IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

***[Reportable*l]**

Case No: 18312/2014

In the matter between:

TASHREEKA OLIVER N.O. Plaintiff

and

MEC FOR HEALTH: WESTERN CAPE
PROVINCIAL DEPARTMENT OF HEALTH First Defendant

THE CITY OF CAPE TOWN Second Defendant

Coram: *Mantame J*
Heard: *06 October 2022*
Delivered: *27 October 2022*

JUDGMENT

MANTAME J

Introduction

[1] The issue mainly concerns the transmissibility of non-pecuniary claims for damages to the estate of Mrs Wareldiah Olivier *("the deceased")*. In order to determine

this issue, the plaintiff requested this Court to develop the common-law and bring it in line with the Bill of Rights. Central for determination are the following questions:

1.1 whether the amendment by the deceased of her particulars of claim on 4 October 2017 had the effect of reopening the pleadings and that *litis contestatio* fell away;

1.2 if *litis contestatio* did fall away, and the pleadings are found not to have closed as a result of the first defendant not yet filing an amended plea by the date of the death of the deceased, whether her non-pecuniary claim for general damages was transmissible to her estate;

1.3 whether on the facts presented by the parties, the common-law principles governing the transmissibility on non-pecuniary claims for general damages is inconsistent with the following provisions of the Bill of Rights:

1.3.1 the right to equal protection and benefit of the law in terms of section 9(1) of the Constitution;

1.3.2 the right to bodily and psychological integrity in terms of section 12(2) of the Constitution;

1.3.3 the right of access to quality health care services in terms of section 27 of the Constitution;

1.3.4 the rights of access to courts in terms of section 34 of the Constitution.

1.4 That, in the event the common-law principles governing the transmissibility of non-pecuniary claims for general damages are found to be consistent with the Bill of Rights, whether those principles give full effect to the spirit, purport and object of

the Bill of Rights and particularly to those provisions enumerated in paragraph 1.3 above and

1.5 whether the common-law principles governing the transmissibility of non-pecuniary claims for general damages ought to be developed in the circumstances of this case.

[2] In its opposition, the first defendant maintained that the non-pecuniary claim is not transmissible to the deceased's estate.

Background Facts

[3] The deceased instituted action for damages against the first defendant arising out of the alleged negligence of medical staff in its employ, which negligence led ultimately to the amputation of her leg on 17 October 2014.

[4] The deceased claimed damages in the amount of R3 175 000.00 (erroneously stated as R3 285 000.00 in the plaintiff's amended particulars of claim dated June 2015) as follows:

4.1 Past medical and hospital expenses in the amount of R5 000.00;

4.2 Future medical expenses in the amount of R2 170 000.00;

4.3 Loss of earnings in the amount of R50 000.00 and

4.4 General damages in the amount of R950 000.00.

[5] At the hearing of this matter, this Court was informed that the plaintiff to date has effected four (4) amendments to their particulars of claim. However, relevant for the

determination of issues in this matter, is the third amendment of the plaintiff's particulars of claim on 4 October 2017. Pursuant to an unopposed notice of intention to amend dated 19 September 2017, the plaintiff amended her particulars of claim by increasing her claim for future medical and hospital expenses to R6 105 000.00. Consequent thereto, the quantum of her claim was increased to R7 155 500.00.

[6] Shortly after the amendment was effected on 4 October 2017, the deceased died on 9 October 2017. The deceased's death occurred prior to the expiry of the fifteen (15) day period afforded to the first defendant to file an amended plea in response to the amended particulars of claim. The first defendant had not at that stage filed an amended plea and has not done so since. Nonetheless, the deceased has been substituted by Tashreeka Oliver N.O as the plaintiff.

[7] It is therefore common cause that pleadings were closed after the joinder of the second defendant and the filing of the amended particulars of claim in January 2016. The disputed issues arose in this matter after the plaintiff's particulars of claim were amended on 4 October 2017.

Submission by the parties

[8] The plaintiff asserted that the issues for determination in this matter are not new in our courts. These principles were considered by the Full Court of the Gauteng Local Division, Johannesburg in *Nkala and Others v Harmony Gold Mining Co Ltd and Others ("the Nkala judgment")*[1] and the common-law was developed to recognise the

[1] Nkala and Others v Harmony Gold Mining Co Ltd and Others 2016 (5) SA 240 (GJ)

transmissibility of claims for general damages to litigant's estates should they die before *litis contestatio.*

[9] According to the plaintiff, the amendment of the deceased's particulars of claim was crucial and necessary at that stage. At the pre-trial conference on 24 November 2016, the parties agreed to appoint joint experts to quantify the deceased's claim for purposes of settlement discussions. Three (3) experts were appointed to prepare medico-legal reports by 18 April 2017 for this purpose. On 23 August 2017, the joint experts had filed their medico-legal reports. However, the issue of both merits and quantum was still in dispute. The plaintiff procured expert reports from three (3) additional experts and at this point, the parties were taking steps in preparation for trial. On 14 September 2017, the deceased gave notice of her intention to amend her particulars of claim by substituting the paragraph dealing with and itemising the future medical and hospital expenses claimed. The increases were prompted by and based on expert reports of Mr Rossouw, the orthotist and prosthetist; Ms Scheffler, the physiotherapist and rehabilitation consultant and Dr Versfeld, the orthopaedic surgeon.

[10] The plaintiff contended that the deceased did not seek to amend any aspect of the particulars of claim beyond the quantum claimed for future medical and hospital expenses. Her claim for general damages remained the same as it was on the date of issue of summons. The first defendant did not object to the proposed amendment to the particulars of claim. The amended pages were accordingly delivered, but the amendment was effected on 4 October 2017, five (5) days before the death of the deceased.

[11] In opposing the issues raised by the plaintiff, the first defendant stated that the pleadings in effect constitute an agreement between the parties as to the issues and claims to be determined by the court.[2] An amendment of the pleadings had the effect of setting aside this agreement on the issues and the plaintiff's claim by allowing the amending party to alter the issues or claims before the court. In essence, *litis contestatio* is the stage at which a claim becomes certain and fixed. The effect of *litis contestatio,* which is reached when the pleadings in a case are closed, is to 'freeze the plaintiff's rights as at that moment.' [3] *Litis contestatio* or the agreement as to the issues and claim to be determined by the court thus falls away until such time as the pleadings are closed once again.[4]

[12] In addition, Rule 29(1) of the Uniform Rules of Court deals specifically with the stages at which pleadings are considered closed. The purpose of a claim for non-patrimonial losses arising out of a delict is to compensate the injured party personally for the deterioration of highly personal legal interests that attach to his or her body and personality.[5] It is intended for his or her personal benefit; it is not intended to compensate his or her heirs / estate.[6]

[13] In this instance, it was stated by the first defendant that the plaintiff amended her claim against the defendant and thereby opened the pleadings on 4 October 2017 by filing her amended particulars of claim. In terms of Rule 28(8) of the Uniform Rules of

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[2] De Villiers, Law of Injuries, quoted with approval in Jankowiak & Another v Parity Insurance Co (Pty) Ltd 1963 (22) SA 286 (W) at 288 F - H
[3] Government of the RSA v Ngubane 1972 (2) SA 601 (A) at 608D
[4] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at para 15
[5] Van Der Merwe v The Road Accident Fund & Others (Women's Legal Centre Trust as Amicus Curiae) 2006 (4) SA 230 CC at 39
[6] Hoffa N.O. v SA Mutual & Fire General Co Ltd 1965 (2) SA 994 (C) at 955 C - D

Court, the first defendant was entitled to plead to the amended particulars of claim within fifteen (15) days that is by 25 October 2017. However, before the defendant could do so, thus effectively closing the pleadings herein, the plaintiff passed away on 9 October 2017.

[14] The first defendant stressed that it is accepted in our law that such a claim is not transmissible to the heirs of the plaintiff unless the plaintiff dies after *litis contestatio* has been reached but before the hearing of the action.[7] It was submitted that the reasoning behind this exception is that the action through *litis contestatio* acquires somewhat of the nature of a contract in that the parties have agreed on the issues and have agreed that the court will adjudicate on the said issues. This agreement on the issues gives rise to a quasi-contractual obligation, which renders the claim transmissible.[8] In this instance, the effect of the plaintiff's amendment of her pleadings was that *litis contestatio* fell away and that consequently, her claim for non-patrimonial damages is non-transmissible to her estate as a result thereof.

[15] The first defendant admitted that the *Nkala* judgment is distinguishable from this matter, in that the full bench in Johannesburg dealt with a class action, which was faced with some procedural challenges (certification) which took forever to be achieved. In such a situation, it developed the law to conclude that any claimant who had instituted a claim for general damages but who had died before *litis contestatio* was achieved would be entitled to pursue that claim. In other words, the claim would become transmissible to his or her estate. However, the minority judgment disagreed with such a conclusion

[7] Hoffa (supra); Milne N.O. Shield Insurance Co Ltd 1969 (3) SA 353 (AD) at 358 A – C; Government of the RSA v Ngubane (supra)
[8] De Villiers, Law of Injuries, quoted with approval in Jankowiak & Ano v Parity Insurance Co (Pty) Ltd (supra) at 288H; Natal Joint Municipal Pension Fund v Endumeni Municipality (supra) at para 15.

and was of the view that this development should be made incrementally and confined to class actions only.

[16] It was the first defendant's considered view that a judgment that has not been ruled upon by either the Supreme Court of Appeal or the Constitutional Court is not binding on this division in terms of the *stare decisis* principle which states that in the interest of legal certainty and consistency a court is bound by the decision of other courts in their division[9] or the decision of a superior court[10] unless it is satisfied that the decision in question is clearly wrong. A decision will be held to be clearly wrong where it has been arrived at on some fundamental departure from a principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. It must be clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous.[11] As stated by the first defendant, there is no suggestion by the plaintiff that the courts in the aforementioned judgments were clearly wrong in ruling as they did or that these judgments are not binding on this Court.

[17] It was the first defendant's view that this Court should not apply the reasoning in the *Nkala* judgment in this case for the following reasons:

(a) the facts of this case do not justify the development of the common law as envisaged in the *Nkala* judgment;

(b) the court in the *Nkala* judgment erred in extending the development of the common-law to the law in general instead of confining it to class action situations only and

[9] Hoffa (supra)
[10] Milne, Ngubane and Endumeni (supra)
[11] Patmar Explorations (Pty) Ltd and Others v Limpopo Development Tribunal and Others 2018 (4) SA 107 at para 3

(c) the impact on the public purse and the impact of the development of the common-law to apply to all claims for general damages as opposed to those in class actions only on competing constitutional rights to, *inter alia*, public health care has not been considered.

[18] The fact that the development of the common-law in this aspect was unwarranted, said the first defendant has been supported by two (2) further cases, *i.e. Nortje v Road Accident Fund*[12] and *Ngubane v Road Accident Fund*.[13] In *Nortje,* the court refused the plaintiff's request to further develop the common-law to allow transmission in such cases, on the grounds that *first*, the legislative intervention was the more appropriate route and *second,* the plaintiff had in any event not placed sufficient evidence before the court to provide sufficient factual support for the requested development of the common-law. Whereas in *Ngubane*, the court again refused to follow the majority decision in *Nkala* preferring the conservative approach taken by the minority. It held that the majority's blanket approach to the development of the common-law, with respect to the transmissibility of general damages prior to *litis contestatio* was reached and went beyond the permissible realms of the judicial development of the common-law and caused the judiciary to impermissibly infringe upon the realm of the legislature *(see para [34])*. A High Court, when faced with a proposed development of the common law, has to apply caution, and consider the wider consequences of the change. The majority in *Nkala* failed to do this *(see para [38]).* The court further held that, as much as there may have been a need to develop the common-law relating to the transmissibility of actions for general damages in respect of class actions, the same consideration did not necessarily apply to

[12] 2022 (4) SA 287 (KZD)
[13] 2022 (5) SA 231 (GJ)

a development of the common-law generally in this regard. The court declared itself bound to follow the generally accepted common-law position.

Discussion

[19] The plaintiff suggested to this Court that, in considering and determining the matter, it should adopt a nuanced approach as it acknowledged that in line with the trite doctrine of *stare decisis* the facts in this case, do not support the wholesale transmission of *Nkala* to this Court. However, the *Nkala* decision must still inform the decision of this Court, even if it is not prescriptive.

[20] At the outset, this Court has to analyse whether the facts of this matter support the outcome that is sought by the plaintiff. This Court is called upon to determine five (5) questions as stated in the first paragraph of this judgment. The *first,* is whether the amendment of the plaintiff's particulars of claim on 4 October 2017 had an effect of re-opening the pleadings and that *litis contestatio* fell away. The plaintiff has not disputed the fact that *litis contestatio* is the stage at which a claim becomes certain and / or fixed. Due to the fact that at that stage, the parties were attempting to settle the matter, it was agreed that further expert reports be procured in order to quantify the deceased's claim. This resulted in the deceased's claim for future medical and hospital expenses increasing and thereby further increasing the quantum. This necessitated the amendment of the deceased's particulars of claim.

[21] When due consideration is had to the amended particulars of claim, the amendments are substantial and material. There are new aspects that in my view would

require some consideration. It may be so that this increase in quantum did not alter the cause of action, the identity of the parties and the scope of the issues in dispute as it was stated by the plaintiff. Notwithstanding, the scope of damages has been increased significantly and it would without a doubt require a pleading. This Court is unable to agree with the plaintiff that the amendment did not redefine the issues in relation to the claim for general damages, as the amount remained the same. This assertion, in my view is somewhat mischievous as it is not for the plaintiff to prescribe how the first defendant should conduct their defence. In my view, the plaintiff's amended particulars of claim re-opened the pleadings and interrupted *litis contestatio and / or litis contestatio* fell away. Since *litis contestatio* fell away, the first defendant was yet to file its amended plea by the date of the death of the deceased.

[22] The Supreme Court of Appeal in *Endumeni (supra)*[14] affirmed this principle further when it stated that:

> "*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 explains the situation as follows:*

[14] At para [15]

'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 …'

[23] In interpreting the above principle, Kruger J in *KS v MS*[15]said:

"*…Nor do I understand the judgment of Wallis JA to mean that any amendment, however immaterial or minor it may be, would result in a fresh litis contestatio. It is when the parties ''add to or alter the issues they are submitting to adjudication'', by amendment or agreement, that ''a new obligation'' comes into existence and a fresh situation of litis contestatio arises"*.

[24] The *second* question to consider is whether the deceased's non-pecuniary claims for general damages was transmissible to her estate. Before the *Nkala* judgment came into effect, the settled law has been that the claim, lapses if the plaintiff or the defendant dies before *litis contestatio.* Claims under general damages are also not cedable, in any case not before *litis contestatio.*[16]

[25] It is therefore prudent to analyse this case before considering a decision whether the deceased non-pecuniary claims for general damages are transmissible to the deceased's estate. On 28 September 2013, the deceased's left leg above the knee amputation was performed at Groote Schuur Hospital after her left leg remained ischemic and unmanageable. Following such a procedure, on 17 October 2014, the deceased instituted an action for damages against the first defendant arising out of an alleged

[15] 2016 (1) SA 64 (KZN) at para [16]
[16] Neethling, Potgieter and Visser, Neethling's Law of Personality at pg 79

negligence of medical staff in its employ, which negligence led ultimately to the amputation of her leg.

[26] Most importantly, this Court was implored by the plaintiff to take into account the realities of modern litigation and recognize a right to amend pleadings at any stage of the proceedings and move with the times. The reality is that at the date of demise of the deceased, the deceased has already amended her pleadings three (3) times and the ultimate close of pleadings had been extended and delayed by at least three (3) years. No explanation from the plaintiff as to why it took so long for this litigation to finalise. It would be recalled that the purpose for regulating the time frame on which to file pleadings in accordance with the rules of court is for the proper management of the proceedings. Without a proper and / or acceptable explanation, it would be irresponsible for this Court to find that non-pecuniary claims for damages are transmissible to the deceased's estate at any time before *litis contestatio.* That would be tantamount to a blanket and/or open ended reward to the plaintiff for doing nothing.

[27] It would appear that the reasons put forward in the *Nkala* judgment motivating for the transmissibility of general damages to the estate of the deceased are extremely distinguishable from this case *(see paras [176] – [222])*. I agree fully that the transmissibility of general damages to the deceased's estate should be confined only to class actions. This Court finds no justification in extending more time and holding that the deceased's claim for general damages is transmissible to her estate without any basis put forward why the matter delayed to reach *litis contestatio*. In my view, it is not enough to merely concentrate at the stage when the parties were negotiating settlement and putting forward as motivation for the transmissibility of general damages to the deceased'

estate. The period between 2014 to 2016 remains unaccounted for. In fact, such a finding will encourage the plaintiffs to sit on their cases and do nothing since there would be no consequences to their non-actions. Instead, they would stand to acquire benefits. In the absence of any factual matrix, there is no support for any finding that the deceased's claim for general damages is transmissible to her estate.

[28] With regard to the *third* question, whether on the facts presented by the parties, the common-law principles governing the transmissibility of non-pecuniary claims for general damages is inconsistent with Sections 9(1), 12(2), 27 and 34 of the Bill of Rights. This, in my view would require a closer scrutiny of facts. The plaintiff contended that equality and particularly, the right to equal protection and benefit of the law as enshrined in section 9 of the Constitution is guaranteed. Had the quantum claimed for general damages not been amended, there is no question that *litis contestatio* would be uninterrupted and the claim for general damages remain intact. The application of a different set of principles that disentitle the deceased and her estate to claim general damages as a result of an amendment that has no bearing on that claim would amount to an arbitrary distinction between a plaintiff in the former scenario, and one in the latter.

[29] In circumstances where the plaintiff was party to the dragging of her heels, it is inconceivable how the distinction between pre and post *litis contestatio* would be held to be an arbitrary distinction between the plaintiffs former and current scenario. If parties were to stick to the rules of court in exchanging pleadings, it would not take more than three (3) months at the most for *litis contestatio* to be reached. In my view, this distinction is unjustified. In any event, although this point was taken in *Nkala*, it was not challenged and the majority found that the legal process would have failed them by discriminating

between the deceased and their fellow claimants based on the uncontrollably lengthy period of time to reach *litis contestatio*. In circumstances where the deceased claimed as an individual, and thereafter dragged the proceedings, it is not clear who she is weighing herself against. Surely, it would not be with the other plaintiffs who prosecuted their cases to finality timeously. In this instance, it was incumbent upon the deceased to prosecute her case timeously. There is not any other person to blame in this scenario other than herself. I find it to be no merit in this complaint.

[30] The plaintiff argued that the bar against pursing a claim for general damages arising from a breach of right to bodily integrity would amount to a denial of a remedy for the breach of section 12(2) of the Constitution. After the demise of the deceased, it is not clear whether the estate of the deceased is at liberty to pursue the increased scope of general damages based on the right to bodily integrity. Section 12 guarantees 'freedom and security of persons' in their living state. It guarantees "*the right to bodily and psychological integrity, which includes the right –*

(a) to make decisions concerning reproduction;

(b) to security in and control over their body; and

(c) not to be subjected to medical or scientific experiments without their informed consent".

In this scenario, the plaintiff instituted a claim timeously upon establishing that there was an alleged medical negligence that was committed by the medical personnel of the first defendant. There was no allegation that her bodily integrity was threatened in any way or was subjected to medical or scientific experiments without her consent. In the result, there is no justification to raise this constitutional principle as motivation for transmission of the deceased claims for general damages to her estate.

[31] The plaintiff fails to appreciate that the general damages that are claimed have aspects that needs consideration by the first defendant. Affording fair opportunity to another party nor a finding that *litis contestatio* fell away, does not amount to a denial of a remedy nor a bar against pursuing a claim for general damages. Similarly, section 27 of the Constitution would not exclude the plaintiff's general damages and / or amount to a denial of a remedy of the breach of section 27 of the Constitution. The deceased had access to health care services while she was still alive. Even if that would not be the case, the plaintiff would still be entitled to what has been pleaded and proven during trial. In the same vain, the fact that this matter served before this Court is an indication that the plaintiff has always had access to Courts in terms of section 34 of the Constitution. Likewise, these complaints are unfounded. In the circumstances, the constitutional rights cited by the plaintiff are unsupported by factual allegations, and therefore the common – law principles governing the transmissibility on non-pecuniary claims for general damages do not offend the full effect of the spirit, purport and object of the Bill of Rights.

[32] This then brings this Court to the last question on whether the common-law principles governing the transmissibility of non-pecuniary claims for damages ought to be developed in the circumstances of this case. In *Carmichele v Minister of Safety and Security & Another (Centre for Applied Legal Studies Intervening)*[17] the Constitutional Court held that:

> "*It needs to be stressed that the obligation of Courts to develop the common law, in the context of the s 39 (2) objectives, is not purely discretionary. On the contrary, it is implicit in s 39 (2) read with section 173 that where the common law as it stands is deficient in promoting the s 39 (2) objectives,*

[17] 2001 (4) SA 938 (CC) at para [39]

the Courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under s 39 (2)".

[33] This, in my view calls for a serious investigation and / or judgment call on the Courts faced with this question. It should be recalled that the claim amongst others for general damages is intended to compensate the injured party personally for the deterioration of highly personal legal interests that attach to his or her body and personality. It is not intended to increase her estate which has not suffered a pecuniary loss as a result of this deterioration or to benefit his heirs who have not experienced the loss of amenities of life or the pain and suffering that the claimant experienced. If that is taken into account, the development of common-law might prove to have a wider detrimental effect in the formulation of delictual remedies than what the plaintiff envisaged.

[34] It is common cause that if due regard is had to the doctrine of *stare decisis*, this Court is not obliged to follow the *Nkala* judgment to the extent that it extended the transmissibility of general damages in general. However, since this Court was asked to consider the *Nkala* judgment in the determination of this aspect, it is therefore sensible that it deals with it. As stated previously the facts in *Nkala* are distinguishable to this case. The class action was about the attempts by the vulnerable mine-workers between 17 000 – 500 000 who were employed in the gold mining industry and their dependants to obtain compensation as a result of them having contracted silicosis and / or TB while

employed in the gold mines. Due to the bulk of these claimants, the application for two (2) classes (silicosis and TB) took about four (4) years for the certification to finalise. It was for this reason that the constitutional imperatives to develop the common-law to afford the transmissibility of general damages to the deceased's estate came to the fore. In this case, there are no competing constitutional circumstances that demands a similar intervention.

[35] This drastic shift came about after the settled law has been that a claim for general damages is not transmissible to the deceased's estate if *litis contestatio* has not been achieved. The wider consequences on the proposed change on the common-law should be properly analysed. A development of law in a blanket fashion without proper consideration of other aspects like, susceptibility to abuse, sustainability on the economic sphere and the public purse, lackadaisical attitude on the part of the plaintiffs to pursue their claims and so on, in my opinion would not always prove to be the right approach to pursue. The Courts have been cautioned not to flex their muscles and develop the law at their whim. The Courts have to exercise a value judgment when deciding whether to develop the law, as each case has to be decided on its merits. However, the courts have been cautioned repeatedly not to overstep the line between incremental development of the existing legislation and the formulation of wholly new ones at its peril, even though at times it might be desirable to do so. The concept of *stare decisis* or the application of settled principle to new situations is very long standing.

[36] In *MEC for Health and Social Development, Gauteng v DZ obo WZ*[18], the Constitutional Court when it dealt with the development of common law set out the inquiry as follows:

> *'[The court] must be clear on: (1) what development of common law means; (2) what the general approach to such development is; (3) what material must be available to a court to enable the development; and (4) the limits of curial, rather than legislative, development of the common law"*.

[37] In this case, it is my considered view that there are no factual allegations justifying a departure from the settled principle. There are absolutely no glaring inconsistencies with the plaintiff's stated constitutional provisions and / or an indication that the common law rule falls short of the spirit, purport and objects of the Bill of Rights.

[38] The Constitutional Court in *MEC for Health and Social Development, Gauteng v DZ obo WZ,*[19] *(supra),* warned that a development of the common-law cannot take place in a factual vacuum. This therefore means that, I repeat any development of the common-law requires factual material upon which the assessment whether to develop the law must be made.

[39] For these reasons, it is my careful consideration that the plaintiff's case for the development of common-law should not succeed.

[40] In the result, the following order is made:

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[18] 2018 (1) SA 335 (CC) para 27
[19] 2018 (1) SA 335 (CC) at para 28, 29, 57 - 58

40.1 The amendment by the deceased of her particulars of claim on 4 October 2017 had the effect of reopening the pleadings and that *litis contestatio* fell away;

40.2 The non-pecuniary claims for general damages are non-transmissible to the deceased's estate before *litis contestatio* is reached;

40.3 The common-law rule as it stands does not offend the spirit, purpose and object of the Bill of Rights and therefore does not require development.

40.4 The plaintiff is ordered to pay costs.

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MANTAME J

WESTERN CAPE HIGH COURT

Coram:	**B P MANTAME, J**
Judgment by:	**B P MANTAME, J**
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