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

CASE NO: 17646/2013

In the matter between:

ANDRIES BAREND KRUGER	FIRST PLAINTIFF
ELAINE JANE BLACKENBERG	SECOND PLAINTIFF

and

THE PRIEMIER OF THE WESTERN CAPE PROVINCIAL GORVENMENT	FIRST DEFENDANT
THE HEAD: WESTERN CAPE PRONVINCIAL DEPARTMENT OF TRANSPORT AND PUBLIC WORKS	SECOND DEFENDANT
ROAD ACCIDENT FUND	THIRD PARTY

Coram: **LE ROUX AJ**

Delivered: **6 July 2026**

ORDER

The following order is made:

1. The costs order contained in paragraph (5) of the order dated 10 September 2025 is reconsidered and substituted with the following order:
   '(5)

   i. for costs incurred prior to 23 September 2021: the Defendants are ordered to pay the Plaintiffs' costs which includes the costs of two counsel where applicable, and the qualifying expenses of Dr. Roodt;
   ii. for costs incurred on and after 23 September 2021 and up to the date of this order: the Defendants are ordered to pay the Plaintiffs' costs on the scale as between attorney and own client on the High Court scale, including the costs of two counsel where applicable, and the qualifying expenses of Dr. Roodt;
   iii. The above costs awards include the costs of all interlocutory applications and procedural steps taken in the main action, save as may already have been separately ordered;'
2. The Defendants are ordered to pay the costs of this reconsideration application with counsel's costs to be taxed on Scale C;
3. All other orders made in the judgment of 10 September 2025 remain in full force and effect.

JUDGMENT DELIVERED ELECTRONICALLY

LE ROUX, AJ

Introduction

[1] This is an application for the reconsideration of the costs order made by myself in the judgment delivered on 10 September 2025 (the "judgment"). The application is brought pursuant to a Calderbank offer made by the First and Second Plaintiffs (the "Plaintiffs") on 23 August 2021 (the "Calderbank offer"), which was not disclosed at the time the costs order was made. The Plaintiffs seek, in the first instance, an order of indemnity costs (alternatively, costs on the attorney and own client scale, or attorney and client scale) in their favour from the date of the Calderbank offer. In the second instance, they seek a reconsideration of the scale on which the party-and-party costs order was granted, contending that Scale C rather than Scale A ought to have been awarded.

[2] I made the following costs order, in ignorance of the Calderbank offer:

> '(1) *Defendants are ordered to pay the Third Party's costs on Scale B regarding their counter-application to join the Third Party, such costs to include the costs occasioned by the employment of two counsel, where applicable;*
>
> (2) *Defendants' claim against the Third Party is dismissed;*
>
> (3) *Defendants are ordered to pay the Third Party's costs on scale B regarding Defendants' claim against the Third Party, such costs to include the costs occasioned by the employment of two counsel, where applicable;*
>
> (4) *Defendants are ordered to pay Plaintiffs' damages as may be agreed or proved;*
>
> (5) *Defendants are ordered to pay Plaintiffs' costs on scale A, such costs to include:*
>
> i. *The costs occasioned by the employment of two counsel;*
>
> ii. *The qualifying expenses of Dr Roodt;*

(6) *The matter is postponed sine die for determination of the quantum of Plaintiffs' damages.'*

[3] As is evident from the judgment, it was found that the Defendants wrongfully omitted to upgrade the road signage in order to make the road safe for road users, that their wrongful omission was the effective and proximate cause of the accident, and that the Defendants failed to establish any contributory negligence on the part of either Plaintiff. No appeal has been noted against the judgment.

Background to the litigation

[4] For convenience, I briefly summarise the background to the litigation, having regard to the judgment and the heads of argument filed in this reconsideration application.

[5] The Plaintiffs sustained serious injuries on 29 October 2010 when the motorcycle driven by the First Plaintiff, on which the Second Plaintiff was riding as a pillion passenger, left the R43 roadway at a sharp horizontal curve on the Rooihoogte Pass approximately 6.2km outside Villiersdorp in the direction of Worcester. The Plaintiffs contended that the Defendants were negligent in failing to erect and maintain adequate and effective warning signage, and in failing to enforce an appropriate speed limit at the relevant section of the road. It was common cause that the Defendants were at all material times responsible for and in control of the roadway.

[6] The trial, which concerned only the issue of liability pursuant to a separation under Uniform rule 33(4), commenced on 6 September 2021. It proved to be prolonged and arduous. In the course of the trial, the Plaintiffs sought to amend their particulars of claim to delete paragraphs 56 and 57 thereof, which had conditioned the Second Plaintiff's claim against the Defendants upon a successful claim against the Road Accident Fund. The Defendants opposed the amendment and launched a conditional counter-application to join the Road Accident Fund as a Third Party. Both applications were determined and a judgment delivered on 2 June 2023, in which the amendment was granted and the counter-application conditionally allowed, with costs being ordered against the Plaintiffs

in respect of the amendment application. After the resumption of the trial and the completion of all evidence and argument, the judgment was delivered on 10 September 2025.

[7] The Calderbank offer was made by the Plaintiffs' attorneys on 23 August 2021, approximately two weeks before the trial was scheduled to commence. In terms of the offer, the First Plaintiff tendered settlement on the basis that the Defendants would be liable for 50% of his proven or agreed damages, with the Defendants to pay the Plaintiffs' taxed or agreed costs on the High Court scale. The Second Plaintiff persisted with her claim in full. The offer stated that should it not be accepted within a reasonable time, and the eventual outcome be similar to or more favourable than the offer, the Plaintiffs would apply for a punitive costs order. The Defendants did not respond to the Calderbank offer.

[8] I ultimately found the Defendants 100% liable for the Plaintiffs' damages, with no contributory negligence on the part of either Plaintiff. The outcome is accordingly considerably more favourable to the Plaintiffs than the Calderbank offer.

The legal framework

The Calderbank principle

[9] The admissibility of Calderbank offers in South African law, and the procedure for their deployment on a reconsideration of costs, has been authoritatively confirmed by a number of recent judgments. In *AD and Another v MEC for Health and Social Development, Western Cape* [2017] ZAWCHC 15; 2017 (5) SA 134 (WCC), Rogers J (as he then was) held that a Plaintiff who makes a secret offer of settlement is entitled to disclose the offer to the court after judgment for the purpose of a reconsideration of costs, and that considerations of public policy favouring settlements and discouraging costly and unnecessary litigation are as compelling in such cases as they are when a Defendant makes an offer in terms of Uniform rule 34.

[10] The Full Bench, in *Du Toit NO obo Nkuna v Road Accident Fund* [2024] ZANCHC 78; [2024] 4 All SA 476 (NCK), endorsed and amplified the approach in *AD supra*. The

Full Bench held that there is no rational basis upon which a Plaintiff ought to be denied access to the benefits of a secret tender, particularly in circumstances where a Defendant with deep pockets unreasonably refuses a reasonable offer, thereby forcing the Plaintiff to endure a long and expensive trial. The court confirmed that such offers ought to be infused in the court's power to regulate its own process, and that the public policy and public interest considerations which underlie the penalisation of a Plaintiff who does not accept a Defendant's reasonable offer must logically apply equally where a Defendant refuses a Plaintiff's reasonable offer.

[11] The Supreme Court of Appeal (the "SCA") confirmed the indemnification objective of costs awards consequent upon Calderbank offers in *Itokolle-Clinix Private Hospital (Pty) Ltd v MNT obo DORM* (863/2024) [2025] ZASCA 153; 2026 (2) SA 407 (SCA) para 54, where it was held that the purpose of awarding costs on the attorney and client scale in such circumstances is to indemnify the Plaintiff in respect of those costs unjustly incurred as a result of the Defendant's unreasonable rejection of the Plaintiff's reasonable offer.

[12] In *V.N N.O (obo Estate late JCLT L) v MEC for Health: Northern Cape Province* (Case No CA&R 68/2023) [2025] ZANCHC 37; [2025] 3 All SA 552 (NCK), the Full Bench of the Northern Cape Division stated the core principle thus: a Plaintiff who presents a secret offer of settlement to the Defendant and ultimately receives an award that is more favourable than the secret offer is entitled to approach the court for a reconsideration application in which she seeks an order that the Defendant pay irrecoverable costs from the date the secret offer was made until the date of the award.

[13] The following legal requirements for the grant of a punitive costs order consequent upon a Calderbank offer, drawn from the authorities, must be satisfied. First, the offer must have been reasonable, constituting a fair discount based on a realistic assessment of the case rather than an attempt to hold out for the best conceivable outcome. Secondly, the offer must have been made timeously, allowing the Defendant a reasonable period to consider it. Thirdly, the Defendant must have behaved unreasonably in failing to accept the offer or to make a reasonable counter-offer, thereby putting the Plaintiff to

unnecessary expense. Fourthly, the outcome must be at least as favourable to the Plaintiff as the offer. Where these requirements are met, the court exercises its discretion afresh and may make such costs order as it deems appropriate in the light of the offer.

Costs scales under Uniform rule 67A

[14] Uniform rule 67A, which came into operation on 12 April 2024, requires a court granting a party-and-party costs order to indicate the scale, under Uniform rule 69(7), by which counsel's fees may be recovered. The three scales are Scale A (maximum R375 per quarter hour), Scale B (maximum R750 per quarter hour), and Scale C (maximum R1,125 per quarter hour). In determining the appropriate scale, the court has regard to the importance, value and complexity of the matter, as well as any considerations of the type listed in Uniform rule 67A(2), which may operate to reduce the scale. The scale applies prospectively to work done after 12 April 2024: see *Mashavha v Enaex Africa (Pty) Ltd and Others* [2024] ZAGPJHC 387; 2025 (1) SA 466 (GJ) at para 12.

[15] Uniform rule 67A is concerned only with party-and-party costs. It does not govern costs on the attorney and client or attorney and own client scale, which are governed by separate principles and at the discretion of the Taxing Master, save that the amounts recovered must, in the opinion of the Taxing Master, have been reasonably incurred.

The issues for determination

[16] The following issues require determination:

a) whether the Calderbank offer was reasonable and timeously made;
b) whether Defendants behaved unreasonably in not accepting the offer;
c) if a punitive costs order is warranted, from which date it should run;
d) whether the award of party-and-party costs on Scale A should be reconsidered; and if so, what scale should be awarded;
e) whether the Scale A order should be corrected *mero motu* under Rule 42(1)(b) as a patent error.

Analysis

Was the Calderbank offer reasonable and timeously made?

[17] The Calderbank offer tendered settlement of the liability issue on the basis that the Defendants would be liable for 50% of the First Plaintiff's proven or agreed damages. Read together with the outcome — that the Defendants are liable for 100% of both the Plaintiffs' damages, with no contributory negligence on either Plaintiff's part — the offer plainly constitutes a generous discount. The First Plaintiff offered to forego half of his claim. The Second Plaintiff's claim was not compromised at all; she persisted with 100% of her damages. The offer was, on any objective assessment, far more favourable to the Defendants than the outcome that was ultimately achieved.

[18] The question whether the offer constituted a fair discount on a realistic assessment of the case must be answered affirmatively. The evidence before this Court, established that the curve on the Rooihoogte Pass was a notoriously dangerous blind rise at which numerous accidents had occurred over many years prior to 2011. Correspondence was sent to the Provincial Administration on more than one occasion warning of the risks, and the community in Villiersdorp, including local businesspeople and police personnel, were well aware of the hazard. The Defendants' own Roads Engineer, Mr. Stofberg, undertook to inspect the road and, months later, supervising technical staff erected substantially improved signage. The failure to maintain Chevron signs and the inadequacy of the pre-accident signage were, as was found, the effective and proximate cause of the accident.

[19] I also consider the offer to have been realistically framed. It acknowledged the complexity of the matter and the existence of a genuine dispute on contributory negligence (which had been pleaded by the Defendants) and on causation. By offering a 50% discount on the First Plaintiff's claim, the Plaintiffs demonstrated a sober and realistic assessment of the risks of litigation, rather than an attempt to extract the maximum possible outcome from the Defendants. The offer was, in the terms used in the case law, a fair discount.

[20] As to timing, the offer was delivered on 23 August 2021, approximately two weeks before the trial was scheduled to commence on 6 September 2021. The Defendants submit that this period was insufficient to constitute a reasonable time for consideration. I am not persuaded. The matter had been litigated since 2013. The Defendants' legal representatives were in a position to evaluate the offer. A joint expert minute had been signed in June 2019. The Defendants had filed an amended plea in June 2021. Their legal representatives were fully seized of the case and were preparing for a trial that was days away. A two-week period, in those circumstances, was more than adequate for the Defendants to consider a settlement proposal that required no more than an acceptance of half-liability on a claim they had vigorously disputed for eight years. Moreover, the Defendants did not even respond to the offer, let alone seek an extension of time to consider it.

[21] I accordingly find that the Calderbank offer was reasonable and was made timeously.

Were the Defendants unreasonable in refusing the offer?

[22] The Defendants advance several grounds to justify their decision not to accept the offer. I shall address each in turn.

[23] First, the Defendants contend that the joint expert minute contained substantial agreement between the experts, and that on the basis of that minute, they could reasonably have concluded that they were not liable. A careful reading of the joint minute does not support this contention. The experts agreed on certain factual matters — for example, that the crash position was uncertain and that motorcyclists bear a responsibility to adjust their driving to road conditions — but they fundamentally disagreed on the central issue of whether the road signage was adequate. Dr. Roodt maintained that the absence of effective Chevron guidance prior to the curve was the cause of the accident. Dr. Joubert relied substantially on his "vegetation" thesis, which was ultimately rejected as unconvincing, internally contradictory, and not supported by the evidence. The joint minute did not come close to establishing that the Defendants had a sound defence; it merely crystallised the disputes between the experts.

[24] Secondly, the Defendants argue that the amendment application introduced by the Plaintiffs on 15 September 2021 — that is, after the offer was made and after the hearing had commenced — and the consequent joinder of the RAF as Third Party, justified their refusal to accept the offer. I cannot accept this argument for two reasons. First, the Calderbank offer predated the amendment notice by three weeks. At the time the offer was made, the Defendants had not yet been confronted with the amendment. The question of the reasonableness of the rejection must be assessed as at the date of the rejection, or rather as at the date by which a reasonable offeree would have responded to the offer. The subsequent amendment, while relevant to the proceedings as a whole, cannot retrospectively justify a non-response to an offer that was already before the Defendants. In any event, the joinder of the RAF ultimately failed entirely. I dismissed the Defendants' claim against the Third Party on the basis that there was no legally enforceable claim. The Defendants' reliance on the RAF joinder as a justification for their litigation stance therefore cannot be sustained.

[25] Thirdly, the Defendants submit that the Second Plaintiff's claim remained at 100%, and that the offer therefore did not constitute a settlement of the full litigation. This submission has some technical force — the offer did not extend to the Second Plaintiff's claim — but it does not assist the Defendants in the context of a reconsideration of costs. The Calderbank principle applies to the First Plaintiff's claim, in respect of which the offer was made and the outcome was unambiguously more favourable. The Second Plaintiff's claim provides no basis for the Defendants to have persisted with the full trial on the First Plaintiff's claim.

[26] Fourthly, the Defendants rely on the 2 June 2023 judgment, in which I found that the Plaintiffs had dragged their feet in bringing the amendment application and ordered the Plaintiffs to pay the costs of the amendment application. While this reflects adversely on the Plaintiffs' procedural conduct in respect of the amendment, it does not address the question of whether the Defendants were reasonable in refusing to settle the underlying liability dispute on terms that were considerably more favourable to them than the

outcome eventually achieved. The procedural matters and the substantive Calderbank question are distinct.

[27] Viewed in their totality, the Defendants' objections do not withstand scrutiny. The essential inquiry is whether the Defendants, knowing what they knew and ought to have known at the time the offer was made, behaved reasonably in ignoring it entirely. I find that they did not. The matters that weigh heavily in this regard are the following:

i. The dangerous and well-documented history of the relevant curve, which was widely known in the community and had been drawn to the attention of the Defendants' Roads Engineer in correspondence. The Defendants knew, or ought to have known, that the community regarded the curve as a serious hazard.

ii. The fact that, following the accident and in response to complaints, the Defendants' own Roads Engineer and technical staff decided to substantially upgrade the signage. The decisions to place more visible signage with advisory speed indications, to introduce the Gentle Curve sign, to position signage further from the curve, and to maintain the Chevrons more diligently, constituted an implicit acknowledgment that the pre-accident state of affairs was inadequate. Dr. Roodt pertinently asked during cross-examination: if the existing signage was not required, why was it changed?

iii. The decision by the Defendants' own expert, Dr. Joubert, not to consult the Roads Engineer and technical personnel at all was remarkable, in my opinion. I drew an adverse inference from the Defendants' failure to call the Roads Engineer or technical personnel to testify. Had the Defendants' legal representatives properly appraised themselves of what their Roads Engineer and technical team would have been required to concede — namely, the purpose of the Chevrons and the positive motivation for erecting the new signage — they ought to have recognised that their defence was substantially compromised.

iv. The untenable nature of the principal plank of Dr. Joubert's evidence, namely his 'vegetation thesis'. I found this evidence unconvincing, internally contradictory, and irreconcilable with Dr. Joubert's own concessions. The suggestion that the First Plaintiff, on a motorcycle at 100 km/h, should have been guided through a blind curve by road-side vegetation and cutting, rather than by proper road signs, was as I found, not a logical conclusion. The Defendants knew, or should have appreciated, that reliance on this thesis carried substantial risk.

V. The disparity in the resources of the parties. The Defendants are organs of state with access to public funding for litigation. The Plaintiffs are private individuals who faced the prospect of a protracted multi-counsel trial with the attendant risk of irrecoverable costs eroding any damages they might ultimately recover. The Plaintiffs' Calderbank offer was plainly intended to bring this expensive and uncertain litigation to an end on reasonable terms. The Defendants' decision to proceed with the full trial in the face of that offer, without even the courtesy of a response, was high-handed and unreasonable.

[28] I am accordingly satisfied that the Defendants behaved unreasonably in failing to accept the Calderbank offer, or to make a reasonable counter-offer, and thereby put the Plaintiffs to unnecessary expense. The unreasonable refusal is itself a proper ground for a special costs order on the attorney and own client scale: see *Du Toit NO* supra, at para 32 and 34.

From which date should the punitive costs order run?

[29] The Defendants submit that if any punitive costs order is warranted, it should run only from the date on which the trial recommenced after the 2 June 2023 judgment. Their reasoning is that the amendment application and the joinder proceedings introduced a measure of legitimacy into the continued litigation before that date.

[30] I do not accept this submission. The Calderbank offer was made on 23 August 2021. A reasonable defendant ought to have responded to and considered the offer within, at

most, a few weeks of its delivery — certainly before the trial commenced on 6 September 2021. The amendment application and its outcome did not change the nature of the liability dispute or alter the Defendants' obligation to engage seriously with the offer. The Defendants' failure to engage with the offer was not caused or excused by the amendment proceedings; it preceded them. I see no principled basis for deferring the commencement of the punitive order.

[31] In my view, the appropriate date from which the punitive costs order should run is 23 September 2021, being a period of approximately one month after the delivery of the offer, which constitutes a reasonable time for a properly advised defendant to have evaluated and responded to the offer. This is consistent with the approach that the cost penalty should apply from the date on which it became unreasonable not to have accepted the offer.

The party-and-party scale: was Scale A appropriate, and does the mero motu correction argument arise?

[32] The Plaintiffs make the point — with some justification, and which the Defendants do not adequately refute — that I may have awarded Scale A under a misapprehension as to which was the highest and which the lowest of the three scales. Under Uniform rule 67A, Scale A is the lowest and Scale C is the highest. The Third Party was awarded Scale B, while the Plaintiffs — who prevailed comprehensively and on a complex matter with serious consequences — were awarded Scale A, the lowest scale. As the Plaintiffs' counsel observed, absent any adverse considerations under Uniform rule 67A(2), there is no obvious justification for the Plaintiffs being awarded a lower scale than the Third Party on the merits of the litigation.

[33] The Defendants submit that the Scale A award constitutes a final order that cannot be varied, relying on the common law rule that a court cannot alter its own final order. They contend that any variation would constitute an exercise of discretion afresh, which is impermissible.

[34] Uniform rule 42(1)*(b)* provides that the court may on application correct an error or ambiguity in a judgment or order. The question of whether the award of Scale A rather than Scale C was a patent error depends on the trial Judge's reasoning. The judgment however does not set out the reasoning for the choice of scale, which is itself suggestive. Had Scale A been a considered choice, one would expect some engagement with the factors under Uniform rule 67A(3). In the absence of such reasoning, and given the anomaly of the Plaintiffs receiving a lower scale than the Third Party despite prevailing comprehensively on a complex and consequential matter, there is a *prima facie* case that Scale A was awarded under a misapprehension.

[35] However, I do not find it necessary to determine the *mero motu* correction issue in isolation, because the reconsideration of costs consequent upon the Calderbank offer renders the question of scale moot in a significant respect. Once indemnity costs (attorney and own client scale) are awarded for the period from 23 September 2021, the party-and-party scale award on Scale A ceases to have practical significance for the costs incurred after that date. For costs prior to 23 September 2021, the appropriate course is to consider the scale question as part of the fresh exercise of discretion mandated by the reconsideration.

[36] Exercising my discretion afresh for the pre-23 September 2021 period, I take into account the following. The matter was undoubtedly complex, involving competing engineering expert evidence, a multi-faceted factual inquiry about a blind road curve with a history of accidents, arguments on contributory negligence and speed limit appropriateness, and an involved set of pleadings. The claim was significant; both Plaintiffs' claims were each estimated at R950,000 for purposes of pleading, and the quantum has not yet been finally determined. The matter was of great importance to the Plaintiffs, for whom this litigation represented their only opportunity to recover damages for the serious injuries they suffered in 2010. There are no negative considerations under Uniform rule 67A(2) that would warrant a reduction from the appropriate scale. On the contrary, my findings about Dr. Joubert's conduct — his evasiveness, his failure to consult the Roads Engineer, his contradictory concessions, and his willingness to advocate for

his client's case rather than assist the court — might well have supported a personal costs order against the Defendants, though that falls outside the present application.

[37] I find accordingly that Scale C is the appropriate party-and-party scale for the costs of the entire matter. Insofar as this constitutes a correction of the Scale A award, it is justified both under Uniform rule 42(1)*(b)* as a correction of a patent error and as part of the exercise of the court's discretion afresh on reconsideration. For the avoidance of doubt, Scale C applies only to work done on or after 12 April 2024; work done before that date is taxable under the rules applicable before that date, consistent with the prospective application of Uniform rule 67A confirmed in *Mashavha supra*.

Order

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

1. The costs order contained in paragraph (5) of the order dated 10 September 2025 is reconsidered and substituted with the following order:
'(5)

   i. for costs incurred prior to 23 September 2021: the Defendants are ordered to pay the Plaintiffs' costs which includes the costs of two counsel where applicable, and the qualifying expenses of Dr. Roodt;

   ii. for costs incurred on and after 23 September 2021 and up to the date of this order: the Defendants are ordered to pay the Plaintiffs' costs on the scale as between attorney and own client on the High Court scale, including the costs of two counsel where applicable, and the qualifying expenses of Dr. Roodt;

iii. The above costs awards include the costs of all interlocutory applications and procedural steps taken in the main action, save as may already have been separately ordered;'

2. The Defendants are ordered to pay the costs of this reconsideration application with counsel's costs to be taxed on Scale C;

3. All other orders made in the judgment of 10 September 2025 remain in full force and effect.

LE ROUX
Acting Judge of the High Court

Appearances

For the Plaintiffs: JJ Botha SC
Instructed by DSC Attorneys

For the Defendants : EA de Villiers-Jansen SC
Instructed by the State Attorney