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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No. 3270/2016

Reportable: NO

Of Interest to other Judges: NO

Circulate to Magistrates: NO

In the matter between:

J[...] R[...] H[...]

FIRST PLAINTIFF

G[...] M[...] A[...] H[...]

SECOND PLAINTIFF

and

THE MEMBER OF THE EXECUTIVE COUNCIL:

DEPARTMENT OF HEALTH, FREE STATE PROVINCE

DEFENDANT

CORAM:

GUSHA, AJ

HEARD ON:

10, 11, AND 13 OCTOBER 2023

DELIVERED ON:

19 DECEMBER 2023.

JUDGMENT

- [1] Pregnancy and the resultant birth of a beautiful, healthy and bouncing baby are one of the greatest joys and blessings of motherhood. Indeed there is no greater love and blessing than to be entrusted with bringing a new life into this world, loving and nurturing it. Admittedly motherhood in and of itself is hardly ever easy, it is a path often filled, amongst others, with love, laughter, pain and all the other hardships of life in general. That however is what makes the journey through motherhood and life so worth-while.
- [2] The joys of motherhood start from the moment a mother-to-be realises that there is new life growing inside her belly to the moment, and beyond I daresay, she gives birth and welcomes her child into this world. Mothers-to-be, new mothers and their significant others, revel during this time of their lives. Sadly this was not to be for the first and second plaintiffs. Owing to the admitted negligence of the employees of the defendant, the plaintiffs' firstborn son (A[...]) demised a mere 2 days after his birth.¹
- [3] The negligence of the defendant's employees unleashed a series of unfortunate and heart-rending events which culminated in these proceedings. As the defendant conceded the merits, I do not for purposes of this judgment deem it necessary to delve into those events, save to, where necessary, fleetingly making reference thereto in the body of this judgment. Subsequent to the demise of A[...], the plaintiffs instituted action for damages as a result of the negligence of the defendant's employees and the resultant sequelae suffered by her. Her claim comprises of the following heads;

3.1. In respect of the First Plaintiff:

¹ The defendant conceded liability for 100% of the first and second plaintiffs' proven and /or agreed upon damages as per Rule 37 minute 11 of 11 August 2022, amended index notices and other pleadings bundle, par 4 page 124.

3.1.1. Future medical expenses: R 663 150.00

3.1.2. Past Loss of earnings: R1 707 385.00

3.1.3. Future loss of earnings: R6 587 165.00

3.1.4. General damages: R 650 000.00

3.1.5. Total loss: R9 607 700. 00

3.2. In respect of the Second Plaintiff:

3.2.1. Future and related expenses: R 86 620.00

3.2.2. Funeral expenses: R 15 000.00

3.2.3. General damages : R 650 000.00

3.2.4. Total loss: R 751 620.00

[4] With the merits conceded, the nub of the remaining dispute between the parties is with regards to the quantum and the contingencies to be applied thereto.

[5] The facts giving rise to the litigation between the parties are largely uncontroverted. It is common cause that on the 2nd August 2013 the first plaintiff, pregnant at the time with A[...] was, following a diagnosis of hypertension at her local clinic, referred to and transferred to Pelonomi Hospital whereat she was informed that she was in labour. This notwithstanding, she was mainly left unattended by the medical personnel. On the afternoon of the 3rd August 2013, she was induced for labour and prepped for an emergency caesarean section, but was, alas, never taken to theatre. A[...] was subsequently born, through vaginal birth after an episiotomy was performed without any local anesthetic

being administered, in the early hours of the 4th August 2013. He reportedly suffered brain damage and sadly demised on the 6th August 2013.

- [6] In an often heart-rending and agonizing wail, the first plaintiff testified that she only held her son for a few seconds before he was taken away from her by the medical personnel. She never saw him alive again and never had the opportunity to lay him to rest as she was hospitalised at the time of his interment. The second plaintiff too never attended the interment as he supported her at the hospital. She was thereafter left unattended in the corridor on a stretcher. When the second plaintiff arrived at Pelonomi hospital, he found her on a stretcher in the corridor and the sheets she lay on drenched in blood. When he attempted to raise alarm, he was met with resistance from the hospital and security personnel.
- [7] The first plaintiff was eventually taken to theatre and when she regained consciousness, she found herself in an ambulance reportedly en route to Universities hospital whereto she had reportedly been transferred. She was admitted to and hospitalised at Universitas hospital from the 4th August 2013 until the 19th August 2013. During her stay at Universitas hospital, she received dialysis treatment.
- [8] As a result of her ordeal, the first plaintiff suffered from heavy and persistent vaginal bleeding for 3 years which prevented the couple from engaging in any sexual intercourse with each other. She testified that she was extremely depressed, suffers from panic attacks, is anti-social, has problems with her memory and has difficulty sleeping. She twice attempted suicide, once in 2013 and once in 2019. I pause here to mention that, seeing and listening to the first plaintiff tender her evidence, was the most agonizing and difficult experience in my judicial life. So emotional was she that it was often difficult to hear or make sense of her evidence throughout the screams. To not be affected by that, one would have to be devoid of all human emotion. No human being should ever be subjected to the treatment that she was.
- [9] The second plaintiff testified and largely supported the evidence of the first plaintiff. He testified that upon his arrival at Pelonomi hospital he realised that his

wife² was pale and lying in a pool of blood. His pleas for help to the medical personnel fell on deaf ears and was rather met with him being removed from the hospital by the hospital security and members of the South African Police Service. As a result of the scuffle between him and the security personnel he fell aground and suffered what he called a “stroke” and that he could feel his chin was out of position.³

[10] Additional to the *viva voce* evidence of the plaintiffs, the following expert evidence was introduced into the record; Dr Shevel a psychiatrist, Dr Truter a clinical psychologist, Mr Peverett an industrial psychologist and Munro Actuaries. For the defendant the following expert evidence was tendered; Dr Lekalakala a psychiatrist, Dr Pienaar a clinical psychologist and Dr Van Pletzen an industrial psychologist.

[11] The respective experts on behalf of the parties, but for the Actuaries, filed joint minutes. I now proceed to deal therewith.

[12] In so far as the joint minute of the industrial psychologists is concerned, the experts are agreed that but for the incident, the first plaintiff would have entered the labour market at 24 years, plateaued at 45 years and would have retired at 65 years. She would have earned R81 000.00 *per annum*, and would have earned a salary of R236 000.00 *per annum* by the age of 65 years. The experts are also in agreement that the first plaintiff's pre-incident career and earnings is deemed significantly compromised and that her future earning capacity would probably be similar to what obtained post-incident, i.e. limited to the informal sector and limited to between R0 – R21 500.00 *per annum*.

[13] In an endeavour to curtail the issues w.r.t. the first plaintiff's loss of income, the parties agreed that same be calculated by an actuary on the basis as postulated in the joint minute, provided that contingencies be the prerogative of the court. In

² The first plaintiff.

³ However in the context of his evidence, I formed the distinct impression that what he experienced was more a state of unconsciousness rather than a stroke, in any event save for his mere say-so, no medical evidence to buttresses his claim was led.

calculations accepted by the first plaintiff, the defendant's actuary calculated her loss of income claim as follows;

	Past Income	Future Income	Total Income
Income but for the incident	R717 586.00	R4 020 524.00	R4 738 110.00
Income post incident	R56 947.00	R228 846.00	R285 793.00
Difference	R660 639.00	R3 791 678.00	R4 452 317.00

[14] Resultantly, in so far as the first plaintiff's claim for loss of income is concerned, the only dispute between the parties are the contingencies to be applied in the various scenarios.

[15] The two clinical psychologists on behalf of the parties Drs. Truter and Pienaar also filed a joint minute for the benefit of the court. A cursory reading of the joint minute does not suggest any notable differences of opinion between the two experts.

[16] In their joint minute, they are agreed that with the background and information available the first plaintiff did not suffer from predated diagnosed psychopathology. It is further their joint expert opinion that the events surrounding the birth of A[...] contributes to her ongoing post-traumatic stress disorder (PTSD) features.

[17] In a joint minute furnished to court during the trial, the two psychiatrists, Drs. Shevel and Lekalakala agree that the first plaintiff suffers from major depressive disorder. Dr Lekalakala considers her chronic depression to be of a mild to moderate degree whereas Dr Shevel considers it to be moderate to severe. Dr Shevel furthermore notes the presence of chronic generalized anxiety with

superimposed panic attacks and agoraphobia and notes that she is now largely confined to her home environment.

- [18] Both experts are agreed that the first plaintiff requires psychiatric / psychological treatment. They however have divergent opinions on the extent of the said treatment. Dr Lekalakala opines that the first plaintiff requires psychotherapy treatment whereas Dr Shevel opines that due to the severity of her condition, the first plaintiff requires long-term treatment including the use of psychiatric medication and psychotherapy.
- [19] With regards to the second plaintiff the psychologists in their joint minute agree that the second plaintiff still relives the trauma and suffers from post-traumatic stress disorder (PTSD) and that he would benefit from psychological interventions.
- [20] In their joint minute, the psychiatrists are agreed that allowance should be made that the second plaintiff attend twenty (20) sessions of psychotherapy.
- [21] Having outlined the evidence and the different expert opinions, the remark I made earlier in this judgment⁴, rings with deafening intensity. The first plaintiff undoubtedly suffered psychological, emotional and behavioural sequelae as a result of the traumatic birth and subsequent demise of her son. She also suffered physical injuries which led to her receiving dialysis and suffered vaginal bleeding for three (3) years thereafter. Add to this the fact that she never had the opportunity to bond and grieve for her son and to get the closure she so needed by attending his interment. So severe was the trauma that for some 3 years after the fact, she could not be intimate with her husband. At the risk of repetition; no human being should ever be subjected to the treatment that the she was subjected to.
- [22] Juxtaposed, the sequelae that the second plaintiff suffered are to a much lesser degree than those suffered by the first plaintiff.

⁴ No human being should ever be subjected to the treatment that the first plaintiff was subjected to.

- [23] Perhaps one ray of sunshine in this tragic and unfortunate turn of events is that the plaintiffs have now found some semblance of closure by visiting their son's grave, they have managed to rekindle their intimacy and appear to be ever so strong in their love for each other, this much was evident from how they supported each other in court.
- [24] In determining the quantum of general damages of this case I am alive to the principle as laid down in **De Jongh v Du Pisanie N.O. 2005 (5) SA 547 (SCA)** that in these instances the court must ensure that its award is fair to both parties, further that it must give just compensation to the plaintiff, but that it must not pour largesse from the horn of plenty at the expense of the defendant.⁵
- [25] Further in determining general damages, a court has a wide discretion and must determine each case on its own merits and generally leans towards conservatism and has regard to considerations such as awards in comparable cases, inflationary changes in the value of money and problems arising from collateral benefits.⁶
- [26] Attempting to determine an adequate *solatium* for the plaintiffs suffering is, of course, a daunting task as no monetary compensation can ever make up for the loss of their child and the resultant mental anguish they suffered. I have however sought guidance in awards in previous cases but comparisons are always odious, particularly as the facts in different cases already, if ever, are directly comparable.⁷
- [27] I now turn to deal with the claim for loss of income and future medical expenses as well as the contingencies to be applied thereto. The law on contingencies is trite and no benefit will accrue from restating it here.⁸ The evidence *in casu*

⁵ At par 582 A-C.

⁶ *Southern Versekering v Carstens* NO 1987 (3) SA 577 (A), *Bay Passenger Transport v Franzen* [1975] 1 All SA 658 (A).

⁷ *Povey v Road Accident Fund* 963390/16) [2022] ZAGPPHC 32 (18 January 2022), *Komape and 3 others v Minister of Basic Education and 3 others* 2020 (2) SA 347 (SCA), *Mbhele v MEC for Health Gauteng* (355/15) [2016] ZASCA 166 (18 November 2016).

⁸ *Nicholson v Road Accident Fund* (07/11453) [2012] ZAGP JHC 137 (30 March 2012).

shows that the plaintiffs were relatively healthy individuals who did not suffer any psychological psychiatric and or problems which would have prevented them from gainfully participating in the labour market but for the events leading up to and including the death of their first –born son.

[28] With regards to the future medical expenses albeit Dr Lekalakala was steadfast in the joint minute that the first plaintiff would benefit from psychotherapy, he did concede in cross examination that in the event psychotherapy is ineffective she would have to receive psychiatric treatment. I am not persuaded that the first plaintiff owing to her admitted past reluctance psychological treatment would now somehow in the future display the same aversion. Firstly because none of us are endowed with the proverbial crystal ball and lastly because when quizzed and prompted on this aspect, she displayed a willingness to get better and was open to any and all available treatment.

[29] Against this backdrop I am of the view that the following contingencies ought to be applied as same would be fair and reasonable in the circumstances of this case;

7.5% on the past income in the “but for” scenario;

15% on the future income in the “but for” scenario: and

5% on past income in the “having regard” to scenario; and

35% on the future income in the “having regard to” scenario.

[30] In the result I make the following order;

30.1. Payment by the defendant to the first plaintiff in the sum of R 5 118 532.90 made up as follows;

30.1.1.	General Damages:	R 550 000.00
30.1.2.	Loss of Income:	R 3 878 362.90
30.1.3.	Future medical expenses:	R 690 170.00

30.2. Payment by the defendant to the second plaintiff in the sum of R390 870.00 made up as follows;

30.2.1. General damages: R 300 000.00

30.2.2. Future medical expenses: R 90 870.00

30.3. The payments to be made into the following banking account;

Honey Attorneys-Trust Account

Nedbank – Maitland Street Branch, Bloemfontein

Branch Code: 1[...]

Reference: H[...]

30.4. In the event the defendant does not, within 30 days from the date on which this order is handed down, make payment of the capital amounts, the defendant will be liable for the payment of interest on such amount at 10.50 % (the statutory rate *per annum*) calculated from the date of this order.

30.5. The defendant to pay plaintiffs' taxed or agreed party and party costs which costs shall include the costs of 1 counsel, including the costs of the following experts;

30.5.1. Dr DA Shevel (Psychiatrist)

30.5.2. Mr Marc Peverett (Industrial Psychologist)

30.5.3. Dr K Truter (Clinical Psychologist)

30.5.4. Mrs J Valentini (Munro Forensic Actuaries)

30.6. In the event where costs are not agreed upon:

30.6.1. The plaintiffs will serve a notice of taxation on the defendant's attorney of record; and

30.6.2. The plaintiffs will allow the defendant 30 court days to make payment of the taxed costs.

On behalf of the Plaintiffs:

Instructed by:

Adv. PJJ Zietsman, SC

Honey Attorneys

BLOEMFONTEIN

On behalf of the Defendant:

Instructed by:

Adv. (Ms) K. Nhlapo-Merabe

Office of the State Attorney

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