

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO.: 13531/2018

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

11 June 2024

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DATE

In the matter between:

AMANDA ADRONICA SHONGWE obo

C.M.M.S.

Plaintiff

and

THE MEC FOR HEALTH – GAUTENG PROVINCE

Defendant

JUDGMENT

MAZIBUKO AJ

Introduction

1. The plaintiff, on behalf of her son, [C.M.M.S.] (hereinafter referred to as 'C'), previously instituted an action for a claim for damages against the defendant,

arising from the negligent conduct of the employees of the defendant, which conduct resulted in C suffering from cerebral palsy.

2. The liability issue was disposed of on 27 January 2020 when the defendant was ordered to pay 100% of the plaintiff's agreed or proven damages, both in her personal and representative capacity. The claim on behalf of C was finalized.
3. The issue before this court is only for quantification of the plaintiff's damages in her personal capacity, for general damages, past and future medical and related expenses, as well as past and future loss of earnings.
4. By agreement between the parties, the application in terms of rule 38(2) regarding the admission of the plaintiff's expert reports as constituting evidence was granted. The plaintiff's reports were accepted as admissible hearsay evidence in terms of the provisions of section 3 of the Law of Evidence Amendment Act, 45 of 1988 and section 34 of the Civil Proceedings Evidence Act, No. 25 of 1965.

Common cause

5. C was born on 18 October 2015. He was diagnosed with cerebral palsy and utterly dependent on his mother for all his needs. He is incontinent of bladder and bowel functioning and has to be kept in a nappy at all times. He cannot sit, stand, walk, speak or respond. He is blind and deaf. Medication does not control his seizures, which he experiences numerous times a day. Feeding is by way of an abdominal feeding tube. He has problems swallowing.
6. He was treated for lung infections and pneumonia on several occasions due to regurgitation. Both hips were dislocated, and they were corrected surgically. His limbs cannot be used voluntarily. His intellectual functioning seems to be non-existent. He does not make any contact with the outside world and appears to be in a vegetative state. Dr Botha is of the opinion that C has a life expectancy of 19 years, which, according to him, is optimistic.

General damages

7. With regard to the general damages, the plaintiff placed its reliance on Dr A Romanis (Dr Romanis), the clinical psychologist who, in his report, stated:

'Post-incident, Ms Shongwe reports a history of traumatic distress coupled with avoidant behaviour, intrusive symptoms, increased arousal and negative alterations in cognitions and mood. Based on the M.S.E. as well as the psychometric results, Ms Shongwe presents with behavioural disturbance. She qualifies for a diagnosis of Post Traumatic Stress Disorder and Depression.'

8. It is trite that when the court considers an appropriate quantum, it would be guided by previous comparable cases. The plaintiff referred the court to the case of *M.N.K. and Another v M.E.C. for Health, Gauteng Province*,¹ where the mother, at 17 years old, gave birth to a child who had cerebral palsy, mental retardation, spastic quadriplegia, microcephaly, severe developmental delay, permanent neuro-physical and intellectual impairment. The mother completed her schooling at a grade 12 level. She later completed a mining qualification and was employed at a mine as a winch operator. On her personal claim for general damages, she was awarded an amount of R350 000 was awarded.
9. In *Mngomeni (obo EN Zangwe) v M.E.C. for Health, Eastern Cape Province*,² the mother was awarded R300 000.00 for emotional shock and severe depression due to cerebral palsy of her child. Both the plaintiff and the defendant seem to agree that an award in the amount of R400 000 will be fair and reasonable.

Past and future medical and related expenses

10. The plaintiff's future medical expenses were calculated based on the reports of Dr Romanis and Dr van der Ryst, as per the actuarial report dated 29 September 2022. According to the report, the plaintiff would require

¹ (9407/2017) [2022] ZAGPJHC 175 (25 March 2022).

² 2018 (7A4) QOD 94 (ECM).

psychotherapeutic consultations with a clinical Psychologist (once weekly) plus travel expenses. It would be fair and reasonable to award an amount of R36 066.00 to the plaintiff for future medical expenses.

Loss of income-earning capacity

11. It was common cause that the plaintiff never repeated a grade. She obtained her Grade 12 Senior Certificate in 2010, qualifying for the minimum requirements for admission to diploma or higher certificate studies. From 2011 to 2014, she was unable to secure employment. She consequently decided to upgrade her Grade 12 marks in 2015 to meet the minimum requirements to study for a degree qualification and improve her chances of securing employment. During this year, she became pregnant, and due to birth complications, her baby was born with Hypoxic Ischaemic Encephalopathy, which resulted in Quadriplegic Cerebral Palsy with Mental Enfeeblement, seizures, and cortical blindness.
12. Since then, she has been mainly responsible for his caretaking and managing his therapies and interventions. He is now five years old, and she wants to find a suitable L.S.E.N. institute to proceed with further studies. However, as he is so young, she prefers that, for the present time, her mother takes care of the child.
13. The plaintiff is 29 years old. Regarding the plaintiff, the educational psychologist, Dr van der Ryst, stated that available information suggested normal birth and milestone development, everyday speech- and language development, and satisfactory academic progress. She did not proceed with further studies after giving birth to C in 2015. In 2021, she indicated that she wanted to pursue B.Com studies.
14. Dr van der Ryst further indicated that based only on her matric certificate, the plaintiff was probably of low average to average intellect with the potential to complete post-school studies to an NQF5 level, possibly NQF6 level depending on opportunity and the availability of funds. Her present cognitive potential and -abilities indicated that her cognitive/intellectual potential

probably fell within the low average to average range. It was not expected that she would be able to cope with university studies.

15. Dr N Kotze, the Industrial Psychologist, presented three scenarios. The first scenario proposes that the plaintiff would have upgraded her matric marks in 2015 and that she would have obtained a degree qualification amounting to a total capitalised value of loss of earning capacity of R12 912 330. However, Dr van der Ryst opined that the plaintiff would not be expected to cope with university studies. Accordingly, scenario one would not be relied on to calculate her loss of earning capacity.
16. The second scenario proposes that the plaintiff would have upgraded her matric marks in 2015 and that she would have obtained a higher certificate (NQF5 level), amounting to a total capitalised value of loss of earnings capacity of R7 782 122,00. Dr van der Ryst opined that the plaintiff is a suitable candidate to pursue studies at a college to an NQF5 level.
17. The third scenario proposes that the plaintiff would have upgraded her matric marks in 2015 and obtained a diploma (N.Q.F. Level 6), which amounts to a total capitalized loss of earning capacity of R11 457 674.00. Dr van der Ryst opined that the plaintiff is a suitable candidate to pursue studies at a college to an NQF6 level possibly.
18. Through her counsel, the plaintiff argued that scenario 2, where she would have upgraded her matric marks in 2015 and obtained a higher certificate (NQF5 level), is the appropriate scenario. Based upon this postulation, she would have a total capitalized loss of earning capacity.
19. The Defendant referred the court to the case of Road Accident Fund v Guedes,³ where the Supreme Court of Appeal stated that the calculation of the quantum of a future amount, such as loss of earning capacity, is not a matter of exact mathematical calculation. By its nature, such an enquiry is

³ 2006(5) SA 583(SCA), paragraph 8.

speculative, and a court can only estimate the present value of the loss, which is often a very rough estimate. The court necessarily exercises wide discretion when it assesses the quantum of damages due to loss of earning capacity and has considerable discretion to award what it considers suitable. Courts have adopted the approach that, in order to assist in such a calculation, an actuarial computation is a helpful basis for establishing the quantum of damages. Even then, the trial Court has wide discretion to award what it believes is just (see *Southern Insurance Association Ltd v Bailey* NO 4 and *Van der Plaats v South African Mutual Fire and General Insurance Co Ltd*).⁵

20. The determination of the general contingency deduction to be made falls squarely within the discretion of the court, which must decide what is fair and reasonable (see *Fulton v Road Accident Fund*).⁶ When the court makes an order for future losses, it is expected to use contingency deductions to provide for any future circumstances that may occur but cannot be predicted with precision. It is accepted that the extent of the period over which a plaintiff's income has to be established has a direct influence on the extent to which contingencies must be accounted for. With the unforeseen contingencies, the longer the period can influence the accuracy of the amount deemed to be the probable income of the plaintiff, the higher the contingencies must be applied. The actuarial calculations are helpful, though not binding to the court, as the court has wide discretion to award what it considers fair and reasonable compensation.

21. A contingency deduction is made so that any possible and relevant future event which might otherwise have caused or influenced the extent of the damages sustained by the plaintiff is considered (see *Erdmann v Santam*

⁴ 2003 (5) SA 164 (SCA) at para [23].

⁵ 1980 (3) SA 105 (A) at 114F - 115D.

⁵⁶ 2012 (3) SA 255 (GSJ), at paragraphs [95] to [96].

⁷ [1985] 4 All SA 120 (C); *Ncubu v National Employers General Insurance Co Ltd* [1988] 1 All SA 415 (N); and *Burns v National Employers General Insurance Co Ltd* [1988] 3 All SA 476 (C).

Insurance Co Ltd).⁷ Contingencies have been described as ‘the vicissitudes of life, such as illness, unemployment, life expectancy, early retirement and other unforeseen factors’ (Road Accident Fund v Guedes).⁸ The courts have recognised, however, that the fortunes of life are not always adverse; they may be favourable.⁹

22. the actuarial calculations are based on a scenario where the plaintiff would have acquired an NQF6 level after improving her matric results and earning an income with the post-morbid delayed by six years. I have no grounds not to agree with the plaintiff in this regard.
23. Considering the plaintiff’s circumstances, which must influence the assessment of the general contingencies to be applied and the content of the expert reports. The court accepts the actuarial calculations that the deduction of 5% on the past loss of earning capacity for pre-morbid earnings capacity would be fair and reasonable. Concerning future loss of earning capacity, a 15% contingency deduction on gross pre-morbidity earnings capacity and a 50% contingency deduction on post-morbidity earning capacity would be fair and reasonable.
24. The court is satisfied that a deduction of 20%, as contended by the plaintiff, is justified. The plaintiff’s loss of earning capacity must be adjusted, resulting in a total capitalised value of loss of earning capacity at R4 786 091 (four million seven hundred and eighty-six thousand and ninety-one rand).
25. Regarding costs, the plaintiff has been successful, and there is no reason she should not be entitled to that.

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⁸ No. 3, supra at paragraph [3].

⁹ No. 4 supra at paragraph 117B.

26. Consequently, the following order is granted;

Order:

1. The Defendant is ordered to pay the plaintiff, in her personal capacity, the amount of R 5 222 157,00 (five million two hundred and twenty-two thousand one hundred and fifty-seven rand) as payment in the full and final settlement of the claim instituted by the plaintiff personally, which payment is to be made within 30 days of the date of this order. The said total is calculated as follows:
 - 1.1. Loss of earnings: R 4 786 091.00
 - 1.2. Future medical expenses: R 36 066.00
 - 1.3. General damages: R 400 000.00.
2. Insofar as the defendant fails to make the payment as prescribed in prayer 1 supra, the defendant is ordered to pay interest to the plaintiff on the aforesaid amount (less any payments made) at the prescribed interest rate per annum, a tempore morae, calculated from the 31st day after the date of the order to the date of final payment, both days included.
3. The Defendant shall pay the plaintiff's taxed or agreed costs of suit, to date, on the High Court scale, such costs to include the following:
 - 3.1. Insofar as not paid in terms of any previous order, the reasonable preparation costs of the following expert witnesses:
 - 3.1.1 M van der Ryst (educational psychologist);
 - 3.1.2 N Kotze (industrial psychologist)
 - 3.1.3 Dr A Romanis (clinical psychologist)
 - 3.1.4 Prima Actuaries.
 - 3.2. The costs attended upon the appointment of two counsel, day fees for the period of trial, i.e. 11 March 2024 up to and including 18 March 2024, and
4. The Defendant shall pay interest on the plaintiff's taxed or agreed costs of suit at the prescribed statutory rate calculated from 45 (forty-five)

days after agreement in respect thereof or from the date of affixing of the taxing master's allocatur to date of payment.

5. Any payment due in terms of this order shall be paid into the following trust account:

Werner Boshoff Inc
Standard Bank Lynnwood Ridge
Account Number: 01-333-2724
Branch Code: 012-445
Ref: W Boshoff / MP / MAT 714.

N. MAZIBUKO
Acting Judge of the High Court of South Africa
Gauteng Division, Pretoria

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be on 11 June 2024.

Judgment reserved: 18 March 2024

Judgment delivered: 11 June 2024

Appearances

Counsel for the plaintiff: Adv SJ Myburgh

Attorneys for the plaintiff: Werner Boshoff I.N.C.

Counsel for the Defendant: Adv AB Rossouw SC

Attorneys for the Defendant: State Attorney's office