of the plaintiff. The issue before it now is whether the defendant had a rational, reasonable ground on which to base its denial of negligence and whether its conduct otherwise was such that costs *de boniis propriis* should be awarded. Before dealing with the submissions I note that Mr Latib was not the counsel appearing for the plaintiff at the trial and that he did not have the benefit of a full transcript of the proceedings. My comments in this case, in so far as they criticise the defendant's case, are not to be read as a criticism of Mr Latib.

53. The defendant submits that the decision to defend the claim was reasonable, rational and proportional. That this decision was taken in ignorance of the relevant facts is not addressed.

54. The defendant now accepts that the plaintiff presented at 12h00 with symptoms such that a diagnosis of abruption placentae had to be excluded. It also accepts

that an abruption constitutes an emergency. Its case is that its employees, having regard to their qualification and experience, acted reasonably in arriving at the diagnosis of abruption and performing the caesarean section when it did. The defendant, however, presented no evidence to support any defence that the diagnosis could nor should not have been made when the plaintiff presented at the MOU. No evidence was led as to the qualification or experience of any employee other than Dr Jeebodh.

55. The defendant submits further that it is clear from the evidence that Dr Manga did not have the skill to perform a caesarean section or an ultrasound. But no such evidence was led. Indeed, the evidence was that certain interns are authorised to perform caesareans but that one did not know whether Dr Manga was one. The submission is, accordingly, unfounded. Inferences about her conduct and failure to act cannot be drawn in favour of the defendant where she was available to testify and not called. Equally unfounded is the submission that Dr Manga "*plainly treated the plaintiff's condition as an emergency*" in circumstances where she suggested the plaintiff's condition be reviewed in four hours, did not apply a drip, did not apply a CTG and did nothing but prescribe analgesics.[3] Both experts noted that to be unacceptable.[4]

56. Mr Latib acknowledges the following, as he was duty bound to do based on the facts of this case:

> "*It is plain that the plaintiff's presenting symptoms at 12h00 were indicative of an abruption and* ***provided the plaintiff was seen by a doctor, urgent steps were required to diagnose and treat the abruption.***"[5] [own emphasis]
>
> "*Had Dr Manga seen the plaintiff at 12h00, she surely would have suspected an abruption and acted with the necessary urgency.*"[6]

[3] [25] of defendant's heads
[4] [25] of defendant's heads
[5] [27] of defendant's heads

57. I fail to comprehend why this admission (which is consistent with the logic of the facts of this matter) on behalf of the defendant should not be the end of this enquiry. Clearly the defendant agrees that the plaintiff presented, objectively speaking, with an emergency. The defendant can surely not reasonably suggest that its failure to deal with an emergency presented to it excuses its failure to deal with the emergency. Emergency medical care provided by the defendant should not be a lottery.[7] It is for the defendant to ensure that such care be provided to members of the public such as the plaintiff and her unborn son. I repeat that the defendant advanced no reasons to defend its failure to do so and no basis to theorise about its failure exists.

F. DEFENDANT'S BLIND RELIANCE ON DR MASHAMBA

58. As regards the defence of the defendant's blind acceptance of the opinion of Dr Mashamba that it had a defence of negligence, the following must be noted.

59. Dr Mashamba's expert report which was, according to the defendant, provided to it in September 2013, consists of just more than one page. It could easily be fit into one typewritten page with smaller typescript.

60. The report notes that only the neonatal records were supplied. That ought to have been enough to have Messrs Matlou and Macheke and Dr Cele supply their expert with the records (which they had) to ensure a meaningful report. During his evidence in chief Dr Mashamba confirmed that the hospital records he received "*were deficient of the antenatal card and the deliveries"*.[8]

61. Because of the importance (and brevity) of the report, I quote its contents in full:

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[6] [27] of defendant's heads
[7] Section 27(3) of the Constitution should not be forgotten.
[8] Mashamba p6 lines 10 - 18

EXPERT opinion on Vuyisile Eunice Lushaba

Documents supplied was (sic) only the neonatal records. Unfortunately there are no antenatal records supplied.

Neonatal records

Vuyisile was admitted at the Johannesburg hospital with a problem of abruption placenta and delivered Menzi on the 30th June 2000 who had APGAR score of 4/10 after 1 minute and 8/10 after 10 minutes by caesarean section. The birth weight was 2860g at an estimated gestational age of 35 weeks.

At birth Menzi had birth asphyxia with severe metabolic acidoisis and hypoxic ischaemic encephalopathy [HIE]. By day 7 of life Menzi had developed fits and was on treatment. Cranial sonar done on day 7 of life revealed findings suggestive of early atrophy. The decision to repeat after 1 week was taken. Menzi was unable to sit at 7 months of age and a diagnosis of Cerebral Palsy was emphasized.

Summary of report supplied

Menzi's mother delivered at the Johannesburg hospital by caesarean section because she had abruption placenta. Menzi was born with asphyxia with severe metabolic acidosis and developed HIE.

Comment

Abruption placenta is a serious complication during pregnancy and occurs when the placenta separates from the uterine wall. It puts both the mother and the fetus (sic) in danger. It leads to deprivation of the fetus (sic) of oxygen and an lead to Cerebral palsy. Perinatal mortality was found to be 119 per 1000 births with Abruption placenta compared with 8.2 per 1000 among other births and this is a 25 – fold higher mortality with Abruptio placenta. *[Cande V Ananth, Allen J Wilcox: Am J Epidemiology vol 153 no 4 2001: Placental Abruption and perinatal mortality in the United States]*. Abruption placenta was responsible for Cerebral palsy in one quarter of all cases determined to be due to antenatal and/or intra – partum hypoxic conditions *[Yamada T, Yamada T, Morikawa M, Minakami H; Early Hum Dev. 2012Nov;88{11}: Clinical features of Abruptio placenta as a prominent cause of Cerebral palsy*].

Conclusion

With such serious complications following Abruptio placenta the outcome of Menzi is strongly associated with the complication that he mother had just before delivery.

Dr T J Mashamba

62. Apart from telling the reader that Menzi Lushaba had cerebral palsy and that this is an extremely serious condition which results from abruption placenta, the report is, as an expert opinion, meaningless. No basis is established on which defendant's negligence is to be disputed unless one is to accept that abruption is

fatal the second it sets in and that nothing is to be done about it, but that is not what the statistics quoted by Dr Mashamba suggest.

63. An expert's opinion

> "*represents his reasoned conclusion based on certain facts or data, which are either common case, or established by his own evidence or that of some competent witness.* ***Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which reasoning proceeds, are disclosed by the expert.***"[9] [own emphasis]

64. The defendant submits as follows.

64.1. Dr Mashamba, having not been briefed with all the records, was unaware that the plaintiff commenced her interaction with the hospital in the MOU and that a diagnosis of abruption was made only at 13h45. His agreement to the joint minute was, accordingly, based on incorrect facts.[10]

64.2. "*If the plaintiff was in the labour ward at 12h00, she would already have been under the care of medical doctors. There would therefore have been no reason not to have arrived at a speedy diagnosis of an abruption and not to have performed a caesarean section urgently.*"[11]

64.3. Therefore Dr Mashamba should not be held to his agreement in the joint minute that the caesarean should have been performed as soon as possible after 12h00.[12]

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[9] *Coopers (SA) (Pty) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung MbH* 1976 (3) SA 352 (A)
[10] heads of argument [33]
[11] Heads of argument [38]
[12] Heads of argument [39]

65. Some point is sought to be made in the heads that the defendant was not permitted to file affidavits beyond those of 27 October 2014. The claim appears to be that Dr Mashamba could then explain how he arrived at a conclusion based on an incomplete knowledge of the facts. But the explanation was known during the trial and is evident from Dr Mashamba's report. He was in possession only of the neonatal records. He only received a copy of Dr van den Heever's report when the joint minute was made.[13] One does not comprehend how he purported to provide an opinion on negligence in the absence of those records. They were vital to the opinion of Dr van den Heever and are vital to the question of negligence.

66. The defendant argues, finally, on this point that, if it were accepted that its expert did not agree that a caesarean section should have been performed after 12h00, then it follows that the order for the defendant to provide submissions on whether it had a duty to interrogate its experts opinion that the defendant had a defence, falls away. The defendant had "*a perfectly reasonable defence*" to the plaintiff's claim.[14] This argument forgets that Dr Mashamba had no knowledge of the plaintiff's presence at the MOU at the time that the decision to litigate was made. The issue is, in any event, irrelevant. The plaintiff was at the hospital, presented with an emergency, and ought to have been treated as such.

67. The effect of the discovery by Dr Mashaba that the plaintiff started off at the MOU is in any event murky. There was no suggestion during his examination in chief that he was retreating from the joint minute. Most importantly, Dr van den Heever's evidence on the effect of the heart rate was not touched upon. The clearest evidence by Dr Mashamba on the MOU issue is the following qualification of his admission that abruption is a medical emergency: "*Ja, what I*

[13] Mashamba p7 lines 19 - 22
[14] Heads of Argument [41]

wanted to say is that it depends on where the patient is. You make a diagnosis then depending on where the patient is, if the patient is in a place where they cannot even do what was supposed to be done in the referral centre you cannot say they should have done it."[15] But Dr Mashamba did not know the MOU at this particular hospital and did not know what it could and could not do. Clearly the MOU recognised a problem and sent the plaintiff to a higher level of care.

When specifically asked in cross – examination to comment on the recorded agreement in the joint minute that the caesarean should have been done as soon as possible after 12h00 he said: "*Ja, because we thought the* (diagnosis of) *abruptio was made. If the abruption was made but here it was missed in the beginning.*[16] *… So you have changed your view? No we say … Do you now believe that there was no requirement of the caesarean section as soon as possible after 12:00? No, I am looking in the context of what we have here and I had indicated that the first time at 12:00 the patient* (was) *at MOU. MOU do not even have caesarean section facilities let us start there right. So when we drew this it was in that context that this was in hospital. Now I have got even a better view or knowledge to say this was MOU not the hospital.*[17] *…Is it still your view that a caesarean section should have been done as soon as possible after 12:00? Yes if the diagnosis was made*[18]*….That is fine, so its is still your view that a(s) caesarean section should have been done as soon as possible after 12:00? Yes but it does not guarantee the outcome.*[19] *…Yes Doctor yes you have made very clear but what you said was most likely with a better outcome? Ja*[20]*. … But you agree with me that the child's*

[15] Mashamba pp35 – 36 lines 21 - 1
[16] Mashamba p75 lines 21 - 24
[17] Mashamba p75 line 25 – p76 line9
[18] Mashamba p77 lines 2 - 4
[19] Mashamba p77 lines 13 - 15
[20] Mashamba p77 lines 16 - 22

prospect would have been so much better if the caesarean (was) *done two hours earlier? Without guarantees yes.*"[21]

67.1. Dr Mashamba did not know whether there was a doctor at the MOU.[22]

67.2. Once a diagnosis is made, it must be acted upon accordingly.[23]

67.3. The diagnosis of abruption was made at 13h45.[24]

67.4. Abruption is a medical emergency.[25]

G. COSTS DE BONIIS PROPRIIS?

68. These costs are not easily awarded. They are awarded when there is "*negligence in a serious degree*".[26] It has also been stated that such costs are awarded for conduct which substantially and materially deviates from the standard expected of the legal practitioner, such that his clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating in a reckless manner, misleading the court, and gross incompetence and a lack of care.[27]

69. The authorities caution that cost orders *de bonis propriis* should only be awarded in exceptional circumstances.[28] A legal advisor or legal representative is not to be

[21] Mashamba p79 lines 20 - 23
[22] Mashamba p38 lines 19 - 21
[23] Mashamba p34 lines 13 - 15
[24] Mashamba p39 lines 18 - 19
[25] Mashamba p45 lines 24 - 25
[26] *South Africa Liquor Traders Association v Chairperson, Gauteng Liquor Board* 2009 (1) SA 565 (CC) [54]
[27] *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and another v Blue Label Telecoms Limited and others* [2013] 4 All SA 346 (GNP) at [35]
[28] For an example where costs *de bonis propriis* were awarded against an attorney in the office of the State Attorney see *Tasima (Pty) Ltd v Department of Transport and Others* 2013 (4) SA 134 (GNP). See also, by way of analogy, *Hai Lin and Weng v Minister of Home Affairs* (the Cathay Pacific

punished with such a cost order for every mistake or error of interpretation. To err is, after all, human.

70. But there is a limit. That limit is, to my mind, crossed when one encounters the degree of indifference and incompetence evidenced in this case. Erring when trying to do one's work well is one thing. Not even caring about doing so is quite another. The public should not have to suffer this complete indifference and incompetence at the hands of public servants. In 1902 Innes CJ thought that it would be detrimental to the public service to "*mulct that official in costs where his action or his attitude, through mistaken, was bona fide*".[29] But circumstances appear to have changed with not even censure from our highest courts being sufficient to induce public officials to public minded service. Something is required to so induce them. Perhaps the answer lies in greater accountability.

71. The MEC herself has stated that she is not personally involved in the decision-making. I am not convinced that she is to be held personally liable for the costs herein.

72. The required exceptional circumstances are present in this case where three professionals – two lawyers and one medical practitioner: -

    72.1. claim that they considered the merits of a case despite being unable to do so because they were, on their own version under oath, not in possession of the necessary records;

    72.2. evidently paid no regard to the expert report of the plaintiff, nor to the relevant documents that were provided with the Liability Bundle;

    72.3. failed to provide their chosen expert with access to the relevant facts;

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judgment of Spilg J) delivered on 11 November 2014 in case no 2014/22434 in the GLD, Johannesburg.

[29] *Coetzeestroom Estate and GM Co v Registrar of Deeds* 1902 TS 216 and see *Absa Bank v Robb* 2013 (3) SA 619 GSH at [14]

72.4. failed to ask their expert to comment on the plaintiff's expert report;

72.5. were content to rely on a one page "report" that disclosed no basis for any defence;

72.6. were content to rely on bald, unsubstantiated, assertions by the expert;

72.7. permitted the litigation to continue in circumstances where (1) no defence is exhibited in the report of their expert (2) no defence was pleaded (3) no defence was advanced at trial and (4) they were unaware of any defence to negligence;

72.8. were reckless as to the facts of this matter.

73. To this must be added an inert approach to pre – trial litigation. Not one time period was promptly complied with. Court time was wasted because the expert report was only provided the Friday before trial. The indifference as to time periods, as well as the contemptuous approach to discovery on the part of Messrs Matlou and Macheke, creates an impression of intolerable incompetence and reckless disregard. When the bizarre approach to discovery is added into the mix, one wonders whether one has stepped into an altered reality.

74. The failure to attend adequately to matters concerning preparation for trial on the part of Messrs Matlou and Macheke is, in my mind, enough of a departure from accepted norms of professional conduct to hold them personally liable for the costs of this matter. It matters not that Mr Macheke is not assisting the defendant as an attorney. He is a legal advisor in the legal department of the defendant and should concern himself adequately with matters allocated to him. This includes ensuring that proper discovery occurs, among others.

75. To this must be added the failure of the three advisors (Messrs Matlou and Macheke and Dr Cele) to obtain the necessary records which would have enabled

them to consider the merits and to brief the expert with the relevant documents to enable him properly to consider the matter, a failure representing "*negligence in a serious degree*"[30] and the necessary "*exceptional circumstance*".[31] This failure led the defendant to defend a claim on negligence where it had no defence.

76. Neither an attorney nor an official such as a legal advisor or medico – legal advisor is a rubber stamp or conveyor belt with his sole function that of conveying instructions and documents to expert witnesses and counsel. Indeed, as Kotze J said in *Port Elizabeth Local Road Transportation Board and Others v Liesing*[32] concerning the obligatory service of heads of argument

> He (the attorney) would, I consider, fail in his duty to his client if he did not peruse both sets of heads of argument and direct his mind to the implications thereof and to the question whether his client's interests are fully protected by the submissions intended to be put forward. The work of preparation is that of the attorney that of presentation is the function of the advocate. They operate side by side, their functions differ in kind but they are complementary to each other. The lay client has the right to expect and to insist upon their joint efforts in the conduct of all aspects of litigation including the presentation of appeals. The heads of argument are required by Rule of Court to be served and are therefore documents of fundamental importance in all appeals to the Full Court. It will in my view be entirely wrong for an attorney not to accord the heads of argument the diligent attention which he accords other documents of fundamental importance.

77. Attorneys who file pleadings have a duty to satisfy themselves that evidence would be available to substantiate the contents of the pleading.[33]

78. The three advisors/representatives are professionals who are, on their own version, charged with making important decisions.

    78.1. Those decisions should be made consciously and after due consideration.

    78.2. The decisions can only be made on the strength of the relevant facts which, in this case, required the antenatal and labour records. As the evidence showed, if something is not written down in medicine, it did

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[30] *South Africa Liquor Traders Association v Chairperson Gauteng Liquor Board* 2009 (1) SA 565 CC at [54]
[31] *Thunder Cats Investments 49 (Pty) Ltd v Feton* 2009 (4) SA 138 (C)at [60]
[32] 1968 (4) SA 401 (E)
[33] *Knight v Findlay* 1934 NPD 185

not happen. These records were essential to a proper consideration of the merits. The defendant argues that it could not be required to interrogate its expert. I do not agree. In the first instance, the defendant should have enquired into the basis on which Dr Mashamba held the view that it was not negligent. It that basis did not exist or was, for example, irrational, it could not logically assist the defendant. No basis for the conclusion as to absence of negligence is evident from Dr Mashamba's report. He could not logically have supplied such a basis during the pre – trial consultations, as he was not in possession of the relevant evidence.

78.3. In these circumstances the decision to defend the claim on negligence was reckless. This much was evident from the complete agreement between the experts on all the relevant issues. A conscientious dealing with the facts of the case would have led to the joint minute being produced in time to avoid the cost of the trial.

79. My views on the degree to which Messrs Matlou and Macheke and Dr Cele failed to comply with their duties are fortified by a consideration of the duty on the state as litigant.

H. THE DUTY ON THE STATE IN LITIGATION

80. The state should not conduct a case as if it were at war with its own citizens, especially not against those who are "*in terms of secular hierarchies and affluence and power the least in its sphere.*"[34]

[34] *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2011 (4) SA 1184 SCA at [15]

81. It should certainly not litigate in a manner calculated to deprive persons such as Mrs Leshaba of her right of access to court because of its refusal to adhere to the rules regarding pre – trial preparation. From the fact that she attended at a state hospital, I deduce that the plaintiff is probably not a wealthy woman. This, to my mind, heightens rather than lessens the obligation of the defendant towards her. She should be entitled to more than the indifference that met her in each encounter with the state and provincial structures in this case.[35] "*All this speaks of a contempt for people and process that does not befit an organ of government under our constitutional dispensation.*"[36]

82. In this case the defendant had consistently to be dragged to comply with the simplest requests and even then it could not interest itself in this case. The defendant's denial of being in possession of relevant medical records and its failure to provide Dr Mashamba with those provided by the plaintiff speaks volumes.

83. As Plasket J stated in *Mlatsheni v The Road Accident Fund*[37] (the footnotes to the extracts from this judgment are included)

> [14] From these provisions, and a reading of the Act as a whole, it is not open to doubt that the defendant is an organ of State.[38] That being so, it is bound by the Bill of Rights[39] and is under an express Constitutional duty to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.[40] This means not only that it must refrain from interfering with the fundamental rights of people but also that it is under a positive duty to act in such a way that their fundamental

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[35] *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* 2001 (4) SA 1184 (SCA) at [12]: *It is the needs of such persons, who are most lacking in protective and assertive armour, that the Constitutional Court has repeatedly emphasized must animate our understanding of the Constitution's provisions.*
[36] *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* supra at [15]
[37] Case 418/2005 ECD
[38] Section 239 of the Constitution defines an organ of state to include an institution that exercises a public power or performs a public function in terms of any legislation.
[39] Constitution, s 8(1).
[40] Constitution, s 7(2).

rights are realised.[41] Furthermore, s 237 of the Constitution requires that all of its constitutional obligations 'must be performed diligently and without delay'.

[15] By frustrating the legitimate claim of the plaintiff in the way that I have described, the employee of the fund who gave Mr Mvulana his instructions has acted in violation of the Constitution: he or she has by unjustifiably frustrating the claim of the plaintiff, failed to 'protect, promote and fulfil' his fundamental rights to human dignity,[42] to freedom and security of the person and to bodily integrity.[43] This employee has also fallen short of what is expected of public administrators by s 195 of the Constitution in that it cannot be said that the irresponsible raising of a frivolous defence promotes and maintains a high standard of professional ethics or that it promotes the '[e]fficient, economic and effective use of resources'. It cannot similarly be said that he or she has performed the constitutional obligations owed to the plaintiff diligently.

[16] Organs of state are not free to litigate as they please.[44] The Constitution has subordinated them to what Cameron J, in *Van Niekerk v Pretoria City Council*,[45] called 'a new regimen of openness and fair dealing with the public'. The very purpose of their existence is to further the public interest and their decisions must be aimed at doing just that. The power they exercise has been entrusted to them and they are accountable for how they fulfil their trust.

[17] It is expected of organs of state that they behave honourably – that they treat the members of the public with whom they deal with dignity, honestly, openly and fairly. This is particularly so in the case of the defendant: it is mandated to compensate with public funds those who have suffered violations of their fundamental rights to dignity, freedom and security of the person, and bodily integrity as a result of road accidents. The very mission of the defendant is to rectify those violations, to the extent that monetary compensation and compensation in kind is able to. That places the defendant in a position of great responsibility: its control of the purse-strings places it in a position of immense power in relation to the victims of road accidents, many of whom, it is well-known, are poor and 'lacking in protective and assertive armour'.[46] In this case, the employee who gave Mr Mvulana his instructions has abused his or her position of power.

84. The state should not litigate in a way designed to undermine a litigant's right of access to court in terms of section 34 or, for that matter, any other of her rights. Inertia and lethargy on the part of the state could run up costs such that less

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[41] *Jafta v Schoeman and others; Van Rooyen v Stoltz and others* 2003 (10) BCLR 1149 (C), para 39; *S v Z and 23 Similar Cases (No. 2)* 2004 (2) SACR 410 (E), para 3.
[42] Constitution, s 10.
[43] Constitution, s 12.
[44] *MEC for Roads and Transport and others v Umso Construction (Pty) Ltd* CkHC undated judgment (case no. 2034/05) unreported; *MEC for Roads and Public Works, Eastern Cape and another v Intertrade (Pty) Ltd* 2006 (5) SA 1 (SCA), paras 20-21.
[45] 1997 (3) SA 839 (T), 850B-C.
[46] *Permanent Secretary, Department of Welfare, Eastern Cape and another v Ngxuza and others* 2001 (4) SA 1184 (SCA), para 12.

wealthy litigants, unable to afford the multiple applications required to compel a response from the state and bring the matter to trial, are compelled to withdraw.

85. Not only were costs unnecessarily incurred by the plaintiff by the various steps required to get the State Attorney to respond, but the taxpayer's money is wasted each time the State Attorney and public service lawyers fail to comply with time periods and Rules of Court.

I. COURT PRONOUNCEMENTS ON THE STATE ATTORNEY and PUBLIC OFFICIALS

86. Cost orders *de bonis propriis* against State Attorneys and public officials are drastic measures. These functionaries should not be terrorised and paralysed into not doing their jobs by the fear that every little error could be met by the extreme sanction of a personal cost order.

87. But we are not faced with an error in this case, be it an error of interpretation or judgment or even an oversight. We are faced with state employees who could not be bothered to do their work.

88. Such incompetence undermines the Constitution and, with it, the social contract underlying it. Our Constitutional Order was not arrived at easily. One might argue that we have been fighting for this for a number of millennia. It cannot be permitted to die with a whimper, sunk away under a swamp of slothful indifference. Drastic measures are called for to turn the tide. If personal accountability among public officials does not come naturally it must be inculcated. Somehow these officials must be taught that their actions (or lack thereof) have consequences; that what they do matter. Somehow they must be

conditioned to care such that a Vuyisile Eunice Lushaba, in the midst of a physical crisis, could expect to enter a provincial hospital and receive the best possible care; the kind of care that committed service produces. And when mistakes are made (as they inevitably will be) then there must be the courage and intellectual honesty not to lie to her, not to threaten her right of access to court by foot dragging and further incompetence; not to further insist that she was not entitled to emergency medical treatment in circumstances where the facts have no patience with such mendacity.

89. I observed the plaintiff, a far from hefty, young woman, carry her fourteen year old son out of court on her back. She did not have a wheel chair in court. During the court proceedings she had to cradle him in her arms because, paralysed as he is, he could not sit by himself. This is symbolic of the destruction wrought by the callous, incompetent indifference on the part of public officials inflicting South Africa at the moment. The plaintiff and her son deserved much better.

90. An analysis of only a few of the judgments dealing with the conduct of public officials over the course of the past 6 years or so reveal that shaming public officials no longer work. Even the strongest exhortation of our highest Courts falls on deaf ears. I include some extensive quotations from a number of authorities in the hope that the State Attorney and defendant's legal department study them with care.

91. Tuchten J in 2013 in *Tasima (Pty) Ltd v Department of Transport and Others*[47]:

> 36. I deprecate strongly the conduct of Ms Lithole as disclosed in her own affidavits before us and the correspondence admittedly sent and received. Her conduct seriously prejudices the administration of justice. Even more importantly, the dysfunctionality to which she refers

[47] 2013 (4) SA 134 (GNP)

demonstrates that the office of the State Attorney, Pretoria, an important organ of state, is presently unable to comply with its constitutional and statutory obligations.

37. To take but one, very important, function of the State Attorney: under rule 4(9), service of court process on the State and on ministers and deputy ministers in the national government as representative of the departments which they head may legitimately take place by service on the State Attorney. If that office is dysfunctional, a court cannot be confident that the process in question has come to the attention of responsible officers within the department concerned. Indeed, the experience of each of the members of this full bench has been that frequently and most disturbingly, civil litigation against the State in this division is allowed to go by default.

38. Under s 1(1) of the State Attorney Act, 56 of 1957, the several offices of the State Attorney are under the control of the Minister of Justice. This court too is an organ of state and subject to the duties under s 41 of the Constitution. With this in mind, it is appropriate that, as foreshadowed in argument, both the Minister of Justice and the parliamentary portfolio committee for justice be provided with copies of this judgment. In my view, too, the Law Society of the Northern Provinces should be sent a copy of this judgment with the request that the Law Society investigate the conduct of Ms Lithole and the office of the State Attorney, Pretoria, as disclosed in this judgment and the papers in the postponement application. I emphasise that while I consider the conduct of Ms Lithole, as disclosed in her own affidavits, to be worthy of censure, the primary purpose in publicising this judgment in the way described is to prompt those in a position to do so to ensure that the office of the State Attorney, Pretoria, fulfils its important constitutional and statutory obligations.

92. Van Oosten J in 2012 in *The Minister of Safety and Security v G4S International UK Ltd*:

> [13] …No explanation has been tendered for the State Attorneys' inaction. The matter was initially entrusted to Mr Rambau, who at the time was the senior assistant state attorney employed at the office of the State Attorney in Johannesburg. … For reasons that have not been explained, Rambau plainly ignored and in fact abandoned his duties as the legal representative of the Minister. A long line of notices, requests, warnings and even court orders were simply disregarded and not attended to.
>
> [14] … Counsel for the Minister urged me to have regard to the nature of the attorney client relationship which exists in legal matters concerning the State. Organs of state are obliged to avail themselves of the services of the State Attorney (see s 3 of the State Attorney Act 56 of 1957). State departments, such as the SAPS, do not have the free choice of instructing a particular legal representative or the right enjoyed by private litigants of terminating the mandate of one legal representative and instructing another. The SAPS is therefore bound to accept that all legal matters, such as the present, will be dealt with the State Attorney. Underpinning this particular relationship, in my view, is the trust placed by not only the SAPS, but other state organs, in the State Attorney to properly fulfil its mandate. But it goes

further: the taxpayer also has an interest in these matters, as public funds are at risk in matters where damages against the Minister are claimed. It cannot, generally speaking, be expected from members of the SAPS to regularly monitor the State Attorney's management of legal matters in which they are or may be involved. In most instances members of the SAPS would not even be aware of the pending litigation as service of the documents commencing legal proceedings, can and is effected on a representative of the Minister, including the office of the State Attorney. These matters are accordingly left entirely in the hands of the State Attorney who is required to perform their duties with the utmost diligence.

[15] At this juncture I consider it necessary to digress and to address the alarming neglect of duty by the State Attorney that appears to have become the order of the day in this division. I will confine the comments I am about to make to cases involving the State Attorney that have served before me in the last few weeks. A number of applications for default judgment against the Minister appeared on the unopposed motion court roll. In those matters the summons had been properly served on the State Attorney, on behalf of the Minister. Those cases all involved claims for an alleged wrongful arrest and detentions by the SAPS. In the absence of a notice of appearance to defend by the State Attorney, they were enrolled on the unopposed motion court roll, for default judgment. At the last moment when the matters were called in court, an appearance from or on behalf of the State Attorney's office was made resulting in a postponement and, of course, unnecessary wasted costs. No explanation was tendered for the State Attorney's non-entry of an appearance to defend, the plaintiffs always content with a suitable costs order in their favour. This kind of neglect, regrettably, permeated into a large number of unopposed matters appearing on another section of the motion court roll: applications against the Minister to compel discovery of documents or compliance with some other notice delivered in terms of the rules. Again, the notices requesting discovery were duly served on the State Attorney, but the lack of compliance, despite despatch of a "courtesy letter" again demanding compliance, caused them to be launched. In one week 12 such matters served before me. At the hearing there was an appearance by or on behalf of the State Attorney. I was informed that all those matters had become settled in respect of which draft orders were handed up for confirmation albeit without any explanation for the reason for the non-compliance. The draft orders all provided for payment of the costs of the applications by the Minister. In the present matter, as I will deal with later, a further costs order against the Minister, is about to follow. These all provide examples of the unnecessary waste of public funds due to deteriorating standards of service and the absence of diligence.

[16] The instances of neglect and the general decline in the standards of service rendered by the State Attorney's office, is a matter of grave concern which needs to be addressed. It cannot be allowed to endure any longer. An urgent in-depth investigation by the authorities concerned, in my view, is necessary. In order to set the process in motion I have decided to cause a copy of this judgment to be forwarded to the Minister of Police, as well as the Minister of Justice and Constitutional Development. It is hoped that the flashing red warning lights which are apparent from what I have set out above, will encourage an investigation and

> correction where necessary, in order to rectify a state of affairs that is not conducive to the delivery of justice by a well-established legal service provider in the public sector. [48]

93. In 2005 in *Kate v MEC for Department of Welfare, Eastern Cape* Froneman J expressed the view that

> Individual public responsibility, in contrast to nominal political responsibility, could be enhanced by forcing individual public officials to explain and account for their own actions, as parties to the litigation.[49]

94. Bertelsman J in 2014 in *Minister of Rural Development and Land Reform v Griffo Trading CC; In Re: Griffo Trading CC v Minister of Rural Development and Land Reform* :[50]

> 41.lt is clear that the applicant department has been exceptionally poorly served by the legal representatives it is obliged to employ in terms of section 3 of the State Attorney Act, 56 of 1957. Nothing has changed since the court drew the completely unacceptable level of service delivery in the S A's office to the attention of the responsible authorities in the above quotation. The litany of failures evident in this case, to attend to the most elementary of administrative duties in an attorney's office, such as diarising files, observing deadlines set by the Rules and orders of court, protecting the integrity of files and of original documents entrusted to officers of this court by their clients' officials reflects the same chaotic state of dysfunctionality that attracted the full court's severe criticism. To this must be added the failure to render a professional service to the department and the court, the unacceptable excuses proffered for failing to protect the litigant's interests and the unprofessional manner in which pleadings and affidavits were prepared. In addition it is clear that the SA's explanations and excuses for the repeated failures to comply with the duties of officers of this court fail to identify the individuals responsible for some of the worst neglects. There can be little doubt that this failure is deliberate to shield the attorneys concerned from being held personally liable for the costs incurred as a result of their misconduct. This court has had to express its disquiet over the generally very poor quality of work delivered by the S A's office in this Division on more than one occasion since the *Tasmina* judgment was delivered. (See, for instance, *Central Authority for the Republic of South Africa v R* [2014] ZAGPPHC 19 (not yet reported). Punitive costs orders have been granted against the SA's clients on numerous

[48] case 07/12735 South Gauteng High Court at [13]
[49] 2005 (1) SA 141 SE at [11]
[50] (12440/11) [2014] ZAGPPHC 666 (2 September 2014)

occasions as a direct result of the failure of its officials to perform their professional functions. It is a matter of very grave concern that nothing our courts have said appears to have been heeded by the Minister or the Department of Justice and Correctional Services. Courts cannot function effectively without the professional support of its attorneys and advocates. The State Attorney is involved most of the litigation affecting the State and is funded by the public purse. The present condition of this office causes significant unnecessary expenditure of public funds that are wasted by costs orders granted against organs of state because of the poor quality of professional service provided by these officers of the court. Eventually the very essence of the Rule of Law is endangered if regular litigants fail to observe the most basic principles that protect the independence and quality of justice dispensed by our courts. It is high time that this malaise is addressed.

53.The court would have made an order holding the individual officers of this court employed by the SA liable if they had been properly identified. It is beyond question that Mbata was negligent to a very high degree, but it appears also to be common cause that she was on leave and on medical leave during critical periods when the matter was not given attention. It is unclear who was responsible for losing the applicant's file and original documents. The failure to identify these individuals appears to be deliberate to avoid the consequence of having to personally recompense the public purse for the waste of taxpayers' money because of the responsible attorneys' unprofessional conduct. The court can but express the hope that the authorities will take appropriate action against the delinquent individuals. A copy of this judgment will be sent to the Hon Minister of Justice and Correctional Services and to the chairperson of the Parliamentary Portfolio Committee on Justice for their information.

95. Yacoob J in 2008 in *Njongi v MEC, Department of Welfare, Eastern Cape*:[51]

[84] The decision not to admit the unlawfulness of the administrative action in the circumstances cannot be said to be unobjectionable. In particular, it must be said that judgments of courts in relation to Provincial Government conduct are not meant simply to be filed away without being read. They contain important information that has a bearing on the conduct of the Provincial Government in issue. It is probable that the legal advisors to the Provincial Government did not read the various judgments which are referred to in this judgment with sufficient care. If they did read them however their conduct is worse. Court judgments were ignored by these lawyers. This is unsatisfactory.

[85] It is not necessary in this case to decide whether the decision of the Provincial Government to invoke prescription was of such a nature that it can or ought to be set aside. That is because the defence of prescription has in any event failed. I am however of the view that, as appears from what I have said earlier, both the decision to oppose as well as the way in which the case was conducted represent unconscionable conduct on the part of the Provincial Government. I do not

[51] 2008 (4) SA 237 (CC)

need to decide whether the fault lay with the legal advisor, an official in the Department, a political office bearer or with all of them.

96. Meer J in the Land Claims Court in 2010 in *Quinela Trading (Pty) Ltd v Minister of Rural Development*:[52]

> [36] *Nyathi v MEC for Department of Health, Gauteng and Another [2008] ZACC 8; 2008 (5) SA 94 (CC)* reconfirmed the constitutional principles regarding the duty of government in respect of public administration. The same principles are applicable to the **state's** duty to comply with its contractual and statutory obligations. In *Van der Merwe & Another v Taylor N.O. & Others [2007] ZACC 16; 2008 (1) SA 1 (CC) at 27* it was acknowledged that the constitutional principles are basic values for achieving a public service envisaged by the Constitution, which required the state to lead by example. As in that case the state has failed to lead in the present case. In the earlier case of *Mohamed and Another v President of the RSA & Others [2001] ZACC 18; 2001 (3) SA 893 (CC) at [68]* the Court endorsed the celebrated words of *Justice Brandeis in Olmstead et al v United States*[11]:
> "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously….. Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example…..If the government becomes a lawbreaker, it breeds contempt for the law, it invites every man to become a law unto himself; it invites anarchy,"
> It should not be necessary to force the State through a court order to comply with its contractual obligations and an Applicant who is forced to seek such an order should not be out of pocket. I am satisfied that Respondents' conduct attracts the punitive cost order sought.

97. O'Regan J in 2009 in *South African Liquor Traders' Association v Chairperson, Gauteng Liquor Board*: [53]

> [46] I turn now to consider the question of costs. I consider first the question of the costs of litigation in this Court, excluding the wasted costs of the hearing on 2 March 2006. The applicants have successfully pursued constitutional relief in this Court and there is no reason why they should not be awarded their costs.
>
> [47] The question arises, however, as to the scale on which such a costs order should be made. The applicants point to the dilatory and unhelpful manner in which the MEC and his officials conducted the litigation both in the High Court and in this Court until after the Court made its order on 2 March 2006. Although there can be no doubt that some of the fault for that conduct is to be laid at the door of the third respondent's attorneys, as I shall set out below, in my

[52] 2010 (4) SA 308 (LCC)
[53] 2009 (1) SA 565 (CC)

> view the MEC bears responsibility for that conduct as well. His legal advisers were in possession of many of the documents and failed to take appropriate steps to ensure that the litigation proceeded smoothly and properly. The MEC must be responsible for the conduct of his legal advisers.

[48] A court will ordinarily show its displeasure at the manner in which a litigant has conducted himself during litigation by an award of costs on the attorney and client scale. As Tindall JA remarked:

> "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."

[49] The MEC, as an organ of state, bears a special obligation to ensure that the work of courts is not impeded. Moreover in this case the applicants have been seeking relief in respect of a provision in a statute which is clearly vague on its own terms and therefore inconsistent with the Constitution. Their attempts have been bedevilled by the manner in which the litigation has been approached by the MEC and, in particular, his legal representatives including his own departmental legal advisers as well as the State Attorney. In all these circumstances, this is an appropriate matter for costs to be awarded against the MEC on the attorney and client scale.

The conduct of the State Attorney

[50] The final issue to be considered relates to the wasted costs of the hearing on 2 March 2006. It will be recalled that on that date there was no timeous appearance by the State Attorney on behalf of the MEC despite the State Attorney's having been asked to be present by an official from the Registrar's office of this Court. Moreover, the State Attorney failed to inform its client of a specific request from this Court to the MEC (in directions issued by this Court on 24 January 2006) to lodge affidavits in this matter. The affidavit lodged on behalf of the individual attorney handling the matter indicates that she did not read the communication from the Court but merely filed it, considering it to be an "update".

[51] It is clear from both the affidavit and the argument tendered on behalf of the State Attorney in this Court that the attorney concerned was recently qualified and inexperienced in constitutional litigation. It does not appear from her affidavit that she sought a supervisor's advice. Nor was there any affidavit lodged by her superiors indicating what system exists in the State Attorney's office for the supervision of junior members of staff in important litigation such as this.

[52] The result is both unfortunate and serious. It is unfortunate because the effect in this case was to

give the impression that the MEC, a senior member of the executive in provincial government, was not interested in assisting this Court in resolving important constitutional litigation. That impression has now been rectified. It is serious because as a matter of common practice it is the State Attorney who is briefed by the government when it is involved in litigation. Given the government's responsibility to assist the work of courts, a lapse of this sort in the State Attorney's office gives cause for grave concern.

[53] In my view, such a lapse called for an explanation to be tendered by a senior attorney in the office of the State Attorney. It was not appropriate that the only explanation forthcoming from the State Attorney's office should have been from a young, inexperienced attorney alone. In so observing, it needs to be said however that the explanation that the young attorney gave for not responding to correspondence from this Court reflected a lamentable want of professional responsibility on her part. It also reflects on her superiors who have evidently left her inadequately supervised and trained.

[54] An order of costs de bonis propriis is made against attorneys where a court is satisfied that there has been negligence in a serious degree which warrants an order of costs being made as a mark of the court's displeasure. An attorney is an officer of the court and owes a court an appropriate level of professionalism and courtesy. Filing correspondence from the Constitutional Court without first reading it constitutes negligence of a severe degree. Nothing more need be added to the sorry tale already related to establish that this is an appropriate case for an order of costs de bonis propriis on the scale as between attorney and client. The order is made against the office of the State Attorney, not personally against the attorney concerned. This Court's displeasure is primarily directed against the office of the State Attorney in Pretoria whose systems of training and supervision appear to be woefully inadequate.

98. Madala J in *Nyathi v Member of the Executive Council for the Department of Health Gauteng*[54]

Conduct of the State Attorney

[64] It is here necessary to consider the manner in which the applicant sought to enforce the judgment debt against the state. The applicant approached the State Attorney and requested payment of the money owed. The State Attorney promised to pay and then failed to do so. Reasons were not given for the failure to pay nor did the State Attorney offer any guidance as to when payment would be made.

[65] The State Attorney then indicated that its client, the first respondent, had decided to bring an application for rescission but could not indicate the basis of such application nor the

[54] 2008 (9) BCLR 865 (CC)

reason for the instruction. This protracted correspondence all occurred whilst the applicant's health deteriorated steadily. The applicant requested to communicate directly with the first respondent and thereafter contacted the senior legal administrator in the first respondent's department. Communications failed between the parties and explanations as to the lack of payment were still not forthcoming. The interim payment sought by the applicant was only received when this Court made a request for such payment to be made.

[66] The fact that payment was only made once the applicant approached this Court for relief reflects the fact that the current procedure of approaching the State Attorney is not effective. There are multiple state institutions involved in the authorisation and administration of debts against the state and this has contributed significantly to the delays in this matter and related matters. It is a convoluted and difficult method which is, as is evident in this matter, largely unsuccessful.

[67] It is evident from the factual matrix before us that there is a breakdown in communication between the office of the State Attorney and the first respondent. The first respondent is the client of the State Attorney yet there is much 'bureaucratic bungling' which impedes the delivery of justice. There is no need for such delays when there is already in existence a court order for payment.

[68] An affidavit was presented on behalf of the State Attorney's office indicating the reasons for its failure to file an appearance to defend in the High Court, as well as its failure to inform the relevant state officials of the outstanding judgment debts. The reasons given are largely unsatisfactory and provide no real solution to problems within the department.

[69] These reasons have, however, been taken into consideration, yet it must be noted that this Court commented on this very problem over a year ago in the *Liquor Traders* case. Precious little has since been done to rectify the situation and I cannot accept further excuses for the ineptitude, especially after the State Attorney has been made fully aware of the alarming state of affairs. In *Liquor Traders,* this Court made the following remarks with regard to the inefficiency of the State Attorney:

> "It is serious because as a matter of common practice it is the State Attorney who is briefed by the government when it is involved in litigation. Given the government's responsibility to assist the work of courts, a lapse of this sort in the State Attorney's office gives cause for grave concern.

In that case, this Court ordered costs against the office of the State Attorney *de bonis propriis* on the scale as between attorney and client, and not personally against the attorney concerned. The costs order was indicative of the Court's displeasure and was "primarily directed against the office of the State Attorney in Pretoria whose systems of training and supervision appear to be woefully inadequate." Relying on the moral obligation of the State Attorney and the Department of Justice to improve the state of affairs has been an exercise in futility. I, accordingly, find that the

relevant state institutions should take steps to rectify the problems highlighted above and report back to this Court as to the progress made.

[74] There is a desperate need for legislation to be enacted that will specifically target the areas of concern outlined in this judgment. The apathy of state officials in their failure to pay judgment debts cannot be addressed unless progressive, targeted steps are taken towards solving these problems.

[76] The English Courts have looked at the possibility of holding officials responsible for wrongs that they have committed in their official capacity. They proceed on the premise that, in committing the wrongs, such officials are stepping outside of the realm of protection afforded to public officials under the Crown Proceedings Act. The possibility of a similar route in South Africa is, however tempting, impractical. The committal of public officials would only result in the 'naming and shaming' of such officials and would produce no real remedy for the aggrieved litigant who is primarily concerned with the payment of the judgment debt. The potential disruption of already overburdened state departments is also a result which should be avoided.

[77] The problems faced in this matter are different. First, the procedures and mechanisms required to enforce claims against the funds are lacking and this needs to be addressed with due consideration of the competing interests involved in this matter.

[78] Secondly, state administration is inefficient and ineffective. The conduct of state officials undermines the legitimacy of both the judiciary and the state. Generally, relevant state departments are in the best position to assess the magnitude of the problems faced by their personnel and are similarly in the best position to address the systemic failure of state officials to perform their duties. These state institutions need to look at these failings holistically and consider the best manner in which to deal with the problems at hand. This Court is not in a position at this stage to assess the problems faced.

J. CONCLUSION

99. In the memorable *Nyathi* decision, Madala J said the following about the connection between our democracy and the manner in which state functionaries performed their functions:

> [80] Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a state predicated on a desire to maintain the rule of law, it is imperative that one and all should be

> driven by a moral obligation to ensure the continued survival of our democracy. That, in my view, means at the very least that there should be strict compliance with court orders.
>
> [81] The state's function is to execute its duties in terms of the relevant legislation. The failure of the state to edify its functionaries about the very legislation which governs their duties is unacceptable. It may be true that the problem lies with the officials who do not know what their responsibilities are and, regrettably, with legal representatives who do not know who the responsible functionaries are. However, this ignorance is no justification for their failings. It may explain the cause of the problem, but it constitutes neither a good excuse nor a justification thereof and cannot serve to protect the state from being held responsible.

100. That judgment, coming as it did from the highest court in our land, should have been sufficient to galvanise the State Attorney into mending its ways. Clearly, if regard is had to the extracts of the judgments referred to above, it has not done so.

101. Messrs Matlou and Macheke and Dr Cele have addressed in their affidavits issues around their conduct and decision making in this case and I am satisfied that they have properly been heard. The *rule nisi* foreshadowed the consideration of a special cost order against the responsible officials.

102. In the circumstances I make the following order:

102.1. Ezekiel Matlou; Jabulani Macheke and Kgoposi Cele are ordered to pay *de bonis propriis* 50% of the costs (identified as such paragraph 134 of my first order of 16 October 2014) jointly and severally with the defendant on the attorney and client scale.

102.2. In the event of the plaintiff recovering all of her costs from the defendant, the defendant is ordered to recover 50% of the costs paid by her to the plaintiff *de bonis propriis* from Messrs Matlou; Macheke and Cele jointly and severally.

102.3. The conduct of Mr Matlou is referred to the Law Society of the Northern Provinces for investigation and such further action as it may deem fit.

102.4. The registrar is directed to send a copy of this judgment, as well as the judgment in this matter of 16 October 2014 to the Law Society of the Northern Provinces with the request that the Law Society investigate the conduct of Mr. Ezekiel Matlou as appears from this judgment with a view to taking such action as the Law Society may consider appropriate.

R M Robinson AJ
26 November 2014

Date of hearing : 28 October 2014

Date of Judgment: 26 November 2014

Plaintiff's counsel: Adv Pillay SC

Instructed by: Wright Rose Innes, Johannesburg

Defendant's counsel: Adv R Latib

Instructed by: State Attorney, Johannesburg