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

OF INTEREST

Case No: 431/2022

In the matter between:

DEANE LUCILLE OLIVIER **Plaintiff**

and

MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH: EASTERN CAPE PROVINCE **Defendant**

JUDGMENT

KOTZÉ AJ

Introduction

[1] The plaintiff's claim against the defendant arises from the defendant's alleged negligent or substandard medical care rendered to her husband, the deceased, while under the care and treatment of the defendant's employees. As a result of such, the plaintiff alleges that the deceased developed septicaemia and several bedsores which became septic, and as a further result, septic shock set in which resulted in the deceased passing away on 8 May 2021.

[2] The plaintiff alleges that as a result of the above, she has suffered severe emotional shock and pain requiring medical treatment, and therefore, claims for the cost of her past and future

medical treatment and general damages in respect of shock, pain and suffering. In sum, the plaintiff alleges that the defendant should be held liable for her damages.

[3] The defendant disputes its liability, and therefore, the matter came before this court on trial.

[4] On 27 July 2023, during the case flow management process and in terms of rule 37A(12)(f), a directive was issued (or to use the wording of the rule, an 'order') in terms of which the issues of liability and quantum were separated. [1] Forward to the start of 2025, the roll call of the matter came before me on 31 January 2025 and was postponed to 7 February 2025 because the joint minute of parties' experts remained outstanding. [2]

[5] On 7 February 2025 the matter was certified trial ready in respect of the separate issue of liability. Although no joint minute, the letter of the plaintiff's attorney dated 6 February 2025 had advised the Registrar that the plaintiff no longer intends on calling her expert (Dr Wosu), and therefore there was no longer a need for the joint minute.

[6] The trial proceeded on the issue of liability only. The trial ran for four days, was postponed for closing arguments, was again postponed for closing arguments, and was finally argued with the parties having filed written heads of argument. Judgment was reserved.

Summary of the parties pleaded cases

[7] It is necessary to first summarise the pleaded case of each party so that the remainder of this judgment could be appreciated in its true context. The plaintiff's claim, as already set out above, relies on the negligent conduct of the defendant's employees as the cause of death of the deceased, and as a further result, her damages arising from it. In paragraphs 10 and 11 of the particulars of claim, the plaintiff alleged:

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[1] The directive forms part of the jointly signed Form 1(a) dated 23 and 29 May 2023. A further formal directive was emailed to the parties on 27 July 2023 at 15:12.

[2] This in terms of paragraphs 3.4 to 3.6 of the parties Form 2 roll call trial preparation checklist.

10. In and as a result of the aforegoing the deceased developed septicemia and several bed sores which became septic and as a further result septic shock set in as a result of which the deceased passed away on 8 May 2021.

11. In and as a result of the aforegoing the Plaintiff suffered severe emotional shock and pain requiring medical treatment as a result of which the Plaintiff suffered damages in the sum of R409 300.00. Made-up as follows:

11.1 Past medical treatment R800.00

11.2 Future medical treatment R8500.00

11.3 General damages in respect of shock, pain and suffering R400000.00.

[8] The defendant in turn pleaded its denial as follows:

13. The Defendant denies that it was negligent in any way as alleged or otherwise, and consequently, denies that there was any breach of a legal duty on its side or its employees which cause (sic) *the alleged death and/or conditions of the deceased and/or plaintiff, respectively.*

14. Alternatively, only in the event that the court finds that the defendant's employees negligently breached any duty of care or any other legal duty owed to the deceased and/or plaintiff, of which breach is denied and that the plaintiff will require medical services and medical supplies as alleged, of which the plaintiff is put to the proof thereof.

[9] The plaintiff's case therefore squarely relied on the wrongful death of the deceased as the source of her damages. During closing argument, Mr Louw, appearing for the plaintiff, advanced an alternative argument to the effect that paragraph 10 of the particulars of claim above allows for an interpretation of two different basis on which to find for the plaintiff. His heads of argument reasoned as follows:

In the alternative, and in the event that it is not found that the deceased passed away as a result of the sub-standard treatment afforded to the deceased at the Livingstone Hospital, then in that event it is submitted that it has clearly been shown that the lack of proper care and treatment given to the deceased at the Livingstone Hospital has caused the Plaintiff harm in having to see, for an extended period of time, how the deceased had been dealt with at the Livingstone Hospital and

read with the failure of the hospital wise her on how to deal with the deceased's condition upon his first discharge as well as on his second discharge from the hospital. It is submitted in the circumstances that in any event the Plaintiff would be entitled to be compensated for the pain and suffering that she was subjected to due to the negligence of the Livingstone Hospital staff.

[10] When the above was debated with Mr Louw, he indicated that an amendment would be made to the particulars of claim to give effect to the above argument. Such an amendment followed on 30 April 2025. The amendment was perfected without objection, and paragraphs 10 and 11 of the particulars of claim now read:

> *10.* *10.1* *In and as a result of the aforegoing the deceased developed septicemia and several bedsores which became septic.*
>
> *10.2* *In and as a further result of the foregoing septic shock set in as a result of which the deceased passed away on 8 May 2021.*
>
> *11.* *In and as a result of the aforegoing as set out in paragraph 10.1 and/or 10.2 above, the Plaintiff suffered emotional shock and pain requiring medical treatment as a result of which the Plaintiff suffered damages in the sum of R409 300.00 made up as follows…*

[11] The above is understood to mean that even if the plaintiff fails to prove that the negligence of the defendant caused the deceased's death (paragraph 10.2 above), she nevertheless suffered damages because of the manner in which the deceased was treated (paragraph 10.1 above). Unfortunately, there was very little argument from the parties in aid to the court on how to unpack the above and adjudicate the evidence, considering that the parties conducted the trial on the particulars of claim as it were, closed their respective cases and argued the evidence all before the amendment was undertaken. Considering the course I intend to take, I will assume that the plaintiff's amendment enables her to advance her argument on both basis.

Summary of the evidence and common causes

[12] The plaintiff relied on the evidence of two witnesses: Sister Rensia Smit (a registered nurse) and the plaintiff herself. In supplement to that, the plaintiff presented as Exhibit A, its trial bundle inclusive of, for present purposes, the relevant hospital records, the report of Sister Smit,

the report of Dr Candice Harris (a general practitioner), and a series of photographs. The plaintiff further handed in as Exhibit B a document titled 'medical certificate of cause of death'. There were no objections raised by the defendant concerning the documentary evidence.

[13] The defendant relied only on the evidence of Dr Andries Petrus Jacobus Botha (a specialist physician), and the joint minute between Dr Botha and Dr Ifeanyi Wosu (a specialist physician).

[14] During the course of the trial, it became common cause that the deceased was admitted to Livingstone Hospital, for his first admission, on 27 January 2021 and was discharged on 23 February 2021. The deceased was again admitted to Livingstone Hospital, for his second admission, on 16 April 2021 and was discharge on 29 April 2021. Finally, the deceased was admitted on 30 April 2021 to Uitenhage Hospital, for his third and final admission, less than 24 hours since his second discharge, until he passed away on 8 May 2021.

[15] It was further common cause that the deceased passed away from septicaemia. What was not common cause, was whether the septicaemia was caused by, for the plaintiff, the infected and mismanaged bedsores of the deceased, or whether, for the defendant, the cause was the deceased's septic arthritis in the right knee.

[16] Sister Smit testified for the plaintiff largely on nursing standards and wound care; Sister Smit examined the hospital records and testified that the deceased's treatment fell below expected standards, highlighting the absence of proper documentation and implementation of nursing protocols, such as turning schedules and wound care. She further testified that the deceased was a high-risk patient for developing bedsores due to multiple comorbidities, including chronic tophaceous gout and arthritis. During his hospitalization, pressure sores eventually developed, specifically on his right elbow, left ankle, and later on his sacral area, lower limbs, and other body parts. These sores reached advanced stages. Sister Smit concluded that the hospital staff failed to observe standard nursing procedures, including documenting skin conditions upon admission, implementing proper pressure sore prevention measures, and applying wound care effectively. There were no records of turning charts, daily dressing protocols, or specific measures tailored to the deceased's deteriorating skin conditions. She emphasized that accurate

records were essential for preventing bedsores and ensuring continuity of care. She highlighted that when the deceased was discharged from Livingstone Hospital on 29 April 2021, he was discharged without any documentation of his condition, follow-up plans, or instructions provided to the plaintiff regarding wound care, yet the next day, on 30 April 2021, he was admitted to Uitenhage Hospital with severe septic bedsores described as foul-smelling and purulent. Sister Smit opined that such sores could not have developed in 24 hours post-discharge and must have existed during his admission at Livingstone Hospital.

[17] The plaintiff herself testified about the deceased's condition, which included chronic tophaceous gout and hypertension. She described her concerns regarding his treatment during his above admissions, and the consistent poor communication from hospital staff, inadequate care and unsanitary conditions, including incidents of soiled bedding and lack of proper wound treatment. The plaintiff testified that the deceased developed bedsores and sepsis during his treatment, leading to deterioration in his health and eventual death. The deceased was initially admitted to Livingstone Hospital in January 2021 after experiencing severe swelling in his knee and symptoms associated with chronic gout. He was later discharged, however, in her view with unresolved medical issues, including bedsores and open wounds on his body. She was given no advice or instructions on how to treat the wounds. The deceased developed no new sores during the time he was cared for at home and his initial condition improved.

[18] The deceased was again admitted on 16 April 2021 to Livingstone Hospital, this time due to symptoms of severe gastrointestinal upset. She described the poor hygiene and unsatisfactory conditions during her attempts to see him. During this admission, the deceased deteriorated further, with odours from his wounds becoming prominent. The plaintiff testified as follows:

> MS OLIVIER: … Then when he went back in the second time, I don't know what happened, but it went havoc from there, when I saw him, how can I explain it without breaking down, he literally rotted away, when he was discharged and I was supposed to fetch him, I got there and you can literally smell him from the lifts, I smelt the smell coming close, and I'd get to his door and it was actually coming from there from his bed, and just seeing [interrupted]…
>
> …
>
> MR LOUW: And then when did you experience this smell or whatever you call it?

MS OLIVIER: When I came up the lifts.

MR LOUW: Yes.

MS OLIVIER: And entered the ward and the smell, it's a distinct smell.

MR LOUW: As you entered the ward?

MS OLIVIER: Yes because he was close to the lifts, here's the sister station, right next to the sister station was the ward that he was in, there was only three beds in that ward, so it's a small ward.

…

MR LOUW: It could be somebody else.

MS OLIVIER: No I saw, because on his bed there was bedding, he was laying on bedding that was soiled, there was like a brown pooh, gunky [inaudible] on it, and then I knew it was coming from my husband, it was dirty linen.

…

MS OLIVIER: No, no, I don't know if you've ever been near a dead animal that's been laying there for a while, it's a specific, like a dead smell.

MS MIYA: Yes.

MS OLIVIER: It's a sharp smell, you can't miss it, it's like a sore oozing, I don't know how to put it, it's just foul smelling.

MS MIYA: Yes.

MS OLIVIER: But it's a distinct smell, it's not a general smell, you don't smell it every day in your life…

[19] The plaintiff recalled the events in her testimony with visible discomfort, crying at times. In questionable circumstances, on the same day of the 'smell' incident above, the deceased was discharged. Following his second discharge, the deceased was barely home a single day, when the plaintiff arranged for him to be admitted to Uitenhage Hospital due to unbearable pain and spasms. She did so because the deceased had expressed fear of returning to Livingstone Hospital. On 8 May 2021, he passed away.

[20] The plaintiff, although armed with reports from Dr Harris and Dr Wosu, elected not to call them as witnesses. The decision was based on an admission made by the defendant during a pre-trial conference when it admitted the entire report of Dr Harris, amplified by the defendant's failure to withdraw that admission. The plaintiff's contention was that the admission stood in the

way of the defendant's intention to lead evidence that would suggest that the cause of the septicaemia was not the bedsores and mismanagement thereof, but the chronic gout. Although much time was dedicated to this issue, and whether the court is bound by the entire report or only the factual admissions made, it is not relevant to the course I intend to follow.

[21] Dr Botha, a specialist physician, provided expert testimony focused on the deceased's medical conditions, including chronic tophaceous gout and septic arthritis, primarily affecting his right knee. Chronic tophaceous gout is a severe complication of gout that destroys joints and can cause ulceration. Following tests, the presence of E-coli bacteria confirmed sepsis in the deceased's right knee, which was treated with antibiotics and aspiration. Dr Botha explained that septic arthritis is a common complication in joints already damaged by chronic conditions like gout. He noted that due to the deceased's debilitative state, a bilateral above-knee amputation was considered but ultimately deemed too risky. He stated that definitive surgical intervention was not viable, given the deceased's critical condition. Dr Botha disputed the classification of some wounds as bedsores, suggesting they were tophi-related breakdowns rather than pressure ulcers.

[22] Dr Botha provided differing conclusions on the cause of the deceased's death than Dr Harris. Dr Botha attributed the septicaemia to septic arthritis in the deceased's right knee, citing blood cultures matching the bacteria identified in the knee and bloodstream. Conversely, Dr Harris concluded that the deceased died from septicaemia caused by infected pressure sores, which view was seemingly also supported by the medical death certificate (as Exhibit B) stating "decubitus ulcers" as a contributing factor to septicaemia. The plaintiff objected to Dr Botha's conclusion on the strength that it stood in conflict with the admitted report of Dr Harris. Appreciating the distinction drawn between admissions of fact, that bind a court, and admissions of opinion, which do not, [3] and having only the benefit of Dr Botha, I asked the following:

> COURT: Okay. If one accepts all of what Dr Harris says as a fact. I am not interested in opinion for now, but as a fact. Do you agree or disagree with her professional opinion or conclusion based

[3] See *HAL obo MML v MEC for Health, Free State* [2022] 1 All SA 28 (SCA) at paras [220] and [229] ; *Van Zyl NO obo AM v MEC for Health, Western Cape Province Department of Health* [2023] 1 All SA 501 (WCC). A party cannot bind the court to the opinion of an expert by a concession that the opinion is correct (*NSS obo AS v MEC for Health, Eastern Cape Province* 2023 6 SA 408 (SCA) at para [24]).

on her facts? If you are in a position to so. If you are not in a position you can tell me. I am trying to divorce the facts from the professional opinions in foresight of what this argument would be.

MR BOTHA: Yes. I would disagree with her. I would have disagreed with her on the basis of exactly that, that the culprit or the most hard-hit area of the body where the pus was isolated and where the infection was isolated, was only the knee. There were never samples taken from other pressure areas. So we do not know whether there were bacteria, and what the nature of the pathology was there. And that is why I relied on the knee because that was the only place I had that was a documented evidence of there were organisms isolated from the knee and from the blood, but not from the other wounds. So the significance of the other wounds to me hangs in the air.

COURT: Mm.

MR BOTHA: I know that they were there, I am not denying that there were…

COURT: Yes.

MR BOTHA: …other wounds in other parts. But the significance of them is for me an uncertainty.

COURT: Yes. Almost as if she has overemphasised their presence…

MR BOTHA: I would think so.

COURT: …and overlooked the knee.

MR BOTHA: I would think so. And underestimated the significance of the findings of the right knee.

[23] The remainder of Dr Botha's evidence concerned his differing opinion to the conclusion reached in Exhibit B, in particular, in the absence of a post-mortem report. The defendant closed its case thereafter.

The general legal principles

[24] In *Goliath v MEC for Health, Eastern Cape*, it was held that: [4]

The general rule is that she who asserts must prove. Thus in a case such as this a plaintiff must prove that the damage that she has sustained has been caused by the defendant's negligence. The failure of a professional person to adhere to the general level of skill and diligence possessed and

[4] *Goliath v MEC for Health, Eastern Cape* 2015 (2) SA 97 (SCA) at para 8.

exercised at the same time by the members of the branch of the profession to which he or she belongs would normally constitute negligence (Van Wyk v Lewis 1924 AD 438 at 444). A surgeon is in no different a position to any other professional person (Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A) at 488C). It has been pointed out that a 'medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care' (Mitchell v Dixon 1914 AD 519 at 525). As Scott J put it in Castell v De Greef 1993 (3) SA 501 (C) at 512A – B, '(t)he test remains always whether the practitioner exercised reasonable skill and care or, in other words, whether or not his conduct fell below the standard of a reasonably competent practitioner in his field' (cited with approval in Buthelezi v Ndaba 2013 (5) SA 437 (SCA) para 15).

[25] In *Oppelt v Department of Health, Western Cape*, the Constitutional Court said: [5]

A successful delictual claim entails the proof of a causal link between a defendant's actions or omissions, on the one hand, and the harm suffered by the plaintiff, on the other hand. This is in accordance with the 'but-for' test. Legal causation must be established on a balance of probabilities. The vital question is whether, as a matter of probability, the applicant's paralysis would not have occurred or been rendered permanent had the reduction procedure been performed promptly and within a time that was reasonably likely to prevent permanent quadriplegia.

[26] In *JA obo Da v MEC for Health, Eastern Cape* 2022 (3) SA 475 (ECB) at paras 48-49, the full court of this division held: [6]

The most commonly employed technique for determining factual causation is the 'but for' test. This means that the appellant had to prove on a balance of probabilities that, 'but for' the negligent actions or omissions of the respondent's employees, the injury would not have occurred. The test for factual causation was explained simply and precisely by Lord Denning in Cork v Kirby MacLean Ltd:

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[5] *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC) at para 35 (also reported as 2015 (12) BCLR 1471 (CC).

[6] *JA obo Da v MEC for Health, Eastern Cape* 2022 (3) SA 475 (ECB) at paras 48-49.

'(I)f you can say that the damage would not have happened BUT FOR a particular fault, then that is in fact the cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not the cause of the damage.'

The law on claims for psychiatric injury

[27] The plaintiff's claim is clearly a claim premised on a psychiatric injury or psychiatric lesion as it is also referred to.

[28] In her supplementary heads of argument, Ms Miya, appearing for the defendant, argued that the plaintiff had to prove that the defendant's negligent breach of the legal duty owed to the plaintiff caused the harm of the plaintiff. [7] During her argument in court, Ms Miya also referred the court to cases which dealt with the issue of harm in psychiatric injury cases. [8]

[29] In *Road Accident Fund v Sauls* 2002 (2) SA 55 (SCA), the plaintiff witnessed her fiancé being struck by a motor vehicle in her near vicinity and thought at the time that he had been killed or seriously injured, leaving her in a condition of shock and confusion, when in fact it turned out not to be the case. There the plaintiff was subsequently diagnosed with a post-traumatic stress disorder which became chronic and unlikely to improve. The court's summary of the plaintiff's case was that '*…her case is that as a consequence of her witnessing the injury to Sauls, she suffered severe emotional shock and trauma, which gave rise to a recognised and detectable psychiatric injury, viz post-traumatic stress disorder.*' [9] The court further listed the material common causes between the parties, which included *'[f]or the purposes of this phase of the litigation, that the respondent had in fact suffered shock and emotional trauma, resulting in*

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[7] Relying on *International Shipping Company (Pty) Ltd v Bently* 1990 (1) SA 680 (A) at 700E-I.

[8] Relying on *N.K v Member of the Executive Council for Health, Eastern Cape*; *Barnard v Santam Bpk*; and, *Road Accident Fund v Sauls, infra.*

[9] At para [2].

chronic post-traumatic stress disorder.' [10] The court stated the following of the law concerning such a claim: [11]

> *It must be accepted that in order to be successful a plaintiff in the respondent's position must prove, not mere nervous shock or trauma, but that she or he had sustained a detectable psychiatric injury. That this must be so is, in my view, a necessary and reasonable limitation to a plaintiff's claim.*

[30] In support of the above, the court in *Sauls* referred to and relied on *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA), where the court at 216E – F made it clear that a prospective plaintiff would have to prove an actual psychiatric injury or lesion and would, as a rule, have to rely on supporting psychiatric evidence to that effect. This came in response to the argument that to allow such claims would open up the floodgates on mere subjective say-so by plaintiffs.

[31] In *Komape and Others v Minister of Basic Education and Others* 2020 (2) SA 347 (SCA), the plaintiffs succeeded with a claim for the 'emotional trauma and shock' they had experienced following the unfortunate death of their young son and sibling. In *Komape*: the plaintiffs were '*diagnosed with having post-traumatic stress disorder, and for years had difficulty in sleeping and required psychological counselling*' and were '*seen by a psychologist*'; [12] '*at a pre-trial conference, the respondents admitted that the first and second appellants and their minor children had 'suffered emotional trauma and shock' as a result of Michael's death*' and '*in a joint minute of the clinical psychologists who were to be called as experts, it was recorded that the appellants had suffered severe trauma and required further psychotherapy*'; [13] the case for the plaintiffs included both their evidence and that of '*an expert psychologist relating to their emotional suffering*'. [14]

[32] In *Komape* the court further said this (with my own emphasis):

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[10] At para [5].

[11] At para [12]; *Komape and Others v Minister of Basic Education and Others* 2020 (2) SA 347 (SCA) at para [27].

[12] At paras [12] & [14].

[13] At para [18].

[14] At para [20].

[25] However, for many years now, such a claim has been recognised in this country where the claimant shows that the nervous shock is associated with a detectable psychiatric injury…

…

[32] Accordingly, there is no difficulty in recognising in principle the legal basis of the appellant's Claim A, which as I understand the pleading, is a claim for emotional shock attributable to a psychiatric lesion caused by the circumstances of Michael's death. It is a claim long recognised in this country and supported by the other common-law jurisdictions I have mentioned. I shall return to whether, given the facts of this case, liability in respect of that claim was established.

…

[47] It is clear from all of this that the respondents admitted that Michael's death had caused each of the appellants to suffer psychiatric injury with which their extended period of grief and sense of bereavement were associated. Once the respondents had admitted this and conceded liability in respect of the claim, there was no longer a lis in respect of which the appellants bore the onus of proof beyond establishing the quantum of their damages. This they purported to do, in part, by the expert evidence led at the trial. In doing so, the evidence further corroborated that which the respondents had conceded. The psychologist, Mr Molepo, explained that the symptoms of depression and post-traumatic stress disorder, suffered as a result of the emotional trauma the appellants had undergone, embraced the grief they had experienced. He explained that their feelings of grief and bereavement were psychological reactions to the significant emotional trauma they had undergone due to the shock caused by the circumstances surrounding Michael's death, and contributed to their psychiatric injuries.

[48] The court a quo dismissed the appellants' claim A as it felt that 'due to the insufficiency of the expert evidence, the appellants had not suffered psychiatric lesions'. In the light of what I have said, it clearly erred and misdirected itself in that regard. The existence of the psychiatric lesions was not only common cause but established by the evidence…

…

[52] As appears from these reports and Mr Molepo's evidence, all of the claimants sustained emotional shock, which is understandable given the circumstances under which poor Michael met his death…

[33] In *MM obo GM v Member of the Executive Council for the Department of Health, North West Province* (782/2022) [2024] ZASCA 52 (18 April 2024) the plaintiff sued in both her

personal and representative capacities, following the birth of her child who was later diagnosed with cerebral palsy, which she alleged was caused by the negligence of the defendant. In her personal capacity, the plaintiff's particulars of claim alleged '*[t]he Plaintiff has been severely shocked and traumatised as a result of seeing her first born in a cerebral palsied state and has suffered general damages for anguish, psychological trauma and loss of amenities of life*.' The defendant denied liability. The court further held that:

> *[11] It is trite that the appellant bears the onus to prove the damages she claims against the respondent, that the respondent's employees owed a legal duty to care for her and her baby, which duty was negligently breached and that a causal nexus exists between the damages suffered and the breach alleged. The quantum generally rests in proving the amounts claimed. Bester v Commercial Union confirmed that a plaintiff who suffers from negligently inflicted 'nervous shock' resulting in psychiatric or psychological injuries is entitled to claim damages for patrimonial loss under the Lex Aquilia. In Road Accident Fund v Sauls, this Court held that in order to be successful in claiming damages for emotional shock a plaintiff must prove that she or he had sustained a detectable psychiatric injury.*
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> *[12] More recently, in Komape v Minister of Basic Education (Komape), where a learner at school fell into a pit latrine and drowned, this Court reaffirmed the position that a plaintiff can only claim damages for emotional shock where it is suffered as a result of detectable psychiatric injury. In contrast, in the present matter there is no evidence that the appellant suffered any emotional trauma or shock. When faced with questions from the Court as to the paucity of evidence to sustain a claim for emotional shock in light of Komape, the high watermark of counsel's response was that the appellant was affected by the injury to her child, evidenced when she became emotional while testifying, and started to cry. The transcript reflects that at some stage in her testimony the appellant requested an adjournment. The presiding judge enquired whether 'the witness required time', and court adjourned briefly. That is as far as the record goes.*
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> *…*
>
> *[15] … the appellant's claim for emotional trauma must be proven by way of evidence. The appellant failed to meet this standard in the high court…*
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> *…*
>
> *[17] … It is necessary to note that the appeal record did not contain any record of whether the parties had agreed to a separation of issues. Only the respondent's attorneys responded to the Court's enquiry and advised that a pre-trial conference was held on 6 November 2017 in which it was agreed that liability and quantum would be separated, and that the plaintiff would bear the*

onus of proof and the duty to begin. No agreement was reached to defer the appellant's claim for emotional shock. In light of this agreement, it remains inexplicable why no evidence was led by the appellant in respect of her claim for emotional shock…

[34] Finally, in the case *of N.K v Member of the Executive Council for Health, Eastern Cape - Application for Leave to Appeal* (502/2017) [2023] ZAECBHC 24 (15 August 2023), Zilwa J, relying by and large on the same authorities above, came to the conclusion that the plaintiff before him had failed to prove her claim for 'severe psychological and/or psychiatric shock and trauma' arising from her medical negligence claim. In *N.K*, the court held that:

[6] Such proof would, of necessity, entail the leading of expert evidence. To succeed, in her claim the plaintiff had to prove that she sustained a detectable psychiatric injury which is not trivial.

[7] The applicant is a lay person and there is no suggestion that she has any expertise that would enable her to diagnose herself of the alleged ailments. A Claimant cannot simply make bald and unsubstantiated allegations of psychological and / or psychiatric shock and trauma that allegedly exists in the present and that will persist in the future. This requires proper accompanying diagnosis from relevant experts such as psychiatrists and psychologists.

[8] It is common cause that in this case no such expert evidence from any psychiatrists or psychologists has been led by the plaintiff to substantiate her claim of having sustained the alleged psychological and / or psychiatric shock and trauma. The mere ipse dixit by the lay applicant to have suffered such injuries has no evidential value that would ground a damages award in her favour for such alleged but unsubstantiated injuries.

Application of the legal principles to the facts

[35] The plaintiff, without proving the quantum of her claim, had to prove that the negligence of the defendant caused her harm. In other words, but for the amount of the damages, the plaintiff in the present context had to prove negligence, causation and harm.

[36] In *Home Talk Developments (Pty) Ltd and Others v Ekurhuleni Metropolitan Municipality* 2018 (1) SA 391 (SCA), a case where the issues of liability and quantum were

separated in terms of rule 33(4), and the matter proceeded to trial in respect of liability, the following was said of the delictual element of damage:

> *[93] Proof of damage is fundamental to a delictual claim. Assessment of damage is not the same as quantifying damage. Before quantifying damage, one must ascertain whether any loss has in fact been suffered. A plaintiff must produce sufficient evidence to enable a court to reasonably find that it has suffered damage. Damage is assessed by comparing the utility value of a plaintiff's patrimony before and after a damage-causing event.*
> *[94] In its plea, the respondent denied that the appellants had suffered damage, and they were thus required to prove that they had suffered loss…*

[37] The plaintiff's testimony on the issue of her damages or harm, was limited to the following:

> MR LOUW: If I may just take an instruction M'Lord. Indebted to M'Lord. Mrs Olivier, I've noticed that you are emotional, or upset while you gave your evidence this morning, apart from that …
> … Experienced since your husband's admission to the Livingstone Hospital the first time, and going through the second time, and then to Uitenhage, what do you experience by day or at night, from that day onwards?
> MS OLIVIER: I went into depression, I was treated for [interrupted].
> …
> MR LOUW: Thank you M'Lord. Perhaps I can phrase it differently, and without going into too much detail, just broadly, do you have nightmares about what has happened?
> MS OLIVIER: I actually, I did, I couldn't sleep, I still suffer from insomnia, I was, I did go to the doctor and I was treated for depression and anxiety, I still have nightmares, it's stuck in here, that kind of thing, so yes I do have a lot of anxiety.
> MR LOUW: As the court pleases, that is the evidence of this witness.
> …

[38] The above was never challenged by the defendant and stood uncontroverted. However, the question that arises is whether the above alone would suffice to prove harm. Absent proven harm, the other issues of negligence and causation matter not.

[39] From the authorities above, it is clear that the plaintiff had to tender in evidence the accompanying diagnosis from relevant experts such as psychiatrists or psychologists, and in the words of Zilwa J in the *N.K* case, the '*mere ipse dixit by the lay applicant to have suffered such injuries has no evidential value that would ground a damages award in her favour for such alleged but unsubstantiated injuries*'. The plaintiff had to prove a 'detectable psychiatric injury'.[15]

[40] Had the plaintiff presented the evidence of a suitable expert on her psychological lesion, her evidence above would have laid the necessary factual basis upon which her expert could base an opinion.

Conclusion and costs

[41] In the result, I am constrained to find that the plaintiff has not proven her damages or harm, and consequently, her claim must be dismissed.

[42] Had the plaintiff done so, the alternative argument of Mr Louw, arising from the amendment of the particulars of claim (paragraph 10.1), may have been a cause of concern to the defendant, considering that: it failed without explanation to call any witnesses to deal with the actual treatment and management of the deceased, in particular, absent thorough medical notes; it failed without explanation to call the 'treating doctor' who concluded on the cause of death as set out in Exhibit B; and it failed to explain how, in the prevailing circumstances, taking into account the comorbidities of the deceased, the deceased was discharged on 29 April 2021 in the state that he was in; and, it failed to withdraw or deal with its admission of the report of Dr Harris, in especially concerning her factual recordings arising from the hospital records.

[43] Concerning the issue of costs, Ms Miya argued that costs should be ordered on a party and party scale, Scale A. Mr Louw argued for costs on Scale C. It is trite that a court retains a

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[15] For example, see *Komape* at para [12].

discretion on the issue of costs, and may take into account an array of considerations, but when doing so, should exercise its discretion judicially.

[44] The general rule is that costs follow the result. Following that rule, the defendant would be entitled to its costs. However, a court may take account of, *inter alia*, the conduct of litigating parties, the failure to take certain steps when they should have, the interest of justice, and ultimately, a decision that is a matter of fairness to both sides.

[45] Considering that the cause of the conclusion I have reached is the plaintiff's failure to establish one of the delictual elements, the general should be followed and the plaintiff's claim should be dismissed with costs.

The Order

[46] Accordingly, the following order is granted:

> The plaintiff's claim is dismissed with costs, such costs to be allowed on Scale A in terms of rule 67A.

C D KOTZÉ
ACTING JUDGE OF THE HIGH COURT

Date of hearing: 10, 11, 12 and 13 February 2025 ; 2 and 8 April 2025
Date of judgment: 10 March 2026

Appearances:

For the Plaintiff : Adv Louw instructed by MKB Attorneys (formerly Niehaus McMahon Attorneys) (ref: MAT8413).

For the Defendant : Adv Miya instructed by the State Attorney (ref: 520/22-P2).