IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO : 2020/20008

REPORTABLE : **YES**
OF INTEREST TO OTHER JUDGES : **YES**
REVISED: **YES**

26 April 2022

DATE **SIGNATURE**

In the matter between:

SIMPHIWE BONGAYIPHI NGUBANE Plaintiff

and

ROAD ACCIDENT FUND Defendant

Summary: ***In terms of the common law, a general damages claim is not transmitted to a deceased estate if the deceased passes way prior to litis contestatio being reached. The majority decision in the Nkala-judgment developed the common law in a blanket fashion whilst the minority in Nkala declined a blanket development of the common law. The development of the common law as per the majority in Nkala has not found universal acceptance in our law and divergent approaches remain. After a review of the authorities on the development of the common law and having regard to foreign jurisdiction developments in this field of law, the measured and cautionary approach as per the minority in Nkala is preferable above the majority's blanket approach. No proper binding development of the common law in relation to general transmissibility of general damages claims have taken place and the existing Supreme Court of Appeal authorities on transmissibility of general damages claims remain binding. This judgment does not affect the class action in Nkala.***

JUDGMENT

Thompson AJ:

[1] "*The law is a jealous mistress and requires long and constant courtship. It is not to be won by trifling favors, but by lavish homage*."[1] Half-minded attention to, even the most minute aspects of law, is spurned by this jealous mistress that is law. She requires constant hard work, effort and dedication towards it.[2] She requires attention, at all times, to a wide spectrum of aspects, even if those aspects are not always immediately clear. The failure to pay adequate attention, to what would seem even the most trifling of aspects in the most simplest of cases can very easily lead to the demise of a case. This matter is a sterling example of the aforesaid.

[2] On the face it, this matter is a simple default judgment application on a claim for ***general damages*** arising out of a motor vehicle collision that occurred on 27 February 2019, with action having been instituted on 11 August 2020 and the summons being served on 14 August 2020. It did not remain simple. The Plaintiff passed away on 25 February 2021 and was lawfully substituted as plaintiff with the executor of his estate. Through all of this, the Defendant never entered an appearance to defend.

[3] As a result of the Defendant never having entered the fray, pleadings never closed and *litis contestatio* was never reached. When the matter was called before me, Counsel

[1] Statement made in 1929 by United States Supreme Court Justice Joseph Story
[2] Sanaskriti Rastogi, Amity Law School Noida ALL INDIA LAW FORUM *Law is a Jealous Mistress* 16 May 2020 https://allindialegalforum.in/2020/05/16/law-is-a-jealous-mistress/

appearing for the Executor deemed the matter to be a simple one that should take no longer than an hour. Unfortunately, Counsel did not afford the law, on all issues that may arise in this matter, long and constant courtship. I enquired from Counsel whether the Plaintiff's claim for general damages have in fact transferred onto his deceased estate, to be pursued by the Executor in the circumstances of this case. Counsel could not provide me with an answer. As a matter of fact, Counsel candidly confirmed that had not considered the point. The matter was stood down that counsel may consider the issue and make submissions on the point.

[4] Prior to returning to the contentious issue in this matter, it is apposite that I first deal with the preliminary matters relating to the application for default judgment.

PROCEDURAL ASPECTS

[5] The collision occurred on 27 February 2019. The RAF1 form[3] was served on the Johannesburg Office of the Road Accident Fund on 9 May 2019. The summons was issued on 11 August 2020 and served on 14 August 2020. The particulars of claim contains an averment that the provision of Section 24 of the RAF had been complied with prior to the institution of the action and I am satisfied that the pre-litigation formalities have been complied with.

[6] The return of service indicates that the summons and particulars of claim was served upon a Mr Bojabotseha, an admin officer ostensibly a responsible employee and not less than 16 years of age, of and in control of and at the principal place of business of the Defendant.

[3] Section 24(1)(a) of the Road Accident Fund Act 56 of 1996 ("the RAF Act") as read with Regulation 7(1) of the Regulations published in terms of the RAF Act under GN R770 in GG 31249 of 21 July 2008 (as amended)

As a return constitutes *prima facie* proof of the contents therein contained, I am satisfied that lawful service of the summons took place.

[7] No defence was ever entered by the Defendant. Even after the application for default judgment was served on the Defendant by the Sheriff on 27 July 2021, no response was elicited from the Defendant. Not even the notice of set down pertaining to the application for default judgment, served on the Defendant on 8 September 2021, spurred the Defendant into action. I am satisfied that the Defendant has knowledge of the action as well as the application for default judgment.

[8] After a draft of this judgment had already been prepared by me on the basis that this matter is proceeding as a default judgment matter, my registrar received an email from the Plaintiff's attorney that this matter had, all of a sudden, become settled. The Plaintiff's attorney opined that as the matter had become settled, the matter should be removed from the roll and dealt with on the settlement roll. This stance was adopted in light of item 35 of the Judge President's Consolidated Directive (18 September 2020 Consolidated Directive) In Re: Court operations in the Pretoria and Johannesburg High Courts during the extended COVID-19 National State of Disaster ("the JP's Directive"), which provides that "*Matters that are enrolled on the Trial roll and which become settled should be removed from the trial roll. These matters should be set down on the Settlement Roll and shall be dealt with in the identical fashion to the Judicial Case Management Meetings/Case Management Conferences under the conditions described above.*"

[9] In my view the reliance by the Plaintiff's attorney on item 35 of the JP's Directive is ill-founded for two reasons. Firstly, item 35 refers to the matter being on the trial roll and

settling. It does not refer to an instance where the matter had already been allocated to a judge for hearing and the judge has taken evidence. Secondly, in my view the sudden settlement is no more than an attempt to remove the matter from my scrutiny and the vexed question posed whether the general damages claim transferred to the deceased's estate. Accordingly I refused to have the matter removed to the settlement roll.

[10] This second aspect was confirmed when counsel, when moving the settlement before me, was taken aback that I again raised the transferring of general damages to the deceased estate as an issue with him. He was of the incorrect view that it is no longer an issue as the matter had settled.

[11] I afforded counsel an opportunity to make submissions on the aforesaid issue and he still could not do so. I extended to counsel the opportunity to submit written heads of argument and, due to the impending festive holiday period, afforded him until 14 January 2022 to file the heads of argument. Shortly before 14 January 2022, counsel informed my registrar that he will not be able to file the heads of argument by 14 January 2022 and requested more time. More time was afforded to Counsel, however as at the date of this judgment I have not been favoured with the additional heads of argument. As judgments cannot lag indefinitely at the behest of counsel, I have now elected to finalise this judgment without the benefit of additional submissions by counsel.

[12] As an aside, and without casting any aspersion on any of the practitioners involved, I am concerned as to the circumstances relating to the sudden settlement having regard to the Defendant's indifferent attitude to this matter until after a default hearing was conducted. I am further concerned about the lack of persistence with seeking final judgment by furnishing

the necessary additional heads of argument. In my view, it would be prudent for the powers-that-be within the office of the Defendant to investigate the circumstances surrounding the sudden settlement of the matter. It may be *'much ado 'bout nothing'*, yet I would be remiss in my duties as a judicial officer to not bring these concerns to the attention of the upper echelons of the Defendant.

THE MERITS

[13] The merits of the matter is relatively simple in nature. The Plaintiff, being a pedestrian, was crossing the intersection of Koma Road and Masingafi Street, Soweto. There was a stop sign controlling traffic and street lights were working on both sides of the road. The Plaintiff made an observation to check if there was any oncoming traffic and, as there was an absence of oncoming traffic he proceeded to cross the road. Whilst crossing the road and by the time the Plaintiff had reached the middle of the road, a silver VW Polo came charging, at a high speed, from a steep hill and collided with the Plaintiff despite the Plaintiff attempting to run out of the approaching vehicle's path. The Plaintiff was seriously injured as a result of the collision.

[14] I take cognisance of the fact that both the neurologist's and the clinical psychologist's reports indicate that the Plaintiff suffer from memory loss, poor average delayed memory and poor immediate verbal memory. The mere fact that evidence is uncontradicted does not mean that I, as judicial officer, must believe and/or accept the evidence tendered by the Plaintiff.[4] Uncontradicted evidence does not necessarily amount to satisfying the burden on

[4] ***Katz v Bloomfield and Keith*** 1914 TPD 379 at 381

proof that rests upon the Plaintiff.[5] Had I only been faced with the Plaintiff's evidence, the merits of the matter may have been the death-knell for the Executor.

[15] However, the Plaintiff's version is, in material respects, confirmed by his brother who is a witness to the accident.[6] Counsel for the Executor submits that the brother is an independent witness. I differ on this score. The Plaintiff's brother, being a possible heir in the Plaintiff's deceased estate, has a vested interest in the claim. He can thus not be considered to be a wholly independent witness. That being said, the Plaintiff's claim was instituted long before his death. It is not a claim instituted by the deceased's brother after the death of the deceased and which may be a construed as a self-serving or enriching action. Moreover, from the Accident Report form it is evident that the Plaintiff was indeed struck by a motor vehicle.

[16] In light of the uncontradicted evidence as a whole on behalf of the Plaintiff, I cannot find that there arises any facts that causes me to, on a balance of probabilities, disbelieve and not accept the Plaintiff's version. I am, on the evidence that is before me, satisfied that the Defendant is 100% liable for the damages that may be proved.

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[5] ***McDonald v Young*** 2012 (3) SA 1 (SCA) at para [6], quoting with approval ***Siffman v Kriel*** 1909 TS 538 *"It is settled that uncontradicted evidence is not necessarily acceptable or sufficient to discharge an onus*."

[6] The Accident Report form describes a wholly different picture. However, in the absence of evidence gainsaying the version of the Plaintiff, I am bound by the admissible evidence presented. It must be noted that the insured driver is identified and the Defendant, if it defended the action, could easily have submitted a gainsaying version. Had the Defendant done so, the outcome on the merits may have been wholly different.

THE CONTENTIOUS ISSUE – DOES THE CLAIM FOR GENERAL DAMAGES TRANSFER TO THE PLAINTIFF'S DECEASED'S ESTATE.

[17] In terms of the common law, a claim for general damages only transfers to a deceased estate if *litis contestatio* had been reached. The authorities in this regard is legion and well known.[7]

[18] *Litis contestatio* is, in modern practice, synonymous with the close of pleadings as envisaged by Rule 29[8] of the Uniform Rules of Court.[9] As the Defendant has never entered the fray and did not deliver a plea, the pleadings could not close and *litis contestatio* could not be reached.

[19] The position under the common law is no different. According to Voet, *litis contestatio* in Roman times were achieved when there was a "*joinder of issue*. . .*enclosed in judicial proceedings*." It meant no more than "*the plaintiff's statement of claim along with the defendant's contradiction or rebuttal*."[10] Voet describes *litis contenstatio* in modern times as

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[7] ***Jankowiak v Parity Insurance Co Ltd*** 1963 (2) SA 286 (W); ***Milne N.O. v Shield Insurance Co. Ltd*** 1969 (3) SA 352 (AD); ***Potgieter v Rondalia Assuracne Corporation of SA Ltd*** 1970 (1) SA 705 (N)

[8] *"Pleadings are considered closed if —*

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

(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; or

(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.

(2) (a) Upon allocation of a date or dates for trial, the registrar must inform all parties of the allocated dates.

(b) The party which applied for the trial date must, within 10 days of notification from the registrar, deliver a notice informing all other parties of the date or dates on which the matter is set down for trial."

[9] See ***Milne N.O.,*** *supra* at 358C; ***Government of RSA v Ngubane*** 1972 (2) SA 601 (AD) at 608D – E; ***Potgieter v Sustain (Edms) Bpk*** 1990 (2) SA 15 (T) at 18H – 19H; ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012 (4) SA 593 (SCA) at para [14]; ***KS v MS*** 2016 (1) SA 64 (KZD) at 69C – D

[10] ***The Selective Voet being the Commentary on the Pandects*** translated by Percival Gane **2 p 158 – 9**

"the practice of *the Romans has also been approved in the customs of present day, so that a judicial proceeding is said to be truly constituted by the joinder of issue, and cannot exist without it."*[11]

[20] Voet does, however, touch upon another subject which may have been of assistance to the Executor. Voet decribes what is termed "*fictitious*" joinder of issue, which arises when "*a defendant, being summoned to law and cited by three edicts, refuses in contumacy to appear."*[12] I could find no authority whereby this Roman-Dutch principle was infused into the common law. That being said, there seems to be no logic that one principle relating to *litis contestatio* being infused to the common law with the exclusion of the other. This is, however, not an issue I need to finally pronounce upon due to the fact that even if it was infused with the common law it would not assist the Executor. On the most liberal of interpretations, *litis contestatio* would occur when the application for default judgment is launched. The application for default judgment is dated 26 July 2021, well after the Plaintiff's death.

[21] In a recent judgment,[13] my brother Mavundla J stated that it is trite "*that a claim for general damages does not pass to the estate of a deceased person unless litis contestatio has taken place*". Had this been the only recent authoritative view on the point, following a long line of appeal court authority, this would have been the end of the road for the Executor. But *alas*, this is not the only recent authoritative pronouncement on the issue of transferability of a general damages claim, prior to *litis contestatio,* to a deceased's estate.

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[11] ***Voet***, *supra* at 159
[12] *Ibid*
[13] ***Mahlangu N.O. obo Mahlangu v RAF*** (67880/14) [2020] ZAGPPHC 7 (15 January 2020)

[22] In ***Nkala and Others v Harmony Gold Mining Company Limited and Others,***[14] the parties who sought certification of a class action also challenged the common law principle against transferability of a general damages claim prior to *litis contestatio* having been reached. This challenge was limited to the class action sought to be certified.[15] The majority judgment, per Mojapelo DJP and Vally J, found that the common law should be developed as a whole[16] in respect of all claimants and defendants across the entire spectrum of general damages, irrespective of whether the cause of action arose from the class action sought to be certified, a Road Accident Fund claim, a medical negligence claim or any other claim in respect of which a general damages claim could be sustained. The majority had regard to the principle that the development of the common law should take place incrementally, but found that an incremental development of common law will have unjustified discriminatory consequences. The minority, per Windell J, agreed with the majority that the common law should be developed, but was of the opinion that the development should happen incrementally and be limited to the class action before it.

[23] Although the Constitution enjoins the High Court to, in appropriate circumstances, to develop the common law, this right accorded to the High Courts does not constitute a licence to change the law as the High Court may deem fit. Where a constitutional challenge is made against a common law principle, the High Court is obliged to, first, consider whether the existing common law requires development in order to accord with the objectives of the Bill of Rights.[17] It is here that the party challenging the common law on constitutional grounds

[14] 2016 (5) SA 240 (GJ)
[15] See para [233]
[16] See para [217]
[17] ***Carmichele v Minister of Safety and Security*** 2001 (4) SA 938 (CC) at para [40]

must identify the constitutional rights that the party avers is being infringed upon and prove the nature of the infringement. The infringement must not be justifiable in an open and democratic society.[18] It is only when the High Court is convinced that common law principle is in conflict with a provision in the Bill of Rights that the High Court is obliged to depart from the common law.[19]

[24] However, the aforesaid envisaged conflict must be a direct conflict with the provisions of the Bill of Rights.[20] If there is no direct conflict with a provision of the Bill of Rights, even if the High Court deems the common law in need of development, the High Court is bound by the principle of *stare decisis* and must follow the existing appeal court authorities on the point.

[25] I pause to mention that I do not deal with second exception identified in the ***Afrox***-judgment, namely where the High Court is entitled to develop the common law where the previous appeal court authorities were based on the *boni mores* of society.[21] I can find, save for a passing remark relating to *boni mores* in comparative jurisdictions,[22] no indication that the development of the common law was affected in terms of the second exception. As a matter of fact, the challenge by the persons who sought the certification of the class action and the development of the common law was based squarely on a challenge in respect of specific provisions contained in the Bill of Rights.

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[18] ***S v Manamela and Another (Director-General of Justice Intervening)*** 2000 (5) BCLR 491 (CC) at paras [32] and [33]
[19] ***Afrox Healthcare Bpk v Strydom*** 2002 (6) SA 21 (SCA) at para [27]
[20] ***Afrox***, *supra* at para [29]
[21] ***Afrox***, *supra* at para [28]
[22] ***Nkala***, *supra* at para [209]

[26] I have difficulty in accepting that the challenge in the ***Nkala***-matter, from a general approach, constituted a direct challenge as envisaged by ***Afrox***. In my view, the challenge to freedom of security of the person and the right to bodily integrity is a personal right. A claim for general damages, it is claim *in personam,* even where the constitutional right of freedom of security of the person and the right to bodily integrity comes into play. In relation to the general approach of the development of the common law on the transferability of a general damages claim to a deceased estate, it is not the person who has directly suffered the harm to bodily integrity that is pursuing the claim. It is an executor, on behalf of a deceased estate in respect of potential heirs who have no automatic right to inherit, that is pursuing the claim. At best, the challenge in respect of bodily integrity and freedom of security of the person – in respect of the general approach to the development of the common law – is an indirect challenge as it does not pertain to a harm suffered by the person who directly suffered the general damages harm.

[27] The next issue, in my view, is the contention that the common law unjustifiably takes away the right of the person who can claim general damages, upon his death prior to *litis contestatio*, to ensure that the beneficiaries of such deceased person's estate receive the benefit of the compensation that he, the deceased person, would have been entitled to.[23] My difficulty in this regard is that "*no one has a fundamental right to inherit and a potential beneficiary who is nominated in a will has no more than a spes or hope of inheriting*."[24] General damages falling into a deceased estate will not summarily be paid to heirs. The

[23] ***Nkala**, supra* at para [200]
[24] ***J W v Williams-Ashman NO & Others*** 2020 (4) SA 567 (WCC) at para [72]

estate's debts, if any, must first be settled. Only then, if there is a residue available for distribution, will the heirs receive an inheritance.

[28] The general reliance on the best interests of a child is also not without controversy. It assumes, generally, the involvement of minor children as potential heirs across the board.[25] In this matter the Plaintiff did not have any children and this consideration does not come into play. Moreover, it presupposes a right to inherit by a child, which right to inherit I have already demonstrated does not exist, and leaves out of consideration the principle of freedom of testation whereby the person entitled to general damages disinherits children beneficiaries.

[29] The equality argument[26] is, in my view, also not without controversy in a general application. As previously indicated, the right to claim general damages is a claim *in personam*. To put it more bluntly, it is a claim to provide solace to a person for pain, suffering, disfigurement, loss of amenities of life and the like which that person had suffered. The reason why the general damages claim is transferred to an estate on the death of the deceased after *litis contestatio* had taken place, generally speaking, is because the deceased had taken timeous steps to prosecute such a claim. There is, in my view, nothing arbitrary in a claimant diligently prosecuting a claim and causing his estate to be vested with a general damages claim due to diligent prosecution of the claim.

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[25] ***Nkala**, supra* at para [203]
[26] ***Nkala**, supra* at para [204]

[30] In this matter the Plaintiff was entitled to make application for default judgment as early as 31 August 2020. The application for default judgment was served almost 11 months later. The failure by the Plaintiff to diligently prosecute his claim for general damages cannot be said, in my view, to create inequality *vis-à-vis* a plaintiff who has diligently prosecuted a claim and had the resultant deceased estate vested with a general damages claim.

[31] Moreover, why draw the line on arbitrariness in respect of plaintiffs who had instituted action for general damages. What about a person who was unlawfully arrested and unlawfully detained for a number of days. Such person, undoubtedly, has a general damages claim. On his way to an attorney, in order to instruct the attorney to institute a general damages claim, he suffers an unrelated heart attack and passes away. Why should his estate be denied the general damages claim merely because, due to no fault of his own, he was denied the opportunity to institute a claim.

[32] Following on from the aforesaid, an executor would not be precluded from instituting action to recover general damages even; where the person who could have claimed general damages had no subjective intention to do so. If the *in personam* claim is transmissible to a deceased estate, there should then be no objection to an executor being able to pursue a general damages claim to enrich a deceased estate for the benefit of heirs.

[33] The answer to the aforesaid questions may lie in the old authorities of *Justinian* and *Voet*.[27] Due to the conclusion I reach, there is no need for me to delve into these aspects.

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[27] The answer to this question is probably most aptly described in the *Institutes of Justinian,* (Sandars ***The Institutes of Justinian*** 7th ed (1962)) wherein it was stated that "*the action was personal to the person injured*".

However, the questions serve to demonstrate that the arbitrary-differentiation-argument has the potential of opening *Pandora's* box,. Taken to its most absurd conclusion, an executor will be vested with a claim in favour of an estate where no such claim was ever intended by the person who actually suffered the general damages.

[34] The concern raised in the ***Nkala***-judgment pertaining to the continual shifting of *litis contestatio* by way of an amendment to pleadings is more apparent than real, in my view. Not every amendment to pleadings will have the effect of re-opening the pleadings.[28] In my view the potential harsh effects of a re-opening of pleadings and the shifting of *litis contestatio* can be addressed on a case-to-case basis.

[35] Windell J, in ***Nkala***, makes reference to the existence of legislation in foreign jurisdictions such as the United States, the United Kingdom and Australia[29] in her dissenting judgment. I have had the opportunity to peruse some of the foreign legislation.[30] What is clear from these pieces of foreign legislation is that a blanket right is not created for the transmissibility of general damages to a deceased estate. In Australia, exemplary (punitive)

Personal rights tend to, as a matter of logic, demise with the death of the person to whom the personal right attaches. But *Justinian* went further in order to explain why the action personal to the person injured could be transferred to a deceased estate. According to *Justinian*, a juridical novation took place at the time of *litis contestatio* having been reached. This is confirmed by *Voet* who states that *litis contestatio* causes "*the thing claimed*" in "*actions in personam*" to become a "*thing in suit*." This has the effect of perpetuating actions which would otherwise be lost by death (***Voet***, *supra* at 162).
It must be remembered that in Roman Law, once *litis contestatio* had been reached, the suit had to be pronounced upon in order to give finality to the dispute between the parties. Otherwise stated, in the context of *in personam* claims, the intention to pursue a personal right had been vested in law for judicial pronouncement. A clear and unequivocal intention to pursue an *in personam* claim has thus been demonstrated.

[28] ***KS***, *supra* at fn 9

[29] Par [236]

[30] Law Reform (Miscellaneous Provisions) Act 1941 (WA), section 4(1), (2) and (2a); Administration and Probate Act 1958 (Vic), section 29(2A), Dust Diseases Tribunal Act 1989 (NSW), s12B; Succession Act 1981 (Qld), section 66(2A); Survival of Causes of Action Act 1940 (SA), section 3(2); Civil Law (Wrongs) Act 2002 (ACT), section 16(4); Damages (Scotland) Act 1976, 1993 and 2011.

damages are specifically excluded from transmitting to the deceased's estate. Furthermore, damages for pain and suffering are excluded unless it falls under a specific statutory provision allowing such a claim to be transmitted to a deceased estate, as created in terms of the Law Reform (Miscellaneous Provisions (Asbestos Diseases) Act 2002. In Scotland, the 1976 version of the Damages Act expressly excluded damages for *solatium* or for any patrimonial loss attributable after the deceased's death. The 1993 version of the Damages Act partially removed the prohibition on the transferring of *solatium* damages, by allowing such a claim to be calculated immediately prior to the deceased's death. The 2011 version of the Damages Act allowed for the inclusion of non-patrimonial damages as well as defamatory damages and damages relating to injuries actionable under the Protection from Harassment Act 1997. It is thus clear that the exclusionary provisions have been revised by the Legislature in Scotland as it deemed it necessary. It was not left in the hands of the courts to determine how the common law should be adjusted and/or changed to meet society's demands.

[36] The transmission of general damages to a deceased's estate is thus not the proverbial free-for-all in foreign jurisdictions. It is a curtailed and conservative approach to the extension of the common law, no doubt based on empirical research as to the necessity and extent of the scope thereof being relied upon by the respective legislatures. In my view, the reasoning by Windell J in her dissenting judgment as to the curtailed and conservative approach to the development of the common law must be accepted above the views of the majority in ***Nkala***. I therefore express my agreement with the views expressed by Windell J in her dissenting judgment on a general development of the common law relating to transmissibility of actions for general damages before *litis contestatio.*

[37] In my view, a development of the common law on the transmissibility of general damages prior to *litis contestatio* having been reached as per the ***Nkala*** majority judgment, goes beyond the permissible realms of judicial development of the common law and causes the judiciary to impermissibly infringe upon the realms of the legislature. As former Deputy Judge President of the SCA, LTC Harms, once stated "[t]*he common law consists of a miriad rules developed over many centuries involving great minds. It represents a fine web, the disturbance of which at one point may have severe unexpected consequences elsewhere. The new era makes extraordinary demands on judicial officers. The ubiquitous Constitution sets the boundaries – boundaries neither of barbed wire, nor made of rubber. Free judicial discretion is not a value of the Constitution, nor is legal uncertainty. The Constitution illuminates the legal landscape, but it is not blinding; it does not provide a trench from which the common law may be attacked, but it entrenches rights. Sections 39(2) and 173 of the Constitution do not place a machete in the hands of the judge to decapitate or to castrate, but it provides modeling clay out of which art must be created capable of withstanding the heat of the oven.*"[31]

[38] The views expressed by LTC Harms has been echoed in the constitutional jurisprudence developed by the Constitutional Court. Caution is required and the effects of a proposed development of the common law must be considered.[32] I could find nothing in

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[31] Potchefstroom Electronic Law Journal Vol 7 No. 2 (2004) ***Development of the common law in view of Sections 39(2) and 173 of the Constitution*** per LTC Harms

[32] ***Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd & Another*** 2016 (1) SA 621 (CC) at paras [36] to [38]

"[36]. Our common law evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism and exploitation. Furthermore, apartheid laws and practices permeated and to some extent delegitimised much of the pre-1994 South African legal system. Courts have a duty to develop the common law – like customary law – to accord with the Bill of Rights.

the ***Nkala*** majority judgment that caution was applied in respect of a blanket development of the common law nor, and even more importantly, that any evidence was presented and/or considered as to the wider consequences of the change ***Nkala*** purported to effect to that area of law. The minority judgment by Windell was more cautious and called for the wider consequences to be considered.

[39] Having regard to various policy considerations which must be addressed in consideration of the wider consequences it is my view that, as much as there may have been need to develop the common law relating to transmissibility of actions for general damages in respect of class actions, the same considerations do not necessarily apply to a development of the common law generally in this regard. The views expressed by the majority in ***Nkala*** falls more within the third category as set out in ***Afrox***. To find otherwise would leave me in hand with a machete, to decapitate the common law based on what would amount to the idiosyncratic views of a single judge. In the premises I view myself as not being bound to follow the majority in ***Nkala*** but rather to follow the generally accepted common law position as pronounced upon by the Supreme Court of Appeal.

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[37] Caution is called for though. It is tempting to regard precedents from the pre democratic era with suspicion. This may be more so when language is used, which some may regard as archaic and reminiscent of a patriarchal feudal era, as when the Court in Kala Singh said that "it does not lie in the mouth of a lessee to question the title of his landlord". However, the mere fact that common law principles are sourced from pre-constitutional case law is not always relevant. Age is not necessarily a reason to change. Some of the lessons gained from human experience over the ages are timeless and have passed the logical and moral tests of time. The Constitution indeed recognises the existing common law and customary law. … Furthermore, legal certainty is essential for the rule of law – a constitutional value.

[38] Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law."

[40] It thus follows that the Executor's claim on general damages must be dismissed. It is therefore not necessary for me to deal with the quantification of the general damages claim.

[41] I pause here to mention that nothing in this judgment must be construed to impact on the class action specific declaration of transmissibility of a general damages claim as set out in paragraph 8 of the order in the ***Nkala***-judgment. This judgment must only be construed in the context of a general development of the common law on transmissibility of a general damages claim.

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

1. The Defendant is liable for 100% of the proven damages in respect of the injuries sustained by the Deceased.
2. The Plaintiff's claim for general damages, being the only head of damages, is dismissed.
3. No order as to costs.
4. The Registrar is directed to bring this judgment to the attention of the Chief Executive Officer of the Defendant, in particular paragraphs [8] to [12].

CHARLES E. THOMPSON
Acting Judge of the Gauteng Local Division, Johannesburg

APPEARANCES:

For the Plaintiff	:	B Molojoa
		Instructed by Khumalo T. Attorneys
For the Defendant	:	No appearance
Date of hearing	:	11 & 24 November 2021
Date of judgment	:	26 April 2022