REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 2013/13116

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

.....
SIGNATURE

9/12/2016
.....
DATE

In the matter between:

ILANA CEDAR JOUBERT Applicant

and

BUSCOR PROPRIETARY LIMITED Respondent

J U D G M E N T

SIWENDU, AJ

INTRODUCTION

[1] The plaintiff seeks the court's leave to amend Particulars of Claim in proceedings instituted against the defendant. She seeks to recover the past and future loss of earnings due to her as well as to her two minor children. The loss follows the death of her husband ('the deceased'). The plaintiff alleges that the defendant requested or permitted or allowed the deceased to enter a sump with a submersible pump.The sump is a confined oxygen-deficient space with oil, toxic, hazardous vapour, dust, and fumes. As a consequence of the exposure, the deceased suffered severe injuries to his central nervous system leading to his death.

[2] At the time, the deceased, held the position of an apprentice with Lira Electrical CC ('the close corporation'). The close corporation was in turn contracted by the defendant to carry out electrical, mechanical repairs and maintenance of equipment owned by the defendant, situated at the defendant's premises and depot.

[3] For convenience, the parties will be referred to as they appear in this application, as 'the applicant' and 'the respondent' through out the judgment.

AMENDMENTS SOUGHT

[4] The applicant seeks to leave to effect four amendments to the particulars of claim which are that:

[4.1] the reference to the year 2012 in para 11 of the particulars is deleted and substituted by the year 2011. The amendment is not opposed;

[4.2] the insertion of the word 'alternatively' between paragraphs 24 and 25 of the particulars of claim the consequence of which is that it will read as follows:

24 " In the premise, the defendant owed a statutory duty of care to the deceased and his dependeants to compligation its duties in terms of OHSA and the regulations, which duty it breached.

Alternatively

The defendant owed the deceased and his dependants a common law duty of care to take reasonable measures to ensure the saftey of persons employed in the work place, which included a duty of ensure that the provisions of the OHSA and regulations were complied with."

[4.3] once the amendment in 4.2 has been effected, the addition of the following wording to para 25 of the particulars:

> 'and to take reasonable measures to ensure the safety of persons entering upon the premises of the defendant, and in particular persons who accessed, used, maintained and repaired the defendant's waste run-off removal system, of which the sump forms part, because the system is an inherently dangerous installation and further creates a source of danger';

[4.4] the amendment of the wording in para 26 of the particulars to read as follows:

> 'The defendant is strictly liable for the plaintiff's damages as a result of its breach of its statutory duties, alternatively, the defendant breached its statutory duties and/or common law duty that it owed to the deceased and his dependents, by negligently failing to take the measures set out in paragraph 17, which it could and should reasonably have done'.

[5] Other than the amendment in respect of the date, the application for amendment was opposed. It merits mention at this stage that the notice of objection filed on record was in respect of the amendment to para 26 of the particulars of claim only. The objection states that:

> The defendant's objection is in respect of a portion of paragraph 4 of the proposed amendment where the proposed amendment reads:
>
> *'the defendant is strictly liable for the plaintiff's damages as a result of its breach of its statutory duties.'*

[6] The main thrust of the amendment is to introduce an alternative plea to the initially pleaded case solely based on a breach of a common law duty of care. The applicant seeks to introduce an amendment which places reliance on the duties imposed by sec 9(1) of the Occupational Health and Safety Act, 85 of 1993, ('the OHSA')[1] read together with the Reg 5[2] under the OHSA. In this regard, she seeks to plead in the alternative that the respondent must be held strictly liable for what is alleged to be a negligent a breach of a statutory duty.

THE APPLICANT'S ARGUMENT

[7] Mr. Bester for the applicant argued that strict liability is not a novel legal concept in our law. It has found application in numerous cases overtime. He submitted that if I juxtaposed sec 9 of the Act with secs 28(1)[3] and 49 of the National Environmental Management Act ('NEMA'), I will find that the provisions of these sections are similar. Given this, based on the decision in *Bareki NO and others v Gencor*[4], the court in considering the nature of the duty imposed, held that sec 28 of NEMA created strict liability on the part of the owner or the possessor of the premises. He submitted that I should adopt a similar approach in interpreting sec 9(1) of OHSA. The wording with regards to the measure of the duty is similar in both statutes. Both make reference to the taking of reasonable measures to prevent harm.

[8] The second leg of the argument, is that I should apply the holistic approach and follow the principles laid down in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[5] read together with *Bothma- Batho Transport (Edms) Beperk*[6] in interpreting the provisions of the OHSA. In doing so, I will find that a breach of sec

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[1] Section 9(1) 'Every employer shall conduct his undertaking in such a manner as to ensure, as far as is reasonably practicable, that persons other than those in his employment who may be directly affected by his activities are not thereby exposed to hazards to their health or safety'.

[2] An employer or? shall take steps to ensure that a confined space is entered by an employee or other person only after the air therein has been tested.

[3] Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing, recurring, or in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment

[4] Bareki N O and another v Gencor Ltd and Others 2006(1) Sa 432 (T) page 8 of 20

[5] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012(4) SA 593 (SCA)

[6] *Bothama-Transport(Edms) Beperk v S Botham & Seun Transport (Edms) Beperk* 2014 (2) SA 494 (SCA)

9 and the regulations results in strict liability on the part of the employer. He further submitted that interpretation of the legislation engages matters of policy in the context of all the relevant facts. In this regard, I should consider the dictum in *PMB Armature Winder v Pietermaritzburg City Council*, Didcott J stated that:

> 'as industry and technology spread, as their complexities multiply, as their destructive potential grows, so the case for their absolute liability gains strength'.

He argued that when the account of the inherent dangers, in this case, is considered, it should be indicative that sometimes it is appropriate to allow for strict liability.

THE RESPONDENT'S OBJECTION AND ARGUMENT

[9] Mr. Redding SC for the respondent argued as the first ground for objection that the OHSA does not make provision for the strict liability contended for in the event of a breach of the duties imposed by the Act. He submitted that a pleading based on strict liability would be bad and non-existent in law as it will render the pleadings excipiable if allowed. As a second ground, he submitted that the deceased cannot institute a claim against the respondent as he was not an employee as envisaged in OHSA. Employees are required to act in a manner conducive to safety.[7] It is common cause that the deceased was an employee of a subcontractor engaged by the respondent at the time.

[10] As a third ground, Mr. Redding SC argued that I should distinguish OHSA from NEMA. OHSA's aim is not to give cause for action or compensation as it is a preventative statute. The criminal sanction provided in the OHSA is the indicator[8] that the aim of the legislation is not compensation for accidents but is preventative in its prescripts. He argued that where the legislation like OHSA imposes a standard of care, it is an indication that strict liability was never intended. He submitted that I should distinguish the *Lascon* and *Bareki* decisions in the interpretation of the OHSA.

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[7] Paul Benjamin: Commentary on the Occupational health and Safety Act; Juta's Occupational Health and Safety Library

[8] Paragraph 26 of the Respondent's Head of Argument.

[11] On other substantive aspects, Mr.Redding SC submitted that the amendment would create confusion in that, two causes of action, one based on a common law duty and the other based on a breach of statutory duty would result. This would, in turn, create two trials, one based on strict liability and one based on common law. He argued further that the respondent would be prejudiced at the trial stage in that it would be prevented from leading evidence about whether or not it was negligent as negligence would be irrelevant if strict liability is allowed. This would constrain the respondent in mounting a defence to show that it was not negligent, as it would be effectively prevented from leading this evidence.

[12] He argued that it was not the intention and interest of the Legislator to make a defendant liable in spite of them not being negligent.There is no indication that the intention of the legislator was that negligence need not be proved.

ISSUE FOR DETERMINATION

[13] The objection raised engages numerous questions of law. In determining whether a case been made out for an amendment, I am bound to determine not merely the procedural requirements and the effect of the amendment sought, but also whether the amendment renders the pleadings excipiable if granted. This is linked inextricably with two further issues raised by the respondent. The first is whether OSHA imposes strict liability. The second is whether the applicant is precluded from instituting a claim based on a breach of a duty of care at common law simultaneously with that based on the breach of OHSA, pleaded in the alternative. The latter touches on the claim that the Respondent will be prejudiced thereby.

APPLICABLE LEGAL PRINCIPLES

[14] It is essential to refer to the provisions of OHSA as a starting point, to deal with the argument by the respondent, that the deceased in turn his dependents

cannot institute a claim for compensation against the respondent for want of a direct employment relationship.

Is applicant excluded from instituting a claim against the employer by OHSA?

[15] I am in agreement in part with the respondent that the scheme of OSHA is to ensure preventative measures against health and safety hazards and injuries. OSHA provides for reciprocal obligations by employers and employees as well as joint governance structures for workplace safety through safety committees.[9]

[16] The submission that, the deceased, an erstwhile employee of a subcontractor, is not owed a duty of care derives from a common- law principle evident in *Peri-Urban Areas Health Board v Munarin*[10]. The court in *Peri- Urban* held that a duty of care is not owed to workers of a contractor unless the terms of a contract or other factors create a duty. This common law principle predates OHSA. Consequently, a reference to some of the provisions of OHSA is necessary. The preamble to the act refers to the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with activities of persons at work.

[17] Section 9(1) of OSHA imposes general duties on employers towards other persons other than employees[11] over and above duties of employees at work[12] for workplace health and safety. The section refers to 'persons other than those in his employment' who are owed the general duty and protection. In my view, the wording of sec 9(1) is broad enough to include subcontractors like the deceased and the public at large if they may be affected by the employer's activities.

[18] Regard also is to be had of the recent decision in *Health Resource Group and others v Minister of Labour and others*[13], dealing with the reach of the OHSA to third

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[99] Sections 17,18,19 and 20 of OHSA
[10] 1965 (3) SA 367 (A).
[11] Section 9 of the Occupational Health and Safety Act 85 of 1993.
[12] Section 14 of the Occupational Health and Safety Act 85 of 1993
[13] 2015 (4) ALL SA 78 (GP).

parties other than employees. The court, in this case, dealt with access to information emanating from inquiries conducted under the act. In interpreting sec 32 of OHSA, the court held that reference to 'any person' in the act means that the provisions are not directed at employees only.

[19] Relevant to the case at hand is secs 37(1) and (2)[14] of OHSA. The sections create the rebuttable presumption that the prohibited act or omission if it occurs, is that of an employer or users. It introduces vicarious liability of an employer or user for workplace health and safety injuries and hazards. In my view, this somewhat alters the common-law position relied upon by the respondent.

[20] For completion, it is also necessary to have regards to sec 35[15] of the Compensation for Occupational Injuries and Diseases Act, 1993 ('COIDA') for the context and understanding of health and safety regulation. While COIDA is only relevant in so far as the right to compensation for employees and dependents is concerned, it provides a material backdrop against which to view the respondent's interpretation and argument. Section 35 of COIDA specifically precludes any employee or the dependent of any employee from instituting civil proceedings against an employer for recovering a loss flowing from occupational injury or disease in the civil courts.

[21] As a result of the factors above, I part ways with the restricted interpretation argued by the respondent. It is not a tenable one. It would lead to an absurd result which precludes not only employees but third parties and the public at large from instituting civil claims for workplace-related health and safety injuries against an

[14] Section 37(1) Whenever an employee does or omits to do any act which it would be an offence in terms of this Act for the employer of such employee or user to do or omit to do, then, unless it is proved that- (a) in doing or omitting to do that act the employee was acting without the connivance or permission of the employer or any such user; (b) it was not under any condition or in any circumstance within the scope of the authority of the employee to do or omit to do an act, whether lawful or unlawful, of the character of the act or omission charged; and (c) all reasonable steps were taken by the employer or any such user to prevent any act or omission of the kind in question, the employer or any such user himself shall be presumed to have done or omitted to do that act, and shall be liable to be convicted and sentenced in respect thereof; and the fact that he issued instructions forbidding any act or omission of the kind in question shall not, in itself, be accepted as sufficient proof that he took all reasonable steps to prevent the act or omission. Section 37 (2) The provisions of subsection (1), shall mutatis mutandis apply in the case of a mandatary of an employer or user, except if the parties have agreed in writing to the arrangements and procedures between them to ensure compliance by the mandatary with the provisions of this Act.

[15] Section 35 of the Compensation for Occupational Injuries and Diseases Act 1993 states that.

employer. Activities of an enterprise extend beyond employees and may include families and surrounding communities where the enterprise operates. OHSA was not only enacted for the benefit of employees but for the benefit of third parties and the public. I am satisfied that the applicant's right of action or that of a third party who is not an employee enjoys protection, and is thus not limited.

[22] I hold that sec 9(1) covers the deceased and in turn, the applicant as a person contemplated thereof. Consequently, she can institute proceedings against an employer like the respondent in the present case

Does OHSA envisage strict liability on the part of the employer?

[23] The hallmark and accepted principles of strict liability is a reference to and a finding of liability or guilt despite the absence of fault. It arises in respect of civil and criminal claims disputes. Strict liability offences are generally of a regulatory nature and where it is particularly important to maximise compliance, for example, public safety or protection of the environment.

[24] The view has prevailed in the past that our courts have demonstrated a reluctance to impose strict liability. On the other hand, legislative developments demonstrate that strict liability is a modern feature of our law.[16]

[25] The first clear indication of acceptance is evident in the *PMB Armature Winders and Bareki NO and another v Gencor Ltd*[17] decisions[18]. In the *PMB Armature Winders* decision Didcott J draws a court faced with such a matter to the basic principles of interpretation of a statute, namely whether the interpretation proffered accords with the intention of the Legislature as opposed to a court's predilection and consideration of the concomitants on the matter. The *Bareki NO and*

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[16] See The Consumer Protection Act 68 of 2008; Telkom (SA) v Duncan[1995] 3 All SA 412(W), Ciba-Geigy(Pty)Ltd v Lushof Farms (Pty) Ltd en n'Anders 2002(2)SA 447 (SCA), National Environmental Management Act, 107 of 1996

[17] Paragraph 7 supra

[18] Supra.

Another v Gencor Ltd decision enjoins a court to have regards to nature of the duty or obligation created by the statute as well as the circumstances under which it arises. The constitutional court in *Cool Ideas 1186 CC v Hubbard and Another*[19] affirms the fundamental tenant and starting point that the words in a statute must be provided with their ordinary grammatical meaning. Where the wording of the section is clear and unambiguous, the Court is obliged to ascertain the intention of the Legislature from the language which it employed[20]. *Cool Ideas* further states that the legislation must be interpreted purposively, having due regards to context, in a manner consistent with and that preserves constitutional validity.

[26] I have placed reliance on these preexisting principles and must as a starting point revisit sec 9 (1) which states that:

> 'Every employer **shall conduct** his undertaking in such a manner as **to ensure**, as far as **reasonably practicable**, that persons other than those in his employment who may be directly affected by his activities **are not thereby exposed to hazards to their health or safety** (own emphasis**).'**

Regulation 5 (1) states that:

> 'An employers or user of machinery **shall take steps to ensure** that a confined space is entered by an employee or other person **only** after the air therein has been tested and evaluated by a person who is competent to pronounce of the safety thereof, and who has certified in writing that the confined space is safe and will remain safe while any person is in the confined space taking into account the nature and duration of the work to be performed therein' (own emphasis).

[27] In providing context for the interpretation of OHSA, Mr. Redding SC placed reliance on Prof Paul Benjamin commentary on OHSA[22] to argue that the aim of the legislation was preventative and was not intended to impose strict liability. Prof Benjamin states that OHSA aims at amongst others,

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[19] 2014(4) SA 474 (CC)

[20] This is as pointed out by Innes CJ as long ago as 1907 in the well-known case of *Venter v R* 1907 TS 910 at 913.

[27.1] a reorientation of the employer's general duties to a more active approach to the elimination or mitigation of hazards;

[27.2] the extension of the employer's obligations to supply workers, with information on dangers present in the work environment as well as provide; and

[27.3] a more comprehensive protection of the public from safety and health hazards emanating from workplaces.

[28] Mr. Redding's argument placed an over-emphasis on the preventative aspects relating to employer-employee responsibilities. It fails to account for the broader import and protections afforded to third parties and the public already alluded to in above. It is incorrect to interpret OHSA in a manner that holds that outsiders who are not connected with the day to day operations of an employer's business and activities have similar obligations to those of employees.

[29] When an account of the ordinary grammatical meaning of the section is considered, it reveals from its plain reading and the language dual components or elements. The first instance is in the use of the words "shall conduct" and "ensure". In my view, this indicates the imposition of duty on an employer in imperative terms. The second instance is the legislation of the standard of care through the use of the words as far as '"reasonably practicable". The elements of this standard required of an employer are articulated in the regulation 5.

[30] In my view, the effect is that the section and regulation have not only imposed a duty of care on the employer. They have, also, hard-wired the standard of care. In this regard, the liability of an employer flows directly from the malum prohibitum conduct of the breach of the duty as well as the breach of the prescribed standard imposed by OHSA.

[31] When an account of section 37(1) in respect of the presumption of acts or omissions by an employer is considered, there is more required of an employer. The section states that the fact that an employer has issued instructions forbidding any act or omission of the kind in question shall not, in itself, be sufficient proof that it took all reasonable steps to prevent the act or omission. In my view, this puts the conduct of the employer under scrutiny beyond the incidence of the onus of proof. To exculpate itself from liability, the employer must show that it met the prescribed standard by demonstrating the actual measures taken to prevent or mitigate the safety risk or hazard created.

[32] In my view, liability flows naturally from the regulation of the foreseeable risk inherent in the employer's hazardous activity and operations as well as the conduct which if proved, is found wanting by falling below the standard of care prescribed for the nature of activity or operations in which it is engaged. In this regard, OHSA imposes both a duty and a standard of care in absolute terms. For this reason, on the plain reading of OHSA, and the reasons above, the liability of the employer is a strict one. It is thus not necessary to consider other paralell legislation in this regard.

[33] Other than the intrinsic interpretation of OHSA Mr. Redding's contention against the imposition of strict liability is that negligence will not be a factor and the Respondent will be prejudiced by this. I understood this to mean that the respondent will be deprived the opportunity of proving the converse, that is, the absence of negligence on its part. Since I have accepted that the section sanctions and imposes strict liability, this argument must first be evaluated against what the applicant would need to prove to succeed. She would need to show that:

[33.1] the respondent owed a duty of care to the deceased as a foreseeable third party or bystander contemplated in OHSA;

[33.2] a breach of that duty in that the respondent's conduct fell below the applicable standard of care referred to in Regulation 5 of the activity and operations in which it is engaged;

[33.3] as well as injury to the deceased in turn the applicant that was caused by the breach; and

[33.4] the damages suffered.

[34] The elements above are to be contrasted with the principles to determine the traditional common law test of negligence. These were developed and restated in numerous cases over time. *Kruger v Coetzee*[21] and in *Ngubane v South African Transport Services.*[22] The assessment is an objective test applied in both criminal and civil cases. The common denominator from case law is that a system of assessment of liability based on a breach of a standard of care expected of a reasonable person has evolved. The decision in *Herschel v Mrupe* is emphatic that the test is grounded in the circumstances of the particular case and is not one in the air. I have already held above that OHSA imposes dually, a duty and a standard of care on an employer resulting in a strict liability of an employer. The test of reasonableness of the employer's measures is entrenched.

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[21] 1966(2) SA 428 A 'For the purposes of liability culpa arises if – (a) a diligens paterfamilias in the position of the defendant – (i) would foresee the reasonable possibility of his conduct injuring another in his person on property and causing him patrimonial loss; and (ii) would take reasonable steps to guard against such occurrence; and (b) the defendant failed to take such steps.'

[22] Kumleben JA, states that 'Once it is established that a reasonable man would have foreseen the possibility of harm, the question arises whether he would have taken measures to prevent the occurrence of the foresseable harm. The answer depends on the circumstances of the case. There are, however, four basic considerations in each case which influence the reaction of the reasonable man in a situation posing a foreseeable risk of harm to others: (a) the degree or extent of the risk created by the actor's conduct; (b) the gravity of the possible consequences if the risk of harm materialises; (c) the utility of the actor's conduct; and (d) the burden of eliminating the risk of harm.'

[35] Given that the standard of care is already hard wired in OHSA together with the regulations, any existing fault (whether dolus or culpa) is inherent and can be inferred from the failure to meet the prescribed standard if it is found to be so from the facts. Furthermore, the enacted measure of reasonableness touches squarely on the extent of the employer's negligence or otherwise. I must accept that the effect of section 37 of OHSA is that the onus would be shifted to the respondent to demonstrate the reasonable measures taken. In my view, the absence of negligence on the part of the respondent will be an inherent component of discharging the onus of proving that it took the reasonable measures required of it. Under such circumstances, in a claim based on the breach of the provisions of OHSA, it would not be necessary to deal with negligence separately. It will be inherent or can be inferred from the failure to meet the prescribed standard should the failure be proved. Thus, an employer would not be deprived of showing an absence of negligence on its part as contended. To hold to the contrary would result in yet another absurdity. The complaint by the respondent is not well founded.

Whether a claim at common law can lie side by side, with an alternative claim of a statutory breach?

[36] The respondent alleges a confusion will result if I were to allow strict liability simultaneously with the alternative common law claim. I have examined the respondent's complaint against the decision in *In Perre v Apand (Pty) Ltd*[23] as well as the decision *in Premier, Western Cape v Fair Cape Property Developers (Pty) Ltd. In Perre,* McHugh J held that in most delictual cases, the facts which establish negligence are precisely the same as those which establish wrongfulness even though that characteristic does not detract from the distinction between the legal elements and the necessity for the success of any claim under the aquillian action that both must be established. In *Premier, Western Cape decision,* Lewis JA held the test of reasonableness goes not only to negligence but also to determine the boundaries of lawfulness.'

[23](1999) 198 CLR 180 (H C of A), para 132.

[37] In *Le Roux v Dey (Freedom of Expression Institute and Restorative Justice Centre as amici curiae),*[24] the constitutional court cautions against confusion. The court held that what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct (which is part of the element of negligence). Reasonableness in respect of wrongfulness concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.' In my view, the malum prohibitum conduct has, in the wisdom of the legislature already been regulated.

[38] The question is whether the codification of the duty and standard of care excludes a claim in delict based on common law. In my view, the respondent confuses the nature of the inquiry with regards to wrongfulness to be proved at common law and that flowing from the statutory imposition of the duty in OHSA. It seems to me that an onerous task lies ahead on the applicant who seeks to plead her case in the manner sought than on the respondent. I am of the view that the respondent's claim that it will be prejudiced is not well founded. Nothing in the reading of the provisions of OHSA indicates that the codification of the duties excludes or is intended to exclude or limit a common law claim a party may have. Both actions can lie side by side, pleaded in the alternative as sought.

[39] Given the findings above, the application for the amendment of the pleadings constitutes a matter that is deserving of consideration by the courts. There is surprisingly thin case law developed on the question of liability of an employer or user under OHSA. It is a matter that is deserving of proper ventilation. The proceedings are not at an advanced stage that they would prejudice the respondent. The prejudice claimed by the respondent is not well founded and is not one that cannot be cured by proper narrowing of the issues through an effective pretrial conference.

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[24] 2011 (3) SA 274 (CC) para 122.

Costs

[40] The respondent argued substantive points of law some of which fell outside of The Notice of the Objection to the Amendment filed. It was not succesful. Mr. Redding called on me to adopt a more flexible approach as these issues were dealt with in the heads of argument. He conceded that if I was not with him, then he is constrained by the terms of notice objection filed.

[41] I am of the view that while the respondent can be criticised for the handling of some of the apsect of the objection, it is not a matter that warrants that punitive costs be awarded. The questions of law were not raised spuriously. Nevertheless, the respondent was not successful. It follows that the applicant should not be deprived of her costs. The costs must follow the result.

[42] In the result, I make the following order:

1. The amendments sought in 4.2, 4.3 and 4.4 above are granted.
2. The respondent is ordered to pay the costs of the applicant except in respect of the amendment with regards to the date which was not opposed.

Siwendu AJ
Acting Judge of the High Court

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Date of hearing:	15 September 2016
Date of judgment:	09 December 2016