



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: 23768/12

In the matter between:

ROCHELLE MARILY KIEWITZ obo

Plaintiff

JAYDIN KIEWITZ ("JAYDIN")

and

THE PREMIER OF THE WESTERN CAPE

Defendant

PROVINCIAL GOVERNMENT N.O

HEARD : WEDNESDAY 26 AUGUST 2015

DELIVERED : MONDAY 7 DECEMBER 2015

JUDGMENT DELIVERED ON 7 DECEMBER 2015

Nuku, AJ

[1] The plaintiff herein, Rochelle Marily Kiewitz instituted proceedings in her personal capacity as well as in her representative capacity as the mother and natural guardian of her son Jaydin, for the recovery of damages suffered as a

result of Jaydin contracting Retinopathy of Prematurity (R O P) shortly after his premature birth.

- [2] The defendant, the Premier of the Western Cape Provincial Government, is being sued herein in his capacity as the official responsible for all claims emanating from the Tygerberg Hospital ("Tygerberg") and the Karl Bremmer Hospital ("Karl Bremmer"), which hospitals are operated, controlled and administered by the Western Cape Department of Health ("the Department").
- [3] For the purposes of these proceedings, I was advised that liability is not in dispute, it having been settled between the parties. I was also advised that what is in dispute is the question of quantum. I was further advised that the parties have agreed, for the purposes of these proceedings, to separate out, in terms of Rule 33 (4) of the Uniform Rules of Court, the issues raised in the defendant's plea in mitigation. The issues raised in the defendant's plea in mitigation relate to what is commonly referred to as the defendant's duty to mitigate damages in delictual claims.
- [4] It was also agreed between the parties that the onus to show that plaintiff could have taken such steps to mitigate the damages rests on the defendant. It was also agreed between the parties that the question as to whether the plaintiff could reasonably be expected to take the steps in question is one to be decided on the circumstances of the particular case, and is a factual enquiry.

[5] Plaintiff was represented by Mr Saner, SC and Defendant was represented by Mr Oosthuizen, SC who appeared with Mr Joseph. I am indebted to both counsel for their comprehensive heads of argument.

[6] The defendant called the following witnesses, namely:

1. Dr Paolo Enrico Ciapparelli ("Dr Ciapparelli");
2. Ms Elizabeth Vosloo ("Ms Vosloo");
3. Ms Elsje Sophia Scheffler ("Ms Scheffler"); and
4. Dr Keith Craig Househam ("Dr Househam")

[7] At the close of the defendant's case the plaintiff testified and she also called Ms Mignon Coetzee ("Ms Coetzee") to testify.

[8] The evidence of Dr Ciapparelli can be summarised as follows: he is employed as a Chief Operations Officer and a Director of Clinical Services at Tygerberg hospital; he is responsible for the clinical services that are delivered by health care professionals and health care workers to the patients at Tygerberg hospital; there is a team of five Manager Medical Services who report to him and they are all Senior Clinical Managers, who are medically qualified; there are ten departments that provide clinical services; each department has an executive head; each department also has divisions and

each division has a divisional head; that Psychology is a division within the Department of Psychiatry and Psychology; the head of this department is Dr Alexander, a qualified Psychologist; the department has four units and each unit has a head who is a Senior Psychologist; the department also has three interns; the duration of an intern is one year; it is a practice that interns always perform their duties under supervision; the Psychology division at Tygerberg would be able to provide Jaydin with on-going support in the form of therapy and/or counselling as recommended by the experts; psychology services on an out-patient basis are all done on an appointment basis; a patient is encouraged to arrive half an hour before the scheduled time of the appointment as it happens sometimes that the clinic runs ahead of time; Professor Meyer is the head of the Department of Ophthalmology; there are consultants and sessional consultants who are all specialist Ophthalmologists; there are also registrars who are all medically qualified; there are also medical officers who are also medically qualified; the Ophthalmology department is able to provide the treatment as recommended by the experts; Ms A Swart is the Assistant Director in the Physiotherapy department; there are five grade 1 chief physiotherapists; there are also a number of Grade 1 and Grade 2 physiotherapists; the physiotherapy department at Tygerberg hospital is able to provide the treatment as recommended by the experts; Dr J Du Toit is the Head Department of Orthopaedic surgery; there are consultants and sessional consultants in the department who are all specialist orthopaedic surgeons other than Professor Flock; the treatment that Jaydin would require is easily available at the Orthopaedic Department in Tygerberg; Ms Berckinstock is the Assistant Director of the Speech Therapy

and Audiology department; generally speech therapy with the aim of development of better speech capacity in children of school going age is handled by the Department of Education and not the Department of Health; Tygerberg is well positioned to provide specialised speech therapy or audiology services; Ms E Williams is the Head of the Department of Occupational Therapy; there is one vacancy of an occupational therapy technician; other than that all the practitioners are qualified Occupational Therapists; the Occupational Therapy Department at Tygerberg hospital is able to provide the services that Jaydin would require; there are national core standards which are a set of standards that are set by a national body which is called The Office of Health Standards Compliance; some of the measures that the hospitals have to comply with are patient care and patient treatment measures; these relate to the quality of infrastructure, the availability of medical equipment, the quality of care, the quality of the patient experience, the availability of pharmaceuticals; it is a very detailed and rigorous set of standards that hospitals are required to comply with; Tygerberg hospital is one of those hospitals that comply with these measures; although the process of national core standards has not yet become regulatory, there are a number of audits that have been carried out at Tygerberg hospital; there is also a system called mortality and mobility reviews; these are conducted by all clinical departments in the hospital on a regular basis; the reviews are conducted by the head of a particular department; there is also another system called BCA which stands for Best Care Always, which is a system process for standardising the performance of certain repetitive procedures especially in intensive care units; there is also an annual patient satisfaction

survey which the hospital conducts; the outcome of the survey is tabled at the hospital's executive committee and it is shared with senior management as well as top management; there is also a quality improvement committee which is chaired by Dr Ciapparelli; there is also a system called CPD which stands for Continuing Professional Development where doctors as well as other categories of staff have to generate or score a requisite number of points on an annual basis in order to maintain their professional registration; there are a variety of channels that are open to patients who have complaints; one of the channels is an SMS complaints line; this enables a patient to send the complaint by way of a short message system ("SMS") to a centralised number; the complaint is then captured at a call centre; it is thereafter directed to the facility it relates to on the same day; the complaint is then to be followed up; the other channels include, asking to see the nurse in charge, the doctor in charge, interaction with the head of department to get the complaint handled at that level or a formal written complaint; in general people with a disability would enjoy some priority in that they get served in preference to patients with no disabilities.

- [9] The evidence of Ms Vosloo can be summarised as follows:
she is the Chief Executive Officer at Worcester Regional Hospital since February 2013; she is an Occupational Therapist by profession; there are nine clinical units at the hospital; the heads of these units are part of the executive management structure; Dr Marius is the head of the Ophthalmology Department; he is the only qualified Ophthalmologist in the department; the

hospital does not provide the service relating to the fitting of contact lenses; the hospital does not provide the services relating to the fitting of artificial eye prosthetics; the hospital refers patients to Tygerberg hospital in respect of services it does not offer; the hospital is able to do the surgical correction of a deviation; Dr Theodore Franken is the head of the clinical unit for the orthopaedics department; he is assisted by two doctors namely, Dr Trotsky and Dr Blake who are both qualified Orthopaedic Surgeons; the Worcester hospital would be able to provide the orthopaedic services that Jaydin would require; Dr Anton Kruger is the Head of the Psychology Department; he is the only Psychologist at the Worcester hospital; there is a community health centre on the same premises as Worcester hospital; Ms Bezuidenhout is the Head of the Physiotherapy Department; the department has four other physiotherapists; the hospital would be able to provide the physiotherapy as indicated for Jaydin; Ms Corne Conradie is the Head of the Occupational Therapy Department; she is assisted by two qualified occupational therapists as well as a third occupational therapist who is doing her community service; Worcester hospital is able to provide the occupational therapy as indicated for Jaydin; Jacques De Wet is the Head of the Audiology and Speech and Language Department; she is an Audiologist and there is only two of them in that department, the other Audiologist being Ms Carla Frumer; there are weekly and monthly meetings (Management Meetings) where heads of clinical units report; the hospital applies the National Core Standards; the hospital has a system similar to the quality improvement committee and the quality improvement plan; the hospital conducts client satisfaction surveys annually; the hospital also has the morbidity and mortality reviews on a

monthly basis; the hospital also has the system of CPD which stand for Continuing Professional Development as this is required by the Health Professions Council.

- [10] The evidence of Ms Scheffler can be summarised as follows:
- she is a physiotherapist with a BSc degree in physiotherapy, an honours degree in physiotherapy as well as a master's degree in medical science; she is currently practising as a disability consultant in private practice; she is an extra ordinary lecturer at the Centre for Rehabilitation Studies at the Stellenbosch University; she is a trainer in disability and rehabilitation; she is on the review board of the Review Journals; she has worked extensively in the public sector; she offers accredited continuing professional development courses for therapists in the Western Cape; she assessed Jaydin to determine his current and future physiotherapy needs; Jaydin presented with three main areas of problems; firstly, he is not able to mobilise independently and safely in the community; secondly, he has a slight neurological dysfunction, with weakness in both hips and a slight weakness on his right-hand side; based on the problems certain recommendations for treatment; she also prepared and signed a joint minute with Ms Jackson who is also a physiotherapist; the minute deals with aspects they agreed on, the aspects where there was partial agreement and the aspects where there was no agreement; the treatment that Jaydin requires is accessible in public institutions; if Jaydin is in Worcester he can access the treatment at Worcester Community Healthcare Centre; if Jaydin is in Cape Town he can

access the treatment either in Tygerberg hospital; if Jaydin requires more specialist rehabilitation care, he would be able to get this from Western Cape Rehabilitation Centre; in Worcester Community Healthcare Centre there is a qualified physiotherapist, Ms Monique Liebenberg whom she had interviewed; in Tygerberg the Head of the Physiotherapy Department is Mrs Annemarie Swart whom she also interviewed; Ms Swart has a team of qualified physiotherapists in her department; Jaydin would be able to access the treatment indicated for him either at Worcester Community Healthcare Centre or at Tygerberg hospital; the Western Cape Rehabilitation Centre is a specialist rehabilitation facility; it offers interdisciplinary treatment; to be admitted into the facility Jaydin would have to make an appointment; there is no need for on-going relationship between a patient and a therapist.

- [11] The evidence of Dr Househam can be summarised as follows: he was the head of the Provincial Department of Health until March 2015 when he retired; prior to assuming that position he was the Deputy Director General of Administration of the Western Cape Provincial Department of Health; the department is structured such that accountability and responsibility is delegated responsibly to the Heads of the hospitals; each hospital has a chief executive officer ("CEO") as the head; the CEO reports to the chief director; the chief director is responsible for a number of hospitals; the chief director reports to the head of operations, the Deputy Director General; the Deputy Director General reports to the Provincial Head; his management philosophy was that he had to have personal knowledge of what was happening at the

hospitals; he had regular meetings with heads of the hospitals; he also visited the hospitals; these visits would at times be unscheduled visits; he would interact with patients and relatives of patients to get a performance indication and a feel of how the hospital was functioning; Tygerberg hospital has a relationship with the University of Stellenbosch; in terms of this relationship the Heads of Department at Tygerberg Hospital are appointees of the University of Stellenbosch; the balance of the staff at the specialist level are appointed jointly by the University of Stellenbosch and the Western Cape Provincial Government; the National Minister of Health has promulgated the National Core Standards; this is a process of external evaluation of the performance of the health facilities; these standards are adhered to by the hospitals in the Western Cape; the clinicians are required to sign performance agreements which set out performance targets; the department assesses the level of performance and quality using a series of indicators; the clinicians have to fulfil certain requirements in terms of their professional registration; they also have to undertake continuing professional development; there are multiple avenues for patients who have complaints; these include the SMS system; there are posters in each health facility which display the number where a patient can send the SMS if he or she has a complaint relating to the treatment he or she has received; this system has been very effective and generally about 90% of the complaints can be resolved within a short space of time; in each health facility there is a complaints box for the patients to give feedback whether negative or positive; in the past the positive comments have outnumbered the complaints; patients are also encouraged to approach the Head of the health facility when they have complaints; some complaints

are referred directly to the department; the cell phone number of the Head of the Department is made available to the members of the public so that they can refer complaints to him; the provincial health facilities could provide the services required for occupational health required by Jaydin; Worcester and Tygerberg hospitals would be able to provide the speech and language therapy required by Jaydin; the provincial healthcare facilities would be able to provide the psychological interventions indicated for Jaydin; the only staff that rotates would be those in training as well as the community service practitioners; the rest of the staff including clinicians are employed on a permanent basis; the rotation is normally not shorter than three months; whilst there is a significant number of interns across the departments, the interns function under the supervision of an appropriately registered and qualified practitioner with experience; the department, particularly Tygerberg and Worcester hospitals are capable of providing the occupational therapy as well as the speech and language therapy that may be required by Jaydin; the presence of highly qualified psychiatrists and psychologists who work in a team context makes the department to be well positioned if not ideally positioned to provide the psychological treatment required by Jaydin; the average waiting time for patients with appointments is between 30 and 45 minutes from the time of their arrival; there is priority policy in terms of people living with disabilities and the elderly; the department has implemented a system called Clinicom which keeps the records of all the patients seen at the facilities; whilst the health system as well as the mental health system is burdened the patients still receive optimal treatment including those with severe mental illnesses.

[12] The evidence of the plaintiff can be summarised as follows: she is the mother of Jaydin; Jaydin is 13 years old; she also has another son, Jade who is 11 years old; her husband works at Old Mutual; Jaydin's blindness was caused by the Tygerberg hospital staff who gave him too much oxygen; she does not trust the public health system as it is the cause of Jaydin's blindness; she was not even told that Jaydin was blind until about six months after his birth; Tygerberg hospital did not even investigate Jaydin's blindness; when there was a problem with Jaydin's leg the state provincial health system did not even bring this to her attention; no one has ever apologised for Jaydin's blindness; she has struggled with Jaydin for 13 years and they only paid Jaydin's school fees recently; she struggles with Jaydin as he has special needs, extra classes and assistance with getting from one place to another; she does not consider it reasonable to be forced to put Jaydin into the Provincial health system; she is angry because if her husband were to get a promotion which requires him to leave the Western Cape, they would not be able to move because Jaydin would still have to come back for treatment; she had to reschedule her appointment at the hospital as they could not find her folder; this was after she had waited from half past nine until about ten to one; she did not get her diabetic medication; in July she had also gone to the day hospital as she was not feeling well; she was told to come back the following day as she did not have an appointment; she prefers getting payment in respect of future hospital and medical expenses than to subject Jaydin to the Provincial health system.

[13] The evidence of Ms Coetzee can be summarised as follows: she has a master's degree in clinical psychology and an honours degree in English; she is registered with Health Professions Council of South Africa ("HPCSA") as a clinical psychologist; she also specialises in neuropsychology; she has practiced as a clinical psychologist for 16 years; she has done medico-legal work for the past 11 years and has testified in court before; she grew up in Worcester where the pioneer school for the Blind is and has a blind brother; she also grew up with a blind foster child; she compiled a medico-legal report after assessing Jaydin; she found that Jaydin, in addition to his blindness, presented with attention deficit disorder ("ADD"); the secondary concern she had related to psychological difficulties he presented with; Jaydin could not maintain stable focus due to distractibility; she referred Jaydin to a specialist, Dr Carl Ziervogel; although Jaydin was put on treatment there were logistical problems as his parents are in Cape Town; these resulted in the treatment not being optimal; it is anticipated that Jaydin will go through very difficult adjustment periods in his life; Jaydin has a history of separation anxiety; she recommended parental guidance for Jaydin's parents to assist them to have a clear understanding of what his difficulties are and to respond appropriately; Jaydin requires additional learning support; Jaydin will require some technological aid as well as additional training related thereto; Jaydin will benefit from and should receive career and educational counselling and psycho-educational counselling; she indicated that Jaydin would require about 60 sessions of this counselling spread over his lifetime; Jaydin would benefit

from musical therapy and tuition; she prepared an addendum to her report in which she commented on the proposition that Jaydin must mitigate his future medical costs by accessing the recommended treatment interventions from the existing state facilities; one of the documents she referred to was an article by Marais and Petersen titled "*Health system governance to support integrated mental health care in South Africa: challenges and opportunities*"; the abstract of the articles deal with strategies to support and improve integrated healthcare in primary healthcare facilities; she came to the conclusion that "*Based on the greater overall pressures on the mental health system, one has to appreciate that optimal lifelong treatment for any individual, let alone a child like Jaydin, is simply and sadly not a reasonable expectation*"; a psychologist provides a service that is hard to define; studies that have looked at the efficacy of the various types of treatment tend to suggest that the definitive factor is the relationship between the client and the therapist; in order for this to occur one needs a safe setting free of negative connotations; the provincial health system has huge negative connotations for numerous reasons; Jaydin does not have a memory of being blinded; at some stage in the future when he is older and more mature and able to think in the abstract he will ask questions and he will have to grieve his blindness; there will be a point where Jaydin will be angry at whoever or whatever made him blind as this happens for handicapped individuals regardless of whether there is a cause; the public health system will be an unsafe setting which may make it enormously difficult for Jaydin to benefit from the treatment within the setting he associates with such a devastating blow; therapy works best when there is a good fit between the therapist and a client; as the evidence

suggests that Jaydin is likely to be seen by a senior therapist at first where after he is likely to be seen by interns, the change in therapists will be detrimental and harmful; the choice of a therapist is viewed as very important in the field of psychology.

[14] The defendant's plea in mitigation was pleaded as follows:

"The defendant denies that the damages suffered are as set out herein. Furthermore, and without derogating from the generality of the foregoing denial, and in respect of all those items indicated in appendix 1 to the report of Whittaker relating to the cost of medical treatment allegedly required by Jaydin, defendant avers as follows:

1. *All future medical treatment reasonably required by Jaydin as a result of his sight impairment and the complications thereof is available at hospitals, clinics and similar situations situated in the Province of the Western Cape, and under the control of the defendant.*
2. *The defendant undertakes to provide, at no cost, future care and treatment of Jaydin which is reasonably required as a result of his sight impairment and complications thereof, which treatment includes in-patient treatment at any hospital, rehabilitation centre or similar institution under the control of the Province of the Western Cape.*

3. *The defendant undertakes to designate a person in the employ of the Province of the Western Cape: Department of Health to liaise with the plaintiff and Jaydin on all aspects relating to the treatment specified in this offer ("the defendant's representative"). The defendant's representative may change from time to time depending on where Jaydin is being treated.*

4. *If any dispute arises as to whether any care, treatment, accommodation or service is reasonably required as set out in paragraphs 1.2 above, the question will be decided by a registered health professional agreed to by the parties, and failing such an agreement, by a person nominated by the Dean of the University of Stellenbosch Faculty of Health Sciences. If any costs are incurred in giving effect to the contents of this paragraph, such costs shall be borne by the defendant.*

5. *Plaintiff and Jaydin are both under a duty to take reasonable steps to mitigate the damages suffered as a result of Jaydin's injuries.*

6. *If the said undertaking is accepted, it will not be necessary for plaintiff or Jaydin to incur any costs as set out in appendix 1 to the said report of Whittaker, in as much as the future medical treatment will be provided at no cost.*

7. *If the said undertaking is not accepted, plaintiff and Jaydin will have failed to mitigate those damages relating to the costs of future medical treatment. Any damages awarded by this Honourable Court should accordingly be reduced by an amount equal to the cost of such future medical treatment."*

[15] The Plaintiff did not replicate to the defendant's plea in mitigation and as such is taken to have denied all the allegations.

[16] The issue for determination is whether Plaintiff and Jaydin, by not accepting the undertaking, will have failed to mitigate the damages relating to the costs of future medical treatment.

[17] It is a recognised principle of our law that, in actions for damages, a plaintiff may not recover compensation for loss which could have been prevented if the plaintiff had taken reasonable steps to prevent that loss (See ***Hazis v Transvaal & Delagoa Bay Investment Co Ltd*** 1939 AD 372 at 388)

[18] The onus to show that Plaintiff could have taken such steps rests on the Defendant. The question as to whether Plaintiff could reasonably be expected to take the steps in question is one to be decided on the

circumstances of the particular case, and is a question of fact. (See **Swart v Provincial Insurance Co Ltd** 1963 (2) SA 630 (A) at 633)

- [19] The standard to be applied, in deciding whether the Plaintiff should have mitigated his loss, is that of a reasonable person. The approach to be adopted was described as follows in **Macs Maritime Carrier AG v Keeley Forwarding & Stevedoring (Pty) Ltd** 1995 (3) SA 377 (D & CLD) at 382B:

*“whether the claimant has acted reasonably in the circumstances is a question of fact and not law. Compare **Moore & Another v DER Ltd** [1971] 3 All ER 517 (CA) at 520. In this regard the standard of reasonableness required of the claimant is not high in the view of the fact the defendant is an admitted wrongdoer ... and in assessing the claimant’s conduct the Court should not be too sagacious to hold that the plaintiff acted unreasonably.”*

- [20] Counsel for Defendant referred to **Williams v Oosthuizen** 1981 (4) SA 182 (C) which is the only case in which the Court declined to award Plaintiff the cost of future medical treatment at a private clinic. At **184H-185D** the Court said the following:

“I am not aware of any authority to the effect that where a potential patient demands provision for future medical treatment he is entitled to

*be awarded the cost of a private clinic in preference to the cost of a public hospital where he has to pay merely for the medicines and a bed for a few days. The public hospital will not refuse to take such a patient; and it would therefore be wrong to order the defendant to provide him with means to pay an expensive private clinic when the potential patient will be accepted by the public hospital at a much lower fee. In this country a plaintiff is obliged to mitigate his damages: and I am of the opinion that, **where he is able to choose between medical treatment at two institutions equally good** (my emphasis), he is obliged to choose the less expensive in the case where the defendant has to pay for the treatment."*

[21] The Defendant's undertaking is to provide the treatment to Jaydin free of charge at the public hospitals which fall under the Defendant's control. The costs of the future medical cost contained in appendix 1 to the report of Whittaker relating to the cost of medical treatment allegedly required by Jaydin are based on the rates applicable in the private healthcare facilities. It follows then that the Defendant has to establish that the public hospitals that will provide treatment to Jaydin are at least as good as the private healthcare facilities.

[22] Counsel for Defendant also submitted that some of the factors that the Court should regard as relevant to the question of whether the injured party could

possibly be expected to undergo the required medical treatment at a provincial hospital mentioned in the unreported judgment of ***Otto v MEC for Health, Mpumalanga*** are the following:

1. the fact that the Plaintiff would have not of it in view of her past experience of a Provincial Hospital which led to the state in which her child finds himself;
2. the fact that the Plaintiff would be exposed to the endless queues and the pathetic service that can be expected in Provincial Hospitals;
3. the fact that if the plaintiff were to relocate to another Province or even worse, to emigrate, the complications will be insurmountable;
4. the fact that the order sought is not competent at common law and the statutory exception is no authority for this exception;

[23] Counsel for Defendant also referred to the unreported judgment of ***Cleophas v The Premier of Gauteng*** where the judge made the following comment "*It sounds strange to the ear and even bordering on arrogance for Defendant to seem (sic) to suggest that it will negligently cause damages to the Plaintiff and thereafter arrogate to itself the form of compensation that the Plaintiff should accept. It is not for the Defendant, in the absence of any statutory injunction.*" He argued that the above comment does not find application in this matter.

[24] Counsel for Defendant submitted that the Court must decide on the question of whether the duty to mitigate exists in particular circumstances, with reference to any relevant constitutional issues applicable to that matter; such as the Defendant being a public health authority that provides access to healthcare services to residents of the Western Cape as enshrined by Section 27 of the Constitution of the Republic of South Africa. He also submitted that Defendant as a public authority, is duty-bound to adhere to the principles of public administration enshrined by Section 195 of the Constitution, which include the duty to ensure that public administration is conducted in an efficient and cost-effective manner.

[25] Counsel for Plaintiff submitted that the Plea in Mitigation, is in reality, simply a rather poorly disguised attempt to avoid the payment of a lump sum delictual damages in monetary terms, according to the settled common law, by offering an undertaking in kind in future, undetermined, periodic instalments, and in the form of a contract and that it is bad in fact and in law. He also submitted that Defendant is required to produce evidence that medical services of the same or an acceptably high standard as that available in the private healthcare system will be available to Jaydin now and for the rest of Jaydin's life. In the regard he referred to **Ngubane v SA Transport Services** 1991 (1) SA 756 at 785C-D where Kumleben JA said: "*thus in the instant case the Respondent was required to adduce evidence – a "voldoende getuienis basis" in the words of Jansen JA – in support of its contention, that is to say, that for the next 35 years, or for some shorter period, medical services of the same,*

or an acceptably high, standard will be available to the appellant at no cost or for less than that claimed by him."

[26] The Defendant's undertaking is to provide treatment to Jaydin at any hospital, rehabilitation centre or similar institution under the control of the Province of the Western Cape. In this regard the Defendant failed to lead any evidence comparing the treatment at the public hospitals to that of the private hospitals. The evidence that the Defendant led was only to the effect that the treatment is available at public hospitals. In my view it is only when the Defendant has established that the public hospitals are as good as the private hospitals that a court would consider it to be unreasonable of the plaintiff to accept treatment in the public hospitals.

[27] The Plaintiff related her experience at Elsies River Day hospital where she had an appointment for ten o'clock. On the day of the appointment despite the fact that she arrived at half past nine in the morning she was only told around ten to one that she must come back the following day as they could not find her hospital folder. She also relayed her experience regarding appointment which had to be rescheduled. She indicated that she would not want Jaydin to remain in the public health system as Jaydin is vulnerable. The Plaintiff's concerns appear to be reasonable more-so that Jaydin is blind. Plaintiff's counsel argued that there is no suggestion that services at Elsies River Day Clinic are comparable to those existing at far more sophisticated hospital

structures at Tygerberg and Worcester. This submission misses the point that what the Defendant has tendered is not the treatment at what it calls sophisticated hospital structures. The Defendant's undertaking is to provide treatment to Jaydin treatment at any hospital, rehabilitation centre or similar institution under the control of the Province of the Western Cape.

[28] Counsel for Defendant submitted that no there is no evidence before this court to suggest that should Plaintiff accept the undertaking Jaydin will be subjected to "*endless queues and the pathetic service that can be experienced in provincial hospitals*". He further submitted that "*On the contrary, **as indicated in paragraph 25 below**, (my emphasis) the undisputed evidence is that the healthcare services in the Western Cape are of high quality.*" Firstly, it cannot assist the Defendant to say that no evidence of endless queues and pathetic service has been presented as it falls on the Defendant to provide evidence that Jaydin will not be subjected to such endless queues and pathetic service. Secondly, the evidence that was presented on behalf of the Defendant only dealt with the availability of treatment and not the standard of care at the hospitals as suggested by counsel for the Defendant.

[29] Plaintiff also testified that should she accept the Defendant's undertaking it will be difficult for them to relocate should her husband obtain a better job


outside of the Western Cape Province. It is not necessary to consider this as there was no evidence suggesting that the Plaintiff's family may relocate.

[30] Counsel for the Defendant submitted that the Court must also decide the question of whether the duty to mitigate exists in particular circumstances, with reference to any relevant constitutional issues applicable to that matter. In this regard he submitted that the Defendant being a public health authority provides access to healthcare services to the residents of the Western Cape as enshrined by Section 27 of the Constitution of the Republic of South Africa. The submission went further to suggest that the Court should take into account the fact that Defendant is duty bound to adhere to the principles of public administration enshrined by Section 195 of the Constitution, which duty includes the duty to ensure that public administration is conducted in an efficient and cost-effective manner. This argument appears to be concerned more with the Defendant that the Defendant's duty to mitigate her damages and as such I do not think that it is a relevant consideration for the purposes of determining the duty to mitigate damages.

[31] In the end I am not satisfied that the Defendant has demonstrated that the Plaintiff's failure to accept the Defendant's undertaking is unreasonable.

In the result the order which I make is the following:

The Defendant's Plea in mitigation is dismissed with costs.



NUKU, AJ