OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(Gauteng Division, Pretoria)

Case no: 47322/2017

Heard on: 24 January 2025

Judgment handed down: 11 April 2025

(1) REPORTABLE: ~~YES~~ / NO

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

(3) REVISED.

DATE : 11 April 2025

SIGNATURE

In the matter between

N[...] O[...] R[...] **1st Plaintiff**

(ID: 1[…])

Assisted herein by her mother and natural

Guardian M[...] I[...] R[...]

M[...] I[...] R[...] **2nd Plaintiff**

And

The Member of The Executive Council For Health, Gauteng **Defendant**

JUDGMENT

STRIJDOM, J

1. The second plaintiff in this matter instituted legal proceedings against the defendant for recovery of damages in her personal capacity and in her representative capacity on behalf of her minor child being the first plaintiff.

2. The defendant is being sued in her capacity as the executive authority responsible for the control and management of the Department of Health and its facilities including hospitals and clinics in the Province of Gauteng.

3. The plaintiff's claim arose from the negligence of the doctors and/or nurses and/or staff involved in the care and management of the first plaintiff during the time of her delivery or birth at Mamelodi Hospital during the period 23 August 2015 and 24 August 2015, when the delivery was completed.

4. The issue of liability has been disposed of 100% in favour of the plaintiffs. The only remaining issue between the parties pertains to the amount of reasonable compensation that should be awarded to them.

5. The first plaintiff's claim for loss of earnings and general damages has been settled between the parties and an amount of R3 430 705 has been awarded to the first plaintiff.[1]

[1] Caselines: Section 2 Pocket 9 page 2-34 (Court order)

6. In respect of her future medical expenses the first plaintiff has been awarded an interim amount of R1 890 466,22 by the Court.[2] The balance of the amount is due for adjudication by this Court.

7. The second plaintiff, in her personal capacity, claims future medical expenses general damages for emotional shock, trauma and loss of amenities of life and past and future loss of earnings.

8. The plaintiffs have appointed various experts to assess the extent of injuries and resultant sequalae therefrom, namely:

    8.1 Dr Izak van Heerden (Urologist);
    8.2 Ms Lila Bruk (Dietician);
    8.3 Dr Karin Levin (Speech Therapist & Audiologist);
    8.4 Dr CF Heffer (Dental Surgeon);
    8.5 Ms Christel Botes (Physiotherapist);
    8.6 Mr Marco Du Plooy (Orthotist & Prosthetist);
    8.7 Dr M Van der Ryst (Educational Psychologist);
    8.8 Ms Anneke Greef (Occupational Therapist);
    8.9 Mr Deon Rademeyer (Mobility Consultant);
    8.10 Dr Daren Stroler (Ophthalmic Surgeon);
    8.11 Dr Tony Birrell (Orthopeadic Surgeon);
    8.12 Mr James Brummer (Architect);
    8.13 Mr Leon Roper (Clinical & Neuropsychologist);
    8.14 Dr Mirriam Close (Specialist Psychiatrist);
    8.15 Ms N Kotze (Industrial Psychologist);
    8.16 Prof PA Cooper (Paediatrician & Neonatologist);
    8.17 Mr Kobus Pretorius (Actuary).

[2] Order for Interim Payment (Caselines: Section 2 Pocket 10 page 57 to 61.)

9. The defendant has not filed any expert reports to deal with the issue of quantum.

10. At the commencement of the proceedings on 20 January 2025 the plaintiffs brought an application in terms of Rule 38(2) to dispense with the need to lead oral evidence of their expert witnesses. The application was granted, and the medico legal reports of the plaintiffs were admitted as evidence to be used to prove their quantum. The plaintiffs closed their case sequel to the order of the Court and the defendant closed its case without presenting any evidence.

11. It was submitted by the defendant that the facts and findings of the plaintiff's experts are a matter of record and what they have opined as the injuries of the first plaintiff and what her medical needs in the future are, is not contested. Annexure A to the plaintiffs' heads of argument which summarised the necessary future medical expenses of the first plaintiff is also not in dispute.

12. The defendant's major contention on the expert reports is restricted to the report of Professor Cooper in so far as it pertains to the factual basis for determining the life expectancy of the first plaintiff. This contention was raised in consideration of the report of Dr Birrell, the Orthopaedic Surgeon and the report of the Actuary.

13. In respect of the second plaintiff, the parties are in agreement that the defendant shall pay the second plaintiff an amount of R1 521 655 for Loss of Earnings and R54 368,00 for Future Medical Expenses.

<u>The First Plaintiff's Claim (Future Medical Expenses)</u>

14. It is common cause that the calculations that have been compiled on behalf of the first plaintiff in respect of her future medical and other needs have been based on the child's life expectancy as opined by Professor Cooper. The latter has opined that the life expectancy is 31,4 years. The contentious issue in this regard is what informs this life expectancy age.

15. It is further common cause that Professor Cooper did not personally evaluate the first plaintiff.

16. Cooper's report has been compiled for the purposes of opining on life expectancy of the first plaintiff.

17. Cooper opines that the first plaintiff should attain an age of at least 31,4 years old, which establishes a need for care and ancillary support to have to be accommodated for a period of at least another 20 years.[3]

18. Cooper has premised her contentions on the following reasoning:[4]

> "2.3 The latest life expectancy tables from Stats SA for the South African population correspond most closely to Koch's Life Table 3. This table will be used to calculate life expectancy.
>
> 2.4 I have placed N[...] midway between category "lifts head but not chest in prone" and "lifts head and chest, partial rolling" as well as fed by others in table 11 of the Brooks paper. This gives an 8.2 – year-old female an 89% chance of reaching the age of 15 years.
>
> 2.5 In table 111 of that paper a 15 – year-old female able to lift head or chest in prone had a life expectancy that was 35% of the US general population.
>
> 2.6 Negative factors for life expectancy in this case are multiple fixed contractures, a weight on the 20th percentile below which there is an increased mortality and the significant limitation to safety when being fed possibly needing a gastostomy feeding tube. A negative correction of 7,5% will be made for these factors.
>
> 2.7 Applying these data to Koch's table 3 gives a life expectancy of an additional "23,2 years from her current age."

[3] Caselines: 9-614 to 616
[4] Caselines: 9-615 to 616

19. Prof Cooper concluded that “On the basis of the published data from California and applying these to South African life expectancies, N[...] has life expectancy of an additional 23,2 years from her current age of 8,2 years, i.e. to the age of 31,4 years.

20. Dr Birrell (Orthopaedic Surgeon) states as follows about the issue of the plaintiff’s ability to lift her head:[5]

    “Future surgical treatment for this child is a matter of not only practicability but also a philosophy. To what extent does one go in order to correct deformities. This child, for example cannot sit, walk or stand, and has difficulty at the moment in even holding up her own head. There is clear spasticity in the upper and lower limbs.”

21. In his addendum report, Dr Birrell reiterates that the child cannot support her neck for more than a few seconds before it flops.[6]

22. The first plaintiff is opined by Dr Birrell to have clear diagnosis of cerebral palsy, which has manifested in her inability to walk, raise her neck, presenting upper limb spasticity, hip flexion, flexed knees and feet stuck in a 60-degree equines, which cannot be corrected[7].

23. In his addendum report, Dr Birrell reiterates the following:[8]

    “As noted in my original report, the child cannot sit, walk or stand or even hold up her own head and no amount of surgery will improve this.”

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[5] Caselines: 9-362 para 14
[6] Caselines: 9-427
[7] Caselines: 9-358 to 360
[8] Caselines: 9-431

24. It was submitted by the defendant that the observation made by Dr Birrell cannot be ignored and should have been taken into consideration by Prof Cooper because he relies on this crucial issue to make a determination as to the life expectancy of the fist plaintiff. It was argued by the defendant that the Court should apply a further 50% contingency.

25. In my view, based on the opinion and observations of Dr Birrell, the life expectancy of the minor child, following the methodology used by Prof Cooper, should be less than what Prof Cooper has opined to be.

26. This has influenced the actuarial calculations since they are based on a scenario where the life expectancy is informed by the conclusion of Prof Cooper.

27. The actuary stated as a concern which needed to be clarified by Prof Cooper:[9]

> "Note that Prof Cooper also applied a negative correction of 7,5% for various negative factors. It is not clear how Prof. Cooper allowed for same, and we defer to the clarification in this regard. Prof. Cooper concluded that N[...] has a life expectancy of an additional 23,2 years (i.e. to the age of 31,4 years). We therefore allow for an additional mortality, loading to reconcile Prof Cooper's conclusion."

28. Instead of seeking the clarity so that the calculations can be made, the actuary proceeds to compile the calculations and still relies on the conclusion reached by Prof Cooper which – he says still needs to be clarified.

29. It was argued by the plaintiffs' counsel that Prof Cooper relied on what was stated in the reports of Ms Anneke Greef (Occupational Therapist), Dr J Reid (Neurologist), Ms C Botes (Physiotherapist and the report of Dr Birrel to form his

[9] Caselines: 9-626

opinion. However, the opinion of Prof Cooper is not reconcilable with the observations of Dr Birrell who personally evaluated the first plaintiff. It was argued by the Defendant that the court should apply a further 50% contingency.

30. I conclude that the calculations in respect of the first plaintiff's future medical expenses and other associated needs are based on an incorrect factual basis and has resulted in them been overstated by the actuary. In my view it would be fair and reasonable to apply a higher contingency.

31. In *Southern Insurance Association v Bailey NO*[10] it was stated by Nicolas J at 116-117 that:

"Where the method of actuarial calculation is adopted, it does not mean that the trial Judge, is 'tied by inexorable actuarial calculations'. He has 'a large discretion to award what he considers right' (per Holmes JA in *legal Assurance Company Limited v Botes* 1963 (1) SA 608 (A) at 61,4F). One of the elements in exercising that discretion is the making of a discount for 'contingencies' of the 'vicissitudes of life'. These include such matters as the possibility that the plaintiff may in the result have less than a 'normal' expectation of life; and that he may experience periods of unemployment by reason of incapacity due to illness or accident, or to labour unrest or general economic conditions. The amount of any discount may vary, depending upon the circumstances of the case. See also *Van der Plaats v South African Mutual Fire & General Insurance Company Limited* 1980 (3) SA 105 (A) at 114-5. The rate of the discount cannot of course be assessed on any logical basis. The assessment must be largely arbitrary and must depend upon the trial Judge's impression of the case."

32. I am of the view that in the circumstances of this case a further 30% contingency in respect of future medical expenses will be fair and reasonable. Such a

[10] 1984 (1) SA 98 (A)

contingency takes into account a probable shorter life expectancy of 31,4 years as postulated by Prof Cooper.

Second Plaintiff's Claim

General Damages

33. It was submitted by counsel for the second plaintiff that an amount of R400 000-00 must be awarded. The defendant argued that an amount of R250 000,00 for general damages would be fair and reasonable.

34. The principles of quantification has been set out in a variety of matters including *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 274, *Sigournay v Gillbanks*, 1960 (2) SA 552 (A) on 572 C, *Pitt v Economic Insurance Company Ltd* 1957 (3) SA 284 (D) E-F, the SCA judgment in *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA).

35. The purpose of an award for general damages is to compensate a claimant for the pain, suffering, discomfort and loss of amenities of life to which he or she has been subjected as a result of the particular injuries that were sustained.

36. Although the determination of an appropriate amount in this regard is largely a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases.

37. In assessment of the second plaintiff, Dr Close[11](Specialist Psychiatrist) notes the severe trauma suffered by her, following the birth of the first plaintiff and which sequalae still persists at present.

[11] Caselines: 9-600 to 611

38. The second plaintiff has suffered a reduction in her amenities to life as she no longer participates socially as she did, whilst further she is noted to present with an alteration in her mood, as well as temperament.[12]

39. The second plaintiff suffer from permanent tiredness and has depressive thoughts of a suicidal nature.[13]

40. Close describes the second plaintiff as having anxiety, which seemingly is compounded through post-traumatic stress symptoms.[14]

41. At present the second plaintiff is aloaf and struggles with her energy levels, which has led to her increased weight and has hampered her relationship with her minor children. [15]

42. The second plaintiff is opined to present with the following fallout, by Dr Close, namely[16]:

> "Miss R[...] does present with residual mood symptoms. As per the Diagnostic and Statistical Manual -5 (DSM-5), which is used for diagnosis in psychiatry, Major Depressive Disorder is a Mood Disorder …
> Although there has been acceptance of the current situation described, there has been an impact in interpersonal and social functioning present. There has been a change in interaction and Ms R[...] has been described as more moody and less sociable. There is noted fatigue present: anxiety as to her children's futures are noted and occasional panic attacks described."

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[12] Caselines: 9-605
[13] Caselines: 9-605
[14] Caselines: 9-605 to 606
[15] Caselines: 9-606
[16] Caselines: 9-609 to 610

43. In MCN obo MBM v MEC for Health, Gauteng Province[17] the Court awarded R300 000,00 to the mother as general damages. The minor suffers from a mixed type of cerebral palsy, predominantly dystonic with a super imposed hemiplegia (paralysis of one side of the body.)

44. In Me obo NPM v MEC for Health, Gauteng[18] an amount of R350 000,00, (current value about R400 000,00) was awarded. The injuries sustained by the minor included cerebral palsy with severe limitations; immobility to perform and enjoy normal activities of daily living and life amenities, neuropsychiatric moderate mental retardation is applicable but where the minor is educable but to a limited degree and where she can feel emotional pain and suffering.

45. In MNK and Another v MEC for Health, Gauteng Province[19]. (Awarded R350 000,00 current value R385 428,98), the child suffered from a brain injury manifesting as cerebral palsy, mental retardation, spastic quadriplegia, microcephaly, severe developmental delay, permanent neuro-physical and intellectual impairment.

46. Having considered the expert reports and having regard to the relevant case law I am of the view that an amount of R400 000,00 would be fair and reasonable compensation for general damages.

47. In the result, the following order is made:

The draft order “X” is made an order.

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[17] (2017/9252) [2023] ZAGP JHC 66 (26 January 2023)
[18] (9257/2017 [2022] ZAGP JHC 29 (21 January 2022)
[19] (9407/2017 [2022] ZA GP JHC 175 (25 March 2022)

JJ STRIJDOM

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Appearances:

For the plaintiffs:	Adv SJ Myburgh SC and Adv JA Steyn
Instructed by:	Vorster & Brandt Inc
For the defendant:	Adv D Mosoma
Instructed by:	The State Attorney