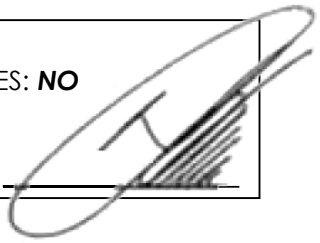
IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***25th January 2021*** Signature: _____



CASE NO: 1352/2017

DATE: 25th JANUARY 2021

In the matter between:

MASHININI, NOMGQIBELO NELLY Plaintiff

and

THE MEMBER OF THE EXECUTIVE COMMITTEE FOR HEALTH, GAUTENG PROVINCE Defendant

Coram: Adams J

Heard: 27, 28, 29, 30, 31 July 2020, 3, 4, 5 and 12 August 2020 – The 'virtual hearing' of this matter – the trial – was conducted as a series of videoconferences on the aforementioned trial dates on the *Microsoft Teams* digital platform.

Delivered: 25 January 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 13H00 on 25 January 2021.

Summary: Action in delict – plaintiff suffered internal injury during serious operation causing her to suffer damages – MEC liable – future hospital, medical and related expenses – *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* 2020 (2) SA 567 (GJ) – recent developments in the law applied – MEC ordered to render certain medical services to plaintiff at Charlotte Maxeke Johannesburg Academic Hospital –

ORDER

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(1) The plaintiff's claim for past hospital and medical expenses is postponed *sine die*.

(2) In respect of those services and items listed under the claims for Specialist Surgeon's Expenses in the reports of Professor Damon Bizos and Dr B H Pienaar, and in their joint minute of the pre-trial conference held between them, the MEC is directed to ensure that these services are rendered to, and procured for Mrs Mashinini by the Charlotte Maxeke Johannesburg Academic Hospital (CMJAH) as and when required at the same or better level of service than in the private healthcare sector.

(3) Judgement is hereby granted in favour of the plaintiff against the defendant for:

(a) Payment of the sum of R2 084 250.40.

(b) Payment of interest on the said amount of R2 084 250.40 at the prevailing legal interest rate from fourteen days from date of this judgment to date of final payment.

(c) Payment of the plaintiff's costs of suit, including the reasonable costs of all medico-legal reports and joint minutes obtained by the plaintiff, and the qualifying fees and court attendance fees of her expert witnesses.

JUDGMENT

Adams J:

[1]. On the 16th of May 2014 the plaintiff ('Mrs Mashinini') attended on the Tambo Memorial Hospital ('TMH') in Boksburg to have her gallbladder removed. In medical parlance, it is said that she underwent a laparoscopic cholecystectomy, which is a common procedure during which a laparoscope (a narrow tube with a camera) is inserted through a small incision into the abdomen to enable the surgeon to see the gallbladder whilst it (the gallbladder) is removed by the doctor through another small incision. A laparoscopic cholecystectomy, although common, is described generally as major surgery with serious risks and potential complications.

[2]. Mrs Mashinini's case, as it turned out, was one such instance in which complications arose – simply put, the operation was botched. Her common bile-duct and her right hepatic artery were perforated by accident during the operation. The consequences for her were disastrous and dire. The iatrogenic fallout for the plaintiff was vast and far-reaching – she had to endure numerous subsequent surgical interventions and there is a real possibility of her undergoing further surgery in the future. At present, she still experiences constant pain on the right side of her upper abdomen where a stent had been inserted. Not to mention the psychological and psychiatric effect all of this has had on her activities of daily living and her occupation – at some point she thought that she was going to die.

[3]. In this action, Mrs Mashinini claims damages as a result of the personal injury suffered by her during the failed operation from the defendant, the Member of the Executive Committee for Health in the Gauteng Provincial Government ('the MEC'), who is the Provincial Executive Authority responsible and vicariously liable for the conduct of the medical staff at the TMH. Ironically, Mrs Mashinini, who is a Registered Nurse at the Chris Hani Baragwanath Academic Hospital ('CHBAH') in Soweto, is an employee of the MEC. She is therefore claiming from her employer damages as aforesaid.

[4]. Thankfully, the MEC accepted that, in performing the surgery on Mrs Mashinini on the 16th of May 2014, the medical staff involved in the said operation had acted negligently and that such negligence had caused the plaintiff's injury and her subsequent damages which resulted from such injury. Therefore, the issue of the merits / negligence / liability had become settled and resolved on the basis that the defendant would pay to the plaintiff whatever damages she is able to prove. On the 6th of August 2018 an order to that effect was granted by this court (Mojapelo DJP).

[5]. What is however not resolved is the amount of such damages to be awarded to Mrs Mashinini. Therefore, what is in issue before me is the quantification of Mrs Mashinini's damages under the different heads of damages, namely past hospital and medical expenses, future hospital and medical expenses and related charges, future loss of earnings and loss of income earning capacity and general damages.

[6]. As regards past hospital and medical expenses, during the hearing of the matter, I was informed by Counsel for the parties that discussions between them were ongoing with a view to settling this head of damages. The plaintiff claims under this head of damages, as per a late notice of intention to amend the amount claimed, the total amount of R363 213.23. The parties were confident that an amount would be agreed upon by the end of the trial, in which case I would have made an award under this head of damages by agreement between the parties. A schedule of past hospital and medical expenses had been furnished by the plaintiff's attorneys to the defendant's attorneys – rather belatedly, so I was told by Ms Makopo, who appeared on behalf of the defendant. The difficulty that the defendant has with the list of expenses is that it contains treatment and expenses unrelated to the iatrogenic injury sustained by Mrs Mashinini as a result of the negligence of the defendant's medical personnel. By the time the trial was concluded, this head of damages had still not been settled and an amount had not been agreed upon. This head of damages therefore stands to be postponed to enable the parties to continue their endeavors to reach agreement on the quantum of the past hospital and medical expenses, alternatively, for adjudication of the said quantum.

[7]. Additionally, the defendant has somewhat belatedly raised a defence in relation to the quantum of the plaintiff's claim referred to by the parties as 'the public healthcare defence'. In a nutshell this defence, which is aimed at the plaintiff's claim for future hospital, medical and related expenses, denies that the plaintiff is entitled to receive monetary compensation in respect of certain future medical treatment and other services as the MEC tenders to give the plaintiff the required treatment and to provide the related necessary services at any one of the public provincial hospitals, which falls under his authority. Mrs Mashinini rejects this defence and persists with her claim for compensation sounding in rands and cents. She contends that no factual evidence was adduced by the MEC to sustain the Public Healthcare Defence but for broad issues being raised during cross examination of plaintiff's surgeon and psychiatrist and certain aspects of availability of surgical and psychiatric services being alluded to by the defendant's psychiatrist. I shall revert to this aspect later in the judgment.

[8]. The aforegoing issues are to be adjudicated against the factual backdrop, the details and particulars of which are set out in the paragraphs which follow immediately hereafter, and which are garnered from the evidence led during the trial of the matter, which commenced on Monday, the 27th of July 2020 and endured for eight days, as well as from numerous expert reports, joint minutes and supplementary joint minutes from a number of experts, notably specialist surgeons / gastroenterologists, psychiatrists, industrial psychologists, occupational therapists and actuaries. All of this documentary evidence forms part of the body of evidence led at the trial.

[9]. Mrs Mashinini was born on the 21st of August 1982. That makes her 38 years old at present. She was 31 years old on the 16th of May 2014 when she suffered the injury during the botched laparoscopic cholecystectomy. During 2016 she got married to Hamilton Khumalo, a 46-year-old fitter and turner. They have however been together for a much longer period and the children born of their relationship are a 13-year-old daughter and a 10-year-old son. The family live in a three-bedroom house in Windmill Park in the Boksburg area.

[10]. Prior to the incident on the 16th of May 2014 Mrs Mashinini was reportedly in good health, except that during 2011 she received treatment for Tuberculosis for a period of approximately six months. Following the botched operation, she has a myriad of complaints. She suffers from severe abdominal pain, experiences nausea and is prone to vomiting at times most inconvenient. She experiences difficulty during sexual intercourse. She has shortness of breath when walking long distances. There appears to be 'movement' inside her body. She struggles to do household chores and with concentration. She thinks that she may be depressed. She occasionally feels tired, which could be as a result of the pain medication. She talks in her sleep and slaps her husband's hand away when he attempts to wake her. She complains of constipation. She is occasionally scared of eating anything, as this could lead to stomach-ache. Her memory is poor. She experiences middle backache and her stomach muscles are painful.

[11]. Mrs Mashinini is qualified as a Registered Nurse, having obtained a Staff Nurse qualification after a two year course during 2005 and 2006 and a General Nursing Certificate after a course which she attended from 2011 to 2013.

[12]. She acquired these formal qualifications whilst working. During 2007 for a period of three months she was employed on a temporary basis as an 'Enrolled Nurse' by Arwyp Private Hospital in Kempton Park. From September 2008 to 2013, for a period of approximately five years, she was employed by the Mpumalanga Department of Health at the Dledluma Clinic in Komatipoort also as an Enrolled Nurse. She was earning approximately R8000 net per month in this capacity. From 2013 to the 6th of May 2014, when she underwent the ill-fated surgical procedure, she was employed by the Mpumalanga Department of Health as a Professional Nurse at the Mongwani Clinic near Tonga. As per her April 2014 salary advice, Mrs Mashinini was earning R13 200.66 gross per month at that time, a portion thereof constituting overtime and other shift allowances.

[13]. So, all was well in the land at that point. Mrs Mashinini was practicing her calling as a Nurse and she was making a good living. She also had plans to advance her prospects further by improving her qualifications with a view to becoming a matron. That was not to be. The unfortunate operation intervened.

The nature of the operation and its dire consequences, as well as the cause, nature and extent of the injury suffered by Mrs Mashinini, are best described with reference to the evidence of the plaintiff's Specialist Physician / Gastroenterologist, Professor Damon Bizos, who incidentally also treated Mrs Mashinini during the course of 2019 and 2020, when she was yet again required to consult a medical practitioner because of the pain and discomfort she was experiencing. Prof Bizos explained that during the operation Mrs Mashinini suffered an injury to the common bile-duct and the artery from the liver – in simple terms what happened is that the common bile-duct and the artery from the liver had been perforated accidentally by the Surgeons during the operation. The injury, so Prof Bizos explained, resulted in a stricture at the hilum and occluded right hepatic artery.

[14]. As rightly submitted by Mr Uys, who appeared on behalf of Mrs Mashinini, the evidence of Prof Bizos is to a large extent unchallenged and uncontested.

[15]. Prior to the laparoscopic cholecystectomy, which was perform at TMH on the 16th of May 2014 by Dr E Lunga, assisted by Dr Wong, Mrs Mashinini was reportedly generally well. She had a caesarean section during 2009 and during 2011 she was treated for Tuberculosis. She was off work from May to December of 2014 because of the operation and its sequelae and also for seven days during 2019. After the operation at TMH she went home to her mother in Greytown, KZN. Although she lived in Gauteng at the time of the operation and worked in Mpumalanga, she decided to go and recover and convalesce at her family home in Greytown, where she would also have had the benefit of support by her mother. That is how it came about that she ended up at Grey's Hospital when she started feeling unwell and the reality of an operation that had gone horribly wrong dawned on her.

[16]. The elective laparoscopic cholecystectomy had originally been scheduled for the 24th of June 2014. However, due to acute and severe abdominal pain, which was becoming unbearable, the date of the operation was brought forward to the 16th of May 2014. It is clear from this that she was in a bad state before the operation and that the purpose of the procedure would have been to relieve her

of the pain and suffering. That was not to be. Instead, it appears that after the operation, she was worse off.

[17]. So much so that on the 27th of May 2014 – some eleven days after the operation – she was admitted to the Grey's hospital after being referred to the said hospital by the Madadeni Clinic. At the time she was experiencing severe and debilitating abdominal pains and discomfort. A laparoscopy performed on the 29th of May revealed peritonitis and biliary ascites. This was explained by Prof Bizos as inflammation of the lining of the inner wall of the abdomen and cover of the abdominal organs, coupled with an abnormal increase in fluid in the peritoneal cavity.

[18]. On the 29th of June 2014 an Endoscopic Retrograde Cholangiopancreatography ('ERCP') and stenting of Mrs Mashinini's bile duct were performed. There was a Strasberg C and E2 bile duct injury and she had post ERCP acute pancreatitis. There was a repeat ERCP in September 2014 and then on the 17th of November 2014 she was readmitted to the Grey's hospital for a bile duct reconstruction. This reconstruction was done after five clips placed on the common hepatic artery and right hepatic artery were seen during dissection of the porta hepatis. There was a Strasberg E3 injury with a stricture at the hilum and occluded right hepatic artery. The right and left hepatic ducts were identified and sutured to one another and a hepatico-duodenostomy was performed using a pedicle greater curvature gastric tube. This implies that the right and left hepatic ducts had been separated by the injury.

[19]. The clinical examination by Prof Bizos on the 7th of June 2019 revealed that Mrs Mashinini is obese. Her blood pressure was 130/90. She has a right sub-costal scar which has extended over to the left. There is an incisional hernia in the midline area of the right sub-costal incision. She has laparoscopic port sites which have no hernias.

[20]. After her procedures at the Grey's Hospital during November 2014, Mrs Mashinini was admitted once for pain and nausea but after that has not been admitted. She sees doctors intermittently. She had an ultrasound done at Sunward Park hospital. This abdominal ultrasound from the 16th of January 2017

showed that the liver was not enlarged. The intra-hepatic ducts were slightly prominent but not grossly dilated. There was no sign of a liver mass. The common bile duct was not dilated. There were no pancreatic masses and the rest was essentially normal. Prof Bizos concluded from this ultrasound that she had slightly dilated intra-hepatic ducts, probably as a result of the previous cholecystectomy with bile duct injury.

[21]. Regarding her liver function tests which were done on the 28th of September 2018 with Ampath Laboratories, her bilirubins were normal. Her alkaline phosphatase was normal at 101, however her Gamma GT was 75, which is normally less than 40. It must be noted that she denies any drinking. Her ALT was normal at 20 (normal 35), AST was raised at 50 (normal 32). Her amylase was normal and her albumin was normal. Her CRP was slightly elevated at 9.

[22]. The 17 November 2014 hepatico-duodenostomy, according to Prof Bizos, was in fact an exploratory laparotomy, hepatico-jejunostomy and a gastric tube reconstruction. This entailed, so the good Professor explained, creating a communication between the hepatic duct and the jejunum (the second part of the small intestines). The reconstruction of the duct was done through harvesting of vessels from the greater curvature of the stomach which was fashioned as a tube creating a new hepatic duct which was connected between the liver and the duodenum. This gastric tube which was being fashioned was then anastomosed from the bile ducts and to the duodenum. This would give access for a later ERCP.

[23]. In sum, Mrs Mashinini, after the botched operation on the 16th of May 2014, ended up with a severe injury to her bile ducts and her right hepatic artery. This has been reconstructed during a later operation. Her recent investigations do not show major anomalies except for slightly dilated intrahepatic ducts as well as a slightly raised Gamma GT.

[24]. In his medico-legal report of the 7th of June 2019 Prof Bizos recommended that Mrs Mashinini would need repair of her right sub-costal scar with hernia repair and revision of the scar. This would cost in the region of R50 000 as a mesh would need to be used. She would also need to see a specialist

hepatobiliary surgeon on a yearly basis and would need sequential sonars and Liver Function Tests (LFT's), which, according to Prof Bizos, would cost in the region of R3500 per annum. She would require a CT scan every three to four years, as well as a MRCP then to check the status of the ducts and thereafter an MRCP every five years to make sure that there is no ongoing stricturing of the bile ducts. If she does develop stricturing, she will need an ERCP and dilation. The cost of that would be in the region of R40 000.

[25]. Prof Bizos also concluded that there is a small chance that Mrs Mashinini would need a redo hepatico-jejunostomy at the cost of R250 000 – Prof Bizos estimated the chance of her having redo surgery at about 15%. He also concluded that there is 'a tiny chance that she will develop major liver problems requiring liver transplant, but [he] thinks that the chances of this would be highly unlikely.'

[26]. As luck would have it, subsequent to his report of the 18th of June 2019, further information became available to Prof Bizos and important developments occurred, which required that he updates his opinion and recommendations.

[27]. Importantly, Mrs Mashinini had undergone a procedure during December 2018 at the Clinix Botshelong-Empilweni Private Hospital in Vosloorus. She was also admitted to the Glynwood Hospital in Benoni during June, August and October in 2019, when she had a further ERCP, as predicted by Prof Bizos, and she had the stent removed. These procedures were performed by a Prof Balabyeki. Also, she had been treated at the Charlotte Maxeke Johannesburg Academic Hospital ('CMJAH') on a few occasions – there she underwent an ERCP on the 10th of October 2019, at which time the stomach was full of food, and further procedures were abandoned. An ERCP was repeated on the 29th of October 2019 and the gastric tube interposition was cannulated. There was a stricture at the anastomosis between the hepatic duct and gastric tube anastomosis. A 9-12mm balloon was pulled though it (there was no sludge) and a plastic stent was placed.

[28]. A further ERCP was performed on 3 December 2020, when the stent was removed from hepatico-gastro-duodenostomy. A stone was found in the gastric

tube, which was removed during the procedure. Mrs Mashinini was to be seen in the ward in 2 weeks for LFTs, therefore on or about the 17th of December 2019 and, if the findings were normal, she would have to be seen in January 2020. On the 15th of January 2020 she was seen by the Surgical Outpatients Department at the CMJAH and again on the 12th of February 2020. She was then reportedly still complaining of pain, but she was otherwise well.

[29]. She also underwent an ERCP by Prof Martin Smith at the Wits Donald Gordon Medical Centre ('WDGMC') in 2020. At that time no strictures were observed. During July 2020, with her problems seemingly not abating despite all of the treatment she had received up to that point, Mrs Mashinini consulted with Prof Bizos, this time complaining of the ever persistent right upper quadrant pain and nausea. Prof Bizos found that she had an incisional hernia in her right subcostal incision. She was not Jaundiced. Liver functions were normal. An ultrasound revealed mildly dilated intrahepatic ducts.

[30]. In sum, Prof Bizos concluded that the Gastric tube interposition had not been trouble free and Mrs Mashinini has required multiple admissions, ERCPS and stenting, removal of stents over the last 2 years. This has required admissions to hospital. Prof Bizos was further of the opinion that the chances of further stricturing and or stone formation is high. He concluded that she would probably need an ERCP on an annual basis and the chances of her needing a hepatico-jejunostomy en Y materializing within five years Prof Bizos estimated at a 40% chance.

[31]. Prof Bizos explained that Mrs Mashinini was bound to suffer from an impaired quality of life as a result of the long-term impact of the adverse outcome, the remaining risk for later complications which includes anastomotic stricture, recurrent cholangitis and secondary biliary cirrhosis, all of which require constant conservative and invasive assessment and management. He also was of the view that the plaintiff's condition is associated with recurrent and continuous nausea, vomiting stricture, stone formation and recurrent stenting which should be carefully monitored to avoid cholangitis and will necessitate probable eventual reconstruction.

[32]. Therefore, and as already indicated, after the ill-fated operation on the 16th of May 2014, Mrs Mashinini was unable to return to work until about January 2015. Shortly after the operation, she was again hospitalized and then for the balance of the period she was recovering from the incident and recuperating. From January 2015 to January 2018, for a period of approximately three years, Mrs Mashinini returned to and remained in her employment as a Professional Nurse at the Mongwani Clinic near Tonga, employed by the Mpumalanga Department of Health. At that time, she was earning approximately R25 000 gross per month, inclusive of overtime, shift and other allowances. She left this employment after requesting a transfer to Gauteng and the reasons given by her for requesting the transfer included the fact that she felt that she was too far from home and her family, who, all along, was staying in Windmill Park in Gauteng. As she puts it, she wanted to be close to her children.

[33]. So from February 2018 to the present time, Mrs Mashinini was employed as a Professional Nurse by the Gauteng Department of Health at the Chris Hani Baragwanath Academic Hospital ('CHBAH') in Soweto. Initially, she was earning R19 405 gross per month, which was less than what she was earning in Mpumalanga. By February 2020 there had been an increase in her salary attributable in part to the fact that she was again receiving shift and other allowances. The plaintiff continues in that capacity presently.

[34]. With that background, I now proceed to deal with the quantification of the plaintiff's claim under the different heads of damages.

Future Hospital, Medical and Related Expenses

[35]. Prof Bizos and his counterpart, the defendant's Principal Specialist General Physician, Dr B H Pienaar, agreed the following future treatment and reasonable associated costs: Repair of the right subcostal scar with hernia repair and revision of the scar at R50 000 with a mesh to be used; 20% lifetime risk of adhesive bowel obstruction of which half would be treated conservatively at R25 000 and half operatively at a cost of R60 000; Consultations with a specialist (hepatobiliary surgeon) on an annual basis with sequential sonars and LFT's at a cost of R3500 per annum for the risk of recurrent cholangitis with an average

of an admission every second year at a cost of R30 000 per admission; a CT scan every 3 to 4 years to check for possible atrophy of the right liver as the arterial supply has been compromised with a 10% chance of requiring a right hepatectomy at the cost of R125 000; immediate MRCP to check the status of the duct and thereafter an MRCP every 5 years to ensure that no ongoing structuring of the bile duct is recurring at a cost of R20 000 per MRCP; ERCP and dilatation and stenting at a cost of R40 000 (as a result of the stricture); high probability of further stricturing and/or stone formation necessitating probable annual future ERCP with a 40% change of needing a hepatico-jejunostomy and Y surgical procedure within 5 years at a cost of R250 000 necessitating 6 weeks off work.

[36]. Actuarially calculated the aforegoing future hospital and medical expenses amount in total to R1 034 487. From this total an amount of R155 173, representing a 15% general contingency, should be deducted, resulting in future expenses of R879 314. Mrs Mashinini accordingly claims this amount from the MEC as representing the Specialist Surgeon's Expenses.

[37]. The MEC, on the other hand, contends that these expenses should be dealt with on the basis of the law as recently developed by this Court (Keightley J) in *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* (4314/15) [2019] ZAGPJHC 504; 2020 (2) SA 567 (GJ); [2020] 2 All SA 177 (GJ) (18 December 2019), in which the Court held as follows:

'[207.1] The common law rule requiring that delictual damages must be compensated in money is developed so as to permit a court to order compensation in kind in appropriate cases in circumstances where:

[207.1.1] the MEC is held liable for the negligent conduct of public healthcare staff causing injury during or at birth to a child in the form of cerebral palsy; and

[207.1.2] the MEC establishes that medical services of the same or higher standard will be available to the child in future in the public healthcare system at no or lesser cost to the child than the cost of the private medical care claimed.

[207.2] In respect of the services categorised in this judgment as the identified services, the MEC will be directed to ensure, as soon as is reasonably possible, that they are provided to K at the CMJAH in accordance with the

> recommendations contained in the relevant expert reports, and as recorded in this judgment, as having been agreed by the parties.

[38]. Ms Makopo, Counsel for the MEC, submitted that *in casu* the MEC has brought the above expenses within the ambit of the *ratio* in Keightley J's judgment. The evidence, so she submitted, has established that these medical services of the same or higher standard will be available to Mrs Mashinini at the CMJAH. In fact, so the argument went, Mrs Mashinini had been receiving treatment at the said hospital before by the selfsame Prof Bizos, who, as part of the WDGMC, is contracted to render services in the Public Healthcare Sector on behalf of the CMJAH.

[39]. Mrs Mashinini, on the other hand contends for payment of these amounts in cash and is supported in that regard by the evidence of Prof Bizos, who was of the view that treatment by Mrs Mashinini in the Public Healthcare Service would not be very practical for the simple reason that her condition necessitates constant, continuous and immediately available emergency care and medical management through a single dedicated specialist. Prof Bizos therefore concluded, when cross-examined on the issue, that the lack of resources in the public health sector, which seriously impedes service delivery due to a first come first serve system, coupled with other factors, means that Mrs Mashinini would be seriously prejudiced if she was to be treated only by the Public Health Sector and compensated accordingly.

[40]. I find myself in agreement with the submissions made in that regard on behalf of the MEC. If regard is had to the evidence before me, I am satisfied that the medical services to be provided by Specialists Surgeons are and will be available to Mrs Mashinini in future in the public healthcare system at no or lesser cost than the cost of the private medical care claimed. Sight should not be lost of the fact that Mrs Mashinini is employed as a Registered Nurse by the MEC, and she would be able to exercise her entitlement to the treatment.

[41]. This can however not be said in relation to the costs of treatment and services for psychiatric and psychological fallouts – there is no evidence before me to suggest that the treatment and services to be received in the Public

Healthcare Sector would be of the same standard as that to be received in the private sector. Mrs Mashinini by all accounts has had an adverse outcome from a psychological point of view. Pain, discomfort and associated sequalae has resulted in mild to moderate depression which flairs up whenever she has to deal with medical emergencies, pain, nausea, vomiting and treatment. The suicidal ideation and her inability to control these emotions despite being medically trained, the chronic and entrenched nature of the depression and the flare ups, leads to a bad prognosis.

[42]. It is the case of the plaintiff that successful management necessitates a focused team orientated treatment regime consisting of psychological assessment and treatment, psychotropic drugs, psychotherapy, adjustments in all life roles inducing pain or fear of pain and continuous management and assessment for at least five years.

[43]. The psychiatric evidence confirms that three aspects require immediate and continuous future management, namely psychotherapy and psychotropic medication; psychological assessment and treatment; and amelioration of any life role, inclusive of employment causing or inducing fears of pain and discomfort. The costs relating to the psychiatric and psychological treatment, according to the plaintiff, amounts to R131 530. The contingency to be deducted from this total should, in my view, take into account the fact Mrs Mashinini's psychiatric and psychological profile may very well be influenced by other factors unrelated to the injury sustained by her as a result of the botched operation. So, for example, she was diagnosed with HIV, which fact she had failed to disclose to many of the experts. She also had a miscarriage subsequent to the injury. I am therefore of the view that a 20% contingency should be deducted from this amount, giving a total of R105 224.

[44]. According to the occupational therapists, assistive devices, therapy, modalities, intervention and domestic assistance are required to treat and ameliorate the sequalae of the adverse outcome and that treatment should be managed in partnership by all the professionals to secure a favourable outcome;

[45]. The only dispute between them relates to future case management and certain items relating thereto. I agree with the MEC's stance in that regard, as supported by his OT, who expressed the view that, all things considered, some of these items are not necessarily needed by Mrs Mashinini and on the probabilities cannot be said to relate to her injury. So, for example, I do not see the logic in the need for the lightweight utensils, small food processor, bucket on wheels, long handled dustpan and broom and the low clothes drying rack, second purge chair and ergonomic office chair to reasonably assist the Plaintiff.

[46]. I am also of the view that there is no need for case management. I agree with the defendant's occupational therapist that Mrs Mashinini is clearly quite capable of managing her own affairs, finances and life. With the assistance of an occupational therapist and with regular sessions with a psychiatrist she will, in my view, be able to cope more than adequately. In order to take into account these issues, I believe that a 20% contingency should also be applied to the total in respect of these expenses, which, according to the plaintiff, amounts to R343 783. Therefore, R343 783 – R68 756.60 (20% contingency) = R275 026.40.

[47]. The total monetary payment to be awarded in favour of the plaintiff in respect of future hospital, medical and related expenses is the total sum of R380 250.40, which will be coupled with an order that in respect of the Specialist Surgeon's expenses, the MEC provides such services and give such treatment to Mrs Mashinini as and when required.

Past and future Loss of Earnings / Loss of Income Earning Capacity

[48]. The industrial psychologists are in agreement that Mrs Mashinini has the aptitude, work ethic, inclination and suitability for her elected employment, that being as a Nurse in the healthcare environment.

[49]. Up to the point when she underwent the operation during May 2014, she was progressing well, earning at that point as a Registered Nurse R13 200.66 gross per month. However, even after the event, and despite all of her problems, her progress and advancement from an occupational point of view was still proceeding well. As and at February 2020 Mrs Mashinini was earning an amount

of R27 515.46 gross per month. This means that in the six years since she suffered the injury her salary had doubled. At first blush, therefore, there appears to be no actual loss of income to the plaintiff.

[50]. It is however the case of the plaintiff that she has been compromised as a result of the injury in that she has been unable to pursue her studies in midwifery, which would have entitled her to attain promotion to the position as a matron. There can accordingly be no doubt, so it is contended on her behalf, that the plaintiff's career progress and prospects have been curtailed. How does one calculate the value of the loss?

[51]. The actuarial approach adopted by the plaintiff is one based on Mrs Mashinini being employed as a professional nurse Grade 1, notch 3, with earnings amounting to R272 553 per annum since November 2019 and that she has historically progressed at a notch a year since appointment at CHBAH. Furthermore, it assumes that notch increases would in future be received every second year instead of annually to provide for any possible delay. The assumption on this approach is furthermore that Mrs Mashinini would receive promotion to the position of Matron in January 2025 at the age of 42.5 years, being twelve years after qualifying and registering as a Registered Nurse, with subsequent notch progressions as a Matron every second year, which would result in the plaintiff's income culminating as a matron at notch 5 in 2043 at the age of 60, the agreed pre-incident retirement age being 65.

[52]. Post adverse outcome the plaintiff's postulation of her future projected income is based on increases of a notch every second year without promotion to the position of a matron and with two years' early retirement. Mr Uys submitted that the influence of a repaired hernia and resultant retirement falls in the exclusive expertise of the surgeons and cannot be disputed on a clinical surgical basis. The rationale is clear, once a hernia occurred and despite repair this condition will probably interfere with the plaintiff's normal employment until age 65.

[53]. Mr Uys furthermore contended that, on the basis of the evidence before me, the calculation advanced by the plaintiff's actuary is factually well founded.

[54]. These bases result in a pre-morbid projected income of R10 033 800 and post-morbid income of R7 525 600. I agree with these submissions and the approach generally. I would however apply contingencies to these amounts as follows: 20% general contingencies in respect of the pre-morbid projected income and 10% in respect of the post-morbid projected income. As regards the pre-morbid contingency application, the rationale is simply that there are no guarantees that the plaintiff would have made it to the position of Matron – the competition for that type of positions is fierce and there is a big pool from which the candidates for that position are drawn. As for the post-morbid contingency application, my view is that the plaintiff is employed by Government and her position is secure. There is still a possibility that she would attain the position of Matron. Also, despite all of the difficulties she complains of presently, she appears to have done well in the six years since the operation.

[55]. Applying these contingencies produces the following result: R8 027 040 – R6 773 040 = R1 254 000, which, in my view, represents fair and reasonable compensation in respect of the plaintiff's future loss of income.

General Damages

[56]. I now turn to deal with the quantum of the general damages suffered by the plaintiff.

[57]. Mr Uys suggested that a sum of R700 000 should be awarded to the plaintiff for her general damages. For comparative purposes, he relied on *Benjamin v De Beer* 1997 (4H3) QOD 1 (SCA), in which a 42-year-old woman, who underwent a thyroidectomy (the removal of her thyroid gland), which resulted in post-operative complications, namely the plaintiff suffering severe haemorrhaging and asphyxia, cardiac arrest, necessitating artificial respiration. The plaintiff in that case on two occasions was rushed to the operating theatre for emergency treatment. A tracheostomy was inserted under general anaesthetic to facilitate breathing, also causing unpleasant consequences: plaintiff unable to speak whilst tube thus placed in airway. Communication conducted by plaintiff having to first inhale, then to cover tube so that air may pass up the airway past the vocal cords and out of mouth or nose, then to uncover

tube to breathe again and then covered again for next speech production. Procedure cosmetically unsightly, particularly for a woman, socially demeaning, functionally unpleasant and uncomfortable, and fraught with distressing complications. Plaintiff further sustaining bilateral vocal cord paralysis or palsy. Plastic surgery administered to incision. Plaintiff then experiencing sudden breathing problem and undergoing further operation involving laser surgery through the mouth on her vocal cords. After discharge plaintiff again having difficulty in breathing and placed in oxygen tent for 3 days. Breathing difficulties recurring and plaintiff readmitted to hospital for further laser surgery to vocal cords to improve breathing. Neither procedure entirely satisfactory and plaintiff admitted to hospital yet again and undergoing surgery to move one vocal cord. Plaintiff ultimately being left with an airway which is too small, giving rise to 'very severe airway problem'. Infection could cause swelling which could block airway, thus necessitating instant medical attention.

[58]. In that case, in which the complications appear at first blush to have been more severe and serious, the plaintiff was awarded R90 000 in 1997, which updated to 2020 monetary value is R515 000,

[59]. Mr Uys also reminded the Court of the extreme bouts of pain and discomfort experienced by Mrs Mashinini in 2014 and again recently and the continuous nausea, recurrent vomiting, right upper quadrant pain, annual recurring assessments and past and future surgery and psychiatric outcome and treatment and future management demands a substantial award.

[60]. Counsel for the defendant, Ms Makopo, submitted that an amount of R400 000 would be reasonable compensation for the plaintiff's general damages.

[61]. In making an award under this head of damages, I have had regard to the comments by the SCA in the matter of *De Jongh v Du Pisanie*, 2005(5) SA 457 (SCA), in which matter an amount of R250 000 was awarded in respect of general damages for a head injury which led to brain damage. Importantly, in that matter the SCA, quoting Holmes J, also pointed out the following fundamental principle relative to the award of general damages:

'The court must take care to see that its award is fair to both sides – it must give just compensation to the plaintiff, but it must not pour largesse from the horn of plenty at the defendant's expense.'

[62]. Applying this principle and having regard to the facts in the matter, to which I have referred to *supra*, notably the fact that some six years after the event, Mrs Mashinini is still suffering the effects of the botched operation, I am of the view that the plaintiff's general damages should be R450 000, which amount should adequately compensate the plaintiff for general damages.

Conclusion

[63]. The amounts to be awarded to the plaintiff as damages are therefore the following: R380 250.40 – for future hospital, medical and related expenses; R1 254 000 – future loss of income; and R450 000 – general damages = Total amount to be awarded: R2 084 250.40.

[64]. In respect of the Specialist Surgeon's expenses, I intend directing the MEC to ensure that these services are rendered to, and procured for Mrs Mashinini as and when required by the Charlotte Maxeke Johannesburg Academic Hospital ('CMJAH') at the same or better level of service than in the private healthcare sector.

Costs

[65]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so. See: *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

[66]. I can think of no reason why I should deviate from this general rule.

[67]. Accordingly, I intend awarding costs in favour of the plaintiff against the defendant.

Order

Accordingly, I make the following order: -

(1) The plaintiff's claim for past hospital and medical expenses is postponed *sine die*.

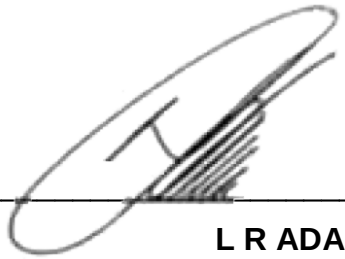
(2) In respect of those services and items listed under the claims for Specialist Surgeon's Expenses in the reports of Professor Damon Bizos and Dr B H Pienaar, and in their joint minute of the pre-trial conference held between them, the MEC is directed to ensure that these services are rendered to, and procured for Mrs Mashinini by the Charlotte Maxeke Johannesburg Academic Hospital (CMJAH) as and when required at the same or better level of service than in the private healthcare sector.

(3) Judgement is hereby granted in favour of the plaintiff against the defendant for:

(a) Payment of the sum of R2 084 250.40.

(b) Payment of interest on the said amount of R2 084 250.40 at the prevailing legal interest rate from fourteen days from date of this judgment to date of final payment.

(c) Payment of the plaintiff's costs of suit, including the reasonable costs of all medico-legal reports and joint minutes obtained by the plaintiff, and the qualifying fees and court attendance fees of her expert witnesses.



L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON:	27th to 31st July 2020, 3rd to 5th and 12th August 2020 – the trial of this matter proceeded on the 9 aforementioned days as a 'virtual hearing' in a series of videoconferences on the *Microsoft Teams* digital platform
JUDGMENT DATE:	25th January 2021 – judgment handed down electronically
FOR THE PLAINTIFF:	Mr Piet Uys
INSTRUCTED BY:	Malcolm Lyons & Brivik Incorporated, Rosebank, Johannesburg
FOR THE DEFENDANT:	Advocate N Makopo
INSTRUCTED BY:	The State Attorney, Johannesburg