

SOUTH AFRICA / JUDGMENT

T.L obo K.R.L v MEC for Health, North West Province (1273/2017) [2021] ZANWHC 33 (25 June 2021) [2021] ZANWHC 33

COURT

North West High Court, Mafikeng

BEFORE

M Z Makoti

CASE / FILE NUMBER

1273/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION – MAHIKENG

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to Regional Magistrates: YES / NO

CASE NO: 1273/2017

In the matter between: T[....] L[....] obo
 Plaintiff
 K[....] R[....]
 L[....]
 And
 THE
 MEC FOR HEALTH, NORTH WEST PROVINCE
 Defendant

JUDGEMENT

MAKOTI AJ

INTRODUCTION

- [1] The plaintiff is the mother to a minor child, K[....] R[....] L[....] ('the minor child'), who was born with debilitating medical condition of cerebral palsy. She instituted this legal action against the defendant on behalf of the minor child, who is presently six year of age. The defendant has conceded liability for 90% of the damages suffered by the minor child.
- [2] With the question of liability out of the way, the trial proceeded on the issue of quantum with specific reference to inter alia the following heads of damages: (1) general damages; (2) loss of earnings; and (3) medical (future) expenses. This Court is called upon to determine the reasonable amount payable for the damages caused to the minor child.
- [3] From the beginning of the trial it was clear that the parties were quite a distant apart in their computation of what would constitute reasonable damages payable towards minor child's care. This is because the initial amount that was claimed by the plaintiff was to the value R23,824,397.25, which has since shrunk to a net claim of R11,509,340.00. The defendant, on the other hand, contends that the reasonable net amount that should be paid to the plaintiff should be limited to R7,869,015.10.
- [4] Given the fact that the parties were not able to reach settlement on the issue, a determination of quantum is to be made by this Court. Once a determination is made of gross value of the amount payable for the damages, to reach the net amount payable a deduction will be made of R313,370.00 in respect of interim payment that was made by the defendant. Also, on the basis that liability was settled for 90% in favour of the plaintiff, an amount equivalent to ten percent (10%) of the total award will be deducted from the amount that is to be awarded to the plaintiff.

- [5] This Court appreciates that the parties have been able to settle one of the heads of damages in the amount payable for future medical expenses at the value of R5,729,671.00. This settlement was determined as a median between the parties' actuarially calculated amounts, to which normal contingencies remain applicable. Future medical expenses covers costs for orthopedic treatment, occupational therapy, dentistry etc.
- [6] What remains for determination by the Court are the following issues which the parties could not reach agreement on:
- [6.1] Whether minor child should be placed in an institution and, if so, the associated costs. The alternative to this is whether minor child should be cared for at home, and related costs;
- [6.2] future loss of earnings or earning capacity;
- [6.3] general damages;
- [6.4] contingencies to be applied;
- [6.5] costs for administering a trust; and
- [6.6] costs of the litigation.
- [7] To advance their respective cases, the parties presented both oral and written evidence, inclusive of the evidence of their respective expert witnesses. The plaintiff led the oral testimony of the following witnesses: the plaintiff, Mr Lance Marais (IP), Me Anneke Greeff (OT), Mr Sieg Sirmon (QS) and Mr Len Eybers (architect). The defendant, on the other hand, led Me Segwati Sebapu (OT) as its only witness.

PLACE OF CARE FOR MINOR CHILD

- [8] The plaintiff gave oral testimony on this issue and stated that she intends to care for minor child from a home that will be purchased and altered to suit his situation. She indicated that she had initially wanted minor child to be cared for in an institution that will be able to give him continuous care for twenty-four (24) hours daily. Her mind has since changed, she continued, after she discussed the matter with her grandmother who advised against her sending minor child to an institution. The reasons for this was partly that there were no institutions near where they are currently staying in Taung.
- [9] Seemingly perturbed by the plaintiff's change of stance, the defendant argued that the decision as to where minor child was to be cared from remained that of the Court which sits as the upper guardian of all minor children. Also, counsel for the defendant argued that the imperative should be to protect or preserve the best interest of the minor child. A decision on what is in the best interest of the minor child, the argument continued, should not be dependent solely on the wishes of the plaintiff as a parent.

- [10] The experts are in agreement that the most ideal situation for any child is to be raised by biological parents, and to be raised in a family setup. In this case, however, Me Sebapu testified that the minor child would be served best by being placed in an institution where care and stimulation will be provided for 24 hours. This was in direct contrast to the testimony of the corresponding expert, Me Greef, who contended that because the mother of the minor child wanted to care for him at home, the Court should grant her wishes. Some parts of her oral testimony proved inconsistent with her written work. For instance, she sought to disavow institutionalization as an option that could help the minor child, which was at odds with her first report in which she considered it as an option. This inconsistency is not so material as to warrant discarding the evidence tendered by Me Greef.
- [11] The issue was taken further by Counsel for the plaintiff who submitted that the only test to be applied in determining where should the child be cared from is whether, on probabilities, the child will be raised and care for at home. I do not agree with this oversimplification of the issue. This is because, on the facts, even if a decision is that the minor child should be cared for at home, such decision will be supported by a consideration of the interests of the minor child. After all, what brings us into this litigation is nothing other than the very same interest of the minor child.
- [12] Also, it has to be mentioned that our Courts have always advocated for a proposition the interest of minor children above the wishes of their parents. By way of example, the Court held amongst others in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others*[1] that ‘the right to have the child’s best interests given paramount importance in matters concerning the child.’[2] It is for such reasons that the concept of paramountcy of the interests of children has been constitutionalized in s 28 of the Constitution.
- [13] Returning to the facts of this case, the Court has heard of the relationship that the minor child has with his siblings. While there is no guarantee that the relationship will remain blissful, it is a connection between siblings that is in my view worthy of consideration if it will be of benefit to the minor child. I am alive to the fact that the experts, including the plaintiff’s educational psychologist Me Van den Heever recommended institutionalization. The role of all the experts and their respective expert opinions is to assist the Court to reach a conclusion that is just.[3]
- [14] Although I am satisfied that institution based case could benefit the minor child, that will not necessarily be without challenges for the plaintiff and the child’s siblings who would have to visit him regularly while in the institution. In the long run, this may affect the minor child if the proposed weekend visitations become burdensome for the family. There is another consideration, which is the uncontested evidence that the minor child excites whenever the siblings are around. Surely this must be sufficient motivation for the Court to find that it will benefit the minor child to be surrounded by familiar people (siblings) who

make him happy. On that basis, I conclude that it will suit the best interests of the minor child if he is cared for at home.

HOME CARE CONSIDERATIONS

- [15] The home care situation calls for determination of two issues, namely: (a) the physical infrastructure needs for the minor child; and (b) personnel needs in the form of care giver(s). That there is need for a trained caregiver is not in dispute, with a relief caregiver from time to time. Both Me Greef and Me Sebapu testified on this issue, and were in disagreement with regard to the amount to be allocated for remunerating the caregivers.
- [16] Although Me Greef had initially recommended two trained caregivers with a relief caregiver, the plaintiff accepts that one caregiver will be appropriate to care for the minor child, with a relief caregiver. Further, plaintiff accepts that the costs is to be calculated for a period equivalent to 14 months to cater for leave and bonus for the trained caregiver. As regards the calculation of quantum for a caregiver, Ms Greef based the costs on rates determined in terms of a Medwell quotation that was tendered as evidence, amounting to R22,940 per month. The total caregiving costs according to the plaintiff's calculations amount to R3,396,184 (being a sum of case management fees of R366,219 and caregivers' costs of R3,029,965).
- [17] The defendant, on the other hand, relied on the testimony of Ms Sebapu to arrive at a proposition that one trained caregiver should be catered for. In addition, the defendant submitted that an allowance for a relief caregiver should be put in place for 20 hours per week. Based on Me Sebapu's evidence, the defendant contended that the rates applicable for the caregiver and the relief should be determined on the basis of the legislated domestic wage rates, with the total cost of care being R3,116,491.00 (a sum of case management fees of R406,499 and caregivers' costs of R2,709,992).
- [18] The parties are not too far apart on these calculations, with the difference of their calculations being an amount of R279,693. The court has to decide which amount is to be awarded, with the understanding being that the award should be reasonable compensation for the damages suffered by the minor child. On behalf of the plaintiff counsel submitted that the calculations should be based on Me Greefs' recommended rates, as per Medwell's quotation. The contention was that there has been no suggestion that her quotation was incorrect, and that she should be believed because of her vast experience as a caregiver handling over 300 cases.
- [19] On the other hand, I have been asked to disregard the published standard rates presented by Me Sebapu. The basis for this is that she did not present written proof of the rates, even though she had confirmed that the rates were published in a government gazette. I differ with the plaintiff's proposition. Not only was Me Sebapu a reliable witness, she also undertook to provide copies of the published rates should they be required. Also, as experienced as Mr Greef may be, the plaintiff could have helped the court by providing more than one quotation, for comparative analysis.

- [20] It has to stressed that the role of experts is to guide the court in its determination of what in this case would be the reasonable compensation for the damages suffered. The conclusions reached by an expert do not bind the court, and may be departed from in appropriate instances.[4] Thus, the court may not slavishly accept what is presented by expert witnesses without further examination. What else is there for the court to compare with in determining the rates applicable, that is, if I were to accept only Me Greef's evidence? I believe that Me Greef could have used her expertise to give more substantiation[5] than just a single quotation for the determination of the applicable rate.
- [21] Me Sebapu, on the other hand, motivated her conclusions by relying on the rates applicable at the Cerebral Palsy Association as well as the published standard rates. On that basis, I persuaded to accept the rates proposed by Ms Sebapu the defendant for determining the applicable rates for caregiving of the minor child. The reasonable amount payable for the minor child's home care is in my view R3,116,491.00.

HOME ADAPTATIONS

- [22] The next question for determination relates to the acquisition of a home for purposes of caring for the minor child, and the costs for the necessary adaptations to the house. Two expert witnesses, an architect and a quantity surveyor, were called on behalf of the plaintiff while the defendant did not call any witness. Mr Eybers, the architect, designed the adaptations that will be required to convert a model low cost house ('RDP house') into one that will be suitable for the minor child's care. The designed adaptations were costed by the quantity surveyor, Mr Sirmon.
- [23] There can be no debate that some conversions will be required on any existing property that may be acquired for the care of the minor child. Also, the parties seemed ad idem that purchasing an already existing house and altering or adapting it to suit the minor child's needs is a cheaper and a more viable option. What they differ on are the costs of acquiring an RDP house, which, in the opinion of Mr Eybers was on average R439,000. The witness accepted that the average price of a similar house in the area where the plaintiff and the minor child are presently residing in R353,604.
- [24] The defendant put it to Mr Eybers, and he accepted it, that it would not make commercial sense for a person to purchase a property and make alterations which are more than three times the property's market value. That the minor child will require lifelong care and support is a matter of common cause. The defendant contends that the majority of alterations that have been proposed are excessive. An amount of R1,003,974.50 was proposed on behalf of the defendant for the purchase and adaptations needed to an RDP type house. In addition, it was contended for the defendant that an amount of R124,323.50 be allocated for maintenance of the property.
- [25] The plaintiff's proposed costs for purchasing and making the necessary alterations to the home is R1,277,730.00 with a further amount of R176,088.00 being the proposed costs to be allocated for maintenance. As indicated, the average price for an RDP house was based on

rates in Gauteng province and not in the North West province's areas of Taung, Christiana and Pampierstad where the plaintiff and the minor child are presently residing. There is a difference of about R85,000.00 in the average price for an RDP house which the court will take into consideration. Furthermore, it was contended for the defendant that certain costs associated with underfloor heating and CCTV camera should be dispensed with given the size of an RDP house.

- [26] Given the usually small size of an RDP house, I agree with counsel for the defendant that a cheaper baby monitor will achieve the purpose of a CCTV camera. However, I am not able to agree that a gas heater will be more suitable to maintain suitable temperature as well as an underground heater would be able to do. It is more labour demanding, comparatively, to use a gas heater than an electric under floor heater. A gas heater poses its own dangers for a person of the minor child's condition.
- [27] To resolve the dispute in this regard it seems to me appropriate to deduct the sum of an amount of R85,000.00 and the price of a CCTV camera from the costs of acquiring and making adaptations to the property. Thus, an amount of R1,192,730.00 is deemed appropriate for the acquisition and adaptation of the property. Higher than normal contingency application, at the rate of 35%, will be used to cater for the maintenance costs which are awarded in the amount of R176,088.00, leaving the net award at R114,457.20.

GENERAL DAMAGES

- [28] The quantification of general damages is another area on which the parties have failed to reach agreement. However, they are not too far apart with the plaintiff's written closing submissions motivating for payment of R2,150,000.00 while the defendant contended in its written closing submissions that the reasonable amount should be determined at R1,900,000.00. From their submissions it can be deduced that they agree that general damages are to be paid, just for the different amounts.
- [29] The defendant submitted that the minor child is mostly unaware of what is happening around him. However, as I indicated above there is no dispute as the payment of general damages. The court in *Marine & Trade Insurance Co Ltd v Katz NO*, [6] per Trollip JA, held 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 he is not completely unaware of the situation and accordingly an award for general damages would be appropriate. The minor child's condition has been classified by experts as a GGCS 2 level V.[7]
- [30] The courts have repeated preferred a flexible approach to the awarding of general damages, largely determined by the broadest general considerations, and depending on what is fair in all the circumstances of the case. What is most critical to consider is the minor child's loss of amenities of life and his pain and suffering.[8]

[31] Comparable authorities serve as important guides for determining the awarding of general damages. The defendant has relied on the case of MSM obo KBM v MEC for Health, Gauteng[9] to support the proposition that an award of R1,900,000 is appropriate to compensate the minor child. In that matter, the court awarded a child of 7 years with a similar case of severe

cerebral palsy and life expectancy of 24.6 years an amount of R2,000,000.00 in general damages. Two years earlier, the Supreme Court of Appeal in NK v MEC for Health, Gauteng[10] had awarded a child with a similar condition an amount of R1,800,000.00 in general damages.

[32] With the effects of inflation, the value of the damages must surely be a slightly higher amount than what the defendant has suggested. Adding several other comparable cases,[11] the plaintiff submitted that an award of more than 2 million will be appropriate to compensate the minor child for the damages suffered. I agree with the plaintiff's submission and accordingly find that an award for general damages in the amount of R2,150,000.00 is justified.

LOSS OF EARNING CAPACITY

[33] The next issue to determine is the appropriate compensation for the minor child's earning capacity. One expert witness called by the plaintiff, an industrial psychologist, Mr Marais, testified as to the claim for loss of earning capacity. His report was based on Patterson scales applicable only in the formal sector and did not work on scales applicable in the informal sector. He did, under cross-examination, concede that it was probable that the minor child may have been employed in the informal sector. The plaintiff calculated the amount for loss of earning capacity as R508,339.00 (formal sector), with 20% contingency deduction already factored, while the defendant has placed it at R222,133.00 (informal sector) and contingency deduction still to be applied. They both agree that a contingency deduction should be applied to the amount awarded for damages.

[34] To measure the loss of earning capacity, as the defendant contended relying on the authority in Bane and Others v D'Ambrosi,[12] the court takes into account what the plaintiff would have earned but for the injury. This is largely a speculative exercise,[13] and expert opinions are important guides for the court to make an award of what may in its mind be appropriate. One accepts that the minor child's family situation is to be taken into consideration to determine the probabilities of where he would likely

have worked.[14] Another consideration is the employment situation in the country and in the North West Province where employment rates are quite low. Thus, it is mostly probable that the minor child would have become employed in the informal sector and, as a result, I make an award of R222,113.00. I, however, part company with the defendant proposition as to contingencies. This is because, though unemployment rates are low,

especially in the North West Province, the minor child may have wandered yonder in search for employment, which is easier to obtain

in the informal sector as opposed to the formal sector. The result is that a contingency deduction of no more than 5% is to be applied, leaving the award for loss of earnings at the figure of R211,007.35.

FORMATION AND MANAGEMENT OF A TRUST

- [35] The parties are in agreement that the funds awarded for looking after the interests of the minor child need to be protected. A registration or formation of a trust is the most common mode that has been adopted to hold funds on behalf of people in similar positions as the minor child.
- [36] The plaintiff's initial was that the court should order that an amount equivalent to 7.5% of the damages awarded be paid by the defendant for the administration of the trust. The defendant, on the other hand, contends that the determination of the 7.5% administration fees should be based on only the amount that will eventually make way into the trust.
- [37] It has become commonplace in quite a number of cases that the calculation of the 7.5% administration fee is based on the total amount of damages awarded to a successful plaintiff. For instance, the SCA in *NK obo ZK v MEC for Health, Gauteng* (supra) first determined the total amount to be awarded to the plaintiff and determined the applicable 7.5% from it. I have not seen any authority where this issue was debated and determined by any court. The parties could not refer me to any authority either.
- [38] In my mind, the amount to be awarded is to cater for the formation of the trust and administration of the funds that are to be placed in the hands of the trustee(s) on behalf of a successful litigant. Because the department will be using public funds to pay for the damages, it should not be made to pay more than what is necessary for the administration of the trust. The suggestion that public funds should be looked after is not a foreign concept.
- [39] Placing reliance on how administration fees are effectively determined in the field of administration of deceased estate, usually 3.5% of the gross value of the estate administered, I am in agreement with the defendant's proposition that the determination of 7.5% be calculated on the amount that will be administered by the trustees on behalf of the minor child.
- [40] It will require the attorneys for the plaintiff to make a separate determination of the amount equivalent to 7.5% of what is transferred into the trust's account, and issue the defendant with a separate invoice for payment by the defendant once that has been done.

COSTS

- [41] The plaintiff has asked that costs on the scale as between attorneys be awarded against the defendant, and based on the court order of 12 October 2020. The reason for this is that the case was postponed on two previous occasions at the defendant's instance, because it (defendant) had not expert reports. Also, the plaintiff avers that the attorneys had to send several letters to the defendant's representatives asking for it to file the reports in compliance with the 12 October 2020 court order.
- [42] Further, the plaintiff contended that the defendant only served the reports on 01 March 2021, one week before the trial which was scheduled to start on 08 March 2021. The reports so filed had been prepared between June and November 2020, causing the plaintiff to deal with them on seriously truncated time. The conduct displayed by the defendant is regrettable, and obstructive to the smooth handling of the litigation. The defendant has offered no explanation for this conduct, which the court frowns at. An award for costs on a punitive scale is in my view warranted.
- [43] The plaintiff had to rely on experts for the determination of appropriate damages. On that basis, it goes without saying that the costs occasioned by the use of expert witnesses should be awarded to the plaintiff.

ORDER

[44] The following order is made:

[44.1] The Defendant shall pay an amount of R10,959,546.40 to the plaintiff in her representative capacity, for and on behalf of her minor child, which amount is computed as follows:

- (a) Undisputed medical expenses: R5,729,671.50;
- (b) Home care expenses:
 - (i) Caregivers: R3,116,491.00;
 - (ii) Home adaptation costs: R1,192,730.00; and
 - (iii) Home maintenance costs: R114,457.20.
- (c) Future loss of earnings: R222,113.00;
- (d) General damages: R2,150,000.00;

[44.2] A deduction of 10% and a further deduction in lieu of interim payment of R313,370.00 have been factored to the amount mentioned in paragraph 42.1 above.

[44.3] The defendant is ordered to pay the costs of this matter, inclusive of the costs that were occasioned by the use of expert witnesses, who shall include:

- (a) Anneke Greeff (occupational therapist);
- (b) Dr AJP Botha (specialist physician);

- (c) Mr Len Eybers (architect);
- (d) Mr Sieg Sirmon (quantity surveyor);
- (e) Dr J J van Niekerk (orthopaedic surgeon);
- (f) Stacey Aires (physiotherapist);
- (g) Dr Karen Levin (speech therapist);
- (h) Mr Heinrich Grimsehl (medical orthotist);
- (i) Mr Lance Marais (industrial psychologist);
- (j) Mr Deon Rademeyer (mobility expert);
- (k) Me S van den Heever (educational psychologist);
- (l) Ms Bruk (dietician);
- (m) Dr A Keshave (paediatric neurologist);
- (n) Ivan Kramer (actuary).

[44.4] The total amount mentioned in paragraph 42.1 above shall be paid by the defendant in accordance with the provisions of section 3(a)(i) of the State Liability Act 20 of 1957 within 30 days from the date of this order directly into the trust account of the plaintiff's attorneys of record.

M. Z. MAKOTI

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION

REPRESENTATIVES:

PLAINTIFF:

ADV DU PLESSIS SC

ENVER SWARTZ ATTORNEYS

C/O MAPONYA ATTORNEYS INC

MAHIKENG

DEFENDANT:

ADV G GOEDHART SC

ADV I MONNAHELA

OFFICE OF THE STATE ATTORNEYS

1ST FLOOR, EAST WING

MEGA CITY, MMABATHO

DATE OF HEARING

: 19 MARCH 2021

DATE OF

JUDGMENT

: 25 JUNE 2021

[1] 2009

(2) SACR 130 (CC) at para [73]. The Court held: “It is neither necessary nor desirable to define with any precision the content of the right to have the child’s best interests given paramount importance in matters concerning the child. It is, as we put it in *Sonderup*, “an expansive guarantee” that a child’s best interests will be paramount in all matters concerning the child. This provision thus imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions. Section 28(2) provides a benchmark for the treatment and the protection of children.”

[2] *M v S* 2007 (12) BCLR 1312 (CC).

[3] *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA) at paras [22] – [24].

[4] *Road Accident Appeal Tribunal & others v Gouws & another* [2017] ZASCA 188; [2018] 1 ALL SA 701 (SCA) para 33.

[5] *Masstores (Pty) Ltd v Pick ‘n Pay Retailers (Pty) Ltd* [2015] ZASCA 164; 2016

(2) SA 586 (SCA) para [15]; see also, *Jacobs v Transnet Ltd t/a Metrorail* [2014] ZASCA 113; 2015

(1) SA 139 (SCA) paras [15] and [16].

[6] *Marine & Trade Insurance Co Ltd v Katz* NO 1979 (4) SA 961 (A).

[7] The condition is described: ‘Physical impairments that restrict voluntary control or movement and the ability to maintain anti-gravity head and trunk postures. All areas of motor function are limited. Functional limitations in sitting and standing are not fully compensated for through the use of adaptive equipment and assistive

technology. At level 5, children have no means of independent movement and are transported. Some children achieve self-mobility

using powered wheelchair with extensive adaptations’. (Emphasis added)

- [8] Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A) at 119D-H. See also Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199.
- [9] 2020
- (2) SA 567 (GJ).
- [10] 2018
- (4) SA 454 (SCA).
- [11] Pikani v MEC for Health, Eastern Cape [2019] JOL 43903 (ECM).
- [12] Bane and Others v D'Ambrosi 2010 (2) SA 539 (SCA) at 547F.
- [13] Allie v Road Accident Fund [2003] 1 All SA 144 (C).
- [14] M and Another v MEC for Health, Gauteng (Case No: 9407/2017) (GJ) unreported.
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