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**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 28471/2012**

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES: YES/NO  
(3) REVISED.

.....  
DATE

.....  
SIGNATURE

In the matter between:

[T.....] [L.....] obo  
[T.....] [T.....]

Plaintiff

AND

**THE MEMBER OF THE EXECUTIVE COUNCIL  
FOR HEALTH AND SOCIAL DEVELOPMENT OF  
THE GAUTENG PROVINCIAL GOVERNMENT**

Defendant

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**J U D G M E N T**

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**TWALA AJ**

- [1] Plaintiff sued the defendant out of this Court in her personal capacity and in her representative capacity as mother and natural guardian of her minor child for damages arising out of the negligence of the staff at Chris Hani Baragwanath Hospital and/or Lenasia South Clinic at the time when plaintiff was admitted with her then unborn son, T..... T..... (T.....).
- [2] It is common cause that on the 3<sup>rd</sup> February 2008 plaintiff was admitted to Chris Hani Baragwanath with her then unborn son T..... Plaintiff endured several hours of labour pains which necessitated a caesarean section. T..... was on 3<sup>rd</sup> February 2008 born by normal vaginal delivery. As a result of the prolonged labour and failure to timeously perform a caesarean section delivery, T..... was diagnosed as suffering from cerebral palsy.
- [3] On the 19<sup>th</sup> February 2014 Mojapelo DJP made an order that:  
*“The defendant shall pay the plaintiff all her agreed or proven damages in her representation capacity for and on behalf of her minor child T..... as a result of the negligence of the staff at the Chris Hani Baragwanath Hospital, resulting in T..... suffering from cerebral palsy”.*
- [4] The issue that remains for determination by this Court is the quantum of damages suffered by the plaintiff. However, at the beginning of the hearing of this case the parties had agreed to settle in the total sum of **R17 274 873.31** on the following heads of damages:
- i) Past medical and related expenses **R222 380.81.**

- ii) Future loss of earnings **R2 550 000-00.**
- iii) General damages **R1 200 000-00.**
- iv) With regard to future medical and related expenses, certain disciplines are in dispute and remain for determination. However other disciplines have been settled between the parties in the sum of **R13 302 492-50.**

[5] At the commencement of the hearing of this case, the defendant brought an application to condone the late filing of its adjusted or amended plea. The plaintiff opposed the filing of the amended plea and the application to condone its late filing.

[6] Defendant argues that the plaintiff served a Rule 28 Notice giving its intention to amend its particulars of claim on the 13<sup>th</sup> March 2015. On the 30<sup>th</sup> March 2015 the plaintiff filed its amended particulars of claim. This necessitated a consequential amendment of the defendant's plea. Although the defendant had already indicated on the 28<sup>th</sup> January 2015 that it intended to amend its plea, it did not effect the amendment because it was avoiding to make a series of amendments. It waited for the plaintiff to amend its particulars of claim before it could make the consequential amendment and/or adjust its plea. It is entitled in terms of the rules of court to amend its pleadings at least 15 days from date of receipt of the plaintiff's amended papers.

- [7] Plaintiff's argument is that the amendment by defendant is not consequential to its amended particulars of claim. If it is, then defendant should have filed its amended and/or adjusted plea on the 17<sup>th</sup> April 2015 as undertaken before Tsoka J in the pre-trial conference held before the learned Judge on 15<sup>th</sup> April 2015. Defendant has failed to file its amendment until the 24<sup>th</sup> April 2015 whereas the hearing was set down for 20<sup>th</sup> April 2015. The defendant faxed its amended plea on the 22<sup>nd</sup> April 2015 and served it on the plaintiff on the 24<sup>th</sup> April 2015.
- [8] Defendant contends that it was not ready to file its amended plea on 17<sup>th</sup> April 2015. However on the 20<sup>th</sup> April 2015 Mojapelo DJP ordered that it should file its amended plea by the 28<sup>th</sup> April 2015 when the case will be heard. Defendant argues further that the plaintiff will suffer no prejudice if the court allows the filing of the amended plea. It is necessitated by the plaintiff's amendment of its particulars of claim from R4.9 million to R65 million. Plaintiff's inconvenience by the late amendment or plea adjustment can be cured by a costs order. The delay in bringing the amendment was not deliberate.
- [9] Rule 28 (8) of the rules of court provides as follows:
- "Any party affected by an amendment may, within 15 days after the amendment has been effected or within such other period as the court may determine, make any consequential adjustment to the documents filed by him, and may also take the steps contemplated in rules 23 and 30"*

Rule 28 (10) provides as follows:

*“The court may, notwithstanding anything to the contrary in this rule, at any stage before judgment, grant leave to amend any pleading or document on such other terms as to costs or other matter as it deems fit.”*

- [10] The approach on allowing amendments to pleadings has been laid down by the courts in numerous decisions. In the case of **Trans Drakensburg Bank Ltd vs Combined Engineering 1967 (3) Durban & Coastal Local Division**, Caney J stated the following:

*“The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. The vital consideration is that no amendment will be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order of costs and where appropriate a postponement.”*

- [11] In the present case, the plaintiff has not shown that the defendant was mala fide in bringing the amendment of its plea. The defendant's explanation that the delay in bringing the amendment was because the plaintiff only amended its particulars of claim on the 30<sup>th</sup> March 2015 is sound and reasonable. Although there were discussions of amending the pleadings in January 2015, it would not make sense for the defendant to

amend its plea before the plaintiff amended its particulars of claim. Plaintiff's claim was amended from R4.9 million to R65 million as a result the defendant had to amend its plea. No prejudice could be visited on the plaintiff if the amendment of the plea is allowed. The same is not true with the defendant who is now facing a R65 million claim.

[12] There is no evidence before me that proves that the defendant was deliberate and wilful in the delay to amend its plea. Defendant obtained the experts' reports in March 2015 and had to consult with the experts before it could amend its plea. It is not clear why it made an undertaking before Tsoka J that it will file its amended plea on the 17 April 2015.

[13] The defendant did not comply with the undertaking it made before Tsoka J on the 15 April 2015 to file its amended plea on the 17 April 2015. However, this was extended by Mojapelo DJP on the 20 April 2015 when the learned Judge ordered the defendant to file its amended plea on the 28 April 2015. It is my view therefore, that there are no mala fides on the part of the defendant in filing its amended plea at this stage of the proceedings. There is no prejudice that would be visited on the plaintiff if the defendant is allowed to file its amended plea. There will be no delay in these proceedings for the defendant is not asking, nor does the amendment necessitate a postponement of this case.

[14] In the circumstances I make the following order:

I. Condonation of the late filing of the amended plea is granted;

II. The Defendant is granted leave to file its amended plea;

III. The Defendant to pay the costs of this application.

I now turn to deal with the main issues in this case.

[15] It is common cause that the plaintiff's minor child, T....., is a seven year old with Cerebral Palsy. The minor child has been referred to a myriad of experts by both the plaintiff and the defendant. Nine of these experts have compiled joint minutes recording agreements on certain aspects of the matter. The plaintiff called four witnesses to testify on its behalf. Two (2) of these witnesses are experts who testified on the future medical treatment required by T..... and the costs thereof in some disciplines and the associated devices. The other two witnesses testified on the legal costs and the creation and running of the trust. The defendant called three witnesses. I do not intend to deal with the whole of the evidence of the witnesses but to highlight those aspects that are in dispute between the parties.

[16] Ms Allison Margaret Crosbie, an Occupational Therapist, testified as follows:

"that she works with children with cerebral palsy. She evaluated the minor child at her offices and visited him at home. She consulted the plaintiff who advised that the minor child sleeps well at night and wakes up at 05H00 the next morning. He walks with an unsteady gait and stumbles on uneven surfaces. He bumps into objects as he walks like a drunk person. He produces excessive amount of saliva – hence food comes out of his mouth than going in. He is incontinent and makes growling sounds when he is doing No.2. He is not aware of No.1 at all. He does not have the sense of danger. He is suffering epileptic seizures. He sleeps at night from 08H30 and wakes up the next day at

05H00. If he wakes up during the night, then it is known that there is something wrong. With his inhibitions, T..... will require 24 hour a day care 7days a week for the remainder of his life. This has been agreed to between herself and Ms Quintal for the defendant in a joint minute dated the 31 March 2015 which forms part of these proceedings. It was further agreed that T..... will require a facilitator to accompany him to any stimulation centre, attend therapy sessions with him and then carry out a sensory rich IEP program at home in the afternoons when he is not at the stimulation centre. He will require a facilitator/ Au Pair for 8 hours a day until he is approximately 18 years of age 5 days a week. The facilitator will receive training from the Case Manager and during the therapy sessions with the treating therapists. He will require 3 care givers from the age of 18 for the rest of his life. The caregivers are normally trained to assist elderly people. They receive a basic nursing training for the elderly and will require further training to be emotionally mature, compassionate and physically strong for a child suffering from cerebral palsy. He requires a Case Manager who stands as go between the parents and the trustees, between the trustees and the financial advisers and informs them of what is in the medical reports and of the amounts required in the immediate future. The caregivers have an 8 hour shift. A domestic worker is necessary at once or twice per week in order to ensure that T..... has a hygienic environment, has clean clothes and that the therapy toys and equipment are kept clean and tidy.”

- [17] Ms Crosbie conceded to the submission by counsel for the defendant that she was not an expert on trust. She conceded further that she neglected to put in her report that T..... will require care for 24 hours a day. Counsel for the defendant put it to her that this does not appear in her report and not even on the past medical expenses which have already been settled between the parties. She conceded that T..... and his family now lives in a house provided by the plaintiff's attorney and is provided with 2 caregivers which the attorney has been paying. It is further



contended by counsel for the defendant that when T..... wakes up at night it is an infrequent occurrence and his parents can and will attend to him. He does not need a caregiver who will sleep in the same room as T..... just to help him with the blankets at night. The witness conceded that a caregiver at night is not absolutely necessary but needs to look at the temperature and heart beat and help with the blankets since T..... kicks off the blankets. T.....'s mother is very much involved in her son's situation and if she can clean for him, then it is not necessary to have a domestic.

[18] Ms Kerry Churchill, a Physiotherapist, testified as follows:

"T..... requires a wheelchair to maintain him in a functional position during feeding and for long distance mobility. The wheelchair she recommended is light in weight and capable of folding. It is easy to transport and fits very well in a small car with limited space. There are other wheelchairs in the market which are heavier in weight, fold their base but the wheels stay attached. They are cumbersome and strenuous to handle. She recommended that the maintenance costs be provided for the wheelchair at 10% of its value and it should be replaced every 3 years until age 21 and every 5 years thereafter. The cost of the wheelchair from the supplier she is familiar with is R42 000 and the maintenance of 10% is R4 200. T..... requires a gait trainer every 3 years until age 18 which will cost R10 300 and the maintenance at 10% of the value thereof. For the rest of his life he will require the rifton pacer gait trainer on yearly basis at the cost of R50 500 and the maintenance at 10% of the value thereof. He will require a walking frame every 2 years from age 18 until age 45. Due to the sensory difficulties with feeding, he requires a seating system that will restrain and calm him down. This was agreed upon her and her counterpart for the defendant.

- [19] Under cross examination she conceded that the wheelchair can serve dual purpose as a feeding chair as well. It must have a removable tray which helps him put his upper limbs on and cause him to sit up straight for lumbar support. She insisted that the wheelchair must be light in weight and must have tilt function, a harness, a cushion and trunk support. He requires a gait trainer to assist him in improving his gait. He can walk short distances and will only be on the chair when he is on an outing or being fed.
- [20] Mr Fuls Rudolf testified that he is a legal costs consultant. He has 24 years of experience in the industry. His experience is that parties normally recover about 70% of their fees on a bill of costs and 50% of the disbursements. The bigger the matter the bigger the shortfall. However, he conceded under cross examination that nothing prevents the Taxing Master from giving a party the full amount claimed. Further that, if a party is not satisfied with the Taxing Master's decision, the aggrieved party has the right to take that decision on review.
- [21] Mr Barend Jacobus van Heerden testified that he is fiduciary practitioner. He administers trusts and estates. He administers trust for disabled children and has about 300 of these trusts. He has been in this business for the past 30 years. He explained that the trustees meet and discuss the investment issues and the needs of the child. The case manager is a go between the trustees and the parents of the minor child. He agreed with the defendant's counsel that it is good business for him but advised that

creation of the trust in cases like the present one is a better option for it functions better than the Guardian's Fund.

[22] Then it was the turn for the defence case. The defendant called Ms L Patel who testified that an Assistant Director in the Gauteng Health Department. In a nutshell her evidence was about the services the clinics and public hospitals provide including catering for children with cerebral palsy like T..... Her evidence related to public health facilities around the area where the minor child resides. Under cross examination she conceded that the public hospitals and clinics do not have capacity to handle everybody for therapy. They put people for therapy in groups. If a particular clinic or hospital lacks capacity, patients are referred to another. They are obliged to abide by court orders at all times. She does not know how many people need treatment for cerebral palsy in the Johannesburg or Gauteng area.

[23] Ms Elizabeth Burger, the Deputy Director, Rehabilitation, Gauteng, testified that all the hospitals in Gauteng have physiotherapists. The wheelchairs the department offers weigh about 14kg and are regarded as within the "light weight category". The wheelchair is regarded as light weight when it weighs between 5 and 22kgs. The wheelchair in terms of the tender of the department costs R9 063 and the gait trainer or reverse walker costs R563. Under cross examination she disclosed that the tender is valid for 2 years starting from 1 October 2014 to 30 September 2016. Thereafter the

department will call for a new tender on new or similar specifications depending on the needs of the patients.

[24] Ms Fredda Strauss, the Deputy Master of the High Court, Pretoria discouraged the payment of the minor child's money into the Guardians Fund. She alluded to the fact that the guardians fund has long processes to be followed before the funds could be released. It has a maximum payment of R250 000 per annum and takes about 40 days before payment is release at any given time. It is a laborious process. It pays a compounded interest rate of 7.3% per annum and does not charge administration costs. The costs of administering a trust is 7.5% of the value of the estate. The trust only submits its accounts to the Master on winding up of the estate. The curator bonis submit its account to the Master on a yearly basis. The curator's fees are 6% on the income of the investments of the estate and charges 2% on the balance of the estate when the estate is wound up. The trustees are called upon to furnish security to the Master.

[25] The defendant raises three (3) issues in its amended plea as follows:

- i. That the plaintiff had a duty to mitigate its damages and has failed to do so;
- ii. That the interests of the child are of paramount importance in this case; and
- iii. That the plaintiff's case exposes the defendant to double jeopardy.

- [26] The defendant contents that the onus lies with the plaintiff to prove that the amounts claimed are reasonable and necessary. She has a duty to mitigate her damages. Plaintiff has to show that her claim on behalf of T..... would not put him (T.....) at optimum living conditions which would not have been on par with those he would have enjoyed had he not been injured. The treatment and assistive devices required can be obtained at the State expense from medical institutions that are under the control and administration of the defendant at a maximum amount of R120 per visit.
- [27] It is absurd for the defendant to even suggest that mitigating the plaintiff's damages entails T..... attending at the health facilities under the control and administration of the defendant. The defendant or its health facility has caused damages to the plaintiff and now wants to dictate the form of compensation that the plaintiff should accept under the guise that plaintiff should mitigate its damages. The defendant does not suggest how the plaintiff was supposed to mitigate her damages except that T..... should again be subjected to the painful treatment at the hands of the defendant's employees in State health facilities. What will happen if there is another medical negligence at the hands of the State health institutions? Must the plaintiff institute another action against the defendant? This would fly in the face that litigation between the parties must be finite.

[28] In the unreported judgment of this division delivered on the 30 April 2015 in the case of **Rewayne Hersig vs Premier, Heath & Social Development, Case No: 42685/2011**, Mathopo J noted the following:

*“ The anomaly or absurdity in the defendant’s plea is best illustrated by the urgent application obtained by the plaintiff on 24 March 2012 for urgent treatment of his bedsores. During the hearing of this matter I was informed by the parties that despite the lapse of the period of 30 days the defendant had not yet complied with the order of Makume J.”*

Ms Patel for the defendant was at pains to explain the issue of capacity within the State facilities. She in fact conceded that there are capacity problems with the State facilities. She said they are obliged to obey court orders and they have never failed to comply with court orders. However, it is abundantly clear from the sentiments expressed by Mathopo J in the Hersig case *supra* that the defendant ignores court orders.

[29] Recently, there has been various judgments in this division in similar cases. In the case of **Souls Cleopas vs The Premier of Gauteng, Case No: 09/41967**, Tsoka J stated the following:

*“It sounds strange to the ear and even bordering on arrogance for the defendant to seem to suggest that it will negligently cause damages to the plaintiff and thereafter arrogate to itself the form of compensation that the plaintiff should accept. It is not for the defendant to determine the form of compensation for plaintiff’s damages. Once the plaintiff has determined the extent of defendant’s duty to compensate him, the defendant has no*

*choice but to pay up so long as the damages have, to the best of the plaintiff, been proved.”*

- [30] Mr van der Walt SC for the plaintiff correctly submitted that an order has been made by this Court that the defendant shall pay to the plaintiff all her agreed or proven damages. The defendant cannot request that an order be granted substituting payment for services. Further, the defendant, as a State department, its payments are regulated by and is bound by the provisions of the Public Finance Management Act, 1 of 1999. There is no provision in the PFMA which substitutes payment for services. On the 19 February 2014 Mojaelo DJP made the following order, inter alia:

*“The defendant shall pay the plaintiff all of her agreed or proven damages in her representative capacity for and on behalf of her minor child, T……., as a result of the negligence of the staff of the Chris Hani Baragwanath Hospital, resulting in T……. suffering from cerebral palsy.”*

- [31] In the circumstances, I associate myself with the judgment of Tsoka J supra in that once the plaintiff has proven her damages, the defendant is obliged to pay.

- [32] According to the undisputed evidence of the experts and to the extent as agreed amongst the expert as it appears on the joint minutes, T……. will require medical treatment and assistive devices in the future. Counsel for the defendant, Mr Khoza SC contends that the regime of caregivers does not give T…….’s family any role in his life. He argues that it has been

accepted by the experts that T..... mother is very much involved in her son's life and assist as much as she can. It is strange that nowhere in the medical reports is stated that T..... has sleeping problems. In fact T.....s mother had no concern about his sleeping patterns. Therefore it is not necessary to have someone looking after T..... whilst he is sleeping.

[33] I agree with Mr Khoza SC that as much as Ts..... requires to be cared for, his family, as well, has a role to play in his life. Ts..... will be living with his family in the house bought for him by the defendant. It is part of their role to keep the house they are living in tidy and clean. In my view, there is no need for a third caregiver to look after Ts..... at night. It is also not necessary to have a domestic to clean T..... room once or twice a week when his family members live with him in the house.

[34] I have dealt with the issue subjecting T..... to the services of State health facilities above. I now turn to deal with the issue of the State health facilities supplying T..... with assistive devices as recommended by the experts.

[35] In the case of *Hersig supra*, the plaintiff required urgent medical treatment for his bedsores. He could not get it from the State health institutions. He was left with no option but to approach the court and obtain an order on an urgent basis. The order was granted but was ignored by these institutions.



What more can the poor plaintiff do to enforce her rights in the circumstances if even a court order is simply ignored? What guarantee does the plaintiff have in this case that the defendant will honour the court order? What options will be available to him if the defendant is recalcitrant and does not obey the court order?

[36] It is my view therefore that T..... need not be dependent on the defendant for the rest of his life for his future medical requirements and the supply of assistive devices. He has suffered enough at the hands of the employees of the defendant and the litigation between the parties must reach finality. The interest of T..... will be better served if the defendant pays the plaintiff's proven damages within 30 days of this order as provided in the PFMA.

[37] Counsel for the plaintiff contends that the best vehicle to administer the funds for T..... is a trust. The defendant led evidence of Ms Strauss who is a Deputy Master of the High Court who testified about the problems of the guardians fund and the advantages of a Curator Bonis.

[38] The experts are agreed that T..... requires a Case Manager who will be a go between the parents and the trustees. The Case Manager is the one who manages the affairs of T..... She knows what medical treatment he requires and when will he require that. She plans how to satisfy the needs of T..... at the most convenient of times. In my view

she can do the same with the Curator Bonis whose administration costs are far less than those of a trust. The evidence before me is that the trustees' administration costs are 7.5% of the capital whereas the Curator Bonis charges 6% on the income of the estate and 2% on the balance of the estate on winding up. I therefore agree with the defendant that a curator bonis be appointed to manage the financial affairs of T.....

[39] The defendant contends that the plaintiff has conceded that there is a contingency fee agreement between herself and her attorneys of record. By its nature the contingency fee agreement is to the effect that the attorneys would be entitled to a portion of the amount of damages that would be awarded to T..... Apportionment of the damages to the attorneys in respect of future medical costs will automatically put T..... out of pocket. Therefore T..... is running the real risk of running out of the necessary medical attention due the contingency fee agreement. These medical costs should not form part of the contingency agreement apportionment as this would be to the detriment of T.....s basic health care. This will expose the defendant to “double jeopardy” since the child has a guaranteed right to basic health care services in terms of the Constitution. Once he runs out of monies for his medical needs, T..... will turn to the very public facility.

[40] Section 34 of the Constitution of the Republic of South Africa, 1996 provides as follows:

*“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”*

[41] It is common cause that the plaintiff and her attorney of record entered into a contingency fee agreement on behalf of T..... who is a minor and suffers from cerebral palsy. The reason why the plaintiff and her attorney concluded a contingency fee agreement is not hard to find. It is because litigation is expensive and the plaintiff and her minor child could not exercise their right in terms of the Constitution for they are people without means. It is virtually impossible for impecunious litigants to access justice and the courts. The Legislature therefore promulgated the Contingency Fees Act, 1997, to assist poor litigants to access justice. Section 2 of the Contingency Fees Act provides as follows:

*“1. Notwithstanding anything to the contrary in any law or the common law, a legal practitioner may, if in his or her opinion there are reasonable prospects that his or her client may be successful in any proceedings, enter into an agreement with such client in which it is agreed –*

- (a) That the legal practitioner shall not be entitled to any fees for services rendered in respect of such proceedings unless such client is successful in such proceedings to the extent set out in such agreement;*
- (b) That the legal practitioner shall be entitled to fees equal to or, subject to subsection (2), higher than his or her normal fees, set out in such agreement, for any such services rendered, if such client is successful in such proceedings to the extent set out in such agreement.*

2. *Any fees referred to in subsection 1(b) which are higher than the normal fees of the legal practitioner concerned (hereinafter referred to as the “success fee”), shall not exceed such normal fees by more than 100 per cent. Provided that, in the case of claims sounding in money, the total of any such success fee payable by the client to the legal practitioner, shall not exceed 25 per cent of the total amount awarded or any amount not, for purposes of calculating such excess, include any costs.”*

[42] Section 5 of the Act provides for review of the contingency fee agreement by the client (the plaintiff in this instance) as follows:

*“5. Client may claim review of the agreement or fees:*

1. *A client of a legal practitioner who has entered into a contingency fee agreement and who feels aggrieved by any provision thereof or any fees chargeable in terms thereof may refer such agreement or fees to the professional controlling body or in the case of a legal practitioner who is not a member of a professional controlling body, to such body or person as the Minister of Justice may designate by notice in the Gazette for the purpose of this action.*
2. *Such professional controlling body or designated body, or person may review any such agreement and set aside any provision thereof or any fees claimable in terms thereof if in his, her or its opinion the provision or fees are unreasonable or unjust.”*

[43] In the present case, the defendant does not challenge the provisions of the contingency fee agreement. The defendant contends that any award of future medical expenses should be excluded from the contingency fee

agreement for the minor child will have a shortfall to meet his future medical needs. As a result the minor child will turn to the health institutions under the control of the defendant. The defendant will not be able to turn him back because of the constitutional rights of a child to basic health care.

- [44] Attorneys take these types of cases on risk that if the plaintiff is successful in his or her case, then fees will be due and payable to the attorney. It is on a “no win no fee basis”. Attorneys incur costs and disburse a lot of money in running these cases. Such costs cannot be fully recovered by the party and party costs component only. In the case of **Law Society of South Africa & Others vs Road Accident Fund & Another 2009 (1) SA 206 (CPD)** Traverso J noted the following:

*“Mr Cassim for the first respondent, is correct in his submission that the entire scheme of the Act is aimed at ensuring the claimants get just compensation and that only party and party costs are guaranteed thereunder. But in all litigation there is invariably an attorney and client component which has to be borne by the client.”*

- [45] In my view Section 2 and 5 of the Act provide for the safeguards should the fee be excessive or if the plaintiff is not satisfied with the provisions or fees in terms of the agreement. I agree with the plaintiff’s counsel that what the defendant proposes to this Court is a tactic to discourage attorneys from taking on poor litigants’ cases. It cannot be said that the defendant is now the champion of the rights of the minor child when in fact it is the

defendant, through the negligent actions of the public hospital staff, who brought this child before this Court.

[46] I am of the view therefore, that this Court cannot interfere with the provisions of the contingency fee agreement as suggested by the defendant, since it would be interfering with the attorney and client relationship. The relationship between the plaintiff and her attorney has nothing to do with the defendant. Further, it would defeat the purpose of section 34 of the Constitution if this Court were to make an order as suggested by the defendant. Indigent people would be adversely affected by such an order.

[47] As indicated above, there are sufficient safeguards in place to protect the interest of T..... in this case. The defendant has placed no evidence before me to suggest otherwise. Therefore the defendant's amended plea falls to be dismissed.

[48] I have indicated supra that it is my view that there is no necessity for T..... to have the services of three (3) caregivers and a domestic worker to clean his immediate environment. This in monetary terms translates to a deduction of the sum of **R3 278 136** for the caregiver and a sum of **R413 984** for the domestic. The total deduction on future medical and related expenses for T..... is therefore a sum of **R3 692 120**.

[49] In the circumstances, I make the following order:

1. The defendant shall pay to the plaintiff a capital amount made up as follows:

1.1	Past hospital, medical and related expenses	R 222 380.8
1.2	Future loss of earnings, earning capacity and Loss of employability	R2 550 000.00
1.3	General damages for pain and suffering, loss Of amenities of life, disability and disfigurement	R1 200 000.00
1.4	Future hospital, medical and related expenses	R24 405 709.50
	<b>TOTAL</b>	<b>R28 378 090.31</b>

2. The capital amount shall be paid on or before the 31 August 2015 directly to the Trust account of the plaintiff's attorneys of record with the following banking details:

**WIM KRYNAUW ATTORNEYS TRUST ACCOUNT**

**ABSA BANK TRUST ACCOUNT**

**ACCOUNT NO: 4.....**

**REFERENCE: M.....**

3. Following payment of the capital amount, the plaintiff's attorneys shall retain the capital amount in an interest bearing account in terms of Section 78(2)(A) of the Attorneys Act, for the benefit of Tshedza Tsita (hereinafter referred to as "the minor child"), pending the appointment of a Curator Bonis.

4. The plaintiff's attorneys shall:
  - 4.1 appoint a Curator Bonis within a period of two (2) months from the date of this order to administer the estate of the minor child;
  - 4.2 pay all the monies held in trust by them for the benefit of the minor child to the Curator Bonis after deduction of their fees, costs and disbursements.
5. The defendant shall pay the costs for the appointment of the Curator Bonis.
6. The defendant shall pay interest on the capital amount at a rate of 9 per cent per annum from the date on which payment becomes due to date of final payment.
7. The defendant shall pay the plaintiff's agreed or taxed party and party costs on the High Court scale, which costs shall be inclusive of, but not limited to, the following:
  - 7.1 The costs attendant on obtaining the medico legal reports and / or addendum medico legal reports and / or the joint minutes, as well as the qualifying and / or preparation fees, if any and as allowed by the Taxing Master, of the experts:
    - 7.1.1 Ms A. Crosbie (Occupational Therapist);
    - 7.1.2 Ms K Churchill (Neurodevelopmental Physiotherapist);
    - 7.1.3 Ms I Hattingh (Speech Therapist);
    - 7.1.4 Ms P Jackson (Physiotherapist);
    - 7.1.5 Dr G Firth (Orthopaedic Surgeon);
    - 7.1.6 Dr P Lofstedt (Dental Surgeon);



- 7.1.7 Dr L Maron (Ear, Nose and Throat Specialist);
  - 7.1.8 Dr L Grinker (Psychiatrist);
  - 7.1.9 Dr M Lippert (Paediatric Neurologists);
  - 7.1.10 Dr S Choonara (Urologist);
  - 7.1.11 Dr B Banieghbal (Paediatric Surgeon);
  - 7.1.12 Mr H Grimsehl (Orthotist);
  - 7.1.13 Ms K Thokoane (Dietician);
  - 7.1.14 Mr D Rademeyer (Mobility Consultant);
  - 7.1.15 Ms R Jessen (Riding and Patient Mobility Consultant);
  - 7.1.16 Ms M Scheepers (Nursing Consultant);
  - 7.1.17 Mr A Grobler (Quantity Surveyor);
  - 7.1.18 Ms S van den Heever (Educational Psychologist);
  - 7.1.19 Prof. D Strauss (Life Expectancy Consultant/Statistician);
  - 7.1.20 Mr M Schussler (Economist);
  - 7.1.21 Mr D De Vlamingh (Industrial Psychologist); and
  - 7.1.22 Mr G Whittaker (Actuary).
- 7.2 The qualifying and/or preparation and / or reservation costs, inclusive of consultations with counsel, for the trial in respect of the following witnesses, if any and as allowed by the Taxing Master:
- 7.2.1 Ms A Crosbie; and
  - 7.2.2 Ms K Churchill.
- 7.3 The costs attendant upon obtaining payment of the capital amount awarded and / or any interest thereon.
- 7.4 The costs consequent upon the employment of two counsel.

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**TWALA  
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**COUNSEL FOR THE PLAINTIFF:      ADV. N van der WALDT SC**

**INSTRUCTED BY:                      WIM KRYNAUW INCORPORATED  
6<sup>TH</sup> FLOOR, MARBLE TOWERS  
208-212 Jeppe Street  
JOHANNESBURG  
TEL: 011 955 5454  
REF: W KRYNAUW/ MEC0015/DC**

**COUNSEL FOR THE DEFENDANT:    ADV. M KHOZA SC**

**INSTRUCTED BY:                      THE STATE ATTORNEY: ME SMITH  
10<sup>th</sup> FLOOR, NORTH STATE BLD  
95 Albertina Sisulu Street,  
Corner Kruis Street  
JOHANNESBURG  
TEL: 011 330 7665  
REF: 5065/12/P4/SMI 436**

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**DATE OF JUDGMENT: 16 JULY 2015**