

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 28157/2019

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

In the matter between:

T[...] N[...]

First Plaintiff

ADVOCATE JOHAN KILIAN N.O., obo N[...] (M[...]), N P

Second Plaintiff

and

MEC FOR HEALTH AND SOCIAL DEVELOPMENT:

GAUTENG PROVINCE

Defendant

JUDGMENT

Mfulwane, AJ

Introduction

[1] This is a judgment on quantum in a matter where the Defendant has conceded 100% liability for damages suffered by the minor child, N[...] P[...] M[...] (“N[...]”), arising from severe brain damage sustained due to negligence during her birth. The matter set down for a ten day hearing of evidence. It was concluded after 4

(four) days of evidence and argument and now is before this Court for the final determination of the capital award.

- [2] The Second Plaintiff, Advocate Johan Kilian, was appointed as the Curator ad Litem to represent the minor child's interests throughout these proceedings.
- [3] The parties have commendably reached agreement on several significant heads, including the minor child's life expectancy (31 years) and the Loss of Earnings (R1,974,926.00) and the amounts of R13,653,418.83 in respect of the claim for future medical, hospital and related expenses, after the deduction of the agreed 10% contingency, as set out in (Annexures 'A1').
- [4] The Defendant has also agreed to provide an extensive list of specific medical services and good at designated public hospitals as detailed in the schedule marked "Annexure B". The Plaintiff has in principle, agreed to accept this provision (the "public healthcare remedy") but reserves her right to claim monetary compensation should the Defendant fail to meet these commitments.
- [5] The issues remaining for determination by this Court and which constitute the final cash component of the award, are the quantum for:
 - a) General Damages.
 - b) The cost of Schooling.
 - c) The cost of House Alterations.
 - d) The necessity for and cost of establishing a trust and
 - e) Whether the common law should be developed to allow for periodic payment of the capital amount, rather than a lump sum.

Analysis of Determined Heads of Damages

A. General Damages

- [6] This is the most significant and complex issue in dispute. The Plaintiff claims R3.5 million, arguing for an award of R2.6 million based on comparable

cases. The Defendant argues, in the first instance, that no award for general damages should be made. In the alternative, the Defendant suggests a nominal award of R500,000.

- [7] The Defendant's primary submission relies heavily on the recent Supreme Court of Appeal (SCA) judgment in *MEC for Health: Gauteng v AAS obo CMMS*. ZASCA¹. In that matter, the SCA overturned an award of general damages, finding that the minor child was in an "unconscious state." The Defendant argues that "unconscious" in this context does not mean comatose, but rather a lack of intellectual appreciation of suffering or loss. The Defendant contends that where a child is in such a state, no award for pain and suffering is competent and an award for loss of amenities of life serves no functional purpose, especially where special damages already provide for all the child's needs.
- [8] The Defendant supports this argument by drawing extensive parallels between the expert reports in AAS and the reports in this matter. Indeed, the paediatric neurologists (Dr Keshave and Dr Mogashoa) are the same in both cases and their diagnoses are strikingly similar: microcephalic mixed cerebral palsy, GMFCS Level V, global developmental delay, intellectual disability and profound physical dependence. Based on this comparison of reports, the Defendant argues that N[...], like the child in AAS, is in an "unconscious state" and thus entitled to no general damages.
- [9] The Plaintiff argues that AAS is distinguishable on the facts. The Plaintiff's counsel submits that N[...] is *not* "unconscious" in the AAS sense. The critical difference between this case and AAS is that this Court heard *viva voce* evidence from N[...]s father, Mr T[...] M[...] and the Plaintiff's occupational therapist, Ms Kirsten Du Toit. The Defendant, by contrast, led no oral evidence to rebut their testimony, relying instead on a comparison of the written expert reports.

¹ *MEC for Health, Gauteng Provincial Government v AAS obo CMMS* [2025] ZASCA 91 (20 June 2025). The majority judgment was authored by Makgoka JA (with Goosen JA and Dawood AJA concurred), while the minority judgment was penned by Kgole JA (with Baartman AJA concurring).

- [10] Mr M[...]’s evidence was clear and compelling. He described a child who, while profoundly disabled, is interactive. He testified that she responds to sounds, particularly his voice and can lift her head when her name is called. He described how she communicates her likes and dislikes through sounds and gestures and how she smiles and experiences pleasure. Ms Du Toit’s evidence corroborated this. She testified that N[...] is a conscious and interactive child who experiences pain. This evidence was not seriously challenged. It paints a picture of a child who, unlike the child in *AAS* (who was found to be in a "persistent vegetative state"), possesses what the *AAS* court itself termed "twilight moments." She has a limited but definite awareness of her surroundings and an intellectual, albeit rudimentary, appreciation of her suffering and her pleasures.
- [11] I therefore make the factual finding that N[...] is not in an "unconscious state" as defined by the majority in *AAS*. She is aware, feels pain and experiences a limited range of pleasures and discomforts. The *AAS* judgment is therefore distinguishable on its facts and does not preclude an award for general damages.
- [12] Having found that an award is competent, I must determine the quantum. The Plaintiff relies on several comparable cases, most notably *PM obo TM v MEC for Health, Gauteng*² a Full Court decision that also distinguished its facts from cases involving unconscious claimants and awarded R1.8 million (with a current value of approximately R2.65 million).
- [13] N[...]’s life is one of profound disability. She is wheelchair-bound, incontinent and entirely dependent on others for every aspect of her life. She will never walk, talk or have the joys of everyday life. She has, however, retained the capacity to feel pain and discomfort and to experience a limited range of positive interactions. The damages awarded must provide solace for this existence. The Defendant’s alternative submission of R500,000 is, in my view, unduly low and inconsistent with the line of authorities relating to conscious, profoundly disabled children. Considering the awards in *PM, NK obo ZK v*

²Case No A5093/2/2014

MEC for Health, Gauteng³ and *Khosa v MEC for Health, Gauteng*⁴ and adjusting for inflation, I find that a fair and reasonable award for general damages in this matter is R2,400,000.00.

B. Cost of Schooling

[14] The Plaintiff claims for a private special needs school (Item P67), which Ms Du Toit clarified in her evidence is more of a stimulation centre. The Defendant argues for the more affordable public option (Muriel Brand School, Item 66), which would save approximately R500,000. Ms Du Toit's expert evidence was that, given N[...]s very low cognitive function, a curriculum-based school like Muriel Brand is inappropriate. She opined that N[...] requires a stimulation centre to meet her specific needs. Any countervailing expert testimony from the Defendant did not rebut this evidence. While the Court is mindful of the need to conserve public funds, the award must be for what is reasonably *necessary* for the child's care. Therefore, the Court shall only award a reduced allocation equivalent to 50% of the claimed amount to cover short-term, necessary private inputs, thereby deferring to the public undertaking for the primary long-term support. The award for private schooling is therefore limited to R250,000.00.

C. Cost of Alterations to the Family Home

[15] The parties' quantity surveyors met and agreed on the cost of alterations to N[...]s father's home in the amount of R1,803,442.06. The Defendant now argues that this amount is unreasonable, being more than double the purchase price of the house and involving an outbuilding. The Defendant suggests a cap of R1.2 million, based on a passage in her own architect's report.

³ CaseLines, Exhibit 14, p 100-284

⁴ (2017/17) (2018) ZASCA

[16] This argument cannot succeed. The proper course for a party that wishes to dispute an agreed expert minute is to repudiate it timeously and lead evidence to challenge it. The Defendant has not done so. The joint minute of the quantity surveyors is the best evidence before this Court as to the reasonable and necessary cost of the required alterations. As held in *Bee v RAF*⁵ such joint minutes are binding on the parties in the absence of a timeous repudiation and contradictory evidence. The Defendant's architect's report does not override the *joint minute* of the quantity surveyors.

[17] The net amount, after the 10% contingency deduction is R1,623,097,85 (R1,803,442,06 less 10%). This amount is awarded.

C. The Trust

[18] The Defendant disputes the necessity of a trust and argues that any fees should be based on hours worked, not a percentage. Given the very substantial award, N[...]s profound and permanent disabilities and her minority, the establishment of a trust to manage the funds on her behalf is not merely reasonable, it is an absolute necessity. It is the only responsible way to ensure the funds are protected and used exclusively for her benefit for the rest of her life.

[19] As to the costs, the Plaintiff claims the "customary" 7.5% for the creation and administration of the Trust. This practice is well-established in our courts, as evidenced by the cases cited by the Plaintiff, such as *Singh*⁶ and *Monyai*⁷ It provides a practical and certain basis for securing the long-term professional management required.

[20] Accordingly, I find that a trust is necessary and that an award of 7.5% of the total capital award for the costs of its creation and administration is reasonable.

⁵ [2018] ZASCA 52

⁶ (413/09) [2010] ZASCA 145

⁷Case No 33807/2021 Gauteng Province (17 September 2025)

C. Development of the Common Law

[21] The Defendant's final plea is for this Court to develop the common law, in terms of section 173 of the Constitution, to allow for: a) An "undertaking to pay" remedy for future medical costs not covered by the public healthcare remedy and b) the payment of loss of earnings and general damages in periodic instalments rather than a lump sum. The Plaintiff opposes this, relying on the Constitutional Court's judgment in *MEC for Health and Social Development, Gauteng v DZ obo WZ* ⁸.

[22] The Court in *DZ* held that a development of the common law cannot take place in a "factual vacuum." A party seeking such a development bears the onus of placing a comprehensive factual matrix before the Court to justify such a departure from established principles like the "once and for all" rule. The Defendant in this matter, while referencing the *TN*⁹ case (which is on appeal), has placed *no evidence* before this Court to discharge that onus. There is no evidence on the Defendant's financial position, the systemic challenges of lump-sum payments, or the feasibility and mechanics of a periodic payment system. The Defendant elected not to call any witnesses on this issue.

[23] Without a factual foundation, this Court is in no position to consider such a "radical departure" from the common law. The *DZ* judgment binds me. The Defendant's prayer for the development of the common law to permit an undertaking or periodic payment must therefore fail.

Order

I accordingly make the following order:

1. The Defendant shall pay 100% to the Second Plaintiff, in his

⁸ 2018 (1) SA 335 (CC)

⁹ *TN obo BN v MEC for Health, Eastern Cape*: Case No: 36/2017

representative capacity on behalf of the minor child, N[...].

2. The Defendant shall pay to the Plaintiff the total capital sum of R19 901 749.85 comprising the following:
 - a. R1 974 726.00 in respect of future loss of earnings;
 - b. R2 400 000.00 in respect of general damages;
 - c. R13 653 926,00 in respect of future medical and related expenses after the deduction of the agreed contingency itemised in Annexure "A1" to the Plaintiff's Heads of Argument;
 - d. R250 000,00 in respect of the costs of special schooling and
 - e. R1 623 097.85 in respect of the costs of house alterations.
3. The Defendant shall pay an amount equal to 7.5% (seven and a half percent) of the total capital sum referred to in paragraph 2 above, in respect of the costs for the creation and administration of a Trust, which shall include the First Plaintiff, that is the mother of the minor child, N[...], as a Trustee.
4. The total amounts in paragraphs 2 and 3 shall be paid into a trust account, to be established for the benefit of the minor child, N[...] within 180 (One Hundred and eighty) days of the establishment of such Trust and the provision of the relevant bank account details to the Defendant's attorneys.
5. By agreement between the parties the Defendant shall provide the medical services, goods, and treatment to the minor child as identified in Annexure "B" to the Plaintiff's Heads of Argument, at the Tambo Memorial Hospital, Charlotte Maxeke Hospital, and/or the Wits Dentistry School.
6. Should the Defendant fail to provide any of the services or items in paragraph 5 above, or should such services or items not be available or be of a substandard quality, the Plaintiff (on behalf of

the Trust) is granted leave to approach this Court, on the same papers, duly supplemented, for an order for the cash equivalent of such service or item.

7. The Defendant shall pay the Plaintiff's taxed or agreed party-and-party costs of suit, such costs to include:
 - a. The reasonable costs of the preparation of all expert-legal reports and joint minutes of the Plaintiff's experts;
 - b. The reasonable qualifying and reservation fees, if any, of the Plaintiff's experts and
 - c. The costs of two counsel (senior counsel on Scale C and junior counsel on Scale B) and the Curator ad Litem.
8. The First Plaintiff's claim for past medical and hospital expenses is postponed sine die.

MFULWANE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

Counsel for the plaintiff:

Adv G Strydom SC and Adv Viljoen

Instructed by:

de Broglio Attorneys Inc

Counsel for the defendant:

Adv. Vas Sonic SC and Adv T. Monene

Instructed by:

State Attorney

Date of the hearing:

6 October 2025

Date of the judgment:

7 November 2025