

SOUTH AFRICA / JUDGMENT

D.S.S v MEC for Health Gauteng (2447/2018) [2024] ZAGPPHC 1199 (15 November 2024)

[2024] ZAGPPHC 1199

COURT

North Gauteng High Court, Pretoria

BEFORE

M J Teffo

CASE / FILE NUMBER

2447/2018

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2447/2018

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED.

Date: 15/11/2024

In the matter between: D[...] S[...] S[...] Plaintiff (obo J[...] K[...] S[...] and G[...] A[...] S[...]) and MEC FOR HEALTH, GAUTENG Defendant

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgment is further uploaded to the electronic file of this matter on Caselines. The date of this judgment is deemed to be 15 November 2024.

J U D G M E N T

TEFFO, J:

Introduction

- [1] The plaintiff in this matter claims damages in a representative capacity as the mother and natural guardian of her two minor children, J[...] K[...] S[...] (J[...], a male) and G[...] A[...] S[...] (G[...], a female) both born on 3[.] M[.] 2015[1] (the twins).
- [2] It is the plaintiff's case that as a result of the negligence of the employees at Steve Biko and Tshwane District hospitals where the minor children were born and received treatment at the time, the children present with and suffer from a condition called retinopathy of prematurity (ROP). J[...] is blind in both eyes and G[...] is blind in her right eye and severely visually impaired in her left eye.
- [3] The issue of liability has been previously resolved and the defendant is liable to pay 100% of J[...]’s proven or agreed damages[2] and 90% of G[...]’s proven or agreed damages[3]. The Court is only enjoined to determine the issue of quantum to be awarded to the plaintiff for the damages suffered by her in a representative capacity.
- [4] The plaintiff's claims and their composition are outlined in paragraphs 11 and 12 of the particulars of claim[4] or paragraphs 11, 12 and 13 of the schedule of loss[5], as follows:
- 4.1 Fair compensation by both J[...] and G[...] to the plaintiff for her caregiving of them to date (see Appendix A to the plaintiff's schedule of loss);[6]
- 4.2 Future hospital, medical and related expenditure (see Appendices B1 and B2 for J[...] and G[...] respectively);[7]
- 4.3 Loss of income and earning capacity (see Appendices C1 and C2 for J[...] and G[...] respectively);[8]
- 4.4 General damages (see Appendices D1 and D2 for J[...] and G[...] respectively);[9]
- 4.5 Costs of the protection of the award (see Appendices E1 and E2 for J[...] and G[...] respectively). [10]
- [5] The following bundles served before Court: the pleadings Bundle (Bundle “00”); the plaintiff's J[...] Expert Bundle (Bundle “8.1”); the plaintiff's G[...] Expert Bundle (Bundle “8.2”); the defendant's J[...] Expert Bundle (Bundle “8.3”); the defendant's G[...] Expert Bundle (Bundle “8.4”); the plaintiff's Actuarial Bundle (Bundle “8.5”); the defendant's Actuarial Bundle (Bundle “8.6”); J[...]’s Joint Minute Bundle (Bundle “9.1”);[11] G[...] Joint Minute Bundle (Bundle “9.2”);[12] the Pre-Trial Minutes Bundle (Bundle “11”); the Trial Bundle (Bundle “18.1”);[13] the Photograph Bundle (Bundle “18.2”).

- [6] Both parties have filed expert reports and where they had opposing experts, joint minutes were obtained. The plaintiff filed five uncontested reports in respect of both J[...] and G[...] (all ten uncontested reports) of the Ophthalmologist, Dr Stoler, the Ocularist, Ms Carvalho, the Optometrist, Sir Nicholas Rose, the Orthopaedic Surgeon, Dr Birrell and the Quantity Surveyor, Mr Simon.
- [7] The defendant admitted Dr Stoler's report in paragraphs C2.1 of the Fourth (Quantum) Pre-Trial Conference Minute on 11-79, Ms Carvalho's report C2.3 on 11-80 to 11-81, Sir Nicholas Rose's report in paragraph C2.5 on 11-81 to 11-82, Dr Birrell's report in paragraph C2.7 on 11-83 to 11-84, and Mr Simon's report in paragraph C2.9 on 11-84 to 11-85 of the Pre-Trial Conference Minute Bundle[14].
- [8] With regard to the joint minutes, as indicated in footnote 11 above, the parties agreed that they constitute agreed and accepted evidence, to be read together with the underlying reports and with the former taking precedence over the latter in the event of any difference between them[15].
- [9] The plaintiff obtained actuarial calculations as per her Actuarial Bundle (Bundle 8.5 on Caselines). On 11 July 2024 the defendant also acquired actuarial calculations (Bundle 8.6 on Caselines). A joint minute of the actuaries was obtained. The actuaries agree that the figures arrived at for the calculation of the loss of earnings are "similar [and] ...that any slight differences are negligible"; that "[m]inor differences in their models mean that they will never replicate figures exactly; differences of up to 2% [between actuaries] in capital values are normal in their industry", and resultantly that the parties should feel free to simply take the mean of the actuarial figures[16].
- [10] I am informed that the legal teams therefore agreed in paragraph C2.1 of the Sixth (Quantum) Pre-Trial Conference Minute on 11-33 to 11-34 to take the mean as proposed by the actuaries.

The advantages of agreements relating to documents and reports

- [11] There is a plethora of cases which affirm the advantages of parties admitting expert reports and joint minutes in the interests of proper case management.
- [12] In *Thomas v BD Sarens (Pty) Ltd*[17], Sutherland J had this to say:

"Firstly, about the fact that admission of a report or a joint minute constitutes admission not just of the opinions contained in the report or joint minute, but also of the facts and research reflected in the report or joint minute:

Where experts ... supply facts, either from their own investigations, or from their own researches, and an agreement is reached with the other parties' experts about such facts, such an agreement ... enjoys the same ... status as facts that are expressly common cause on the pleadings or ... in an exchange of admissions.

Secondly, on the importance of parties being bound by joint minutes:[18]

[where] ... experts meet and agree ... the parties are not at liberty to repudiate such an agreement placed before court ... [I]t is illegitimate to cross-examine an opponent's witness to undermine an agreed position on fact or on opinion unless, before the trial begins, the opinion of a party's own expert has been formally repudiated. No litigant shall be required to endure the risk of preparing for trial on a premise that an issue is resolved only to find it is challenged."

[13] In addition, the following remarks were made by Rogers AJA in Bee with regard to the importance of parties being bound by agreements contained in joint minutes:[19]

13.1 On the importance for proper case management of litigants reaching agreement on as many matters as possible so as to limit the issues to be tried:[20]

A fundamental feature of case management, here and abroad, is that litigants are required to reach agreement on as many matters as possible so as to limit the issues to be tried.

13.2 With regard to the importance of expert joint minutes and being bound by them:

where the matter in question fall within the realm of ... experts ..., it is entirely appropriate to insist that experts in like disciplines meet and sign joint minutes. Effective case management would be undermined if [this process isn't followed] ...

... where ... experts ... meet and file joint minutes, ... the joint minutes will correctly be understood as limiting the issues on which evidence is needed.

The injuries and the sequelae thereof

[14] J[...] has been diagnosed with severe visual impairment, leaving him "legally blind" because of ROP. He also has an attention deficit hyperactivity disorder ("ADHD") and some impairment of cognitive-linguistic ability. He suffers from frequent migraine-type headaches. He has no ability to see, read and/or write. Although he has speech impairment, he can eat, chew and swallow competently. There is no significant impairment of gross motor function, while he has some visual impairment related to impairment of the fine motor function. He understands conversation addressed to him and can communicate effectively with well-known others, although his speech impairment may restrict his ability to express himself to persons unfamiliar to him. He moves around competently in well-known environments, struggles to run and move around in unfamiliar places. He requires guidance when out of his well-known spaces. He feeds and drinks independently and requires assistance with other self-care tasks. He struggles with interpersonal interactions and relations. He is attending a special needs school for people with visual impairment and has been assessed as being able to cope with formal education in the special needs setting.

[15] As a result of ROP, G[...] has severe visual impairment. Her right eye is regarded as being "legally blind". Her left eye is slightly better as to acuity. She has low average or normal cognitive/intellectual ability, and her language and speech skills are on par with peers of the same age. Her brain scan is reported to be normal. She experiences intermittent headaches.

She is however, in good general health and her weight, length and head circumference are within normal range. She is also continent of bladder and bowel. There are no signs of any significant motor impairment or orthopaedic problems. Her learning problems are like those of children of her age, and she has performed well academically. She communicates competently, although there may be some difficulty when communicating with strangers. She performs most self-care tasks independently, requires some assistance, for example, when tying her shoelaces. She interacts confidently with her peers and assumes leadership roles in her classroom. She is a strong supporter of her twin brother who has more severe visual impairment.

The approach adopted by the legal teams in the present matter

[16] I was referred to the judgment of Gilbert AJ in *Denby v Ekurhuleni Metropolitan Municipality*[21] where facts are similar to the present matter in that the defendant's legal representatives could not obtain a mandate, nevertheless, they did what was in their client's interests by debating and agreeing to figures.

[17] At paragraph 23 of the *Denby* judgment, Gilbert AJ had this to say:

"... the alternative would have been for them to appear in court but leave it to the plaintiff to advance his case in which he sought damages significantly more to that to which [the defendant's legal team] ... was prepared to agree [which] ... would be seriously prejudicial to the defendant. The lesser evil so to speak, was for the defendant's legal representatives

understandably to agree with the plaintiff on suitable amounts of damages consequent upon carefully considered concessions and

admissions made during the course of pre-trial engagements [in preference to remaining supine and allowing] ... judgment [to] go against the defendant for a significantly larger amount."

[18] Gilbert AJ consequently approved the conduct of the defendant's legal team and approved the "settlement" between the legal teams, making it an order of court.

[19] The parties also placed reliance on the judgment of Lekhuleni J who recently concurred with the approach adopted by Gilbert AJ in *Denby* and made the following remarks in *Rautini v Prasa*[22]:

"To this end, I share the views expressed in Denby v Ekurhuleni Metropolitan Municipality 2021 (1) SA 190 (GJ), para 11, a case sharing striking similarities with the present, where the court observed that 'the defendant's legal representatives found themselves in the invidious position that they were unable to obtain instructions from their client to agree to a consent order, but in the discharge of their professional legal duties both to the court and their client to engage constructively with the plaintiff's legal representatives in pre-trial proceedings, including in the making of appropriate concessions and admissions, had concluded there remained no discernible lis between the parties to be litigated'."

- [20] On the understanding that practitioners in general have a legal duty as members of the legal profession[23] to act in a manner that shall promote and advance the efficacy of the legal process, and that entering the court's arena should not be embarked upon frivolously, the parties in the present matter adopted the approach taken in the Denby and Rautini matters.
- [21] Extensive pre-trial conferences were held on 18 June 2024[24], 11 July 2024[25] and 17 July 2024[26], where different opinions were expressed with submissions made by both parties, conveying their respective views and certainly some common ground could be found. These discussions between the parties led to an agreement that the matter may be dealt with on the strength of the papers.
- [22] The agreements between the parties obviated the need for oral evidence, the trial which would have been long and arduous, and would have had huge cost implications. I appreciate the attitude of the defendant's legal team in this matter reaching agreement to this effect is in keeping with the highest standards of the profession, and in particular with that of a defendant as outlined in a number of cases that have come before this Court and the Supreme Court of Appeal.
- [23] The process of discussion and debate between the legal teams and particularly their agreement that the matter could in light of the joint minutes be dealt with on the papers, meant that the parties were able to excuse their experts in the course of the negotiations, thereby saving considerably on costs.
- [24] The defendant's legal team, even though they did not have any mandate from their client, through their conduct have saved their client and the taxpayer considerable expenses with the result that a much lesser quantum amount will be awarded as a result of the approach adopted by them[27].
- [25] That being said and having regard to the decision of *NSS (obo AS) v MEC for Health, Eastern Cape*[28], a court, however, is not bound by agreements reached between experts or parties' agreements, nor is it bound by the joint minutes or the reports, and may test these opinions if deem necessary[29]. If the Court however is not so inclined, a court will be entitled to confirm the agreements reached between them.

The plaintiff's schedule for loss and appendices and the process of its composition

- [26] I was presented with a schedule of loss together with thirteen Appendices on the strength of the reports and joint minutes.
- [27] The Schedule of Loss and Appendices A to E2 deal with the different components of the plaintiff's claims in her representative capacity on behalf of J[...] and G[...].
- [28] Appendices F, G1 and G2 are the draft order and the trust deeds respectively.
- [29] In the Schedule of Loss the actuarial aspects were dealt with as follows:

29.1 In respect of the nett capitalisation rates, at paragraph 7 of the Schedule of Loss there is an indication that the plaintiff's actuaries applied a uniform 2,5% nett capitalisation rate to all future aspects of the claim. The defendant's actuaries utilised the same nett capitalisation rates. It was submitted that the parties are in full agreement in this regard[30]

29.2 Regarding the plaintiff's actuary's use of the Life Table 2, in paragraph 8 of the Schedule (11-121 to 11-25) the plaintiff set out clear authority[31] to the effect that this table is the most appropriate. The defendant's actuary utilised the same table and the legal teams have thus agreed that this is the correct approach[32].

29.3 With regard to the possibility of a reduction in the twins' life expectancy brought about by their blindness:

29.3.1 The plaintiff's Dr Campbell opined that the twins' blindness has not resulted in any reduction in life expectancy.

29.3.2 Dr Botha for the defendant opined a small loss of life expectancy.

29.3.3 This was discussed and the legal teams agreed that the life expectancy experts' mean 0,7 years' difference in respect of J[...] and 1.3 years' difference in respect of G[...] is miniscule and will have a minuscule effect, if it has any effect, and in the circumstances the legal teams agreed to proceed ... by ... taking the mean between the two sets of actuaries' calculation results.

[30] Both parties filed reports in respect of the two minor children. Five uncontested reports were filed by the plaintiff in respect of J[...]. The reports are from Dr Stoler, the Ophthalmologist; Ms Carvalho, the Ocularist; Sir Nicholas, the Optometrist, Dr Birrell, the Orthopaedic Surgeon and Mr Simon, the Quantity-Surveyor. Further to this, nine joint minutes were filed. Those are the minutes of paediatricians (Lombard/Lewis); educational psychologists (Pienaar/Ellis); the architects (Eybers/Retief); the speech and language therapists and audiologists (Levin/Barber); life expectancy experts (Campbell/Botha); psychiatrists (Fine/Lekalakala), the industrial psychologists (Linda and Jooste/Van Pletzen); physiotherapists (Jackson/Mkanzi), the clinical psychologists (Truter/Van der Merwe); and occupational therapists (Greeff/Ndabambi).

[31] In respect of G[...] there are five uncontested reports of Dr Stoler, Ms Carvalho, Sir Nicholas Rose, Dr Birrell and Mr Simon. There are also nine joint minutes of the paediatricians, educational psychologists, the architects, the speech and language therapists and audiologists, the life expectancy experts, the psychiatrists, industrial psychologists, the psychotherapists, clinical psychologists and occupational therapists.

[32] I was informed that the following approach was adopted in drawing up the Schedule of Loss:

32.1 Where experts in different areas of expertise had similar recommendations, they dealt with these items together, or disregarded the items dealt with by experts whose expertise may have been outweighed by others.

32.2 Where there was agreement on the need for certain therapies and/or items but the number of items or the costing differed, they took the mean of the two experts' recommendations.

32.3 Where one expert made recommendations and the other was silent on the issue, or failed to cost the items, they generally accepted these items and utilised the available costing.

32.4 In some instances of dispute between the experts, for the purpose of compromise they either agreed to disregard them (with the rider that should the plaintiff's expert be required to testify, they reserved the right to lead evidence in respect thereof); or for example applied a higher contingency deduction in order to account for the dispute.

32.5 In other instances of dispute, where they believed that the plaintiff's expert was patently correct by virtue of experience or common-sense, they leaned towards the plaintiff's expert (fully explaining why and to what extent they were doing so) and applied contingency deductions where necessary. Likewise, in some instances they preferred the defendant's expert.

32.6 In some instances there were certain items recommended by one expert and other items recommended by the other, there they took the mean.

32.7 Contingency deductions were applied on an item-by-item basis on the strength of the cases referred to in Appendix B3 on 11-204 to 11-214 on Caselines, in particular, the cases of Van der Merwe v Premier of Mpumalanga 2005 (5) QOD 13-15 (T); and Lochner v MEC for Health and Social Development, Mpumalanga [2013] ZAGPPHC 388 (27 November 2013), and a common-sense approach.

[33] The plaintiff's legal team submitted that the defendant's legal team was provided with the Schedule and Appendices and at the Fourth, Fifth and Sixth (Quantum) Pre-Trial Conferences the legal teams discussed the implications of the various underlying reports and joint minutes, and debated the various heads of damages, the calculated items, applicable case law, and the application of contingency deductions.

[34] Through vigorous debate at these pre-trial conferences, it was submitted, the plaintiff was constrained in some instances to further reduce the figures contained in the Schedule of Loss and Appendices. This is the basis upon which they argue that the figures ultimately arrived at are fair and reasonable.

[35] As previously indicated the defendant's legal team could not obtain any mandate from their client. There is therefore no formal agreement reached between the parties.

The plaintiff's claim for past caregiving in respect of both minor children

[36] This claim has been fully substantiated in Appendix A at paragraphs 2 to 5. It is submitted that the proposed figure of R361 146,00 in paragraph 6 of Appendix A was meant for both minor children. On this basis the plaintiff did not make provision for the 90% liability finding in favour of G[...]. The defendant's legal team at paragraph C6.1 of the Fourth (Quantum) Pre-Trial Conference Minute, was constrained to agree to the figure, without instructions. I have looked at the proposed figure and the facts together with the case law

relied upon and having considered that the plaintiff proposed this figure for the two minor children when the cases referred to only make provision for one person, I find the figure to be fair and reasonable for the plaintiff's claim for the past care giving of the two minor children.

The plaintiff's claim on behalf of J[...]

J[...]'s future medical and related expenditure

[37] This claim has been fully substantiated in paragraph 12.1 of the Schedule[33] of Loss and Appendix B1[34].

37.1 Ophthalmic care – The plaintiff proposed a figure of R861 900. This is based on the uncontested and admitted reports of the Ophthalmologist, Dr Stoler, the Ocularist, Ms Carvalho[35]. It was submitted that because the defendant's Prof Mayet agreed with Dr Stoler's report, the plaintiff disallowed Ms Carvalho's recommendations and Sir Nicholas Rose fully substantiated his proposals. At paragraph C4.1 of the Sixth (Quantum) Pre-Trial Conference Minute on 11-335 the defendant's legal team agreed with the figure proposed by the plaintiff.

37.2 Psychotherapy, psychiatric treatment and psychotropic medication – This is based on the joint minutes of the psychiatrists and clinical psychologists (paragraph 4 of Appendix B1 on 11-144 to 11-151). It was submitted that the parties' experts agreed that a claim for psychotherapy was as a direct result of the minor children's blindness. However, the figures differed between the parties' clinical psychologists. The legal teams ultimately took the mean between the experts' recommendations. The amount was then divided between the minor children's claims for therapy.

37.3 The parties further dealt with J[...]'s likely psychiatric and psychotherapeutic needs in paragraph 4.4 of Appendix B1. A proposal of 20% on the basis of the expert views that J[...]'s ADHD may be partly attributed to his blindness[36]. The respective experts all agreed that J[...] required psychotherapy and that this was attributable to his blindness. However, the costing was different and the legal teams eventually took the mean between the respective recommendations. The cost of medication was agreed between the psychiatrists and the figure was accepted. A point was made at paragraph 4.4.7 on 11-150 to 11-151 of the paediatricians' recommendation for a twice annual visit to a healthcare professional in respect of J[...] pre-morbidly and allowed R Nil in this regard[37].

37.4 The plaintiff's legal team proposed a figure of R206 994,00 in respect of these costs. The defendant's legal team after a discussion of the proposal, accepted it. Having considered the evidence before me and the minutes of the parties' pre-trial conference on 11-335 to 11-336 in paragraph C4.2 of the Sixth (Quantum) Pre-Trial Conference Minute, I am persuaded that the amount is fair and reasonable.

37.5 Physiotherapy – The plaintiff proposed a figure of R287 794,00 (paragraph 5 of Appendix B1 to the Schedule of Loss on 11-151 to 11-156). The proposal was discussed (see C4.3 on 11-336 of the Sixth (Quantum) Pre-Trial Conference Minute). Eventually the legal teams agreed on a figure of R283 794,00 in respect of physiotherapy.

37.6 Provision for fractures, falls and osteoporosis arising out of J[...]’s blindness – The report of Dr Birrell, the Orthopaedic was not contested. Based on Dr Birrell’s suggested figure of R436 368,00 spread over J[...]’s lifetime and plaintiff’s consideration that J[...] will be provided with caregiving, the plaintiff’s legal team proposed a figure of R350 000 (see paragraph 6 of Appendix B1 to the Schedule of Loss on 11-156 and 11-158 and C.27 Fourth (Quantum) Pre-Trial Minute Conference Minute on 11-83). The figure was accepted by the defendant’s legal team.

37.7 I have looked at the proposal made together with the evidence before me and I am satisfied that the figure of R350 000,00 will fairly and reasonably compensate the plaintiff for this provision.

37.8 Speech therapy – This aspect was discussed under paragraph 7 of Appendix B1 to the Schedule of Loss on 11-159 to 11-165 and paragraph C4.4 of the Sixth (Quantum) Pre-Trial Conference Minute on 11-336. The plaintiff proposed a figure of R1 277 889,00. The legal teams ultimately agreed on a figure of R1 277 609,00 (the resultant figure after taking the actuarial mean) for speech therapy.

37.9 Having considered the facts before me and the expert reports, I am persuaded that the figure of R1 277 609,00 is fair and reasonable under the circumstances.

37.10 Occupational therapy and related items – This item was discussed in paragraph 8 of Appendix B1 on 11-194 to 11-201 and paragraph C4.5 of the Sixth (Quantum) Pre-Trial Conference Minute on 11-337. The legal teams eventually considered that a figure of R10 153 079,00 is justified by evidence. I am satisfied that this item was extensively dealt with by the parties and having considered the experts’ views and the authorities relied upon together with the evidence I accept that the figure

considered by the respective legal teams is fair and reasonable.

37.11 Additional costs and accommodation – This aspect was discussed in paragraph 9 of Appendix B1 to the Schedule of Loss on 11-174 to 11-176 and paragraphs C4.6 of the Sixth (Quantum) Pre-Trial Conference Minute on 11-337 to 11-338. The plaintiff proposed a figure of R1 046 594,00. After discussion the plaintiff agreed on a figure of R850 000,00 and the defendant’s legal team accepted the figure as fair and reasonable. I am persuaded that this figure is justified by the evidence.

37.12 The total figure for future hospital, medical and related expenditure in relation to J[...] is the sum of R13 983 376,00 made up of all the amounts referred to above.

Loss of income and earning capacity - J[...]

[38] This head of damages was discussed under Appendix C1 on 11-215 to 11-245 and paragraph C4.7 of the Sixth (Quantum) Pre-Trial Conference Minute on 11-338. The legal teams debated the figures and the contingency deductions. There are differences in the actuarial calculations which were found to be relatively small. The legal teams took the difference into account and taking the mean between the actuarial calculations, they arrived at a figure of R8 160 875,00. I have considered the evidence together with the figure proposed by the legal teams and I am satisfied that it is fair and reasonable, and justified by the evidence.

General damages - J[...]

[39] This head of damages was discussed in Appendix D1 of the Schedule of Loss on 11-253 to 11-259 and paragraph C7.3 of the Fourth (Quantum) Pre-Trial Conference Minute on 11-99. Having looked at the applicable principles and comparable case law after debating the issue, the legal teams found a common ground on a figure of R1 800 000,00 for general damages in respect of J[...].

[40] I have considered the injuries suffered by J[...] and comparable case law and agree that the amount of R1 800 000,00 for general damages in respect of J[...], is fair and reasonable.

The plaintiff's claim in respect of G[...]

[41] It appears from the papers that the parties in the matter in casu used the same experts in the various fields for both J[...] and G[...]. This will therefore mean that the recommendations will be similar since both minor children are blind and the differences between the respective experts will also be similar.

G[...]’s future medical and related expenditure

41.1 Ophthalmic care – This aspect was discussed under paragraph 13.1 of the Schedule[38] and Appendix B2[39]. It was submitted that there was no actuarial difference between the plaintiff and the defendant. The legal teams considered that the figure of R1 043 716,00 is fair and reasonable and justified by the evidence. I have looked at the figure and the evidence and do not have any reason not to accept the figure proposed by the parties.

41.2 Psychotherapy, Psychiatric Treatment and Psychotropic Medication – This aspect has been discussed in paragraph 4 Appendix B2 on 11-182 to 11-185 and paragraph C4.10 of the Sixth (Quantum) Pre-Trial Conference minute on 11-339. It was submitted that there is also no actuarial difference between the parties on this aspect. The legal teams agreed on a figure of R120 818,00. Having considered the joint minutes of the clinical psychologists and the psychiatrists and the actuarial calculations, I cannot find any fault on the figure considered by the legal teams. It is in line with the evidence and I find it to be fair and reasonable.

41.3 Physiotherapy – This aspect was discussed in paragraph 5 of Appendix B2 to the Schedule of Loss on 11-185 to 11-187 and paragraph C4.11 on 11-339 to 11-340. It was submitted that the plaintiff proposed a figure of R260 000,00. The legal teams agreed to take the mean on the differences between the actuarial calculations and agreed on a figure of R263 417,00. I find the figure to be fair and reasonable, and justified by the evidence.

41.4 Provision for fractures, falls and osteoporosis arising out of G[...]’s blindness – This aspect was discussed in paragraph 6 of Appendix B2 to the Schedule of Loss on 11-189 and paragraph C2.7 of the Fourth (Quantum) Pre-Trial Conference Minute on 11-83. It was submitted that only the plaintiff had an expert in this regard. Dr Birrell conveyed orthopaedic costs for G[...] to be R950 000,00. The legal teams debated the figure and found common ground on the figure of R250 000,00. I am persuaded that this figure is fair and reasonable and is consistent with the evidence.

41.5 Speech therapy – This aspect was discussed in paragraph 7 of Appendix B2 to the Schedule of Loss on 11-190 to 11-194 and paragraph C4.12 of the Sixth (Quantum) Pre-Trial Conference Minute on 11-340. It was submitted that the legal teams discussed this aspect and considered that the figure of R1 218 047,00 is fair and reasonable. Having considered the evidence, I fully agree that the amount is justified by the evidence.

41.6 Occupational therapy – This aspect was discussed in paragraph 8 of Appendix B1 on 11-194 to 11-201 and paragraph C4.13 of the Sixth (Quantum) Pre-Trial Minute on 11-341. It was submitted that this aspect was discussed at length and the legal teams found common ground on a figure of R7 374 476,00. They agreed to take the mean of the actuarial difference between the respective parties’ calculations. I find that the figure is fair and reasonable as it is justified by the evidence.

41.7 Additional accommodation costs – This aspect was discussed in paragraph 9 of Appendix B to the Schedule of Loss on 11-201 to 11-202 and paragraph C4.14 of the Sixth (Quantum) Pre-Trial Conference Minute on 11-341. It was submitted that this aspect was discussed and the plaintiff agreed to a reduced figure of R950 000 which the defendant’s legal team was prepared to accept. In my view this figure is fair and reasonable and justified by the evidence. The total amount to compensate the plaintiff for future hospital, medical and related expenditure in respect of G[...] is therefore an amount of R11 220 474,00.

Loss of income and earning capacity - G[...]

[42] This head of damages was discussed in Appendix C2 on 11-246 to 11-252 and paragraph C4.15 of the Sixth (Quantum) Pre-Trial Conference Minute on 11-341 to 11-342. It was submitted that the legal teams debated the figures and the contingency deductions. There is a relatively small difference in actuarial calculations. Taking the difference into account and the mean between the actuarial calculations, the legal teams found common ground on a figure of R9 377 942,00. Having considered the matter, I am convinced that the figure is fair and reasonable and justified by the evidence.

General damages - G[...]

[43] This head of damages was discussed in Appendix D2 of the Schedule of Loss on 11-260 to 11-264 and paragraph C8.3 of the Fourth (Quantum) Pre-Trial Conference Minute on 11-104 to 11-105. I was informed that this head of damages was discussed and the legal teams found common ground on a figure of R1 600 000,00. I have considered the evidence, the principles dealing with the assessment of general damages, comparable case law and the figure agreed between the parties. I am persuaded that the figure is justified by the evidence and it is fair and reasonable under the circumstances.

Defendant's special plea in respect of the plaintiff's claim for protection of funds

[44] The defendant's special plea reads as follows:

"3.1 The plaintiff claims an amount of R6 600 000,00 for:

'The costs of and associated with the appointment and remuneration of, and the provision of security by, a trustee or curator bonis and, in the former event, the creation of a Trust.'

3.2 The plaintiff is the natural mother and the legal guardian of the minors.

3.3 There is accordingly no basis for the appointment of a curator bonis or the creation of a Trust and the plaintiff is therefore not entitled to any costs associated with such a curator or Trust.

3.4 In the premises, the claim for the creation of such Trust or appointment of a curator bonis falls to be dismissed."

[45] In the heads of argument filed on behalf of the defendant it is contended that the plaintiff did not file a reply.

[46] The defendant's legal team argue in their heads of argument that a child is entitled to have his or her property and property interests safeguarded and administered and to be assisted in administrative, contractual and other legal matters and a parent or guardian is obliged to provide same to the child. Reliance thereof is placed on section 18(3) of the Children's Act[40].

[47] The defendant's legal team submit that even before the damage-causing event, the minor children would have been entitled, as of right, that the plaintiff would protect and administer their property they acquire in their lifetime up to the age of majority and be assisted in administrative, contractual and other legal matters. They claim that ROP did not create a new obligation.

[48] It is asserted that a claim for payment for the award to be protected is a luxury as the children are already entitled to protection and the plaintiff is obliged to provide same.

[49] It is further submitted that the general premise is that a party will be entitled to compensation for the appointment of a curator bonis, for that matter a Trust, if the appointment of a curator is unavoidable as a result of the injuries. The defendant claims that it is not the case in the present matter.

[50] It is further contended that where the children who suffer from ROP's parent is not incapacitated, it does not follow as of right, that an amount should be awarded for the administration of the award.

[51] The plaintiff disagrees with the defendant's contentions.

Defendant's argument the third special plea should have received a reply

[52] It was submitted on behalf of the defendant that in accordance with the ordinary rules of pleadings, the special plea is taken to be denied. However, the plaintiff is precluded from advancing any version not pleaded.

[53] It was further argued that the plaintiff did not plead any material facts which would change the status quo ante that she would be incapable of executing her obligations as a parent and therefore there is no causal link and/or basis for compensation for the protection and administration of the award.

[54] The plaintiff's legal team referred the Court to paragraph 13.5 of the plaintiff's particulars of claim. This paragraph reads as follows:

"13.5.1 The twins will not be capable of managing the awards herein; including making investments and obtaining returns as per the assumptions underlying actuarial calculations, and nor should their parents [i.e. the plaintiff] be expected to do so, because they are not trained to do so."

[55] Having considered the allegations made in the particulars of claim as referred to above, there can be no doubt that a replication was not necessary. The allegations for the protection of the award have been pleaded. This, in my view, takes care of the argument in terms of section 18(3) of the Act.

Is payment for the protection of the award a luxurious expense?

[56] In supporting his claim that compensation for the protection of the award is a luxury, it was further submitted on behalf of the defendant that the effect of such a claim is that a parent is avoiding its statutory and constitutional obligations towards his/her child at the State's expense. This should not be countenanced.

[57] The plaintiff respectfully disagrees. It has been submitted that the minor children will become adults whereupon the plaintiff will have no legal control over them or their assets. However, they will still be extremely vulnerable individuals.

[58] The plaintiff's legal team contend that there are at least four good reasons why the defendant's submissions are ill-conceived: They argue that this goes against the logic and precedent of other similar cases in all of which protection was afforded. They submitted that various cases have been referred to where this Court had agreed to lifelong protection of awards by way of trusts. The legal team further disagrees with the defendant's suggestion that the plaintiff should take this burden on her shoulders. They argue that the suggestion is without foundation. It is further contended that the defendant is bound by agreements

between the experts in the joint minutes and that the agreements are to the effect that the money must be protected. Furthermore, it is submitted that the fact that there is adequate authority in other cases is against the defendant's

proposition.

- [59] In the heads of argument filed on behalf of the defendant on quantum at paragraph 5.4, the legal team of the defendant refers to the educational psychologists' views that J[...] is to be considered vulnerable and that all funds awarded should be protected for his exclusive use for the rest of his life. The same point is made under paragraph 5.6 in respect of both minor children. The defendant's legal team does not deny that the experts including their own experts agree that the minor children's funds should be protected for their exclusive use for the rest of their life.
- [60] In my view, and given the evidence relating to the vulnerability of the minor children and the burden that their mother is already having with regard to taking care of them and having to go to work, I do not think that when the experts agreed that the funds to be awarded should be protected, they had in mind that their mother should take that responsibility. If that was the case, it would have not been necessary for the experts to agree on the protection of funds to be awarded. Put differently, the experts would have spelt it out which would have been unusual.
- [61] I am in full agreement with the plaintiff's legal team that the parties are bound by the agreements reached.
- [62] I have looked at the cases referred to by the plaintiff, most of which related similarly to blind children. Our Courts agreed to lifelong protection of the awards by way of trusts. Although it has been argued on behalf of the defendant that in all the cases relied upon by the plaintiff, the defendant agreed to the entitlement for the protection of the award, I cannot find any reason why even in the matter in casu the Court should not allow the protection of the award given the evidence on record.
- [63] The plaintiff's legal team have also referred me to a number of cases which include those of: *Nkosi v Minister of Justice* 1964 (4) SA 365 (W) 367, *Khumalo v Minister of Law and Order* (1998) 4 QOD A3-131 (W) at A3-169 to A3-172 and *Van de Venter v Premier of Gauteng* (2004) 5 QOD E2-01 (T) which held that protection of an award must be afforded whenever the Court has reason to believe that the claimant in question will not have the training or otherwise the ability to manage a large award.

The minor children will be able to manage the funds when they turn 18

- [64] The defendant contends that although the minor children are legally blind ... once they reach majority [they ought] to be able to function independently ... There are many thousands of blind people in the Republic who are able to look after their affairs.

[65] It was submitted on behalf of the plaintiff that that is not the point. Those thousands of blind people out there whose funds are not protected in this way were not paid awards that represent every single cent they would have earned and will need to pay, which award must be invested and, quite obviously, protected.

[66] I find merit in the submissions made on behalf of the plaintiff. It would be irresponsible for this Court to leave large amounts of funds as in the present matter in the hands of the plaintiff and/or the minor children when they attain majority without proper evidence that they will be able to manage such funds. There is therefore no basis to uphold the defendant's special plea. It is therefore dismissed with costs.

[67] Regarding what the costs for the protection of the award of the minor children would be, the defendant made a concession that if the plaintiff succeeds with her argument, then the formulation that 7,5% of the capital award in respect of future medical costs, loss of income and general damages will be applicable. 7,5% protection in respect of J[...] will be R1 795 891,00 and in respect of G[...], it will be an amount of R1 661 881,00.

[68] Under the circumstances I conclude that total fair and reasonable value to compensate the plaintiff's claims in a representative capacity on behalf of her minor children is as follows:

68.1 The claim for past caregiving in the amount of R361 146,00;

68.2 The plaintiff's claim on behalf of J[...] in the amount of R25 740 070,00; and

68.3 The plaintiff's representative claim on behalf of G[...] in the amount of R21 438 267,00.

[69] In the result I make the following order:

69.1 The defendant's third special plea is dismissed with costs.

69.2 The draft order marked "X" is made an order of court.

M J TEFFO

JUDGE OF THE HIGH COURT

Appearances For the plaintiff J F Mullins SC and L A East Instructed by Gert Nel Attorneys For the defendant S Joubert SC J Janse van Rensburg Instructed by State Attorney Heard on 26 July 2024
Date of judgment 15 November 2024

[1] The minor children are currently 9 (nine) years old.

[2] As per the court order dated 8 March 2021.

[3] As per the court order dated 16 February 2022.

[4] See 02-19 to 02-20 of the Pleadings Bundle on Caselines.

[5] See 11-126 to 11-127 of the Pre-trial minute Bundle on Caselines.

[6] See 11-131 to 11-137 on Caselines.

- [7] See Appendix B1 in respect of J[...] on 11-138 to 11-178, Appendix B2 on 11-179 to 11-203 in respect of G[...] and the authorities relating to future medical and related expenditure contingency deductions on 11-204 to 11-214 on Caselines.
- [8] See Appendix C1 in respect of J[...] on 11-215 to 11-245 and Appendix C2 on 11-246 to 11-252 in respect of G[...] on Caselines.
- [9] See Appendix D1 in respect of J[...] on 11-253 to 11-259 and Appendix D2 on 11-260 to 11-264 in respect of G[...] on Caselines.
- [10] See Appendix E1 in respect of J[...] on 11-265 to 11-274 and Appendix E2 on 11-275 to 11-276 in respect of G[...] on Caselines.
- [11] See paragraph C3.2 of the Fourth (Quantum) Pre-Trial Conference Minute on 11-88 where the parties agreed that the joint minute will go in as constituting agreed evidence, to be read together with the underlying reports, with the joint minutes taking precedence over the underlying reports in the event of any differences between them.
- [12] See footnote 11 above.
- [13] See paragraph C4.3.3 of the second (Quantum) Pre-Trial Conference Minute on 11-40 where the parties agreed on the status of the documents contained in the bundles on the basis that they are what they purport to be without either party necessarily admitting the correctness of the contents thereof, and that the copies may be used instead of originals.
- [14] It ought to be noted that the admissibility of these reports was raised again in paragraph C1 of the Fifth (Quantum) Pre-Trial Conference Minute on 11-325 to 11-328. The defendant was considering appointing an ophthalmologist Prof Mayet to counter Dr Stoler. Apparently, however, the defendant had been informed by Prof Mayet that he had considered Dr Stoler's report and that he had nothing to add.
- [15] See paragraph C3.2 of the Fourth (Quantum) Pre-Trial Conference Minute on 11-88 of Caselines.
- [16] See 9.1-42 to 9.1-43 on Caselines.
- [17] [2012] ZAGPJHC 161 (GJ) paras 9 to 14; see also *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) (Rogers AJA; paras 64 to 73); *Jacobs v Road Accident Fund* [2019] ZAFSHC 42 (FB) (Moeng AJ; paras 24 to 30), *J v Road Accident Fund* 2019 (7B4) QOD 104 (FB) (Moeng AJ; paras 26 to 28) and *MMCA v MEC for Health, Eastern Cape* 2019 JDR 2325 (ECB) (Tokota J; para 29).
- [18] In the absence of timeous repudiation by a party. Here, there was agreement that the reports, joint minutes and actuarial calculations constitute admissible evidence – see paragraph 5.4 above.

- [19] The learned Acting Justice relied to a large extent in this regard on Sutherland J's reasoning in BD Sarens above.
- [20] Precisely as the legal teams here have done, by debating issues and by agreeing that the matter may be dealt on the strength of the papers. We refer in this regard to para 7 below.
- [21] 2021
- (1) SA 190 (GJ)
- [22] Case number 19132/2014, 22 January 2024 Western Cape Division para 33.
- [23] Rule 60.1 of the Code of Conduct for Legal Practitioners.
- [24] Caselines: 11-77 to 111.
- [25] Caselines: 11-324 to 330.
- [26] Caselines: 11-331 to 345.
- [27] With reference to cases such as Mashinini v MEC for Health, Gauteng
- [2023] ZASCA 53 (18 April 2023), for example, the approach of the defendant's legal team has – and we say this with all the necessary respect, and based on our experience in many cases saved the defendant considerably in terms of costs.
- [28] 2023
- (6) SA 408 (SCA).
- [29] The Court held at paragraph [24] that "... a party cannot bind the Court to the opinion of her opponent's expert witness by merely conceding that the opinion is correct ... Put simply the decision on the opinion is for the Court, not for the witness". However, Kriegler J's apt description of the position in S v M 1991 SACR 91 (T) was quoted in the same paragraph as follows: "A court's approach to expert evidence has been dealt with on many occasions. The Court is not bound by expert evidence. It is the presiding officer's function ultimately to make up his own mind. He has to evaluate the expertise of the witness. He has to weigh the cogency of the witness's [sic] evidence in the contextual matrix of the case with which he is seized. He has to gauge the quality of the expert qua witness. However, the wise judicial officer does not lightly reject expert evidence on matters falling within the purview of the expert witnesses filed".
- [30] See the Fourth (Quantum) Pre-Trial Conference Minute on 11-89 to 11-90 where the parties agreed in paragraph C5.1 that the discount rates are acceptable (with the defendant's caveat that this was subject to advice of their own actuarial opinion – which opinion then confirmed the agreement.

- [31] See *Singh and Singh v Ebrahim* [2010] ZASCA 145 (SCA), *AD & IB v MEC for Health and Social Development, Western Cape*, 2016 (7A4) QOD 32 (WCC); and *PM (obo TM) v MEC for Health, Gauteng* (A5093/14; 7 March 2017; Meyer J, with whom Weiner and Monama JJ concurred); where the lead of Singh and AD in utilising Life Table 2 was followed.
- [32] See the agreement at paragraph C5.2 of the Fourth (Quantum) Pre-Trial Conference Minute on 11-90 that the legal teams were agreed on the use of Koch's Life Table 2.
- [33] 11-126 on Caselines.
- [34] Appendix B1 runs from 11-138 to 11-178 of the Pre-Trial Minute on Caselines.
- [35] It bears mentioning that Ms Carvalho's recommendations were disallowed because they are based on the miniscule chance of the twins losing what remains of their sight and requiring enucleations and/or scleral cells.
- [36] This is a prime example of what they have said about the conservative approach they adopted. Had the matter gone to trial they could have led evidence to the effect that J[...]’s ADHD was exacerbated by his blindness. For settlement purposes they accepted that it was not.
- [37] Here, they made the same point as above and emphasised that this is a “defendant friendly assumption which they make, and they reserve the right to revisit this aspect should the matter proceed to trial”. Again this reflects the conservative approach adopted by the plaintiff.
- [38] 11-126 on Caselines. The same is equally applicable.
- [39] Appendix B2 runs from 11-179 to 11-203 of the Pre-Trial Minute Bundle on Caselines.
- [40] Act 38 of 2005 (the “Act”).

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