

SOUTH AFRICA / JUDGMENT

Mohlala v MEC for Health, Limpopo Province (5028/2017) [2024]

ZALMPPHC 16 (26 February 2024)

[2024] ZALMPPHC 16

COURT

Limpopo High Court, Polokwane

BEFORE

Semenya

CASE / FILE NUMBER

5028/2017

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Policy

IN

THE HIGH COURT OF SOUTH AFRICA;

LIMPOPO

DIVISION; POLOKWANE.

CASE

NO: 5028/2017

REPORTABLE:

YES/NO

OF

INTEREST TO OTHER JUDGES: YES/NO

REVISED

Date

:26 February 2024

SEMENYA

AJP

In

the matter

between:

GELDY

TIISETSO MOHLALA: PLAINTIFF
And
MEC

FOR HEALTH, LIMPOPO DEFENDANT
PROVINCE:

JUDGMENT

Heard on 09 OCTOBER 2023. The date and time for hand-down is deemed to be on the 26 February 2024 at 16:00. This judgment handed down electronically by circulation to the parties' representatives by email and publication and release to SAFLII.

CORAM: SEMENYA AJP:

- [1] The plaintiff in this action issued summons against the defendant in which she claims damages alleged to have been sustained by her through the negligence of the defendant's employees. It is common cause that the cause of action arose on the 6 May 2017 at Maphutha L Malatji hospital (the hospital) in Phalaborwa. It is further common cause that the plaintiff attended the hospital for the purpose of the delivery of her unborn baby when her breasts and chest were burned.
- [2] The defendant initially filed a plea in which liability was denied. However, the defendant later conceded 100% liability in respect of the merits of the case. An order to that effect was made by this court. The parties agreed to separate the issue of merits and quantum in terms of Rule 33(4) of the Uniform Rules of Court. This agreement too was made an order of court. The trial proceeded only on the issue of quantum.
- [3] The plaintiff and several expert witnesses testified. The plaintiff stated that she was born on the 08 August 1996. On the 6 May 2017 she visited the hospital to deliver her second baby. The nurses at the hospital decided to call a doctor when they realised that her labour was prolonging. The doctor arrived and decided to deliver the baby by caesarean section after a local anaesthesia was performed. During the course of the operation she complained that she is feeling cold. One of the nurses decided to put a hot water bottle on her chest to make her feel warm. She thereafter told the medical staff that she was feeling pain on her chest. She later found out that her chest was burned by that hot water bottle. She remained in hospital for three days during which the blisters caused by the burns were treated. She was told not to breastfeed the baby. She was discharged after three days and went home. She returned to the hospital when her injuries were becoming worse. She was admitted for two months.

- [4] The plaintiff further testified that she has a grade 12 which she passed with a Diploma in 2026 as her highest level of education. She used to do part time work after school and during weekends at a tavern when she was still at school. As at the date of the incident she was working at that tavern on a fulltime basis. Her job description entailed cooking, cleaning and selling liquor to patrons. She was earning a salary of R2500.00 per month. She stated that she consulted various specialists after the incident.
- [5] Plaintiff testified further that she wanted to go back to work after giving birth but could not because of the injuries. Her mother who was assisting her with her children passed away after the delivery of her second child. She wanted to further her studies at FET College to do a course in human resource or marketing with the money her deceased father had put aside for her education. She has used that money to buy formula for her baby as she could not breastfeed due to the injuries she sustained. Her deceased mother was willing to take care of her baby while she was studying. After giving birth she did community work programmes (CWP) where she was earning R840.00 per month. She experiences pain whenever she worked in a hot or warm environment. She would put a cloth between her breasts to avoid discomfort or pain caused whenever the two breasts come into contact. She also experiences pain each time she bends down.
- [6] During cross-examination she stated that there are many people where she stays who have better qualifications but who remains unemployed. She is currently unemployed and she is not studying. She was still waiting for admission at FET college.
- [7] Dr Lovelace Leonard Mashayamombe, a Specialist Psychologist, did psychiatrist assessment on the plaintiff in the 4th week of July 2018 and compiled a report filed by the plaintiff. He testified that the purpose of the assessment was:
- a) to determine how the plaintiff's psychiatric disorders emerged and how they developed within the last year from May 2017 to the date of assessment;
 - b) to identify any clinically significant psychiatric disorders she may have developed as long-term complications of the burns she sustained to her breast during the index caesarean section;
 - c) to identify any clinically significant functional impairment the identified psychiatric disorder may be exerting on her social function and work productivity;
 - d) to identify the relevant psychotropic medication and any other psychiatric intervention strategies indicated in the management of the identified psychiatric disorder;
 - e) to determine the medical costs involved in administering the relevant psychotropic medication and in implementing the relevant psychiatric intervention strategies in the management of the identified psychiatric disorder; and
 - f) to discuss the long-term treatment outcome of the identified psychiatric disorder.

- [8] Dr Mashayamombe stated that the contracture formation on the plaintiff's breasts causes pains whenever she lies down because the breasts no longer fall naturally. He further stated that the appearance of her breasts is of permanent disfigurement which she is conscious of and is taking measures to conceal it. She is no longer comfortable to expose her breast to other people while taking a bath. She also wears clothes that completely cover her breasts.
- [9] According to Dr Mashayamombe, the plaintiff is further psychologically affected by her inability to breastfeed her baby, which she considers to be an opportunity missed to bond well with her baby. Her breasts were oozing pus and serous fluid. She would not be able to take modelling as a career.
- [10] On mental state examination, Dr Mashayamombe observed that the plaintiff's mood was depressed. She spoke with a low volume of voice and her thoughts were pessimistic. She told him that she is worried that her scars would scare potential lovers away when they discover her disfigurement. Her cognitive function was nonetheless intact. On the functional impact of the disorder, the doctor stated that the plaintiff had a GAR score of 51-60 which means that she is able to do physical work though she cannot lift heavy objects because of the impact of the pain.
- [11] The doctor testified that the plaintiff's standard of education makes her fall in the semi-skilled category. She relies on manual work. The contractures induce pain and contracting is no longer normal. Her power is limited. He describes the plaintiff's condition as life long and that the pain is permanent. According to the doctor the chronic pain and the ugly is the source of the plaintiff's permanent depressive mood.
- [12] Dr Mashayamombe agreed with counsel for the defendant during cross-examination that he is not best placed to comment on the impact of plaintiff's disfigurement on her employment ability as well as on the impact of pain which she may be feeling on her breasts. When asked to comment on the observations made by the Plastic and Reconstructive Surgeon (P&R) appointed by the plaintiff, where the latter reports that the plaintiff has no contractures and physical pain, he responded by saying that he is not a specialist on contractures and physical pain. He further stated that the plaintiff did not tell him that she intended to choose modelling as a career.
- [13] Maggy Ntebo Kgaphola, an Occupational Therapist, assessed the plaintiff on two occasions, the 18 September 2017 and 19 February 2022. She testified that during assessment she observed that the plaintiff was unable to stand for prolonged periods. She was also not functional because of her depressed mood. She stated that although the plaintiff meets the physical demands of a general worker, the work that she did pre and post injury, she is not suitable for the position due to anxiety, low self-esteem, hypersensitivity and lack of confidence. She states that the plaintiff's sense of dignity and self-worth has been affected by the injuries and the resultant scars. She opines that her condition makes her a vulnerable employee and would need a sympathetic employer. She testified that the plaintiff should avoid jobs which require prolonged standing and walking in the sun to avoid breast sticking

together due to sweat and hot temperatures. She concludes that the plaintiff to be an unequal competitor.

- [14] The plaintiff relies on the report of Professor E Ndobe, a Plastic and Reconstructive Surgeon, appointed by the defendant. In his report, Dr Ndobe notes that there is large hyperpigmented on the scars on both breasts and sternum. The scars are unsightly and ugly resulting in poor self-esteem. He further states that breasts are a sign of femininity and sexual organ and that the scars have affected the plaintiff's self-esteem severely to the extent that she cannot undress in public in fronts of friends and family. She further states that the plaintiff is not comfortable to undress in front of her partner and has stopped swimming as a result of the scars. In summary, Dr Ndobe states that this is a severe and permanent cosmetic disfigurement on a highly sensitive part of a woman's body, with severe traumatic and psychological implications.
- [15] Ms Sebapu, of Occupational Therapists filed a report and testified on behalf of the defendant. She assessed the plaintiff on the 30 May 2021. According to Ms Sebapu, the plaintiff demonstrated the ability to do light and medium work with the bilateral weight handling. She opines that with therapy, the plaintiff is expected to be able to manage sedentary, light and medium weights with better comfort.
- [16] Ms J White and Ms Tjale, Industrial Psychologists, gave oral evidence and filed joint minutes. They agree that, the plaintiff had a Grade 12 level of education as at the date of the incident. Her father had left money for her tertiary education. Her mother, who assisted her in taking care of the children passed away. Ms Tjale is of the opinion that if the incident did not occur, the plaintiff would have returned to work three to four months post- maternity to continue with her work as a general worker with similar earnings, until she found a better paying job. Ms White is of the opinion that the plaintiff would have remained unemployed after giving birth in order to look after her child. She would have returned to her job of a cook and cleaner. She considers that she would not have been able to work after the death of her mother as she would have had to look after her children. Ms white takes the unemployment rate among the youth in South Africa as another impediment to the plaintiff remaining in employment. She further states that the onset of covid-19 would have significantly limited her chances of securing employment.
- [17] Post-incident, Ms Tjale is of the opinion that the plaintiff can no longer reach her pre-incident career postulations. She recommends that the difference between pre and post career postulations should be used as basis to determine loss of earnings. Ms White is of the opinion that the plaintiff will be able to continue in the work she was doing pre-incident and the CWP work that she did post-incident. She suggests that her loss of earnings should be calculated using he actual post-incident reported earnings, career progress as per the pre-incident postulations and normal increases. On the basis of the reports by other witnesses, Ms White notes that the psychological state in which the plaintiff finds herself due to the incident has a direct impact on her earnings in a market environment. She suggests a significantly higher contingency deduction in view of the clinical psychologist's report that

the death of her parents has contributed to condition she finds herself in.

- [18] It is trite that a court has a wide discretion to determine an award of general damages which is fair and reasonable, having regard to all the circumstances of the case and the prevailing attitudes of the community- *Tuch and Others v Myerson and Others* 2010 (2) SA 462 (SCA). During argument, counsel for the plaintiff contended that an amount of R 2000 000.00 will constitute a fair and reasonable compensation on the plaintiff's general damages. Counsel for the defendant on the other hand, argued that an award of R200 000.00 should be made by this court to compensate the plaintiff for pain and suffering.
- [19] Counsel for the defendant referred this court to comparable cases of *Buyts and Another v Lennox Residential Hotel* 1978 (2G2) QOD 836 in which the plaintiff, who was newly married, sustained burns on the lower part of the body as a result of hot water tap falling off while she was in a hotel bath. 35% of her body was covered with second degree burns. Some of the scars were visible. She could not wear dresses and skirts as she had to cover the scars by wearing trousers. She was awarded an amount of R6000.00 which translate into R252 962. 24 in today's monetary value. In *Nkonywa v Cantor* 1983 (3G2) QOD 475 (SE) a child of 12 years of age sustained 15% burns on her leg, which caused her to be hospitalised for two months. She had to undergo four operations, including a succession of three skin graft operations. The court made an award of R7000.00 which is the equivalent of R280
927. 92 in today's monetary value.
- [20] In *Oosthuizen V Homegas (Pty) Ltd* 1992 (3) SA 466 (0), the plaintiff sustained serious burns on his face, head, hands left arm and body during a gas explosion that took place at his workplace. His lungs were affected with resultant oedema and effusion. He was awarded an amount of R 45 000.00 for general damages in the form of shock, pain and suffering. According to counsel for the plaintiff this amount to R419.00 according to 2023 Robert Koch Quantum Yearbook.
- [21] I had the opportunity to see the scars caused by the burns on the plaintiff's chest and breast on the photos attached to Dr Ndobe's report. I agree with Dr Ndobe's opinion regarding the impact of the burns and the scars on the plaintiff's self- esteem. However, I am of the view that the injuries sustained by the plaintiff in *Oosthuizen* are more severe and exposed to anyone's sight than those sustained by the plaintiff in this case.
- [22] Counsel for the defendant contends that, based on the cases that she had referred this court to, as well as expert reports, an amount of R200 000.00 will constitute a reasonable compensation for general damages suffered by the plaintiff. I do not agree with this submission. The plaintiff suffered pain while she was undergoing caesarean section. All she could do was to alert the medical staff that she was feeling pain. It was only after her relative took a photo of her chest that she could realise the extent of the nature and injuries. She could not breastfeed her baby because of the painful blisters on her breast. Her scars are unsightly. On the other hand, I am of the view that an amount of R2000 000.00 would be too excessive considering the nature of the injuries in comparison to other previous awards. I

am of the view that an award of R400 000.00 (Four Hundred Thousand Rands) would constitute a fair and reasonable compensation.

- [23] On loss of earnings, the plaintiff is relying on calculations made by Munro and the defendant on those made by Manala. Counsel for the plaintiff contends that this court should accept the calculations made by Munro in that they are updated to Quantum Yearbook:2023, as compared to that of Manala, which was calculated in 2022. Munro provided this court with four scenarios, three of which are based on the report compiled by Ms Tjale. Scenario 4 is based on the report compiled by Ms White. The calculations in scenario 1 was made on the assumption that the plaintiff would have been able to obtain a certificate. The total loss arrived at was R10 348 400. Scenario 2 was calculated on the assumption that the plaintiff would have remained with a Grade 12 qualification but that she would have been able to secure a corporate type of job. The total loss of earnings in this scenario is calculated at R6 344 100. The calculations in scenario 3 was made on the assumption that the plaintiff would remain with a Grade 12 qualification, would secure a non-corporate type of job (semi-skilled). The total loss is calculated at R3 627 800. The calculations in scenario 4 are based on Ms White's report on the assumption that she will remain a semi-skilled worker. Manala, on the other hand, calculated total loss to be R2 076 987.00.
- [24] Ms Tjale and Ms White agree that higher than normal contingencies should be applied in this case. Counsel for the plaintiff argues that scenario 2 provide the most suitable compensation in the circumstances of this case. She has no objection to a higher contingency as recommended by experts. It is trite that provision for contingencies falls squarely within the subjective discretion of the court on what is fair and reasonable. - *Southern Insurance Ass Ltd v Bailey* 1984
- (1) SA 98 (A). I agree with the experts that a higher contingency has to be applied to the amount arrived at in scenario 2. This court will take into consideration the rising level of employment in the country and that the plaintiff was likely to remain unemployed, more so due to her level of education. The plaintiff was two years out of school when the incident happened and has already delivered two babies. Her level of education, namely Grade 12, was not solely caused by the incident in that she decided to work than to further her studies even though money was available for her education. I will further consider the evidence that she has not been rendered unemployable. She retains the physical ability to do her pre-incident type of jobs with limitations. A contingency deduction of 30% would be fair and reasonable.
- [25] On future medical expenses, counsel for the defendant contends that there is no evidence that the plaintiff would require future medical expenses for the injuries she sustained. She submits that the correct order would be that she should present medical bills to the defendant for payment after consultation. Counsel for the plaintiff argues that the defendant had agreed to make payment of R400 000.00 as part payment, which was never paid. She contends that there is no guarantee that the defendant will pay the bill should an order to

that effect be made.

[26] I agree with counsel for the plaintiff in as far as the need to make an order with regard to future medical costs in view of the manner in which she has been psychologically affected by the incident. The amount of R300 000.00 will be fair towards contribution to medical costs.

[27] In the result the draft order marked "X" is made an order of court

M.V SEMENYA

ACTING JUDGE PRESIDENT OF THE

HIGH COURT; LIMPOPO DIVISION

APPEARANCES: COUNSEL FOR THE PLAINTIFF : ADV. LM Montsho-Moloiasne & Adv. M Raphahlelo INSTRUCTED BY : NM Mabunda Attorneys COUNSEL FOR THE DEFENDANT : ADV. Monene & N Sikhwivilu INSTRUCTED BY : State Attorneys.

X

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

26.02.2024

Case No: 5028/2017

BEFORE THE HONOURABLE SEMENY A.AJP

DATE: 26 FEBRUARY 2024

In the matter between:

GELDY TISETSO MOHLALA

And

Member of Executive COUNCIL:

DEPARTMENT OF HEALTH LIMPOPO PROVINCE

DRAFT ORDER

Having read the documents of the records and heard Counsel for the parties;

IT IS ORDERD THAT:

1. The Defendant shall pay the sum of R4 441 270.00:

Four Million Four Hundred and Forty-one Thousand Five Hundred and Seventy Rand. in full and final of the plaintiff's claim and the said amount is payable in to the following bank account:

Account Holder N.M. Mabunda Attorneys Bank Name First National Bank Branch Code 261449
Account Number 6[...] Type of Account Trust Account REF NMM/01/MH

2. The above costs will also be paid into the above trust account, which costs shall include the following:

2.1. the costs of two Counsel including traveling for 07th June and 09th of October 2023;

2.2. the Defendant shall pay the Plaintiff's costs on high court scale to date hereof which shall include, the fees of two Counsel including perusal, preparation, drafting of heads of argument and full day fee for court appearance on 07th and 08th June 2023, 04th and 05th September and 09th October 2023.

2.3. the reasonable taxable fees for consultation and preparation for trial, qualifying and reservation fees (if any) and on proof thereof as well as the costs of the reports, addendums including joint minutes of:

2.3.1. Dr N Du Plessis - Plastic and Reconstructive Surgeon;

2.3.2. Dr L Mashayamombe - Specialist Psychiatrist;

2.3.3. Ms N Kgaphola - Occupational Therapist;

2.3.4. Mr T.T. Manzini - Clinical Psychologist;

2.3.5. Ms T Tjale - Industrial Psychologist; and

2.3.6. Munro Consulting Actuaries.

BY ORDER OF COURT

REGISTRAR

Counsel for Plaintiff

L.M. Montsho- Moloisane SC

Adv. M Raphahlelo

Instructed by: N.M. Mabunda

Counsel for Defendant

Instructed by: State Attorney

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