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

Reportable

CASE NO: 2992/2013

In the matter between:

O[...] M[...]

PLAINTIFF

and

**MEMBER OF THE EXECUTIVE COUNCIL
RESPONSIBLE FOR HEALTH IN THE
EASTERN CAPE PROVINCE**

DEFENDANT

Neutral citation: *O[...] M[...] v MEC for Health, EC (C/N).*

Coram: NHLANGULELA AJP

Heard: 24 MARCH 2025

Delivered: 04 SEPTEMBER 2025

Summary: General damages – loss of amenities of life – whether a claim made by an unconscious plaintiff for compensation for loss of amenities of life is competent – claim found to be not competent and dismissed with costs.

ORDER

1. The plaintiff's claim for compensation made on behalf of her minor child is dismissed without an order as to costs.

2. The defendant pays the plaintiff, in her personal capacity, the amount of R280 000 (R400 000 less 30%) in respect of her claim for general damages after application of the apportionment with interest thereon at the legal rate from 30 days after the grant of this order to the date of payment thereof.

3. The defendant is ordered to pay the cost of the action relating to quantum together with all reserved costs, if any, on scale C (for SC) and scale B (for junior counsel) together with interest thereon at the prevailing legal rate from a date 30 days after taxation or agreement to date of final payment thereof, such costs to include:

3.1 the cost of two counsel where utilised.

3.2 the cost of the hearing on 24 March 2025 including counsel's day fee.

3.3 the cost of preparing for consultations and trial.

3.4 the travelling and accommodation expenses, if any, of the plaintiffs legal representatives attending consultations with witnesses and court.

3.5 the reservation fees, if any, together with the qualifying fees, if any, of the plaintiff's expert witnesses, together with the costs of preparing their reports and supplementary reports, if any, in respect of whom notices in terms of rule 36 (9) (a) and (b) have been filed of record.

JUDGMENT

Nhlangulela AJP

[1] The plaintiff is Ms O[...] M[...], the mother of N[...] M[...], a minor boy-child. She sues in her personal capacity as well as in representative capacity on behalf of her minor child. Her claim is for damages arising from the negligent monitoring of labor and delivery at the birth of the child between 15 and 25 February 2008 at Mthatha General Hospital, hence the defendant is the MEC for Health, Eastern Cape (the MEC). As a result of negligent monitoring, the child suffered from cerebral palsy. The estimated value of damages sought to be recovered in respect of the plaintiff was R500 000, and R2 500 000 in respect of the child.

[2] At the time of the hearing on the matter, the issue of the MEC's liability for wrongful monitoring had been settled on 11 December 2020. In addition, an award for damages in the sum of R400 000 (subject to apportionment at 70%-30%) in favour of the plaintiff was agreed upon between the parties. Therefore, the claim for general damages in respect of the child remains outstanding for adjudication in this matter, all other claims having been extinguished by the death of the child on 25 October 2024.

[3] In the law of delicts, general damages are a non-patrimonial type of damages comprising two distinct categories. The first category relates to pain and suffering, mental anguish, fear and anxiety. The second category comprises loss of amenities of life, reduced expectation of life and disfigurement¹.

[4] In this case, the nature of the injuries suffered by the child is set out in various medical reports, admitted by consent in terms of s 3 of the Law of Evidence Amendment Act No. 45 of 1988. The medical reports reveal that the child suffered a hypoxic brain injury during labour, as a result of which he suffered from cerebral palsy of a mixed spastic and dyskinetic motor impairment. This severe brain injury resulted in significant

¹ See: *Reyneke v Mutual and Federal Insurance Co Limited* 1991 (3) SA 412 (W) at 419.

impairment of body function and multiple contractures, and resulted in brain dysfunction and motor impairment affecting his head, neck, trunk, and all four limbs. He was classified as GMFCS, Level 5 and MACS, Level 5, representing those individuals with the most severe restriction of functioning. Those impairments are associated with severe language impairment, incontinence, multiple contractures in his upper and lower limbs and mild and fixed scoliosis.

[5] Furthermore, the child suffered from severe cognitive impairment in that:

he was conscious and aware of his surroundings. But his physical impairment prevented him from reciprocating and engaging effectively. He was mostly content and peaceful but at times became irritable with his surroundings. He initiated contact with others but could not express himself properly because of his severe impairment of communication, for he appeared to understand his mother when she spoke to him, but he was unable to express himself verbally or non-verbally. He was unable to engage in purposeful activity because of his severe physical impairment. He could hear and see without any difficulty, although he had a squint in his right eye. He had a dyskinetic grimace on his face, and his mouth remained open. He had abnormal involuntary movements of his tongue, and he was unable to speak at all. He had drooled at times. He was dependent on careful feeding by others and on a relatively smooth diet. He was only able to indicate hunger by crying and comfort by smiling and laughing. He knew and recognised his family when he returned home. He also recognised his mother's voice on the telephone when she spoke to him. He recognised his own name and he understood the conversation addressed to him. However, he was unable to express himself effectively by non-verbal or verbal means other than by smiling, laughing or crying. He enjoyed watching television and in particular the cartoon programs. He was unable to sit, crawl, stand, walk, or even roll. He was completely dependent on others for all aspects of functional mobility. He was completely incapable of taking part in ordinary and everyday aspects of life.

[6] There were significant barriers to the child's well-being and function during his short life span, in that he had not been supplied with any mobility aids or assistive devices beyond buggies. He and his mother lived in poverty under adverse conditions in an inadequate home environment and without proper transportation options. Despite this, his mother displayed a commitment to his well-being and care. He did not have regular medical follow-ups for cerebral palsy. He did have monthly sessions of physiotherapy, occupational therapy and speech therapy at various hospitals during his life. He was assessed as having a life expectancy of 29 years in total. He had lived for approximately 17 years.

[7] Counsel for the defendant submitted that the medical report of Dr Campbell shows that the child suffered from a moderate to severe cognitive impairment and, although conscious and aware of and interested in his surroundings, he was unable to engage with them. His ability to communicate was restricted. It did not appear as though he was suffering from any chronic or recurrent pain. Further, counsel drew the attention of the court to a report by Dr de Kock, the Industrial Psychologist, where it is stated that the child had profound developmental delays, rendering him unable to understand instructions or communicate appropriately. Against this background, counsel submitted that since the child had no intellectual appreciation of his condition, the monetary award made could not be used to his advantage, nor could it provide consolation to him. In contending that the child's neurological condition was in 'persistent vegetative state'², thus an unconscious plaintiff, he placed reliance on *Collins v Administrator, Cape*³, where the following was said at 92F-H:

'As previously indicated, there would appear to be unanimity that an unconscious person is not entitled to damages for pain and suffering or anguish, that is to say, the subjective element of the loss of amenities, since he or she suffers no pain and experiences no anguish. The objections to the English approach are the following. First, the award of non-pecuniary damages in respect of the actuality of

² The neurological condition that is described in *Clarke v Hurst NO and Others* 1992 (4) SA 630 (D).

³ 1995 (4) SA 73 (C) at 92F-H.

the loss serves no purpose as the money awarded cannot be used for the benefit of the unconscious plaintiff. Second, it can provide no consolation to an unconscious plaintiff, as consolation presupposes consciousness and some capacity of intellectual appreciation. A conscious person who, by reason of his injuries, is incapable of deriving any advantage from a monetary award can notionally obtain some consolidation from the receipt of money and from being able, if he pleases, to give it away. An unconscious person cannot even have this consolation.'

[8] The issue of whether the child is the unconscious plaintiff or not does not arise in this case. Counsel did not raise an issue about the medical evidence contained in the reports that places the child into the category of an unconscious plaintiff. It is so because the proof lies in the severity of the hypoxic ischemic injuries sustained by the child, which imposed the most severe restrictions on the functioning of his brain and motor systems, affecting the head, neck, trunk, and all four limbs. The manner in which the injuries sustained compromised the capacity of the child to engage with others meaningfully has already been discussed, and no more needs to be said.

[9] It appears in the plaintiff's particulars of claim that the damages sought are for pain and suffering and loss of amenities of life. It is a trite law that an unconscious plaintiff is not entitled to damages for pain and suffering⁴. Therefore, the issue for decision in this case is whether the plaintiff's child, as the unconscious plaintiff, is entitled to compensation for the loss of amenities of life. This is a vexed question, which was answered in the negative by Scott J in *Collins (supra)*, in 1995; the affirmative answer having been given in *Gerke NO v Parity Insurance Co Ltd*⁵ in 1966; and *Reyneke (supra)* in 1991. Between the hearing of arguments and delivery of the judgment in this matter, the conflicting decisions were settled by the majority bench of the SCA in *The*

⁴ Ibid at 92

⁵ *Gerke v Parity Insurance Co Ltd*⁵ 1966 3 SA 484 (W)

*MEC for Health, Gauteng Provincial Government v AAS obo CMMS*⁶ (AAS) where, endorsing the *Collins* case, the following is stated:

[157] The position in our law on the compensation of an unconscious claimant can thus be summarised as follows. Such a claimant is not entitled to any award for pain and suffering under any circumstances. This is uncontroversial. In respect of an award for loss of amenities of life, such can only be made to the extent it can serve some function for the personal and exclusive benefit of the claimant. This is particularly so where an award for special damages adequately provides the means and facilities to make the unconscious claimant's life less miserable.'

[10] The doctrine of *stare decisis*⁷ requires this Court to follow settled law that has been pronounced by the SCA. That being the case, in applying the newly evolved delictual principle of law that an unconscious plaintiff is not entitled to compensation for loss of amenities, I am duty-bound to dismiss the plaintiff's claim for compensation that she brought on behalf of the minor child. And I must take into account that mulcting the plaintiff with costs could be catastrophic because she is a poverty-stricken citizen. Furthermore, the *Biowatch*⁸ principle may well redound in her favour, as the nature of the case prosecuted on her behalf is not an abuse, but a constitutional rights-based claim founded on the vindication of the child's protected right of freedom and security of the person in terms of s 12 of the Constitution. However, for the success of the plaintiff acting in her personal capacity, the costs ought to be paid by the defendant.

Order:

[11] In the result, the following order shall issue:

⁶ (SCA) unreported case no 401/2023 of 20 June 2025 at para 157.

⁷ In *Ex Parte Minister of Safety and Security and Others: In RE: S v Walters and Another* (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) at para. 57 the words *stare decisis* was said to be: '... an abbreviation of a Latin maxim, *stare decisis et non quieta movere*, which means that one stands by decisions and does not disturb settled points'.

⁸ *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 (CC).

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Z. M. NHLANGULELA
ACTING JUDGE PRESIDENT
EASTERN CAPE DIVISION

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