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

CASE NO: 57301/15

REPORTABLE:YES/NO

OF INTEREST TO OTHER JUDGES:YES/NO

REVISED:YES/NO

In the matter between:

N T H[…] Plaintiff

and

MEC FOR HEALTH, GAUTENG PROVINCE Defendant

JUDGMENT

WANLESS AJ

Introduction

[1] On the 27th of March 2014, at Natalspruit Hospital, Gauteng, one N T H[…], an adult female *("the Plaintiff")* gave birth to twins, namely a girl *("N[...]")* and a boy *("N[...]").* Tragically, N[...] died approximately 6 months later and his twin sister, N[...], died on the 16th of July 2016 (aged [….]). The Plaintiff, acting both in her personal capacity and in her representative capacity as the duly appointed executor of N[...]'s deceased estate, instituted this action against the MEC FOR HEALTH, GAUTENG PROVINCE *("the Defendant").*

[2] The trial in this matter commenced on the 18th of November 2019. At the outset, this court indicated that it would be necessary to convene a Conference in terms of Rule 37(8) in order that, *inter alia*, the numerous bundles of documents prepared for the hearing be entered as exhibits; the issues and non-issues be clearly defined and the respective cases of both parties be outlined. In this manner, it was hoped that the trial in this matter would proceed, in an orderly manner, to the benefit of all.

[3] Despite the trial commencing on the 18th of November 2019 the aforesaid Rule 37(8) Conference was only held on the 20th of November 2019. The reason therefor (as is clear from the record) is that the court accommodated the Plaintiff by allowing the Plaintiff to lead the *viva voce* evidence of two of the Plaintiff's expert witnesses who were only available to testify during the first three days that the matter had been set down for hearing. The minute of that Rule 37(8) Conference is at pages 54 to 65 of Exhibit F (B). It is not the intention of this Court to burden this judgment unnecessarily by setting out, in detail, the contents of the said minute. Rather, the contents thereof will be referred to, where applicable, later in this judgment.

The Plaintiff's case

[4] The Plaintiff's case is that the employees of the Defendant were negligent in failing to diagnose and treat the progression of hydrocephalus sustained by N[...] timeously. In addition thereto the Plaintiff avers that the revised ventricular-peritoneal shunt ("VP shunt"), inserted in May 2015, became blocked and was never revised. The aforegoing caused N[...]'s death. In respect of the Plaintiff herself the Plaintiff claims both special and general damages arising from the loss of her child. General damages are also claimed on behalf of N[...].

The Defendant's case

[5] In opposition to the Plaintiff's claims the Defendant avers that the cause of N[...]'s injuries were the injuries she suffered as a result of prematurity of birth. In particular, the Defendant avers that the radiological and physiological findings of the minor subsequent to the 19th of August 2014 (being the date when the first VP shunt was inserted) can all be attributed to the initial injuries sustained as a result of prematurity of birth. Finally, in the event that the Defendant is found to be liable to compensate the Plaintiff in respect of damages in relation to either herself or N[...] the Defendant avers that there should be an apportionment of those damages arising from contributory negligence on behalf of the Plaintiff.

The Defendant's Special Plea

[6] In its Amended Plea dated 13 April 2018 the Defendant raised a Special Plea that, in light of the fact that N[...] had passed away before *litis contestatio,* the claim in respect of her general damages could not be transmitted to the Plaintiff *(Pages 30 to 32 of Exhibit A).*At the trial in this matter it was recorded that this Special Plea had been abandoned by the Defendant. In the premises, it was not necessary for this court to consider same.

The Plaintiff's claim on behalf of N[...] in respect of general damages arising from burns suffered by her whilst in the care of the Defendant

[7] As part of the claim for general damages in respect of N[...] the Plaintiff averred that she had suffered extensive burns arising from negligence on behalf of the Defendant's employees as a result of her being placed near, or very close to, a heater whilst in the care of the Defendant at hospital *(Sub-paragraph 6.5 of the*

Plaintiff's Amended Particulars of Claim at page 100 of Exhibit A). The Defendant conceded liability therefor and the quantum of general damages in respect thereof was settled between the parties. This Court was requested to make an order that the Defendant pay to the Plaintiff the sum of R100 000.00 in relation thereto. In the event that this court awarded general damages in addition thereto then this court would include the said sum in the total amount awarded. If not, a separate award would be made in respect thereof.

Facts which were common cause or not seriously in dispute

[8] From, *inter alia*, the available hospital records *(Exhibit L)* ; minutes of the Rule 37 Conferences held between the parties *(Exhibit F(B))*, together with the medico-legal reports of various experts *(Exhibits C; C(A); C(B); D and D(A))*; joint minutes compiled by certain experts *(Exhibit E*) and the *viva voce* evidence of the witnesses who testified at the trial the following facts were either common cause or not seriously disputed by the parties, namely:-

8.1 the Plaintiff's only antenatal visit was on the 17th of February 2014 at the Goba Clinic;

8.2 N[...] and her twin brother were born, prematurely, on the […] at Natalspruit Hospital, Gauteng;

8.3 prior to the birth of N[...] and her twin brother the Plaintiff was HIV positive;

8.4 the Plaintiff's twins (her first pregnancy) were born by normal vaginal delivery due to a non-pulsating umbilical cord prolapse which may be classified as a medical emergency;

8.5 N[...]'s head circumference, at birth, was 28 cm and her weight was 1.140kg;

8.6 N[...] was resuscitated at birth and the next day (the 28th of March 2014) she was diagnosed with respiratory distress;

8.7 she was also diagnosed, on the 28th of March 2014, with grade III Hyaline Membrane Disease;

8.8 on the 29th of March 2014, N[...] was transported from Natalspruit Hospital to the Far East Hospital for the purposes of ventilation;

8.9 following her treatment at the Far East Hospital she was transported back to the Natalspruit Hospital on the 3rd of April 2014;

8.10 during her short life N[...] was HIV negative;

8.11 no congenital abnormalities were noted at birth;

8.12 N[...] was discharged from hospital on or about the 3rd of June 2014;

8.13 on the 5th of June 2014, N[...] was examined and found to have “a bulging fontanel”. It appears that at this stage she was diagnosed with hydrocephalus;

8.14 N[...]’s ventricles were tapped whilst she was in the neonatal intensive care unit of Natalspruit Hospital and prior to the insertion of a VP shunt. The tapping of ventricles is a therapeutic measure of treating hydrocephalus where the insertion of a VP shunt is not ideal;

8.15 prior to N[...] having a CT scan of the brain she was diagnosed with:-

8.15.1 Encephalopathy;

8.15.2 Periventricular Leukomalacia;

8.15.3 Grade III intraventricular haemorrhage;

8.15.4 Cystic lesions in the brain;

8.15.5 Extensive white matter injury of prematurity; and

8.15.6 Hydrocephalus;

8.16 on the 19th of June 2014 N[...] had a CT scan of the brain;

8.17 on the 19th of August 2014 she underwent the insertion of a VP shunt;

8.18 on the 10th of September 2014 and the 5th of November 2014, N[...] attended at Chris Hani Baragwanath Hospital for follow-up visits;

8.19 on the 11th of February 2015 the Plaintiff complained to employees of the Defendant that N[...] was now blind;

8.20 N[...] was admitted to Natalspruit Hospital as a result of pneumonia and mild respiratory distress on the 30th of March 2015;

8.21 on the 29th of April 2015, a further CT scan of the brain showed that the VP shunt had become displaced;

8.22 on the 6th of May 2015 a revision of the VP shunt took place at Chris Hani Baragwanath Hospital took place;

8.23 N[...] was once again discharged from the Natalspruit Hospital on the 13th of May 2015;

8.24 on the 5th of August 2015 and the 7th of October 2015 N[...] attended at Chris Hani Baragwanath Hospital (as an out-patient) for follow-up visits;

8.25 on the 28th of October 2015, N[...] was examined by Dr Moja (Neurosurgeon). Following his examination of N[...] and the results of an urgent CT scan of her brain which suggested a blocked shunt and extensive hydrocephalus, Dr Moja referred N[...] to the Chris Hani Baragwanath Hospital for an urgent shunt revision. This was never done prior to N[...]'s death;

8.26 on the 5th of November 2015; the 12th of November 2015; the 26th of November 2015; the 14th of January 2016; the 17th of March 2016 and the 14th of July 2016, N[...] attended at Chris Hani Baragwanath Hospital (as an out-patient) for further follow-up visits;

8.27 N[...] died on the 16th of July 2016.

The law

[9] It is trite that, since the Plaintiff's claim is framed in delict, it is incumbent upon the Plaintiff to prove, on a balance of probabilities, the elements of negligence; causation and wrongfulness *(Oppelt v Department of Health Western Cape 2016 (1) SA 325 (CC) at paragraph 34).*

[10] In the matter of *Oppelt* the Constitutional Court held that the failure of the employees of the Department of Health, Western Cape, to transfer an injured rugby player sufficiently rapidly to an appropriate treatment facility was negligent and that this negligence was the cause of his permanent paralysis. More particularly, at paragraph 83 of that judgment, the Constitutional Court held:

"Reasonable healthcare practitioners in the position of the Respondent's employees, armed with the knowledge that Conradie was the Respondent's specialised unit for spinal cord injuries in the Western Cape, and the knowledge that patients who had suffered spinal cord injuries had to be treated urgently, would have transferred the Applicant directly to Conradie. This was not done. The inescapable inference is that the Applicant was not treated with the reasonable care and skill required of the Respondent's employees at Wesfleur. The conduct of the Respondent's employees, coupled with their slavish adherence to transfer protocols, was substantially short of the standard of practice that a member of the public is entitled to expect from a reasonably proficient hospital and reasonably proficient doctors. I am also satisfied that the negligence of the Respondent's employees led to the Applicant's permanent paralysis."

[11] With regard to negligent omissions (as alleged in the present matter) the requirement of wrongfulness was held, in the matter of *Minister of Safety* & *Security v Van Duivenboden 2002 (6) SA 431 (SCA) at paragraph 12 (See also Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA) at paragraph 18)* to be:

"….the negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm".

[12] Also, in the matter of *Oppelt*, it was held *(at paragraph 51)* that:

"The criterion of wrongfulness ultimately depends on a judicial determination of whether, assuming all the other elements of delictual liability are present, it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct".

[13] Further, the Constitutional Court in *Oppelt's* matter*, at paragraph 54,* held:

"There is no doubt that the legal convictions of the community demand that hospitals and health care practioners must provide proficient health care services to members of the public. These convictions also demand that those who fail to do so must incur liability."

[14] The standard against which a medical practioner is judged is that of the reasonable medical practioner in the same circumstances *(Oppelt (supra) at paragraph 71)*.

[15] A successful delictual claim entails proof of a causal link between the Defendant's actions or omissions, on the one hand, and the harm suffered on the other hand *(Oppelt (supra) at paragraph 35)*. This is in accord with the well-established and accepted "but for" test for factual causality *(International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (AD) at 700F-I; Simon & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (AD) at 915B-H; Minister of Police v Skosana 1977 (1) SA 31 (AD) at 35C-F).*

[16] In the matter of *Chapelkin & Another v Mini (103/2015) [2016] ZASCA 105 (14 July 2016), at paragraph 49,* the Supreme Court of Appeal cited, with approval, an earlier decision of that court, namely *ZA v Smith 2015 (4) SA 574 (SCA)*,where, *at paragraph 30*, it was held:-

"What [the but-for test] essentially lays down is the enquiry – in the case of an omission – as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the "but-for test" is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish the causal link with certainty (see eg Minister of Safety and Security v Van Duivenboden (SCA)2002 (6)SA431(SCA);([2002] 3 All SA 741; [2002] ZASCA 79) para 25; Minister of Finance & others v Gore NO 2007 (1) SA 111 (SCA) ([2007] 1 All SA 309; [2006] ZASCA

98) para 33. See also Lee v Minister of Correctional Services 2013 (2) SA 144 (CC) (2013 (2) BCLR 129; [2012] ZACC 30) para 41.)"

See also: Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC) at paragraph 65.

[17] Legal causation must be proved on a balance of probabilities *(Lee v Minister for Correctional Services 2013 (2) SA 144 (CC) at paragraph 39).*

[18] In the matter of *Michael & Another v Linksfield Park Clinic (Pty) Ltd & Another [2001] 1 All SA 384 (AD,* in respect of the evaluation of expert evidence in cases involving alleged medical negligence, the Appellate Division *(at paragraphs 36 to 39 inclusive)* stated the following:

"[36]…… what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of *Bolitho v City and Hackney Health Authority [1997] UKHL 46; [1998] AC 232 (H.L.(E.)).* With the relevant *dicta* in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.

[37] The court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached "a defensible conclusion" (at 241 G - 242 B).

[38] If a body of professional opinion overlooks an obvious risk which could have been guarded against it will not be reasonable, even if almost universally held (at 242 H).

[39] A defendant can properly be held liable, despite the support of a body of professional opinion sanctioning the conduct in issue, if that body of opinion is not capable of withstanding logical analysis and is therefore not reasonable. However, it will very seldom be right to conclude that views genuinely held by a competent expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which the court would not normally be able to make without expert evidence and it would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide "the

benchmark by reference to which the defendant's conduct falls to be assessed" (at 243 A-E)."

See also: Menday v Protea Assurance Co Ltd 1976 (1) SA 565 (E) at 569

The Evidence

[19] No less than ten (10) witnesses, nine (9) experts and one lay witness, gave *viva voce* evidence before this court. This judgment will not be burdened unnecessarily by setting out, in detail, the evidence of each of these witnesses. Rather, their evidence will be referred to where appropriate. In addition to a number of medico-legal reports compiled by the aforesaid expert witnesses and other expert witnesses who did not testify before this court, various joint minutes were prepared by certain experts who had been instructed by the parties.

Evidence on behalf of the Plaintiff

[20] In support of her case the Plaintiff led the oral testimony of five (5) witnesses, four (4) experts and one (1) lay witness. As will be dealt with later in this judgment the Plaintiff did not testify.

[21] The experts who testified on behalf of the Plaintiff were Dr Moja (Neurosurgeon); Dr Maponya (Paediatrician); Dr Mashayamombe (Psychiatrist) and Mr Mphuthi (Clinical Psychologist). The lay witness called to give evidence on the Plaintiff's behalf was Miss N[…] (N[...]'s paternal grandmother).

Evidence on behalf of the Defendant

[22] The Defendant led the *viva voce* evidence of four (4) experts, namely Dr Weinstein (Radiologist); Dr Malebane (Obstetrician); Professor Omar (Neurosurgeon) and Dr Mathibha (Neonatologist). In addition thereto, the Defendant called Dr Emeieole (Neurosurgeon) to testify. This witness testified in his capacity as an employee of the Defendant and in light of the fact that he had treated N[...].

Assessment of the evidence

[23] In deciding whether any alleged omissions of the Defendant's employees wrongfully caused N[...]'s death, it appears to this court, in light of the evidence, that three principal issues arise for this court's consideration. Firstly, should the Defendant's employees have diagnosed N[...]'s hydrocephalus earlier and inserted the first VP shunt before they did? Secondly, did the employees of the Defendant fail to treat the hydrocephalus properly by failing to realise that the VP shunt was blocked and taking steps to replace same, particularly after the referral of Dr Moja? Thirdly, even if the said employees had acted positively by*, inter alia*, inserting the VP shunt earlier and replacing the blocked VP shunt, would N[...]'s death have been avoided?

The alleged delay in diagnosing and treating N[...]'s hydrocephalus

[24] The relevant time period in respect of this enquiry is from N[...]'s birth to the date of the insertion of the VP shunt. In the premises, the facts and evidence pertaining to the period […] to 19 August 2014 should be considered.

[25] It is true that a fairly considerable amount of time was taken up, at trial, by evidence pertaining to, *inter alia*, events which took place prior to the birth of the Plaintiff's twins and during the Plaintiff's pregnancy. This related, *inter alia*, to the gestational age of N[...] at birth; the effect that this had on the severity of the injuries sustained by her as a result of premature birth and whether there was any contributory negligence on behalf of the Plaintiff.

[26] In this regard, it is the opinion of this court that events which took place prior to the birth of N[...] and her twin brother; the precise gestational age of N[...] at birth (the Plaintiff having contended this was 30 weeks whilst the Defendant averred that it was 28 weeks); whether the Plaintiff should have attended the antenatal clinic more often than she did and whether the treatment rendered by the Defendant's employees at that clinic was adequate, are all irrelevant. This is so, since not only is it common cause in this matter that the Defendant's employees were, in no manner whatsoever, responsible for the premature birth and the injuries sustained as a result

thereof but, also, the nature of those injuries, together with the reasonable treatment therefor, are largely common cause.

[27] It is common cause that the birth of N[...] and her twin brother was anything but straightforward. Not only did it involve a multiple birth (in itself an episode fraught with danger) but the birth was correctly classified as a medical emergency. The potential dangers thereof; the fact that the twins were being born extremely premature (which would have been clearly evident from the ultrasound carried out during the Plaintiff's labour); a lowered Apgar score and N[...]'s very light birth weight, would all have been indicators, to reasonable medical practitioners attending at the birth, that it was highly probable N[...] could sustain serious injury as a direct result thereof. This, in turn, would have alerted reasonable medical practioners responsible for the care of N[...] that she would require specialised medical attention and intervention. The aforegoing is borne out not only by certain steps taken by the Defendant's employees but, also, by certain important events which took place following the premature and complicated birth of N[...].

[28] It was common cause that N[...] was resuscitated at birth and required oxygen. She was admitted to the neonatal intensive care unit at the hospital where she had been born. The next day she was diagnosed with respiratory distress and grade III Hyaline Membrane Disease. As a result thereof, N[...] was transported to the Far East Hospital for the purposes of ventilation. She remained on ventilation for 4 days before being taken back to Natalspruit Hospital (neonatal intensive care unit) on the 3rd of April 2014. Based on these facts, it would have been clear, at this early stage, to a reasonable medical practioner, that N[...] would have been in grave danger of suffering from hydrocephalus resulting in brain damage and, potentially, death. The situation, at that stage, would have alerted a reasonable medical practioner to take all reasonable steps to reach a sound diagnosis and, thereafter, to render proper medical treatment as was reasonably necessary in the circumstances.

[29] It became common cause during the trial in this matter, having regard to, *inter alia*, the circumstances pertaining to N[...]'s birth, that intracranial ultrasounds should have been administered, at the very latest, within a couple of weeks of her birth. More particularly, it was the undisputed evidence of Dr Maponya (Paediatrician) that, as a matter of routine and proper practice, intracranial ultrasounds are taken for all infants born at, or earlier than, 32 weeks of gestation. This is done during the first week of life and followed up in the second and sixth weeks to diagnose haemorrhagic lesions in the ventricles of the brain *("intraventricular haemorrhage");* detect cystic lesions and predict the long-term outcome of a child born prematurely. It was further the undisputed evidence of this expert witness that these ultrasounds

are done so that following the aforesaid diagnosis the situation can be managed promptly in order to prevent hydrocephalus which, in turn, will lead to cerebral palsy and all of the complications associated therewith.

[30] Significantly, there is nothing in the hospital records *(Exhibit L)* to indicate that, prior to the CT scan taken on the 19th of June 2014, any intracranial ultrasounds were carried out in respect of N[...]. Just as importantly the Defendant did not place any evidence before this court to suggest otherwise. In the premises, this court holds, on a balance of probabilities, that the employees of the Defendant failed to administer intracranial ultrasounds in respect of N[...] before the 19th of June 2014 (nearly 3 months after the birth of N[...]) when a CT scan was taken of N[...]'s brain.

[31] It is also important to note that it is common cause in this matter that, at the same time when N[...] was in the neonatal intensive care unit at Natalspruit Hospital, prior to her discharge from that hospital on the 3rd of June 2014 and the CT scan on the 19th of June 2014, N[...]'s ventricles were tapped. As noted earlier in this judgment, it is also common cause that the tapping of ventricles is a therapeutic measure of treating hydrocephalus where the insertion of a VP shunt is not ideal. In simple terms, tapping is a substitute for a VP shunt until a shunt is inserted. So, the fact that tapping took place, is indicative of the fact that N[...] had suffered an intraventricular haemorrhage. If this is so, it is inconceivable as to why no ultrasounds were carried out before the CT scan and that the said scan was only carried out on the 19th of June 2014. Even more puzzling, is the fact that it was also common cause between the parties that *prior* to N[...] having a CT scan of the brain she had already been diagnosed with encephalopathy; periventricular leukomalacia; grade III intraventricular haemorrhage; cystic lesions in the brain; extensive white matter injury of prematurity and hydrocephalus.

[32] It is true (and this is also common cause) that it is not desirable to insert a VP shunt in respect of a child until the child weighs at least 1.5kg. In this regard, it is indicated in the hospital records (the contents of which were admitted by both parties to be correct) that N[...] reached that weight on the 30th of May 2014. Accordingly, at that date, had an ultrasound been taken before then, a shunt may well have been inserted into the brain of N[...]. Instead, the VP shunt was only inserted on the 19th of

August 2014. This is just short of 5 months following the birth of N[...] and exactly 2 months following the CT scan which clearly showed hydrocephalus (the reason the shunt was inserted).

[33] Having regard to the aforegoing, this court holds, on a balance of probabilities, that the employees of the Defendant were negligent in delaying the diagnosis and treatment of N[...]'s hydrocephalus prior to the insertion of the VP shunt on the 19th of August 2014. Reasonable medical practitioners in the position of the Defendant's employees, would not only have diagnosed N[...]'s condition earlier than they did but would also have ensured that the VP shunt was inserted earlier than the 19th of August 2014.

Did the employees of the Defendant fail to treat the hydrocephalus properly by failing to realise that the VP shunt was blocked and taking steps to replace same, particularly after the referral of Dr Moja?

[34] Once again the answer to the above is to be found in the facts which were either common cause at the commencement of the trial or became so during the trial in light of, *inter alia*, the testimony of the various expert witnesses. The relevant time period in respect of this enquiry is from when the VP shunt was first inserted (19 August 2014) to the date of N[...]'s death (16 July 2016).

[35] Following the insertion of the shunt on 19 August 2014 the Plaintiff took N[...] to the Chris Hani Baragwanath Hospital for follow-up visits on the 10th of September 2014 and the 5th of November 2014. On the 11th of February 2015 the Plaintiff complained to employees of the Defendant that N[...] was blind. It is common cause that whilst the Defendant cannot be held liable for the blindness suffered by N[...] (this being as a result of the damage to the brain arising from, *inter alia*, the premature birth and the *sequellae* thereof) such is a common feature of hydrocephalus.

[36] Shortly thereafter, on the 30th of March 2015, N[...] was once again admitted into the care of the Defendant at Natalspruit Hospital, suffering from pneumonia and respiratory distress. Upon physical examination, it was recorded that N[...] now had a

bulging fontanelle and spastic limbs. It is common cause that a bulging fontanelle is as a result of trapped cerebral fluid on the brain which causes the fontanelle to bulge. Moreover, it is common cause that, apart from this fluid putting pressure on the brain, a bulging fontanelle is a classic indicator of hydrocephalus, since the ventricles of the brain are blocked, thereby causing the said fluid to remain, rather than drain away. This, in turn, causes damage to vital tissue of the brain. It is further common cause that spastic limbs are a classic symptom of hydrocephalus giving rise to cerebral palsy.

[37] It was also noted, on the 30th of March 2015, that N[...]'s head circumference had increased to 48cm (from the 28cm recorded at birth). This, in accordance with the accepted chart used in matters of this nature, was above the 97th percentile. The larger the head circumference in relation to the age and gender of the patient the higher the reading on the chart. At the same time, the higher the percentile the greater the extent of the hydrocephalus (and corresponding danger to the health of the patient). It is a well-known and accepted fact that a swollen head is probably the best indicator of the onset of hydrocephalus. On the 22nd of April 2015 the hospital records reflect that the Plaintiff complained that N[...]'s head was getting bigger. Upon measuring, it was found that her head circumference was now 51 cm (an increase of 3cm since the 30th of March 2015) which, obviously, still fell within the 97th percentile.

[38] As a result of the aforegoing, a CT scan of the brain was performed on the 29th of April 2015. This showed that the VP shunt had been displaced and was no longer functioning properly in that it was not draining fluid from the brain. This gave rise to the revision of the shunt, at Chris Hani Baragwanath Hospital, on the 6th of May 2015. On the 13th of May 2015, N[...] was once again discharged from Natalspruit Hospital. Despite the aforegoing, when N[...] was seen at a follow-up appointment on the 5th of August 2015 at Chris Baragwanath Hospital it was noted that N[...]'s head circumference had continued to increase and was, at that stage, 56 cm (an increase of a further 5cm in a period of 3 months).

[39] On the 28th of October 2015 the Plaintiff took N[...] to see Dr Moja (Neurosurgeon). When Dr Moja examined N[...], her head circumference had reached 58cm (a further increase of 2cm in a period of time just short of 3 months). As a result thereof Dr Moja ordered an urgent CT scan of N[...]'s brain. The report in respect thereof suggested that the VP shunt was blocked and that N[...] was now suffering from extensive hydrocephalus. In the premises, Dr Moja urgently referred N[...] to Chris Hani Baragwanath Hospital for a further shunt revision. As set out

below, this revision was never carried out and N[...] died, approximately 8 months later, on the 16th of July 2016.

[40] On the 5th of November 2015, N[...] was taken to Chris Hani Baragwanath Hospital. Her head circumference was recorded as 57.5cm. Once again, on the 12th of November 2015, N[...] was taken to Chris Hani Baragwanath Hospital. On this occasion the hospital records reflect that she had hydrocephalus and a shunt *in situ* which was not working. Her head circumference was recorded to be 58cm. N[...]'s next visit to Chris Hani Baragwanath Hospital took place on the 26th of November 2015. Her head circumference was recorded to be 58cm. Significantly, the hospital records reflect that there were no beds available in the hospital and that the Plaintiff should return with N[...] in January 2016.

[41] In accordance therewith the Plaintiff once again visited the Chris Hani Baragwanath Hospital with N[...] on the 14th of January 2016. At this visit N[...]'s head circumference was measured at 54cm. The next visit to Chris Hani Baragwanath Hospital was on the 17th of March 2016. N[...]'s head circumference was measured at 58cm. The hospital records reflect that N[...] had hydrocephalus; a shunt had been inserted during August 2014; N[...]'s head circumference had not increased during the past 4 months, remaining at 58cm and that there was no need to carry out a shunt revision. The Plaintiff was advised to return to Chris Hani Baragwanath Hospital on the 23rd of June 2016 (in 3 months) for a further follow-up visit. The final recorded visit by N[...] to Chris Hani Baragwanath Hospital was the 14th of July 2016 where her head circumference was recorded to have increased by a further 1cm, namely, 59cm. The Plaintiff was advised to return to Chris Hani Baragwanath Hospital with N[...] (in 5 months) on the 29th of December 2016. Tragically, this was an appointment N[...] would be unable to keep. She died 2 days later on the 16th of July 2016.

[42] As noted earlier in this judgment the fact that N[...] became blind was not as a result of any negligence on behalf of the Defendant's employees. Nevertheless, the fact that (as agreed in the joint minute of Dr Letsoalo and Professor Makunyane, Ophthalmologists) her blindness was secondary to severe hydrocephalus, should have alerted those employees to the fact that, despite the insertion of the VP shunt some 6 months earlier (because of hydrocephalus) there could well be a problem with the shunt which should be investigated by*, inter alia*, a CT scan. This was only done some 2 months later when it was discovered that the shunt had become displaced, giving rise to a revision thereof.

[43] From the 19th of August 2014 to the 16th of July 2016, not only did N[...], upon physical examination by the Defendant's employees, exhibit various classic symptoms of hydrocephalus but these symptoms became progressively worse, indicating the onset of severe hydrocephalus. The nature of the symptoms have been dealt with in detail above. It should have been abundantly clear that the VP shunt was blocked (or at the very least, not functioning properly) from, *inter alia,* the increasing circumference of N[...]'s head. Coupled to this was the fact that the shunt had previously become displaced necessitating a revision thereof. Any doubt that a further revision was urgently required would have been dispelled by the urgent referral of N[...] to Chris Hani Baragwanath Hospital by Dr Moja shortly after the 28th of October 2015 and the radiological report which suggested that the shunt was blocked. On behalf of the Defendant, it was suggested, by both Dr Weinstein and Professor Omar, that the Defendant did not have the capacity (sufficient beds or Neurosurgeons) to attend to the blocked shunt. However, it was correctly conceded, by both of these witnesses, that the procedure could have been carried out if it was classified as an emergency. As dealt with above the blocked shunt was never replaced, despite numerous visits by N[...] to Chris Hani Baragwanath Hospital during the period following the referral by Dr Moja until her death (a period of some eight and a half months).

[44] In light of the aforegoing, this court holds that the Defendant's employees failed to properly treat the hydrocephalus by failing to realise that the VP shunt was blocked and taking steps to replace same, particularly after the referral of Dr Moja.

Even if the Defendant's employees had acted positively by, *inter alia*, inserting the VP shunt earlier and replacing the blocked VP shunt, would N[...]'s death have been avoided?

[45] It became clear during the trial in this matter that part of the Defendant's defence to the Plaintiff's claims that N[...] died as a result of the Defendant's employees negligence (in addition to the defence that her death was caused by her premature birth), was that the insertion of the VP shunt was for palliative and not therapeutic reasons. In other words the VP shunt had been inserted solely to prevent the swelling of her head from increasing thereby not only making N[...] more comfortable but also making it easier for the Plaintiff to take care of her daughter. It was therefore the Defendant's case that a functioning VP shunt would not have prevented the death of N[...].

[46] The principal protagonist of this theory was Dr Weinstein (Radiologist). At the time of trial this witness was a long-time employee of the Defendant (for more than 20 years). During the course of his lengthy testimony before this court he continually evaded questions, was argumentative and speculative. Whilst being forced to concede that the ultimate decision in respect of the treatment of N[...] fell outside his field of expertise (radiology) and within the expertise of other suitably qualified experts (with particular reference to the Paediatrician (Dr Maponya) and the Neurosurgeon (Dr Moja) who testified on behalf of the Plaintiff), he continually expressed opinions which fell within the fields of those expert witnesses. Importantly, he attempted to draw inferences from the available medical records which would support the defence of the Defendant, absolving the Defendant's employees from any negligence. These inferences were not, on a balance of probabilities, the only inferences that could be drawn therefrom (or from the facts which were common cause between the parties in this matter). Importantly, this witness was not involved in the treatment of N[...] and had no personal knowledge thereof. It follows therefrom that this court did not find Dr Weinstein to be a reliable witness upon whom this court could rely. In any event, the evidence of this witness ultimately took the matter (and in particular the defence proffered by the Defendant) no further.

[47] Professor Omar (Neurosurgeon), like Dr Weinstein, was, at the time of trial, employed by the Defendant. More particularly, he was head of Neurosurgery in Gauteng. As was the case with Dr Weinstein, this witness had not treated N[...]. His testimony dealt mainly with the treatment of hydrocephalus in general. Moreover, it appeared to this court that the principal reason why he was called to give *viva voce* evidence before this court on behalf of the Defendant was in respect of the alleged lack of facilities in Gauteng hospitals under the control of the Defendant. In the premises, notwithstanding the considerable expertise and experience of this witness, his testimony before this court offered little or no assistance to the court in deciding the present matter. Importantly, his evidence failed to support the defence of the Defendant that the Defendant's employees were devoid of any negligence when it came to the proper treatment of N[...].

[48] In stark contrast to Dr Weinstein and Professor Omar, Dr Moja (Neurosurgeon) was not only an independent witness (it being confirmed by Defendant's Counsel that he was not acting on a contingency basis) but he had also physically examined N[...] and (on the basis of a CT scan to the brain), recommended to the Defendant's employees that they carry out an urgent revision of the VP shunt which appeared to be blocked. The really important evidence which this expert witness provided to this court was in relation to the therapeutic intervention of a fully functional VP shunt and the prognosis of N[...] had she had the benefit thereof.

[49] Dr Moja found that N[...]'s breathing difficulties and hypoxia (well documented and dealt with earlier in this judgment) would have led to secondary hypoxic-ischaemic brain injury and periventricular germinal matrix brain haemorrhages. It would therefore be reasonable to conclude that N[...] would have sustained some degree of neurological impairment as a result of her hypoxic-ischaemic brain injury and intraparenchymal haemorrhages (germinal matrix haemorrhage). In his expert opinion the severity of N[...]'s hypoxic-ischaemic could be classified as mild to moderate. This classification was due, *inter alia*, to the following, namely:-

(a) a moderate encephalopathy is characterised by lethargy, decreased spontaneous motor activity, hypotonia, irregular breathing and seizures;

(b) a severe encephalopathy is characterised by a stupor/coma; no spontaneous limb movements; flaccid tone; apnoeic episodes and seizures;

(c) the hospital records on the 7th of April 2014 (11 days post-delivery) reflect that N[...] was *"alert"* and *"moving all 4 limbs".* There is no record of seizures; coma; lethargy or limb weakness to suggest a moderate to severe encephalopathy.

[50] It was therefore the opinion of this expert witness that as at the 7th of April 2014, N[...] had a reasonably fair neurological prognosis from the mild to moderate hypoxic-ischaemic encephalopathy. Pertaining to the relevance of a germinal matrix haemorrhage and hydrocephalus, it was Dr Moja's further testimony that N[...] developed a grade III to IV germinal matric haemorrhage, intraventricular haemorrhage and hydrocephalus. The significance of the said grading, according to this expert witness, was that with a Grade III, there is a 80% chance of survival and a 55% risk of progressive ventricular distension in survivors. With a grade IV, there is a 50% chance of survival and a 80% risk of progressive ventricular distension in survivors.

[51] In the premises, even on a worst case scenario (grade IV), N[...] had a 50% chance of survival. According to Dr Moja she fell within the 50% survival group. Obviously, her chances of survival would increase to 80% as one moved to a grade III classification (as dealt with above). However, as testified to by Dr Moja, her continued chances of survival would be on the condition that the high risk of progressive hydrocephalus (ranging from 55% to 80%) is recognised and adequately treated. The hydrocephalus must be diagnosed early and treated appropriately to prevent progressive neurological deterioration from the progressive ventricular enlargement. Therefore, a delay in the diagnosis and treatment of the associated hydrocephalus would lead to a progressive neurological decline and, ultimately, death.

[52] The evidence of Dr Moja was not seriously challenged by any of the expert witnesses who testified before this court on behalf of the Defendant. In this regard, apart from the testimony of Dr Weinstein and Professor Omar, dealt with earlier in this judgment, the Defendant relied on the evidence of Dr Malebane (Obstetrician); Dr Mathibha (Neonatologist) and Dr Emeieole (Neurosurgeon). In light of the facts which were common cause or not seriously in dispute in this matter, the evidence of Dr Malebane and Dr Mathibha do not really take the matter much further. As already dealt with in this judgment, facts pertaining both to what took place during the Plaintiff's pregnancy and/or at the time of delivery are largely irrelevant. Likewise, the precise gestational age of N[...] at birth and whether this was 28 or 30 weeks, cannot (once again in light of the proven facts) support the Defendant's contention that the death of N[...] can be explained by the effects of her premature birth. Regarding the testimony of Dr Emeieole, it is true that this witness was the Neurosurgeon who examined N[...] on two occasions as an out-patient at Chris Hani Baragwanath Hospital. However, it was clear from the nature of his testimony before this court that (unsurprisingly) he had no independent recollection of the said examinations having taken place and his findings in respect thereof. His evidence was confined to notes he had made in the hospital records; those made by the nursing staff during those examinations and other recordals in the hospital records made by employees of the Defendant. As such, his evidence only served to confirm those facts which were common cause. Ultimately, the evidence of these three witnesses not only failed to add to those facts which were common cause and could be accepted by this court but failed, in any manner whatsoever, to disturb the balance of probabilities based on those facts.

[53] This court has no hesitation, whatsoever, in accepting the expert evidence of Dr Moja. In this regard, not only was his evidence based squarely on the proven facts but it was rendered in a forthright and logical manner. Further, there were no contradictions therein, either during his testimony or when he was cross-examined. Dr Moja was an impressive witness whose testimony remained largely undisputed. On the other hand, as dealt with earlier in this judgment, the same cannot be said in respect of the evidence of the Defendant's remaining expert witnesses, namely Dr Weinstein and Professor Omar. In the premises, this court rejects the evidence of these witnesses insofar as same may possibly be seen to contradict that of Dr Moja or any other of the Plaintiff's expert witnesses.

[54] Having regard to all of the aforegoing, this court holds that, on a balance of probabilities, the employees of the Defendant were negligent in failing to treat the

hydrocephalus properly by failing to realize that the VP shunt was blocked and taking steps to replace same, particularly after the referral of Dr Moja.

Finding in respect of the merits

[55] From the aforegoing, it is clear that the employees of the Defendant were negligent in their diagnosis of N[...]'s true condition and by failing to properly render medical treatment to her. These omissions constituted negligence in that reasonable medical practioners, in the position of the Defendant's employees, would not only have reached an earlier and proper diagnosis of that medical condition but would have taken proper and reasonable steps to treat that condition. In other words, the Defendant's employees failed to render to N[...] the necessary medical treatment with the requisite care and skill which other medical practioners, in the same position, would have done *(Oppelt (supra) at paragraph 71*).

[56] With regard to wrongfulness, it was never contended, on behalf of the Defendant (correctly so), that if the Plaintiff proved the elements of negligence and causation the omissions of the Defendant's employees were not wrongful. Clearly, the negligent omissions by the Defendant's employees in the present matter more than satisfy the accepted guidelines as set out, *inter alia*, in the decisions of *Minister of Safety* & *Security v Van Duivenboden (supra); Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd (supra) and Oppelt (supra).*

[57] The only remaining element for the Plaintiff to prove in order to succeed in her claim against the Defendant is that of causation. But for the negligence of the Defendant's employees would N[...] have died when she did? Once again, this court must rely on the evidence of Dr Moja. In particular, as dealt with earlier in this judgment, it was the expert opinion of this witness that had N[...]'s medical condition been diagnosed earlier and had she received proper medical treatment at an earlier stage, her chances of survival would, statistically, have been between 50% and 80%. At the same time, whilst it is clear that N[...]'s premature birth was the cause of permanent damage and deficits which would plague N[...] throughout her life, it cannot be said, on the proven facts, that same caused her death. In the premises, this court holds that the Plaintiff has proved, on a balance of probabilities that the negligence of the Defendant's employees caused N[...]'s death. Having proved all of the essentials of a delictual claim the Plaintiff is entitled to be compensated by the Defendant in respect of her special and general damages and in respect of general damages suffered by N[...].

[58] On the issue of contributory negligence, as pleaded by the Defendant, there is no real evidence before this court that the Plaintiff contributed, in any manner whatsoever, to the damages sustained by her either in her personal capacity or on behalf of N[...]'s deceased estate. In this regard, the Defendant relies primarily (if not solely) on the alleged failure of the Plaintiff to attend sufficient antenatal visits during her pregnancy and, thereafter, failing to attend certain pre-arranged appointments at the Defendant's various hospitals. With regard to the former, this court has already dealt with the fact that what transpired prior to N[...]'s birth has little or no bearing on the ultimate decision to be made in this matter. Arising therefrom, any failure by the Plaintiff to attend more antenatal appointments at the clinic than she did, should not be taken into account when considering whether any negligence can be apportioned to the Plaintiff. Regarding the latter, the Defendant failed to place before this court any real evidence that the Plaintiff consistently missed appointments to consult with the Defendant's employees which may have contributed to N[...] failing to receive the necessary medical attention. Indeed, the proven and common cause facts paint a very different picture of the Plaintiff as a mother. Not only did the Plaintiff ensure that N[...] kept the majority of appointments but, on more than one occasion, took N[...] to see the Defendant's employees before the designated date. In addition thereto, the Plaintiff was proactive in attempting to seek proper medical care for her daughter. This is clear from, *inter alia*, the fact that the Plaintiff complained to the Defendant's employees in respect of N[...]'s blindness and, most importantly, sought the assistance of Dr Moja in respect of the deterioration in N[...]'s medical condition. In the premises, this court holds that there was no contributory negligence on the part of the Plaintiff in this matter.

Ad the quantum of the Plaintiff's damages

The Plaintiff's claim for general and special damages in her personal capacity

[59] It was submitted, on behalf of the Defendant, that the Plaintiff had forfeited her claim in respect of general damages when she elected not to testify. In support of this submission the Defendant relied on the decision of *M v MEC for Health, Eastern Cape (699/17) (2018) ZASCA 141 (1 October 2018).* This matter was an appeal to the Supreme Court of Appeal in respect of a decision of Nhlangulela DJP in the Eastern Cape Division of the High Court of South Africa. In the court of first instance that court was asked only to decide the issue of delictual liability. Hence, whilst it is true that the Plaintiff in that matter did not testify, it cannot assist, in any manner whatsoever, the Defendant's argument that when deciding the quantum of damages

to be awarded to a successful Plaintiff, a Plaintiff who elects not to testify should forfeit any right to claim damages.

[60] In respect of the Plaintiff's election not to testify before this court, it is fairly trite that, when quantifying the amount of damages to be awarded, a court may, where applicable, draw an adverse inference against a Plaintiff who makes such an election. In the present matter, it is common cause that the Plaintiff attended the proceedings yet declined to testify. Dr Mashayamombe (Psychiatrist) testified that, in light of, *inter alia*, her severe depressive mood disorder, she would be unable to testify before this court. This was not seriously disputed on behalf of the Defendant during cross-examination. In addition thereto, cognisance should also be had of the evidence of Mr Mphuthi (Clinical Psychologist) who testified that the Plaintiff was suffering from a moderate to severe post-traumatic stress disorder ("PTSD") marked by depression and diminished psychosocial and psychophysiological functioning and capacity. Taking all of the aforegoing into account, it is the finding of this court that it would be reasonable to expect the Plaintiff in the present matter not to testify and that no adverse inference should be drawn against her for failing to do so. In any event, any lacunae which may exist in the evidence placed before this court in respect of the Plaintiff's claim for damages (both in respect of herself in her personal capacity and on behalf of N[...]'s estate), was more than compensated for by both the expert evidence led at trial (including the collateral evidence relied upon by those expert witnesses) and the *viva voce* evidence of Miss N[…] (N[...]'s paternal grandmother).

General damages

[61] Evidence pertaining to what the Plaintiff was forced to endure as a result of the deterioration of N[...]'s medical condition; the onset of hydrocephalus with the devastating sequellae thereof and the trauma suffered by the Plaintiff in losing a second child, was placed before this court by Miss N[…]; Dr Mashayamombe and Mr

Mphuthi. In her Amended Particulars of Claim the Plaintiff, in her personal capacity, claimed general damages for emotional shock and trauma, together with the loss of the enjoyment of the amenities of life, as a globular sum, in the amount of R1 500 000.00. At the conclusion of the trial in this matter and during the course of argument, it was submitted, on behalf of the Plaintiff, that an appropriate award in respect of the Plaintiff's general damages would be the sum of R500 000.00.

[62] Miss N[…] testified to the drastic changes to the Plaintiff before and after the death of N[...]. Importantly, she also testified to the extremely difficult time that the Plaintiff experienced during the […] that N[...] was alive. In this regard, not only did N[...] constantly require the Plaintiff's attention but she was always crying. The aforegoing and the effect that this had on the Plaintiff was described by Mr Mphuthi as the "burden of injury". Miss N[…] impressed this court as an honest witness. She described how, after the death of N[...], the Plaintiff was distraught; highly emotional and cried often. At a stage, N[...] could not eat properly, as a result of which it became necessary for the Plaintiff to force food down her daughter's throat. When N[...] cried and cried the Plaintiff would cry too. According to this witness the Plaintiff was devastated by N[...]'s death. She could not accept what had happened. The witness further testified that she encouraged the Plaintiff to return to school to complete her studies. However, the Plaintiff dropped out of school and has never returned thereto.

[63] In addition to his diagnosis of PTSD (dealt with above), Mr Mphuthi diagnosed the Plaintiff as suffering from severe depression. This diagnosis was confirmed by Dr Mashayamombe when he testified. He also testified to the fact that, in 2019, the Plaintiff presented with the following psychiatric symptoms, namely a marked depressed mood; marked generalised body tiredness; inability to cope with domestic chores; low self-esteem and an inability to be in the presence of children who were born in the same year as N[...]. It was true that the Plaintiff had been diagnosed as HIV positive a month before the birth of the twins and that the Plaintiff had suffered the loss of another child when N[...]'s twin brother died. These were contributing factors to the Plaintiff's condition but, according to Dr Mashayamombe, the deterioration of N[...]'s medical condition and her death were the stressors which had ultimately given rise to her severe depression and PTSD.

[64] Plaintiff's Counsel referred this court to the matter of *Maart v Minister of Police (3049/2011) [2013] ZAECPEHC 19 (9 April 2013)* where a Plaintiff was awarded damages in the sum of R200 000.00 for the emotional shock suffered when her child died as a result of being shot in the back of the head by the police. The present day value of that award is R279 222.00. The court was also referred to the matter of

Walters v Minister of Safety and Security (7397/2001) [2012] ZAKZDHC 19 (12 April 2012). In this matter the Plaintiff's husband hanged himself in the police cells. The Plaintiff was awarded the sum of R185 000.00 in respect of general damages which has a present day value of R272 519.00.

[65] It is trite that whilst the consideration of past awards for similar claims in respect of general damages will assist a court in assessing same, it is also accepted that our courts should not slavishly follow same. This is true since every case is, in one way or another, unique and possesses its own particular set of facts and circumstances. Moreover, it is trite that when a court considers the issue of general damages, it should take into account all the facts and circumstances of that particular case and has a wide discretion to award what it considers to be fair and adequate compensation to the injured party.

[66] No amount of monetary compensation will ever be enough to alleviate a parent's loss of a child, This is so, particularly where that child is young, like N[...]. Nevertheless, this court must attempt to do so. Insofar as the previous awards referred to by the Plaintiff above are relevant, it is the opinion of this court that the general damages suffered by the Plaintiff should be in excess thereof. Taking all of the aforegoing factors into account, it is the opinion of this court that an appropriate award in respect of the Plaintiff's general damagers would be the sum of R400 000.00.

Special damages

[67] The Plaintiff's claim under this head of damages consists of future medical treatment and medication. Both Mr Mphuthi and Dr Mashayamombe made reference thereto in their respective medico-legal reports (confirmed when they gave *viva voce* evidence before this court). In addition thereto, an actuarial calculation was carried out by one Loots (Actuary) in order to quantify this claim. Neither the necessary treatment and medication, nor the manner in which the said calculation was carried out (the report of the Actuary being admitted into the evidence by consent), were seriously disputed by the Defendant. This court accordingly accepts that the Plaintiff should be awarded the sum of R136 000,00 as set out in Exhibit Q.

The Plaintiff's claim for general damages in her capacity as the executor of N[...]'s deceased estate

[68] The sequellae of the injuries sustained by N[...] and how these manifested themselves visibly, have been dealt with thoroughly in this judgment. As stated earlier, Miss N[…] testified that N[...] cried continually. The only other witness to testify in respect of N[...]'s general damages was Mr Mphuthi. In this regard, he told this court that when he examined N[...] (not long before she died) she was in a semi-vegetative state and essentially non-responsive. In the premises, he was unable to be of any real assistance in determining the general damages suffered by her. However, this witness confirmed that prior to N[...] reaching this semi-vegetative state she would have been responsive. As such, she would have been susceptible to, *inter alia*, pain and suffering; incapacity and the loss of amenities of life. Support for this finding may be found in the fact that the Defendant has agreed to pay R100 000.00 in respect of N[...]'s general damages when she sustained extensive burns whilst being cared for by the Defendant's employees.

[69] The degree of impairment suffered by N[...] was severe. This court was not referred to any previous awards made by our courts where a minor child suffered similar sequellae but died prior to the court having to decide the quantum of general damages. As dealt with earlier in this judgment, an amount of R1 000 000.00 was originally claimed in respect thereof. This was reduced to the sum of R700 000.00 in the Plaintiff's Heads of Argument. Finally, it was submitted, on behalf of the Plaintiff, that R500 000.00 would be an appropriate award in respect thereof.

[70] Having regard to all of the aforegoing, this court holds that the reasonable amount which should be awarded in respect of N[...]'s general damages is the sum of R500 000.00. To this must be added (by consent) an additional sum of R100 000.00 in respect of general damages for the extensive burns suffered by N[...] as a result of the further negligence of the Defendant's employees. In the premises, this court awards to the Plaintiff the total sum of R600 000.00 in respect of N[...]'s general damages.

Costs

[71] At the completion of the trial in this matter, Plaintiff's legal representatives provided this court with a Draft Order and sought an order in terms thereof. Included therein is*, inter alia*, an extensive and detailed order in relation to costs. For various reasons this court has elected not to make an order in terms of the said Draft Order. The order of this court is set out hereunder.

[72] In the first instance, there is no reason why the court should deviate from the general rule that the successful party be entitled to recover his or her costs. Following thereon the Defendant should be ordered to pay the Plaintiff's costs. In determining those costs, it was submitted that the Defendant should be ordered to pay the costs of two Counsel. In this regard, the Plaintiff elected not to employ the services of Senior Counsel. Rather, the Plaintiff was represented throughout the trial by two Junior Counsel. Having regard to, *inter alia,* the complexity of the matter; the amount of evidence placed before the court at trial and the extensive amount of documents which made up the various exhibits in the matter, this court is satisfied that the Plaintiff was entitled to employ the services of two Junior Counsel.

Order

[73] The court makes the following order, namely: -

1. The Defendant pay to the Plaintiff, in her personal capacity, the sum of R536 000.00;

2. The Defendant pay to the Plaintiff, in her capacity as the executor of N[...]'s deceased estate, the sum of R600 000.00;

3. Interest on the amounts as set out in paragraphs 1 and 2 hereof *a tempore more*, calculated from the date of judgment to date of final payment;

4. The Defendant pay the Plaintiff's costs, such to include the costs of two Counsel and the costs of Counsels' consultations with the experts set out in paragraph 5 hereof;

5. The Defendant pay the costs of the following experts, namely:-

   5.1 Dr Segwapa (Plastic Surgeon)-report and any addendums thereto;
   5.2 Joint Minute of Dr Segwapa and Dr Berkowitz (Plastic Surgeons);

5.3 Dr Moja (Neurosurgeon)-report and any addendums thereto; reservation costs; qualifying costs and attendance costs;
5.4 Dr Letsoalo (Opthamologist)- report and any addendums thereto; Joint Minute of Mr Mphuthi and Dr Bubb (Clinical Psychologists);
5.5 Joint Minute of Dr Letsoalo and Dr Makunyane (Opthamologists);
5.6 Mr Mphuthi (Clinical Psychologist)-report and any addendums thereto; reservation costs; qualifying costs and attendance costs;
5.7 Dr Masindi (Educational Psychologist)-report and any addendums thereto;
5.8 Dr Ndzungu (Occupational Therapist)-report and any addendums thereto;
5.9 Dr Lowane-Mayayise (Industrial Psychologist)- report and any addendums thereto;
5.10 Potgieter (Actuary)- report and any addendums thereto;
5.11 Dr Burgin (Obstetrician & Gynaecologist)- report and any addendums thereto;
5.12 Joint Minute of Dr Burgin and Dr Malebane (Obstetricians & Gynaecologists) ;
5.13 Dr Jogi (Radiologist)- report and any addendums thereto;
5.14 Joint Minute of Dr Jogi and Dr Weinstein (Radiologists);
5.15 Dr Maponya (Paediatrician)- report and any addendums thereto; reservation costs; qualifying costs and attendance costs;
5.16 Joint Minute (unsigned) of Dr Maponya (Paediatrician) and Dr Mathivha (Neonatologist);
5.17 Dr Mashayamombe (Psychiatrist)- report and any addendums thereto; reservation costs; qualifying costs and attendance costs;
5.18 Loots (Actuary)- report and any addendums thereto.

BC WANLESS

ACTING JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on :11 September 2020

For the Plaintiff: Advocate DP Mogagabe
dpmogagabe@gmail.com
083 353 5979
Advocate FJ Kokela

felikokela@gmail.com
(no cellular telephone number provided)

Instructed by: Kokela Attorneys
Mrs L Kokela
kokelaattorneys@gmail.com
072 036 5862

For the Defendant: Advocate I Adams
luzelle@rsabar.com
071 221 3411

Instructed by: State Attorney (Pretoria)
Mr A Masenamela
mmasenamela@justice.gov,za
076 942 0213

Date of Judgment: 8 February 2021