IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 2432/2015

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) [redacted] 13/03/2024

In the matter between:

THABANG MICHAEL LEBOGO — PLAINTIFF

and

THE MEC:DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT, LIMPOPO PROVINCIAL GOVERNMENT — DEFENDANT

JUDGMENT

NAUDÈ-ODENDAAL J:

[1] The Plaintiff instituted a claim against the Defendant for payment of delictual damages, which the Plaintiff alleges he suffered as a result of the negligence of the employees, nurses and doctors, at the Seshego Hospital.

[2] The background facts are briefly that the Plaintiff, Mr. Lebogo, 27 years old at the time, was taken by ambulance and admitted as a patient at Seshego Hospital at approximately 13h01.

[3] The Plaintiff was vomiting, had severe abdominal pain, and he was confused and weak. The Plaintiff was admitted and was given an injection to sedate him, which caused him to sleep. The Plaintiff woke up on 6 November 2014 having sustained 2nd degree burn wounds over his body with no idea of how this happened to him.

[4] The initial diagnosis made was Hepatitis B, drug induced. At the time of his discharge his final diagnosis, according to the hospital records was Hepatitis B, HIV positive, 2nd degree burn wounds, drug induced.

[5] The only issue in dispute is, whether the burn wounds the Plaintiff sustained, were as a result of the employees of the Defendant's, negligence.

Plaintiff's Case:

First Witness: The Plaintiff's Mother, Mrs. Lebogo

[6] Mrs. Lebogo, in summary, testified that the Plaintiff is her son. He lives with her. The Plaintiff experienced abdominal pain and was vomiting. They called an ambulance and he was taken to hospital. Mrs. Lebogo and her sister, Mrs. Boshomane, accompanied the Plaintiff to the hospital. The Plaintiff was admitted at hospital. He did not want to stay at hospital alone. He was then given an injection to sedate him and went to sleep.

[7] Mrs. Lebogo testified further that the following morning, even before visiting hours, she received a call from Mrs. Ledwaba, a nurse, at the hospital. Mrs. Ledwaba requested Mrs. Lebogo to come to the hospital. Upon Mrs. Lebogo's arrival at the hospital she was taken to Mrs. Ledwaba. Mrs. Ledwaba informed her that the Plaintiff got injured and was burned.

[8] Mrs. Lebogo was taken to the Plaintiff. She found the Plaintiff to be in another ward than the previous day. He was covered in bandages and had a cut/scar above his left eye and also on his chin. His hands, chest and waist area, going down to his buttocks, were covered in bandages, as well as one of his legs. Mrs. Lebogo could just not recall whether it was the Plaintiff's right or left leg that was covered.

[9] Mrs. Lebogo asked for an explanation and was then taken to the Superintendent of the Hospital by Mrs. Ledwaba and a one Mrs. Nkwana. The Superintendent told Mrs. Lebogo, in the presence of Mrs. Boshomane, that he will not know who was on duty and how the Plaintiff got burned. He did not explain – he merely hit on the table with his fist and told Mrs. Lebogo that she can approach her attorneys.

[10] According to Mrs. Lebogo, the Plaintiff was not using any drugs.

[11] Under cross-examination the Counsel for the defence attempted to put a defense to Mrs. Lebogo on behalf of the Defendants to the effect that the Plaintiff was not used to using a shower as there was no shower at their home, furthermore that the Plaintiff's sedation wore off earlier than expected because of his drug use. According to the Defendant's version, the Plaintiff woke up at around 03h00 am the morning and went to the bathroom to take a shower, the Plaintiff fainted in the shower and burned himself.

[12] Mrs. Lebogo denied that the Plaintiff took any drugs, she furthermore, under cross-examination, testified that the hospital did not have any hot water during 2014. Mrs. Lebogo testified that the Plaintiff's sister gave birth earlier the year, there was no hot water at the hospital and the baby had to be bathed at home. According to the evidence, the hospital used Urns to heat up the water for the patients and

would then poor water from the Urn into a bowl with which the patients would be washed.

[13] The version of the Defendant put tot Mrs. Lebogo, was that the Plaintiff woke up at 03h00am, he went to the bathroom, opened the shower and burned himself. When the nurses heard the screams, they rushed to him to assist him. He resisted. They removed him from the shower, he slipped and fell on the wet floor. Mrs. Lebogo however did not accept this version, she also said that she cannot say what happened there because she was not there.

[14] It was further put to Mrs. Lebogo that the Defendant and/or its employees or medical staff, were not negligent and in fact rather attempted to assist the Plaintiff. This was denied by Mrs. Lebogo. Mrs. Lebogo said that if that was not the case, why would they then assist the Plaintiff to apply for a grant.

Second Witness: Mrs. Boshomane: The Plaintiff's Aunt.

[15] Mrs. Boshomane testified that she accompanied Mrs. Lebogo to the hospital on the 6th of November 2014. When they entered the hospital on 6 November 2014, they (Mrs. Lebogo and herself) were informed that the Plaintiff was burned. They were taken to the Plaintiff. He was alone in a room and covered in bandages. According to Mrs. Boshomane, they asked the personnel, including the

Superintendent at the hospital, what burned the Plaintiff to which they all responded that they did not know. Mrs. Boshomane testified that the Superintendent hit on the table with his fist and told Mr. Lebogo that she could go to her lawyers.

[16] Mrs. Boshomane testified that when her sister's child gave birth earlier in 2014, there was no hot water. She also testified that the Plaintiff informed them that when they changed his bandages, they had to warm-up water in an Urn in order to have hot water.

[17] Mrs. Boshomane also testified that she had a miscarriage and was admitted in the same hospital about a month earlier, and also whilst she was in hospital, there was no hot water. They wanted to know what and how the Plaintiff got burned. She testified that if it was indeed the shower, as per the Defendant's version, the Plaintiff's entire body should have been burned from head to toe and he would have been burned on his face and shoulders as well. Mrs. Boshomane stated that if the hospital was not negligent, the Plaintiff would not have gotten burned.

Third Witness: The Plaintiff

[18] The Plaintiff testified that he was born in 1987. On the 5th of November 2014 he fell ill, he had abdominal pain and was vomiting. He thought he had bile. He did

not take any drugs, but smoked cigarettes. He was taken to hospital by an ambulance. Upon arrival at the hospital he was pushed in a wheelchair into the hospital and was admitted. Upon his admission, he was injected with a sedative which made him sleep. He didn't have anything with him, except the clothes he was wearing, when he was admitted. After he received the sedative, he fell asleep and could not remember anything. When he regained his consciousness, he found that he was covered in bandages.

[19] The Plaintiff testified that he was burned on his back going down to his buttocks, his right hand and arm, his left hand and arm and also his right leg. He had a cut/abrasion on his chin and above his left eye which left a scar. The Plaintiff testified that he had to take liquid foods through a syringe whilst at hospital after he sustained the burn injuries, he also had to wear diapers.

[20] The Plaintiff testified that he still suffers from the burn wounds, especially when it is hot, he has to wear light clothes. He can't wear a belt because it will cause his skin on his back to tear. The burn wounds also affected his vision. He received a disability grant due to the burn injuries caused by the hospital.

[21] Under cross-examination, the Plaintiff also confirmed that there was no hot water at the hospital. The nurse who came to change his bandages heated water in an

Urn. They would then pour the water from the Urn into a basin to wash, wipe and clean him. The Plaintiff maintained his version under cross-examination that he could not recall what happened when he got burned. He only saw that he was covered in bandages when he woke up.

[22] By agreement between the parties, the expert reports and affidavits were filed and accepted as evidence without calling the respective experts. The following expert reports were submitted by the Plaintiff's legal representative:-

22.1 An affidavit and report by Dr. Pienaar, a Plastic Surgeon, marked Exhibit "A".

22.2 An affidavit and report by Dr. Leputu, a Specialist Psychiatrist, marked Exhibit "B".

22.3 An affidavit and report by Me. Natalie Lauren Hamilton (Brink), an Industrial Psychologist, marked Exhibit "C".

22.4 An affidavit and report by Me. Linda Roos, an Occupational Therapist, marked Exhibit "D".

22.5 An affidavit and report by Mr. Michelle Barnard, an Actuary, marked Exhibit "E".

[23] After the acceptance of the affidavits and reports by the respective expert witnesses as exhibits, the Plaintiff closed his case. The Defendant called two witnesses.

Defendant's First Witness: Sister Lepelele

[24] Sister Lepelele testified that she has been employed at Seshego Hospital since 2009. She is currently a professional nurse. On 5 November 2014 she reported on duty at 19h00 in the evening. According to her, the Plaintiff was confused and weak when he was admitted in their ward. He was given a sedative just before she arrived and reported on duty. She testified that the Plaintiff's condition was not of such a nature that he needed high care, he only had to be monitored frequently. Monitoring was done every 2 hours.

[25] She expected the sedative to last for twelve hours. Normally the sedative lasts for twelve hours, unless there are other contra indications for example the sedative will wear off earlier in patients who use substances. She testified that she wouldn't have known if the sedative was going to wear-off earlier.

[26] She testified in examination in chief that the Plaintiff woke up at 03h00am on 6 November 2014, he went to the bathroom and wanted to take a shower, he opened the hot water and got burned on both his hands, lower back and left leg.

[27] Mrs. Lepelele testified that they became aware of the incident when they heard the Plaintiff screaming. According to her, they rushed to the bathroom and found the Plaintiff standing in the bathtub. There was a shower in the bathtub – a two in one. They wanted to pull him out but he resisted. They eventually managed to pull him out, but he slipped and sustained a laceration on his chin and left eyebrow. They were four nurses on duty. They put him on the bed and assessed his injuries. According to Mrs. Lepelele they found that the Plaintiff had superficial burns and a laceration on the chin and left eyebrow. The burn wounds were dressed, whereafter they called a doctor.

[28] According to Mrs. Lepelele, there was no complaint about the water or geyser that day. The hospital did have hot water. The hot water ran through a general system servicing the entire hospital. She testified that the patients who are bedridden are bathed by the nurses. They will use a small basin to collect hot water from the bathroom and will then carry the water to the patient's bed where they will bath him. Mrs. Lepelele denied that they ever used an Urn for hot water and stated that the Urn was only used for tea and coffee.

Defendant's Second Witness: Dr. Modiba

[29] Dr. Modiba testified that he was the Clinical Manager – Medical at Seshego Hospital. He has been employed at Seshego Hospital as a medical practitioner

(doctor) for 16 years. On the 5th of November 2014, he was on call for the general wards. Dr. Modiba's shift started at 16h30pm on 5 November 2014 and ended on 6 November 2014 at 07h30am.

[30] Dr. Modiba testified that whilst he was busy doing his rounds in the maternity ward he received a call about a patient who got injured in the shower. He instructed the nurses to give the patient an injection as a sedative and dress him. When he arrived at the patient, he found that it was the Plaintiff (Mr. Lebogo). The Plaintiff was in a stable condition.

[31] The Plaintiff appeared to Dr. Modiba to having been ill for some time. He had a laceration on his left eyebrow and chin. According to Dr. Modiba, the Plaintiff also had superficial 1st degree burns on his arms, leg and back.

[32] Dr. Modiba testified that he was informed by the nurses that they heard the Plaintiff scream in the bathroom while they were at the nursing station. They rushed to him and found him in the bath. The nurses tried to remove him but he resisted. He slipped and fell.

[33] According to Dr. Modiba, the sedative was administered to the Plaintiff around 18h00pm on the 5th of November 2014. He was informed that the patient woke up between 05h00am and 06h00am on the 6th of November 2014. He confirmed that the sedative did no last for the expected 12 hours. According to Dr. Modiba the Plaintiff had hepatitis (infection in the liver).

[34] According to Dr. Modiba, there is a bath in the bathroom with a shower head, in other words, a two in one. Dr. Modiba testified that there was hot water in the hospital on the day in question.

[35] In cross-examination, it was put to Dr. Modiba that according to the hospital records he arrived at the Plaintiff around 04h00 am. Dr. Modiba said that he was only informed telephonically around 04h00 am about the incident, but he arrived at the Plaintiff around 05h00 am to 06h00 am.

[36] In the hospital records, the doctor's diagnosis was that the Plaintiff fell into a bath with hot water. Dr. Modiba confirmed the diagnosis to be correct. Dr. Modiba further confirmed that the Plaintiff had a Glascow Coma score of 12/15.

[37] Dr. Modiba, further, under cross-examination confirmed that the sedative administered to the Plaintiff at a maximum, wears off after 12 hours, but it usually starts to wear off after 10 hours. Dr. Modiba further confirmed that the sedative wore off more or less the time of the incident and the nurses should have been more alert that the Plaintiff might start to wake-up. According to Dr. Modiba, the nurse should have had this knowledge.

[38] Dr. Modiba also confirmed under cross-examination that he did not tell the Plaintiff or the Plaintiff's mother what happened as that was not his duty, but the duty of the nurses and the offices.

Legal Principles and the Law:

[39] The legal relationship between a medical practitioner and a patient is usually created by contract. The practitioner undertakes to render professional services and the patient undertakes (normally) to pay for services rendered.

[40] The Defendant had an obligation by contract and by delict. The Defendant had a duty of care towards the Plaintiff, being indigent, to provide proper care, and not to harm or to injure him.

[41] In order for the Plaintiff to succeed with his claim for damages, he must allege and prove

a) the contract or agreement;

b) negligent breach of the contract;

c) causation; and

d) damages.

[42] It is an implied term of the contract between medical practitioner and patient that the medical practitioner will exercise the reasonable skill and care of a practitioner in the particular field. In deciding what is reasonable, the evidence of qualified physicians is of the greatest assistance, however, what is reasonable under the circumstances is a matter for the court to decide. **(See Van Wyk v Lewis 1924 AD 438).**

[43] Expert evidence must be evaluated in accordance with the principles enunciated by the Supreme Court in **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another (1) (361/98) [2001] ZASCA 12; [2002] 1 All SA 384 (A) (13 March 2001) at paragraph 34**:-

"However, it is perhaps as well to re-emphasise that the question of reasonableness and negligence is one for the court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the court are reaching its own conclusion on the issues raised."

[44] The Supreme Court of Appeal in **Michael and Another v Linksfield Park Clinic *supra* at paragraphs 36 to 37** held as follows:-

*"**[36]**...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. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority **[1997] UKHL 46**; **[1998] AC 232** (H.L.(E.)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect. **[37]** The court is not bound to absolve a defendant from liability for allegedly*

negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached "a defensible conclusion"

[45] It was further held in **paragraph 40** of **Michael and Another v Linksfield Park Clinic *supra*** that:-

"Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express the prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of Dingley v The Chief Constable, Strathclyde Police, ***200 SC (HL) 77*** *and the warning given at 89 D-E that:*

"(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a judge may be seduced into a position where he applies to the expert evidence the standards which the expert

himself will apply to the question whether a particular thesis has been proved or disproved - instead of assessing, as a judge must do, where the balance of probabilities lies on a review of the whole of the evidence.

[46] From the documentary, as well as *viva voce* evidence before me, it is clear that there was an agreement between the Plaintiff and the medical practitioners and/or the medical staff members and nurses at Seshego Hospital.

[47] The Defendant called two witnesses who were responsible for giving various different versions. There is a version given by the professional nurse/sister Lepelele in the hospital records, a second version pleaded in the Defendant's plea, which was also put to the witnesses. A third version during evidence in chief which in summary is that the sedation wore off when the nurses did not suspect it, they heard the Plaintiff scream and rushed to his assistance where they found him in a hot shower. The Plaintiff resisted the nurses' assistance and slipped and fell. Under cross-examination Sister Lepelele however testified that the Plaintiff was standing in the bathtub with an overhead shower and he was already standing away from the water, whereafter they turned off the water and tried to get the Plaintiff out of the bathtub, but he resisted, slipped and fell which caused the lacerations to his

upper eyelid and chin. A fifth version was given by Dr. Modiba in the hospital records and as he testified in court to the effect that the Plaintiff fell into a bath with hot water.

[48] In my view, the Defendant's version that the Plaintiff got out of bed at 03h30 am on the morning of 6 November 2014, walked to the bathroom and wanted to take a shower and subsequently changed the bath tap to shower mode before opening a tap of hot water over himself, which caused him to sustain the 2nd degree burn wounds, is improbable and not true.

[49] Firstly, it is highly improbable that the Plaintiff would have remained standing in the bath under the extremely hot water and cause himself to burn. It is further highly improbable that the Plaintiff would resist assistance from the nursing staff and remain in the bath under the shower to get burned, all this whilst he was screaming. Furthermore, if one considers where the burn wounds are situated, it does not support the Defendant's version that the Plaintiff got burned under a shower – which later transpired to be a half-height shower head.

[50] Furthermore, even if the Defendant's version was probable and true, in any event, the water was too hot for human use and not safe. In addition, the Plaintiff had to stand under the boiling hot water for a considerable long time to sustain the degree

of burn wounds, at the respective places on his body as he did. However, Sister Lepelele testified that when you open the tap to the shower, you have to stand under the water or wait for a considerable long time before the water becomes warm. It is not immediately warm, let alone hot. Therefore, the Plaintiff had to stand in the shower for an even longer period than what could have been anticipated before the water turned warm and hot to such an extent to burn him.

[51] The test for negligence was formulated in the well-known case of **Kruger v Coetzee 1966 (2) SA 428 A at 430E-F** as follows:-

"For purpose of liability culpa arises if:

(a) A diligence pater familias in the position of the defendant-

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(iii) the defendant failed to take such steps."

[52] Although this is the classic formulation which has consistently been applied, the Supreme Court of Appeal restated the test as in **Mukheiber v Raath and Another 1999 (3) SA 1065 (SCA) at 1077 E -**

F by adopting the following test asproposed by **Prof. Boberg in the Law of Delict at 390**:

"For the purposes of liability culpa arises if –

(a) a reasonable person in the position of the defendant –

(i) would have foreseen harm of the general kind that actually occurred;

(ii) would have foreseen the general kind of causal sequence by which that harm occurred;

(iii) would have taken steps to guard against it, and

(b) the defendant failed to take those steps".

[53] This latter formulation involves a narrower test for foreseeability than that propounded in **Kruger v Coetzee**, *supra* by relating it to the consequences produced by the conduct in question and effectively conflating negligence and so-called "*legal causation*" in order to eliminate the problems associated with remoteness. See the judgment of **Scott JA in Sea Harvest Corporation v Duncan Dock Cold Storage 2000 (1) SA 827 (SCA) at 839.**)

[54] Essentially, the test in the **Mukheiber-case**, *supra* involves a consideration both of factual causation and of remoteness in order for *culpa* to be established. But

Scott JA stated in the **Sea Harvest case**, *supra* at **839 E – F** that he had not understood the judgment in the Mukheiber-case to have unequivocally embraced the relative theory of negligence and went on to observe that there probably can be no universally applicable formula appropriate to every case.

[55] In **Van Wyk v Lewis 1924 AD 438 at page 444, Innes CJ** said the following about the applicable test for determining whether a medical practitioner was negligent in the performance of his or her duties:-

*"it was pointed out by this court, in **Mitchell v Dixon (1914 AD p525)** that "a medical practitioner is not expected to bring to bear upon a case entrusted to him the highest possible degree of professional skill but he is bound to employ reasonable skill and care. In deciding what is reasonable, the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that general level."*

[56] It cannot be determined in the abstract whether a surgeon has or has not exhibited reasonable care and skill. The question to be answered is whether the Defendant's doctors and medical staff members acted as average surgeons and medical staff members, placed in similar circumstances, would have acted, or did

they manifestly fall short of the skill, care and judgment of the average surgeon and or medical staff members in similar circumstances.

[57] The Defendant in this matter did not tender any expert witnesses, alternatively any other evidence, to prove the contrary. In fact, Dr. Modiba, himself, testified that it should have been expected at the time of the incident that the Plaintiff would start to wake-up and confirmed that the nurses should have been alert to this fact.

[58] In my view, the Plaintiff succeeded in alleging and proving that the treatment and monitoring given to him at Seshego Hospital was sub-standard and negligent in the circumstances. Alternatively, the water used in the hospital to bath and/or shower by the patients was too hot for human consumption, of which fact the hospital staff should have reasonably been aware.

[59] In my view, in all probability the hospital did indeed have issues with water, alternatively the water system was defective. The hospital staff used an Urn to heat up or even boil the water, and failed to test the heat of the hot water before the Plaintiff was bathed or washed and he consequently got burned.

[60] It is self-evident that the burns were caused by the negligence of the staff of the Defendant in failing to properly care for the Plaintiff.

[61] I am under the circumstances, having considered the evidence and reports presented, satisfied that the Plaintiff succeeded in alleging and proving that there was a contract or agreement, there was negligent breach of the contract, causation and that he suffered damages in the consequence. The Defendant and its medical personnel did not exercise and act with the reasonable skill and care expected of a practitioner in the circumstances and therefore the Defendant was in negligent breach of the contract between patient and medical staff members of the Seshego Hospital.

[62] By virtue of all the evidence and facts placed before me, only one conclusion can be drawn and that is that the Defendant is 100% liable for the Plaintiff's proven and/or agreed damages.

QUANTUM OF DAMAGES:

[63] Both the Plaintiff and Defendant filed expert reports. Joint minutes have also been filed between all the experts.

[64] In **Phillipa Suzan van Zyl N.O. v The MEC for Health 2022 [ZAWCHC] 133 (2023) (4 July 2022) All SA 501 (WCC) at par 68, Gamble J** said the following:-

"68. A joint minute compiled by the experts has a particular status in a matter such as this. The Court a quo relied on the judgment of Rogers AJA (as he then was) for the majority in Bee which sets out that status and the approach thereto as follows.

"Effect of agreement between experts

[64] This raises the question as to the effect of an agreement recorded by experts in a joint minute. The plaintiff's counsel referred us to the judgment of Sutherland J in Thomas v BD Sarens (Pty) Ltd [2012] ZAGPJHC 161. The learned judge said that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts (para 9). Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement 'unless it does so clearly and, at the very latest, at the outset of the trial' (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-trial conference (para 12). Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the

agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare (para 13). Sutherland J's exposition has been approved in several subsequent cases including in a decision of the full court of the Gauteng Division, Pretoria, in Malema v The Road Accident Fund ***[2017] ZAGPHC 275*** *para 92."* (Footnotes omitted).

[65] Dr. JPM Pienaar and Dr. A Potgieter, as plastic and reconstructive surgeons, stated as follows in their joint minutes:-

"We hereby agree on the history and physical findings as well as proposed treatment plan of scar revision to his small facial scars. The burn scars are not amendable by surgical or medical treatment. We agree that the burn wound distribution and extend is not that of a shower (sprayed splash) injury but rather that of bath water. The time of exposure was longer than a splash type of injury. Possibility of loss of consciousness can not be ruled out."

[66] In the joint minutes between the Industrial Psychologists, Mr. P.C. Diedericks (PD) and Mr. L. Marais (LM), the experts agreed that the Plaintiff's biographical background is a matter of record as indicated in their respective reports. They agreed that at the time of the incident, the Plaintiff was working in a self-employed capacity as a Trolley Pusher. He reported different information to the experts regarding his earnings at the time of the incident. To PD he reported that he earned R180 per week (R9360 per annum) and to LM that he was uncertain about

his earnings at the time of the incident. His earnings reported to PD was between the lower quartile and median earnings of self-employed persons in the informal sector.

[67] PD and LM agreed that it would be equitable to postulate that the Plaintiff's income would have progressed steadily (straight line recommended) in real terms to a lever equivalent to the median earnings of unskilled workers in the non-corporate sector of the labour market employees (at the time of the report, R25500 per annum), to be reached at approximately age 40-45 years. According to PD, if the Plaintiff is employed in the non-corporate sector, he may also have received an annual bonus equivalent to 2 – 4 weeks' salary. According to LM it is however unlikely that he would have switched his employment, and it is postulated that he would have remained a trolley pusher.

[68] According to PD the Plaintiff would have been able to continue working until age 63 – 65, depending on the retirement policy of his employer at the time. However, according to LM, the Plaintiff would have worked until he qualified for government pension, age 60 years, health permitting. The experts however deferred to the relevant medical expert to comment on the impact the Plaintiff's overall health and HIV+ status would have on his likely retirement age.

[69] Post-morbid, PD and LM agree that, based on the overall body of expert opinion, the Plaintiff has been rendered a vulnerable and unequal competitor in the open labour market mostly form a psychological perspective as well as from a physical perspective due to this scars.

[70] PD and LM differ in regards to the Plaintiff's future income. According to PD, the Plaintiff will clearly not be an equal competitor for alternative work and his best option will be to work in a self-employed capacity, such as trolley pusher. The Plaintiff's income is however likely to be lower than what he earned at the time of the incident, given his residual pathology. If he cannot do such, or similar work in a self-employed capacity, he will probably remain unemployed.

[71] LM agrees that the Plaintiff will remain a trolley pusher and that he will earn accordingly, similar to his pre-accident earnings, and defer to factual information in this regard.

[72] Dr. Leputu and Dr. Melapi agreed in their joint minutes that pre-morbidly the Plaintiff was a 27-year old patient at Seshego Hospital, where he sustained burn wounds. His highest educational qualification is grade eight (Gr 8) and he is

employed in the informal employment sector, pushing trolleys at supermarkets. The Plaintiff has no post-school qualifications. Further, the Plaintiff is HIV+, smokes cannabis and drinks alcohol. He however had no functional impairment as a result of the aforementioned conditions or substances prior the burn injuries that he sustained while admitted at Seshego Hospital. The Plaintiff had no history of mental illness symptoms or diagnosis prior the burn wounds.

[73] Dr. Leputu and Dr. Melapi agreed that post-morbid, the Plaintiff fulfils diagnostic criteria for Post-Traumatic Stress Disorder (PTSD) and Major Depressive Disorder (MDD), which is as a result of the burn wounds that he sustained whilst admitted at Seshego Hospital. They further agree that because of the scarring from the burn wounds, the Plaintiff's self-image and confidence have been affected negatively and as a result thereof he cannot function as well as he used to prior to the burn wounds. It was agreed that both PTSD and MDD that was diagnosed in the Plaintiff, are chronic. They may follow a remitting and relapsing course.

[74] In both Dr. Leputu and Dr. Melapi's opinion, the Plaintiff requires long term treatment form both a psychiatrist and a psychologist. In respect of psychotherapy, it was agreed that each session costs between R800 and R1500. A course of psychotherapy ranges between 12 and 16 sessions. In respect of

psychiatry treatment, a first consultation with a psychiatrist ranges between R2500 and R3500. Follow up consultations range between R1000 and R1500. The Plaintiff may need about four follow up sessions per year, depending on response to treatment.

[75] In respect of medication, both Dr. Leputu and Dr. Melapi are *ad idem* that anti-depressants are used for both PTSD and MDD. An estimate cost of commonly used medication is R600 per month. There may also be additional costs if hospitalisations become necessary in future, however the cost and probabilities of hospitalisation cannot be estimated reliably at this stage.

[76] Ms. Roos and Ms. Beddingfield, the Occupational Therapists, in their joint minutes, agree that the presence of unsightly scars, anxiety, poor self-confidence and an affected self-image can be related to the injuries the Plaintiff sustained. The therapists agree that it can be seen as reasonable that the Plaintiff suffered past loss of earnings for approximately 11 months due to the injuries sustained, but they are however (in agreement) of the opinion that the Plaintiff's ability to assist customers with their trolleys have not been affected significantly by the injuries he sustained.

[77] Mrs. Roos and Ms. Bedingfield further agree that the Plaintiff's self-image is hampered by the unsightly scars he sustained. Together with the diagnosis of Adjustment disorder with mixed anxiety and depression, it could most probably affect his self-confidence and ability to present himself sufficiently during a work interview, partly affecting success when seeking alternative employment. They also agree on 16 hours Occupational Therapy Intervention, which should include psychosocial rehabilitation, for instance by means of Group Therapy to address life skills and emotional functioning, functional rehabilitation including for instance domestic participation as well as work conditioning. A case manager could then determine further rehabilitation needs.

[78] Case management for an additional 4 hours is recommended to make sure that the Plaintiff attends the recommended therapies and to manage his case. An Occupational Therapist is recommended as case manager. They further agreed that the cost involved for Occupational Therapy in South Africa at the time of the joint minutes was approximately R670.00 per hour including VAT. An additional cost of ±R475.00 per visit should be reserved for home and work visits for the travelling time and distance covered by the therapist.

[79] The therapists agree on physiotherapy and biokinetics for pain management, improved endurance and body strength, mobility maintenance as well as core strengthening. The therapists further agreed that depression and anxiety could affect work motivation and work quality, as well as quality of life and therefore recommends psychotherapy. The therapists also agreed on a consultation with a dermatologist who can provide the necessary advice on the correct treatment for the burn wound areas. They also agreed that the Plaintiff suffered loss of amenities and defer to their respective reports for more detail in this regard.

[80] Mrs. Michelle Barnard, from Quantum Actuarial Services CC, made calculations according to the postulations of the Industrial Psychologist filed on behalf of the Plaintiff, namely PC Diedericks, and the joint minutes between Diedericks and the Industrial Psychologist filed on behalf of the Defendant, L. Marais. She applied 5% contingency for past loss of income, 15% for future pre-morbid contingency and 35% post-morbid contingency (as per her instruction).

[81] The Plaintiff's Counsel however submitted that the 20% spread is a fair and reasonable percentage taking into consideration all the factors of contingency already pointed out. It was further submitted that by virtue of the disagreements

between the Industrial Psychologists and the evidence before court, a fair award for loss of earning capacity is found in Scenario 2B of the calculations.

[82] In my view, neither of the calculations reflected in the Scenario's by the Actuary are correct and a reflection of the actual loss of income. At most the Plaintiff was left without any income whatsoever, except for the disability grant he received from January 2015 to December 2015 for a period of 1 year where after he returned to his normal work of pushing trolleys. He indicated that his annual income was R9360.00 per year and he received a disability grant in the amount of R16770.00. The Plaintiff therefore was in an advantaged position in that his disability grant received was in actual fact more than his total income per annum. It can therefore not be said that he suffered a loss of past income. It should also be borne in mind that the Plaintiff only stopped working as a trolley pusher during approximately 2020/2021 (6/7 years after the incident).

[83] In respect of future loss of income, the Plaintiff appears to be adversely impacted by the residual psychological pathology, as well as the serious and permanent disfigurement arising from the scarring sustained in this incident and his overall residual pathology will likely have an adverse impact on his drive and motivation to work and this may explain his unemployment since 2020/2021 to date. It should

however be borne in mind that during evidence in Chief, the Plaintiff testified that he cannot work as he used to because he gets tired. This may also be as a result of his HIV+ status.

[84] It should further be borne in mind that with therapy and medication, the Plaintiff's self-esteem and depression can become better or even return to normal. Having considered the above facts in respect of the Plaintiff's claim for future loss of income, I am of the view that the Plaintiff will suffer some loss of future income, however I am of the view that the Plaintiff's income should only be calculated to the age of 60 (being the age he will qualify for a state pension) and not 64, considering the fact that Plaintiff was diagnosed to be HIV+, suffered from health issues at the time of his admission, his highest grade is only Grade 8 and he was a trolley pusher up to or about 2020/2021 whereafter he did piece jobs as a gardener. In addition, I am of the view that a contingency of 35% pre-morbid should be applied and not just only 15% and 40% post-morbid instead of only 35% post-morbid. In the result, I am of a view that a future loss of income in the amount of R223279-00 is reasonable.

[85] In respect of future medical expenses, I am of the view that the estimation and calculations made by the Actuary are indeed reasonable and the calculation is as a

result of the estimations by the experts in their joint minutes for costs. In the result an amount of R416369.00 is awarded for future medical expenses.

[86] This then leaves the issue of general damages and enjoyment of amenities of life. It is clear that the Plaintiff suffered emotional trauma and still suffers from depression, over and above the burn wounds, as well as permanent disfigurement and scarring as a result of the incident.

[87] In **M obo Thibedi and Another (7202/2008) [2019] ZAGPPHC 128 (24 April 2019)**, the Plaintiff sustained scars on his forehead, hairline and above the eyelid. The Plaintiff was awarded R450 000.00.

[88] In **Mpulwane E v Road Accident Fund (4661/2016) [2019] ZAGPPHC 563 (3 October 2019)**, the Plaintiff sustained burn wounds on her neck, both legs, buttocks, both feet, right forearm and hand which covered 45% of her body. She was awarded R700 000.00.

[89] In **Mashego v Road Accident Fund (2120/2014) [2018] ZAGPPHC 539 (13 June 2018)**, the Plaintiff sustained burn wounds and scars over her chest and belly. The court awarded R500 000.00.

[90] Having regard to these cases, as well as inflation on the amounts awarded, and further having regard to the injuries the Plaintiff sustained and more in particular the circumstances under which the injuries were sustained, as well as the fact that the Plaintiff will be disfigured and scarred for the rest of his life, I am of the view that a reasonable amount to be awarded for general damages, inclusive of loss of amenities of life would be R650 000.00.

[91] It is trite law that costs normally follow the result. In the present matter there is no reason to deviate from this general rule. In the result the Defendant is to pay the costs of suit on a party and party scale, including all costs previously reserved, as well as costs of expert witnesses, consultations and reports where such costs have been incurred.

[92] I therefore make the following order:-

1. The Merits are awarded 100% in favour of the Plaintiff.

2. The Defendant is ordered to pay the Plaintiff an amount of **R1289648.00** (One Million Two Hundred Eighty Nine Thousand Six Hundred Forty Eight Rand), which amount is calculated as follows:-

a.	Future Medical and Related Expenses	R416 369.00
b.	Past and Future Loss of Earnings	R223 279.00
c.	General Damages and Enjoyment of Amenities of Life	R650 00.00

3. Interest on the amount of R1289648.00 at the prescribed interest rate per annum, as at the time of judgment, calculated fourteen days from date of judgment to date of payment.

4. Cost of suit on a party and party scale, which costs shall include, but not be limited to all expert costs, including consultations, drafting of reports and joint minutes, and reservation costs, where applicable.

[redacted]

M. NAUDÉ-ODENDAAL

JUDGE OF

THE HIGH COURT,

LIMPOPO DIVISION,

POLOKWANE.

APPEARANCES:

HEARD ON:	**6 & 7 NOVEMBER 2023**
HEADS OF ARGUMENT SUBMITTED IN CLOSING ARGUMENT:	**28 NOVEMBER 2023**
JUDGMENT DELIVERED ON:	**13 MARCH 2024**

For the Plaintiff:	Adv. M. De Meyer
Instructed by:	Oosthuizen & Steyn Attorneys Polokwane, marieadvlaw@gmail.com christine@osattorneys.co.za
For the Defendant:	Adv. EK Tsatsi SC
Instructed by:	The State Attorney Polokwane Ref:753/15/MV