

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO.: 21185/2008

10/6/2016

Not reportable

Not of interest to other judges

Revised.

In the matter between:

T P VILAKAZI

Plaintiff

and

THE MEC OF THE DEPARTMENT OF HEALTH,
MPUMALANGA

Defendant

JUDGMENT

VAN DER WESTHUIZEN, A J

1. The plaintiff claimed damages from the defendant in respect of herself and her minor daughter arising from negligent treatment provided to the minor child soon after the latter's birth at the Witbank Hospital during January 2007.
2. This matter has some history.

3. The defendant initially defended the action. On 28 September 2009, the defendant accepted liability to pay 100% of the plaintiff's proven, alternatively agreed damages suffered, in terms of a draft order that was made an order of court on that day. The said order provided that the issue of quantum to be postponed *sine die*.
4. On 5 October 2011, this court made an *interim* award in the amount of R100 000.00 and which was payable on or before 30 November 2011. I am told that no payment in respect of the *interim* award has been made to date.
5. This court struck out the defendant's defence on 15 August 2014.
6. This matter was enrolled for trial on 6 June 2016, however it stood down to 7 June 2016 to enable counsel for the plaintiff to ascertain whether the defendant would participate in the present trial. I am told that the attorneys had indicated that the plaintiff should proceed by way of default.
7. Plaintiff was represented at the trial by senior and junior counsel. Such representation is warranted.
8. As part of the plaintiff's case, counsel for plaintiff handed into court certain affidavit evidence by experts in support of their respective reports that were already before court. These related to the reports by:
 - (a) Lida Moller, an Educational Therapist;
 - (b) Dr J P M Pienaar, a Plastic Surgeon;
 - (c) Dr Engelbrecht, an Orthopaedic Surgeon;
 - (d) Dr DA Shevel, a Psychiatrist;
 - (e) Carin Mohr, an Occupational therapist; and
 - (f) C du Plessis, an Actuary.
9. These aforementioned affidavits confirmed the findings contained in the reports prepared by the deponents. Some experts had filed supplementary affidavits that dealt with updated information. I accept these affidavits into evidence.

10. Counsel for the plaintiff further handed in affidavits by teachers of the minor child in respect of problems encountered by the minor child due to her limitations as a result of the circumstances surrounding her birth and the subsequent incident that occurred at the Witbank Hospital soon after birth. These affidavits were by:

- (a) Ms T S Mpila, a grade 2 teacher at [...] Primary School, Bethal;
- (b) Ms P P Y Mashinini, a grade 1 teacher at [...] Primary School, Bethal; and
- (c) Ms P A Nkosi, head of the department of the foundation phase at [...] Primary School, Bethal.

11. The affidavits by the respective teachers of the minor child and that of the head of the department foundation phase paint a bleak picture of the future of the minor child. It is clear from those affidavits that the minor child has severe learning disabilities that impact tremendously on her ability to progress at school.

12. The plaintiff led the *viva voce* evidence of the following witnesses:

- (a) Ms L Möller, an Educational Therapist;
- (b) Mr W J Wessels, an Industrial Psychologist; and
- (c) Ms E Bester, an Occupational Therapist.

The evidence of the minor's mother, the plaintiff, was also led.

13. In the particulars of claim two claims are set out. Claim 1 relates to damages that the minor child suffers as a direct result of the incident that occurred during January/February 2007. The second claim relates to the plaintiff in her personal capacity as a result of the incident during January/February 2007.

14. Counsel for plaintiff requested that the matter only proceed in respect of the claim relating to the minor child, the other claim, claim 2 to stand over for adjudication at a later stage.

15. The circumstances that led to the claim for damages in respect of the minor child can be summarised as follows:

- (a) The plaintiff was admitted to the Witbank Hospital on 15 January 2007 and on the same day she gave birth to the minor child;
- (b) The minor child was born prematurely at 28 weeks and was incubated;
- (c) During the period 15 January 2007 to 9 March 2009, the personnel and employees of the Witbank Hospital generally took care of the plaintiff and the minor child, administered medication and intravenous feeding to the minor child, applied a tourniquet to the leg of the minor child when administering a Iatrogenic intravenous feeding in the neonatal intensive care unit of the hospital;
- (d) The application of the tourniquet was by way of a surgical glove;
- (e) During the night of 3 to 4 February 2007, the tourniquet was left on the minor's right leg
- (f) The failure to remove the tourniquet on that occasion, resulted in the blood supply to the lower leg being cut off and thereby causing permanent damage to the body tissue of the minor's leg;
- (g) The sequelae of the aforesaid failure to timeously remove the tourniquet resulted in permanent scarring and an inability to utilise the leg properly in a normal and natural manner.

16. Dr P Engelbrecht, an Orthopaedic Surgeon, indicates and recommends in his report future medical procedures that are necessary to be undertaken as a result of the aforesaid incident. He has set out the cost of such medical procedures.

17. The various experts agree that the result of the aforesaid incident, the minor child suffers severe physical impairment. The experts are also agreed that the said physical impairment exacerbates the inevitable impairment resulting from the premature birth of the minor child.

18. The minor child is thus not only physically disabled, but *inter alia* also suffers cognitive disabilities. The combined result, so say the experts, impacts negatively on the progress of the minor child in her education, her natural development, her social interaction and her prospects of enjoying employment later.

19. The effect of the foregoing, according to the experts, requires that the minor child be placed in a special school where she would be privy to assistance in respect of her impaired learning ability and where she would enjoy further assistance relating to her development. The New Hope School in Pretoria has been identified as a recommended placement. The minor child would be accommodated in the hostel facilities of the school for logistical and other related reasons. She presently resides with her mother in Bethal, Mpumalanga.
20. However, the experts are further agreed, that the minor child requires additional assistance in addressing her impaired learning abilities. Such additional assistance would require the appointment of a tutor *l au pair*. The experts are agreed that the minor's mother is not capable of assisting the minor child in this regard.
21. The experts are agreed and recommend that provision is made for the appointment of an Occupational Therapist to assist the minor child from time to time in monitoring her physical impairment.
22. As the minor child is incapable to attend to any financial matters of her own, she is presently 9 years of age, and would in future not be able to attend thereto, the experts recommend that a trust be established where a trustee could attend to her financial matters and to assist in arranging the various medical procedures that are recommended as and when such are required.
23. I agree that it is necessary to place the minor child in a special school such as the New Hope School in Pretoria and that she be accommodated in the hostel facilities. I further agree that the minor child suffers such impairment as a result of the incident that an Occupational Therapist be appointed as and when required to monitor the progress of the minor child. I also agree that it is necessary to appoint a tutor *l au pair* to assist as recommended.
24. It is clear from the evidence before me that the mother of the minor child would not be capable to assist the minor child in attending to the minor child's financial matters. It would be in the interest of the minor child that a trust be established

and a trustee to be appointed to address the matters as indicated in the reports. In that regard, Mr Constant Wilsnach, an attorney, has indicated that he is willing to be appointed as trustee. I am of the view that the duration of the trust should be life long. Should it be required that the trust be terminated prior to the death of the minor child, an application in that regard is to be made to the High Court. A draft Trust Deed has been provided. I am satisfied with the terms thereof.

25. I have before me a number of Actuarial reports compiled in respect of the relevant rubrics relating to damages. There are updates and others deal with additional issues that have arisen since the initial report was prepared. These are of great assistance in determining the amounts to which the plaintiff is entitled.

26. Mr Geach submitted in respect of the contingencies relating to the loss of earnings that are to be considered, that 17.5% would be reasonable and fair. I agree.

27. He also submitted, with reference to comparable awards made in the past, that an amount of R350 000.00 in respect of general damages would be reasonable in the circumstances surrounding this matter. I agree.

28. It follows that the plaintiff in her representative capacity as mother and natural guardian of the minor child is entitled to the amount of R4 109 273.00 made up as follows:

(a) Loss of earnings	R676 000.00 less 17.50%: R 558 195.00
(b) General damages:	R 350 000.00
(c) Future medical and related expenses:	R2 472 550.00

Subtotal:	R3 380 745.00
Minus interim payment:	R 100 000.00
Plus trust costs (life long):	R 828 528.00
Total:	R4 109 273.00

I grant the order as contained in the draft order prepared by counsel for the plaintiff, duly

completed by me, marked XYZ and attached to this judgment.

On behalf of Plaintiff: B P Geach SC
 L J Visser

Instructed by: Salome Le Roux Attorneys

On behalf of Defendant: No appearance

Instructed by: