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REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2014/20974

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

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DATE

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SIGNATURE

In the matter between:

M: J obo K

Plaintiff

And

MEC FOR HEALTH GAUTENG PROVINCE

Defendant

JUDGEMENT

MAKUME, J:**A INTRODUCTION**

- [1] This is a claim for damages by the plaintiff arising out of the birth of her minor child K at Tembisa Hospital on the 19th August 2006. The only issue for determination by this court is quantum of damages the Defendant having earlier conceded liability. An order was granted on the 2nd June 2018 that Defendant must pay Eighty percent (80%) of the agreed or proven damages flowing from the neurological injuries sustained by the minor child K during her birth.
- [2] The Plaintiff is J M an adult female person born on the 2nd February 1971 who resides at [...], Ivory Park 2 MIDRAND. She is the biological mother of K.
- [3] The Defendant is the Member of the Executive Council for Health Gauteng Provincial Government who is responsible for the control, functioning, operations and management of the Gauteng Department of Health.
- [4] Tembisa Hospital is a medical institution which falls under the authority of and is controlled, managed and operated by the Department of Health of the Gauteng Province.

BACKGROUND

- [5] On the 18th August 2006 the Plaintiff was admitted to the Tembisa Hospital for confinement. She endured several hours of labour when an urgent Caesarean operation was indicated.

[6] As a result of Plaintiff's prolonged labour and the defendant's employees failing to perform urgent Caesarean operation she gave birth to K by way of a normal vaginal delivery on the 19th August 2006.

[7] As a result when K was born she suffered an hypoxic Ischaemic incident/birth asphyxia due to intrapartum asphyxia causing her to sustain severe brain damage as a result of which she suffers from cerebral palsy and mental retardation.

[8] At the Case Management Conference held on the 10th February 2020 before Weiner J the parties agreed that the matter was trial ready in respect of quantum on the following heads of damages:

8.1 General damages

8.2 Loss of earnings

8.3 Care giving

8.4 Care Management

8.5 Cost of motor vehicle

8.6 Cost of home

[9] Subsequent to that conference the parties convened again shortly before the trial on the 9th March 2020 at which pretrial conference the following was agreed:

9.1 The Defendant offered to settle general damages in the amount of R1 800 000.00 which offer was accepted by the plaintiff.

9.2 The defendant undertook to file its own actuarial report by the 13th March 2020 for purposes of calculating the plaintiff's future loss of earnings.

- [10] Notwithstanding the undertaking as set out in 9.2 above when this matter commenced before me on the 18th March 2020 the Defendant had not filed its actuarial report. This necessitated an agreement to the effect that calculation of the Plaintiff's future loss of earnings will be based on the calculation as set out in the Plaintiff's actuarial report which was handed in as Annexure "A"
- [11] Accordingly the only issue to be decided by me in respect of K's future loss of earnings relates to the level of education she would have achieved and based on that her projected employment opportunities.
- [12] The parties' Counsels are in agreement about complications experienced by the minor child, K. A further agreement was reached between the parties that plaintiff's medico-legal reports be handed in as evidence without formal proof thereof.

B. PLAINTIFF'S EXPERT REPORTS

- [13] The Plaintiff handed up a number of its expert reports including joint minutes of opposing experts. The point of dispute between the plaintiff and the defendant is to be found in Bundle "K" which is the joint minute report of the opposing Industrial Psychologists. In particular Defendant's Counsel points out that at paragraph 2.5.3 of the joint minute the Industrial Psychologists differ in terms of the likely earnings of K. It is this aspect that the defendant counsel latched on in arguing for a higher contingency in the final calculation of K's future loss of earnings.
- [14] In her amended particulars of claim dated 17th March 2020 at paragraph [13] read with paragraph 15.2 the plaintiff says that as a result of the admitted negligence by the defendant's employees K will experience loss of earnings,

alternatively future earning capacity as a resulting of a permanent and total inability to generate any meaningful income result in future loss of R5,3 million.

- [15] It is common cause between the parties that K suffers from a severe type of cerebral palsy. Prof J. Smith, a Neonatologist, in analyzing the MRI Scan as it appears in the report of Dr Ranchod confirms that “the features were those of an acute profound hypoxic ischaemic brain injury”.

- [16] Dr G. S. Gericke, a Specialist Pediatrician on Clinical examination reports that K suffers mixed cerebral palsy and that the history and clinical findings do not contain information which point towards a condition other than classical cerebral palsy.

- [17] Ms Aires, a Physiotherapist, says that K is classified on the GMFCS System as being a child with Level 111 function. According to that system the incumbent walks with adaptive equipment assistance, requires hand-held mobility assistance to walk indoors while utilizing wheeled mobility indoors, in the community and at school, can sit on own or with limited external support and has some independence in standing transfers.

- [18] Professor R. Solomon, a Paediatric Neurologist, assessed K and made the finding that she suffers Dyskinetic Cerebral Palsy and has profound intellectual disability.

C. LOSS OF EARNING

- [19] Against the medical findings set out above the Industrial Psychologists also produced their reports. As a basis of their reports it can be accepted as common cause that both agree that K is unemployable. They differ in respect of her likely earnings pre-accident having regard to her family history and educational achievement of her parents and siblings.

- [20] Plaintiff's Industrial Psychologist Talid TALMUD (TALMUD) of Jacobson Talmud Consulting Pty Ltd makes the point that had the incident not occurred K would have been able to attend mainstream school and complete Grade 12 level of education and possibly a diploma level of education.
- [21] TALMUD further makes the point that now that K finds herself in this position post morbid she has suffered from developmental delays and has been diagnosed with cerebral palsy due to complications following the incident. Taking into account that diagnosis Talmud opined that K has been rendered unemployable in the open labour market.
- [22] It is significant to note that both Industrial Psychologists in assessing K's premorbid occupational or employment sustainability that one of the factors to be taken into consideration is her family history, circumstances and their educational qualifications and occupation.
- [23] It is common cause that K's father obtained a Grade 10 level of education and is currently unemployed whilst her mother obtained Grade 12 level of education and is currently employed as a General Worker. Her eldest brother obtained Grade 12 level of education.
- [24] This court accepts the general notion that with the advent of technology children of late tend to progress higher or further than their parents academically and vocationally. It is not surprising that Dr Geeta Prag, an Educational Psychologist makes the finding at paragraph 3.4 of her report that when considering the reported information regarding the family schooling and employment history, it would be apt to reason that pre-incident, K would have been able to complete a Grade 12 with a Certificate pass/Diploma. Further that she would have been able to attend the FET College to obtain Certificate Courses (NQF5) or a Tertiary institute of her choice to obtain Diploma Courses (NQF6). With those qualifications Dr Prag concludes that K would have been able to secure employment in the field of her studies.

- [25] Nicolene Kotze, the Defendant's Industrial Psychologist, agrees with the finding by Dr Prag but strangely dismisses that finding when she at 7 (v) of her report says that because of an article published in 2018 by one Subethra Pather an Academic Development Lecturer at Cape Peninsula University of Technology which indicated that more than 40% of students drop out in their first year of study, that there is no guarantee that K would have completed post Grade 12 qualification. On that basis alone Nicolene Kotze opines that a higher than normal pre-accident contingency deduction should be applied.
- [26] The basis for this conclusion is in my view speculative. The article by S. Pather is not before this court for scrutiny. It does not tell us if the assessment related to Cape Peninsula University of Technology only or other institutions of higher learning. I also do not know what the reasons are for such drop out rate it could be financial or anything else except ability to learn or any intellectual short coming.
- [27] In any case in the joint minute of the Industrial Psychologists dated the 12th February 2020 at paragraph 2.6 there is agreement based on Scenario 2 being NQF level 5 Higher Certificate level of education which includes a Diploma. This agreement and concession puts paid for reliance on the report by Subetra Pather.

D. CALCULATION OF FUTURE LOSS OF INCOME EARNING CAPACITY

- [28] The main point of difference between the parties is not that K would not have been able to earn income pre-morbid, it is her likely earnings. Plaintiff has submitted uncontroverted evidence by her actuary Gerald Jacobson who has detailed two scenarios Scenario 1 being the scenario when K would have progressed up to Grade 12 and Scenario 2 being when K would have a Diploma qualification.
- [29] The Plaintiff has advanced argument and asks this court to award loss based on Scenario 2 being value of income in the amount of R5 820 767.00 less

20% contingency which gives us an amount of R4 656 614.00. To this must still be deducted 20% liability in terms of the earlier court order.

- [30] The defendant has without producing any evidence asked the court to award damages as detailed in Scenario 1 in the plaintiff's actuarial report. This is notwithstanding the fact that in the joint minute the Industrial Psychologists agreed that the minor child K would have progressed and achieved a diploma certificate. In the final analysis the defendant relying on the academic report by Subethra Pather submits that the defendant would settle for a higher contingency of between 25% to 35% in the event that the court should accept basis 11 of the actuarial report.

- [31] The Defendant referred me to an as yet unreported decision by my brother Davis J in the matter of Morongoe Ruth Modise obo Minor and Road Accident Fund Case Number 10329/2019 Gauteng Division of the High Court Pretoria a judgement delivered on the 12th August 2019.

- [32] In the judgement Davis J rejected the Defendant's argument that a 35% contingency deduction as he says that there was no basis for that increased percentage having regard to inter alia Southern Insurance Association Ltd v Bailey No 1984 (1) SA 98 (A) at page 116 G-117A, Goodall v President Insurance Company Ltd 1978 (1) SA 389 (W) and Shield Insurance Company Ltd v Hall 1976 (4) SA 431 (A).

- [33] The basis on which the actuary calculated the future loss of earnings was as set out in the reports of Dr A P J Botha a specialist surgeon and Dr V. R. Mogashoa a Paediatric Neurologist as well as the Industrial Psychologists referred to above.

- [34] In the Modise matter the court only accepted a 35% contingency in calculating post-incident earning. This is different for in this matter we have to deal with pre-morbid scenario.

E. CONTINGENCIES

[35] It is generally accepted that contingencies cover a wide range of considerations which vary from case to case. A trial court has a wide discretion in that regard. The usual considerations include taxation, life expectancy, loss of employment, etc. In his report Gerald Jacobson took all these factors into consideration.

[36] In BEE v Road Accident Fund 2018 (4) SA 366 SCA the age of the claimant was taken into consideration as relevant in determining contingencies. It was held that the younger the victim the longer the period over which the vicissitudes of life will operate and the greater the uncertainty in assessing the claimant's likely career path. In that case a contingency of 15% for future loss of earnings over a lifespan of 11 years was appropriate.

[37] In this matter I find nothing wrong with the plaintiff's call to fix contingency in respect of future loss of earnings at 20% as proposed in the actuarial report.

[38] ORDER

38.1 In partial disposal of the matter, the defendant shall pay the plaintiff in her representative capacity for and on behalf of K an amount of R 5 525 290.88 (Five Million Five hundred and Twenty Five Thousand Two Hundred and Ninety Rands and Eighty Eight Cents) which amount comprises the following:

38.1.1 General Damages in the amount of R1 800 000.00

38.1.2 Future loss of earning capacity: R3 725 290.88 which is arrived at as follows:

CAPITAL	R5 820 767.00
Less 20% liability	R1 164 153.40
	<hr/>
	R4 656 613.60
Less 20% contingencies	R 931 322.72
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Total	R3 725 290.88
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38.2 The amounts referred to in paragraphs 38.1.1 and 38.1.2 above shall be paid within 30 days of the date of this order, failing which the defendant shall pay interest on the said amount at the rate of 10.25% per annum calculated from 30 days after the date of this order to date of payment.

38.3 The determination of remaining heads of damages and related issues is postponed sine die.

38.4 Defendant shall pay Plaintiff's taxed or agreed party and party costs on the High court scale in respect of the action to date, such costs to include:

38.4.1 the costs attendant upon the obtaining of payment of the full sums including any interest referred to herein.

38.4.2 the defendant shall pay the plaintiff's costs consequent upon the employment of one counsel on the senior junior scale, including but not limited to counsel's appearance fees, his preparation fees, travelling costs and time, drafting of documents attending consultations, inspections and pre-trials.

38.4.3 The costs to date of this order, which costs shall include the costs of the attorney which include necessary travelling costs and

expenses (time and distance), preparation for trial and attendance at court which shall include all costs previously reserved.

38.4.4 The costs of all medico-legal, actuarial and addendum reports required for the determination of the quantum including but not limited to the following:

38.4.5 The reasonable and taxable preparation, qualifying and reservation fees, if any, in such amount as allowed by the Taxing Master, of the following experts:

38.4.6 The reasonable costs incurred by and on behalf of the Plaintiff in attending all medico-legal examinations of both parties' experts which shall include but not be limited to necessary travelling costs and expenses including travelling (time and distance), accommodation and airfare if any.

38.4.7 The costs of and consequent to the parties' experts holding joint meetings and compiling minutes of joint meetings if any, and /or addendum reports and joint minutes.

38.4.8 The costs of and consequent to the Plaintiff's trial bundles and witness bundles, including the costs of 6 (six) copies thereof.

38.4.9 The costs of an interpreter if any.

38.4.10 The costs of and consequent to the holding of all pre-trial conferences, including counsel Mr Desmond Brown's charges in respect thereof if any.

38.4.11 The travelling fees of the Plaintiff, who is hereby declared a necessary witness, including but not limited to any airfares, shuttles and accommodation if any.

38.5 Such agreed or taxed costs shall be paid within 14 days of the agreement or taxation thereof.

38.5.1 In the event that the costs are not agreed the Plaintiff shall serve a notice of taxation on the Defendant's attorney of record.

38.5.2 The Plaintiff shall allow the Defendant 14 (Fourteen) days from the date of allocatur to make payment of the taxed costs.

38.5.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.25 % per annum on the taxed or agreed costs from date of allocatur to date of final payment.

38.6 The sums of money and any interest thereon referred to in paragraphs 1.1 and 1.2 above and the costs referred to in paragraphs 4 and 5, are payable to the Plaintiff's attorneys trust account, the particulars of which are as follows:

Name of account Holder:	DU PLESSIS ATTORNEYS TRUST ACCOUNT
Bank Name	: ABSA BANK LIMITED
Branch Name	: Randburg Business Bank
Branch Code	: 632 005
Account number	: 405 883 0885
Account Type	: Trust Account

DATED at JOHANNESBURG this the day of April 2020.

M A MAKUME

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

DATE OF HEARING : 18 MARCH 2020

DATE OF JUDGMENT : APRIL 2020

FOR PLAINTIFF : ADV BROWN

PLAINTIFF ATTORNEYS : DU PLESSIS ATTORNEYS

FOR DEFENDANT : ADV MTUKUSHE

DEFENDANT ATTORNEYS :