IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case NO; 21336/2014

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES / NO

(3) REVISED

_22/04/2022_____

_____

DATE SIGNATURE

In the matter between

B[....] N[....] obo N[....] S N[....] Plaintiff

V

The MEC for Health, Gauteng Defendant

REASONS

MABUSE J

[1] On the 12th of August 2021 I granted an order which read as follows:

"*The Defendant is ordered to pay the amount of R571, 879. 00 to the Plaintiff in her representative capacity, in respect of the claim for past caregiving services."* Having made the aforegoing Order, I furnished no reasons therefor. The Defendant now seeks reasons for said Order. These are therefore the reasons.

[2] The plaintiff in the above matter is B[....] N[....], an adult female who resides at House Number [….]. The Plaintiff claimed damages against the Defendant in her capacity as the mother and natural guardian of her minor son, N[....] S N[....] (N[....]), who was born on 13 May 2009. He was four yes ten months old at the time the Plaintiff commenced this litigation against the Defendant.

[3] The Defendant is The Member of the Executive Council, Department of Health of the Gauteng, Provincial Government, in her or his official capacity. The head office of the Member of the Executive Council is located at Bank of Lisbon Building, 37 Sauer Street, corner Market and Sauer Streets, Johannesburg, Gauteng Province.

[4] On or about 15 May 2009 the Plaintiff was admitted at Pholosong Hospital in Gauteng. She was pregnant with N[....]. The purpose of admitting her at the said hospital was to assist her to deliver her pregnant baby and to supervise such delivery.

[5] It is the Plaintiff's case that the medical practitioners and nursing staff (the medical staff), of the Defendant's said hospital who were responsible for the

monitoring and management of her labour process and the treatment, monitoring and management of her and baby N[....] before, during and after the birth of N[....] breached the legal duty which they owed to her and her baby, acted negligently in many respects set out in the Plaintiff's particulars of claim(poc). This is not in dispute.

[6] It is the Plaintiff's further case that, because of the negligent breach of the legal duty which the medical staff of the Defendant's said hospital had to her and her baby, N[....]:

[6.1] the plaintiff's labour process was unduly prolonged:

[6 .2] N[....] was born by means of natural delivery in a severely compromised state on 13 May 2009.

[6.3] N[....] suffered an acute intrapartum hypoxia hypoxic ischemic insult to his fetal brain, which was aggravated and or compounded by, inter alia, a hyperoxia and hyperthermia.

[6.4] N[....] developed neonatal encephalopathy.

[6.5] N[....] suffered permanent severe brain damage manifesting as epilepsy and cerebral palsy of a profoundly serious degree.

[7] Because of this severe brain damage and severe epilepsy and cerebral palsy and the sequelae thereof which the Plaintiff's baby, N[....], sustained he is and would be permanently disabled to the extent that:

[7.1] he is and will be permanently disabled to the extent that he will require permanent assistance by skilled personnel.

[7.2] he has required caregiving from the time of his birth, which was rendered to him by the Plaintiff, and will require full time caregiving for the rest of his life.

[8] Because of the negligent conduct of the medical staff at Pholosong hospital resulting in severe brain damage and disablement, he has suffered damage:

[8.1] in respect of the costs incidental to the caregiving services rendered by his mother from the date of his birth to date at the cost of R6000 per month.

[9] Initially the defendant denied any:

[9.1] negligence by the medical staff at Pholosong Hospital. He contended that the medical staff did their best properly and effectively to manage, supervise and oversee the birth of N[....]. He contended furthermore that the Plaintiff arrived at the said hospital 11 hours after her labour had commenced and thereby subjected herself to prolonged labour and her unborn baby to prolonged fetal distress which manifested meconium.

[9.2] To the extent that N[....] may be found to have suffered an acute intrapartum hypoxic ischemic insult or birth asphyxia, epilepsy, or microcephaly and or hypoxic ischemia encephalopathy that caused brain damage manifesting as epilepsy and cerebral palsy of a profoundly serious degree, the defendant denied these allegations.

[10] In terms of the Court Order granted by Pretorius J on 27 January 2020 at the end of the liability trial, the Defendant was declared liable for payment of 100% of N[....]'s proven or agreed damages which he suffered at Pholosong hospital, as a result of the management, monitoring and assessment of the Plaintiff's labour process and the delivery by the medical staff of N[....] at Pholosong hospital resulting

in him suffering severe brain damage manifesting in dyskinetic cerebral palsy and spastic quadriplegic.

[11] Now, considering the condition of N[....] as assessed by the experts, according to the Defendant's counsel, the issue in dispute is whether the plaintiff has made out a good case for an award of damages for past caregiving, and if so, how much.

The Plaintiff's case

[12] In her particulars of claim the Plaintiff's claims include, for purposes of these reasons, a claim for fair compensation for the caregiving services she rendered to N[....] from his birth to date hereof by his mother beyond the amount of care caregiving which a mother would normally render to her young child.

[13] The Plaintiff's counsel's view is that N[....] is entitled to some form of compensation for the caregiving that was rendered to him by his family, in particular his mother, since birth. In this regard he relies on the expert's reports and some comparable reported authorities and states that it is clear from the facts and experts' reports that N[....]'s mother has, in the nature of things, had to make considerable additional sacrifices to care for him, given N[....]'s severe brain damage and disability. Furthermore, he referred to some authorities both in the United Kingdom and in South Africa which confirmed the principle that, in the circumstances set out in the experts' reports, N[....] should be entitled to a fair award for the caregiving services rendered to him thus far by his family. (My own underlining)

[15] The first case to which he referred was that of **Cunningham v Harrison and Another [1973] 3 ALL ER 463 (CA) at 469** obiter following dictum:

"*The plaintiff's advisors seem to have thought that a husband could not claim for the nursing services rendered by a wife unless the husband was legally bound to pay*

you for them. So, on their advice... an agreement was signed whereby the husband agreed to pay his wife 2000 pounds per annum in respect of her nursing services… I know the reason why such advice is given. It is because it has been said in some cases that a plaintiff can only recover for services rendered to him when he was legally liable to pay for them... But I think that view is much too narrow. It seems to me that when a husband is grievously injured – and is entitled to damages- then it is only right and just that, if his wife renders services to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered. It should not be necessary to draw up a legal agreement for them. On recovering such an amount, the husband should hold it on trust for her and pay it over to her."

[17] The principle set out in the Cunningham case is that where a person who is seriously injured, and is entitled to damages, (just like N[....]), it is right and just that if his wife (or mother as in the instant case) renders a service to him instead of a nurse, he should recover compensation for the value of the services that the wife or mother has rendered. It is clear from the above that the right to be cared for belongs to the injured person. If the mother becomes the caregiver, she can only be compensated at the value of such caregiving services. N[....]'s loss is the existence for the nursing services the value of which is the proper and reasonable cost of supplying the needs.

[18] The principle set out by Lord Denning MR, Orr and Lawton in Cunningham supra had already been recognized and established in **Mitchell v Mulholland (2) [1971] 2 All ER 1205,** in which the plaintiff, who was severely injured, recovered

substantial damages of 20,000 pounds for pain and suffering and loss of amenities and 213504 pounds for nursing care.

[19] Counsel for the Plaintiff also relied on the following South African cases. These are the cases in which the principle set out in the Mitchell case supra was first enunciated and applied in situation that arose completely in South Africa. I now turn to these cases.

[19.1] **Klaas v Union and South West Africa Ins Co Ltd 1981 (4) SA 562 (A) at 566-567**

In this case Van Heerden AJA, having dealt with the topic as treated by Street in The Law of Damages, in the United States of America, and having repeated the law as established in Cunningham v Harrison and Another at page 463 where Lord Denning MR said obiter at page 469:

"It seems to me that when a husband is grievously injured- and is entitled to damages- then it is only right and just that, if his wife renders services to him, instead of a nurse, he should recover compensation for the value of the services that his wife has rendered"

cited with approval the following passage by Megaw LJ from Donnelly v Joyce (1973) 3 ALL ER 476 (CA):

"*In the same month, the Court of Appeal delivered judgment in Donnelly v Joyce (1973) 3 ALL ER 476 (CA). This was the case in which a six-year-old plaintiff's mother had given up a part time job in order to care for her severely injured son after his discharge from hospital. Counsel for the defendant (respondent in the appeal) contended that the plaintiff could not recover anything in respect of his mother's services since he was under no legal obligation to reimburse her, and that no regard*

could be had to the mother's loss of wages since the plaintiff could not claim in respect of another's loss. This contention was rejected by MEGAW LJ who said (at 479-80):

"We do not agree with the proposition, inherent in counsel for the defendant's submission, that the plaintiff's claim, in circumstances such as the present, is properly to be regarded as being, to use his phrase, 'in relation to someone else's loss', merely because someone else has provided to, or for the benefit of, the plaintiff- the injured person- the money or the services to be valued as money, to provide for needs of the plaintiff directly caused by the defendant's wrongdoing. The loss is the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant. The plaintiff's loss, to take this present case, is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages- for the purpose of ascertainment of the amount of his loss, is the proper and reasonable cost of supplying those needs. That, in our judgment, this is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.

Hence it does not matter, so far as the defendant's liability to the plaintiff is concerned, whether the needs have been supplied by the plaintiff out of this own pocket or by a charitable contribution to him from some other person whom we shall call the 'provider'; it does not matter, for that purpose, whether the plaintiff has a legal liability, absolute or conditional, to repay to the provider what he has received

because of the general law or because of some private agreement between himself and the provider; it does not matter whether he has a moral obligation, however ascertained or defined, so to do."

[19.2**] General Accident Versekeringsmaatskappy SA Bpk v Uijs NO 1993 (4) SA 228 AA at 236-237**

In this case, again Van Heerden AR, as she then was, had the following to say:

"Die appellant het in eerste instansie betoog dat nie bewys is dat Van Huyssteen van gestruktureerd verblyf gebruik sal maak nie, en dat dit ondersake is dat dit in sy beste belang sal wees om wel in 'n gespesialiseerde inrigting geneem te word. Terselfdertyd is met verwysing na Blyth v Van den Heever 1980 (1) SA 191 (A) op 2225-6, toegegee dat n' Hof by die berekening van skadevergoeding wel toekomstige gebeure wat mag plaasvind in aanmerking kan neem. Bostaande betoog berus op 'n verkeerde premisse. In Blyth was dit moontlik, maar nie waarskynlik nie, dat die eiser se arm in die toekoms afgesit sou word.

Hierdie Hof het bevind dat met inagneming van onder andere die sterkte van die moontlikheid nogtans 'n toekenning ten opsigte van die koste van die amputasie gemaak moes word. In casu het ons met 'n ander situasie te doen. Dit is nie onseker of van Huyssteen se toestand verblyf in 'n gerustruktureerde inrigting verg nie. Al wat onseker is, s die mate waartoe hy gebruik daarvan sal maak. Afgesien van die moontlikheid da hy by tye semi-gerustruktureerde huisvesting mag vind, is hierdie onsekerheid egter nie ter sake nie. Sy posisie is goed vergelykbaar met die' van 'n parapleeg wat dag en nag verpleging nodig het, maar wat moontlik mag verkies om sover doenlik snags deur haar man versorg te word. Nietemin is die koste van verpleging die omvang van haar verhaalbare skade, oftewel vergoedingsmaatstaaf

*(vgl of **Cunningham v Harrison and Another [1973] 3 ALL ER 463 (CA) at 469**). En net so is in onderhawige geval die koste van die gestruktureerde verblyf van Huyssteen se vergoedingsmaatstaaf ongeag of hy al of nie konstant daarvan gebruik sal maak. 'n Toelating moet egter gemaak word met die oog op die moontlikheid dat Van Huyssteen by tye semi-gestrutureerde verblyf mag bekom).*

[19.3] **Zarabi v The Road Accident Fund B4-246 to B4-247**

In this case it was argued by counsel for Plaintiff that a claim for past caregiving services rendered by a mother to her severely injured daughter was accepted and granted. Counsel for the Plaintiff pointed out that in accepting and granting the claim for past caregiving services, the Court relied on the Cunningham, Klaas and Uijs cases.

[20] Counsel for the Plaintiff concluded his argument by stating that there is therefore sufficient authority in our law for the acceptance of the claim for past caregiving services. I agree with him.

THE DEFENDANT'S CASE

[21] Advocate N Manaka, counsel for the Defendant, argued in her heads of argument that, for the following reasons, the Plaintiff's claim for past caregiving services rendered to N[....] since birth is not sustainable.

[21.1] the said claim relates to the Plaintiff in her personal capacity, when in this instant matter she is only cited in her representative capacity.

[21.2] At the time she issued summons in her representative capacity, her claim in her personal capacity had become prescribed, and she was therefore non-suited.

[21.3] The plaintiff had failed, in her personal capacity, to comply with the requirements of section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act NO. 40 of 2002. She thereafter submitted that the Plaintiff's claim for the past caregiving services should be dismissed.

[22] In support Advocate Manaka relied on the full court judgment of **PM obo TM v The MEC for Health, Gauteng Provincial Government Case No. A5093/2014 (the PM),** which is distinguishable, on the facts, from the current matter. The matter came before Court as an appeal against certain parts of the trial Court's damages ensuing because of hypoxic brain injury sustained during the perinatal period leaving the child severely disabled by quadriplegic cerebral palsy. The appeal concerned, inter alia, the disallowance of certain items of the claim for the costs of the suit and the dismissal of certain of the appellant's claims in her personal capacity, including her claims for past and future caregiving beyond the scope of duties of 'normal' parenthood.

[23] The trial court had awarded a sum of R 313190 as damages to the appellant in her personal capacity in respect of her past hospital and medical expenses and in respect of the expenses she incurred in employing a caregiver to look after TM a sum of R52000. 00. The issue before the appeal court was the trial's Court refusal to award damages to the appellant personally in respect of her claims for future medical expenses, general damages for shock and trauma as well as loss of amenities and for past caregiving beyond the scope of duties of "normal" parenthood. In this respect she had claimed the sum of R432,000.00 calculated at R4000 per month for nine years and future caregiving case management beyond the scope of duties of "normal' parenthood for which she had claimed the sum of R600,000 calculated at R5000 per month for ten years during the child's adulthood.

[24] In refusing to award any damages to the appellant's past caregiving and future caregiving and case management beyond the scope of duties of 'normal' parenthood, the trial Court had *the following to say:*

'I take cognizance of the fact that the plaintiff has made a number of sacrifices as a consequence of her dedication to [TM]. However, she also admirably completed a number of certificates, studied, and secured full time employment, whilst fulfilling her parental responsibilities. [TM] was looked after by Pathways in the day as well as a caregiver, who lives with the family. The defendant correctly does not deny being liable for the costs of a caregiver for the past two years as well as the costs of [TM] attending Pathways (subject to my discretion). At a most fundamental level, it is my view that irrespective of the negligence of the defendant in this matter, and irrespective of the quantum of damages awarded to the plaintiff, the plaintiff cannot to be absolved of her parental responsibilities as defined by the law. As such it is my view that the plaintiff cannot claim remuneration for past caregiving.'

And further:

'*Apart from the notional difficulty I have with a parent being compensated for "rendering services" to a child, for the reasons already given, the plaintiff has a legal responsibility to [TM]. Thus, in the event that [TM's] impairments not being casually linked to negligence on the part of any person, then the plaintiff would have been legally obliged to 'render services' to [TM]. Moreover, to the extent that the defendant has admitted liability for the costs of a full-time caregiver for [TM], as well as cost of being looked after at a facility, this claim for future caregiving beyond the scope of normal parable appears to be duplicated to a certain extent.'*

The Full Court itself made the following observation:

'[73] I share the trial court's difficulty with a parent being compensated for caring for his or her own child, or as it was put by the trial court, for rendering services to one's own child, as well as with the concept of parental caregiving beyond the scope of 'normal' parenthood. The nature and scope of normal or usual parental obligations in any given situation, I daresay, are determined by the circumstances, abilities, disabilities, and the like, of each individual child, irrespective of the cause of any disability or other condition such as asthma, anorexia, obesity, or substance dependency. The cause of any disability may be congenital, accidental, self-inflicted or the result of another's negligence or even intent. In substance, the appellant's claim for the past and future caregiving beyond the scope of normal parenthood in this instance, appears to be rather one for non-pecuniary damages. I do not believe, as a matter of policy, that is such a claim, without more should be entertained. The social burden would also be too great. The trial court, in my view, correctly refused these two personal claims of the appellant.'

[25] The fundamental differences between the PM case, on which counsel for the Defendant relies, and the current case are that:

[25.1] during the day [TM] was looked after, not by the appellant, but by Pathways. No evidence was produced by the Defendant, in the current matter, to show that during the day N[....] was looked after by Pathways or any other similar agency.

[25.2] in the PM case, [TM] was also looked after by a caregiver who also lived with the family. There is no evidence in the current matter which shows that, apart from the mother, N[....] was being looked or was looked after by a caregiver.

[25.3] the court, in the PM matter, stated, among others, that *'the plaintiff, (referring to the appellant) cannot be absolved over parental responsibilities as defined by the*

law.' It is understandable why the court made that observation. It is primarily because in the PM matter the appellant had launched a claim for caregiving services in her personal capacity and not in representative capacity. The fundamental difference between the PM matter and the current matter is that in the current Ms B[....] N[....] lodged, for good reasons, a claim for caregiving service, on behalf of N[....], in her representative capacity, in other words, in her capacity as the mother and natural guardian of N[....] and not in her personal capacity. She has not claimed any remuneration against the defendant for any caregiving services she rendered to N[....] in her personal capacity. When one looks at the combined summons one will notice that N[....]'s mother has not lodged any claim for caregiving services she has rendered to N[....] in her personal capacity and that no relief is sought by her in that regard. In my view, she acted correctly by lodging a claim for caregiving services in her representative capacity because essentially, N[....], being a minor, could not do so on his own.

[25.4] in the PM matter the child's mother had claimed for caregiving services in her personal capacity while she herself was not rendering those services. In the instant matter, the Plaintiff rendered caregiving services personally without any assistance

[26] For the following reasons, there is no merit in the reasons set out by counsel for the Defendant why the Plaintiff's claim for caregiving services should not succeed. In my view, they are fallacious and cannot be sustained.

[26.1] The Court Order granted by this Court on 12 August 2021 makes it abundantly clear that the sum of R571,879.00 was awarded to the Plaintiff in her representative

capacity. (My own underlining). The Plaintiff's legal team carefully crafted the Order. It states as follows:

"The Defendant is hereby ordered to pay an amount of R571, 879.00 to the Plaintiff in her representative capacity, in respect of her claim for past caregiving services."

[26.2] In the particulars of claim, there was no personal claim by the Plaintiff to be compensated, in her personal capacity, for the caregiving services she had rendered to N[....]. There was therefore no way in which this Court could grant an order if there was no such claim.

[26.3] Again, in the particulars of claim there was no relief sought by the Plaintiff to be compensated, in her personal capacity, for the caregiving services she had rendered to her son.

[26.4] In paragraph 1.2 of the particulars of claim, the Plaintiff made it clear that in this matter she was acting in her representative, as the mother and natural guardian of her son.

[26.5] Paragraph 5 of the judgment of Pretorius J also makes it clear that the Plaintiff, Ms B[....] N[....], claims damages on behalf of her minor son, N[....] S N[....], of whom she is the mother and natural guardian. The fact that the Plaintiff claims damages for caregiving services rendered to her son does not necessarily mean that she does so in her personal capacity unless she clearly and unambiguously states so in the pleadings.

[26.6] A claim for caregiving services, is a claim that belongs to the person who has been grievously injured, like N[....], and not to the person who renders caregiving services to the injured person. Clarity for this view can be found, in my view, in the cases cited by counsel for the Plaintiff. That the loss belongs to the person who has

been grievously injured, and not his mother or a nurse, is clear from the following statements:

[27.1] Cunningham case

The paragraph cited above which shows that the person who is entitled to recover compensation for caregiving services is the husband who was previously injured and not his wife or nurse.

[27.2] Klaas v Union and South West Africa Ins Co Ltd

See the paragraph by MEGAW LJ cited with approval in paragraph [19.1] above.

[27.3] General Accident Versekeringsmaatskappy SA Bpk v Uijs

See paragraph [19.2] supra where it is stated that:

'*Nietemin is die koste van verpleging die omvang van haar herhaalbare skade, oftewel haar vergoedingsmaatstaf.'*

[28] It is clear from reading the judgment of PM that the authorities relied on by the Plaintiff's counsel in the current matter were brought to the attention of the Full Court. The is no reference at all by the Full court to any one of the said authorities. In the circumstances one is not perplexed by the absence of any critique of those authorities by the Full Court. The PM case is, accordingly, no authority for the principle that it is the person who is grievously injured who is entitled to recover compensation from the person who committed the delict.

[29] Accordingly, I agree with Counsel for the Plaintiff, that there is enough authority, both in the United Kingdom and in South Africa, that in these circumstances N[....], and not his mother, should be entitled to a fair award for the caregiving services rendered to him so far by his family.

Has the plaintiff made out a case for the relief sought?

This is a question raised by counsel for the Defendant in her heads of argument. She contends that:

[30.1] no facts square placed before this court either by way of evidence or in the experts' reports referred to in the Plaintiff's counsel's heads of argument.

[30.2] the plaintiff's counsel has not explained the scale by which to measure the amount of caregiving that a mother 'normally' renders to her 'young child.'

[30.3] that the plaintiff did not testify about what she regarded as caregiving that goes beyond what a mother would normally render to her young child.

[31] In response to the questions posed by the Defendant's counsel, counsel for the Plaintiff referred to case law that states that agreements reached between the experts in their respective joint minutes are binding on the parties and regarded as common cause. He informed the court accordingly that he would rely on the agreements reached between the experts on the basis that these agreements are indeed common cause. He placed reliance on the judgment of Kubushi J in **Malema v Road Accident Fund [A5075/2015] [2017] ZAPJHC 275 [3 October 2017]** as well as the decision of **Bee v RAF 2018 (4) SA 366 (SCA)** in which the SCA had the following to say:

"*.. the joint minute will correctly be understood as limiting the issues on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation a fair warning you must be given it. In the absence of repudiation [i.e., fair warning], the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue."*

“Unless the trial court itself were for any reason dissatisfied with the agreement and alerted the parties to the need to adduce evidence on the agreed material, the trial court would, I think, be bound and certainly entitled to accept the matters agreed by the experts.”

[32] The evidence of Ms B[....] N[....], read in conjunction with the experts’ joint minutes cover, in my view, all the evidence that the Defendant requires, or thinks is missing. I do not think it necessary for the purpose of this judgment to recite the respects in which the evidence that the Defendant contends is missing, is covered by the experts’ joint minutes. The experts’ joint minutes have been filed of record and are therefore available. Quoting them in this judgment will unnecessarily make it voluminous. The Defendant has not given ‘fair warning’ that he will not stand by the experts’ joint minutes. Based on the judgment of BEE, this court is satisfied that the Defendant's counsel’s complaint about the missing evidence lacks merit. Counsel for the Defendant has not commented on the BEE judgment, whether it is not applicable in the current circumstances or whether it has been set aside or whether the facts of the said judgments are distinguishable from the facts of the current matter. In the absence of any comments on the BEE judgment by counsel for the Defendant, this court is entitled to take it into account and to apply its principle in this matter.

P M MABUSE

JUDGE OF THE HIGH COURT

Appearances:

Counsel for Plaintiff	Advocate JH StröH SC
Assisted by	Advocate F Pauer
Instructed by	O Joubert Attorneys
Counsel for the Defendant	Advocate N Manaka
Instructed by	The State Attorney.
Date of Hearing	21 August 2021