

**HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case No: 38145/10

REPORTABLE: Electronic reporting only.
OF INTEREST TO OTHER JUDGES: No.
REVISED: Yes

In the matter between:

MARIAM PIETERSEN

Plaintiff

and

MEC FOR HEALTH, PROVINCE OF GAUTENG

Defendant

***Case Summary:* Medical Negligence – Quantum of Damages.**

General damages - negligent administration of the drug Tegretol caused Stevens-Johnson syndrome with associated practical complete loss of sight, reduced hearing in the left ear, impaired senses of smell and taste, disfigurement, post-traumatic stress disorder, major depressive disorder and change in personality.

Loss of earnings – plaintiff and her husband decided she would no longer work in order to look after their school going daughter on a full-time basis – whether probable scenario is that she would have remained unemployed for the remainder of her life despite the negligent medical treatment.

JUDGMENT

MEYER J

[1] This is a delictual claim for damages instituted by the plaintiff, Mrs Mariam Pietersen, against the defendant, the Member of the Executive Committee for the Department of Health, Gauteng, as a result of the negligent medical treatment she received from medical doctors at the Helen Joseph Hospital, Johannesburg. They have been treating her since 2005 when she experienced her first episode of an epileptic seizure. She was treated with Epanutin and Epilim from which she had an allergic reaction. A medical doctor at Helen Joseph Hospital negligently prescribed the drug Tegretol to her, *inter alia* resulting in her developing Stevens-Johnson syndrome, which was diagnosed on 11 September 2007, with associated blindness that, in the plaintiff's case, was caused by an allergic reaction to the Tegretol drug (the negligent act). Stevens-Johnson is a rare but very serious disorder of the skin and mucous membranes. The plaintiff was 39 years of age at the time of the negligent act.

[2] It is common cause that the defendant is vicariously liable for 100% of the plaintiff's proven damages as a result of the negligent medical treatment she received, liability having been settled on 17 November 2014. The plaintiff claims damages in the total amount of R23 million for general damages, loss of earnings and future medical costs, assistive devices including a dwelling that will be suitable to her special needs.

[3] The parties have agreed on a stated case and the expert reports and joint minutes filed to be admitted into evidence without the need to hear *viva voce* evidence from such expert witnesses with regard to the issues to be determined in terms of the stated case. They agreed to call their industrial psychologists to give *viva voce* evidence on the basis for the calculation of the plaintiff's loss or lack of loss of earnings as set out in their respective medico-legal reports and in their joint minutes. The plaintiff and her husband testified, and the industrial psychologist, Dr Mohapi Malaka, gave expert *viva voce* evidence on her behalf. The defendant called the industrial psychologist, Ms Prudence Ngoavko, to give *viva voce* evidence on its behalf.

[4] The parties held round-table discussions on 26 June 2021 and 7 July 2021 regarding the matter on my directions, after the trial had been concluded 18 June 2021. On 26 June 2021, the plaintiff made an offer to the defendant to settle her claim for R10 488 860. The parties reached agreement on the plaintiff's future medical expenses, assistive devices and adjusted living space to cater for the plaintiff's special needs as contained in the joint minutes of the occupational therapists and the architects' reports. They obtained a revised actuarial calculation in accordance with the joint minutes and reports and agreed that a total amount of R5 062 100 would be a fair and reasonable amount of compensation for the plaintiff's medical expenses, assistive devices and adjusted living space.

[5] The parties also agreed to obtain a new actuarial calculation of the plaintiff's loss of earnings at a reduced retirement age of 60 years. They have also applied contingency deductions of 20% and 30% to the past loss and future loss of income, which they agree is a fair assessment in the circumstances. This brings the total loss of earnings to a calculation of R1 926 760. The parties filed further joint submissions, setting out their further agreements and authorities on the plaintiff's claim for general damages, including those of foreign jurisdictions. They also filed an agreed draft order, leaving only the total amount of the award blank in paragraph 1 thereof. The only disputes between the parties that still require determination are the amount of general damages to be awarded to the plaintiff and whether the probable scenario is that she would have remained unemployed for the remainder of her life despite the incident.

[6] In their stated case the parties rely *inter alia* on the plaintiff's updated medico-legal reports from a specialist physician, Dr Dlakane, a specialist neurologist, Dr Lezanne Wynand-Ndlovu, and a specialist psychiatrist, Dr ZAE Motala. Dr Wynand-Ndlovu reports that the plaintiff is suffering from Stevens-Johnson syndrome, which resulted *inter alia* in a loss of vision, hyper pigmented lesions on the face, torso and extremities on examination. Dr Wynand-Ndlovu is of the opinion that the plaintiff is left with lasting physical and neurophysiological manifestations as a direct result of the Stevens-Johnson syndrome. The clinical manifestations which Dr Wynand-Ndlovu has mentioned have impeded the plaintiff's ability to be independent. Dr Wynand-Ndlovu is

of the opinion that the plaintiff would encounter immense difficulty competing for employment in the open labour market.

[7] Dr Motala diagnosed the plaintiff as suffering from post-traumatic stress disorder and a major depressive disorder. She also suffered from Stevens-Johnson syndrome associated with scarring of the skin, visual impairment, loss of sensation around the mouth, impaired sense of taste and marked impairment in functioning. Dr Motala is of the opinion that the plaintiff's condition is chronic and that the likelihood of recovery is slim.

[8] Dr Dlakane states that the plaintiff on examination was quite emotional with a labile mood. She was considerably overweight with a weight of 110 kg. Dr Dlakane noted that the most glaring of the findings was related to the plaintiff's eyes. She has no eyelids with an opacification of the left eye. The right eye had some kind of a prosthetic lens from which she could partially see, at that time. She also had healed scars on her face and chest. Her disease has adversely affected her mental health and relationship with her husband. She feels she is no longer attractive and has become a burden to him. She is also being mocked by the children in her neighbourhood, being called a 'monster'. She also now suffers from depression, which worsens the prognosis for her physical illnesses creating a vicious circle.

[9] In their stated case the parties also agree that the joint minutes and medico-legal reports compiled by those experts may be accepted into evidence without calling the authors thereof for purposes of their stated case. The ophthalmologists, Dr U Kunzmann and Dr S Kassen, agree that the plaintiff's condition of visual impairment is related to severe ocular complications resulting from her Stevens-Johnson syndrome and that the offending medication which precipitated the allergic reaction was the oral ingestion of Tegretol. She underwent a successful keratoprosthetics procedure to the right eye in 2016. The procedure provided her with temporary visual improvement. She developed complications in the right eye in 2019, which necessitated the evisceration procedure of her right eye. She currently does not have an eye on the right side. Dr

Kunzmann found that the plaintiff has light perception in the left eye while Dr Kassen found that she is legally blind.

[10] In their joint minutes the parties' industrial psychologists, Dr Mohapi Malaka and Ms Prudence Ngoako, agree that post-incident the plaintiff cannot participate in the open labour market. They, however, disagree on her pre-incident earning capacity. This issue has subsequently been resolved between the parties. Furthermore, the plaintiff was unemployed at the time of the incident and the industrial psychologists disagree whether the probable scenario is that she would have remained unemployed for the remainder of her life despite the incident.

[11] General damages: In *Sandler v Wholesale Coal Supplies Limited* 1941 AD 194 at 199, Watermeyer JA said that-

'[I]t must be recognized that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money, which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair, in all the circumstances of the case.'

[12] I also respectfully agree with the Rogers J in *AD and IB v MEC for Health and Social Development, Western Cape Provincial Government* 2016 (7A4) QOD 32 (WCC) that-

'[m]oney cannot compensate AD 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. '

[13] It is trite that awards in previous cases can only offer broad and general guidelines in view of the differences that inevitably arise in each case. The process of comparison is not a meticulous examination of awards and should not interfere upon the court's general discretion (See, for example, *Protea Assurance v Lamb* 1971 (1) SA 530 (A) at 535H-536A). In *AA Onderlinge Assuransie Assosiasie Bpk v Sodoms* 1980 (313) QOD 105 (A), Botha AJ said-

‘. . . dat dit in die algemeen nie gerade is nie om ‘n aanpassing vir die verminderde waarde van geld te maak deur die slaafse navolging van syfers wat in die Verbruikersindeks voorkom nie. Dit kan die beweegruimte van ‘n verhoorhof by die vasstelling van die quantum van algemene skadevergoeding te veel aan bande lê.’

And in *Erdmann v Santam Insurance Co Ltd* 1985 (312) QOD 516 (C) at 525, Fagan J said this:

‘I am aware that the facts in the cases quoted differ from those in the present case. I am aware that, even if the facts were similar, the awards in those cases are not to be slavishly followed but are guidelines only. I am aware of the warnings against rigid application of the consumer price indices in comparing earlier awards.’

In *De Jongh v Du Pisanie NO* 2005 (5) SA 457 (SCA) para 60, after noting that the tendency towards increased awards in respect of general damages in recent times was readily perceptible, the Supreme Court of Appeal reaffirmed conservatism as one of the multiple factors to be taken into account in awarding general damages.

[14] Humans have five basic senses: touch, sight, hearing, smell and taste. As a direct result of having developed Stevens-Johnson syndrome due to the negligent administration of the drug Tegretol to the plaintiff, she lost her sight completely, has reduced hearing in the left ear and impaired senses of smell and taste. These rank as serious disabilities, especially the plaintiff's complete loss of sight. The plaintiff is greatly disfigured, especially in her face: she has no right eye; she has sutured eyelids with inward eyelashes that cause her irritation; her nostrils have crusty secretions; she has

loss of sensation around the mouth; and she has hyper-pigmented lesions in the face, torso and extremities. The long term *sequelae* of her toxic epidermal necrolysis are yet to become apparent. She suffers from post-traumatic stress disorder and major depressive disorder. She has suicidal ideation. The plaintiff experiences a change in personality, she feels ugly and useless, becomes emotional, is irritable and short tempered. She has become reclusive, avoids family and former friends. She used to go to church and sing in the church choir, which she since the incident no longer does. She believes she is being stared at because of her appearance. She was once called a 'monster' by a child laughing at her. When he testified, her husband said this:

'It is like I lost my wife. We cannot talk or have conversations and she would become too emotional.'

The plaintiff's pain and suffering, disfigurement, disability and loss of amenities of life are ongoing. I have itemised the prejudicial effects which weigh most with me.

[15] In respect of blindness counsel referred me to: (a) *Van der Merwe v Premier of Mpumalanga* 2005 (513) QOD 1 (T), where Claassen J awarded R700 000 general damages in circumstances where the premature birth of a baby girl resulted in a condition known as 'Retinopathy of Prematurity', which was not diagnosed and treated early enough by the personnel of the Rob Ferreira Hospital in Nelspruit, causing her blindness from birth; and to (b) *Kloppers v Rondalia Assurance Corporation of SA Ltd* 1972 (213) QOD 289 (W), where Claassen J awarded R25 000 general damages in circumstances where a boy aged seven at the time of the trial suffered total blindness for all practical purposes as a result of a brain injury sustained in an accident as well as *inter alia* a grave change of personality, 25% chance of epilepsy, severe mental distress, anxiety and depression. The court took into account that the boy's suffering was likely to last for the next 60 years because of his age. These cases, of course, differ from the present case. The plaintiff *in casu* enjoyed sight for more than 40 years. But the principle to be extracted from them, as well as some of the foreign case law to which counsel referred me, is the significance of the loss of senses, particularly the loss of smell and taste, and that the loss of sight is a serious injury. I do not think any useful

purpose could be served to analyse the other cases to which I have been referred in respect of the other conditions from which the plaintiff suffers as a result of the negligent act. It is, as far as I can see, practically impossible to find a case comparable to the present one.

[16] I realise that money cannot compensate the plaintiff for everything she has experienced and lost. But, guided by the past awards and applying the principles to which I have referred, I am of the view that an amount of R3 000 000 represents a fair and reasonable amount to be awarded as compensation for the plaintiff's general damages in all the circumstances of this case.

[17] I now turn to the question whether the probable scenario is that the plaintiff would have remained unemployed for the remainder of her life despite the incident. The plaintiff was born on 16 January 1969 in Kliptown, Johannesburg. She has a standard 6 (grade 8) level of education. She started her career in the security industry in 1988, as a security guard for Springbok Security. Her duties were to check parcels at the doors of grocery shops, such as Checkers or OK Bazaars. In 1989 she worked at Adcock Ingram for a year. Her duties were to put clips onto drips. The plaintiff and her husband, Mr Pietersen, lived together since 1990 and they got married on 9 April 1991. One daughter was born from their marriage during 1991. The plaintiff was employed at Witspos Post Office, Mondeor in the capacity of a mail processor for 6 months during 1997. When their daughter was 7 years of age and in grade 1 at school, the plaintiff and her husband agreed that she would no longer work in order to look after their daughter, because the area where they then resided in Cumming Road, Eldorado Park was, in their view, not safe for their daughter. The plaintiff's unchallenged evidence is that when their daughter was at school, however, she and her brother were selling clothes and ice cream. She also did hairdressing from home. The plaintiff testified that she earned approximately R5 000.00 per month in doing so. At the time of the incident in 2007, the plaintiff was still looking after their child on a full time basis and not formally employed. Their child thereafter left school with a standard 9 level of education.

[18] Dr Malaka is of the opinion that, but for the incident, the plaintiff would have had the opportunity to obtain and retain employment. He is of the view that, although the plaintiff was not formally employed at the time of the incident, she had the potential and prospects of returning to formal employment; she was not unemployable, only unemployed at the choice of her and her husband in order to look after their child while she was undergoing her schooling. Whether or not a mother, such as the plaintiff, would return to formal employment during or after their children's schooling, in the view of Dr Malaka, depends on various 'pull and push factors'. A mother or housewife at home may save the family more or less than she would otherwise have earned in full-time employment (a factor pulling the mother to stay home). On the other hand, the financial needs of a family or a husband who loses his employment, are factors that may 'push' a mother and housewife back to formal employment. What counted in the plaintiff's favour should she have elected to re-enter formal employment, according to Dr Malaka, is that she was never dismissed or retrenched, but resigned her employment positions for reasons of her own. The only factor that could have diminished her prospects of employment as a semi-skilled employee, in the opinion of Dr Malaka, is the age factor.

[19] Ms Ngoaka is of the opinion that it is highly unlikely that the plaintiff would have returned to formal employment, *inter alia* given her low level of education, limited work experience and having been unemployed for ten years prior to the incident. The plaintiff would at her age, in the opinion of Ms Ngoaka, always have found it difficult to compete with younger more experienced job seekers in the open labour market. Ms Ngoaka, however, concedes under cross-examination that pre-incident the plaintiff was employable, but post-incident she was rendered unemployable as well as that her prospects of employment were better before the incident than thereafter.

[20] Expert evidence must be evaluated in accordance with the principles enunciated by the Supreme Court of Appeal *inter alia* in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) at pp 1200 – 1201 paras [34] – [40], namely '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.' The opinion advanced by Dr Malaka, in my view, is to be preferred; it is founded on

logical reasoning and accords with the probabilities. The plaintiff remained economically active even though not formally employed in order to personally care for their only child who was school going. It is a matter of common knowledge that many mothers who elect to leave their formal employment and care for their children before and while they are school going, elect to return and find formal employment once their children had left school. Dr Malaka informed me that he was unaware of any statistical data on the percentage of women who return to formal employment once their children have left school.

[21] I am of the view that the contingency deductions of 20% and 30%, which the parties by agreement applied to the plaintiff's past loss and future loss of income are, in all the circumstances of this case, fair and reasonable. The plaintiff's total loss of earnings, as agreed to by the parties, is therefore calculated in the amount of R1 926 760.

[22] The order I propose to make, therefore, is a total award of R9 988 860, being an award of R3 000 000 in respect of the plaintiff's general damages, an award of R5 062 100 in respect of her medical expenses, assistive devices and adjusted living space, and an award of R1 926 760 in respect of her total loss of earnings. The defendant has made an interim payment to the plaintiff in the amount of R1 000 000.00, which amount must be deducted from the total award amount.

[23] In the result the following order is made:

1. The defendant shall pay to the plaintiff the total amount of R R8 988 860 on or before the 31st of August 2021 into the following account:

Name of account holder	: Masewawatla Attorney
Type of account	: Trust Account
Bank	: ABSA
Account number	: [....]
Branch code	: 632005
Branch	: Gandhi Square

Deposit ref

: Mariam Pietersen

2. The defendant shall pay the plaintiff's taxed and/or agreed party-and-party costs on the High Court scale, within 30 (thirty working days) after settlement and/or taxation of the legal costs, which costs shall specifically include the costs of:

2.1 all medico-legal reports, actuarial and addendum reports as prepared for purposes of trial and furnished to the defendant's attorneys as well as all reports in the plaintiff's bundles, including but not limited to the following:

- 2.1.1 Dr Siphokazi Dlakane (Specialist Physician)
- 2.1.2 Dr Lezanne Wynand-Ndlovu (Specialist Neurologist)
- 2.1.3 Dr Ulrich Kunzmann (Specialist Ophthalmologist)
- 2.1.4 Ms Daphney Mathebula (Occupational Therapist)
- 2.1.5 Dr Mohapi Malaka (Industrial Psychologist)
- 2.1.6 Ms Sipho Njobe (Architect)
- 2.1.7 Dr Z.A.E Motala (Specialist Psychiatrist)
- 2.1.8 Mr Charl du Plessis (Munro Actuaries)
- 2.1.9 Mrs Lufuno Modipa (Neuropsychologist)
- 2.1.10 Dr Colin Schamroth (Specialist Cardiologist)
- 2.1.11 Mrs Ndileka Ramaifo (Occupational Therapist)
- 2.1.12 Dr K.J.P Lubuya (Ophthalmologist)
- 2.1.13 Dr R.D Jobo (Specialist Physician)
- 2.1.14 Dr Eduard Sevenster (Ophthalmologist)
- 2.1.15 Dr A.P Rossouw (Neurologist)

2.2 the reasonable and taxable preparation, qualifying and reservation fees for trial, of the above listed experts;

2.3 the reasonable costs incurred by the plaintiff in attending at the medico-legal examinations of the experts;

2.4 the plaintiff's costs in the preparation of and uploading of the matter to CaseLines and the time spent in the preparation of trial bundles on the CaseLines;

2.5 the plaintiff's counsels' fees for the preparation and drafting of the heads of argument;

2.6 the trial fees of the plaintiff's counsel on trial from the 14th to the 18th June 2021, inclusive of preparation, roundtable meetings and consultation fees.

3. The plaintiff shall file a notice of intention to tax a Bill of Costs together with her proposed Bill of Costs on the defendant's attorneys of record prior to enrolling the Bill of Costs for taxation and shall comply with the Rules of Court and time periods specified therein for the taxation of legal costs.

P.A. MEYER
JUDGE OF THE HIGH COURT

Judgment:	02 August 2021
Heard:	14, 15, 17 and 18 June 2021
Plaintiff's Counsel:	Adv PG Malindi SC (assisted by Adv TA Mofokeng)
Instructed by:	Masewawatla Attorneys, Johannesburg
Defendant's Counsel:	Adv R Mkhabela
Instructed by:	State Attorney, Johannesburg