OF INTEREST

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)

CASE NO. 579/2013

In the matter between:

ASANDA BEAUTY TYIBILIKA Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF HEALTH,
EASTERN CAPE PROVINCE Defendant

Practice – Amended Rule 37A – Case Management has ushered in a new era that requires practitioners and litigants to be mutually concerned with and responsible for meeting the objectives of case management. Gone are the days of technical point taking or practitioners adopting a supine attitude when it comes to trial matters proceeding by simply waiting for the other to do all the gearing up for trial regardless of who bears the onus or who is *dominus litis*. Rule 37A (2) (c) instead behoves the parties on either side to act *professionally* and in the mutual interest of promoting effective case management so that trials run when they are supposed to, and that their completion is expedited. Both are also enjoined to *address the problems* that may arise in finalising cases. It is mutual trial readiness that case management aspires to – Wasted costs and blame apportioned between the parties *in casu*.

JUDGMENT IN RESPECT OF COSTS ARISING
FROM THE REMOVAL OF THE MATTER
FROM THE TRIAL ROLL ON 16 NOVEMBER 2021

HARTLE J

[1] The abovementioned action was enrolled for hearing on quantum on 16 November 2021.[1]

[2] The matter served before Goosen J at a trial roll call hearing on 12 November 2021. He issued a directive confirming that the matter was ready to proceed to trial on the allocated trial date. It appears from a note endorsed on the file for the benefit of the trial judge however that despite the order issued by him on the morning of 12 November 2021, he had subsequently been approached by the State Attorney representing the defendant who had suggested a contrary view. The note suggests further that the order had been taken by the plaintiff's representatives in the absence of the defendant despite a request by them to stand the matter down in order to obtain the defendant's instructions. Also noted by my colleague was the defendant's concern that she wished to appoint experts to counter those filed by the plaintiff, hence her reservation that the matter was trial ready.

[3] Under these circumstances Goosen J deferred to the trial court to consider the merits of the defendant's contentions raised in chambers regarding the question of trial readiness.

[1] A merits judgment in favour of the plaintiff was delivered on 21 May 2019.

[4] On the morning of the trial Mr. Mtshabe who appeared for the plaintiff insisted that the plaintiff was ready to proceed on trial.[2] Mr. Sishuba who appeared for the defendant argued conversely however that the matter was not trial ready and should not have been endorsed as such in the first place. Mr. Sishuba requested me to issue a declarator to the effect that the matter was "not trial ready", which would occasion an obvious removal of the matter from the trial roll, with the plaintiff to pay the wasted costs occasioned by the matter's unnecessary enrolment, alternatively unwarranted certification of trial readiness whereas it was far from ready for adjudication according to the defendant. After hearing the parties' submissions, I ruled that the matter be removed from the trial roll, but I reserved the question of costs.

[5] The expectation regarding what is to happen at trial roll call - the culmination of the judicial case management trajectory, is set out in the "Practice directive on judicial case management, Eastern Cape Division"[3] as follows:

> "1. This Practice Directive is issued pursuant to the amendment of the Rules of Court set out in Government Gazette 42497, R842 promulgated on 31 May 2019.
> 2. The amendment introduces, *inter alia,* rule 37A, which, in turn, introduces Judicial Case Management as part of the Uniform Rules of Court (the Rules).
> 3. In order to facilitate the introduction of Judicial Case Management, and to regulate matters pending further directives which will, in due course be issued, the following procedures shall apply throughout the Division:
> *3.1 The primary responsibility to manage a case and prepare same expeditiously for trial remains with the parties and their legal representatives, upon whom it is incumbent to comply with the Rules.*
> 3.2 In terms of rule 37A (1) Judicial Case Management as envisaged by rule 37A shall apply to the following categories of cases:
> 3.2.1 all damages claims against the Road Accident Fund; and
> 3.2.2 all damages claims founded on alleged medical negligence.
> 3.3 The categories of matters set out in paragraph 3.2 above shall only be enrolled for trial in accordance with the provisions set out in rule 37A
> 3.4 In respect of all matters other than those set out in paragraph 3.2 above, the provisions of rule 37 shall apply and such matter shall be enrolled for trial by the Registrar in accordance with rule 3 of the Rules Regulating the Conduct of the

[2] The matter was ostensibly enrolled for hearing on the printed trial roll for 15 November 2021, but my clerk was informed by one of the parties that this was a mistake. The matter was called again on 16 November 2021 when the parties appeared before me.

[3] This Directive was issued by the Judge President of the Eastern Cape Division on 25 June 2019.

proceedings of the Eastern Cape Division published in GN R3289 of 12 September 1969.

3.5 All civil matters enrolled for hearing (whether in accordance with rule 37A or otherwise) shall be subject to a weekly roll call that shall henceforth be held before a judge (in open court) at each seat of the Division on Friday at 09h00 four (4) weeks prior to the week in which the matter is enrolled.

3.6 The purpose of the roll call shall be to ensure that the parties have complied with the Rules and that the matter is ready to proceed to trial on the allocated trial date.

3.7 In respect of those matters to which rule 37A does not apply, the parties shall:

3.7.1 be required at the roll call to:

(a) satisfy the Judge that they have substantially complied with the provisions of rule 37 of the Rules and that the matter is ripe for adjudication on the trial date;

(b) deal with any outstanding matters relating to trial-readiness;

(c) indicate what steps have been taken to narrow or limit the issues in dispute; and

3.7.2 file a minute of the pre-trial conference dealing with the matters envisaged in rule 37(6) which minute shall clearly identify the issues to be tried.

3.8 Only practitioners with right of audience in the High Court shall appear at the roll call, and shall do so appropriately robed.

3.9 The record of the roll call process shall be included in the trial file.

3.10 In respect of those matters enrolled pursuant to rule 37A, the roll call shall serve as final certification of trial-readiness. The parties shall be obliged to file a minute recording compliance with any outstanding directives and such further agreements reached by the parties which relate to the conduct of the trial.

3.11 If at the roll call hearing it appears that a party has not complied with the provisions of rule 37 or 37A the Judge concerned may direct that a further conference be convened and that a minute be filed. In such event the matter may be set down for a further roll call hearing. The Judge may in addition issue such further orders as may be required to facilitate compliance with the Rules and bring the matter to trial readiness.

3.12 If the matter has been settled prior to the roll call hearing, the parties will be required to present a draft order detailing the settlement and, where appropriate, affidavits and other documents relevant to any existing contingency fee agreement. The Judge then presiding may if he/she is satisfied, finalize the matter in accordance with the agreement or, in appropriate cases, defer issuing such order until the terms of the settlement and/or contingency agreement shall be considered.

3.13 These Directives replace all previous Directives relating to Judicial Case Management, which are hereby withdrawn, and shall come into effect on 01 July 2019."

(Emphasis added.)

[6] It is also necessary to consider the import of the Uniform Rule of application herein. Rule 37A provides as follows:

"**37A. Judicial Case Management.**—(1) A judicial case management system shall apply, at any stage after a notice of intention to defend is filed—

(*a*) to such categories of defended actions as the Judge President of any Division may determine in a Practice Note or Directive; and (*b*) to any other proceedings in which

judicial case management is determined by the Judge President, of own accord, or upon the request of a party, to be appropriate.

(2*) Case management through judicial intervention—*

(a) shall be used in the interests of justice to alleviate congested trial rolls and to address the problems which cause delays in the finalisation of cases;

(b) the nature and extent of which shall be complemented by the relevant directives or practices of the Division in which the proceedings are pending; and

(c) shall be construed and applied in accordance with the principle that, notwithstanding the provisions herein providing for judicial case management, the primary responsibility remains with the parties and their legal representatives to prepare properly, comply with all rules of court, and act professionally in expediting the matter towards trial and adjudication.

(3) The provisions of rule 37 shall not apply, save to the extent expressly provided in this rule, in matters which are referred for judicial case management.

(4) In all matters designated to be subject to judicial case management in terms of subrule (1) (a) at any stage before the close of pleadings, the registrar may—

(*a*) direct compliance letters to any party which fails to comply with the time limits for the filing of pleadings or any other proceeding in terms of the rules; and

(*b*) in the event of non-adherence to the directions stipulated in a letter of compliance, refer a matter to a case management judge designated by the Judge President who shall have the power to deal with the matter in terms of the practice directives of the particular Division concerned.

(5) (a) Notwithstanding the allocation of a trial date, a case that is subject to judicial case management shall not proceed to trial unless the case has been certified trial ready by a case management judge after a case management conference has been held, as provided for in subrule (7).

(b) A case management judge shall not certify a case as trial ready unless the judge is satisfied—

(i) that the case is ready for trial, and in particular, that all issues that are amenable to being resolved without a trial have been dealt with;

(ii) that the remaining issues that are to go to trial have been adequately defined;

(iii) that the requirements of rules 35 and 36 (9) have been complied with if they are applicable; and

(iv) that any potential causes of delay in the commencement or conduct of the trial have been pre-empted to the extent practically possible.

(*c*) A case management judge may order directions on the making of discovery where the judge considers that such directions may expedite the case becoming trial ready.

(6) In every defended action in a category of case which has been identified in terms of subrule (1) (a) as being subject to judicial case management in which any party makes application for a trial date following the close of pleadings, the registrar shall issue a notice electronically to the parties, at the addresses furnished in terms of rules 17 (3) (*b*) or 19 (3) (*a*), in respect of the holding of a case management conference.

(7) The notice by the registrar in terms of subrule (6) shall inform the parties (*a*) of the date, time and place of a case management conference in the matter to be presided over by a case management judge; (*b*) of the name of the case management judge, if available; (*c*) that they are required to have held a pretrial meeting before the case management conference at which the issues identified in subrule (10) in relation to the conduct and trial of the action must have been considered; and (*d*) that the plaintiff is required. not less than two days before the time appointed for the case management conference, to—

(i) ensure that the court file has been suitably ordered, secured, paginated and indexed; and

(ii) deliver an agreed minute of the proceedings at the meeting held in terms of paragraph (c), alternatively, in the event that the parties have not reached agreement on the content of the minute, a minute signed by the party filing the document together with an explanation why agreement on its content has not been obtained.

(8) The minute referred to in subrule (7) (d) (ii) shall particularise the parties' agreement or respective positions on each of the issues identified in subrule (10) and, to the extent that further steps remain to be taken to render the matter ready for trial, explicitly identify them and set out a timetable according to which the parties propose, upon a mutually binding basis, that such further steps will be taken.

(9) (*a*) In addition to the minute referred to in subrule (7) (d) (ii), the parties shall deliver a detailed statement of issues, which shall indicate—

(i) the issues in the case that are not in dispute; and

(ii) the issues in the case that are in dispute, describing the nature of the dispute and setting forth the parties' respective contentions in respect of each such issue.

(*b*) A case management judge may, upon considering the statement by the parties referred to in paragraph (a), direct that appearance by one or all of the parties is dispensed with.

(10) The matters that the parties must address at the pretrial meeting to be held in terms of subrule (7) are as follows—

(*a*) The matters set forth in rules 35, 36 and 37 (6);

(*b*) the soliciting of admissions and the making of enquiries from and by the parties with a view to narrowing the issues or curtailing the need for oral evidence;

(*c*) the time periods within which the parties propose that any matters outstanding in order to bring the case to trial readiness will be undertaken;

(*d*) subject to rule 36 (9), the instruction of witnesses to give expert evidence and the feasibility and reasonableness in the circumstances of the case that a single joint expert be appointed by the parties in respect of any issue;

(*e*) the identity of the witnesses they intend to call and, in broad terms, the nature of the evidence to be given by each such witness;

(*f*) the possibility of referring the matter to a referee in terms of section 38 of the Act;

(*g*) the discovery of electronic documents in the possession of a server or other storage device;

(*h*) the taking of evidence by video conference;

(*i*) suitable trial dates and the estimated duration of the trial; and

(*j*) any other matter germane to expediting the trial readiness of the case.

(11) Without limiting the scope of judicial engagement at a case management conference, the case management judge shall—

(*a*) explore settlement, on all or some of the issues, including, if appropriate, enquiring whether the parties have considered voluntary mediation;

(*b*) endeavour to promote agreement on limiting the number of witnesses that will be called at the trial, eliminating pointless repetition or evidence covering facts already admitted; and

(*c*) identify and record the issues to be tried in the action.

(12) The case management judge may at a case management conference—

(*a*) certify the case as trial ready;

(*b*) refuse certification;

(*c*) put the parties on such terms as are appropriate to achieve trial readiness, and direct them to report to the case management judge at a further case management conference on a fixed date;

(*d*) strike the matter from the case management roll and direct that it be re-enrolled only after any noncompliance with the rules or case management directions have been purged;

(*e*) give directions for the hearing of opposed interlocutory applications by a motion court on an expedited basis;

(*f*) order a separation of issues in appropriate cases notwithstanding the absence of agreement by the parties thereto;

(*g*) at the conclusion of a case management conference, record the decisions made and, if deemed convenient, direct the plaintiff to file a minute thereof;

(*h*) make any order as to costs, including an order *de bonis propriis* against the parties' legal representatives or any other person whose conduct has conduced unreasonably to frustrate the objectives of the judicial case management process.

> (13) The record of the case management conference, including the minutes submitted by the parties to the case management judge, any directions issued by the judge and the judge's record of the issues to be tried in the action, but excluding any settlement discussions and offers, shall be included in the court file to be placed before the trial judge.
> (14) The trial judge shall be entitled to have regard to the documents referred to in subrule (13) in regard to the conduct of the trial, including the determination of any applications for postponement and issues of costs.
> (15) Unless the parties agree thereto in writing, the case management judge and the trial judge shall not be the same person.
> (16) Any failure by a party to adhere to the principles and requirements of this rule may be penalised by way of an adverse costs order."
> (Emphasis added)

[7] It is clear from the provisions above, and from the various forms employed in this division to facilitate the mechanism of case management, both judicially and via the registrar, that the protocol has ushered in a new era that requires practitioners and litigants to be mutually concerned with and responsible for meeting the objectives of case management. Gone are the days of technical point taking or practitioners adopting a supine attitude when it comes to trial matters proceeding by simply waiting for the other to do all the gearing up for trial regardless of who bears the onus or who is *dominus litis*. Rule 37A (2) (c) instead behoves the parties on either side to act *professionally* and in the mutual interest of promoting effective case management so that trials run when they are supposed to, and that their completion is expedited. Both are also enjoined to pre-empt and *address the problems* that may arise in finalising cases. Further, although templates and forms are tools employed by this division to achieve the aims of case management, it is not the perfunctory responses or merely going through the motions that meet that end. Parties must through their continuing efforts engage earnestly with each other, the case management judge, and the court to promote meaningful access to justice and the effective use of the court's resources.[4]

[4] This was the expectation in paragraph 1 of the Eastern Cape Joint Rules of Practice even before the advent of case management. The provision remains of application and enjoins the parties to remain in constant communication and co-operation right up to the date of the trial.

[8] Submissions concerning the trial readiness of the present matter were made from the bar.[5]

[9] In brief it was contended on behalf of the defendant that the matter had firstly been improperly set down. Secondly, it was suggested that the matter could not be trial ready because the pleadings, "have not yet closed". In support of this contention Mr. Sishuba pointed to the fact that the defendant had filed a late amendment to her plea introducing the "public healthcare defence" to which the plaintiff still had time to replicate and the parties time still to file their respective expert notices and summaries based on the amended defence.[6] (The defendant also prays in the amended plea that any damages awarded to the plaintiff are to be paid in periodic instalments over a period of five to eight years, which may also entail the development of the common law.)[7] Thirdly, and assuming that the matter had been properly set down, the defendant claimed that she had requested that the action be postponed. In this respect it was recorded

[5] Ideally a substantive application for the removal (or a postponement) of the matter ought to have been made by the defendant because there was no narrative before me of the relevant events bearing specifically on the question of costs. Instead, I had to trawl through the court file to glean what had supposedly happened, and when, to supplement the information provided by counsel. There were also conflicting "versions" offered to me from the bar as to what had conduced to the state of trial unreadiness and more importantly who was responsible therefor, which "dispute" I realised would not be capable of being resolved in the customary fashion. I am however mindful of the fact that the very objective of case management and of the requirement that civil matters be subjected to trial roll call four weeks before the allocated hearing date, are measures among others to expedite the finalisation of trials and that a robust approach is called for to assess whether the parties have substantially complied with the Uniform Rules and the matter is in fact ripe for adjudication on the trial date. The tenor of the provisions of Rule 37A, read together with Case Management Directive of this division and the questions posed to the parties in the relevant checklists filed in anticipation of the trial roll call hearing, make it plain that the primary responsibility is on the litigating parties to manage the case and prepare for trial. The Judge concerned should therefore be able to rely on their assurances endorsed in the trial minutes, or recorded in the checklist(s), or given orally at the trial roll call hearing, as to the state of trial readiness and to accept these at face value. This should therefore eschew the need for unnecessary applications when situations arise, as they will, requiring some introspection into the question of trial readiness and who or what conduced to that state especially if a punitive costs order is being sought. An overly formal approach will obviously retard the objectives of case management and add to the costs of the litigation. in the result I dealt with the matter practically as a preliminary objection by the defendant to the trial proceeding, if not as a "further roll call hearing" such as is envisaged in the Case Management Practice Directive albeit such hearing had perforce to be entertained at the doors of the trial court. I also had to accept at face value the suggestion that the defendant's interests had not been properly represented at the roll call hearing by her "absence".

[6] The "Public Health Care Defence" requires a development of the common law. MEC for Health & Social Development, Gauteng v DZ obo WZ ("DZ") 2018 (1) SA 335 (CC) at paras [44] – [59].

[7] DZ *Supra* at paras [24] and [25].

that the plaintiff's attorneys had been advised in writing that the issues for determination raised by the amendment are similar to those which in that week were the subject of adjudication by my colleague Griffiths J in the matter of Andiswa Noyila v MEC for Health, Eastern Cape Province (Bhisho case no. 36/2017), the hearing of which was contemporaneously underway in East London at the Tribunal, the idea being that the Noyila matter be disposed of first.[8] I was informed that this letter had attracted no reply and indeed the plaintiff's local attorney appeared visibly surprised when in court he was shown the letter to which he had purportedly not furnished a response.

[10] Further, a general objection was raised to the effect that one of the plaintiff's notices in terms of rule 36 (9)(a) and (b) in respect of Dr Rob Campbell were not compliant with those sub-rules, both in respect of the main purpose of sub-rule (9) as well as the *dies* prescribed therein.

[11] Although Mr. Mtsabe indicated that the plaintiff was ready to proceed on trial, he did not vociferously oppose Mr. Sishuba's request that the matter be removed, provided that the defendant pay the wasted costs occasioned by such removal.[9]

[8] The matter of Noyila ran for two weeks from 16 November 2021 and then stood adjourned until March next year.

[9] Since I was not shown the letter, it is uncertain whether the defendant tendered wasted costs.

[12] He pointed out however that, as far as the plaintiff was concerned, the matter had been properly enrolled and had been confirmed trial ready by the State Attorney acting on the defendant's behalf in the trial roll call checklist itself.[10] He further asserted that the plaintiff's expert reports had been filed timeously and took into account the defendant's proposed amendment, even if it was not perfected until after trial roll call. (This assurance however misses the defendant's unique argument that because of her new defence raised, the pleadings have been "re-opened" and the parties therefore *still have time* to file their expert notices and summaries.) He added that the plaintiff did not intend to take any of the steps envisaged in rule 28 (8) post amendment, this removing any encumbrances to the matter proceeding.

[13] Turning to the first ground upon which question of trial readiness was challenged Mr. Sishuba suggested in this respect that the plaintiff had simply issued her notice of set down dated 23 July 2021 advising that the matter would be heard on "15 November 2021" (*sic*) without any certification by a judge that the matter was trial ready and without first holding the requisite pre-trial conference.[11]

[14] Although I could not find any directive in the court file certifying the matter trial ready (in respect of the separated issue of quantum), or the registrar's notice of enrolment on the trial roll, it is in my view improbable that the trial date was allocated by the registrar in the absence of the requisite case management

[10] Two checklists appear from the file, the last one dated 9 November 2021. It was signed by both the plaintiff and the defendant's attorneys in support of the submission that "the matter is trial ready". The checklist was filed together with the parties' Joint Practice Note (also signed by both sets of attorneys) but rather unfortunately suggests a perfunctory dealing with the matter because it related the names of the expert witnesses who would testify in respect of the *merits*, whereas the merits have already been disposed of by way of a judgment and order of this court dated 21 May 2021. It is regrettable that parties are not applying their minds to the true objective of case management, but rather are simply going through the motions at trial roll call hearings. It is significant that absolutely no mention is made in either as to a necessary, or even possible, postponement.

[11] See rule 37A quoted above which sets out the pre-requisites applicable to the enrolment of matters for trial.

procedures having been followed.[12] In the file I found trial preparation checklists for certification of trial readiness (Forms 1(a)), as well as pre-trial minutes, suggesting that the customary pre-trial protocols must have been adopted. The plaintiff could therefore not have acted independently in filing a notice of set down of the matter but would have done so only after receipt of the registrar's notice of allocation of a trial date. In any event the enrolment upon trial, on the basis of a Judge's certificate of trial readiness to get to even that point, would have been conditional upon the matter being finally certified trial ready at roll call.[13]

[15] There is therefore no merit in the assertion that the matter was prematurely enrolled, but if there was in the first place any valid basis for the defendant to be suggesting that the set down was unprocedural, or improper, or that she had been blindsided by the enrolment, one would have expected her to have volubly complained or raised a formal challenge to the filing of the plaintiff's notice of set down. This technical objection appears to have been raised as an afterthought.

[16] The next question concerns the impact of the defendant's late amendment on the status of the proceedings.

[17] The defendant gave notice of her intention to amend her plea by the introduction of the public healthcare defence on 23 September 2021 but did not perfect her amendment until 12 November 2021. The delivery of the amended plea seems to have occurred after the parties appeared before Goosen J at trial roll call, but its absence was given limited recognition to in the trial roll call

[12] Since 1 July 2019 stringent case management processes have been in place in this Division. The registrar is obliged to wait for a judge's certification before any action is enrolled for hearing.
[13] See paragraph 3.10 of the Practice Directive on Judicial Case Management.

checklist in the sense that the parties recorded that the defendant would attend to its filing.

[18] The effect of rule 28 (5) is that if a proposed amendment to a pleading is not objected to, the party's demur in this respect is taken to mean that he/she consents to the proposed amendment. The party seeking the amendment thereby acquires the right to amend, but the actual amendment of the pleadings takes place only when the amendment is effected within the stipulated time in accordance with sub-rule (7), that is within ten days after the expiration of the initial period of ten days.[14] The other side to the coin is that a party who has consented to the amendment and allowed it to be incorporated (by not objecting), is not entitled thereafter to argue that the court should disregard it.[15]

[19] The plaintiff in this instance indeed accepted the inevitably of the matter proceeding on the basis of the defendant's amended plea and took steps to prepare her case for trial along this basis.

[20] Reading between the lines, however, there seems to have been no communication between the parties regarding the obvious impact of the amendment on the trial readiness of the matter. Whereas Mr. Mtshabe asserted that the plaintiff had no intention of filing any further pleadings or reacting formally to the amendment, the impression is gleaned that the defendant was unaware of the plaintiff's attitude towards the late amendment or of the fact that she was co-incidentally preparing her case to meet the defendant's amended defence foreshadowed in her notice of intention to amend her plea.

[14]Van Heerden v Van Heerden 1977 (3) SA 455 (W) at 457G – 458A; Fiat SA (Pty) Ltd v Bill Troskie Motors 1985 (1) SA 355 (O) at 358 (C).
[15] Presto Parcels v Lalla 1990 (3) SA 287 (E).

[21] It appears from the court file that the plaintiff, no doubt in response to the late amendment, filed not one, but two, expert reports in October 2021 already to counter the suggestion that the defendant is well placed to provide care-in-kind to the plaintiff or to make payments on a periodic basis instead of a lumpsum payment as is the traditional manner in which quantum is ordered to be paid by the courts of our country. For some or other reason those same reports were filed again on 11 November, giving the impression that they were being filed "late" in relation to the trial date of 16 November 2021. The defendant's argument however is not that the expert notices and reports were filed "out of time" in relation to the trial date, but rather that their existence necessitated the defendant *responding* to them (Sic) by filing expert reports of her own in substantiation of her new defence. What was suggested is that she would be prejudiced if she did not have an opportunity to file her own expert reports to "counter" the views held by the plaintiff's experts in this regard.

[22] This is somewhat ironic however since the defendant bears the onus to adduce evidence to substantiate the argument raised by her for the development of the common law.[16] (Even in respect of a mitigation of healthcare costs defence she would also have an evidential burden to counter the plaintiff's evidence that her damages claimed are reasonable.)[17] One would have imagined therefore that if the defendant was serious about pursuing her amended defence at the trial that she would firstly have delivered her amendment early and, secondly, have garnered the written views of experts who would support her argument that the common law ought to be developed *in casu*. She should also have been in a position already to file formal notices in terms of rule 36 (9) (a), if not in terms of sub-rule (b), well in time before the trial date.[18] Indeed, I imagine that some

[16] DZ *Supra* at [20] to [23]; MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government ("MSM") 2020 (2) SA 567 (GJ) at paras [23] to [36].
[17] DZ and MSM *Supra*.
[18] The defendant should also ideally have filed a notice in terms of rule 16A. MSM *Supra* at paras [10] to [15].

consultation with these experts and vital witnesses would have preceded the crafting of the defendant's notice of intention to amend, leaving her and her representatives in no doubt as to the challenges ahead of her and how much work was required to prepare for trial on the basis of her amended plea.[19] Although litigating parties are certainly entitled to the running of *dies* that prompt the next step it must not be lost sight of (within the context of the new case management system) that such entitlement will be constrained and or must be attenuated or adjusted where late amendments are sought to be introduced after the matter has already been enrolled for trial. The party seeking to amend must certainly consider how the amendment will affect the trial proceeding and be open about such an impact, especially when it comes to the issue of tendering costs. In this respect the defendant on the one hand seemed to require an indulgence by having asked the plaintiff to agree to a postponement of the trial, but on the other was not prepared to own that she was the author of the disruption. She should indeed have offered the wasted costs that would be occasioned by accommodating her in this respect to lay a basis for the development of the common law.

[23] Even so, evidently no discussion ensued between the parties concerning how the scope of the litigation had been changed, if at all, by the now perfected amendment or how this might impact the trial proceeding, neither was Goosen J brought up to speed regarding the recent developments or how this would affect matters. Although the plaintiff asserted that she was fully ready to run, it helps not a jot for one party to be prepared and the other clearly not. It is mutual readiness that case management aspires to.

[24] Instead of approaching the matter from the angle of the parties' obligations to professionally case management the trial - the duty at the core of mutually

[19] MEC for Health & Social Development, Gauteng v DZ obo WZ Supra at paras [20] and [23].

getting a matter to a state of trial readiness, the defendant adopted a technical approach in assessing the status of the matter.

[25] Mr. Sishuba referred the court to Natal Joint Municipal Pension Fund v Endumeni Municipality[20] in which the concept of *litis constestatio* is explained as follows:

> "The origin of the concept of *litis contestatio* is the formulary procedure of the Roman law in which the litigants appeared before the praetor, who formulated the issues that the judge had to decide. Once the issues had been formulated the stage of *litis contestatio* was reached.[21] In *Government of the Republic of South Africa v Ngubane*[22] Holmes JA said:
>
> > 'In modern practice *litis contestatio* is taken as being synonymous with close of pleadings, when the issue is crystallised and joined … And in modern terminology, the effect of *litis contestatio* is to "freeze the plaintiff's rights as at that moment".'
>
> There is no problem with this formulation when parties abide by their pleadings and conduct the trial accordingly. Frequently, however, they do not do so because other issues arise that they wish to canvass and either formally, by way of an amendment to the pleadings, or informally, as in the present case, the scope of the litigation is altered. Here the defendant sought to add new issues specifically relating to the validity of the amendment that introduced the proviso. Up until then the parties were at one that the proviso was in force and available to be relied on by the Fund, subject to the issues around its interpretation. If the plaintiff's rights were frozen at the close of pleadings the basis would have been that the proviso was in force. It would make a mockery of the principles of *litis contestatio* to permit Endumeni to depart from its previous stance by challenging the validity of the proviso, but to bind the Fund to a factual situation at the close of pleadings that had altered by the time that Endumeni sought to challenge the validity of the proviso."

[26] He also referred the court to the provisions of rule 29 (1). This sub-rule dictates the relevant scenarios in which pleadings are considered closed. This occurs when:

> "(a) either party has joined issue without alleging any new matter, and without adding any further pleading;

[20] 2012 (4) SA 593 (SCA) at para [14].

[21] JAC Thomas Textbook on the Roman Law, Chapter VII on the formulary process. P van Warmelo An Introduction to the Principles of Roman Civil Law at 278, para 733.

[22] Government of the Republic of South Africa v Ngubane 1972 (2) SA 601 (A) at 608D-E.

(b) the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;
(c) the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; and
(d) the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed."

[27] In *casu*, he submitted that the pleadings could not be regarded as closed for purposes of assessing the question of trial readiness. Rather he suggested that the amendment re-opened the pleadings and that they would remain open until after expiry of the appropriate *dies*. The effect of this for present purposes, so he reasoned, meant not only that the plaintiff still had time to file a replication to the amended plea, but that it remains open to her and the defendant to still file expert notices and reports within 60/30 and 120/90 days respectively after "the close of pleadings" which date, according to him, is one still in the future.

[28] His underpinning for this view, namely that we are dealing with a fresh *litis contestatio* so to speak, and a new anticipated moment of close of pleadings, is the *dictum* in Natal Joint Municipal Pension Fund to the following effect:

> "The answer is that when pleadings are re-opened by amendment or the issues between the parties altered informally, the initial situation of *litis contestatio* falls away and is only restored once the issues have once more been defined in the pleadings or in some other less formal manner. That is consistent with the circumstances in which the notion of *litis contestatio* was conceived. In Roman law, once this stage of proceedings was reached, a new obligation came into existence between the parties, to abide the result of the adjudication of their case. Melius de Villiers[23] explains the situation as follows:
>
> > 'Through litis contestation an action acquired somewhat of the nature of a contract; a relation was created resembling an agreement between the parties to submit their differences to judicial investigation …'
>
> When the parties decide to add to or alter the issues they are submitting to adjudication, then the 'agreement' in regard to those issues is altered and the consequences of their prior arrangement are altered accordingly. Accordingly, when in this case they chose to reformulate the issues at the commencement of the trial, a fresh situation of *litis contestatio* arose and the rights of the Fund as plaintiff were fixed afresh on the basis of the facts prevailing at that stage."[24]

[23] Melius de Villiers The Roman and Roman Dutch Law of Injuries 236.
[24] *Supra* at para [15].

[29] It is unnecessary in my view for me to consider whether the amendment to the plea has in fact introduced a fresh situation of *litis constestatio* in the manner envisaged by Wallis JA in Natal Joint Municipal Pension Fund.[25] The issue of the extent of the quantum was always in dispute on the pleadings. The defendant by her amended plea has simply sought to introduce a different manner of payment and requests the court to develop the common law so as to allow the quantum to be paid periodically or in instalments and/or to deliver services in kind.

[30] Whilst I accept that this produces an angle that was not there before and a novel approach requiring the common law to be developed, I cannot agree from a case management perspective that the mere filing of the amended plea altered the fixed date envisaged in rule 29 (1). In any event, it appears that the court in Natal Joint Municipal Pension Fund was concerned with a different issue, namely the stage at which the plaintiff's rights in that instance were frozen. The issue of relevance *in casu* - from a practical point of view, is when the plaintiff could take the next procedural step of setting a matter down for trial. Clearly that moment has come and gone, which is how the plaintiff got to the point of being allocated a trial date in the first place.

[31] The provisions of rule 28 dictate the process when an amendment is introduced. In this instance the defendant did not strictly observe the provisions of sub-rule 7, but that is now water under the bridge. The plea in amended form has been delivered. The plaintiff is strictly afforded time to respond to the amendment, but if the parties had bothered to engage with each other the defendant would have learnt that the plaintiff has no intention of formally reacting to the amended plea. The plaintiff's response was to deliver the two expert

[25] *Supra*.

reports dealing with the novel issues raised by the amended plea to counter the defendant's argument that a basis exists i*n casu* to develop the common law.

[32] The defendant ought to have recognised this and got on with the job of filing her own expert reports to lay the basis for the development of the common law.[26] Had she done so, the parties would not have been in the position in which they found themselves when the matter was called on 16 November 2021. Contrariwise, if she felt that time constraints were against her, she ought to have pursued a formal application to postpone the trial if she felt that the plaintiff was being unreasonably obtuse to her situation.

[33] Both parties are in my view somewhat to blame for the predicament. The defendant could not have divined that the plaintiff was not going to formally react to her amended plea. The plaintiff should have said something about the defendant getting on with perfecting her amendment if she felt aggrieved by this formal step not having been taken, or have indicated that she was indeed not going to make capital of the late amendment. At the very least the parties should, from a case management perspective, have pertinently discussed the way forward and not left it to the surmise of each other concerning what was to ensue and when. Both of them have an obligation to prepare properly and timeously and to meaningfully input issues or any uncertainty that may still exist between them at trial roll call (if not earlier), using the customary mechanisms available to them to ensure that judicial resources are not wasted, which is but one of the purposes of case management. Parties should not litigate carelessly or distinct from their obligation to meaningfully embrace case management. The two key objectives of case management in my view are to get cases through the system as expeditiously as possible, and to minimize the costs impact to the litigants.

[26] DZ *Supra* at [36] and [57] to [59].

[34] I repeat my view indicated above that the filing of the defendant's amended plea ought not to have altered the fact that the pleadings were closed ages ago in this matter (from a case management perspective) and indeed this was the premise for the allocation of the trial date in the first place. The position is that when a pleading is amended after the traditional close of pleadings this does not automatically alter the fact that the stage of close of pleadings obtained in the first place.[27]

[35] In the ordinary course a party amending his pleadings and putting the other party out is responsible for any delays or consequential costs occasioned by an amendment. I accept that the amendment is an important one to the defendant and that it has become a constitutional imperative for the State to consider and pursue alternative means of making reparation in cases of medical negligence.[28] However, that does not mean that she, or any other State party for that matter, is to be given a free pass and/or falls to be regarded as exempt from the ordinary rules of practice or the parties' mutual obligation to bring their part in professional case management.[29]

[36] It is unfortunate in this instance that the defendant sought to pass off her late reliance on the public healthcare defence as anything but an indulgence.

[37] It is necessary briefly in closing to have regard to the provisions of rule 36 (9) (a) and (b) concerning the filing of expert notices and reports since the advent

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[27] Potgieter v Sustein (Edms) Bpk 1990 (2) SA 15 (T) at 20C.
[28] MSM *Supra*.
[29] In MEC for Health, Gauteng Provincial Government v PN 2021 (6) BCLR 584 (CC) at para [26] the Constitutional Court reaffirmed this principle that High Courts have the power to develop the common law and that the MEC for Health can, *where the issue of damages has not yet been finalized*, amend his/her plea to request that the common law be developed (assuming a proper factual foundation exists therefor), whether the action was issued, or the merits decided before DZ.

of the new case management protocol. The recently amended sub-rule provides as follows:

> "(9) No person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless—
> (*a*) where the plaintiff intends to call an expert, the plaintiff shall not more than 30 days after the close of pleadings, or where the defendant intends to call the expert, the defendant shall not more than 60 days after the close of pleadings, have delivered notice of intention to call such expert; and
> (*b*) in the case of the plaintiff not more than 90 days after the close of pleadings and in the case of the defendant not more than 120 days after the close of pleadings, such plaintiff or defendant shall have delivered a summary of the expert's opinion and the reasons therefor:
> Provided that the notice and summary shall in any event be delivered before a first case management conference held in terms of rules 37A (6) and (7) or as directed by a case management judge."

[38] The very fact that the sub-rule behoves the parties to exchange expert notices and summaries before the first case management conference suggests that the *dies* run from the date when the pleadings have traditionally closed. It is rare I daresay that parties at present and especially in damage claims founded on the alleged medical negligence of public hospitals strictly follow these timelines and file all their reports before the first case management conference but the important thing in my view is that if they are speaking to one another there should be no misgivings about their respective intentions which are subjected to scrutiny at the various levels of case management. With the question being pertinently posed in checklists and the obligation on those appearing at trial roll call to make appropriate submissions regarding the matter's final certification of trial readiness it is hard to imagine a situation where there would not be extensive engagement between litigants concerning these issues. (Indeed, in a scenario where the State is requesting the court to develop the common law one would expect that such engagement would be an absolute imperative.) Often the reports are filed out of time according to the strict computation of time limits, but invariably the parties seek each other's consent to file reports later, the ultimate emphasis being on getting to the point where joint minutes can be obtained.

[39] Concerning the defendant's claimed request for a postponement, it is in dispute whether the request for the postponement came to the attention of the plaintiff's attorneys at all. The parties were not in agreement that the exchange of correspondence between them bearing on this aspect be disclosed to the court, but I cannot discern any malice on the part of the plaintiff's attorneys in this respect.

[40] However, if the parties were speaking to each other as they ought, the plaintiff may well have been inclined to allow the defendant the benefit of testing the waters so to speak concerning the ability of the Eastern Cape Health Department to provide health care services in kind and to see how the court might be inclined to come to the defendant's assistance regarding the possibility for delayed or periodical payments. The request itself should not have been perceived to be unreasonable, but that should in my view have come with an appropriate tender of wasted costs.

[41] Regarding the last ground of the defendant's challenge to the trial readiness of the matter, I do not find it a compelling argument that the notice and/or summary falls short for want of compliance with rule 36 (9)(a) and (b).[30] In any event it seems to me to be churlish to suggest this as a basis for the lack of trial readiness when the parties have not meaningfully engaged with each other concerning more critical issues impacting on this determination.

[42] As I said before, the plaintiff was also remiss in my view in engaging meaningfully with the defendant concerning the true state of trial readiness of the matter. It wasn't a choice of hers to shun the mutuality that professional case

[30] It was open to the defendant to rely on the provisions of paragraph 2 (c) of the Joint Rules of Practice if she felt aggrieved by the summary of either expert relied upon by the plaintiff.

management requires. I intend to reflect the court's displeasure in this respect in the costs order which I make below. On the other hand, it was the defendant's tardiness and lack of appreciation of her own state of unpreparedness that was causal to my order removing the matter from the roll, which conduct contributed in greater measure to the fact that the matter could not proceed on the trial date. I am further not impressed that instead of conceding a need to have the matter postponed, the defendant instead sought to raise the technical objections which she did to avoid responsibility for the wasted costs once it appeared that a postponement was necessary and inevitable.

[43] In the result I issue an order in the following terms:

1. The matter is removed from the trial roll.
2. The defendant is liable for 80% of the wasted costs occasioned by the removal of the matter from the trial roll, the full costs complement to include the costs of second counsel.

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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 16 November 2021
DATE OF JUDGMENT: 30 November 2021*

*Judgment delivered electronically on this date by email to the parties.

APPEARANCES:

For the plaintiff: Mr. N R Mtshabe and Ms. T Mduba instructed by Dudula Attorneys care of Mlonyeni & Lesele Inc., King William's Town (ref. Mr. E Simaya.)
For the respondent: Mr. M H Sishuba instructed by The State Attorney, East London (ref. Mr B Tongo.)