CONSTITUTIONAL COURT OF SOUTH AFRICA

Member of the Executive Council for Health, Gauteng Provincial Government v PN

CCT 124/20

Date of Judgment: 1 April 2021

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday, 1 April 2021 at 10h00 the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the Supreme Court of Appeal. That Court upheld an appeal against a decision of the High Court of South Africa, Gauteng Local Division, Johannesburg. The application concerned whether an order determining only the question of liability pursuant to a separation in terms of rule 33(4) of the Uniform Rules of Court and which is to the effect that the defendant must pay to the plaintiff 100% of the agreed or proven damages means that (a) the manner of compensation is *res judicata* (i.e. has been finally determined) and (b) compensation can only be in one lump sum sounding in money.

The respondent, Ms PN, is the mother of a minor child who is afflicted with cerebral palsy as a result of injuries sustained at birth at a state healthcare facility in Johannesburg. The respondent instituted a claim for damages in excess of R32 million against the applicant, the Member of the Executive Council for Health, Gauteng. When the matter came before the High Court, Moshidi J gave an order in accordance with a draft agreed to by the parties. The order separated the questions of liability and quantum, with quantum to be determined at a later stage. It also declared that the applicant is obliged to "pay to" the respondent "100% . . . of her agreed or proven damages".

After that order had been granted, this Court handed down judgment in *MEC for Health and Social Development, Gauteng v DZ obo WZ*. In that matter this Court considered the need for the development of two common law rules, the "once and for all" rule and the rule that damages for

medical negligence must be paid in money. Such development would allow compensation by provision of physical items or medical services in the public healthcare sector instead of money (the public healthcare defence), or allow for the making of an undertaking according to which medical services or supplies that cannot be provided in the public healthcare sector are paid for when they arise in the future (the undertaking to pay defence). Although in *DZ* a case was not made out for the development of these common law rules, this Court held that, should a case be made out for such development in the future, it may be successful. On the authority of that judgment, the applicant in the present matter amended his plea in the High Court and sought a development of the common law so that he could raise the public healthcare and undertaking to pay defences.

When the matter came before Van der Linde J in the High Court for the determination of quantum the respondent argued that, since Moshidi J's order stated that the applicant is obliged to "pay to" the respondent "100% . . . of her agreed or proven damages", the manner of compensation was *res judicata*. According to the respondent, the stipulated manner of compensation required payment in one lump sum sounding in money and it was thus not open to the Court to consider the development of the common law. Van der Linde J rejected the respondent's argument, finding that the respondent was unduly fixated on the words "to pay", and that the purpose of this part of the order was not to deal with how the respondent was to be compensated, but rather whether the applicant was at all liable for compensation. On appeal, the Supreme Court of Appeal overturned this. It reasoned that the word "pay" clearly meant payment in money, and in one lump sum. According to the Supreme Court of Appeal, both the applicant's liability and manner of compensation had been finally adjudicated.

The applicant applied to this Court for leave to appeal against that judgment of the Supreme Court of Appeal. This Court issued directions calling upon the parties to file written submissions and elected to decide this matter without an oral hearing.

In a unanimous judgment penned by Madlanga J (Mogoeng CJ, Jafta J, Khampepe J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ concurring) the Constitutional Court held that in context, there was nothing magical about the use of the word "pay". It held that Moshidi J's order did not dispose of the method of compensation. To hold that it did would stretch the ordinary meaning of the words read in their proper context.

The Constitutional Court noted that the interpretation preferred by the respondent has the effect that the court determining quantum may not consider a development of the common law. This is contrary to the powers of courts to develop the common law under sections 39(2) and 173 of the Constitution and to grant any just and equitable remedy when deciding constitutional matters in terms of section 172(1)(b) of the Constitution.

Additionally, the Constitutional Court held that this interpretation may infringe the applicant's right of access to courts and potentially undermine the right of everyone to have access to healthcare services. The Constitutional Court thus held that Moshidi J's order must be interpreted

not to deal with the manner of payment and should not be read to preclude a consideration of the development of common law.

On costs, the Constitutional Court applied the *Biowatch* principle and determined that there was no basis for awarding costs against the respondent even though she was the losing party. Each party was ordered to pay their own costs in the Constitutional Court and the Supreme Court of Appeal.