THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY

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MEC for Health, Gauteng Provincial Government v AAS obo CMMS (401/2023) [2025] ZASCA 91 (20 June 2025)

Today the Supreme Court of Appeal upheld an appeal by the MEC for Health, Gauteng Provincial Government (the MEC) against a judgment and order of the Gauteng Division of the High Court, Pretoria (the high court). The appeal concerned a child who suffered a severe brain injury at birth due to the negligence of the health practitioners employed by the Gauteng Department of Health, of which the MEC is the provincial executive.

The child, represented by his mother, the respondent, was awarded R13 330 578.28 (Thirteen million three hundred and thirty thousand, five hundred and seventy-five rand and twenty-eight cents) for special damages. In addition, the court awarded the child R2 200 000 (Two million Two Hundred Thousand Rands) for general damages. The MEC appealed against the award of general damages on the basis that the child is in a vegetative state, and therefore, was not entitled to general damages. Alternatively, the MEC contended that the amount should be reduced to R500 000 (Five Hundred Thousand Rands).

There were two issues on appeal. The first was whether the child is in an unconscious and vegetative condition. The second arises if the first issue is answered in the affirmative. That is, if he is in an unconscious, vegetative state, the question is whether he is entitled to an award for general damages. The second issue has been a source of divergent views in three judgments of the high court, namely: *Gerke NO v Parity Co Ltd* 1966 (3) SA 484 (W) (*Gerke*); *Reyneke v Mutual & Federal Insurance Co. Ltd* 1991 (3) SA 412 (W) (*Reyneke*) and *Collins v*

Administrator, Cape 1995 (4) SA 73 (C) (*Collins*). Both *Gerke* and *Reyneke* decided that an unconscious claimant is entitled to general damages, while *Collins* took the opposite view.

The Court was not unanimous on either of the two questions. The first judgment, written by Kgoele JA (with Baartman AJA concurring), concluded that the child is not in an unconscious, vegetative state. After analysing the expert reports, the first judgment concluded that although he had limited insight into his condition, the child had 'twilight moments'. For that reason, he was entitled to general damages. As a result, it became unnecessary for the first judgment to consider whether the child is entitled to general damages. Nevertheless, Kgoele JA concluded that even if the child is in an unconscious, vegetative state, she would still have concluded that the child is entitled to general damages. The first judgment reasoned that the child cannot be equated to a dead person. The child has lost the ability to participate in life's activities and the capacity to live the life he could have otherwise lived. His ordinary enjoyment of life has been greatly diminished.

Kgoele JA further drew an analogy with claimants who die after their cases had reached *litis contestatio*. Their claims and subsequent payment are transmissible to their estates. In the same breath, reasoned Kgoele JA, there can be no objection if the award to an unconscious claimant accrues to their relatives after they die. Kgoele JA further concluded that the high court did not commit any misdirection in how it awarded the amount of R2 200 000. As the result, she would have dismissed the appeal.

The second judgment (the majority judgment) was written by Makgoka JA (with Goosen JA and Dawood AJA concurring). The judgment commenced by clarifying some of the issues pertinent to the award of general damages such as: (a) the use of previous comparable cases; (b) the distinction between pain and suffering, on the one hand, and loss of amenities, on the other; and (c) the interrelationship between special (pecuniary) damages and general (non-pecuniary) damages. In respect of all of the above, the second judgment concluded that the high court had failed to consider them properly or at all, and had therefore misapplied the law. On these bases, the award fell to be set aside, even if it was found that the child was entitled to an award for general damages.

Turning to whether the child is in an unconscious state, the second judgment considered the definition of a vegetative state with reference to the expert reports, and concluded that he is in such a state.

That conclusion necessitated a consideration of whether the child is entitled to general damages. The second judgment alluded to two schools of thought in this regard. On the one hand, there is the 'objective' approach, in terms of which an unconscious claimant is compensated for the mere fact that he or she has been injured. On the other hand, there is a 'functional approach', in terms of which damages for non-pecuniary loss may be justified only to the extent that they serve a functional purpose for the claimant. The second judgment extensively surveyed academic opinion, foreign law comprising the position in England, Australia, Canada and American law.

English law was particularly important as both *Gerke* and *Reyneke* were influenced by it, and *Collins* declined to follow it. In English law, too, judicial opinion was divided. The majority view as articulated in *H West & Son Ltd and Another v Shephard* [1963] 2 All ER 625 (*West*), is that an unconscious claimant is entitled to general damages for loss of amenities of life, and that it is of no concern of a court as to how the award is to be utilised. In other words, damages are awarded to an unconscious claimant, on an objective basis, irrespective of whether they are aware of their loss of amenities of life.

The second judgment then turned to the South African law and critically analysed the decisions in *Gerke*, *Reyneke*, *Collins* and other cases, as well as some dicta of this Court's judgments in *Marine & Trade Insurance Co Ltd v Katz* 1979 (4) SA 961 (A) and *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) (*Bailey*). The second judgment concluded that the English approach reflected in *West*, and adopted in *Gerke*, has not found acceptance in South Africa, as several South African cases had employed the functional approach, and thus rejected the English objective approach.

The exception is *NK obo ZK v Member of the Executive Council for Health of the Gauteng Provincial Government* [2018] ZASCA 13; 2018 (4) SA 454 (SCA) (*NK obo ZK*) on which the first judgment relied. There, it was said that the use to be put to the award was of no business of the court. The second judgment disagreed with this dictum and pointed out that it went against the authority of this Court in *Bailey*, in which it was held that the function to be served by an award of damages is something which may be taken into account together with all the other circumstances. To the extent *NK obo ZK* deviated from the authority of this Court, it does not constitute binding authority.

The second judgment furthermore clarified the remarks in *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 that the courts adopt a 'flexible approach' to the awarding of damages, determined by the broadest general considerations'. These remarks, cautioned the second judgment, constitute no answer to the doctrinal question as to whether an unconscious claimant is entitled to an award for general damages.

The second judgment holds that where the claimant is unconscious but a claim for loss of amenities of life is asserted on their behalf, a court is enjoined to take that fact into account in all circumstances. The second judgment emphasised two aspects. First, that a compensation award, whether for pecuniary or non-pecuniary damages, must have a purpose. If the purpose of an award cannot be achieved, it must follow that there is no basis for such an award. In a case of loss of amenities of life, the purpose of an award is to offer some *solatium* or consolation to a claimant. If, because of the claimant's unconsciousness, this cannot be achieved, there should be serious doubt whether the award should be made. Second, general damages serve to protect 'highly personal legal interests that attach to the body and personality of the claimant'.

As a result, the award must be capable of being used for the exclusive benefit of the claimant. In the present case, the situation is complicated by the fact that the claimant is an infant who was born with severe mental retardation resulting in his unconsciousness. As such, his mental development was stunted at birth. He has never experienced any life other than the unconscious one. Put differently, the child has never experienced anything but his disability and dysfunction.

Makgoka JA therefore, summarised the position in our law on the compensation of an unconscious claimant as follows. Such a claimant is not entitled to any award for pain and suffering under any circumstances. In respect of an award for loss of amenities of life, such can only be made to the extent it can serve some function for the personal and exclusive benefit of the claimant. This is particularly so where an award for special damages adequately provides the means and facilities to make the unconscious claimant's life less miserable.

Therefore, where loss of amenities of life is claimed for an unconscious claimant, the particulars of such loss should be pleaded. A court adjudicating such a claim is enjoined to always enquire as to the purpose to be served by such an award. Accordingly, unless there is

some indication that additional sums in the form of general damages can be employed for the exclusive use of the claimant, there is no juridical basis for awarding such amounts in the form of general damages for loss of amenities of life.

In the present case, adequate provision has been made for the child's physical needs by an award of special damages. There was no evidence as to what the additional amounts, over and above those provided for by special damages, would be used for. In the absence of any indication as to how that amount was likely to be used for the exclusive benefit of the child, it should not have been awarded. Awarding additional amounts for loss of amenities of life to the unconscious child would serve no purpose other than benefiting the child's mother. The result is that there was no basis for awarding the amount of R2 200 000 for general damages.

For these reasons, the majority upheld the appeal with costs of two counsel and amended the order of the high court to reflect that no award is made in respect of general damages.

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