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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MTHATHA)**

Case No.: 1433/2015

Reportable	Yes / No
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In the matter between:

S[...] M[...]

Plaintiff

and

MEC FOR HEALTH, EASTERN CAPE

Defendant

JUDGMENT

Cengani-Mbakaza AJ

Introduction

[1] In 2015 the plaintiff instituted action against the defendant in her personal and representative capacities, seeking damages arising from the defendant's negligent treatment of her daughter S [...], born on 1 October 2004. On 18 September 2018, the defendant conceded the merits.

[2] The quantum of the plaintiff's claim in her personal capacity for loss of past and future income was separated. This is the issue for determination before this court. Allied to that, the court must decide whether the plaintiff is entitled to an amount of R9,658,088, if it is found in her favour.

The pleadings

[3] In her particulars of claim, the plaintiff avers that had it not been for the defendant's negligent treatment of her child, she would have completed her diploma studies which she commenced in 2009, at the end of 2012 at age 26. She anticipates that she would have entered labour market in Human Resources field in accordance with Dr Gideon De Kock's projections (Dr De Kock), an industrial psychologist.

[4] Further to the plaintiff's case considering the pre-morbid scenario, her career was delayed, and she would only be able to start her career once the funding became available. Initially, it was envisaged that she would start her career in 2024. It was further anticipated that in January 2029 at the age of 43 years she would probably procure permanent work at the lower quartile of Paterson C1, earning R445,000. It was further projected that through further education, in in-house training and job changes she is likely to have progressed to a career ceiling at the mean level of Paterson C1, being R505,000. These scenarios were later evolved during the presentation of oral evidence.

[5] To fully comprehend the defendant's case, it is apposite to outline the plaintiff's timeline of events and academic studies as follows:

TIMELINE	EVENT
3 September 1986	Plaintiff's date of birth
2004	Plaintiff in grade 11, fell pregnant and left school. Plaintiff's child S[...] born on 1 October 2004

2005-December 2006	S[...] diagnosed with TB spine
2006	Plaintiff passed grade 11
2007	Plaintiff passed grade 12
2008	Plaintiff gave birth to a second child, B[...] on 1 April 2008
2009	Plaintiff started studies at Walter Sisulu University, enrolled for diploma in Human Recourse Management (3-year course)
2010	Second year of studies S[...] again diagnosed with TB of the spine
2011	Third year of studies Child's condition deteriorated, she was fully paralysed in August 2011.
2012	Fourth year of studies. Plaintiff repeated certain courses.
2013	Fifth year of studies. Enrolled for three final courses in order to complete the diploma but failed one course.
2014	National Student Financial Aid Scheme (NSFAS) discontinued to fund the plaintiff. She could not complete her diploma
2017	All the courses that the plaintiff previously obtained were invalidated for failure of completing the diploma within the stipulated time frames.

[6] The defendant therefore avers that the plaintiff's delay in completing her studies was not caused by the defendant's negligent treatment of S[...] and therefore is not entitled to any loss of income. It was ventilated during oral evidence that there was no reason for her to drop off school in 2014 and 2015 and further no reason for

her not to study in 2017. The alternative to the defendant's case is that the plaintiff contributed to the delay in completion of her studies in that when the child was placed at the boarding school, the plaintiff removed her in March 2013 after a period of two months without any cause.

The evidence

[7] The plaintiff's timeline of events is captured at paragraph 5 of this judgment. However, to put issues into perspective it is crucial to summarise the reasons why the plaintiff could not timely complete her educational qualifications according to her own version. In 2009 she enrolled for five courses and passed three of those. The failure of the two courses, so she testified was attributed to the fact that unlike in the high school environment where she previously studied, she was unfamiliar with the nature of the studies to which she was exposed.

[8] When S[...] took ill in 2009, she could not focus well on her studies. In 2011 she enrolled for four courses and only passed one. The plaintiff testified that she had to focus on attending S[...]’s illness by frequently visiting hospitals. When visiting hospitals, she had to stand on long queues. This consumed a lot of time for her to study, so she explained.

[9] When the child's situation deteriorated especially when she could not walk, she had to manage both. Despite the difficulties she endured, in 2012 she registered for three courses and passed all of them. In 2013 when she enrolled three of her courses, she passed two courses because she had to focus on also finding a boarding school for S [...]. Owing to the fact that the child developed bed sores in the boarding school, she had to remove her. She looked after the child at home and simultaneously focused on her studies which made her not to cope.

[10] The plaintiff explained that the reason she dropped out of school in 2014 and 2015 was because NSFAS could not fund her, having exhausted her five-year funding limit. According to NSFAS rules, funding is only available for a qualification within five-year-period, and student who exceeds the timeline without completing their qualification become ineligible.

[11] The plaintiff testified that despite all these difficulties, she made other attempts to study in 2016. Her mother funded her registration but later stopped due to unavailability of funds. Her mother could not pay for her and S [...]’s funds. This led her to go to Gqeberha and take care of S [...] who was also studying.

[12] The plaintiff further testified that she was unsuccessful in obtaining jobs, even temporary ones. Had she obtained her diploma in 2012 or the worst in 2013, she would have pursued her career by further education and training. She planned to study a degree in Education at the University and should this claim succeeds she will pursue her studies as such. The birth of her second born, so she explained, did not contribute to the delay in her studies because he was always a healthy child and a daycare scholar.

[13] Dr Gedeon De Kock interviewed the plaintiff on 04 June 2024. Based on his interview, he opined that the plaintiff had tenacity to complete her diploma in at least four years, consistent with the pace of approximately 50% of the students. Furthermore, he concluded that the defendant’s negligent treatment of S[...] immensely contributed to the plaintiff’s delay in completion of her studies. He explained that the negligent treatment of the plaintiff’s child changed the plaintiff’s life not only temporarily but forever. The plaintiff had to suddenly deal with a six-year-old child that was healthy up to a point to suddenly become ill and the defendant not showing any sense of urgency in treating the child, ending up with her being paralysed.

[14] This had an enormous impact on her person life, her own well-being, psyche, and her own performance, so he explained. Dr De Kock explained that the plaintiff could not neglect her motherly roles. According to him, the plaintiff’s high school failures were not relevant to the issues at hand. He opined that the fact that the plaintiff got news in 2011 that her child will be paralysed forever, a month before her exams, had an enormous impact on her state of mind and her readiness to engage for final examinations. Therefore, it was not a surprise that she only passed one subject.

[15] In his testimony, Dr De Kock referenced to job grading systems and actuarial reports. In terms of his projections, individuals with tertiary qualifications typically fall within the C band, while graduates often start with B band and progress to skilled level within C. Dr De Kock projected that the plaintiff starting at 50% of the B2 salary level, would likely undergo a process of job seeking and temporary employment before advancing to B4, with a salary of R267 000 per annum, representing the lower level of B4, once she secures permanent employment.

[16] During his grading, he moved the plaintiff to C5 band which is R781 000 per annum at age 45. According to Dr De Kock, age 45 is the age that people normally plateau in terms of their careers. In this case he provided for inflation increases per annum. Dr De Kock indicated that higher than normal contingencies (20%) should be applied in this case. The plaintiff will further her tertiary studies through the settlement of this claim, so he explained.

[17] On 08 to 15 June 2022, Dr De Kock and his colleague, Dr Althea Van Der Merwe (Dr Van Der Merwe) who is the defendant's expert concluded their first joint minute. At the time, the defendant's expert agreed that there was indeed a loss attributable to the negligent treatment of the plaintiff's child. The defendant's expert further opined that the plaintiff would work half a day hence she gave her a projection of 50% of those earnings. Dr De Kock further opined that from ages 30 to 45 the plaintiff would progress steadily from B5 to C5. On the other hand, Dr Van Der Merwe had only moved the plaintiff to C1 which is one notch. According to Dr De Kock, a person with an NQF6 qualification would fall into the skilled category which is C1-C5. The job grading skills may even proceed to category D.

[18] Further to his testimony, Dr De Kock referenced to the second joint minute which was between himself and Dr Van Der Merwe. According to the second joint minute, they agreed on the post-morbid scenario. They further agreed that higher contingencies should be applied in this case. According to Dr De Kock's projection, the plaintiff will enter a labour market as an older person with no experience and may take longer to find a permanent employment. With this evidence, the plaintiff closed her case.

[19] The defendant called the evidence of Dr Van Der Merwe, and her evidence can be summarised as follows: On 07 October 2021, she compiled a report on behalf of the defendant. She did another report on behalf of the plaintiff on 2 February 2022. According to her assessment, she considered that had it not been the illness of the plaintiff's daughter, the plaintiff would have timely completed her diploma. She then concluded that there was a delay in plaintiff's career path for a period of 10 years which would have been occasioned by loss.

[20] She confirmed to have concluded a joint minute with the plaintiff's expert. In the joint minute she repeatedly recorded that there was a delay in the plaintiff's career path which due to the illness of the child had occasioned the plaintiff a loss. When she was preparing for a trial, she felt that she needed more information. Following that, she saw the plaintiff again and prepared an addendum dated 03 March 2023 (the second report). In the second report she opined that the negligent treatment of the plaintiff's child did not result in the plaintiff's delay in completion of her studies and consequently did not cause any loss to the plaintiff.

[21] When asked to explain the change in her reports, she testified that on further investigation she noted that in 2009, before the child's injury the plaintiff had failed two subjects. When the child was ill, the plaintiff had the support of the hospitals, the social worker, and the family carer. In addition, so she explained, the plaintiff removed the child from school and took care of her. Furthermore, the plaintiff was funded by NSFAS which would in exceptional circumstances grant her a permission to study for even a fifth year. She confirmed the agreements and disagreements she had with Dr De Kock in the joint minutes. With this evidence, the defendant closed its case.

The legal framework

[22] In civil proceedings the plaintiff bears *onus* to prove her case on a balance of probabilities. The term '*onus*' should be used in the original sense referring to the

ultimate burden of proof on the plaintiff to satisfy the court of her entitlement to succeed in her case rather than merely the duty to counter the defendant's case.¹

[23] In *Opelt v Department of Health, Western Cape*,² a case that I was referred to by Mr Mtshabe SC on behalf of the defendant, the Constitutional Court (CC) outlined the general approach to be adopted in medical negligence cases, particularly where conflicting expert opinions arise. The CC referenced to *Linksfeld*³ and held:

'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's reaching its of own conclusion on the issues raised...' [emphasis added]

Discussion

[24] Both parties submitted heads of argument which this court considered in preparing its judgment. Mr Schoeman SC, counsel for the plaintiff argued that the plaintiff was a credible witness and therefore has proved her case on a balance of probabilities. He further argued that Dr De Kock's opinion should be accepted and that of Dr Van Der Merwe be rejected on the basis of contradictions she made.

[25] Conversely, Mr Mtshabe SC argued that the plaintiff's decision to carry over courses from previous years to subsequent years was unrelated to the defendant's negligent treatment of her child. Even if the child's injury had affected the plaintiff's studies, there was no evidence to support this claim. Counsel referenced to *NK v Member of the Executive Council for Health, Eastern Cape*⁴ (NK). He contended that expert testimony such as from an educational or clinical psychologist was

¹ Pillay v Krishna 1946 AD at 952.

² 2016 (1) SA 325 (CC), 2015 (12) BCLR 1471 (CC) (14 October 2015) at para 36.

³ Michael and Another v Linsfield Park Clinic (Pty)(Ltd) and Another (1) (361/98) [2001] ZASCA 12; [2002] 1 All SA 384 (A) (13 March 2001).

⁴ (502/2017) [2023] ZAECBHC 24.

necessary to establish the impact of shock and trauma on the plaintiff's academic performance, as the plaintiff herself is not an expert.

[26] With these principles in mind, I will now proceed to apply the analytical process to the facts of this particular case. Although the defendant's expert Dr Van Der Merwe acknowledged contradictions between her first and second reports, she failed to adequately justify her second opinion, despite conceding that opinions should be based on facts. During cross-examination, she made several crucial concessions, including:

- (a) The plaintiff's child paralysis impacted her studies; the time spent caring for the child delayed her studies;
- (b) The plaintiff's educational failures could be attributed to her child's illness and her caregiving role, including standing in hospital long queues;
- (c) And that the plaintiff's role in caring for her sick child must have had both physical and emotional impacts;
- (d) She further conceded that the plaintiff had to play various roles, and due to her experiences, she could not pass all her subjects.

[27] I acknowledge all the shortcomings in Dr Van Der Merwe's testimony. However, what was stated in *AM and Another v MEC, Health, Western Cape*⁵ finds relevance in this case. The court per Wallis JA (with Swain, Mokgohloa and Dlodlo JJA concurring) held :

'[21] The opinions of expert witnesses involve the drawing of inference from the facts. The inferences must be reasonably capable of being drawn from those facts. If they are tenuous, or far-fetched they cannot form the foundation for the court to make any findings of fact. Furthermore, in any process of reasoning the drawing of inferences from the facts must be based on the

⁵ (1258/2018) [2020] ZASCA 89, 2021 (3) SA 337 (SCA) (31 July 2020).

admitted or proven facts and not a matter of speculation. As Lord Wright said in his speech in *Caswell v Powell Duffryn Associated Collieries Ltd*:

‘Inference must be carefully distinguished from speculation. There can be no inference unless there are objective facts from which the inference to infer the other facts which it is sought to establish...But if there are no positive proved facts from which the inference can be made, the method of inference and what is left is mere speculation or conjecture.’ [footnotes omitted].

[28] In this instance, when Dr Van Der Merwe prepared the first report which motivated her to make certain agreements with Dr De Kock, she had already considered all the circumstances surrounding the plaintiff’s case. There was no new information that could have motivated her to change her initial position. Therefore, I reject the second report dated 3 March 2023 on the basis that it was insufficiently motivated.

[29] On the other hand, it would be a wrong approach to entirely reject Dr Van Der Merwe’s evidence based on credibility concerns, as suggested by Mr Schoeman SC. It must be acknowledged that although testifying for the defendant, she re-affirmed her initial opinion that the plaintiff’s academic progress was impacted by the defendant’s negligent treatment of her child.

[30] Notwithstanding the fact that the plaintiff was not a perfect witness when viewed in isolation, her evidence made logical sense when considered in the context of the entire case. Most of the facts presented by the plaintiff regarding the timeline of events and her experiences in caring for her child during this difficult journey are common cause. In my view, both experts strengthened the reliability of the plaintiff’s evidence to a great extent.

[31] Therefore, in the overall scheme of things, the court is faced with the evidence of two industrial psychologists who agreed with the plaintiff’s version that the defendant’s negligent treatment of the child significantly harmed the timely completion of her studies. The question arises whether the veracity of their evidence

is questionable given their specialisation as industrial psychologists rather than educational or clinical psychologists.

[32] The defendant's challenge to Dr De Kock's opinion based on speciality is startling, given that he also called Dr De Van Der Merwe, an industrial psychologist, and a colleague of De Kock to rebut his opinion. If his approach were legally valid in this regard, one would expect him to have called a clinical or educational psychologist to rebut Dr De Kock's stance. In my analysis, after Dr Van Der Merwe made crucial concessions, the defendant opted to deem the industrial psychologists' opinions irrelevant. This approach is not supported by the circumstances of this case.

[33] Therefore, there is no legal or factual basis to discount the evidence of the two psychologists especially where they agree. As experts in the field of psychology, they provided the court with general knowledge concerning their discipline. Their opinions remain relevant, and their credentials were never placed in dispute. The information they provided was necessary to assist the court, which it did rather than usurping its function.

[34] Furthermore, the plaintiff's case is distinguishable from *NK*⁶, a case that I was referred to by the defendant's counsel. In *NK*, the court criticised the plaintiff's reliance on the expert opinion of a gynaecologist regarding psychological trauma and depression emanating from the birth of her brain damaged child, noting that the expert lacked expertise in psychology. In contrast, the current case focuses on delay in completing studies caused by the defendant's negligent treatment of the plaintiff's child. The plaintiff did not testify that she suffered from depression or psychological trauma.

[35] Therefore, the evidence before this court is sufficient to prove on a balance of probabilities that the defendant's negligent treatment of the plaintiff's child delayed the plaintiff's academic progress. Given Dr Van Der Merwe's significant concessions,

⁶ Fn 4 *supra*.

this fact remains uncontroverted, and the defendant's plea of contributory delay is unfounded.

[36] The next issue is the quantification of loss of earnings. Mr Schoeman SC submitted that the court would consider the actuary's calculations of the plaintiff's loss dated 03 May 2024. He referenced to a plethora of authorities and prayed that regarding the pre-morbid scenario, the court should apply 5% which is the normal contingency and 15% in respect of the past and future loss of income. In respect of post-morbid scenario, so he submitted, the court would apply higher contingencies as per the testimony of Dr De Kock, consequently contingency of 35% in respect of future loss of earnings should be applied.

[37] Conversely, Mr Mtshabe SC argued that the court cannot grant the proposed figures on page 29 of the plaintiff's head of argument which are derived from an actuarial report dated 3 May 2024 as they contradict the plaintiff's pleaded case. Furthermore, there is no evidence from either the plaintiff or De Kock justifying the R9,658,088 award, as his evidence pertains to a scenario where a person would work as a human resource personnel member until retirement. The plaintiff could have called the actuary to justify her calculations, so he argued.

[38] The legal position is that an enquiry into the damages for loss of earnings is to its nature speculative because it involves a prediction as to the future without the benefit of crystal balls, soothsayers, augers or oracles. All the court can do is to make an estimate, which is often a very rough estimate of the present value of a loss.⁷

[39] When determining a suitable contingency allowance, some subjective judgment is unavoidable, as predicting the future is not a judicial skill. This proposition was supported by Margo J in *Goodall v President Insurance Co Ltd*⁸, where he held:

⁷ Southern Insurance Association Ltd v Bailey NO 1984(1) SA 98.

⁸ 1978(1) SA 389 (W) at 392H-393A.

‘In the assessment of a proper allowance for contingencies arbitrary considerations must inevitably play a part, for the art or science of foretelling the future so confidently practised by ancient prophets and soothsayers, and by modern authors of certain type of almanack, is not numbered among the qualification of a judicial office.’

[40] Although the defendant’s counsel contested the calculations of the actuary dated 3 May 2024, he provided no updated recommendations or alternatives to assist the court in determining a suitable award. Furthermore, regarding the possible award, he cited no authorities for the court’s consideration. Notably, Dr Van Der Merwe conceded that her projection of the plaintiff working half-a-day was illogical. Therefore, no reliance can be placed in her projections.

[41] After reviewing the current actuarial calculations dated 16 January 2025 which assume that the plaintiff would start studies in 2026 until 2030, contrary to the 03 May report assumption of 2024, I conclude that the earlier reports favour the defendant due to the increased claim amount in the new calculations. The updated calculations dated 16 January 2025, estimate a total loss of income to be R10,928, 723.

[42] Having considered the circumstances of this case, specifically the plaintiff’s age, the unemployment rate including the tremendous delay in her studies, I adopt the actuary’s calculations dated 03 May 2024. I further conclude that the application of higher contingency deduction of 35% in respect of future loss of earnings in the post-morbid scenario is justified. The adopted calculations are as follows:

Item of loss	Past Income	Future Income	Total Income
PRE-MORBID SCENARIO			
Income had incident not occurred	3256460	12271315	15527775
Less contingency of 5% for past and 15% for	162823	1840697	

future income			
Pre-morbid loss of income	3093637	10430618	13524254
PRE-MORBID SCENARIO			
Income having regard to the incident / joint minute	-	5947947	
Less contingency of 35%		2081781	3866166
TOTAL LOSS OF INCOME			
Pre-morbid less post-morbid loss of income			9658088

Order

[43] Consequently, the draft order is hereby incorporated into and made part of the court order as follows:

1. The defendant is ordered to pay the plaintiff the amount of R9,658,088.00 in respect of her claim for loss of past and future income.
2. The defendant is furthermore ordered to pay the aforesaid amount within 14 (fourteen) days of date of this judgment, failing which interest will accrue at the prevailing legal rate from 14 (fourteen) days after date of order to date of final payment.
3. The aforementioned amounts are to be paid into the trust account of Mpambaniso Attorneys, with the following details:

Account Name: Mpambaniso Inc. Attorneys
Bank: Nedbank
Account No.: 1[...]
Branch code: 118420

4. The defendant is ordered to pay the costs of the hearing of the matter together with all reserved costs, if any, on scale C, together with interest thereon at the legal rate from a date 14 (fourteen) days after *allocatur* and/or agreement to date of payment, which costs will furthermore include:

4.1 The costs of two counsel, where utilized.

4.2 The costs of the hearing on 3 and 4 June 2024, 9 and 10 December 2024 and 16 January 2025, including counsel's fees.

4.3 The costs of preparing for consultations and trial.

4.4 The costs of obtaining the court record, perusal thereof and preparation thereon.

4.5 The costs of preparing heads of argument.

4.6 The travelling and accommodation expenses, if any, of the Plaintiff's legal representatives attending consultations with witnesses and court.

4.7 The reservation fees, if any, together with the qualifying fees, if any, of the Plaintiff's expert witnesses, Dr Gideon De Kock and IAC Actuaries, relating to the abovementioned issue, together with travelling costs and accommodation costs, if any, in respect of the abovementioned witnesses.

N CENGANI-MBAKAZA
ACTING JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff : Adv A.D Schoeman SC. with Adv H.B. Ayerst

Instructed by : MPAMBANISO ATTORNEYS

C/o VAPI ATTORNEYS

Mthatha

Ref.: PJQ/tb/CIV8216

For the Defendant : Adv N.R. Mtshabe. SC with Adv Z. Madlanga

Instructed by : STATE ATTORNEY

Mthatha

Ref.: 1147/14-A2

Date Heard : 16 January 2025

Date Delivered : 22 April 2025