

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION: MTHATHA

CASE NO. 121/2016

M. P. obo S. P.

Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, EASTERN CAPE, PROVINCE

Defendant

JUDGMENT

BROOKS J

[1] The plaintiff issued a combined summons against the defendant, the Member of the Executive Council for Health, Eastern Cape Province. In doing so, she acted in her capacity as the grandmother and legal guardian of the minor child S., who was born on [...] 2005.

[2] The plaintiff's claim is for the recovery of damages alleged to have been suffered by S. as a result of an hypoxic ischemic injury to his brain which was sustained at birth. Issues pertaining to the liability of the defendant were separated from issues pertaining to the *quantum* of the damages alleged to have been suffered by S. and the latter were allowed to stand down.

[3] At the closure of both the plaintiff's and the defendant's cases on the merits, and after hearing argument, an *ex tempore* judgment was delivered *in extenso* and an order was made to the effect that the defendant is liable to make payment to the plaintiff of such damages as she may prove, or it may be agreed that she has suffered in her representative capacity as a result of the hypoxic ischemic injury to S.'s brain on [...] 2005.

[4] Immediately thereafter, Mr Mtshabe, who appeared on behalf of the defendant, made an application from the bar for an order postponing the further conduct of the trial on issues pertaining to the *quantum* of damages. After hearing argument an *ex tempore* judgment *in extenso* was delivered on the application. It is not necessary for present purposes to repeat the content thereof. It is sufficient to state that an order was made refusing the application for a postponement.

[5] It is common cause between the parties that S. suffers from cerebral palsy as a consequence of the hypoxic ischemic injury sustained by his brain at birth. There is also no dispute about the severity of his condition. He is affected in a quadriplegic manner which also involves the trunk of his body. He is unable to stand without assistance and is able only to roll, or scoot or to a certain extent

crawl in order to move. He is unable to feed himself or to see to his own personal hygiene. His speech is severely affected.

[6] In assessing the quantum of the damages to be awarded as compensation in this matter, both parties made extensive use of a number of medical experts. In respect of the vast majority of the different aspects of the plaintiff's claim in her representative capacity, an expert in a particular field who gave a report on behalf of the plaintiff was matched by an expert in the same field who gave a report on behalf of the defendant. Of particular assistance in the determination of an appropriate award of damages is the fact that in each instance the corresponding experts produced a joint minute in which was recorded the expression of a common or agreed view on the particular aspect which they had been called upon to address. This feature has eliminated the need to evaluate which expert's opinion should be accepted and which rejected in all but few instances.

[7] A fair summary of the various fields of the enquiry addressed by the experts in this matter finds expression in the certificate of value produced by Robert Koch, a consulting actuary in Cape Town. The certificate expresses a valuation date of 5 February 2018. For its content it draws on the joint minutes produced by the parties experts, who addressed the full range of S.'s needs and unavoidable necessary medical expenses, ranging from addressing S.'s need for mobility and daily professional care to the need for professional dietary supplementation.

[8] The content of the actuarial certificate of value was addressed in the evidence given by Dr Campbell, who within his specialised field had produced a calculation of the probable life expectancy of S.. This had been used by the actuary in the calculation of the various amounts included in the certificate of

value. Of equal importance was the process, the outcome of which finds expression in the certificate of value, by which Dr Campbell was able to identify areas in which the joint reports produced by experts in different but overlapping fields reflected the same items, leading to duplication in allowance. The certificate of value made use of the same numbering sequence in addressing the various elements which make up its content as were used by the actuary in the production of an earlier certificate. A comparison between the two certificates indicates clearly areas in which a duplication of allowance occurred initially. Both the form and the content of the most recent certificate of value demonstrate that this has, on the whole, been corrected.

[9] An area where duplication had not been addressed was identified by counsel during argument. The future medical expenses estimated by dental health practitioners on behalf of both parties are both included in the certificate of value. In addressing the issue, Mr Mtshabe conceded that the figure estimated by Dr Lofstedt on behalf the plaintiff should be retained and the estimate provided by Dr Galatis on behalf the defendant should be discarded. On this counsel were in agreement and the total reflected on the actuarial certificate of value falls to be adjusted accordingly.

[10] Another area of disagreement between the parties' experts calls for consideration. A paediatric nurse with specialist knowledge and experience in the field of nursing youngsters with the type of disabilities which beset S., Miss Anderson, gave evidence on behalf of the plaintiff. This evidence addressed the needs which S.'s condition and specific circumstances call for in a wholistic manner. However, specific to her area of expertise was her recommendation in respect of the need for carers to look after S.. In her opinion, the care required is

a twenty-four hours per day, seven days a week regime. To enable this requires two suitably trained carers. In her report on the same point, the defendant's corresponding expert, Ms Smit, was of the opinion that only a single carer was called for during the day. The joint minute produced by the two experts agreed on all other aspects but this. In my view, with due regard to the severe nature and overwhelming extent of S.'s condition and the devastating effect it has on his ability to see to any of his own needs, the view which expresses a need for twenty-four hour assistance on each day of the week is more logical and defensible. Moreover, Ms Smit was not called to give evidence in support of her expert report on the point. Miss Anderson motivated her recommendation in a forthright but compassionate and professional manner. She has considerable experience in the field of the co-ordination and placement of carers in similar circumstances and I have no hesitation in accepting her recommendation as both reasonable and necessary. It finds full expression in the certificate of value produced by the actuary.

[11] It is apposite to record that Dr Campbell gave his evidence as a rehabilitation manager, leader and co-ordinator. He has significant experience as a registered medical practitioner. He stressed the need for there to be a sustainable life care plan for the determinable period of S.'s life expectancy which addresses the realities of premature ageing and associated health risks which come with the condition of cerebral palsy and its quadriplegic expression. He endorsed the principle that it is important to ensure the availability of a basket of basic care in addressing the needs of a person such as S.. He confirmed that S. is always going to be dependent on qualified carers, throughout the remainder of his natural life.

[12] Both Dr Campbell and Miss Anderson highlighted the fact that S.'s brain functions at a much higher level than his body enables him to express. In my view, this is a vital aspect which informs the reasonableness of the allowance for an I pad and associated technological support systems and the allowance for school fees, school travel costs and stimulation games and "apps" for the I pad. Mr Mtshabe queried the need for such allowances to be made as no such school facility as may accommodate S.'s needs is to be found in Mthatha. In my view, this approach is unnecessarily limiting and may do S. a dis-service in the result. Dr Campbell and Miss Anderson both endorsed most strongly the need for a case manager to be appointed to co-ordinate and direct all the role players in S.'s life care plan. His grandmother, or her successor within the family group, will form but part of a team. At the moment, it is recorded in some of the expert reports that S.'s grandmother would be open to him being sent to an appropriate school when this would be justified. The manner in which allowance is made for this possibility in the certificate of value takes cognisance of the fact that it may only happen in the future. In my view, no basis exists for the exclusion of this allowance on the available evidence.

[13] The same cannot be said of the allowance for the attendance by S. at a day care centre after reaching the age of eighteen. It is common cause that there is no such centre in Mthatha. By its very nature, a day care centre does not accommodate persons who attend it on anything other than a daily basis. The prospect that S. and his family may move to a centre where there is such a day care facility is not addressed in any of the available evidence. Accordingly, it is so remote that it falls to be excluded. The necessary adjustment to the certificate of value must be the deduction of R578 998,00 from the total value reflected in the certificate.

[14] No allowance for the contingencies was made by the actuary in the computation of the certificate of value. In my view, there should be no alteration by way of the application of the contingency factor. The reason is that it is clear that the certificate of value has been produced with due cognisance to the extensive work done by Dr Campbell to address the probabilities associated with S.'s life expectancy and variations in his condition and ability, both positive and negative. No evidential basis has been laid for any further adjustments to be made by the application of a contingency factor.

[15] The same does not apply to the claim for the future loss of earnings. Here a contingency factor must be applied. The question is whether it should be 15% or 20%. The second question is whether the basis of the award should be the attainment of a Grade 12 pass but for the injury or the attainment of a Grade 12 pass and some sort of diploma at tertiary level. The plaintiff's expert in his report highlights what he describes as "an upward trend" in children today who wish to achieve more and to earn more than their parents. In addition, background evidence points to the likelihood that S. would have followed his uncle's example, as a role model, the latter pursuing tertiary education. The plaintiff's experts did not take S.'s life expectancy into account, but the defendant's actuary, Mr GW Jacobson did. However, Mr Jacobson applied a 20% contingency factor, which, in the absence of a stronger evidential basis, seems too high. Mr du Plessis, who appeared on behalf of the plaintiff, reasoned in his argument that the best approach was to adopt the calculation made by the defendant's actuary of the value of a loss of earnings based upon a Grade 12 pass and a tertiary diploma, but taking cognisance as he does of the life expectancy of S. and applying a 15% contingency factor to the award in place of a 20% contingency factor. In my view, there is merit in the submission.

[16] What remains is an assessment of an appropriate award for general damages. There can be no doubt that S. experiences and will continue to experience an unimaginable level of suffering and permanent disability. There has been a devastating loss of enjoyment of ordinary amenities of life which a totally healthy person could reasonably expect and would take for granted. Adequate compensation is called for. By all accounts S. is a bright little person whose deeper cognitive awareness is less severely affected than his ability to express himself verbally and physically. This must be a factor which aggravates his suffering. A full assessment of an appropriate award of general damages afforded by a judgment in the Gauteng Division of the High Court of South Africa¹ has been referred to with approval on previous occasions in this court². There an award of R1 800 000.00 for general damages was well motivated. An appropriate adjustment for inflation is all that is required to render that judgment highly persuasive in this matter. In my view, an award of R2 000 000.00 for general damages would be fair and reasonable.

[17] As a focal point in his submissions, Mr du Plessis produced a draft order which embodies provisions for the establishment of a trust to be terminated upon the death of S.. The administration of the trust will be subject to the scrutiny of the Master of this court. In my view, the establishment of such a trust would be appropriate in the circumstances.

[18] The following order will issue:

¹ C.S. (obo T.G.S.) v MEC FOR HEALTH, GAUTENG (27452/2009) GPPHC (6 August 2015).

² N. MGOMENI obo E.N. ZANGWE v MEC FOR HEALTH, EASTERN CAPE PROVINCE (1972/2014) ECHCM (20 June 2017).

1. The defendant shall pay the plaintiff in her representative capacity for and on behalf of S. P. (“the minor child”) the amount of R21 589 799,00 within thirty (30) days of the date of this order. The aforesaid amount is made up as follows:

1.1 R18 749 922.00 for future medical expenses and related costs.

1.2 R 839 797,00 for future loss of earnings capacity.

1.3 R2 000 000,00 for general damages.

2 In the event that the defendant fails to pay the amounts referred to in paragraph 1 above, within 30 days of the date of this order, the defendant shall be liable to pay interest thereon at the prescribed rate of interest.

3. The defendant is, in addition to paragraph 1 above, ordered to pay the costs of the administration of the trust, to be created to manage the award of the minor child, in the amount of R1 619 234,90, being 7.5% of the award of the minor child.

4 The defendant shall pay the plaintiff’s costs of suit (on the High Court scale) to the date of this order, such costs to include:

4.1 the costs of counsel;

4.2 the costs of travelling and subsistence of the plaintiff’s legal representatives and witnesses for the purposes of consultation and trial;

4.3 the costs attendant upon the obtaining of payment of the full sums including any interest referred to in paragraphs 1, 2 and 3 above and including the costs associated with the creation of the aforesaid trust;

4.4 the costs incurred in obtaining the medico-legal reports including supplementary reports, addenda, actuarial reports and joint minutes, as well as, where necessary, the qualifying, attendance, reservation and preparation fees of:

Dr Hulley	Obstetrician
Prof Andronikou	Radiologist
Prof Van Toorn	Paediatric Neurologist
Prof Odendaal	Gynaecologist
Mr. Mike Irving	Forensic Document
Ms. Lesley Fletcher	Nurse
Dr Malan	Research
Dr A Ebrahim	Gynaecologist & Obstetrician
Ms. Bianca Grey	Occupational Therapist
Dr PJ Lofstedt	Dentist
Mr. Gregory Shapiro	Industrial psychologist
Ms. Sue Anderson	Nurse
Ms. Shobana Singh	Speech Therapy
Mr. Deon Rademeyer	Mobility Expert
Ms. Mandy Read	Dietician
Dr Robert Campbell	Clinical Psychologist
Ms. Grace Hughes	Physiotherapist
Mr. Nkanyiso Masondo	Architect
Mr. Ivan Kramer	Actuary
Mr. Robert Koch	Actuary

4.5 Any reserved costs relating to trial proceedings;

5. The defendant shall pay interest on the aforesaid costs at the current prescribed legal rate of interest from a date fourteen days after *allocatur* or agreement to date of payment thereof;
6. The net balance remaining, after paying the costs set out in paragraph 5 above, and recovering all costs and expenses for which the plaintiff is liable, including her legal representatives' fees as between attorney and own client, shall be dealt with on the basis that Nonxuba Inc. attorneys shall cause a deed of trust, to be named the "S. P. Trust", is to be registered by the Master of the High Court, incorporating the provisions normally to be found in an *inter vivos* trust, within 9 (nine) months of the date of this order, or such longer period as the Master may on application direct, with the following additional provisions:
 - 6.1 the trustees should be persons of good standing and suitable to act as trustees in this matter;
 - 6.2 the trustees appointed or their successors in title shall have the powers of assumption;
 - 6.3 the trustees shall be exempt from furnishing security;

- 6.4 the trustees shall hold and administer the trust fund for the benefit of the minor child, S. P., only;
- 6.5 the trustees shall apply the net income of the trust fund for the maintenance and benefit of the minor (as advised from time to time by the appointed case manager) and, if at any time it is not adequate for the purpose, the capital thereof;
- 6.6 the Trust shall terminate on the death of the minor, alternatively in accordance with the Trust deed;
- 6.7 the remuneration of the trustees shall be at the rate equivalent to (and not exceeding) that of a *curator bonis* as contemplated in the Administration of Estates Act, 1965, as amended and shall be borne by the defendant.
- 6.8 the trustees shall disclose any interest in any transaction involving the Trust.
- 6.9 The provisions of this paragraph shall, in accordance with the provisions of Trust Property Control Act, 1988, as amended, be subject to the approval of the Master of the High Court.
- 6.10 This order must be served by the plaintiff's attorney on the Master of the High Court and the trustees.

7. The sums of money and any interest thereon referred to in paragraphs 1, 2 and 3 above, and the costs (and any interest) referred to paragraphs 4 and 5 above, are payable to the plaintiff's attorneys' trust account, the particulars of which are:

Name of account Holder: Nonxuba Inc.
Bank Name: ABSA BANK LIMITED
Branch Name: Eastgate
Branch Code: 632005
Account number: [...]
Account Type: Trust Account

JUDGE OF THE HIGH COURT

Appearances

Counsel for the plaintiff: Adv DTvR du Plessis SC

Instructed by Nonxuba Inc.
c/o Potelwa and Co,
43 Wesley Street
Mthatha

Counsel for the defendant: Adv NR Mtshabe

Instructed by State Attorney
94 Sissons Street
Fortgale
Mthatha

Date heard: 15 May 2018

Date delivered: 22 May 2018