



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: 19 July 2024

Case No. 06139/2016

In the matter between:

FLORENCE LOLO RADEBE

Plaintiff

and

MEC FOR HEALTH AND SOCIAL DEVELOPMENT (GAUTENG)

Defendant

JUDGMENT

WILSON J:

- 1 On 16 July 2013, the plaintiff, Ms. Radebe, was operated on at a hospital controlled by the defendant, the MEC. The aim of the surgery was to replace her left knee with a prosthetic joint. The surgery went badly wrong. Although the knee joint was replaced, Ms. Radebe now cannot bend her knee at all. Her left leg is, as a result, stuck in a fully extended position. She has apparently been in this condition for the last decade.

- 2 The MEC accepts that the knee replacement surgery was negligently performed, and has assumed liability for Ms. Radebe's proven losses. In all but two respects, the MEC and Ms. Radebe also agree what those losses were.
- 3 The parties disagree about whether and to what extent Ms. Radebe will require domestic assistance because of the injuries caused by the negligent surgery, and accordingly whether and to what extent the MEC should have to pay for such assistance. In addition, the parties do not agree on the quantum of general damages – meant, for the most part, to compensate for Ms. Radebe's pain and suffering and loss of amenity of life – that should be awarded.
- 4 Those two issues were brought to trial before me on 12 to 14 June 2024. I now give judgment on each of them in turn.

Domestic assistance

- 5 Ms. Radebe is presently 64 years old. Ms. Adams, who appeared for the MEC, accepted that Ms. Radebe will need domestic assistance as she ages. Ms. Adams submitted, however, that this need arose not from the knee replacement surgery itself, but from the fact that Ms. Radebe already had arthritis in her left knee and pain in both of her knees at the time of the operation. It was the severity of Ms. Radebe's arthritic pain that gave rise to the need for the operation in the first place. Accordingly, Ms. Adams reasoned, Ms. Radebe's condition would likely have so debilitated Ms. Radebe as to have made the need for domestic assistance inevitable whether or not she had the knee-replacement surgery.

- 6 I cannot accept this line of reasoning or the conclusion pressed from it. The evidence was that, although she was in pain before the operation, Ms. Radebe was mobile and able to perform a number of tasks associated with her job as a meat packer at a Spar supermarket.
- 7 Ms. Radebe resigned from her employment a few months before her operation. Ms. Adams submitted that Ms. Radebe likely resigned because she was in too much pain to work. It was contended that a doctor's note written before the operation confirmed that Ms. Radebe "was no longer capable of working" (MEC's submissions, paragraph 2). But the contention does not bear scrutiny, because that is not what the note said. It said that the pain in her joints made it "difficult to work". That is not the same thing. The doctor who wrote the note was not called to give evidence, so it is impossible to know what his assessment of Ms. Radebe's condition really was. Moreover, everyone accepts that Ms. Radebe was in pain before the operation. That is why she had it. But the doctor's note is not evidence that she was immobile or unable to work.
- 8 Second, Ms. Adams submitted that Ms. Radebe was immobile without a crutch "approximately seven (7) months prior to the surgery" (MEC's submissions, paragraph 4). However, the evidence does not justify that submission. The submission is based on a report from the MEC's occupational therapist, who said that Ms. Radebe reported that she "made use of a crutch since early 2013 due to mobility difficulties". While the use of the word "early" implies a pre-operative need for a crutch, it does not in itself justify the conclusion that Ms. Radebe was using a crutch for seven months.

- 9 Nor does it justify a finding, against the weight of evidence, that Ms. Radebe was immobile before her operation. The weight of evidence was that, other than high blood pressure, Ms. Radebe was healthy and mobile before the surgery.
- 10 There can be no serious dispute that the surgery changed all of that. Ms. Radebe is now substantially immobile without the assistance of a crutch. Even with a crutch, she finds it difficult to get around. This is partly because her left leg is stuck in a fully extended position as a result of the negligent surgery. It is shorter than her right leg, probably also as a result of the negligent surgery. A decade after the operation, the knee-joint is still painful and swollen. The parties' respective occupational therapists differed on the degree to which Ms. Radebe could function in that state, but neither took issue with the proposition that Ms. Radebe's post-operative state was significantly worse than her pre-operative state. I heard no evidence of any kind that suggested that Ms. Radebe's pre-operative arthritis was such that it would eventually have immobilised her or that it would have debilitated her to the same degree as the surgery did.
- 11 There can, accordingly, be no serious issue taken with the proposition that Ms. Radebe's conceded need for domestic assistance is the direct result of the debilitating effects of the poorly-performed knee replacement surgery. The MEC's occupational therapist's evidence to the contrary was not reasonably related to the admitted facts, or to the facts she recorded in her report, which itself confirms that Ms. Radebe's mobility and capacity to do ordinary daily tasks deteriorated significantly after the surgery. For that reason, and because

the conclusions she drew appear to me to be well beyond her expert ken, MEC's occupational therapist's opinion that Ms. Radebe's need for domestic assistance arises from a pre-existing condition and not from the negligent surgery may safely be rejected (see in this respect *MV Pasquale Della Gatta* 2012 (1) SA 58 (SCA), paragraph 26).

12 The question is accordingly not whether Ms. Radebe requires domestic assistance as a result of the poorly-performed surgery, but how much assistance she will need, for how long, and how much it will cost. The parties provided actuarial calculations of the amount Ms. Radebe would reasonably need to provide herself with domestic assistance for the remainder of her life. The MEC's calculation was R437 024. Ms. Radebe's calculation was R594 126. Counsel were agreed that, although the two calculations were based on slightly different assumptions, there was little to choose between them. They were both fair estimates of Ms. Radebe's needs, assuming I found that those needs arose from the surgery, and not from her pre-existing arthritis.

13 Having reached the conclusion that Ms. Radebe's need for domestic assistance arises from the surgery, and not from her pre-existing condition, it seems to me that a midpoint between the two estimates would be a reasonable starting position from which to calculate the amount that should be awarded Ms. Radebe for domestic assistance.

14 That midpoint is R515 575. Were there no prospect that Ms. Radebe's condition will get any better, I would have awarded her that amount. However, the MEC has undertaken to fund a further surgery at a public hospital in which a rehabilitation of Ms. Radebe's knee replacement will be attempted. Ms

Radebe has accepted that undertaking. It is accordingly necessary to consider whether the amount I would otherwise have awarded for domestic assistance should be reduced to account for the possibility that the rehabilitative surgery will improve Ms. Radebe's condition, and make her less reliant on domestic assistance.

15 I heard no evidence on the likelihood of the rehabilitative surgery being successful. However, there was no serious dispute that surgeries of this nature are inherently riskier than straightforward knee replacement surgeries; that complete recovery is unlikely; and that the nature and extent of the likely improvement to Ms. Radebe's condition as a result of the rehabilitative surgery is essentially unknowable.

16 Nonetheless, I am required to award damages for Ms. Radebe's injuries now. I cannot wait and see how or if she will improve. For that reason, I intend to apply a contingency deduction to the amount I would otherwise have awarded to Ms. Radebe for the costs of future domestic assistance. This approach to quantifying the possibility of future medical improvement is consistent with the decisions in *Singh v Ebrahim* [2010] ZASCA 145 (26 November 2010) (see especially paragraphs 209 to 211) and *NT obo SDT v MEC for Health: North West Provincial Government* [2024] ZANWHC 125 (16 May 2024) (see paragraphs 17 to 19).

17 Ms. Adam contended it would be appropriate to reduce my award by 15%. Ms Adams sought a deduction of 20%. There really is little to choose between these two figures. In the absence of some mathematical assistance based on the facts of this case (which I do not have on this point), my choice represents

little more than a “blind guess” (*Southern Assurance Association v Baily NO* 1984 (1) SA 98 (A) at 114D-E). However, given that Ms. Adam’s 15% suggestion was calculated on the higher figure provided by Ms. Radebe’s expert, it seems only fair to apply that deduction to the lower amount I have reached.

- 18 For all these reasons, I assess the amount due to Ms. Radebe for future domestic assistance at R438 250.

General Damages

- 19 I now turn to Ms. Radebe’s claim for general damages. Here, the parties are some distance from one another. The MEC contended that an award of R300 000 would be appropriate. Ms. Radebe asked for an award of R1 million.

- 20 A court assessing general damages exercises a broad discretion on the facts of the case before it, guided “in a general way [by] previous awards in broadly similar cases” (*Protea Insurance Co. Ltd v Lamb* 1971 (1) SA 530 at 536A).

- 21 My general damages award must obviously have regard to the debilitating effect that the negligent surgery had on Ms. Radebe in all its dimensions. Those dimensions were not just physical, in the sense that Ms. Radebe cannot now move without assistance and that she still feels moderate to severe pain in her left knee. There is also a psychological aspect to her injury. For reasons that can readily be understood, Ms. Radebe’s lack of mobility leaves her bereft. The feelings of sadness and loneliness arising from a substantial reduction in her physical capacity have affected her relationships with her family. By all accounts, Ms. Radebe led a vital and active life before the knee-

replacement surgery. She now leads one of loneliness, of pain and – no doubt – of deep personal frustration. If Ms. Radebe's rehabilitative surgery is unsuccessful, she will have to cope with this for the rest of her life.

22 Bearing all this in mind, I think that the MEC's proposed quantum of damages has inadequate regard to the pain and suffering the negligent surgery has caused Ms. Radebe. In addition, the cases on which the MEC's proposal is based are almost all out of date. Moreover, the one contemporary case upon which Ms. Adams relied– *Khakhang v Road Accident Fund* 2021 JDR 3306 (FB) – dealt with a substantially different knee injury, which was, on its face, less severe than Ms. Radebe's. For one thing, Mr. Khakhang retained some flexibility in his left knee (see paragraph 29). Ms. Radebe's condition is, of course, much worse. She has no flexion in her knee at all. But even in Mr. Khakhang's case, the court awarded R400 000 (R485 365 in today's prices). This is significantly more than the MEC is prepared to accept is appropriate to compensate Ms. Radebe.

23 Ms. Adam submitted that *Fekenisi v MEC for Health, Eastern Cape* [2020] ZAECHC 16 (11 August 2020) provides a better analogue for the facts of this case. In that matter a negligent knee-replacement surgery resulted in a dislocated joint and what appears to have been a serious and festering wound. As a result of the surgery, Ms. Fekenisi could neither walk nor stand. Her condition was not expected materially to improve. Her psychological problems were much the same as those experienced by Ms. Radebe. Mbenenge JP awarded R950 000 for general damages (just over R1.1 million in today's prices).

24 Ms. Adam submitted that Ms. Radebe is only “slightly better off” than Ms. Fekenisi. For the most part, I agree. There is, however, a qualitative difference between being able to walk with crutches, as Ms. Radebe can, and being unable to stand or walk at all, which was apparently Ms. Fekenisi condition. In this respect, Ms. Radebe is, I think, much more than “slightly” better off than Ms. Fekenisi.

25 I am grimly aware of the imprecision of any exercise which involves comparing different cases of loss and suffering – which are always, ultimately, incommensurate. Nonetheless, for the reasons I have given, I think that a just and fair award for general damages in this case would be R850 000.

Costs

26 Ms. Adam asked for costs on the “B” scale. But this is an unexceptional personal injury case. Though obviously important to Ms. Radebe, it presents no novel or complex questions. An enhanced order for counsel’s costs is accordingly inappropriate.

Order

27 The parties’ draft order – on which they are otherwise agreed – will be amended in light of my conclusions, and uploaded to this court’s electronic registry.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 19 July 2024.

HEARD ON: 12, 13 and 14 June 2024

DECIDED ON: 19 July 2024

For the Plaintiff: N Adam
Instructed by E Talane Attorneys

For the Defendant: LH Adams
Instructed by the State Attorney