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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NUMBER: 1943/2016

Reportable: NO

Circulate to Judges: NO

Circulate to Magistrates: NO

Circulate to Regional Magistrates: NO

In the matter between:-

[N...T...] obo [S...D...T]

Plaintiff

and

**MEC FOR HEALTH: NORTH WEST
PROVINCIAL GOVERNMENT**

Defendant

CORAM: MFENYANA J

Delivered: This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 10h00 on **16 May 2024.**

ORDER

(1) The defendant shall make payment to the plaintiff in her representative capacity on behalf of [S...D...T], the minor child, the amount of R 17 260 423.20 made up as follows:

a. R16 056 207.60 (R18 889 656.00 less 15% contingency allowance) in respect of the plaintiff's claim for future medical expenses.

b. A final amount R1 204.215.57 in respect of the costs associated with the administration of the Trust to be formed in terms of the order of Hendricks JP of 1 November 2022, and the reasonable costs in respect of the furnishing of security by the Trustees (being 7.5%, as agreed between the parties, calculated on the partial capital amount of R16 056 207.60 in a. above.

(2) Payment of the above amount shall be made into the trust account of the plaintiff's attorneys. the details of which are as follows:

Mokoduo Erasmus Davidson Attorneys Trust Account

First National Bank, Rosebank Branch

Account Number: 6[...]

Branch Code: 2[...]

(3) The defendant is ordered to pay the plaintiff's taxed or agreed party and party costs on the High Court scale -Scale C, subject to the discretion of the Taxing Master, such costs to include:-

3.1 the reasonable costs of obtaining the medico-legal reports, as well as any addendum medico-legal reports of the following expert witnesses of the plaintiff relating to the issue of quantum, of whom due notice was given in terms of Rule 36(9)(a) and (b) of the Uniform Rules, namely, Prof. R Solomons, Prof. M Vorster, Dr. U Kunzmann, Dr. P Lofstedt, Ms. N Davidoff, Ms. J Meyer, Mr. C Mattheus, Dr M Scher, Mr. D Rademeyer, Dr. I van Heerden, Ms. Downs, Ms. K du

Buisson, Ms. A Reynolds, Ms T da Costa, Ms. A Mattheus, Ms. L Leibowitz, Ms. S Aires, Dr. B Wolfowitz, and Mr. W Loots.

- 3.2 the reasonable costs of the following expert witnesses of the plaintiff relating to their preparation for holding of joint expert meetings with their respective counterparts, including their costs of drafting and finalising the joint expert minutes emanating from such joint expert meetings: Ms. N Davidoff, Ms. S Aires, Mr. C Mattheus, Dr. M Scher, and Ms. A Reynolds.
 - 3.3 the reasonable reservation fees of Ms. Davidoff, Prof. Solomons, and Dr. Scher, if any.
 - 3.4 the reasonable costs pertaining to consultations of the legal representatives with the plaintiff and the abovementioned experts.
 - 3.5 the reasonable travel and accommodation fees of the plaintiff and the minor child, if any.
 - 3.6 the costs of two counsel.
- (4) The party and party costs referred to above as taxed or agreed, shall be paid by the defendant directly into the trust account of the plaintiff's attorneys for the benefit of the minor child. After deduction of legal costs and the cost consultant's fee for drawing the bill of costs and attending to its settlement or taxation, the balance shall be paid into the Trust so created, unless same has not yet been created, in which event such balance shall be invested in terms of Section 86(4) of the Legal Practice Act, 28 of 2014 with first national bank, Rosebank, for the benefit of the minor child. Any interest accruing thereon shall likewise be for the benefit of the minor child and shall be utilised as may be directed by the Trustees of the Trust once created.

(5) The plaintiff shall cause a notice of taxation to be served on the defendant's attorneys and the defendant shall make payment of the taxed costs within 30 (thirty) days from date of service of the bill of costs.

(6) It is recorded that:-

6.1 the plaintiff has concluded and signed a written contingency fee agreement with the plaintiff in terms of which the plaintiff at no stage carried any risk for fees or any portion thereof (annexure "N1d").

6.2 in terms of the contingency fee agreement, the plaintiff shall be liable for fees equal to or higher than the plaintiff's attorney's normal fee on attorney and client scale, provided that such fees which are higher than the normal fees ('success fee') shall not exceed such normal fees by more than 100 percent, and provided further that as the claim is one sounding in money, the total of any such success fee payable shall not exceed 25% of the value of the claim, which amount shall for the purposes of calculating such excess, not include any costs.

JUDGMENT

MFENYANA J

INTRODUCTION

[1] The plaintiff, in her representative capacity as the mother and natural guardian of the minor child, [S...D...T] claims damages against the defendant for the alleged negligence of the employees of the defendant. [S...D...T] was born at with cerebral palsy on 28 October 2013.

- [2] On 28 January 2021, as a prequel to this trial, Petersen AJ (as he then was) granted an order in favour of the plaintiff, holding the defendant liable for 100% of the plaintiff's agreed or proven damages. The determination of quantum was postponed *sine die*.
- [3] The matter served before me for determination of the quantum of damages to be awarded to the plaintiff as a result of the negligence of the defendant.
- [4] In quantification of the damages incurred, the plaintiff appointed various experts. The plaintiff's claim is in respect of general damages, loss of income, future hospital and medical expenses (including contingencies), and expenses related to the establishment and administration of a Trust for the benefit of [S...D...T].
- [5] Prior to the hearing of this matter and subsequent to the order of this court in respect of the merits, the parties reached settlement in respect of various heads of damages, including the creation and administration of a Trust, and on 1 November 2022 Hendricks JP granted an order in respect of the above heads of damages. The determination of future medical, hospital and related expenses as well as the remaining costs in respect of the trust to be formed were postponed *sine die*.
- [6] The only issue remaining are the contingencies which should be to the total amount of future hospital and medical expenses, agreed between the parties to the amount of R18 889, 656.00. The various items which form the basis of future medical expenses and the costs thereof are common cause between the parties and are contained in annexure "B" which was admitted into evidence. The main source of disagreement, as it played out during the trial of this matter appears to be the amount of contingencies to be applied to the total amount for future hospital and medical expenses.
- [7] The total amount for future medical expenses as agreed to between the

parties stands at R18 889 656.00. The plaintiff contends that a contingency deduction of 7.5% would be reasonable in the circumstances. In support of this contention, the plaintiff was called to testify. She testified that she is a Zimbabwean national who came into the Republic of South Africa (the Republic) in 2005. She moved to the North West in 2009 and worked as a domestic worker for the Saunders family until August 2023. She has been married to her husband since October 2012. [S...D...T] was born in 2013 while she was still employed by the Saunders' s. She left their employ in 2023 to take maternity leave for the birth of her second child, [S...]. On her return, her services were terminated. She has been doing 'piece jobs' once a week as a domestic worker. The remainder of the week, she looks after her children. They also rely on income from her husband's employment as a cleaner at a private company.

[8] In 2010 she obtained her Zimbabwean Exemption Permit (ZEP) which she renewed up until 2021 when her last permit expired. Thereafter the Minister of Home Affairs granted an extension to all ZEP holders until 30 June 2024. On 14 June 2023 she applied for a waiver for which she still awaits the results. According to the plaintiff she and her husband intend to remain in the Republic and raise their two children. She has become aware that they will be eligible for citizenship when the children reach the age of majority. [S...D...T] is currently 10 years old.

[9] The plaintiff further testified that she lives in a shack with her husband, [S...D...T] and [S...], their eldest child. As to their conditions of living, she explained that the shack they live in has electricity. Their source of water is a communal tap situated 200m outside their home. They rely on an outside pit toilet.

[10] She testified that future plans and wishes for [S...D...T] are to enrol her at a special school for handicapped children in Brits. She had already done her research on this, as this is of paramount importance to her. The plaintiff further testified that if a suitable home could be erected for [S...D...T] it would

be ideal if it were to be erected in the Brits area. This, the plaintiff stated, would enable the minor child to retain relationships with her friends. This would also increase the plaintiff's prospect of obtaining fulltime employment once caregivers have been appointed for [S...D...T], and enable her to earn an income to sustain herself.

[11] The defendant on the other hand contends that a contingency allowance of 50% for future medical expenses and costs would be appropriate in the circumstances. The main basis for this proposition is that the plaintiff does not qualify to own land in the Republic as she is not a citizen, and therefore a higher contingency should be considered. The defendant submits that what this Court is required to do is to place the plaintiff in the position she was in before the injury. The defendant went further to recommend that as the plaintiff presently lives in a shack, she should be provided with suitable adjustable accommodation with a room for a caregiver.

[12] The defendant relied on the decision of the Full Court of the Gauteng Division in *PM obo TM v MEC for Health, Gauteng Provincial Government (PM obo TM)*¹, for the proposition that a high contingency deduction should be applied. Notably, in *PM obo TM* on which the respondent relies, a contingency deduction of 20 percent was allowed. This is a far cry from the 50 percent deduction sought by the respondent.

[13] In *AD & Another v MEC for Health* the Supreme Court of Appeal (SCA) noted:

‘Money cannot compensate ... [the minor on behalf of whom the claim had been made] for everything he has lost. It does, however, have the power to enable those caring for him to try things which may alleviate his pain and suffering and to provide him with some pleasures in substitution for those which are now closed to him. These might include certain of the treatments which I have not felt able to allow as

¹ [2017] ZAGPJHC 346 (7 March 2017).

quantifiable future medical costs . . .²

[14] It is trite that the deduction of contingencies is intended to take into account the 'vicissitudes of life'. These are not cast in stone and will vary from one case to another. In the circumstances of the present case, the primary issue relates to the plaintiff's status as a *peregrinus* in the Republic, and which as counsel for the defendant argued, creates an uncertainty as to the future plans and location of the plaintiff and resultantly, the minor child [S...D...T]. She argued that this is exacerbated by the inherent uncertainty which attains specifically to Zimbabwean nationals given the status of and litigation surrounding the ZEPs. It is common cause that the Minister of Home Affairs (Minister) extend the validity of the ZEP. It is also common cause that the validity of ZEP remains in force until 30 June 2024 following a decision by the Full Court of the Gauteng Division.

[15] It is generally accepted that the normal range of contingency deduction is between 15 and 20 percent. This of course depends on the specific facts of each matter, and as Nicholas JA noted in *Southern Insurance Association Ltd v Bailey NO (Bailey)*³ the rate of assessment of contingency deductions is largely arbitrary and depends on the judge's impression of the case. In *Khoza v MEC for Health, Gauteng*⁴ the SCA went further to state that a reasoned outcome is nevertheless required, 'not only if a court is to depart from the normal range of between 15 and 20 percent... .' The court cautioned that while conjecture may be required, it should not be done whimsically.⁵ Such departure should only occur with good reason, such as the presence of special circumstances indicating that the patient's life is likely to be more adverse than the norm.

[16] Contingencies are ordinarily left to the parties to agree on, and where no

² AD & another v MEC for Health and Social Development, Western Cape Provincial Government (27428/10) [2016] ZAWCHC 116 (7 September 2016).

³ 1984 (1) SA 98 (A).

⁴ (216/17) [2018] ZASCA 13 (15 March 2018).

⁵ Para 17.

agreement is reached, the court has a discretion to determine the rate of contingencies applicable. In this matter, the disparity between what the plaintiff and the defendant seek can best be addressed by having regard to the underlying reasons for each proposition. As already stated, the defendant's contention is premised on the plaintiff's non-citizen status which excludes her from owning land in the Republic, as well as [S...D...T]'s life expectancy of 25.59. She currently has approximately 15 years left.

- [17] The plaintiff relies on *Singh and Another v Ebrahim (Singh)*⁶ where the SCA approved a contingency deduction at the flat rate of 10% in respect of future medical and hospital expenses where the minor child's life expectancy at the time, was 21 years was appropriate. The child was 9 years.
- [18] Contending for a contingency deduction of 7.5% counsel further argued that [S...D...T] will not be exposed to most of the hazards of life that other (healthy) children are ordinarily exposed to. He submitted that the claim for future medical and related costs comprises costs that will be incurred immediately over a short period, and over the duration of the minor child's lifetime. He argued that in the strict sense, no contingency should be applied on costs that are to be expended immediately, which take up the bulk of the claim.
- [19] That, in my view is not sufficient to depart from the normal range of contingencies of between 15 and 20 percent. There is also no evidence before this court that [S...D...T] might not undergo any of the procedures or be given any of the aids recommended. If anything, counsel for the plaintiff submitted that most of the aids are required in the short term which could justify an upward adjustment. The contingency allowance pertaining to these costs can in my view, be set off against the costs which will only be incurred in the longer term, bearing in mind [S...D...T]'s projected life expectancy. In the exercise of my discretion, I consider a contingency deduction at the flat rate of 15% of the total amount to be an appropriate adjustment.

⁶ (413/09) [2010] ZASCA 145.

- [20] As regards the defendant's contention that the plaintiff is a peregrinus, no evidence was provided which could assist the Court in following the defendant's contention. Of great concern is the tenor of the submission *vis-à-vis* the Bill of Rights which guarantees equal protection of the law to everyone. I could not find any support, nor did the defendant provide such, for the suggestion that a foreign national is entitled to less protection of the law while in the Republic. To my mind the submission is not only unfortunate, but unconstitutional.
- [21] What is more is that the defendant does not dispute any of the items proposed by the plaintiff as necessary future medical expenses and requirements for [S...D...T]. The costing of these items is also common cause. That, in my view, is tantamount to an agreement in respect of those items and the issues associated with them. Recently, the Constitutional Court in *Mafisa v Road Accident Fund and Another*⁷ noted that where parties have settled the disputes between them, it is 'improper and irregular' for the court to interfere, absent any evidence of impropriety.
- [22] It seems what the defendant seeks to achieve is obtain a lesser award than that agreed upon, by contending for a higher than usual contingency deduction. At the risk of repetition, this can only be done 'with good reason, such as the presence of special circumstances indicating that the patient's life is likely to be more adverse than the norm'. I may also add that such special circumstances must also be lawful.
- [23] Having said that, I could find no features in this matter to suggest that [S...D...T]'s life is likely to be inflicted by more adversities than is the norm in the circumstances to warrant a departure from the normal rate of contingencies. I do not consider the fact that because of his condition, he is likely to be housebound to be sufficient to call for such deviation. I consider a contingency deduction of 15% to be fair in the circumstances.

⁷ [2024] ZACC 4.

ORDER

[24] In the result, I make the following order:

(2) (1) The defendant shall make payment to the plaintiff in her representative capacity on behalf of [S...D...T], the minor child, the amount of R 17 260 423.20 made up as follows:

a. R16 056 207.60 (R18 889 656.00 less 15% contingency allowance) in respect of the plaintiff's claim for future medical expenses.

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3.1 the reasonable costs of obtaining the medico-legal reports, as well as any addendum medico-legal reports of the following expert witnesses of the plaintiff relating to the issue of quantum, of whom due

notice was given in terms of Rule 36(9)(a) and (b) of the Uniform Rules, namely, Prof. R Solomons, Prof. M Vorster, Dr. U Kunzmann, Dr. P Lofstedt, Ms. N Davidoff, Ms. J Meyer, Mr. C Mattheus, Dr M Scher, Mr. D Rademeyer, Dr. I van Heerden, Ms. Downs, Ms. K du Buisson, Ms. A Reynolds, Ms T da Costa, Ms. A Mattheus, Ms. L Leibowitz, Ms. S Aires, Dr. B Wolfowitz, and Mr. W Loots.

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(4) The party and party costs referred to above as taxed or agreed, shall be paid by the defendant directly into the trust account of the plaintiff's attorneys for the benefit of the minor child. After deduction of legal costs and the cost consultant's fee for drawing the bill of costs and attending to its settlement or taxation, the balance shall be paid into the Trust so created, unless same has not yet been created, in which event such balance shall be invested in terms of Section 86(4) of the Legal Practice Act, 28 of 2014 with first national bank, Rosebank, for the

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(6) It is recorded that:-

6.1 the plaintiff has concluded and signed a written contingency fee agreement with the plaintiff in terms of which the plaintiff at no stage carried any risk for fees or any portion thereof (annexure "N1d").

6.2 in terms of the contingency fee agreement, the plaintiff shall be liable for fees equal to or higher than the plaintiff's attorney's normal fee on attorney and client scale, provided that such fees which are higher than the normal fees ('success fee') shall not exceed such normal fees by more than 100 percent, and provided further that as the claim is one sounding in money, the total of any such success fee payable shall not exceed 25% of the value of the claim, which amount shall for the purposes of calculating such excess, not include any costs.

S MFENYANA
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

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Date reserved:

18 October 2023

Date of judgment:

16 May 2024