

SOUTH AFRICA / JUDGMENT

MNK and Another v MEC for Health, Gauteng Province (9407 /2017) [2022] ZAGPJHC 175 (25 March 2022) [2022] ZAGPJHC 175

COURT

South Gauteng High Court, Johannesburg

BEFORE

Nichols

CASE / FILE NUMBER

9407 /2017

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 9407 /2017

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED.

NO

DATE:

25 March 2022

In

the matter between: K[....]:
M[....]
N[....]
First Plaintiff
ADV
KRIEL N.O. (Curator ad Litem to
K[....]:
S[....]
M[....])
Second Plaintiff
And
MEC
FOR HEALTH, GAUTENG PROVINCE
Defendant

Coram: Nichols AJ

Heard: 14 March 2022 – The ‘virtual
hearing’ by the Court was conducted as a videoconference on
Microsoft Teams.

Delivered: 25 March 2022 – This judgment was
handed down electronically by circulation to the parties’
representatives via
email, by being uploaded to Caselines
and by release to SAFLII. The date and
time for hand-down is deemed to be 10h00 on 25 March 2022.

JUDGMENT

NICHOLS AJ:

Introduction

[1] This matter came before me as a stated case for adjudication in terms of Uniform Rule 33. On 6 June 2019, the defendant, the MEC for Health for the Gauteng Provincial Government (the MEC), was declared liable for the medical negligence, which was the sole cause of the fetal distress that resulted in SMK (the child) being born with cerebral palsy that had poor long-term neuro-developmental outcomes and which caused her to suffer from asymmetric spastic quadriplegia. The first plaintiff, MNK (the mother) sues in her personal capacity and the second plaintiff, Advocate H Kriel N.O. (the curator) sues in his representative capacity on behalf of the child.

- [2] On 4 November 2020, the child's claim for future loss of income and general damages was resolved before Meyer J, who ordered the MEC to pay the curator R4 107 004.00 for future loss of earnings and R2 million for general damages. He also directed that a Trust be established to receive and preserve any award to the curator for the exclusive benefit of the child. Such Trust was established on 24 August 2021.
- [3] The outstanding issues that required determination were postponed sine die by consent of the parties. These issues were the quantification of the mother's personal claim for general damages and the quantification of the curator's claim for future medical costs, hospital expenses and modalities.
- [4] The matter was initially set down to proceed before me as a trial of long duration. Despite the best efforts of both parties legal representatives, settlement of the outstanding issues remained elusive. In recognition of the fact that the parties were in agreement on all aspects, they agreed to present a stated case in terms of Uniform Rule 33 for this Court to determine and finalise the outstanding issues in this matter.
- [5] The parties stated case sets out the agreed facts in support of the issues that require determination. The stated case is supported by Exhibit 1 and Appendix A. Exhibit 1 records and summarises the agreed facts relating to the matter. Both parties filed extensive medico-legal reports on the quantum aspects of the plaintiffs' claims that remained outstanding. Joint minutes were prepared by the experts to record their agreement on the child's clinical condition and quantum. The summaries of the joint minute agreements by the experts is recorded in Exhibit 1. Appendix A contains a detailed reference to the agreed items, costs thereof and the frequency with which the items, where applicable, should be replaced. Appendix A is further delineated into two columns, one representing the total cost of items for which no public health services can conceivably be rendered (Column A); and the second for which public health services may conceivably be capable to be rendered (Column B).
- [6] It is common cause and has been agreed that as a result of medical negligence, the child suffers from a brain injury manifesting as cerebral palsy, mental retardation, spastic quadriplegia, microcephaly, severe developmental delay, permanent neuro-physical and intellectual impairment. The child is classified as a GMFCS level II (Gross Motor Functional Classification Scale), MACS V (Manual Ability Classification System) and CFCS V (Communication Functional Classification System). She has received minimal medical treatment since birth. The child is now 10 years old and her agreed life expectancy is 52 years. She resides with her mother, grandmother, aunt, uncle and cousin in a freestanding home in Limpopo. Their home is equipped with electricity and has a toilet located outside.

- [7] The mother's personal claim is for general damages as a result of the child's agreed clinical condition. The mother gave birth to the child when she was 17 years old. She completed her schooling with a grade 12 level of education. She then later went on to complete a mining qualification and is currently employed at a Mine as a winch operator. She is no longer in a relationship with the child's father and he has no contact with her or the child.
- [8] The curator's representative claim for future medical costs, treatment and rehabilitative modalities and expenses is pursued on the common law basis of the costs reasonably necessary to treat and /or ameliorate the child's condition for the balance of her life in private healthcare. In the pleadings, the MEC raised the public healthcare defence seeking development of the common law for delivery of services and modalities instead of payment of damages; and periodic payments.

Issues

- [9] As alluded to at the outset, the agreed issues for determination are the quantification of the mother's claim for general damages and the curator's claim for future medical costs, treatment / rehabilitative modalities and expenses.
- [10] The parties, however also seek an order for, inter alia, the postponement and separation for later determination of whether the items referred to in Column B of Appendix A can be delivered in future in terms of the public health care defence. A fortiori, I am also required to determine whether such order is competent.

The child's agreed clinical condition and costs for future medical treatment

- [11] It is apparent from the stated case, Exhibit 1 and Appendix A that there is strong consensus and agreement amongst the expert witnesses. They agreed on the child's clinical condition and the nature, extent, frequency and costing of future medical treatment and rehabilitative modalities reasonably required by the child in future.
- [12] The SCA in *Bee v Road Accident Fund*[1] held that:
- 'The joint report of experts is a document which encapsulates the opinions of the experts and it does not lose the characteristic of expert opinion. The joint report must therefore be treated as expert opinion. The fact that it is signed by two or more experts does not alter its characteristic of expert opinion. The principles applicable to expert evidence or reports are also applicable to a joint report. The joint report before the court is consequently part of evidential material which the court must consider in order to arrive at a just decision.'
- [13] The parties have agreed that the costs for services and equipment identified by the dieticians, mobility experts, orthotists and prosthetists and architects may not be provided by the public health care service. These are itemised and quantified in Column A of Appendix A. They have also agreed that the costs for services and equipment identified by the orthopaedic surgeons, physiotherapists, speech therapists, audiologists, occupational therapists, paediatric neurologists, urologists, dentists and psychiatrists may be provided by

the public health care service. These are itemised and quantified in Column B of Appendix A.

- [14] Having considered the joint minutes and the summaries provided in Exhibit 1, I am satisfied that the experts are in agreement regarding the child's future medical expenses and costs related to specialist equipment and services. I am also satisfied that the agreed costs have been subjected to actuarial adjustment by the plaintiffs' actuary. I now turn to identify the key aspects from the joint minutes regarding the child's clinical condition and future medical expenses and costs.
- [15] The paediatric neurologists agree that the child is capable of independent mobility. Her comorbidities include profound intellectual disability, microcephaly, behavioural concerns and global developmental delay. She is almost completely dependent on others for activities of daily functioning and will require the specialised services of a paediatric neurologist for the remainder of her life. Although she has not presented with seizures since the neonatal period, her risk factors are such that she remains at a high risk of developing epilepsy for the rest of her life. The child is not potty-trained and requires nappies on a full time basis. She is non-verbal and communicates with gestures. She has an abnormal gait although she can run and she has limited use of her hands. The child has no understanding of basic concepts. She has drooling of saliva and is an oral feeder. She is not cooperative at all and does not like to be touched. The experts agreed the child will require services including MRIs; EEGs; x-rays; blood tests; medication; hospital admissions; paediatric neurologist consultations; Botox; and the associated costs.
- [16] The physiotherapists noted that although the child is a spastic quadriplegic, they were in agreement that their assessments indicated that she had a much more marked impairment on the right side than her left. They agreed that the child has suffered obvious physical limitations but her biggest disability is her intellectual one which strongly impacts on her physical function as well. She is prone to falls and will probably sustain a fracture or soft tissue injury at some point in her life. They agreed on the nature, extent, frequency and cost of the physiotherapy she will require. They also agreed on the equipment required to support this therapy and the replacement period and costs of such equipment.
- [17] The speech and language therapists agreed that the child has not developed true language and uses a limited range of communicative behaviours. They agreed the rating of her communication on the CFCS is level V and that she presents with severe neurological involvement of the control of the musculature required for feeding and for speech production. She presents with dysphagia and she is at risk of dehydration, nutritional compromise and aspiration. They agreed the costs of alternative and augmented communication devices and required related therapy.
- [18] The occupational therapists agreed that the child presents with severe developmental delay and is maximally dependant for all of her needs to be met. She is not expected to be formally educated but will, however strongly benefit from attendance at a well-established

special needs school, which caters for therapies at school and can facilitate her daily needs and sensory stimulation. They agreed that the most important learning and emotional management for the child is to ensure she is adequately stimulated, and her environment is adequately set up for her needs. The care the child requires is thus intensive and demanding and it is of utmost importance that she has appropriately trained and skilled individuals to care for her for the remainder of her life, in an effort to limit the burden of care on her mother and family. They agreed on the nature and frequency of the occupational therapy sessions, home programmes, full reassessments, travel costs to therapy sessions, equipment and supplies that would be required. The total cost of these services and equipment was also agreed. The occupational therapists also agreed on the need for a case manager and care givers and the associated costs.

- [19] The dieticians agreed that the child was mildly underweight and severely thin for a girl of her age and height. She had a good appetite and required full assistance with feeding. The child has dysarthric speech but attempts to communicate when she is hungry / thirsty and when she has had enough to eat. She has a good appetite but her intake remains limited (dietary variety) and imbalanced in terms of both macro and micronutrients (namely protein and iron). She does not have any overt swallowing difficulties and no complaints of constipation. She has an adequate fluid intake, which is necessary for the removal of waste products from her body and for maintaining hydration status. They agreed on a dietary supplementation and complementary feeds, necessary dietetic consultations, equipment and the associated costs.
- [20] The dentists agreed that the child will require dental services, including examinations; theatre costs for dental procedures that will have to be performed under anaesthetic; anaesthetists' fees; dental fees (including surgical fees); x-rays; and various dental consumables and accessories. They agreed the costs of these services, consumables and accessories.
- [21] The gastroenterologists agreed that the child has faecal incontinence and will require nappies indefinitely. The urologists agreed that the child will be on nappies for the rest of her life and the neurologic bladder in these cases are normally an overactive reflexogenic bladder with normal sphincter relaxation. They agreed the child will require consultations with urologists and urodynamic studies. The experts agreed the costs of the nappies, consumables and the costs of these services.
- [22] The psychiatrists agreed that the child will require consultations in the future. They agreed the costs of the services and any potential treatment and medication arising as a result. The orthopaedic surgeons agreed that the child will require orthopaedic surgeon consultations, physiotherapy, medication and the associated costs of these services and medication.

[23] In relation to the orthotists and prosthesis, the experts agreed that the child requires orthotic footwear, a specialised wheelchair, a transport buggy, walking frame and a hydraulic hoist. They also agreed on the maintenance and replacement costs for this equipment. The mobility experts agreed on the requirements for a motor vehicle, the costs and replacement costs of same.

The curator's claim for future hospital, medical and related expenses and costs

[24] The parties have agreed upon and accepted as reasonable, the experts' agreements, as reflected in the joint minutes, on the nature, extent, frequency and costs of treatment and modalities required in future to reasonably treat and/or ameliorate the condition of the child. The parties' legal representatives have also discussed, identified and agreed upon the items individually in order to ensure that any duplication of cost or service is removed.

[25] Accordingly, I accept the parties' contention, as supported by Exhibit 1 and Appendix A that the actuarial report and schedule procured by the curator in respect of future hospital, medical and related expenses and costs:

- (a) Is based upon the experts' joint minute agreements on the type, need and frequency of required future treatment and modalities.
- (b) Contain a detailed reference to the agreed items, the costs thereof and the frequency with which the items, where applicable, requires to be replaced;

[26] A plaintiff who claims damages for the cost of future medical expenses bears the onus of establishing that the damages claimed and associated cost of the medical expenses is reasonable.[2]

[27] Our courts have already decided that compensation in kind may be permitted in appropriate cases in circumstances where:

'the MEC is held liable for the negligent conduct of public healthcare staff causing injury during or at birth to a child in the form of cerebral palsy; and the MEC establishes that medical services of the same or higher standard will be available to the child in future in the public healthcare system at no or lesser cost to the child than the cost of the private medical care claimed.'[3]

[28] In the premises, I accept as fair and reasonable the agreed quantification of the child's future medical costs, treatment / rehabilitative modalities and expenses. The parties have agreed the total amount under this head of damages to be R18 224 991.00.

[29] Of the total agreed amount, the parties contend that in respect of:

- (a) Column A, those services and equipment for which no public health services can conceivably be rendered, the total agreed amount for payment is R13 529 153.00.
- (b) Column B, those services for which public health services may conceivably be capable to be rendered:

- (i) The value of these services, modalities and treatment amount to R4 695 838.00.
- (ii) An order should be granted for the postponement and separation for later determination of whether the items and services listed in this column can be delivered in future in terms of the public health care defence.
- [30] The order that has been jointly proposed does not require this Court to direct that the services and modalities identified in Column B be provided by the public healthcare system. In proper circumstances, such orders have been found to be justified and appropriate. Accordingly, the parties seek an order that is competent and capable of being given effect to.

The mother's claim for general damages

- [31] The Occupational Therapists agree that the mother has been exposed to intensive requirements and in-depth medical processes relating to the child's upbringing. Looking after a childlike child is extremely draining and time consuming and the loss of having an able bodied child is devastating. The child requires full time care. Often the presence of a disabled child in a family, places added strain on parents as well as dynamics between other family members. The mother currently is employed. She is also engaged and needs to spend time with her fiancée on top of caring for a childlike child. Managing this balance is not easy. The mother will thus benefit from psychological and/or psychiatric intervention going forward to assist

in handling the situation she has landed up in with her child.

- [32] The industrial psychologist, Mr L Linde, noted in his expert report that the mother 'will benefit from psychotherapy to assist her in coming to terms with her changed circumstances.' The educational psychologist, Ms B Eybers-Purchase noted that the 'mother will require outside help to care for the child to prevent burn-out.' She also recommended parent guidance to assist the mother and family since a 'multiple disabled child such as the child is severely taxing on the family system.'

- [33] The paediatric neurologist, Dr D Pearce noted that the mother:

'has been burdened with an immense, full time care load far exceeding that of normal parenting. This will persist as long as the child lives. This imposes significant restrictions on career choices, family dynamics, vacations etc. This cost excludes the significant emotional strain and pain endured by the mother and her family.'

- [34] The parties agreed that as a result of the agreed clinical condition of the child, the mother suffers from emotional shock and trauma that manifests as a psychiatric lesion.[4] The MEC, however admitted and conceded her liability in respect of the mother's claim for general damages. Consequently there is no longer a lis in respect of which the mother bears an onus beyond establishing the quantum of her claim for general damages.[5]

- [35] In consequence of the comments by the various experts on the impact of the child's clinical condition on the mother, I have no hesitation in accepting the parties' agreement regarding the mother's condition and that she is as a result entitled to a claim for general damages.
- [36] The parties jointly contended that an award of R 350 000.00 would constitute fair and reasonable compensation in respect of this head of damage. In this regard, I was referred to *Mngomeni (obo EN Zangwe) v MEC for Health, Eastern Cape Province*[6] that was decided in 2017. In this matter, a mother was awarded R300 000.00 for emotional shock and severe depression due to cerebral palsy of her child. That award is now valued at R 349 000.
- [37] I was also referred to the award for general damages that was made by the SCA in 2019 in *Komape*[7] where the parents were each awarded R350 000.00 as general damages for their emotional shock, trauma and grief. This award would be valued at more than R350 000.00 in 2022.
- [38] A court has a wide discretion when determining the quantum of an award for general damages. The amount of awards in comparable cases provides a useful guide when considering the amount that should be awarded, subject to the facts and circumstances of the matter under consideration.[8] In the circumstances I am, however satisfied that the sum of R350 000.00 represents a reasonable and fair amount as compensation for the mother's claim for general damages.
- [39] In the result the following order is made:
1. The defendant shall pay, in respect of the first and the second plaintiffs' claims the total amount of R 14 893 839,48 (Fourteen Million, Eight Hundred and Ninety-Three Thousand, Eight Hundred and Thirty-Nine Rand and Forty-Eight Cents) which amount is calculated as follows:-
 - 1.1. The first plaintiff's personal claim for general damages:
 - 1.1.1. R 350 000.00 (Three Hundred and Fifty Thousand Rand) together with interest a tempore morae calculated in accordance with the Prescribed Rate of Interest Act 55 of 1975 (7,5%) only to start running after 30 days of this judgement;
 - 1.2. The second plaintiff's representative claim on behalf of S[...] M[...] K[...] (hereinafter referred to as "the minor"):
 - 1.2.1. R 14 543 839.48 (Fourteen Million, Five Hundred and Forty-Three Thousand, Eight Hundred and Thirty-Nine Rand and Forty-Eight Cents) which amount is calculated as follows:-
 - 1.2.1.1. Future Medical Costs and Modalities per Appendix A (Column A) hereto: R 13 529 153.00

1.2.1.2. Plus: Interim trust management costs of 7,5%: R 1 014 686.48

TOTAL: R 14 543 839.48

2. The determination of the portion of the second plaintiff's claim for future medical costs and expenses, in an amount of R 4 695 838.00 as per Appendix A (Column B) hereto, is hereby separated from the balance of the issues in terms of Uniform Rule 33(4) and postponed sine die.
3. The total amount referred to in paragraph 1 above (R 14 893 839.48 (Fourteen Million, Eight Hundred and Ninety-Three Thousand, Eight Hundred and Thirty-Nine Rand and Forty-Eight Cents), together with any interest due in accordance with the Prescribed Rate of Interest Act 55 of 1975 (7,5%) shall be paid, the interest to only start running after 30 days of date of

judgement:

3.1. In accordance with the provisions of Section 3(3)(a)(i) of the State Liability Act 20 of 1957 as amended;

3.2. Directly into the following trust account of the plaintiffs' attorney of record:

Account Name : Edeling Van

Niekerk Inc

Bank

: Nedbank

Branch

: Business Banking

Account number : [...]

Branch code : 128605

4. The plaintiffs' attorney shall:

4.1. Upon the receipt of the amount mentioned in paragraph 1.2.1. above and subject to what is directed below, pay the amount to the S[....] M[....] K[....] Trust. (Letter of Authority dated 24 August 2021, Master Ref No. IT000078/2021(G));

4.2. Be entitled to, prior to payment to the abovementioned trust:

4.2.1. Make payment of expenses incurred in respect of and accounts rendered by expert witnesses as identified in paragraph 5 hereunder as well as the fees of counsel and the second plaintiff's (curator ad litem's) fee from the aforesaid funds received by them for benefit of the minor;

4.2.2. Payment, from the aforesaid amounts paid and received for the benefit of the minor, of their fees and disbursements in accordance with their written fee agreement.

5. The defendant shall pay the plaintiffs agreed or taxed High Court costs of suit to date as between party and party, such costs to include :-

5.1. All costs in obtaining all medico-legal reports, including:

Expert

1 Specialist Physicians

Dr APJ Botha

2 Paediatric Neurologist

Dr Pearce

3 Dentist

Dr PJ Lofstedt

4 Orthopaedic Surgeon

Dr AH van den Bout

5 Ear Nose and Throat Specialist Dr JS Bouwer

6 Dietician

Ms T Kaltenbrun

7 Speech Therapist

Dr K Levin

8 Educational Psychologist

Ms BL Purchase

9 Gastroenterologist

Dr D Bizo

10 Physiotherapist

Ms P Jackson

11 Psychiatrist

Dr BA Longano

12 Occupational Therapist

Ms A Crosbie

13 Orthotist and Prosthetist

Mr H Grimsehl

14 Architect

Mr D Ceronio

15 Urologist

Dr F van Wijk

16 Ophthalmologist

Dr L van der Merwe

17 Industrial Psychologist

Mr L Linde

18 Actuary

Algorithm

19 Mobility Expert

Mr Rademeyer

20 Economist

Mr Schussler

21 Audiologist

M du Plooy

5.2. The qualifying, consultation, preparation, and participation in joint expert meetings in respect of the quantification of the first plaintiff's personal claim for general damages and the second plaintiff's representative claim for future medical and hospital costs;

5.3. The travelling costs of the minor child to and from all medico- legal appointments and consultations;

5.4. Costs of counsel to date hereof, including the preparation for and the trial and the preparation and drafting of the stated case, Exhibit I and Appendix A;

5.5. The costs in respect of the appointment, employment and reporting by/of the curator ad litem (the second plaintiff) inclusive of the costs for the trial and attendances in respect of the trial;

5.6. The costs of the preparation and perusal of the bundles used for trial purposes and the uploading thereof to CaseLines.

6. Should the defendant fail to make payment of any of the amounts referred to in this order within 30 (thirty) days of this order, interest will commence to accrue on the amounts payable from the due date at the applicable morae interest rate (7,5%) until date of final payment.
7. The plaintiffs shall, if the costs are not agreed, serve the notice of taxation on the defendant's attorneys of record.
8. The costs shall be paid in accordance with the provisions of Section 3(3)(a)(i) of the State Liability Act 20 of 1957 as amended.

T NICHOLS

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for the plaintiffs: Adv P Uys

Attorney for the plaintiffs: Edeling Van Niekerk Inc

Roodepoort

Ref: AL Kruger/tvn/MAT1305 (Kgo8/1)

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Counsel for the defendant: Adv DJ Joubert SC

Attorney for the defendant: The State Attorney

Johannesburg

Ref: BM Mokgohloa/2658/15/P49

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[1] Bee v Road Accident Fund 2018

(4) SA 366 para 30.

[2] MEC for Health and Social Development, Gauteng v DZ obo WZ 2018

(1) SA (335) (CC) para 18; MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government (4314/15)

[2019] ZAGPJHC 504; 2020 (2) SA 567 (GJ); [2020] 2 All SA 177 (GJ) (18 December 2019) para 32.

[3] MSM obo KBM ibid para 207.

[4] As described by the SCA in Komape v Minister of Basic Education Equal education amicus curiae (754/2018 and 1051/2018) [2019] ZASCA 192 (18 December 2019) para 45.

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- [5] Komape ibid para 47.
- [6] Mngomeni (obo EN Zangwe) v MEC for Health, Eastern Cape Province 2018 (7A4) QOD 94 (ECM).
- [7] Komape v Minister of Basic Education Equal education amicus curiae 2019 JDR251 SCA.
- [8] Mbhele v MEC for Health for the Gauteng Province (355/15)
- [2016] ZASCA 166 (18 November 2016) para 13.
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