

SOUTH AFRICA / JUDGMENT

# Mhlongo v Member of The Executive Council For Health of The Gauteng Provincial Government (11229/2019) [2022] ZAGPPHC 652 (30 August 2022)

[2022] ZAGPPHC 652

## COURT

North Gauteng High Court, Pretoria

## BEFORE

P N Manamela

## CASE / FILE NUMBER

11229/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 11229/2019

REPORTABLE:

NO  
OF  
INTEREST TO OTHER JUDGES: NO  
REVISED  
30  
August 2022  
In

the matter between:

NELISIWE  
MHLONGO  
Plaintiff  
And  
MEMBER  
OF THE EXECUTIVE COUNCIL FOR HEALTH  
OF  
THE GAUTENG PROVINCIAL GOVERNMENT  
Defendant

## JUDGMENT

MANAMELA AJ (Ms)

## INTRODUCTION

1. This is quantum trial for a medical malpractice claim in terms of which the plaintiff is claiming delictual damages for child-birth related injuries which occurred at Natspruit Hospital on or about 10 and 11 October 2009 resulting in a total disablement.
2. The merits of this case have been settled 100% in favour of the Plaintiff on 20 July 2021.
3. The facts are common causes, that the Plaintiff, Nelisiwe Mhlongo, was admitted at Natspruit Hospital at approximately 14:00 on 10 October 2009. On 11 October 2009, she gave birth to Sphelele Mkhululi Simelane (Sphe) who, as a result of the negligence of the defendant's staff, sustained the severest form of spastic cerebral palsy of a quadriplegic distribution, profound cognitive impairment, microcephaly and epilepsy, resulting in mixed dyskenetic and spastic cerebral palsy, leaving him in severe pain in need of round-clock care.
4. The admissibility of the facts and findings of all these experts as expressed in the joint minutes, are common cause between the parties, except for some adjustment on some of the experts projected future medical expenses, as well as the computation of general damages.
5. The Plaintiff had 22 experts whose reports were provided in support of her claim, and the Defendant had 20 experts. The court made admission of evidential material provided by these expert witnesses in their respective reports and as confirmed by their respective joint minutes. There are no repudiations by any of the experts.
6. In *Bee v Road Accident Fund* (093/2017)

[2018] ZASCA 52; 2018 (4) SA 366 (SCA) (29 March 2018). In *Bee* case, the effect of agreement between experts was explained as follows

‘[64] This raises the question as to the effect of an agreement recorded by experts in a joint minute. The appellant’s counsel referred us to the judgment of Sutherland J in *Thomas v BD Sarens (Pty) Ltd*

[2012] ZAGPJHC 161. The learned judge said that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts (para 9). Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement ‘unless it does so clearly and, at the very latest, at the outset of the trial’ (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference

(para 12). Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare (para 13). Sutherland J's exposition has been approved in several subsequent cases including in a decision of the full court of the Gauteng Division, Pretoria, in *Malema v The Road Accident Fund* [2017] ZAGPHC 275 para 92.

7. Joint minutes were procured between the parties' respective experts across all similar disciplines except for the following experts retained by the plaintiff: Ms Rich (mobility expert); Mr Eybers (architect); Mr Sirmon (quantity surveyor) and Ms Bruk (dietician), whose evidence were provided by way of Rule 38(2) affidavits. The defendant does not object to the evidence of these experts being adduced by way of Rule 38(2) affidavits.

8. Rule 38(2) states that:

'The witnesses at the trial of any action shall be orally examined, but a court may at any time, for sufficient reason, order that all or any of the evidence to be adduced at any trial be given on affidavit or that the affidavit of any witness be read at the hearing, on such terms and conditions as to it may seem meet: Provided that where it appears to the court that any other party reasonably requires the attendance of a witness for cross-examination, and such witness can be produced, the evidence of such witness shall not be given on affidavit'.

9. The court has a discretion, to be exercised judicially upon a consideration of all the facts, to allow evidence to be given on affidavit. The power should be exercised carefully and there must be clear evidence in the affidavit(s) supporting the application that sufficient reasons exist. In respect of those experts where the defendant does not have a countervailing expert, both counsels agreed that the plaintiff's experts' reports will be acceptable, these is pertaining to the dietician, the mobility expert, the architect and the quantity surveyor as adduced by way of Rule 38(2) affidavit.

10. In *Madibeng Local Municipality v Public Investment Corporation Ltd* 2018

(6) SA 55 (SCA). The Supreme Court of Appeal summarized the correct approach to this subrule as follows:

*"[26] The approach to rule 38(2) may be summarised as follows. A trial court has a discretion to depart from the position that, in a trial, oral evidence is the norm. When that discretion is exercised, two important factors will inevitably be the saving of costs and the saving of time, especially the time of the court in this era of congested court rolls and stretched judicial resources. More importantly, the exercise of the discretion will be conditioned by whether it is appropriate and suitable in the circumstance to allow a deviation from the norm. That requires a consideration of the following factors: the nature of the proceedings; the nature of the evidence; whether the application for evidence to be adduced by way of affidavit is by agreement; and ultimately, whether, in all the circumstances, it is fair to allow evidence on affidavit."*

## EXPERT EVIDENCE

The relevant joint minutes and the outcome of their agreements, which are common cause, can be summarised as follows:

Life expectancy: Professors Strauss and Steel

11. The life expectancy experts, Professors Strauss and Steel, have agreed that Sphe's estimated remaining life expectancy at age 12.4 is an additional 12.1 years, should he require and receive a gastrostomy (PEG") and therefore all calculations contained in the updated future medical expenses under annexure "A" to the particulars of claim have been revised based on the basis of a life expectancy of an additional 12 years to amounts stated under annexure "B".

Dr M Lippert (paediatric neurologist) and Professor Kakaza (neurologist)

12. Both experts agree that Sphe suffers from a severe form of total disablement requiring round the clock care with severe and complicated spastic cerebral palsy of a quadriplegic distribution, profound cognitive impairment and microcephaly and epilepsy. The neurologists agreed that Sphe needs 3 annual visits to a paediatric and thereafter a neurologist per annum at R7500 per annum; hospitalisation costs over his lifetime relating to his neurological state of at least 12 such admissions at R15 000 per admission; care for his epilepsy which includes medication plus EEG monitoring at R6000 per annum; anti-spasticity treatments which may range from Baclofen oral treatment to oral diazepam, Baclofen spinal infusion pump. An amount of R20,000 per annum should be provided for. The amount for these recommendations as per annexure "B" (items 3b to 7b) is R466 219.

ENT surgeons: Dr Maron and Dr Motakef

13. The ENT surgeons agree that Sphe should be provided with ongoing monitoring of his hearing, that ABR under sedation should be performed. They agree that drooling should be managed with a trial of Botox, and if successful, repeated every 6 months at a cost of R18 000 per procedure. They also agree on a provision for submandibular duct relocation/rerouting. The cost of which is approximately R95 000 for the entire procedure. They agreed that a swallowing test may be of benefit. Dr Maron recommends a trial of treatment for LPR at a cost of R800 per month for a period of 6 months and additional treatment with ACC 200, Buscopan and Atropine drops, which if effective should be continued indefinitely at a cost of R1 200 per month. Dr Motakef disagrees. In respect of the aspects of treatment is not agreed to by Dr Motakef a 50% probability has been proposed. Although it is proposed that an amount

of R220 123,00 be accepted in respect of the recommendations and joint minutes by the ENT surgeons, I am of the view that the amount of R267 430,00 remains reasonable for provision of ENT treatment.

Audiologists: Mesdames M Venter and N Masoka

14. The experts agree that a tympanogram was present bilaterally reflecting normal middle ear pressure compliance and volume. Both experts agree that thresholds could not be established on the days of assessment and that ABR testing under sedation is required. A once off allowance for ABR testing is provided for at a private institution. Normal outer ear hair cell function was confirmed. Normal retrocochlear function and response across the basilar membrane could not be established, and they agreed that Sphilele only passed the objective test and that a mild hearing loss could not be ruled out. Ms Venter suggests that middle ear function ought to be monitored until age
21. Ms Masoka disagrees. Ms Venter recommended that provision be made for hearing aids. Ms Masoka disagrees. Ms Venter suggested travel costs be provided for. Ms Masoka did not make such provision. Ms Venter recommends that real ear measurements, annual consultations for ear moulds, batteries, drying system and hearing aid services and insurance be provided for. Ms Masoka states that this is not required at this stage. In respect of the areas of disagreement, the Plaintiff proposed that provision be made for a 30% likelihood of Ms Venter's recommendations being required which is computed at an amount of R51 028,50 for future audiological needs. I am of the view that the provision made by Ms Venter remains reasonable and should be made available without any deductions as stated under Annexure B: items 19g to 28g. Items 20g to 28g, in the amount of R51 028,50.

Speech therapists: E van der Merwe and N Masoka

15. The speech therapists agree on almost all aspects of Sphilele's speech therapy, feeding intervention and AAC focussed speech and language therapy needs. The parties propose that an amount of R489 814,50 be accepted in respect of future speech therapy. [Plaintiff's claim based on joint minutes and plaintiff's expert was for R506 371,00. Annexure "B" items 29h-72h].

Dentists: Drs Lofstedt and Le Roux

16. The anticipated treatments and costs are included at table 1 and table 2 of Dr Lofstedt's report. The amount recommended by Dr Le Roux is significantly higher than that recommended by Dr Lofstedt. Pursuant to their joint minute, it is proposed that the amount of R285 245,00 as recommended by Dr Lofstedt be accepted in respect of future dentistry requirements, which is found to be acceptable.

Orthopaedic surgeons: Drs Versfeld and Modisane

17. The orthopaedic surgeons agree that Sphe will require extensive surgery and Botox therapy. The paediatric neurologists and physiotherapists agree that the future orthopaedic treatment required by Sphe should be expedited. Both his hips are dislocated and there is no dispute that he is in significant pain. The amount proposed in respect of future orthopaedic treatment is R833 820,50. [Annexure "B": amount claimed was R 1 078 219 – items 89j – 101j]. The amount of R 1 078 219 is awarded in respect of orthopaedic surgery needs.

Cardiologists: Dr K Govendrageloo and Dr F F Takawira

18. The experts agree that Sphilele may be at risk of developing cardiac complications if he develops chronic respiratory or airway issues in future and they agree that he needs to undergo cardiac evaluation annually and if stable, every two years thereafter. The cost thereof would be in the region of R3800 per evaluation with an annual escalation of plus minus 6 to 5 to 6%. The amount agreed upon by the experts was calculated to be R24 532,00. [Annexure “B”, items 102k – 103k]. The amount is confirmed to be in order.

Urologists: Drs Van Heerden and Moshokoa

19. Sphilele has cerebral palsy with a neurogenic bladder. His urological costs include: nappies, barrier cream; bladder medication such as an anticholinergic agent to suppress bladder pressure; infection control; constipation management such as Movicol or similar; and visits to the urologist. The urologists have agreed on Sphilele’s future urological needs. The amount agreed has been calculated to be R239 842,00. [Annexure “B”: items 104l – 111l]. The amount is confirmed to be in order.

Physiotherapists: Mesdames Pip Jackson and Sharon Mkansi

20. The experts agree on their respective findings on evaluation of Sphilele. They have provided their own tariffs and agreed on the methodology for billing medical aids. They provide a range for the actual costs of the various treatments, they agree that caregiver training is required, they are largely in agreement on Sphilele’s physiotherapy requirements. They differed in regard to: hospital admissions as a result of his respiratory events – Ms Jackson recommended 2 hospital admissions in his adolescent years given his respiratory compromise; outpatient treatment – Ms Jackson recommended that 2 of the outpatient treatments should be provided as home visits and that outpatient treatments visits occur before and or after an admission to hospital; additional evaluation and outpatient treatments following minor fractures and soft tissue injuries and degenerative conditions; and the type of standing frame which Sphilele requires. The parties have considered the areas of agreement and disagreement and propose that the amount of R550 849,00 be awarded in respect of future physiotherapy and related equipment and treatment. [Annexure “B”: amount claimed was R565 593,00. Items 112m – 181m]. The amount of R550 849.00 is confirmed.

Occupational therapists: Ms Caga and Ms Bainbridge

21. The occupational therapists agree that Sphe is ineducable in a conventional, remedial or LSEN context. Acceptance to Monde Specialised stimulation facility in the area, will be contingent on acceptance criteria and screening processes and should this fail, Sphilele will be best catered for in one of several private facilities in greater Johannesburg area. Centres like Monde Stimulation Centre and Tsepong Stimulation Centre have their own caregivers with costs already included. Ms Bainbridge however notes that these centres has a ratio of 6 children: 1 caregiver which, given Sphilele’s significant disability, would not be appropriate.

His caregiver should accompany him to the Monde Stimulation Centre. Ms Caga recommends that the amount of time that Sphilele will spend on these centres must be considered when calculations regarding caregivers are done; employment prospects are considered nil; safe transportation to and from medical and therapy appointments is supported. Considering Sphilele's height and contracted, hypertonic, and quadraparetic body with dislocated hips, transfers into and out of his wheelchair and car will be dangerous for him and his caregivers. They both recommended that he preferably be transported in an MPV, such as a Ford Torneo; he needs a wheelchair accessible home. He has outgrown his buggy which is broken; caregivers should be trained specific to CP care. The experts partially agree or disagree as follows: they agree that he requires therapeutic intervention, but the quantity and duration

varies. The treatment rate recommended is R850 per hour (Bainbridge) and R750 per hour (Caga) for private Occupational Therapy with an average rate of R800 per hour). They agreed that case management is required but the rate and duration is not agreed. Ms

Bainbridge recommends a rate of R950 per hour and Ms Caga a rate of R750. Ms Caga recommends an initial set up of 100 hours for the first year, 24 sessions per annum for 3 years (R18 000) and thereafter 6 hours per annum (R18,000). Ms Bainbridge

recommends 30 hours for the first year and 24 hours per annum thereafter. The experts agree that full time care is required for

life provided by trained and dedicated care assistants attending to him at home and at school should he be placed at such. They agreed that salary must be in line with Basic Employment Act. They agreed that his mother serves a night-time care function in childhood to 18 years, but from adulthood the complement of caregivers increases. The costs of caregiving recommended by the experts are similar. With regard to specialised equipment, the occupational therapists agree that Sphilele requires an appropriate

seating system to provide suitable head and neck support, whilst also accommodating his spasticity, hip dislocations, poor trunk, and neck control and to protect him from accelerated further derangement, which includes a back-up buggy serving also as a transport; a foldable buggy is necessary for when his seating system is in for repairs; and specialised equipment for ADLs is listed in the table in their joint minute. The disagreements relate to – the choice of a seating system, with Ms Caga recommending the Mygo system and Ms Bainbridge is of the opinion that Sphilele requires more than the conventional Mygo system; and the need for a hoist whilst Sphilele is still a child.

22. They agree that he needs splinting and that it should be custom made by the treating OT and reviewed/replaced every 6 months until age 21 and annually thereafter. They agree on the therapy items. They disagree on the need for AAC communication with Ms Bainbridge deferring this and Ms Caga stating that Sphilele is not a candidate for AAC communication. (The speech therapists have dealt with AAC communication which falls within their field of expertise). The recommendations of the quantum by Ms Caga in her report exceeded the one made by Ms Bainbridge. The defendant is bound by the agreement as recorded in the joint minute arising from the recommendations by Ms Caga. The amount agreed between the occupational therapists in respect of future occupational therapy has been calculated as R4 548 445,00. [Annexure “B”, items 182n - 228n].

Orthotists: Mesdames Sonja Bonsma and Michelle Cox

23. The experts agree on all aspects, including biennial consultations. They agree that a thoracolumbar orthosis (TLSO) is unlikely to be of any benefit to his current condition. However, provision should be made for custom bracing if an orthopaedic surgeon requires it to provide post-surgical stabilisation or maintenance of surgical correction. A TLSO is costed at R 30 000,00 to be replaced every year until he reaches skeletal maturity at approximately 18 years of age. The amount proposed in respect of future orthotic needs is R944 043,00. [Annexure B, items 229o – 248o] and the amount is confirmed to be in order.
24. No agreement could be reached in relation to the recommendations by Dr Marus and Ms Bubb, and the plaintiff does not persist with these claims.
25. The ophthalmologists and psychiatrists made no recommendations for future medical expenses in their joint minutes.

Dietician: Ms Bruk

26. The amount calculated in respect of the recommendations by Ms Bruk, dietician is R182 021,00.

Mobility expert: Ms Rich

27. The amount calculated in respect of the amount recommended by Ms Rich, the mobility expert is R386 368,00.

Mr Eybers (plaintiff's architect) and Mr Sirmon (plaintiff's quantity surveyor)

28. Mr Sirmon based his costings on Mr Eyber's design recommendations. The recommendations are based on a conceptual house taking into account all Sphilele's needs as suggested by the various experts. There is no countervailing report from an architect or a quantity surveyor expert. As such Mr Eyber's and Mr Sirmon's reports stands to be admitted in terms of Rule

38(2) on affidavit. The amount calculated in respect of the recommendations by Mr Eybers, architect is R106 654,00.

29. The amount calculated in respect of the recommendations by Mr Sirmon is R1 805 690,00.

#### SUMMARY: FUTURE MEDICAL EXPENSES

30. The following amounts are awarded in respect of future medical expenses:

Neurosurgery Nil Paediatric Neurology R466 219.00 Psychiatry Nil Educational Psychology Nil  
ENT R267 430.00 Ophthalmological Nil Audiological R51 028.50 Speech Therapy R489 814.50  
Dentist R285 245.00 Orthopaedic R833 820.50 Cardiology R24 532.00 Urology R239 842.00  
Physiotherapy R550 849.00 Occupational Therapy R4 548 445.00 Orthotist R944 043.00 Dietician  
R182 021.00 Mobility R386 368.00 Architect R106 654.00 Quantity Surveyor R1 805 690.00 TOTAL  
R11 182 019.50 Less interim payment R1 090 680.00 Total R10 091 339.50 Less 0% contingency  
deduction R0.00 Net amount R10 091 339.50

#### FUTURE LOSS OF EARNINGS/EARNING CAPACITY

31. Both educational psychologists: Ms Bubb and Mr Ellis – educational psychologists agree that Sphe is unemployable and that he would have been able to achieve a Grade 12 and an NQF6 level education at a TVET college, had it not been for the accident. On the calculation of future loss of earnings, they postulate that he could have qualified as an artisan.
32. The Industrial psychologists: Mrs B Donaldson and Mr H Pletzen, also share the same opinion that Sphe will never be able to work or earn any income and agree that he could have become an artisan. The actuarial calculations done by Mr Schwalb (for plaintiff) and Ms Brink (for defendant), indicates that:

The post morbid scenario:

33. The parties' relevant experts agree in the post-morbid scenario that Sphilele is remuneratively unemployable. The post-morbid earnings are therefore taken to be zero.

The pre-morbid scenarios:

34. Given the joint minutes of the educational and industrial psychologists, the scenario upon which they agreed is basis A, artisan. The calculation is set out below as follows:
- a. Basis A – an artisan:
- i. no income until December 2027;
- ii. January 2028 – December 2028: R107'000 per year;
- iii. January 2029 – December 2029: R164'000 per year;
- iv. January 2030 – December 2030: R231'000 per year;

- v. from January 2031: R398'000 per year (lower quartile, annual guaranteed package – Artisan and Manufacturing sector – Paterson C1);
  - vi.increasing in a straight line to R575 000 per year (median, annual guaranteed package – Artisan and Manufacturing sector – Paterson C2) in January 2040;
  - vii.thereafter increasing in a straight line to R776'000 per year (upper quartile, annual guaranteed package – Artisan and Manufacturing sector – Paterson C4) at age 45;
  - viii.thereafter, increasing with earnings inflation until retirement at age 65.
35. The value of Sphilele's premorbid earnings based on him becoming an artisan, but for the defendant's negligence, is calculated at R2,000,168.00, less normal contingency of 15%.
36. It is proposed that an amount of R1 700 000,00 be accepted in respect of the claim for future loss of income.

#### CONTINGENCIES

37. The court has a wide discretion which needs to be exercised judicially when it determines fair and reasonable compensation for loss of income or earning capacity. In the majority of claims, the percentage to be deducted is negotiated by the parties, but contingencies remain the prerogative of the Court.
38. The 'once and for all' principle determines that a plaintiff only has one chance to claim all past and potential damages flowing from a single cause of action. When courts make awards for potential or future losses, it is general practice to make use of contingency deductions to provide for any future events or circumstances which is possible but cannot be predicted with certainty such as longevity, loss of employment, early death, promotion prospects, etc.
39. It is a general practice to make use of contingency deductions to provide for any future events or circumstances which is possible but cannot be predicted with certainty such as longevity, loss of employment, early death, promotion prospects. The court in *Goodall v President Insurance* 1978 1 SA 389 (W) illustrated the approach of the so-called sliding scale of ½ % per year to retirement age in the 'but for' scenario was adopted – i.e. 25% for a child, 20% for a youth and 10% in middle age. In the 'but for' scenarios the Road Accident Fund usually agrees to deductions of 5% for past loss and 15% for future loss – the so-called "normal contingencies". The courts have had varying views on how to apply contingencies. Concerning the proposition that the "normal" contingency deduction on prospective losses is 15%, see *Bartlett v Mutual and Federal* 1989 (4) QOD A4-20 (T), *Matthyssen N.O. v Padongelukkefonds* 1999 (4) QOD B4-23 (T); *De Bruyn v Road Accident Fund* 2003 (5) QOD J2-69 (W), *Zarrabi v Road Accident Fund* 2006 (5) QOD B4-231 (T) and *Radebe v Road Accident Fund* 2013 (6A4) QOD 220 (GNP). The contingency deductions vary from 0% on certain items of future medical expenses (where these are to be immediately incurred) to more than 10% in certain circumstances. Some courts have adopted an individualised approach to the determination of contingency deductions for these expenses.

40. There are authorities which suggest that a contingency deduction should be based on a sliding scale of 0,5% for every year of the future loss. In *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA); *Bismilla v Road Accident Fund* 2018 (7B4) QOD 64 (GSJ); *YZ v Road Accident Fund* 2019 (7E2) QOD 14 (WCC).
41. The parties propose the following in respect of the application of contingencies:
- a. interim payment – 0% contingency deduction. Sphilele is entitled to the full amount awarded for future medical expenses on 17 June 2022 without a contingency deduction being applied to this award (which remains unpaid);
  - b. future medical expenses (after deduction of the interim payment): 6,5% contingency deduction on the balance due in respect of future medical expenses after the deduction of the interim payment; and
  - c. future loss of income: 20% contingency deduction.

#### GENERAL DAMAGES

42. It is common cause that Sphilele has suffered a devastating loss of the amenities of life. He experienced and will continue to experience pain, suffering and discomfort as a result of the consequent conditions and the medical procedures required to treat the consequent conditions.
43. Despite his severe condition, Sphilele is conscious of his environment, is responsive to his mother and siblings and has an appreciation for music and sound. He is therefore not in a state of “unconscious suffering”. He has been living in significant pain arising from his dislocated hips and severe contractures. Ms Bainbridge and Ms Jackson expressed dismay that he has been left to suffer to this extent.
44. Sphilele’s condition is comparable to that of the minor child in *NK v MEC for Health Gauteng Provincial Government* 2018 (4) SA 454 (SCA); 2018 (7A4) QOD 80 (SCA).
45. The SCA in the *NK* matter cited with approval the following dictum by Trollip JA in *Marine & Trade Insurance Co Ltd v Katz* NO 1979 (4) SA 961 (A). In these terms:

*“[7] In Marine & Trade Insurance Co Ltd v Katz NO, Trollip 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. This case has been followed in numerous instances. ZK's awareness of his suffering, albeit diminished by his reduced mental faculties, puts him in this 'twilight' situation. During the course of argument this became common cause. This confirms that he is entitled to an award for general damages and that all that remains to be determined, under this head, is how much would be suitable in all the circumstances”.*

46. In NK the appeal was upheld and the SCA awarded an amount of R1 800 000,00 in respect of the claim for general damages for the minor child in NK supra which translates into an amount of R2 124 000,00 in today's monetary terms.
47. In Marine & Trade Insurance Co Ltd v Katz NO supra an award of R90 000,00 was made for general damages in 1979 which is equivalent to R3 459 000,00 in 2022 monetary terms.
48. Sphilele's life expectancy is not dissimilar to the minor child in the case of MSM obo KBM v MEC Health, Gauteng 2020 (2) SA 567 (GJ), where the minor child had a total life expectancy of 24.6 years. In that case the Court awarded general damages in the amount of R 2 000 000 in 2020 which is equivalent to R 2 194 000,00 in 2022 terms.

I find that an award of R2 200 000,00 in respect of general damages would be an appropriate award in this matter.

#### AWARD PROTECTION

49. There is no dispute that Sphilele's award must be protected.
50. On 20 May 2022, the full bench of this Court by my sister Keightley J, handed down judgement in a Special hearing on Trusts, in the High Court of South Africa Gauteng Division, Pretoria, Case number 35182/2016. The Court held that there are certain instances when the money awarded in a lump sum ought to be protected, such as where minors and or where a traumatic brain injury has occurred, where the recipients of damages awards, as is the case here.
51. The Court held that:
- “58. We conclude therefore that for both principled and pragmatic reasons practitioners representing vulnerable plaintiffs in RAF and medical negligence matters (including curators ad litem where appropriate) should be permitted to apply to court for either the appointment of a curator bonis or for the establishment of a trust to protect the damages awarded. In each case it should be open to the court to determine whether the proposed protective mechanism will properly and effectively manage the award in the plaintiff's interests.”*

52. With regard to the costs of trusts, the Court held that:

*“78. The solution therefore lies in greater care being taken in deciding on the appointment of either a curator bonis or the establishment of a trust in considering, inter alia, the question of remuneration. In circumstances where a trust is established, the remuneration and administration costs must be dealt with explicitly and comprehensively in the court order and/or trust instrument*

incorporated into the order of court. If this is done correctly, it will deal with the Master's complaint that trustees 'set their own fees.

79. Ordinarily, the reasonable remuneration of the trustee will vary from trustee to trustee according to the complexity, quality, time and amount of work done in the administration of the trust funds. The court in the matter of Kloppe v the Master of the High Court noted in this regard that:

‘...time and effort together with the degree of complexity of one’s duties have to be taken into account. It is accordingly clear that the time factor cannot be considered in isolation nor can it be an overriding factor. The other factors must be taken into account as well’.

53. I have considered the prescribed costs for the administering a trust in terms of the Administration of Estates Act, 1965 (Act 66 of 1965) (as amended) and the approach adopted by the Courts to these costs. On this basis, I found the cost of 7.5% of the total award to be reasonable cost for the protection awarded and management of the award.

#### SUMMARY

54. In summary, we submit that an award of R15 121 746.80 should be made calculated as follows:

a. Future medical expenses

R10 091 339.50

b. Future loss of earning capacity R1 700 000,00

c. General damages

R2 200 000,00

Subtotal:

R13 991 339.50

Plus interim payment:

R1 090 680.00

Total capital of claim:

R15 082 091.50

d. Plus: 7,5% for administration of trust R1 130 335.31

Total claim

R16 212 426.80

Minus: Interim payment

R1 090 680.00

Total award to be made

R15 121 746.80

#### COSTS

55. There is no need to deviate from the general rule that the costs must follow the result. The plaintiff is entitled to her costs in prosecuting the claim, such costs to include the qualifying, preparation and reservation costs (if any) of the plaintiff's experts together with the costs of two counsel.

#### ORDER

The following order is made:

1. The Defendant is ordered to make payment to the Plaintiff, in her representative capacity as mother and natural guardian of the minor child, SPHILELE MKHULULI SIMELANE ("the minor"), of the capital amount of R15 121 746.80 (FIFTEEN MILLION ONE HUNDRED AND TWENTY ONE THOUSAND, SEVEN HUNDRED AND FOURTY SIX RAND AND EIGHTY CENTS) ("the capital amount")
2. The defendant shall pay the capital amount into the Plaintiff's attorneys' trust account within 60 calendar days from the date of this order, the details of which account are as follows:

NAME

:

JOSEPH'S INC, TRUST ACCOUNT

BANK NAME

: RMB PRIVATE BANK, JOHANNESBURG

ACCOUNT NO : [...]

BRANCH NO

: 261-251

REFERENCE

: A CALITZ/J NORTON/M374

3. The capital amount will not bear interest unless the defendant fails to effect payment thereof within 60 calendar days of the date of this order. In the event of such failure, the amount payable will bear interest at the mora rate of 7.75% per annum calculated from and including the 61st calendar day after the date of this order, up to and including the date of payment thereof.

4. The proceeds of capital amount, after deduction of the Plaintiff's attorney and own client costs and interest on unpaid disbursements ("the remaining amount") shall be payable by the Plaintiff's attorney to a trust to be created within 6 (six) months of the date of this order, in terms of the Trust Property Control Act, No.57 of 1988, as amended.

5. Until such time as the professional trustee is able to take control of the remaining amount and to deal with it in terms of the Trust Deed, the Plaintiff's attorney of record:

5.1 is authorized to invest the remaining amount in an interest-bearing account with a registered banking institution in terms of Section 86(4) of the Legal Practice Act, 2014 for the benefit of the minor, pending the finalization of the creation of the Trust;

5.2 shall be prohibited from dealing with the remaining amount in any other manner unless specifically authorized thereto by the Court, subject to the provisions of sub-paragraph 5.3 hereunder; and

5.3 is authorized and ordered to make any reasonable payment to satisfy any of the minor's needs that may arise and that are required, in the interim, for treatment, therapy, care, equipment or related expenses, from the remaining amount.

6. The appointment of any professional trustee to the trust is subject thereto that the professional trustee furnishes security to the satisfaction of the Master of the High Court.

7. The defendant is ordered to pay to the plaintiff her party and party costs on the High Court scale up to and including 22 July 2022, such costs to also include but will not thereby be limited to the following taxed or agreed costs:

7.1 the costs attendant upon the obtaining of payment of the capital amount referred to in paragraph 2 above;

7.2 the reasonable costs consequent upon obtaining this order;

7.3 the reasonable costs of the expert reports and addenda reports in respect of which the plaintiff gave notice in terms of Rules 36(9)(a) and (b), namely:

7.3.1 Dr G Marus (Neurosurgeon);

7.3.2 Dr M. Lippert (Paediatric Neurologist);

7.3.3 Dr M Vorster (Psychiatrist);

7.3.4 Ms E Bubb (Educational Psychologist);

7.3.5 Dr L Maron (Ear, Nose and Throat Specialist);

7.3.6 Dr C Weitz (Ophthalmologist);

7.3.7 Dr M Venter (Audiologist);

7.3.8 Ms E van der Merwe (Speech Therapist);

- 7.3.9 Dr P Lofstedt (Dentist);
- 7.3.10 Dr G Versfeld (Orthopaedic Surgeon);
- 7.3.11 Dr K Govendrageloo (Paediatric Cardiologist);
- 7.3.12 Dr I van Heerden (Urologist);
- 7.3.13 Ms P Jackson (Physiotherapist);
- 7.3.14 Ms J Bainbridge (Occupational Therapist);
- 7.3.15 Ms. Sonja Bonsma (Medical Orthotist/Prosthetist);
- 7.3.16 Ms L Bruk (Dietician);
- 7.3.17 Ms B Donaldson (Industrial Psychologist);
- 7.3.18 Mr R Rich (Mobility Consultant);
- 7.3.19 Dr R Campbell (Rehabilitation expert);
- 7.3.20 Prof D Strauss (Life Expectancy Expert);
- 7.3.21 Mr L Eybers (Architect);
- 7.3.22 Mr S Sirmon (Quantity Surveyor);
- 7.3.23 Mr G Schwalb (Actuary);
- 7.4 The costs of preparing for and securing joint minutes;
- 7.5 The costs of preparing Rule 38(2) affidavits;
- 7.6 The reasonable costs consequent upon the employment of two counsel, one of whom is to be allowed on the scale of senior counsel, to be determined by the Taxing Master.
8. The costs referred to in sub-paragraph 7 above, shall be paid into the trust account of the Plaintiff's attorneys, Joseph's Incorporated.
9. There is a valid contingency fee agreement.

P N MANAMELA

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 19 July 2022

## Judgment

delivered: 30 August 2022

**APPEARANCES:**

Counsels for the Plaintiff: Adv. G-M Goedhard SC together with

Adv. H Cassim

Attorneys for the Plaintiff: Joseph's

Inc Attorneys

Counsels for the Defendant: Adv.

A Rossouw SC together with

Adv. L Pretorius

Attorneys for the Defendant: The

State Attorney, Pretoria

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