IN THE HIGH COURT OF SOUTH AFRICA,
KWAZULU- NATAL LOCAL DIVISION, DURBAN

CASE NO: 6373/2007

In the matter between:

THULELENI JUDITH MNGOMEZULU Plaintiff

and

MINISTER OF LAW AND ORDER Defendant

JUDGMENT

Date Delivered: 08 August 2014

CHETTY, J:

[1] The plaintiff, Thuleleni Judith Mngomezulu, instituted action against the defendant following the shooting of her daughter, Portia Nompumelelo Mvuyana, by members of the South African Police Services on 22 May 2006. It is not in dispute that following the shooting, the plaintiff's daughter was admitted to hospital, where she died on 26 May 2006 as a result of her injuries sustained in the shooting.

[2] At the time of her daughter's death, the plaintiff was unemployed due to illness and was dependent on her daughter for support. Following the death of her daughter, the plaintiff instituted action against the defendant for loss of support in the sum of

R250,000. The action was defended, and the defendant simply put up a bare denial of the allegations levelled against it. The plaintiff thereafter amended her particulars of claim contending that as a result of the loss of her right to support from her daughter, she has suffered damages in the amount of R612,000 on the basis that her daughter, at the time of her death, was employed on a permanent basis in the insurance industry. It was alleged that had she lived, the deceased would have contributed towards the plaintiff's support for a period of 34 years, in the amount of R18,000 per year. It is on that basis that the plaintiff's claim for loss of support was increased to the sum of R612,000.

[3] At a later stage, the plaintiff filed a further amendment in terms of Rule 28 contending that as a result of the death of her daughter, she suffered severe emotional shock which caused her to become severely ill and to be admitted to hospital with severe depression and anxiety for which she continues to use prescription medication. As a result of her depression, the plaintiff contends that she continues to seek psychiatric counselling. Accordingly, the plaintiff seeks damages in the amount of R500,000 for emotional shock.

[4] Shortly after placing the matter on the Roll and awaiting the allocation of a trial date, the parties held a pre-trial conference. In the course of the process, the plaintiff forwarded the defendant's attorney with an actuarial report in substantiation of her claim for loss of support. In a report prepared by actuaries Human and Morris, it is contended that the plaintiff's claim for loss of support totalled R901,872. In due course, the plaintiff

commenced preparation for trial and gave notice that she intended to call two medical experts in substantiation of her claim. These were to include a general medical practitioner and a specialist psychiatrist. The reports of both experts were duly forwarded to the defendant's attorneys.

[5] On 28 May 2013 the defendant's attorneys recorded the following to those acting for the plaintiff.

> *"In an effort to amicably settle same, I am instructed by the Minister of Police to concede on the issue of liability and the issue of quantum be proven."*

[6] This was followed by a notice filed by the defendant's attorney in which the defendant formally conceded liability in the matter, with the costs to be cost in the cause, for such damages as were agreed or proven by the plaintiff.

[7] It is against this background that the matter proceded to trial. The elements of a loss of support claim were identified by Corbett JA in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 839B, as:

> *"(a) a wrongful act by the defendant causing the death of the deceased, (b) concomitant culpa (or dolus) on the part of the defendant, (c) a legal right to be supported by the deceased, vested in the plaintiff prior to the death of the deceased, and (d) damnum, in the sense of a real deprivation of anticipated support".*

[8] At the outset of the proceedings, Ms Rasool who appeared for the plaintiff, reiterated that the sole issue for determination by the Court was restricted to an

assessment of the quantum of damages sustained by the plaintiff as the defendant had conceded liability on the merits of the plaintiff's action. The present action was posited on two claims – one based on loss of support and the other for emotional shock. As such, counsel submitted, it was not necessary for the plaintiff to have to prove the legal justification for its claim, as this was rendered superfluous by the concession on liability. Ms Moodley, who appeared for the defendant, accepted this as a correct interpretation of the concession on liability made by the defendant.

[9] The plaintiff, as set out above, claimed damages in the amount of R500,000 in respect of 'severe emotional shock'. Before dealing with the factual basis of the plaintiff's claim, it is necessary to have regard to how our Courts have approached such claims. Binns-Ward J in *Ng Pan Hing and others v Road Accident Fund* [2014] 2 All SA 186 (WCC) at paragraph 14 noted on appeal:

> "The recovery of compensation in delictual damages for "nervous shock" or psychiatric injury has proven a contentious subject internationally.
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> *"Because of the crucial role of policy considerations, especially due to concerns about potentially limitless liability, the development of the law in this area has been treated in some judgments as analogous, to the development of the law of delict in respect of the recovery of damages for pure economic loss. See in this regard, for example, the remarks of Lord Steyn in White and others v Chief Constable of South Yorkshire and others [1999] 1 All ER 1 (HL) at 31–32:*
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> > "Courts accept that a recognisable psychiatric illness results from an impact on the central nervous system. In this sense therefore there is no qualitative difference between physical harm and psychiatric harm. And psychiatric harm may be far more debilitating than physical harm.
> >
> > It would, however, be an altogether different proposition to say that no distinction is made or ought to be made between principles governing the recovery of damages in tort for physical injury and psychiatric harm. The contours of tort law are profoundly affected by distinctions between different kinds of damage or harm: see *Caparo Industries Plc. v. Dickman* [1990] 2

> AC 605, at 618E, per Lord Bridge of Harwich. The analogy of the relatively liberal approach to recovery of compensation for physical damage and the more restrictive approach to the recovery for economic loss springs to mind. Policy considerations encapsulated by Justice Cardozo's spectre of liability for economic loss 'in an indeterminate amount for an indeterminate time to an indeterminate class' played a role in the emergence of a judicial scepticism since *Murphy v Brentwood District Council* [1991] AC 398 about an overarching principle in respect of the recovery of economic loss: see Steele, *Scepticism and the Law of Negligence*, [1993] C.L.J. 437. The differences between the two kinds of damage have led to the adoption of incremental methods in respect of the boundaries of liability for economic loss."

[10] Although the legislature and the Courts in the United Kingdom have attempted to restrict the basis for liability in regard to torts based on nervous shock, the approach formulated in South Africa in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A) is to treat psychiatric injury as legally indistinguishable from any other form of bodily injury, the basis being the effect of the wrongdoer's conduct on the claimant's nervous or neurological system. This approach was reaffirmed in *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) where a mother claimed damages for psychiatric injury, upon being informed telephonically, a few hours after the event, of the death of her young son in a motor vehicle collision. As to liability, the Court held in *Barnard* that the negligent driver should have foreseen that as a consequence of the serious physical injury or death of any person in a resultant collision, third parties closely connected by love or affection to the deceased or injured person might suffer psychiatric injury upon being informed of the event. In arriving at this conclusion, Van Heerden DCJ approved of the dictum of Cleaver J in *Majiet v Santam Limited* [1997] 4 All SA 555 (C). See too the judgment of Brennan J in *Jaensch v Coffey* [1984] HCA 52; 54 ALR 417 at 430 where the Australian High Court recognised that *"a psychiatric illness induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential".*

THE CLAIM FOR LOSS OF SUPPORT

[11] Against this backdrop I turn to the evidence before me. The plaintiff testified that she lived together with her daughter (whom I shall refer to as the 'deceased') in Durban and that they were an extremely close knit family. The plaintiff is unmarried and had no other children. She described the intimate relationship which she had with her daughter, stating that her daughter "told her everything". She testified that the deceased matriculated in 2001 and attended tertiary college the following year, where she completed a course in secretarial and computing skills. Thereafter, the deceased enrolled at the University of KwaZulu-Natal to study Information Technology, but terminated those studies due to the plaintiff resigning from her employment at a bank due to ill health. The plaintiff's testimony was that she had returned to the country in 1991 after being part of the armed struggle against the apartheid government. She eventually found employment at a finance institution in 1997, which later became known as African Bank. She was employed here as a consultant. At the time of her resignation due to ill health in 2001, she stated that she did not receive any pension or ill-health benefits as she was not a registered employee. This evidence remained intact under cross examination.

[12] Owing to the plaintiff's unemployment, the deceased was obliged to quit her studies to support the household. She found employment at a funeral parlour. While the plaintiff testified that the deceased did not disclose to her how much she earned, her evidence was that her daughter managed to pay for all the household expenses,

including rent for their flat, utilities, as well as the costs of all her medication. She estimated this to be approximately R5000,00 per month.

[13] The plaintiff further testified that her daughter informed her that she had secured a higher paying job as an insurance broker in April 2006. Again, the plaintiff testified that she had no knowledge of precisely how much her daughter earned at the time. Counsel for the defendant questioned the plaintiff on her lack of knowledge of the deceased's earnings, particularly in light of her testimony that the deceased "told her everything", the inference being that the deceased must surely have conveyed this information to her mother in light of their close relationship. Despite the plaintiff's lack of knowledge of exactly how much the deceased earned, there was nothing from her testimony to suggest that she was being evasive as a witness, nor was any such suggestion put to her. Accordingly, no adverse inference can be drawn from her lack of knowledge. The deceased's earnings at the time of her death, which is relevant to the calculation for the loss of support claim, had to be ascertained from the evidence of her employer at the time. The plaintiff's testimony that she was solely dependent on her daughter for support (including the cost of purchasing medication for her ill health) was not dented in any way under cross examination, and accordingly must stand.

[14] According to the plaintiff, after the death of her daughter, her life came to a stand-still as her child represented her "*only hope*". She had no one else to help her at home, and turned to her cousin to take care of her for a while. It is not in dispute

between the parties that the plaintiff eventually succeeded in finding employment as a protection officer with the Passenger Rail Agency of South Africa (PRASA) on 1 January 2010, where she currently earns a gross salary of R11 281,79. This factor has an obvious bearing on the amount of the plaintiff's claim for loss of support, which is dealt with below.

[15] In support of her claim for loss of support, the plaintiff relied on the evidence of Mr Africa Didi, an insurance broker for whom the deceased worked immediately prior to her death. Mr Didi testified that he was a registered broker in terms of the Financial Advisory and Intermediary Services Act (FAIS Act) and carried on business under the name of AMML Financial Services. He recalled placing an advert in the newspaper in 2006 when he sought to recruit new consultants at his brokerage. The deceased was one of 10 applicants to be selected in April 2006, after which she entered into an agency agreement with AMML Financial Services to market various products related to the insurance industry. These included funeral and life insurance policies. In the course of his testimony, Mr Didi produced various documents including an agreement between his company and the deceased reflecting her basic salary of R1250,00 commencing from April 2006. According to Mr Didi, during the first month of employment an agent was not required to sell any products and therefore would not qualify for any commission. During this period the deceased also underwent training under the auspices of Old Mutual Group Schemes, where she obtained 92% in a test designed to ascertain her competency to conduct business as an insurance agent. Mr Didi further recorded that although the deceased was employed by him for a brief period, she gave

him the impression of being an able and intelligent employee who would have been successful as a broker.

[16] Pertinent to the claim for loss of support is Mr Didi's evidence that in terms of the salary structure and contract entered into with the deceased, she would have earned a basic salary from the second month onwards of R2 500.00 per month, as well as commission of R100,00 per "qualifying case" sold on behalf of the company. In other words, the commission would become due where all of the necessary supporting documents from a prospective client was in order, and submitted to the head office to be processed.

[17] The evidence revealed that agents were also given an incentive bonus to sell more policies. The contract of employment specified a bonus structure based on the number of policies sold, commencing at 20% for the first quarter of employment, and progressing incrementally to a maximum of 50% of commissions earned. The explanatory note to Clause 8.1 of the employment contract reads as follows:

> "*These percentage[s] will be calculated [on] the commission actually earned and received by the Broker (in terms of a Broking Agreement) in respect of any business introduced or affected by the Agent.*
> *The Broker shall, at the end of the month in which the Broker receives any payment of commission in terms of Broking Agreements in respect of any business introduced or effected by the Agent, render to the Agent a statement setting out sufficient details of the business concerned and the amount paid to the Broker in respect thereof."*

[18] Mr Didi testified that although Old Mutual Group Schemes had set a target of 13 policies cases per week, his brokerage had set a lower target for the agents of 8 policies per week. On this basis, he projected that the deceased, had she remained in employment, would have achieved the target of 8 policies per week with a resultant commission of approximately R3200 per month. This amount in addition with her bonuses would have equated to a net salary of R7500 per month.

[19] Relying on the evidence of Mr Didi and the documentary proof of the employment contract concluded with the deceased, it was contended on behalf of the plaintiff that had she lived, her net income would have been apportioned into two parts – one to herself and the other to her mother who was unemployed and reliant on her for support until January 2010 when the plaintiff started working. On the basis of Mr Didi's evidence, the loss of support was actuarially calculated to the sum of R75 663,00. Under cross examination, Mr Didi conceded that on his own evidence, at the time of the deceased's death in May 2006, she had not sold any policies warranting the payment of commission. His evidence was that as at 22 May 2006, she had written up two 'cases', but these were incomplete as certain supporting documentation had not been obtained from the client. He further stated that where agents failed to meet their targets, they would not be paid their monthly basic salary. Instead, they would simply be paid commissions on whatever they sold. Whilst describing his brokerage's targets of 8 policies per week as achievable, he accepted that the insurance industry was susceptible to the prevailing economic climate, and that the amount of commissions earned by an agent in a month was entirely subject to fluctuation. It was put to him,

having regard to these concerns, whether the deceased's earnings could be assumed at R7500,00 per month, particularly as she had only been in employment for two (2) months at the time of her death. Ms Rasool submitted that this was the best evidence available to the Court, and that in the absence of any contrary evidence from the defendant, the Court should accept the uncontested version of Mr Didi. In fairness to the witness, he did not set out to embellish his evidence as to the earning potential of the deceased. Her earnings were also capable of being objectively assessed from the express terms of her employment contract. In terms of the pre-trial agreement concluded between the parties, the plaintiff's actuaries were to be used for the purposes of calculating the quantum of loss sustained.

CLAIM FOR EMOTIONAL SHOCK

[20] The plaintiff's second claim was for emotional shock arising from her daughter's death. As set out above, the plaintiff testified of the close relationship that she enjoyed with her daughter, who was her only remaining family member. She testified that upon hearing of her daughter's shooting on 22 May 2006, she fainted. She related that upon visiting her daughter in hospital on the first day, she appeared to be improving, and attempted to speak. She related that her daughter could not understand why she had been shot by the police as she had done nothing wrong. On the second day, the plaintiff testified that a member of the police services, a Captain Nkosi, visited her daughter in hospital and informed her that once she was discharged, she should institute

proceedings against the police as they had been negligent in shooting her. The plaintiff then testified that on the third day when she visited her daughter, she was struggling to speak. She was able to hold her daughter's hand, but there was no improvement in her condition. The plaintiff returned to the hospital the following morning, only to be informed that her daughter had passed away during the course of the night.

[21] As a result of her daughter's death, the plaintiff testified that she had consulted various medical practitioners and psychologists, and was diagnosed with depression. She continues to receive medication as she is unable to sleep. She also testified she was seeing recurring images of her child in hospital. Apart from the plaintiff's depression, she appears to harbour deep resentment, justifiably, against the police who shot her only daughter. Her feelings appear to be exacerbated by the failure of the persons involved to acknowledge responsibility for their conduct. Under cross-examination, the plaintiff stated that when she returned from exile into the country in 1991, she did not suffer from any psychological illnesses or any form of depression. She stated that following her daughter's death she sought counselling in order to come to terms with her passing. She was treated by Dr Suliman, a general practitioner who referred her to a clinical psychologist, Dr Pillay, who practised at the same surgery as the general practitioner. At the time when she was seen by Dr Suliman, she was placed on medication for stress as well as for elevated blood pressure. She recalled having informed the doctor of the circumstances surrounding her daughter's death. She continues to take medication for her state of depression.

[22] As part of the documentary evidence in support of the claim for emotional shock, the plaintiff gave notice that it intended to call a specialist psychiatrist, Dr D Singh, whose report dated 28 January 2014 was included in the bundle of documents for the purposes of trial. At the trial however Dr Singh was not called for reasons that are unknown to the Court. As such, the contents of his report constitute hearsay. Prior to this however the defendant's counsel cross examined the plaintiff as to the circumstances leading to her consultation with Dr Singh. At this stage, the defendant's counsel had assumed that Dr Singh would be called to testify. The plaintiff testified that a few years after her daughter's death, she gained employment at PRASA in January 2010. However, she encountered various problems at work. She was referred to Dr Singh by her employer. The plaintiff stated that her stress at work was exacerbated by her being asked to carry a firearm on her person. She refused to do so, citing the accident involving her daughter. In addition, the plaintiff was facing work place competition with colleagues relating to promotions and positions within the company. Upon consulting with her psychiatrist, it was suggested that she be redeployed to another position, which would not require her to carry a firearm.

[23] It was evident from the plaintiff's testimony, and there was nothing to gainsay her version, that she was treated on 6 occasions by a specialist psychiatrist, between October and November 2013. She confirmed that she no longer requires the assistance from the psychiatrist, but continues to receive medication to help her sleep better. This medication is now obtained via a public health clinic. As she stated in her evidence, the

referral to Dr Singh took place via her employer, who paid for her consultations and treatment received at the time.

[24] In support of the claim for emotional shock the plaintiff called to Dr Suliman, a general medical practitioner, as a witness. He testified that he has been in practice for a number of years, both as a general practitioner as well as a part-time district surgeon in the greater Durban area. He further testified that he has treated patients at the King George Psychiatric Hospital in Durban, as well as in various clinics in the KwaZulu-Natal region. Whilst not a specialist psychiatrist, and admittedly not an expert in the field, he nonetheless indicated that he has a basic understanding of psychiatry. Using his basic medical knowledge and clinical skills when consulting with her, he was able to diagnose the plaintiff when she first saw him in January 2007, as suffering from a major depressive episode. The witness confirmed that the plaintiff's depression was due either directly or indirectly to the trauma of having lost her daughter.

[25] After consulting with the plaintiff, he deemed it appropriate to refer the plaintiff to a clinical psychologist, Dr L Pillay. He further confirmed that the plaintiff had been his patient until November 2013, until which time she had been treated for high blood pressure and her depression with medication. He further testified that the plaintiff has frequent relapses into depression, despite her taking regular medication for this condition.

[26] Under cross-examination, Dr Suliman conceded that he was not an expert in the field of psychiatry but nonetheless had the necessary experience to be able to diagnose a patient suffering from depression, and in doing so applied the accepted psychiatric Medical Disorder Guidelines to establish whether the plaintiff's behaviour fell within the parameters of the defined illness.

[27] I am satisfied on the basis of the evidence before me that although Dr Suliman is not a specialist psychiatrist, he is sufficiently qualified and has the necessary practical experience to testify as to the plaintiff's state of health, and more particularly the reason for him formulating his diagnosis that the plaintiff suffered from depression.

[28] Under cross-examination, the defendant's counsel sought to elicit the doctor's opinion on the contents of the report prepared by Dr D Singh, the specialist psychiatrist, who was not called to testify. Counsel probed the doctor for his views on a conclusion reached by the psychiatrist that the depression experienced by the plaintiff was not only due to the death of her daughter, but that she suffered from a "*major depressive disorder due to multiple aetiology*". It is clear that the general practitioner was not consulted by the plaintiff with regard to her work-related stress. However, Dr Suliman was able to confirm that the depression suffered by the plaintiff could be attributed to what the psychiatrist's labelled as a "*complicated grief*" with features of a "*depressive disorder*". In this regard, see the discussion in *Ng Pan Hing (supra)* at paras 28-29 related to "*complicated bereavement*".

[29] The plaintiff elected not to call any further witnesses and thereafter closed its case. The defendant, as it had indicated to the Court at the outset, did not intend calling any witnesses. The defendant accordingly closed its case.

ASSESSMENT OF DAMAGES

[30] In general, when dealing with a loss of support claim, the central enquiry is to determine whether there was a need by one person for financial support, and whether there was a concomitant duty on another to provide it. This is dependent on facts of the matter, notably whether there existed a relationship between the claimant and the deceased which would give rise in law to a duty of support and whether, in the context of any such duty, there was a need at the relevant time for support to be provided (*cf* Neethling-Potgieter-Visser *Law of Delict* (6ed) at 279 *sv* "Requirements for loss of support".)

[31] In the present matter, in light of the defendant's admission of liability, it was not necessary for the plaintiff to lead any evidence to establish a basis for legal causation in respect of the grounds on which damages were claimed. The only issue before the Court is that of *quantum*. The plaintiff claimed R612 000 for loss of support, and R500 000 for emotional shock. At the time of trial, the plaintiff's claim for loss of support was eventually whittled down to R75 663,00. The basis for this calculation was the subject of some debate, as it was arrived at taking into account the best case scenario

for the plaintiff, that is, that her deceased daughter would have earned an amount of R7500 per month as an insurance agent.

[32] Ms Moodley, who appeared for the defendant, accepted that at a minimum, the plaintiff was entitled to compute a loss of support claim on the second month's salary that the deceased would have earned in terms of the agency agreement. This amounted to R2500 per month. This would have constituted the deceased's basic salary, excluding the payment of any commissions and any incentive bonus. It was also evident that an industrial psychologist would have been best placed to have made an assessment of what the deceased's earning could have been, taking into account the variables of commission on policies and bonus payments. Accordingly, I adopted the view that it would be preferable for the parties to secure an industrial psychologist's report. It was agreed that they would be bound by the calculations, unless I was advised otherwise.

[33] What thereafter transpired is that the plaintiff's attorneys instructed an industrial psychologist to prepare a report on the pre-morbid earning potential of the plaintiff's daughter, and the loss of support to the plaintiff as a result of her death. The report was completed and furnished to the Court on 11 July 2014, together with an amended actuarial calculation assessing the loss of support to the plaintiff to be in the region of R126 580.00. I then received a memorandum from both counsel that the figures in the report should be disregarded. Counsel subsequently informed me that, by agreement, no reliance should be placed on the final actuarial calculation as it was calculated on an

erroneous assumption of the deceased's position in the job market. Accordingly, it was accepted by both counsel that no regard should be had to the reports filed after the conclusion of the trial on 12 June 2014. My determination of the plaintiff's claim for loss of support is therefor confined to the evidence led at the trial together with the actuarial reports filed at that time.

[34] In my view, it would not be unreasonable to assume that the deceased could have achieved the monthly targets referred to by Mr Didi. These targets are based on lesser sales figures per month than those set by the Old Mutual Group Equally relevant is that the defendant produced no evidence to suggest that the testimony of Mr Didi was far-fetched or exaggerated. In light of all of the circumstances, I find no reason not to accept the correctness of the actuarial report, I therefore find for the plaintiff on that basis.

[35] As regards the claim for compensation for emotional shock, counsel for the plaintiff accepted that the amount initially claimed in the summons was formulated without any rational consideration for comparative awards for similar claims. I will revert to this insofar as it has a bearing on costs. The plaintiff's evidence that she fainted upon hearing news of the shooting of her only child, and of having spent three days visiting her in hospital, only for her to pass away on the fourth day, are certainly factors that must be considered in assessing a claim for compensation for emotional shock. So too was the evidence of the close bond between the plaintiff and her daughter, and the absence of any other siblings in the family. None of this evidence was placed in dispute

under cross examination. It is also reasonable to conclude from her evidence that the plaintiff initially believed that her daughter would recover from the injuries sustained, but she eventually succumbed two days later to the injuries from the gun-shot wounds inflicted by the police. As the Court in *Ng Pan Hing (supra)* at para 24 pointed out:

> "Grief and sorrow over the death of anyone held in deep affection is a natural phenomenon. The closer the relationship the greater the hurt that falls to be resolved in the grieving process and the longer and more disabling the effect of the process is going to be. That much is a matter of common human experience, which expert evidence is not required to establish. Damages are not recoverable in delict for normal grief and sorrow following a bereavement."

[36] The plaintiff's claim for emotional damages is not solely based on the evidence of having witnessed her daughter slowly slip away, but on the evidence of the subsequent onset of depression, from which she presently suffers. Windeyer J in the Australian High Court in *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 394 expressed the following view on claims for shock:

> "Sorrow does not sound in damages. A plaintiff in an action of negligence cannot recover damages for a 'shock', however grievous, which was no more than an immediate emotional response to a distressing experience sudden, severe and saddening. It is, however, today a known medical fact that severe emotional distress can be the starting point of a lasting disorder of mind or body, some form of psychoneurosis or a psychosomatic illness. For that, if it be the result of a tortious act, damages may be had."

[37] The plaintiff's counsel submitted that a reasonable award of compensation for the emotional shock suffered by the plaintiff should be no less than R150 000. In support of her submission, Ms Rasool referred me to the decision in *Allie v Road Accident Fund* [2003] 1 All SA 144 (C) at para 37 where the Court held that:

> "In making an award, the court is not bound by one or other method of calculating general damages. The court has a wide discretion. (See the headnote in *Southern Versekering v Carstens N O* 1987 (3) SA 577 (A).) Comparative awards in other cases might be a useful guide. They may be instructive but not decisive. In *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A) at 535H-536A, the following dicta is instructive:
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> > "It should be emphasised, however, that the process of comparison does not take the form of meticulous examination of awards made in other cases in order to fix the amount of compensation. Nor should the process be allowed so to dominate the enquiry as to become a fetter upon the court's general discretion in such matter."
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> It is settled law that psychological *sequelae* can be the subject of a damages claim arising from a motor accident provided that it can be established that plaintiff suffered a detectable psychological injury. (See *Bester v Commercial Union Versekeringsmaatskappy van SA Beperk* 1973 (1) SA 769 (A) at 776H-777A.)"

[38] In assessing quantum, I have considered that in *Majiet v Santam Limited* 1997 (4K3) QOD 1 (K) Corbett & Honey Volume 4, K3-1, the plaintiff was awarded general damages in the sum of R35 000 for a major depressive disorder after she came upon the sight of her 9 year-old child lying in the road, after the child was struck down by a motor vehicle. The plaintiff fainted at the scene, but was informed that her child called out for her before dying. The Court in *Potgieter v Rangasamy & another* [2011] JOL 27633 (ECP) considered a host of similar cases in at paragraphs [45 – 55] in determining that an award for emotional shock in the sum of R75 000 would be reasonable in the circumstances. In that case, the plaintiff sued for emotional trauma following an accident in which she was a passenger on a bus. The bus was carrying netball players from various schools and the plaintiff accompanied the players in her capacity as a teacher at one of the schools. Three children died in what appeared to be horrific accident. As a result, she suffered severe emotional trauma as some of the parents of the deceased attributed blamed to her for the accident.

[39] Counsel for the plaintiff informed me that the present day value of the award in *Potgieter (supra)* would be R91 000. The facts in the present case are somewhat distinguishable from that of *Potgieter* and *Majiet* (supra). I have taken into account that the plaintiff spent four days at her daughter's bedside before she died. Her hopes that her daughter would survive the gunshot injuries waned after the second day. In assessing damages for emotional trauma, it is true that it would be natural for any parent to suffer grief at seeing their child pass away, due to the fault of another. To accept that this, without more, would be the basis of a claim for damages for emotional shock, would be problematic. It could give rise to a rash of claims for emotional trauma following every accident witnessed. The concern, which was expressed by Navsa J (as he then was) in *Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal* 1996 (2) SA 37 (W) at 63B–D of the floodgates opening if claims for nervous shock were not contained within manageable limits, has been recognised as a factor to be considered in making such awards. Considering the circumstances of this particular case, I am of the view that an award of R75 000 is reasonable for damages in respect of the claim for emotional shock.

[40] In relation to costs, counsel for the defendant submitted that if my award of damages does not exceed the R300 000 threshold for cases to be dealt with by the Regional Court, I should not award costs on the High Court scale, particularly as the initial amount sued for was R1, 112 000. In light of the conclusions that I have reached in relation to the award of damages under each of the headings claimed by the plaintiff,

I am perturbed that the plaintiff had not sought to properly ascertain the true extent of the damages it was likely to recover, rather than proceeding to litigate in the High Court without any rational or intelligible attention to assessing quantum. In response, the plaintiff's counsel diverted fault to the defendant, who at the pre-trial, agreed that the matter should *not* be transferred to another court. It would be at this stage entirely opportunistic for the defendant to capitalise on the reduced amount awarded for damages as a means to escape liability for costs on the High Court scale. Fairness would dictate that the defendant bear the costs of the action on the High Court scale.

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

a. That the defendant is ordered to pay the plaintiff the following amounts:
   i. For loss of support R75 663,00
   ii. For emotional shock R75 000,00
   iii. Interest on the damages set out in paragraph (a) at the prescribed legal rate of interest from a date 14 days after judgment to date of payment;
   iv. Costs of suit, such costs to include the qualifying expenses of Dr A Suliman.

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M R CHETTY

JUDGE OF THE HIGH COURT

DURBAN

Appearances:

For the Plaintiff:	Adv. Z Rasool
	Instructed by Askew & Associates, Durban
For the Defendant:	Adv. M Moodley
	Instructed by State Attorney, Durban
Date of hearing	11-12 June 2014.
Date of judgment	8 August 2014.