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

CASE NO: 7202/2008

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

DATE

SIGNATURE

In the matter between:

C[....] M[....] obo L[....]

PLAINTIFF

AND

**DR THIBEDI
BRIAN HLONGWA**

**FIRST DEFENDANT
SECOND DEFENDANT**

JUDGMENT

STRIJDOM AJ

INTRODUCTION

[1] The plaintiff instituted a claim for damages against the defendants on behalf of L[...] (hereinafter referred to as the minor child) as a result of injuries and scarring on his forehead which emanated from the wrongful insertion of a drip in his head.

[2] At the time of the incident the minor child was approximately 3 weeks old and was admitted to hospital on 17 June 2004 on an initial diagnoses of anaemia. His condition deteriorated and he was eventually diagnosed with tuberculosis, Cytomegalovirus, Anaemia, Ascites and HIV.

[3] The drip that was inserted in the minor child's left temporal area of his scalp became septic and developed skin necrosis.

[4] The defendants admitted 100% liability for the plaintiffs' proven damages as a result of the injury and scarring sustained by the minor child.

[5] The defendants also admitted liability and the costs of future medical expenses in the amount of R110 000,00.

[6] What is therefore in issue is the amount of general damages and whether the defendants are liable for the minors loss of earning capacity if any.

The plaintiffs' injuries:

[7] The neurosurgeons, Dr Lekgwara and Karan described the patients' incident related injury as follows:

“Left front-temporo-parietal skin necrosis as a result of intravenous line (drip) infiltration or placement. We defer an opinion to the Plastic surgeon.”

[8] The Plaintiff appointed Dr Selahle, a plastic & reconstructive surgeon who assisted the minor child's injuries on 22 March 2017. He recorded the scars and deformities as follows:

8.1 Face\Scalp

-15x12cm scar with irregular borders which involves the left side of the forehead and Fronto-

-Temporal Scalp. This scar has the following associated deformities.

8.2 Alopecia, which is involving:

-Left temporal and frontal hairline

-7cm strip of frontal scalp.

8.3 3 MM Elevation of the Left eyebrow.

-There is normal eye movement.

-There is normal eyelid (upper and lower) closure with no Lagophthalmos.

-The scar has no features of scar hypertrophy but it is however cosmetically unsightly and disfiguring.

[9] Dr Selahle, a plastic and reconstructive surgeon suggested future treatment and opined as follows:

“The writer is of the opinion that the forehead portion of this scar will not be satisfactorily improved by scar revision without causing further left eyebrow deformities, displacements and additional scar on the forehead. The area of

alopecia on the frontal left scalp and the left temporal hairline can be improved by using tissue expansion of the hair-bearing scalp.”

[10] Dr Selahle also suggested tissue expansion and further treatment with an estimated cost of approximately R102 800.00

[11] Dr Sehahle concluded that although the scar has no features of scar hypertrophy, it is

“11.1 Cosmetically unsightly and disfiguring

11.2 conspicuous and difficult to conceal.

11.3 permanent with some prospects of scar improvement by scar revision techniques.”

[12] The defendants also appointed a plastic surgeon, Dr Potgieter who assessed the minor child on 1 April 2019.

12.1 he recorded the scalp and face injury as;

“5x4 hyper pigmented hypertrophic scar at the left forehead”

12.2 he recorded the impact of the injuries on the patients appearance, function and psyche as follows:

“L[...] is most affected by his neurodevelopmental delay and right hemiplegia. I defer to the relevant expert regarding these issues. The scars of his forehead bother him as well.”

Social interactions: Decreased due to developmental delay, hemiplegia and forehead scars.

Work: Decreased due to development mental delay, hemiplegia and forehead scars.

Sport& Recreation: Decreased due to development delay, hemiplegia and forehead scars,

Life Expectancy: Normal.

[13] Dr Potgieter commented as follows: On the future prognosis of the minor Child's injury:

"Surgical revision will improve the appearance of his scars, but the patient will remain disfigured as a result of his injuries. He will still feel self-conscious in social situations, his clothing choices will be limited and certain environmental circumstances, such as harsh sunlight will be uncomfortable. Consequently his scars should be considered permanent disfigurement."

[14] According to the joint minutes of the plastic surgeons it is clear that the minor Child's disfigurement is permanent, and they are of the opinion that his future medical expenses will be approximately R110 000.00.

General Damages.

[15] The general principles regarding the manner in which an award in respect of general damages is to be approached, can be summarised as follows:

15.1 In Southern Insurance Association v Bailey N.O¹ the appellate Division (as it then was), said at page 113 H the following regarding the way in which general damages should be determined:

¹ 1984 (1) SA 98 (AD).

“This Court has never attempted to lay down the rules as to the way in which the problem of an award of general damages should be approached.”

15.2 The accepted approach is the flexible one described in the often quoted statement of Watermeyer JA in Sandler v Wholesale Coal Suppliers Ltd.²

15.3 There is this no uniform approach to the determination of general damages.

15.4 In assessing the appropriate award to make, a Court should also consider previous awards made in earlier cases. One must however be careful as the assessment of awards of general damages with reference to awards made in previous cases is with difficulty. The fact of a particular case need to be looked as a whole and few cases are directly comparable. They are a useful guide to what other courts have considered to be appropriate, but they have no higher value than that.

15.5 In considering previous awards it is right that a court should be alive to the effect of the ravages of inflation upon the value of money during the interceding years. Inflation rates, however, no matter how reliable, unlike previous awards are merely guidelines as to what an appropriate award in a particular case would be.³

15.6 Any enquiry into damages for loss of earning capacity is of its nature speculative because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can

² 1940(1) AD 194 at 199.

³ AA Onderlinge Assurance Assosiasie BPK v Sodoms 1980(3) SA 134 (A).

do is to make an estimate, which is often a very rough estimate, of the present value of the loss.⁴

Comparable case law.

[16] In my view the following matters are indicative of the nature and value of the award that the plaintiff would be entitled to:

16.1 Heynecke v Visagie⁵. In this matter the plaintiff was bitten by a dog in the area of the left cheek. The damage to nerve ending resulted in an inability to raise the left eyebrow and close the eyelids tightly. He was left with a persistent swelling in the injured area with resultant irritation of the eye and excessive weeping and left eye. Although the scarring had improved and could further be improved by plastic surgery, severe irregular scarring remained as a serious cosmetic blemish.” The award for general damages of R2500 at the time translates to R64 000.00 in present value.

16.2 In Visser v Visser⁶ The Plaintiffs son was bitten four times in the face by a Labrador and he sustained the following wounds: a large flap laceration involving the middle section of this forehead above the right eyebrow, a second laceration through the right eyebrow, a deglazed wound on the right side of the cheek below the right lower eyelid with tissue loss, a full thickness laceration to the right upper lip as well as lacerations in the neck which were down to the platysma level. He was awarded general damages in the amount

⁴ Southern Insurance Association v Bailey NO 1984(1) SA 98 (AD) at 113 G to 114D.

⁵ 1980(3)G4) QOD 102 (W).

⁶ 2012(4) SA 74 (KZD), 2012(6G4 QOD (W).

of R70 000.00 which amounts to R101 000,00 in 2019 according to the QOD yearbook.

16.3 In MTA obo MK v Road Accident Fund.⁷ The minor child sustained a visible ugly scar on her forehead on the left side which qualifies for non-pecuniary loss due to it being visible and ugly and she therefore qualifies for compensation for the scar sustained under general damages. The court considered the physical injury as well as loss of amenities of life as a result of depression and was satisfied that the amount of R400 000,00 was a reasonable amount for general damages.

16.4 In Mashigo v Road Accident Fund.⁸ The plaintiff sustained soft tissue injuries to her left wrist, left knee, burn wounds to her arms and breast and was awarded R450 000.00 in respect of general damages

[17] It was submitted by counsel for the defendant that an amount of R100 000.00 to R150 000 .00 would be a reasonable compensation for general damages. Counsel for the plaintiff suggested an amount of R400 000.00.

[18] On a consideration of all the facts in the present matter and awards previously make in similar matters, I have concluded that an award in the amount of R450 000.00 would represent fair compensation.

Future medical expenses

[19] The only future medical expenses, according to the plastic and reconstructive Surgeons would be R110 000.00. It was conceded by the counsel for the

⁷ (4484/2016) (2018) ZAGPJHC (18 June 2018)

⁸.(2120/2014) (2018) MZAGPPHC 539 (13 June 2018)

defendants that an amount of R110 000.00 should be awarded to the plaintiff for future medical expenses.

Loss of earning Capacity

[20] It was argued by counsel for the defendants that the plaintiff failed to tender evidence that the minor child's capacity to be employed is diminished due to inter alia the scarring on the head of the minor child.

[21] It is common cause that the plaintiff did not obtain any expert reports regarding the minor child's loss of earning capacity.

[22] On the material before me, I cannot find that the minor child's capacity to be employed is diminished due to the scarring on his head.

[23] In all the circumstances I am of the view that the plaintiff is entitled to be compensated in the amount of:

1. R450 000.00 in respect of general damages.
2. R110 000.00 in respect of future medical expenses.

[24] Accordingly, I make the following Order:

1. The defendant to pay an amount of R560 000,00 (Five hundred and sixty thousand rand) (comprising of the amount of R450 000,00 for general damages and R110 000,00 for the future medical expenses) to the plaintiff as full and final settlement in respect of the plaintiff's claim on behalf of her minor child, for general damages, future medical expenses and loss of income, instituted due to the injuries sustained as a result of the incorrect insertion of a drip on 26 July 2008.
2. The aforesaid capital amount in paragraph 1 will not bear interest unless the defendant fails to effect payment thereof (or any part thereof) within 30 (Thirty) calendar days of this order, in which event the capital amount r outstanding amount will bear interest at the rate of 10% per annum calculated

from and including the date of this order up to and including the date of payment thereof.

3. The defendant shall pay the plaintiff's taxed or agreed party and party costs on the High Court scale, which costs shall include the following:

- 3.1 The reasonable taxable costs, as allowed by the Taxing Master, of obtaining the medico-legal reports, addendum reports (if any) and joint minutes of the following experts of the plaintiff relating to the issue of quantum:

- Dr. Lekgwara – Neurosurgeon
- Dr Sehalabe – Plastic surgeon

- 3.2 The costs consequent to the employment of senior junior counsel by the plaintiff including the costs of all previous reserved costs order.

4. The amount and costs stipulated in paragraph 1 and 3 above, shall be paid into the following trust account of the plaintiff's attorney:

Account name:	Shabangu B Attorneys & Associates
Account number:	[....]
Bank:	STANDARD BANK
Branch code:	010045
Reference:	3276/07/MV/JCS

5. The following provisions will apply regarding the determination of payment of the plaintiff's abovementioned taxed or agreed costs:

- 5.1 the plaintiff shall timeously serve the notice of taxation on the defendant's attorneys of record;

- 5.2 the plaintiff's attorney shall allow the defendant 30 (thirty) calendar days to make payment of the taxed costs from date of settlement or taxation thereof;

- 5.3 should payment of the plaintiff's taxed or agreed costs not be effected timeously, the plaintiff will be entitled to recover interest at the rate of 10%, calculated from the 31st calendar day after the date of the Taxing Master's allocator, up to the date of final payment.

6. It is recorded that there is a contingency fee agreement, which complies with the provisions of the Act in this matter. A copy of the agreement as well as the affidavits of the client and attorney is handed up.

[7] Draft order marked "X" made order of court.

JJ STRIJDOM

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 15 April 2019

Judgment delivered: 24 April 2019

Counsel for Plaintiff: Adv J Barnardt

Attorney for Plaintiff: Shabangu B Attorneys & associates

Counsel for Defendant: Adv Shangisa SL

Attorney for Defendant: The State Attorney