

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE
SIGNATURE

Case no.: **37474/2016**

In the matter between:

**TSHABALALA PHILISIWE PORTIA obo
TSHABALALA SPHEPHELO NHLANHLA**

PLAINTIFF

And

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH OF THE GAUTENG PROVINCIAL
GOVERNMENT**

DEFENDANT

Coram:

Dlamini J

Date of hearing: 07 February 2022 – in a ‘virtual Hearing’ during a videoconference on Microsoft Teams digital platform. Parties filed their respective closing heads of argument on 05 July 2022 and Subsequently made further/final submissions on 22 September 2022.

Date of delivery of reasons: 05 December 2022

This Judgment is deemed to have been delivered electronically by circulation to the parties’ representative via emails and same shall be uploaded onto the caselines system.

JUDGMENT

DLAMINI J

1. This is a delictual claim for damages instituted by the plaintiff, Ms. Portia Tshabalala in her representative capacity as the mother and natural guardian of Sphephelo for the *sequelae* of the injuries suffered by Sphephelo before his birth as a result of the negligent medical treatment he received at the Coronation Hospital, causing him to sustain severe brain damage with the resultant dyskinetic cerebral palsy and intellectual disability.
2. On 30 April 2018, an order was granted by this Court, in terms whereof the defendant is held liable for 100 % of the plaintiff’s agreed or proven damages.
3. At the hearing of the matter, the parties agreed as follows that;-
 - 3.1 The minor child's life expectancy is 21.8 years (31.7);
 - 3.2 General Damages in the amount of R2 000 000, 00;
 - 3.3 Loss of earnings in the amount of R 1 887 182,00;

- 3.4 A vehicle with adaptors and running costs R 1058 565.00;
- 3.5 House alterations cost R 451 693.05;
- 3.6 Stimulation Centre costs R 87 586.00;
- 3.7 Caregiver R 2 994 724.
- 3.8 The defendant is liable to pay plaintiff 7.5 %of the total value of the claim in respect of the establishment and administration of a trust to be created for and on behalf of Sphephelo.

4. At issue for the determination before this Court is the determination and distillation of the disagreements between the Speech and Language Therapist and the disagreement between the Occupational Therapist. Further, whether certain items concerning future medical and related expenses be compensated in monetary terms.

5. At the hearing of the matter, the parties agreed that the heads of damages under the Public Healthcare Defence in respect of future medical expenses be postponed *sine die*. Taking into the plaintiff's life expectancy of 31.7 years and all the circumstances of this case I am of the view that a contingency deduction of 10% to be applied in respect of the claim for future medical, hospital and related expenses is fair and just.

6. The plaintiff testified and called the following witnesses to testify on her behalf, the Speech Therapist Mrs. Davidoff and the Occupational Therapist Mrs. Reynolds.

7. The defendant called the Speech therapist Mrs. Dikobe and the Occupational therapist Mrs. Ndabambi and the Chief Executive Officer of Rahim Moosa Hospital Dr. Mkabayi to testify.

PLAINTIFF'S EVIDENCE

8. The plaintiff testified that after the death of her grandmother in 2021, she moved to a rented house in Warden. She survives on Sphephelo children social grant. She wishes to place Sphephelo at a simulation center near Bethlehem during the week. She says her plan before Sphephelo's birth was

to complete her matric and thereafter further her studies to become a social worker.

9. The plaintiff avers that over time she has developed her unique way of communicating with the child. She says Sphephelo will point to his stomach when he is hungry. That when he is sick, he will lie down, and if he has a headache, he will point to his head. Generally, he loves watching television and playing with his toys.

SPEECH/ LANGUAGE THERAPIST

10. In their joint minute, the parties Speech Therapist Mrs. Davidoff and Ms. Dikobe agree that the plaintiff has various pre-linguistic communication skills including, joint attention, eye contact, identifying pictures with eye gaze and head gestures, understanding the functions of common objects, following instructions and attempts at imitating actions.
11. They agreed that Sphephelo presents with impaired motor functioning of his oral structures as a result of severe dysarthria, which impacts his ability to speak and communicate and his ability to eat and swallow effectively.
12. They, however, disagree on several issues;-
 - 12.1 Mrs. Davidoff rated the plaintiff at Level 111 in the dysphagia assessment on the Eating and Drinking Ability Classification System, whilst Ms. Dikobe rates plaintiff at Level 11;
 - 12.2 The frequency and cost of swallowing therapy;
 - 12.3 The frequency of speech-language therapies and costing involved;
 - 12.4 The cost involved in caregiver training;
 - 12.5 On the issue regarding the ACC equipment and devices;
 - 12.6 The requirements and recommendations for assistive devices.
13. Mrs. Davidoff avers that Sphephelo does not present with lip closure whilst eating and drinking, whereas Ms. Dikobe indicated that during her

assessment Sphephelo was able to obtain oral closure to avoid anterior spillage.

14. Mrs. Davidoff recommends a Modified Barium Swallow to assist with the safety and efficiency of Sphephelo's eating and drinking limitations. In this regard, Mrs. Davidoff recommends separating the swallowing and speech therapy.

15. Mrs. Davidoff submits that there are strong prospects and probability that the AAC intervention will further improve Sphephelo's communication skills which will entail upgrading the AAC devices.

16. Mrs. Dikobe avers that both feeding and speech therapies can be done together. That it is unusual to do the therapies separately when it is the same service.

17. Mrs. Dikobe disagrees with Mrs. Davidoff's opinion regarding the efficacy and the necessity of administering the MNR therapy to Sphephelo.

18. Both experts agree on the requirement of ACC equipment and devices for the plaintiff but differ on the details thereof. Mrs. Dikobe recommends a Low-Tech AV system such as Talking Mats, symbols, and a communication manual.

OCCUPATIONAL THERAPIST

19. In their joint minute, Mrs. Reynolds and Ms. Mbonambi confirm that the plaintiff has expressed her wish that she would prefer that Sphephelo should continue to live with the family and possibly attend a simulation center daily.

19.1 Accordingly, the parties have agreed that Sphephelo will be placed at the Pathways Simulation Center in Bethlehem.

19.2 They agree that suitable provisions should be made for the appointment of a case manager.

19.3 They concur that Sphephelo is totally dependant on full-time care, and needs assistance with personal hygiene-related issues. That he is

completely dependent on external assistance tasks such as washing, cooking, and cleaning.

20. The point of disagreement between the two experts is whether the provision for additional therapy by Mrs. Reynolds is justified. Further, whether an additional daytime caregiver and nighttime caregiver will be required once Sphephelo turns 18 years.
21. The plaintiff submits that additional therapy should be allowed including the provision of an additional daytime caregiver from the age of 18 years.

DR MKABAYI'S EVIDENCE

22. The defendant called Dr. Mkabayi the Chief Executive officer of Rahim Moosa Hospital. Dr. Mkabayi gave evidence in support of defendant's submission that some of the services and goods which plaintiff seeks monetary compensation for can be provided by the hospital to plaintiff and Sphephelo.
23. Dr. Mkabayi provided a list of items that she believes can be procured by the Hospital for Sphephelo. At the hearing of the matter, Dr. Mkabayi testified that she has written a letter to her Head of Department (HoD) and the MEC for Health requesting her HoD and MEC to engage their counterparts in the Free State to finalise the arrangements for delivering the necessary items to the plaintiff. When the Heads of Arguments were heard on this matter, no reply or acknowledgment of Dr. Mkabayi's letter to her HOD and MEC was presented in this Court. Significantly, no reply was filed with this Court from the HoD and MEC in the Free State agreeing to this proposal.
24. The principle regarding the evaluation of expert evidence are trite and are set out succinctly in **Michael and another v Linksfield Park Clinic (PTY) Ltd**¹ at *para* [34] to [40] that; - "*What is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning*"

¹ (1) (361/98) [2001] ZASCA 12; [2002] 1 All SA 384 (A) (13 March 2001)

25. I fully support the defendant's broader submission that due care and acknowledgment should be taken that Sphephelo will be attending Pathways simulation center that will provide Speech and Occupational therapy, consequently the frequency of these interventions recommended by the Speech and Language therapy and the occupational therapy experts should be reduced accordingly.

26. Having said the above, I now turn to evaluate the expert's reasoning on the following heads of damages;-

SWALLOWING THERAPY, SPEECH THERAPY

27. I am satisfied that Shephelo requires undergoing the swallowing and speech therapies. That the swallowing and feeding therapy should be performed with his mother and the caregiver. However, I find no cogent reasons why these therapies should be separated in circumstances where these therapies will be conducted by the same experts on the plaintiff. These could be combined in a single session. Moreover, these will be augmented by the therapies that the plaintiff will receive at the simulation center. Accordingly, a medium of 15 hours of therapy is allowed. As a result, the following amounts listed under Annexure TPP4, items L5, R23 922; L6 R11 695, and, L7 R14 918 as proposed by defendant are just and fair and should be allowed.

MNR THERAPY AND AAC EQUIPMENT AND DEVICES

28. In my view, the suggestion that Sphephelo should undergo rehabilitation under the MNRI method will simply result in overstimulation. Sight should not be lost of the fact that plaintiff will be placed at a stimulation center. It is a specialist center that deals with children with CP. Pathways is deemed to possess the necessary expertise, programs, and equipment to assist its patient. Accordingly, the award for alternative and augmentative communication therapy is disallowed.

BLENDERS, SLOW COOKER, FRIDGE

29. On the provisions of the fridge, slow cooker, and blender, Mrs. Dikobe disagrees that these items should be provided to the plaintiff on the basis that these are considered part of typical household appliances and Sphephelo does not require any more than what is typically available at home. This objection is unsustainable, Mrs. Dikobe does not define what a typical household should look like, The facts are that the plaintiff is a single parent who sustains herself and Sphephelo through the social grant, hence it cannot be expected that she will have the necessary financial resources to acquire these appliances. In my view, these appliances should be allowed. Accordingly items, L35, L36, L37, L38, L39, L40 and L41 should be allowed.

STIMULATION CENTER

30. The parties have reached an agreement that Sphephelo will be placed at the Pathways simulation center in Bethlehem

CAREGIVERS

31. Both experts agree on the need for the provision of a caregiving service for the plaintiff and I endorse their proposition. The costs of one daytime and one night-time caregiver at a cost of R 2 944 724.00 has been agreed upon between the parties and is endorsed. However, I am not satisfied that plaintiff has made out a case for the provision of a second night-time caregiver after Sphephelo turns 18 years. The plaintiff duly assisted by one caregiver can be able to provide the necessary care and attention to Sphephelo. He will at this stage be fully integrated within his family activity structure. Further, Sphephelo will be provided with a specialized bed and hoists that will be operated on by his mother and the caregiver.

DOMESTIC WORKER

32. Since Sphephelo will be placed in the simulation center during the day, there is therefore no reason why the plaintiff cannot share the domestic shores with the caregiver. Therefore the need for a domestic worker in this case is not justified.

ADDITIONAL THERAPY

33. As I have indicated above, Sphephelo will attend a simulation where this service will be provided as a result there is no need for additional therapy.

PROCUREMENT OF GOODS BY RAHIM MOOSA HOSPITAL

34. I was not impressed with the candor and demeanor of Dr. Mkabayi. She at most times appears to be busy on her cell phone during her testimony. I had to ask her if she need time off to deal with and attend to her cell phone. She conceded when asked by the Court that this was a pilot project. Herself and the RMH have never procured and delivered any of the items to a CP child who resides outside of Gauteng Province.

35. In her testimony she avers that she had just written a letter to her MEC and the Chief Financial Officer (CFO), requesting them to contact their counterparts in the Free State and request them to confirm whether their Free State colleagues will be able to assist the plaintiff to source some of the items in the Free State. At the hearing of the matter, there's neither an acknowledgment of her letter by her own MEC and CFO nor a reply. There is no confirmation from the MEC for Health in the Free State agreeing to this project.

36. I must admit I was heartened by the dedication and good care the plaintiff has provided to her son Sphephelo appears to be in good health and well looked after. In my view, it will be unjustified to subject the plaintiff and the minor child to this pilot project in circumstances where this project does not succinctly set out how it will reasonably, conveniently, and timeously deliver the necessary supply to the plaintiff in Bethlehem. In the result, defendant is ordered to pay in monetary terms all the items listed under Annexure A hereto, and all the medical treatments, therapies, and medication in terms of Annexure B hereto.

37. In light of all the above circumstances, I make the following Order

ORDER

1. The Order that I have signed and marked "X" is made an Order of Court.

DLAMINI J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing: 22 September 2022

Delivered: 05 December 2022

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