

SOUTH AFRICA / JUDGMENT

Booyse and Another v MEC, For Health, Gauteng Province (16233/13) [2019] ZAGPPHC 363 (19 July 2019)

[2019] ZAGPPHC 363**COURT**

North Gauteng High Court, Pretoria

BEFORE

Lukhaimane

CASE / FILE NUMBER

16233/13

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Policy

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

REPUBLIC OF SOUTH AFRICA

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED.

CASE

NO: 16233/13

In

the matter between: LIZ-MARIE
 BOOYSE
 FIRST PLAINTIFF
 JACOB
 JACOBUS BOOYSE
 SECOND PLAINTIFF
 and
 MEC
 FOR HEALTH, GAUTENG PROVINCE
 RESPONDENT

JUDGMENT

LUKHAIMANE AJ:

1. The First and Second Plaintiffs instituted this action in their personal and representative capacities against the respondent, owing to the negligence of certain staff members at the Tswane District hospital. On 8 February 2010, their son JJ sustained a brain injury that left him with very little voluntary functional movement and he is therefore dependent on others for all activities of daily living. At the time of the trial, JJ was 10 years old. He has since passed away on 1 April 2019, after the hearing but before closing arguments. The trial had only proceeded on the question of quantum of damages only, as a finding had already been made that the defendant is 100% liable for the plaintiffs' proven or agreed damages in their personal and representative capacities. The initial claim was for an amount of R19 695 500 in the First Plaintiff's capacity as mother and natural guardian of JJ. In addition, she and the Second Plaintiff, JJ's father, in their personal capacity, jointly claimed an amount of R796 000. The damages that the First Plaintiff claims to have suffered in her representative capacity as set out in the Plaintiff's Particulars of Claim are as follows:
 - Future medical and related expenses R14 065 000
 - Future loss of earnings
R2 040 000
 - General damages
R1 800 000
 - Cost of protecting money
R1 790 500
2. Damages claimed in their personal capacities as set out in the particulars of claim are as follows:
 - Past hospital, medical and related expenses R50 000

- Future medical and related expenses

R50 000

- Care giving beyond normal parenthood

R576 000

- General damages (for shock and trauma)

R60 000

for each of the Plaintiffs

R120 000

3. Therefore as can be gleaned from the claims above, these are for costs of medical and related care for JJ and damages to the Plaintiffs' in their personal and representative capacities.
4. Owing to the fact that JJ has since passed away, the court is relieved of the responsibility to decide on the following claims:
 - Future medical and related expenses for JJ
 - Loss of earnings
 - Cost of protecting JJ's money; and
 - Care giving beyond normal parenthood for the Plaintiffs
5. The court is further relieved of the need to make a ruling on Defendant's first and second special defences, namely that instead of being directed to pay compensation in money, the Defendant be directed to provide the medical services to JJ whenever they would be required and that instead of being directed to pay the loss of earnings in a lumpsum, the Defendant be directed to pay those amounts in instalments from when this loss would eventuate, respectively.
6. This then leaves the issues to be decided upon as follows:
 - Past hospital, medical and related expenses suffered by the Plaintiffs in their personal capacities
 - Future medical and related expenses suffered by the Plaintiffs in their personal capacities.
 - General damages in respect of severe psychological shock and trauma and loss of amenities of life of the Plaintiffs in their personal capacity.

- General damages claimed by the First Plaintiff in her representative capacity in respect of pain, suffering and discomfort, loss of amenities of life, permanent disability, severe permanent psychological shock and trauma, lost years of life and permanent disfigurement suffered by JJ junior until date of his demise.
- 7. At the outset it should be mentioned that the parties agreed on a life expectancy of 17 years for JJ. Life expectancy refers to the additional years which a person is expected to live, as from the person's age at the date of calculating the person's expected

additional years. A person's expected death age is arrived at by adding the additional years to the person's age at the calculation

date (see *AD and Another v MEC for Health and Development, Western Cape Provincial Government* (27428/10)

[2016] ZAWCHC 181 (7 September 2016) at paragraph 87). This has a bearing on the First Plaintiff's claim for general damages in her representative capacity.

8. General Damages

8.1 The Defendant's submissions in this respect are that their medical evidence points to the fact that JJ was in a permanent vegetative

state and therefore is not entitled to an award of general damages. The Plaintiffs on the other hand contend that JJ was not in a permanent vegetative state. The legal position on this issue seems settled in that, in instances of a brain injury, in order for a claim to be successful, the claimant must not be in a vegetative state (see *NK v MEC for Health, Gauteng* 2018(4) SA 454 SCA).

8.2 What is left to be determined is whether on the facts, JJ was in a permanent vegetative state.

8.3 Prof Smuts, Associate Professor of Steve Biko Academic Hospital's Paediatric Neurology Unit and registered paediatric neurologist,

testified that JJ had been under the care of their unit most of his life and his condition had deteriorated over time. Prof Smuts'

evidence was based on a Quantum opinion report that she submitted for the Defendant's use. She testified that JJ's clinical features had gradually changed over time and his epilepsy has become increasingly difficult to control since 2016. She indicated that his ability to interact had deteriorated over time as he had previously always been able to respond to one's voice and even smiled. She indicated that at the time of compiling the report, 01 October 2018, although his eyes were open, he is hardly responding. She records that there is an occasional facial grimace, cry or "possible" smile.

8.4 The issues around JJ's gross motor function and manual ability classification are not in dispute.

8.5 Whilst the Defendant would like the court to accept that JJ was in a persistent vegetative state for some time prior to his death, this factor has never been pleaded, despite the pleadings being amended twice which might explain why the Plaintiffs did not bother to submit any evidence to counter this given the extensive joint minutes completed by various experts on behalf of both parties.

8.6 The rest of Prof Smuts' evidence was aimed at future medical expenses and is therefore not relevant. The medico legal analysis report dated 17 March 2017, was not considered as it sought to ascribe JJ's condition to something other than the Defendant's staffs negligence, which matter has been settled.

8.7 Plaintiffs' evidence was that until JJ's passing, he was in a state of severe spastic tetraplegia, extremely handicapped and totally dependent on care for every need. As per Prof Smuts' evidence, the parties are in agreement with her assessment of JJ's gross motor function and manual ability classification. He had severe cortical blindness, was fed through a PEG tube as he could not swallow nor close his mouth and had an IQ of less than 20. They also confirmed that he suffered from epilepsy which became increasingly difficult to control since February 2016.

8.8 JJ junior's clinical features have gradually changed over time. However Prof Smuts conceded that on 26 April 2018 he was not in a vegetative state (see pg 247 par 20 record Volume 3 2019-02-25- 2019-03-29).

8.9 Having regard to the video taken during October 2018 it was clear that JJ was not in a vegetative state. From the shower video "noises of joy" could be heard and from the motor car video it was clear that JJ junior was crying and from the music video it was clear that JJ junior "was happy" (see pg 77 -79 record 2018-10-22).

8.10 When the Second Plaintiff resumed his evidence on 25 March 2019, with reference to a visit by JJ junior to his Springs residence in December 2018 and March 2019, Second Plaintiff testified "... we never have a dull moment with my son. He is always friendly; he is always kind you can touch him he is always smiling. If you play music he will show reaction but he understand what I am playing for him right nowHe will smile he knew where he was at home with us' (see pg 73 and 73 par 8 - 13 and par 25 Volume 1 record 2019-03-25 – 2019-03-29).

8.11 It is therefore clear from the evidence of both parties that it cannot be conclusively said that JJ was in a permanent / persistent vegetative state. Therefore, on a balance of probabilities, the court has to err on the side of caution and accept that on the evidence whatever his condition was, it was definitely not a permanent / persistent vegetative state. In that respect, in *Marine & Trade Insurance Co ltd v Katz* NO 1984(1) SA 98 (A) at 119 0-H, Trolip JA pointed out that, In awards arising from brain injuries, "although a person may not have 'full insight into her dire plight and full appreciation of her grievous loss: there may be a 'twilight' situation in which she is not a so-called 'cabbage' and accordingly an award for general damages would be appropriate. "

8.12 Although a trial court should not slavishly follow previous awards, one can have regard to them in getting a general sense of appropriate range (*Protea Assurance Code Ltd v Lamb* 1971(1) SA 530 (A) at 536) and in doing so one should have regard to changes in the purchasing power money (*SA Eagle Insurance Co Ltd v Harley* 1990(4) SA 833 (A) at 8410; *Minister of Safety and Security v Seymour* 2006(6) SA 320 (SCA) para 16 - 17). As was said by Nicholas JA in *Southern Insurance Association Ltd v Bailey* NO 1979(4) SA 961 (A) at 983 A-G "this court has not adopted a functional determination as to how general damages should be awarded. It has consistently preferred a flexible approach, determined by the broadest general considerations, depending on what is fair in all the circumstances of the case. We do not have to determine what the award will be used for - its purpose or function. What we must consider is the child's loss of amenities of life and his pain and suffering

8.13 In *S obo S v MEG Health Gauteng* [2015] ZAGPPHC 605, another CP case, Lauw J awarded R1.8 million as general damages (R2 220 802.00 in current 2019 value). The child's life expectancy was 19 years.

8.14 The mere fact that JJ junior passed on, does not "exclude" his right to claim general damages. Prof Cooper testified that "life expectancy is best based on speculative factors, but one try to reach what would probably be most appropriate guess in trying to establish what his life expectancy is ... The definition is that if we took a hundred people with the same condition today, at what point would 50 of them still be alive and that is defined as life expectancy ... What it does not say is that let us say that is 10 years from now, some of those may die in a week's time and some of them may live to another 20 or 30 years" (see pg 343 par 15 25 record Volume 4 2019-03-25 – 2019-03-29).

8.15 Not much of JJ's life remained and the gross total of general damages had been suffered. An award for interim payment in the amount of R1 500 000.00 was ordered by this Honourable Court dated 29 October 2018. The Plaintiffs argued that the amount of the interim payment of R1 500 000.00 be regarded as compensation for JJ junior's compensation for general damages and that no further amount be payable as compensation for JJ junior's claim for general damages.

8.16 Having had regard to the above, this court is inclined to agree with the Plaintiffs that an amount of R1 500 000.00 is fair and reasonable compensation for JJ's claim for general damages.

8.17 In their personal capacities, the Plaintiffs also claim damages for past hospital, medical and related expenses in the amount of R50 000.00, future medical and related expenses in the amount of R50 000.00, compensation for care-giving services rendered beyond the scope of normal parenthood in the amount of R576 000.00, and general damages for shock and trauma in the amount of R120 000.00.

8.18 Whilst all these claims are founded on a different basis as advanced by the Defendant, the Defendant suggests that evidence should have been led on each of these claims. Plaintiffs on the other hand seek to rely on agreements reached in the joint minutes that resulted in there being no need to advance evidence on some of the issues.

8.19 Therefore, it is prudent that before dealing with the merits of each claim, I deal with the status of joint minutes.

8.20 This matter was settled by the Supreme Court of Appeal's majority judgement in *Bee v RAF* 2018 (4) SA 366 (SCA) where it was stated at paragraphs 66 and 73 as follows:

"... the joint minute will correctly be understood as limiting the issues on which evidence is needed. If a litigant for any reason does not wish to be found by the limitation a fair warning must be given. In the absence of repudiation (i.e. fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue."

"Unless the trial court itself were for any reason dissatisfied with the agreement and alerted the parties to the need to adduce evidence on the agreed material, the trial court would, I think be bound, and certainly entitled, to accept the matters agreed by the experts."

9. Past hospital, medical and related expenses

9.1 It was agreed by the parties in a telephonic and email addendum minute between the occupational therapists that JJ be admitted to Little Gems (refer to paragraph 4.22, page 74 of the paginated papers, Index vi, Bundle 3).

"4.22 On discussion and consideration of the facilities and needs for JJ, we agree that Little Gems, (in Linksfield) is a suitable option for JJ to reside in. This centre offers a suitable child to care-giver ratio. JJ is given one-to-one care... The cost is R15000 per month plus R100 per month for nappies."

9.2 JJ was admitted from December 2018 until his passing on 1 April 2019. Therefore a total of R60 000 was expended for past hospital, medical and related expenses.

10. Future hospital, medical and related expenses

10.1 The Plaintiffs claim an amount of R63 501.00 for future hospital, medical and related expenses. The Defendant is of the view that there was no evidence that those expenses were incurred, In addition, the Defendant avers that with the passing away of JJ, expenses for this purpose will no longer be required, therefore the claim should be denied.

10.2 Again, if reference is had to the joint minutes dated 17 October 2018, the Educational Therapists agreed as follows:

"We agree that the parents should receive counselling and support in dealing with a cerebral palsy child and in doing what is in the best interest of the child. With the client's diminishing life expectancy the parents might also benefit from counselling as his health is deteriorating, whilst considering Prof Smuts findings and opinion. It is suggested that initially the parents receive 12 sessions counselling at R1 000 a session and that provision is made for 6 sessions annually with a 10% increase."

10.3 With JJ's passing on 1 April 2019, it is so that the extent of this claim should be revised downwards. Considering the fact that he passed away, aged 10, during the trial, the circumstances are such that counselling for the Plaintiffs is warranted. Therefore, the Plaintiffs should receive the initial 12 sessions of counselling at R1 000 per session and a further 6 sessions per annum for two more years, with a 10% increase.

10.4 Therefore an amount of R25 860 is awarded in this regard.

11. General damages for the Plaintiffs in their personal capacities

11.1 The Defendant's submission in this regard is that the Plaintiffs' psychologist, Ms Karen Adams confirmed that neither Plaintiff suffers from any psychiatric condition and that whilst they might have endured grief and sorrow that such grief and inevitable bereavement is not actionable *Collins v Administrator*, 94G-I Cape 1995 (4) SA 73 (C).

11.2 It is so that Ms Adams testified that both Plaintiffs do not exhibit sufficient symptoms to warrant a psychiatric diagnosis, however that they exhibit symptoms associated with the presence of depression. Evidence was led indicating that the relationship between the First and Second Plaintiffs ended as a result of the inability to deal with JJ's condition especially on the part of the First Plaintiff. The Second Plaintiff's life ceased to exist outside of taking care of JJ. He testified to feeding him, bathing him and taking him to hospital on a regular basis. He was also at pains to let him stay in a facility as he was burdened with guilt.

11.3 It is so that as society, we tend to denigrate or look down upon disease of the mind, especially depression. This is more so when the persons exhibiting such symptoms are ordinary folk just getting by.

11.4 In *Delisile Mbhele v MEC for Health for the Gauteng Province*, (SCA case number 355/2015 [2016] ZASCA 166), an amount of R100 000 was awarded in 2016 against the MEC for Health in Gauteng as compensation for emotional shock. In this instance, there was no medical evidence of lasting trauma, unresolved mourning or chronic bereavement. At paragraph 19 of the judgement, Judges Tshipi et Mocumie JJA state as follows:

"However, although no medical evidence was presented, there can be no doubt that the appellant experienced severe shock, grief and depression as set out in para 4.6 of the stated case: 'The death of her "baby" left her feeling empty. For months after the death of the baby she shut herself behind closed doors and did not wish to socialise with family and friends The death of the "baby" came as a shock as she had made preparations for its birth and in expectation thereof had already bought a lot of clothes, toys and other utensils.... She has since the death of Tebogo given birth to a child she named Siyabonga. She lost interest in her work and squandered her money. As a result, for months she suffered from depression.'

11.5 The Plaintiffs are claiming an amount of R60 000 each. The court finds the amount reasonable under the circumstances and awards such to Plaintiffs.

12. It is ordered as follows:

12.1 The Defendant is ordered to pay the capital amount of R205 860.00 (Two hundred and five thousand eight hundred sixty only), within 30 (thirty) days of date of this order served on the Defendant's attorneys, to the Plaintiffs' attorneys of record, trust account

details:

ACCOUNT HOLDER : ADEL VAN DER WALT INC

BANK

: ABSA BANK

TRUST ACCOUNT No : [...]

BRANCH

: MENLYN

BRANCH CODE

: 632 005

REFERENCE

: AS2131

as payment for damages to the First and Second Plaintiffs in respect of the First and Second Plaintiffs claim in their personal capacity relating to First and Second Plaintiffs claim for General Damages and First and Second Plaintiff's claim for Special Damages (future medical costs).

12.2 The Defendant is ordered to pay the capital amount R1 500 000.00 (one million five hundred thousand rand only) as payment for damages to the First Plaintiff in respect of First Plaintiffs claim in her representative capacity on behalf of Johannes Jacobus Jonker ("the minor"). It is noted that the amount of R1 500 000.00 (one million five hundred thousand rand only) was paid by the Defendant to the Plaintiffs attorney of record's trust account as interim payment in terms of a Court Order dated 29 October 2018. No further payment is to be made by the Defendant in this regard.

The aforesaid amounts will not bear interest unless the Defendant fails to effect payment thereof or either thereof within thirty calendar days of the date of this order, in which event such capital amount or amounts will bear interest at the statutory mora rate in accordance with the provisions of the Prescribed Rate of Interest Act, 55 of 1975, as amended by the Judicial Matters Amendment Act, 24 of 2015, and which rate of interest will be referred to herein after as "the mora rate, calculated from and including the 31st (thirty first) day after date of this order to and including the date of payment thereof.

12.3 The Defendant is ordered to pay the Plaintiffs taxed or agreed party to party costs, including the following costs for the following days Monday, 22 October 2018; Tuesday, 23 October 2018; Monday, 29 October 2018; and Monday, 25 March 2019; 26 March 2019; 27 March 2019; 28 March 2019 and 29 March 2019:

12.4 The costs of employing two counsel;

12.5 The costs of the obtaining by the Plaintiffs of the reports and addendum reports of the following experts and of giving Rule 36(9)(a)&(b) Notice thereof:

12.5.1 Ms Karen Adams

12.5.2 Mr D Rademeyer;

12.5.3 Ms P Coetsee;

12.5.4 Mr C Mattheus;

12.5.5 Dr MM Lipper;t

12.5.6 Ms F Coetzee;

12.5.6 Dr Lofstedt;

12.5.7 Mr CJ Koen;

12.5.8 Ms CJ Nel;

12.5.9 Dr EM Moshokoa;

12.5.10 Dr BH Pienaar;

12.5.11 Ms E Els;

12.5.12 MS M du Plooy;

12.5.13 Dr D Potgieter;

12.5.14 Capital Radiologists;

12.5.15 Arch Actuarial Consultants

12.6 The reasonable preparation/qualifying and reservation fees (if any) of the experts referred to in paragraph 3.5 above, including the costs of consultants (if any) with the Plaintiffs legal team;

12.7 The costs of obtaining the various expert joint minutes;

12.8 The costs of obtaining the various actuarial calculations;

12.9 The reasonable travelling costs of Mr D Rademeyer;

12.10 The reasonable travelling costs of attending the medico-legal examinations subject to the discretion of the Taxing Master;

12.11 The costs of making up and distributing the various bundles;

12.12 The costs of drafting the heads of argument.

12.13 The following witnesses are declared to be necessary witnesses, namely:

12.13.1 Mr JJ Jonker (Second Plaintiff);

12.13.2 Dr Moshokoa;

12.13.3 Dr Pienaar;

12.13.4 Dr Lofstedt; and

12.13.5 Ms K Adams

12.14 The following provisions will apply with regards to the determining of the aforementioned taxed or agreed party and party costs:

12.14.1 The Plaintiffs' attorneys of record shall serve the Notice of Taxation on the Defendant's attorneys of record;

12.14.2 The Defendant shall be allowed 30 (thirty) calendar days from the date of settlement or taxation within which to effect payment of the agreed or taxed costs; and

12.14.3 Should payment not be effected within the aforementioned period, the Plaintiffs will be entitled to recover interest on the taxed or agreed costs at the mora rate calculated from and including the 31st (thirty first) day after the date of settlement of the costs or of taxation, to and including the date of final payment thereof.

12.14.4 A contingency fee agreement in terms of the Contingency Fee Act, 1977 (Act No 66 of 1977), was entered into between the Plaintiffs and Adele van der Walt Inc.

MA LUKHAIMANE

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appearances:

On behalf of the applicant : Adele van der Walt Inc

Instructed by

: Adv Salie Joubert SC

Adv Hilgard Botma

On behalf of the respondent : The State Attorney of Pretoria

Instructed by

: Adv Vas Soni SC

Date of hearing

: 12 June 2019

Date of judgment

: 19 July 2019

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