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

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case no: 2795/2015

In the matter between:

**MEC FOR THE DEPARTMENT OF HEALTH:
FREE STATE PROVINCE**

Applicant

And

G A K[...] obo M A K[...]

Respondent

IN RE:

G A K[...] obo M A K[...]

Plaintiff

And

**MEC FOR THE DEPARTMENT OF HEALTH:
FREE STATE PROVINCE**

Defendant

CORAM:

HEFER AJ

HEARD ON:

15 FEBRUARY 2024

DELIVERED ON: 25 APRIL 2024

[1] This is an application for leave to appeal by the Applicant (the Defendant in the main action) against an order and reasons therefor dated 21 November 2023, by Lekhoaba AJ.

[2] The Respondent's claim, in her representative capacity on behalf of the minor child, M[...], is a claim for personal injury arising from negligence of the medical- and nursing staff at the Elizabeth Ross Hospital, Free State Province.

[3] The Plaintiff alleged that as a result of prolonged labour and failure to timeously perform a Caesarean section to deliver M[...], the minor child suffered a hypoxic-ischaemic incident due to asphyxia, meconium aspiration syndrome and/or respiratory distress syndrome causing her to sustain severe brain damage as result of which she is suffering from cerebral palsy. When the Plaintiff later discovered the unfortunate situation of her minor child, she instituted action for damages against the Defendant.

[4] Lekhoaba AJ was called upon to adjudicate the general damages only, after the Applicant had been held liable for 100% of the Plaintiff's damages. The Court held that the fair and reasonable amount for compensation of the minor child in respect of general damages is R2,400,000.00 (R2.4 million).

[5] The Applicant relies on several grounds in support of the application for leave to appeal. In summary, the Applicant's grounds of appeal relate to the life-expectancy of the minor child, who is almost 15 years of age, who according to the expert evidence before Court, has a life-expectancy of age 27.7 or 29.6 years, in other words a further approximately 14 years.

[6] The relevant portion of Lekhoaba AJ's judgment, reads as follows:

"[67] The Court is of the view that the submission by the Defendant's

counsel that life-expectancy had to be taken into account in respect of general damages is misplaced.

[68] The Court is of the view that life-expectancy does not take away pain and suffering of the minor child in respect of the reasonable and fair amount to be awarded. The life-expectancy plays a role on the loss of earning capacity and this Court has not been tasked to deal with the loss of earning.

[69] The Court agrees with Plaintiff's submission that general damages must bear a direct relationship to the personal suffering of the minor child.

[70] The Court is of the view that a fair and reasonable amount for compensation of the minor child in respect of general damages is R2,400,000.00 (Two Million Four Hundred Rand)."

[7] With reference to certain authorities relied upon by Mr *Salie*, appearing on behalf of the Applicant herein, it was submitted that the Court *a quo* has erred in her award of R2,400,000.00 and that an award between R1,800,000.00 and R2,000,000.00 is in line with the present day awards for general damages to children suffering from cerebral palsy.

[8] In the matter of **PM obo TM v MEC for Health, Gauteng Provincial Government**¹ the Full Bench of the Gauteng High Court, confirmed the approach to be followed by a Court of Appeal to a trial court's award of damages, namely:

"It is settled law a trial Court has a wide discretion to award, what it in the particular circumstances, considers to be fair and adequate compensation to the injured party for his bodily injuries and their *sequelae*. It follows that this court will not, in the absence of any misdirection or irregularity, interfere with the trial Court's award of damages unless there is a substantial variation or a striking disparity between the trial court's award

¹ (A5093/2014) [2017] ZAGPJHC 346 (7 March 2017)

and what this court considers ought to have been awarded, or unless this court thinks that no sound basis exists for the award by the trial Court. AA Mutual Insurance Association Ltd v Maqula 1978 (1) SA 805 (A), at 809 8 - D. Also Singh v Ebrahim (413/09) [2010] ZASCA 145 par. 148".

[9] Mr *Van Rooyen*, appearing on behalf of the Respondent, has drawn attention to the fact that in none of the authorities relied upon by the Applicant, it was specifically stated that the award for general damages was directly linked to the life-expectancy of the patient. He further argued that it is of course imperative that life-expectancy be considered in matters of this nature. It is an essential element to determine damages, more particularly future medical expenses and loss of earnings. These heads of damages are meticulously calculated by actuaries with specific reference to the life-expectancy.

[10] With these submissions, I must agree. In the **PM**-matter referred to, the Court indeed stated that the issue of the particular child's life-expectancy, which the expert witnesses differed upon, "*... is of considerable importance because of the effect it has on the calculation of much of the appellant's damages claims*". Upon scrutiny of the judgment of the Full Bench, the Court of Appeal indeed held that its assessment of life-expectancy differs from that of the Court *a quo* with an additional four years. It appears further from the judgment that the life-expectancy of the minor child was indeed taken into consideration in respect of the claim for future medical and related expenses and that the Full Bench took into consideration the minor child's diminished life-expectancy of 22 years in the award relating to the loss of earnings and the contingencies applicable thereto. The Court also, in this regard referring to the trial court's large contingency deduction of 50%, again referred to the diminished life-expectancy which was assessed and in awarding damages for loss of earnings by Koen J in **Singh and Another v Ebrahim**².

[11] In respect of general damages, the Full Bench referred to the fact that the minor child was permanently disabled and had a diminished life-expectancy. But

² (8027/2004) [2008] ZAKZHC 112 (30 July 2008)

unlike in regards to the award of future loss of earnings, the number of years in respect of life-expectancy was not taken into consideration. It appears that the Full Bench merely took into consideration the fact of diminished life-expectancy in regards to the calculation of the amount of general damages.

[12] In **AD and 18 v MEC for Health and Social Development, Western Cape**³, which involved an athetoid cerebral-palsied boy who was almost 8 years old at the time of trial, Rogers J awarded an amount of general damages equivalent in 2014 to the amount of R2,575,493.00. The boy was described as severely mentally retarded, with a life-expectancy which does not appear from the reported judgment.

[13] In **NP (obo SP) v MEC for Health, Eastern Cape Province**⁴, involved a cerebral-palsied boy who was 13 years old at the time of trial. He was incontinent, unable to stand without assistance and able only to roll or crawl and had severally affected speech. His cognitive functions were however at a higher level. His life-expectancy does not appear from the judgment and Brooks J awarded the 2014 equivalent amount of R2,633,066.00.

[14] In the matter of **Du Bois v Motor Vehicle Accident Fund**⁵, Stratford J (as he then was), took into consideration the principle outlined in **Sandler v Wholesale Coal Suppliers Ltd**⁶, as follows:

"The law attends to the pure wrong done to a suffered 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

³ 2016 (7A4) QOD 32 (WCC)

⁴ 2018 (8A4) QOD 87 (EC)

⁵ 1992 (4) SA 368 (TPD)

⁶ 1941 AD 194

in all the circumstances of the case."⁷ (own emphasis)

[15] Stratford J continued as follows:

"The award which I am about to make does not emanate from my first establishing what I would have awarded the claimant for general damages had she lived till 57 or 58 years of age, that is 27 years from the date of collision instead of 5 years and 6 months therefrom. I did not arrive at my award by dividing that amount by 5 because the claimant only lived for approximately one fifth of the 27 years. The award arrived at is what I think is fair in all the circumstances of this case."

[16] In summary of this aspect, upon a scrutiny of the authorities relied upon by the parties, it appears that the facts that an injured person does have a diminished life-expectancy, was taken into account as such, but the remaining number of years in respect of such person did not play a role in determining the amount of general damages to be awarded. The principle of which amount is fair in the circumstances is still paramount.

[17] It is now accepted that the Superior Courts Act raised the bar for granting leave to appeal. Bertelsmann J in **Mont Chevaux Trust v Goosen**⁸ held as follows:

"It is clear that the threshold for granting leave to appeal against the judgment of a High Court has been raised in the new act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see Van Heerden v Cronwright and Others 1985 (2) SA 342 (C) at 343 H. The user of the word **would** in the new statute indicates a measure of certainty that another could will differ from the court whose judgment is sought to be appealed against."

⁷ p.374E-G

⁸ 2014 JDR 235 (LCC) at par. [6]

[18] In the matter of **RSN v RAF**⁹, the Full Bench again confirmed that a Court of Appeal must consider whether there is a striking disparity between an award by a Court *a quo* and what the Court of Appeal considers to be an appropriate award. If it is found that there is indeed such a striking disparity, then the Court of Appeal must give consideration to a more appropriate award.

[19] I have considered the comparable authorities relied upon by both parties in this application for leave to appeal. In **Kriel NO obo S v MEC for Health, Gauteng Provincial Government**¹⁰ where a minor child had a life-expectancy of 43.5 years, the Court awarded R2,000,000.00 in respect of damages; in **ZK v MEC for Health, Gauteng Provincial Government**¹¹, an award of R1,800,000.00 was made for general damages in 2018; in **CS (obo TGS) v MEC for Health, Gauteng**¹², an award of general damages in the sum of R1,800,000.00 was made in respect of a child whose life-expectancy was reduced to 30 years, in 2015 (the equivalent thereof in 2024 is R2,728,558.00); in **AG and 18 v MEC for Health and Social Development, Western Cape**¹³, the equivalent award in 2024 was R2,575,493.00; in **MK v MEC for Health, Gauteng**¹⁴ the present equivalent award in the amount of R2,525,230.00 was made and in the matter of **NP (obo SP) v MEC for Health, Eastern Cape Province** (*supra*) the equivalent award in the amount of R2,633,066.00 was made.

[20] Taking into account those authorities it cannot be held that there is a striking disparity between what the Court *a quo* found and what a Court of Appeal might find. In view thereof, the Applicant has not succeeded in showing that a Court of Appeal would come to a different conclusion as that of the Court *a quo* in regards to the amount of general damages awarded. The

⁹ (A137/2018) [2023] ZAGPPHC 641 (31 July 2023)

¹⁰ (9407/2017) [2020] ZAGPJHC 273 (14 November 2014)

¹¹ 2018 ZASCA 13; 2018 (7A4) QOD 80 (SCA)

¹² 2015 SAGPPHC 605; 2018 (7A4) QOD 104 (GNP)

¹³ 2016 (7A4) QOD 32 (WCC)

¹⁴ 2018 (4) SA 454 (SCA)

application for leave to appeal should therefore fail.

Order:

Therefore, I make the following order:

The application for leave to appeal is dismissed with costs.

HEFER AJ

Appearances on behalf of the Applicant:	Adv M Salie SC
Assisted by:	Adv K Nhlapo-Merabe
Instructed by:	State Attorneys Bloemfontein
On behalf of Respondent:	Adv M van Rooyen
Instructed by:	Webbers Attorneys Bloemfontein