THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 216/2017

In the matter between:

NK obo ZK **APPELLANT**

and

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

Neutral citation: *NK obo ZK v MEC for Health, Gauteng* (216/17) [2018] ZASCA 13 (15 March 2018)

Coram: Lewis, Majiedt, Willis and Dambuza JJA and Pillay AJA

Heard: 2 March 2018

Delivered: 15 March 2018

Summary: Medical negligence – quantum of damages – court a quo erred in this regard – award for general damages increased – contingency deduction for future loss of earnings reduced – appeal upheld.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Mashile J sitting as court of first instance):

1 The appeal is upheld, with costs, including the costs of two counsel.

2 Paragraphs 1 and 2 of the orders of the court a quo are set aside and are replaced with the following:

'1 The Defendant shall pay an amount of R19 048 291 to the plaintiff in her representative capacity, for and on behalf of her minor child, ZK, which amount is computed as follows:

(a) Past medical expenses:	R1 375
(b) Future hospital, medical and related expenses:	R14 490 799
(c) Future loss of earnings:	R1 427 166
(d) General damages:	R1 800 000
SUB-TOTAL:	R17 719 341
(e) Trust (7.5% of R17 719 340.40):	R1 328 950
TOTAL AMOUNT:	R19 048 291

2 The total amount mentioned in paragraph 1 above, less the amount of R15 578 983.93 that was paid by the defendant on 29 February 2016, shall be paid 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. The banking details are as follows:

WIM KRYNAUW ATTORNEYS TRUST

Bank: ABSA – Trust account

Account number: [….]

Reference: H NORTJE I MEC0003

3 The amount of R19 048 290.93 shall be retained by the plaintiff's attorneys in an interest-bearing account in terms of section 78(2)(A) of the Attorneys Act 53 of 1979 for the benefit of the minor child.'

JUDGMENT

Willis JA (Lewis, Majiedt and Dambuza JJA and Pillay AJA concurring):

Introduction

[1] This appeal is concerned with two issues arising from a claim for medical negligence. The first is the award made for general damages, and the second is the amount that should be deducted for contingencies in respect of the loss of future earnings. For general damages, the court a quo awarded R200 000 but the appellant contends that it should have been R1 800 000. The agreed loss of future earnings was R1 159 642. From this amount, the high court made a 35 per cent contingency deduction. The appellant submits that the deduction should have been 20 per cent. She appeals to this court with the leave of the court a quo.

[2] The appellant instituted the action as the parent and natural guardian of her minor son, ZK. She gave birth to him at the Chris Hani Baragwanath Hospital on 25 May 2008. The Gauteng Provincial Government is responsible for the administration and management of the hospital. The respondent is the political head of the Provincial Department of Health.

[3] During the course of his birth, ZK experienced foetal distress, more particularly a hypoxic-ischaemic incident, due to perinatal asphyxia. As a result, he has severe brain damage, which manifests itself in spastic cerebral palsy, quadriplegia, mental retardation, epilepsy, marked delays in development, speech

deficits, general spasticity, compromised respiratory function, subluxation of the hip, scoliosis of the spine and behavioural problems. The appellant claimed that it was the negligence of the staff at the hospital which caused ZK's maladies and extensive suffering.

[4] The parties agreed that there should be a separation of the merits of the case from the quantum and an order was made to this effect in terms of Rule 33(4) of the Uniform Rules of Court. The merits were adjudicated by Spilg J. On 2 February 2015, he found that ZK's brain damage was indeed the result of the negligence of the staff at the hospital and that the respondent was liable for 100 per cent of the plaintiff's proven damages. The court a quo (Mashile J) adjudicated the damages.

[5] The damages were claimed under four separate heads: past hospital, medical and related expenses; future hospital, medical and related expenses; future loss of earnings and general damages. The parties agreed on past and future hospital, medical and related expenses in an aggregate amount of R14 490 799. This amount was to be paid into a trust for the benefit of ZK. A further 7.5 per cent of this amount was allowed for the costs of establishing and administering the trust. The parties agreed that the estimated loss of future earnings would be R1 783 958, subject to an appropriate contingency deduction. Accordingly, the only issues left for the court a quo to determine were the quantum of general damages and the contingency deduction from the agreed future loss of earnings. The two issues are now in contention before this court. The fact that there was no cross-appeal indicates that the respondent does not contend that there should be no award for general damages. This was confirmed by counsel for the respondent during the course of oral argument.

The Issue of Quantum for General Damages

[6] The appellant's expert witnesses testified that ZK will be incontinent for his entire life. This will result in the perpetual use of nappies. The wet and soiled nappies will have to be changed by caregivers. Moreover, the experts said that he experiences pain and discomfort as well as unhappiness and frustration with his situation. He will have to undergo physiotherapy, requiring the regular use of a hoist in later years. He dislikes being moved by others. He will lose his entire mobility

when he is about 37 years old. He has difficulty eating and, at least to some extent, he has to be force-fed. This evidence was not disputed. ZK is not in a state of 'unconscious suffering'.

[7] In *Marine & Trade Insurance Co Ltd v Katz NO*,[1] Trollip JA pointed out 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 she is not a so-called 'cabbage' and accordingly an award for general damages would be appropriate.[2] This case has been followed in numerous instances.[3] ZK's awareness of his suffering, albeit diminished by his reduced mental faculties, puts him in this 'twilight' situation. During the course of argument this became common cause. This confirms that he is entitled to an award for general damages and that all that remains to be determined, under this head, is how much would be suitable in all the circumstances.

[8] In coming to its conclusions on the appropriate amount to award as general damages, the court a quo said that the figure agreed between the parties relating to past, future and related medical and hospital expenses took ZK's loss of amenities of life into consideration. Accordingly, it held that a further award in that regard would be a duplication of compensation.

[9] As was said by Nicholas JA in *Southern Insurance Association Ltd v Bailey NO*,[4] 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.[5] 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.

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

[2] Ibid at 983A-G. Today we may prefer to use the term 'vegetative state' to 'cabbage'. See, for example, *PM obo TM v MEC for Health, Gauteng Provincial Government* [2017] ZAGPJHC 346 (7 March 2017) para 55.

[3] See, for example, more recently, *Road Accident Fund v Delport NO* 2006 (3) SA 172 (SCA) para 23; and *Mbele v Road Accident* 2017 (2) SA 34 (SCA).

[4] *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.

[5] Ibid.

[10] The appellant relied on the following unreported cases, dealing with similar circumstances, in support of her contentions as to the appropriate amount to be awarded as 'general damages': (a) *S obo S v MEC for Health, Gauteng*[6] in which Louw J on 12 August 2015 awarded R1 800 000; (b) *Matlakala v MEC for Health, Gauteng*[7] in which Keightley J on 2 October 2015 awarded R1 500 000; (c) *Mbhalate v MEC for Health, Gauteng*[8] in which Campbell AJ on 17 February 2016 awarded R1 800 000; and (d) *PM obo TM v MEC for Health, Gauteng Provincial Government*[9] in which Meyer, Weiner and Monama JJ on 7 March 2017 in an appeal to the full court, also awarded R1 800 000. In *PM obo TM v MEC for Health* the full court referred extensively to the judgment of Rogers J in *AD & another v MEC for Health and Social Development, Western Cape Provincial Government.*[10] The appellant also referred us to *The Quantum Yearbook.*[11]

[11] We endorse the following position which Rogers J held in *AD & another v MEC for Health* and which was followed by the full court in *PM obo TM v MEC for Health*:

'Money cannot compensate IDT [the minor on behalf of whom the claim had been made] 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 . . .'[12]

[12] Compensation for pain and suffering – to the extent that one can ever 'compensate' for it – is neither a duplication of the amount awarded for past and future medical and hospital expenses, nor for loss of amenities of life. The court a quo was clearly wrong in regard to the 'duplication' issue and, accordingly, its award

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[6] *S obo S v MEC for Health Gauteng* (2009/27452) [2015] ZAGPPHC 605.
[7] *Matlakala v MEC for Health, Gauteng Provincial Government* (2011/11642) [2015] ZAGPJHC 223 (2 October 2015).
[8] *Mbhalate v MEC for Health, Gauteng Provincial Government* (2012/45017/12) (dated 17 February 2016).
[9] *PM obo TM v MEC for Health* supra fn 2.
[10] *AD & another v MEC for Health and Social Development, Western Cape Provincial Government* (27428/10) [2016] ZAWCHC 116 (7 September 2016).
[11] Robert J Koch *The Quantum Yearbook* 2017 at 126.
[12] *AD & another v MEC for Health* supra fn 12 para 618. See also *PM v MEC for Health* supra fn 2 para 56.

must be interfered with by this court. There is, moreover, a striking disparity between what the court a quo has ordered and what this court thinks should have been awarded.[13]

[13] Counsel for the respondent submitted that this court should not, without further ado, make an award that accords with other awards made by the high court in various divisions and, especially, this court should guard against assuming that all brain injury cases deserve the same award. Of course, this court will scrutinise past awards carefully and, in each case before it, make its own independent assessment. It is trite that past awards are merely a guide and are not to be slavishly followed, but they remain a guide nevertheless.[14] It is also important that awards, where the sequelae of an accident are substantially similar, should be consonant with one another, across the land. Consistency, predictability and reliability are intrinsic to the rule of law. Apart from other considerations, these principles facilitate the settlement of disputes as to quantum. We have had particular regard to the cases upon which counsel for the appellant has relied and, especially *AD & another v MEC for Health* and *PM obo TM v MEC for Health*, where the issues are substantially similar to those before us. The appellant has asked for an award of R1 800 000 as general damages. This has been justified in all the circumstances of this case.

The Deduction for Contingencies

[14] At the trial the appellant argued for 20 per cent and the respondent 50 per cent as a deduction for contingencies. The high court decided that 'the best approach would be to divide the difference' between the two, arriving at a figure of 35 per cent. Counsel for the respondent defended the court a quo's deduction of 50 per cent for 'contingencies' on the basis that this had been the deduction in *Katz*. Two points operate to diminish the force of that argument. The first is that the deduction for contingencies was made by agreement between the parties in that case.[15] The second is that the facts of that case were very different and, in particular,

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[13] See, for example, *AA Mutual Insurance Association Ltd v Maqula* 1978 (1) SA 805 (A) at 809B-D; *Road Accident Fund v Guedes* 2006 (5) SA 583 (SCA) at 587B-D.
[14] See, for example, *Minister of Safety and Security v Seymour* 2006 (6) SA 320 (SCA) paras 17-19; and *Minister of Safety and Security v Tyulu* 2009 (5) SA 85 (SCA) para 26.
[15] *Katz* supra fn 1 at 979H.

the contingency deduction took into account the likelihood of the patient's remarriage.[16]

[15] As Nicholas JA said in *Bailey*[17] the deduction for contingencies is meant to take into account the 'vicissitudes of life'.[18] These include:

'[T]he possibility that the plaintiff may in the result have less than a "normal" expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions.'[19]

Counsel for the respondent also relied very strongly on the following, which follows shortly after what Nicholas JA had to say about the vicissitudes of life: 'The rate of the discount cannot of course be assessed on any logical basis: the assessment must be largely arbitrary and must depend upon the Judge's impression of the case.'[20] He did so to defend what he conceded may seem to have been an arbitrary assessment of the appropriate deduction.

[16] The leading case, in recent years, of the meaning of 'arbitrary' is *First Nationa*l *Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*.[21] Ackermann J, delivering the unanimous judgment of the court, emphasised that although 'arbitrary' may often mean without any 'rational connection between means and ends', it does not always carry the same meaning and context is important.[22] Ackermann J was also referring to the interpretation of a statute and not a word used in a judgment. To my mind, simply taking the median between what the respective parties ask for on the deduction or contingencies without any further explanation, is indeed devoid of any rational connection between the means by which the decision was made and the result (or end) of the decision-making process. Nevertheless, in context, something more reasoned is required, not only if a court is

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[16] Ibid at 979C-G.
[17] *Bailey* supra fn 4 1984 (1) SA 98 (A).
[18] Ibid at 116H.
[19] *Bailey* supra fn 4 at 116H-117A.
[20] Ibid.
[21] *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para .
[22] Ibid paras 61-69.

to depart from the normal range of between 15 and 20 per cent, but also simply to take the median of what the respective parties asked for. It is like the rolling of a dice. A court is not a casino. Of particular relevance is that there are no special circumstances present to indicate that, but for his perinatal asphyxia, the vicissitudes of ZK's life are likely to be more adverse than the norm. Conjecture may be required in making a contingency deduction, but it should not be done whimsically.

[17] In regard to the deduction for contingencies, the appellant enjoined us to have particular regard to the judgment of this court in *Singh v Ebrahim*,[23] in which a 15 per cent contingency deduction was approved, and *PM obo TM v MEC for Health* in which 20 per cent was deducted.[24] The appellant made it plain that she would consider 20 per cent to be eminently fair and reasonable to both parties.

[18] As with the award for general damages, the disparity between what the court a quo ordered and what this court thinks should have been awarded is again too striking to be left undisturbed. A 20 per cent deduction for contingencies in respect of future loss of earnings, as asked for by the appellant, would be appropriate.

[19] The order which follows is that which the parties agreed should be made in the event that the appellant succeeded to the extent that R1 800 000 was to be awarded as general damages and a 20 per cent deduction for contingencies made from estimated future earnings:

1 The appeal is upheld, with costs, including the costs of two counsel.
2 Paragraphs 1 and 2 of the orders of the court a quo are set aside and are replaced with the following:

'1 The Defendant shall pay an amount of R19 048 291 to the plaintiff in her representative capacity, for and on behalf of her minor child, ZK, which amount is computed as follows:

(a) Past medical expenses: R1 375
(b) Future hospital, medical and related expenses: R14 490 799

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[23] *Singh & another v Ebrahim* (413/09) [2010] ZASCA 145 (26 November 2010); 2010 JDR 1431 (SCA).
[24] *PM obo TM v MEC* supra fn 2 para 51.

(c) Future loss of earnings:	R1 427 166
(d) General damages:	R1 800 000
SUB-TOTAL:	R17 719 341
(e) Trust (7.5% of R17 719 340.40):	R1 328 950
TOTAL AMOUNT:	R19 048 291

2 The total amount mentioned in paragraph 1 above, less the amount of R15 578 983.93 that was paid by the defendant on 29 February 2016, shall be paid 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. The banking details are as follows:

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3 The amount of R19 048 290.93 shall be retained by the plaintiff's attorneys in an interest-bearing account in terms of section 78(2)(A) of the Attorneys Act 53 of 1979 for the benefit of the minor child.'

N P WILLIS
Judge of Appeal

APPEARANCES:

For Appellant: N Van der Walt SC (with him, M Coetzer)
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