**LUSHABA v MEC FOR HEALTH, GAUTENG 2015 (3) SA 616 (GJ)**A

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| **Citation**  | 2015 (3) SA 616 (GJ)  |
| **Case No**  | 17077/2012  |
| **Court**  | Gauteng Local Division, Johannesburg  |
| **Judge**  | Robinson AJ  |
| **Heard**  | October 28, 2014  |
| **Judgment**  | November 26, 2014  |
| **Counsel**  | *Adv Pillay SC* for the plaintiff.*R Latib* for the defendant.  |
| **Annotations**  | Link to Case Annotations  |

B

**Flynote : Sleutelwoorde**

**Costs** — Costs de bonis propriis — When to be awarded — Against state attorney and public officials — MEC liable for damages arising from birth of child with disability — Defence of claim unjustified and reckless — Conduct of state employees of such degree of incompetence and indifference that to be C held personally responsible for portion of costs.

**Headnote : Kopnota**

C After making an order declaring the Gauteng MEC for Health, the defendant, 100% liable for the plaintiff's damages arising from the birth of her son, with a disability, and ordering her to pay costs, the court issued a rule nisi calling upon her to show cause why she should not be held personally liable D *de bonis propriis* for costs; alternatively, to identify the responsible officials. When considering confirmation the court focused on the conduct and decision-making of the state attorney and legal advisors from the health department (a medicolegal advisor and legal administrative officer) identified as having dealt with the claim.

E *Held*: Costs *de bonis propriis* were only to be awarded in exceptional circumstances and a legal advisor or representative was not to be punished for every mistake or error of interpretation. But there was a limit, and it had been crossed when encountering the degree of indifference and incompetence evidenced in this case. The required exceptional circumstances were present where the three professionals, two lawyers and onemedical F practitioner —

   •   claimed that they considered the merits of the case, despite being unable to do so since they were not in possession of the necessary records;

   •   paid no regard to the expert report of the plaintiff;

   •   failed to provide their chosen expert with access to the relevant facts;

   •   failed to ask their expert to comment on the plaintiff's expert report;

G    •   were content to rely on a one-page report that disclosed no basis for any defence;

   •   were content to rely on bald, unsubstantiated assertions by the expert;

   •   permitted the litigation to continue in circumstances where (1) no defence was exhibited in the report of their expert; (2) no defence was pleaded; (3) no defence was advanced at trial; and (4) they were unaware of any H defence to negligence ;

   •   were reckless as to the facts of this matter in decision-making; and

   •   had an inert approach to pre-trial litigation. (Paragraphs [68], [70] and [72] – [73] at 634E – F, 635B – C and 635D – 636A.)

Although such costs orders were drastic measures, the court was faced with I state employees who simply could not be bothered to do their work. Recent authorities dealing with the conduct of public officials revealed that shaming them no longer worked — even the exhortations of the highest court fell on deaf ears.

Accordingly the rule was confirmed and the responsible officials ordered to pay *de bonis propriis* 50% of costs jointly and severally with defendant on J attorney and client scale. A copy of the judgment was forwarded to the

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relevant Law Society for further action as it deemed fit. The MEC was A discharged from personal liability. (Paragraphs [71], [90] and [102] at 635D – H, 640E – F and 649F – I.)

**Cases Considered**

**Annotations**

Case law B

*Absa Bank and Others v Robb*[2013 (3) SA 619 (GSJ)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%2720133619%27%5d&xhitlist_md=target-id=0-0-0-2555): referred to
*Coetzeestroom Estate and GM Co v Registrar of Deeds* 1902 TS 216: distinguished
*Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH*[1976 (3) SA 352 (A)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%27763352%27%5d&xhitlist_md=target-id=0-0-0-2557): considered
*Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*C 2003 (10) BCLR 1149 (C): referred to
*Kate v MEC for the Department of Welfare, Eastern Cape*[2005 (1) SA 141 (SE)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%27051141%27%5d&xhitlist_md=target-id=0-0-0-2559) ([2005] 1 All SA 745): considered
*Knight v Findlay* 1934 NPD 185: referred to
*Kriel v Bowels*[2012 (2) SA 45 (ECP)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%272012245%27%5d&xhitlist_md=target-id=0-0-0-2561): considered
*Lin and Another v Minister of Home Affairs and Others* (GJ case No 2014/22434, D 18 November 2014): referred to
*MEC for Roads and Public Works, Eastern Cape and Another v Intertrade Two (Pty) Ltd*[2006 (5) SA 1 (SCA)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%270651%27%5d&xhitlist_md=target-id=0-0-0-1785): referred to
*MEC for Roads and Transport and Others v Umso Construction (Pty) Ltd* (Ck case No 2034/05): referred to
*Minister of Rural Development and Land Reform v Griffo Trading CC:*E *In re Griffo Trading CC v Minister of Rural Development and Land Reform*[2014] ZAGPPHC 666: considered
*Minister of Safety and Security v G4S International UK Ltd and Others* (GJ case No 07/12735, 30 March 2012): referred to
*Mlatsheni v Road Accident Fund*[2009 (2) SA 401 (E)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%27092401%27%5d&xhitlist_md=target-id=0-0-0-2563): considered
*Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd* F [2014 (3) SA 265 (GP)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%2720143265%27%5d&xhitlist_md=target-id=0-0-0-2565) ([2013] 4 All SA 346): dictum in para [35] applied
*Njongi v MEC, Department of Welfare, Eastern Cape*[2008 (4) SA 237 (CC)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%27084237%27%5d&xhitlist_md=target-id=0-0-0-2567) (2008 (6) BCLR 571; [2008] ZACC 4): considered
*Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Others*[2008 (5) SA 94 (CC)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%2708594%27%5d&xhitlist_md=target-id=0-0-0-1665) (2008 (9) BCLR 865): Gconsidered
*Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuzaand Others*[2001 (4) SA 1184 (SCA)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%270141184%27%5d&xhitlist_md=target-id=0-0-0-2569) (2001 (10) BCLR 1039): considered
*Port Elizabeth Local Road Transportation Board and Others v Liesing*[1968 (4) SA 401 (E)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%27684401%27%5d&xhitlist_md=target-id=0-0-0-2571): considered H
*Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Others*[2010 (4) SA 308 (LCC)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%2720104308%27%5d&xhitlist_md=target-id=0-0-0-2573): considered
*S v Z and 23 Similar Cases (No 2)* 2004 (2) SACR 410 (E): referred to
*South African Liquor Traders Association and Others v Chairperson, Gauteng Liquor Board, and Others*[2009 (1) SA 565 (CC)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%27091565%27%5d&xhitlist_md=target-id=0-0-0-2575) (2006 (8) BCLR 901; [2006] ZACC 7): considered I
*Tasima (Pty) Ltd v Department of Transport and Others*[2013 (4) SA 134 (GNP)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%2720134134%27%5d&xhitlist_md=target-id=0-0-0-2577): considered
*Thunder Cats Investments 49 (Pty) Ltd and Others v Fenton and Others*[2009 (4) SA 138 (C)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%27094138%27%5d&xhitlist_md=target-id=0-0-0-2579): referred to
*Van Niekerk v Pretoria City Council*[1997 (3) SA 839 (T)](http://ipproducts.jutalaw.co.za/nxt/foliolinks.asp?f=xhitlist&xhitlist_x=Advanced&xhitlist_vpc=first&xhitlist_xsl=querylink.xsl&xhitlist_sel=title;path;content-type;home-title&xhitlist_d=%7bsalrFh%7d&xhitlist_q=%5bfield%20folio-destination-name:%27973839%27%5d&xhitlist_md=target-id=0-0-0-2581) ([1997] 1 All SA 305): referred to. J

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**Case Information**

A Adv *Pillay SC* for the plaintiff.

*R Latib* for the defendant.

*Return day of rule nisi order granting costs.*

**Order**

B 1.   Ezekiel Matlou, Jabulani Macheke and Kgoposi Cele are ordered to pay *de bonis propriis* 50% of the costs (identified as such in para 134 of my first order of 16 October 2014) jointly and severally with the defendant on the attorney and client scale.

2.   In the event of the plaintiff recovering all of her costs from the defendant, the defendant is ordered to recover 50% of the costs C paid by her to the plaintiff *de bonis propriis* from Messrs Matlou, Macheke and Cele jointly and severally.

3.   The conduct of Mr Matlou is referred to the Law Society of the Northern Provinces for investigation and such further action as it may deem fit.

4.   The registrar is directed to send a copy of this judgment, as well as D the judgment in this matter of 16 October 2014, to the Law Society of the Northern Provinces with the request that the Law Society investigate the conduct of Mr Ezekiel Matlou as appears from this judgment, with a view to taking such action as the Law Society may consider appropriate.