

SOUTH AFRICA / JUDGMENT

N.M obo A.M v Member of the Executive Council For Health: Eastern Cape Province (Reasons) (629/2019) [2022] ZAECBHC 47 (2 December 2022) [2022] ZAECBHC 47

COURT

Eastern Cape High Court, Bhisho

BEFORE

Hartle

CASE / FILE NUMBER

629/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, BHISHO)

CASE NO. 629/2019

NOT REPORTABLE

In the matter between:

NM OBO (her son) AM

Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH: EASTERN CAPE PROVINCE

Defendant

(in re the negligence of hospital staff at Stutterheim and Cecilia Makiwane Hospitals)

REASONS FOR QUANTUM AWARD

HARTLE J

[1] On 10 August 2022 I granted an order in the following terms after a quantum hearing:

“1. The Defendant shall pay the Plaintiff in her personal capacity the amount of R331 000.00 within 30 calendar days of this order.

2. In the event that the Defendant fails to pay the amount referred to in paragraph 1, within 30 days of the order, the Defendant shall be liable to pay interest thereon at the prescribed rate of interest.

3. The Defendant shall pay the Plaintiff in her representative capacity for and on behalf of A[...] (“the minor child”) the amount of R24 045 233.00. The aforesaid amount is made up as follows:

3.1 R2 000 000.00 for general damages;

3.2 R2 718 043.00 for future loss of earnings capacity;

3.3 R17 649 616.00 in respect of future hospital, medical and related expenses; and

3.4 R1 677 574.00 in respect of the costs of the administration of the trust.

4. It is recorded that the Plaintiff was granted and awarded an interim payment in terms of Rule 34A of R5 000 000.00 in terms of the Court Order dated 4 June 2021 attached hereto as “A”.

5. The amount of R24 045 233.00 as set out in paragraph 3 above is accordingly reduced to the amount R19 045 233.00.

6. The Defendant shall accordingly pay to the Plaintiff in her

representative capacity for and on behalf of the minor child the amount of R19 045 233.00.

7. In the event that the Defendant fails to pay the amount referred to in paragraph 6, within 30 days of the order, the Defendant shall be liable to pay interest thereon at the prescribed rate of interest.

8. The Defendant shall pay Plaintiff’s costs of suit (on the High Court scale) to date hereof, such costs to include:

8.1 the costs of counsel;

8.2 the costs attendant upon the obtaining of payment of the full sums including any interest referred to in paragraphs 1 and 6 above and including the costs associated with the creation of the trust referred to herein; and

8.3 the costs incurred in obtaining the medico-legal reports including supplementary reports, addendums, actuarial reports and joint minutes, as well as, where necessary, the qualifying, attendance, reservation and preparation fees of:

Roslyn Rich (mobility expert)

Mandy Read (Dietician)

Bianca Grey (Occupational Therapy)

Grace Hughes (Physiotherapy)

Nkanyiso Masondo (Architect)

Dr Lofstedt (Dentist)

Dr Robert Campbell (General Physician)

Rochelle Thanjan (Speech Therapist)

Sue Anderson (Nursing)

G Shapiro (Industrial psychologist)

Ian Meyer (Clinical Psychologist)

Ivan Kramer (Actuary)

Robert Koch (Actuary)

Manala Actuaries (Actuary)

9. The Defendant shall pay interest on the aforesaid costs at the

current prescribed legal rate of interest from date of allocatur or agreement to date of payment thereof.

10. The amounts referred to in paragraph 1, and any interest referred to in paragraph 2; paragraph 6, and any interest referred to in paragraph 7, and all costs referred to in paragraph 8 shall be paid to the Plaintiff's attorney Trust Account whose account details are as follows:

Enzo Meyers Attorneys Trust Account

Bank: Absa (Frere Square)

Account No: 4[...]

Code: 6[...]

11. The net balance remaining, after paying the costs set out in paragraph 8 above, and recovering all costs and expenses for which the Plaintiff is liable, including her legal representatives' fees as between attorney and own client, shall be dealt with on the basis that the Plaintiff's attorneys shall transfer the said net balance thereof to the "A[...] M[...] TRUST" the registration of which has been ordered by the Court in terms of the Court Order dated 4 June 2021, as supplemented on 23 June 2021, which earlier order is attached hereto as "A".

12. In the meantime, the aforesaid award shall be paid to the Plaintiff's attorneys to be invested in an interest-bearing account in terms of section 86 (4) of the Legal Practice Act, No. 28 of 2014, and to make payment of any reasonable expenses or disbursements for the benefit of the minor child as a trustee would have been able to do pursuant to the objects of the envisaged Trust, and in due course to account fully to the trustee appointed, of all costs, fees, expenditure and/or disbursements paid from the award once the Trust has been registered and the balance of the award is paid over.
13. Paragraph 3 of the earlier order (Annexure "A") is amended by the deletion of the trust account particulars of the Plaintiff's erstwhile attorneys and substituted by the account details of Enzo Meyers Attorneys as reflected in paragraph 10 above."
- [2] The matter had taken a fortuitous turn towards the end of the hearing that had resulted in an acceptance of what was fair in respect of all heads of damages that remained to be determined, bar the issue of general damages.
- [3] Several important concessions were made during the trial that conduced to this state of affairs.
- [4] When the parties ultimately argued before me, I was also presented with a draft order that was a culmination of their joint effort at resolving the minutiae of the order's terms. Mr. Dukada who appeared for the defendant unfortunately (as is often the case in these matters) held no instructions to agree to any heads of damages but fairly made concessions where these were necessary.[1]
- [5] When the trial initially commenced before me the defendant applied for a postponement which I refused. The application had been launched in the week prior to the trial date on an urgent basis but the duty judge stood the matter down to be dealt with by the trial court. The gist of the application was that because the defendant had raised the public health care defence in a "test case" pending before this court, that it was appropriate for that matter to first be determined as the anticipated judgment would, as I understood Mr. Dukada's argument, have a considerable influence on the way the department's defence in medical negligence actions is to be conducted going forward.[2]
- [6] I was however not persuaded that the judgment was "just around the corner" as was suggested to me by Mr. Dukada (indeed that action has yet to be finalised), or that that finding could bind any other court pertaining to the public health care defence, since each case obviously stands on its own merits. Moreover the defendant had simply failed to make out a case for a postponement and could not persuade me that the trial prejudice to the plaintiff would be ameliorated by any costs order I might make.
- [7] The trial commenced the following morning with the focus on the plaintiff's outlay of the child's future medical costs and the obvious impact to his life by his unfortunate impairment.

[8] Several experts testified including Dr. Robert Campbell, a physical rehabilitation specialist, who assessed the child's gross motor function on level two. He expounded upon the impact to the child of his impairment, made suggestions regarding how these should be remediated and reflected upon the costs that will necessarily be

incurred in pursuit of his treatment and modalities in a private care institution. Dr. Campbell opined that the care recommended and required that the child would benefit from was not and has historically not been available in the public health domain.

[9] The plaintiff called Heather Hughes, a physiotherapist also working in the area of rehabilitation who honed in on the particular modifications required for the child to enable him to manage in his environment from a gross motor perspective and the costs to facilitate his needs and provide the necessary modalities accordingly.

[10] Susan Anderson, a professional nurse, similarly weighed in on the cost to manage the child's case.

[11] Mandy Reed testified regarding the dietary aspects of the child's care and the reasonable costs to be incurred in this respect. Rosalind Rich brought her expertise on the child's needs and costs from the point of view of a mobility consultant; Ms. Bianca Grey from the perspective of an occupational therapist; and Mr. Vincent Masondo from that of an architect.

[12] Several further reports concerning the child and his medical requirements were handed in by consent. The plaintiff herself testified as did Mr. Ian Meyer, psychologist, who traversed the emotional and psychological impact to her by the fact that her child was born with cerebral palsy and the disruption to her life as a result.

[13] Actuarial reports were also entered into evidence by consent.

[14] The testimony adduced on behalf of the plaintiff largely went unchallenged and the defendant herself led absolutely no evidence to counter the careful exposition by her of what was relevant to establish the quantum or to underpin her public health care defence.

[15] When it came to closing arguments Mr. McKelvey applied for an amendment to the plaintiff's particulars of claim to bring them in line with the testimony that had been adduced in the plaintiff's favour. This was met with an unreasonable objection on behalf of the defendant which I dismissed. However, because the parties' differences went to the fundamental issue of the child's life expectancy, I accepted Mr. Dukada's argument that the defendant stood to be prejudiced unless I granted her a brief postponement to allow her expert (Dr. André Botha) to consult with the child on the issue of his life expectancy and thus to respond to the amendment which I had allowed.

[16] When the matter came before me again the parties had reached agreement regarding a much reduced life expectancy of 55.5 years and there was a fresh engagement between them concerning the plaintiff's adjusted claims in recognition of this important concession.

- [17] In particular the actuarial calculations were refreshed and formed the basis for the accepted life expectancy of the child.
- [18] Counsel resolved where it was necessary to draw stark lines of difference, which was basically only in respect of the issue of what quantum ought to be awarded for general damages. For the rest, as they were obliged to, both, where necessary, properly made concessions as to what was fair.
- [19] Mr. McKelvey had suggested that an award of R2 000 000.00 in respect of general damages was apposite. Mr. Dukada argued conversely that an award of R1 800 000.00 should be made. I opted for the former amount as representing the most reasonable estimate of these damages in the plaintiff's representative capacity.
- [20] The defendant's attorney, presumably because a presence was not maintained on the Zoom hearing platform, requested reasons for my order.
- [21] I do not intend to provide reasons concerning the issues the parties agreed upon or which were conceded by counsel before me. Indeed this would amount to an unnecessary drain on my resources that are already under considerable pressure.
- [22] The state attorney is expected in terms of the provisions of section 2 (2) (b) of the State Liability Act No. 20 of 1957 to both request written instructions from the head of department and to provide further legal advice to him/her on the merits of the action where proceedings to recover these have been instituted, in other words, early on in the litigation. (One would have expected, therefore, that the defendant's legal representative in this instance would have been thoroughly steeped in the matter, engaged in trial, and able to promote and facilitate a settlement because this eventuality must have been specifically anticipated.)
- [23] In addition parties involved in litigation, especially the state attorney by virtue of the above provisions and in terms of established court and case management practices, are obliged to endeavour as far as possible to resolve issues (or aspects of their cases) that are amenable to resolution without trial and/or narrow the issues as far as can be done or to curtail the need for oral evidence to be adduced, all in the name of efficient, costs effective litigation, and the exclusion of the court's resources that can be put to better use.
- [24] Rule 36 (9A) also obliges the parties to explore common ground between experts as much as possible.
- [25] It therefore strikes me as odd, where counsel at least were ad idem regarding practically all aspects bar a narrow difference of opinion in respect of the quantum for general damages, that the defendant's legal representative should have asked for reasons for my order.

[26] I mention coincidentally that it was also evidently quite embarrassing for Mr. Dukada to have come to court with no instructions from the defendant concerning what damages in her view ought reasonably to have been awarded to the plaintiff. Her attorney should at the very least have involved himself in the trial and kept his finger on the pulse of what was going on.

[27] Be that as it may I will account below for my decision regarding the extent of the award of general damages, nothing else having been contentious between the parties.

[28] I stress further that the order which I granted was premised on no oral evidence having been adduced by the defendant at all at the trial and no real challenge having been directed at any of the evidence adduced by the plaintiff.

[29] The essential facts underlying the award of general damages were the following:

29.1 The child (7 years at the time of trial) irreversibly suffers from spastic and dystonic cerebral palsy. This spacity entails awkward abnormal movements of his whole body but is worse on his left side, especially in his left arm and right leg.

29.2 He is mentally and physically compromised and permanently disabled.

29.3 He cannot play like other able-bodied children, although he can walk independently, albeit clumsily. He frequently falls though when mobilising on his own due to neurological impairment.

29.4 His inability to communicate leaves him highly vulnerable and unable to cope in an ordinary community environment, such as for, example, a mainstream school, which restricts his ability to participate in ordinary day-to-day life.

29.5 His differences make it hard to communicate and commune with people, though he enjoys engaging with other children, which leaves him bereft of the ordinary pleasures of life and community.

29.6 He has poor dentition.

29.7 He has suffered a profound loss of amenities of life.

29.8 According to the evidence, he has some appreciation for his condition. He gets frustrated for example when he cannot use his left hand.

29.9 His life expectancy has been curtailed. He is expected to live only to the age of approximately 55.5 years.

29.10 He is totally dependent on others for his daily living and must be supervised at all times.

29.11 He is unemployable.

29.12 At the age of 30 his condition is likely to deteriorate.

[30] As was submitted by Mr. McKelvey who appeared for the plaintiff, this matter involved substantial levels of pain, suffering and disablement, with a devastating loss of the amenities of life for the child. He relied on the judgments of *NK obo ZK v MEC for Health, Gauteng*[3], *C S (obo TGS) v MEC for Health, Gauteng*[4], *Mngomeni v MEC for Health : Eastern Cape*[5] and *MSM obo KBM v MEC : Health Gauteng*[6] in support of his contention that an award R2 million for general damages was justified in all the circumstances.

[31] It is trite that an award of general damages must bear a direct relationship to the personal suffering of the child and is intended for his/her personal benefit.

[32] Willis JA in *NK obo ZK v MEC for Health, Gauteng*[7] stated the following regarding the approach to be adopted in the determination of general damages in actions such as these:

“[9] As was said by Nicholas JA in Southern Insurance Association Ltd v Bailey NO,[8] this court has not adopted a ‘functional’ determination as to how general damages should be awarded. It has consistently

preferred a flexible approach, determined by the broadest general considerations, depending on what is fair in all the circumstances of the case. We do not have to determine what the award will be used for – its purpose or function. What we must consider is the child’s loss of amenities of life and his pain and suffering.

[33] In *AD and Another v MEC for Health and Social Development, Western Cape Provincial Government*[9] Rogers J, at paragraph [618], stated the following regarding the determination of general damages:

“Money cannot compensate IDT [the disabled child] for everything he has lost. It does, however, have the power to enable those caring for him to try things which may alleviate his pain and suffering and to provide him with some pleasures in substitution for those which are now closed to him. These might include certain of the treatments which I have not felt able to allow as quantifiable future medical costs ...”

[34] Mr. McKelvey by way of comparison and to guide this court referred to the awards made in *Singh v Ebrahim*,[10] *C S obo TGS v MEC for Health Gauteng*,[11] *PM obo TM v MEC for Health, Gauteng Provincial Government*,[12] *Mngomeni obo Zangwe v MEC for Health, Eastern Cape Division*,[13] *Megalane NO v RAF*,[14] *Matlakala NO v MEC for Health, Gauteng Provincial Government*,[15] *NK obo ZK v MEC for Health, Gauteng*,[16] *MP obo SP v MEC for Health, Eastern Cape Province*. [17] All of these precedents are readily available in the *Quantum Yearbook*, if not on SAFLII.

[35] In all these matters the awards, translated to present day values, equate to approximately R2 million for general damages and involve more or less the same general suffering of a cerebral palsy patient.[18]

[36] Mr. Dukada submitted that an award of R1.8 million was more than adequate for general damages. He contended that the cases relied on by Mr. McKelvey appeared to be “of more severity” compared to the case of the child. Whilst I am in agreement the cases raised by him do present more severe scenarios, the awards in those cases however have current day values of closer to R2.5 million.[19]

[37] Most of the awards relied upon by Mr. McKelvey in this current year exceed R2 million, which I believed to be an imminently fair award for general damages and in consonance with awards in more or less similar cases.

[38] In the result I issued the order which I did.

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING: 8 August 2022 DATE OF ORDER: 10 August 2022 DATE OF REQUEST FOR

REASONS:

17 August 2022 DATE OF REASONS: 2 December 2022

Appearances :

For the Plaintiff : Mr. C McKelvey instructed by Enzo Meyers Attorneys, East London (ref. Mr. Meyers).

For the Defendant : Mr. P Dukada instructed by The State, East London (ref. Mr. Mgujulwa).

[1] See the comments of my colleague Brooks J in *BM v MEC for the Department of Health, EC* [2020] JOL 48528 (ECM) regarding the obligation on the health department to responsibly and honourably litigate with public funds (at para [25]). The court criticised the defendant and her department for their lack of engagement in trials of this nature which leads to a frustration of the court processes one way or another (at para [26]); their refusal to accept the guidance of their own experts and legal team (para [29]); the “glaringly obvious failure on the part of the defendant to address the procedures associated with the assessment of an appropriate quantum award”(at para [29]); the lack of knowledge by them of the conduct of litigation (at para [39]); and the lack of any mandate to settle (at para [44]). These concerns certainly came to the fore in the hearing before me.

[2] The matter concerned is *Thandiswa Nohila v MEC for Health, Eastern Cape* (Bhisho High Court case number 36/2017) which action is presently pending before my colleague Griffiths J.

[3] 2018

(4) SA 454 (SCA).

[4] Case No. 27452/2009 [2015] ZAGPPHC (12 August 2015).

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- [5] Case No. 1972/2014 ECLD (Mthatha) (20 June 2017).
- [6] 2020
- (2) SA 567 (GJ).
- [7] Supra.
- [8] Southern Insurance Association Ltd v Bailey NO 1984
- (1) SA 98 (A) at 119D-H.
- [9] (27428/10)
- [2016] ZAWCHC 181 (7 September 2016).
- [10] [2010] ZASCA 145 (26 November 2010).
- [11] (27452/2009)
- [2015] ZAGPPHC (12 August 2015).
- [12] (A5093/2014)
- [2017] ZAGPJHC 346 (7 March 2017).
- [13] (1972/2014) (20 June 2017) (unreported).
- [14] [2006] 5 QOD A4 – 10 (W).
- [15] [2015] ZAGPJHC 223.
- [16] (216/2017)
- [2018] ZASCA 13 (15 March 2018).
- [17] (121/2016) (22 May 2018).
- [18] See NK obo ZK supra at para [13] regarding the court's observation that the consonance of awards, and their predictability and reliability are intrinsic to the rule of law and that these principles, apart from other considerations, facilitate the settlement of disputes as to quantum. I would suggest that this is especially more so in the arena of cerebral palsy where experience has grown pragmatically.
- [19] For NK obo ZK supra; C S obo TGS supra (R2 502 000.00); PM obo TM supra (R2 329 000.00); Matlakala NO supra (R2 085 00.00); and MSM obo KBM supra (R2 304 000.00).

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