



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case no: 335/2021

In the matter between:

**NOMGQIBELO NELLIE MASHININI**

**APPELLANT**

and

**THE MEMBER OF THE EXECUTIVE COUNCIL  
FOR HEALTH AND SOCIAL DEVELOPMENT,  
GAUTENG PROVINCIAL GOVERNMENT**

**RESPONDENT**

**Neutral citation:** *Mashinini v The Member of the Executive Council for Health and Social Development, Gauteng Provincial Government (335/2021)*  
[2023] ZASCA 53 (18 April 2023)

**Coram:** ZONDI, SCHIPPERS and GORVEN JJA and MALI and SIWENDU AJJA

**Heard:** 15 February 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 18 April 2023.

**Summary:** Delict – action for damages based on medical negligence of public hospital staff – claim for future medical and hospital expenses – public healthcare defence - whether expenses for future medical treatment are reasonable and whether such

treatment can be provided at the State hospital – defendant failed to adduce evidence to support its contention that medical services of the same, or an acceptably high standard available at the State hospital at no cost or less than that claimed by plaintiff – need to develop common law not established.

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## ORDER

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Adams J, sitting as court of first instance):

1 The appeal is upheld with costs including the costs of two counsel where so employed.

2 The order of the high court is set aside and is replaced with the following order:

‘Judgment is hereby granted in favour of the plaintiff against the defendant for:

(a) payment of the sum of R3 213 564.40.

(b) payment of interest on the said sum of R3 213 564.40 at the prevailing legal interest rate from the 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 the plaintiff’s expert witnesses.

(d) the plaintiff’s claim for past hospital and medical expenses is postponed *sine die*.’

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## JUDGMENT

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**Zondi JA (Schippers and Gorven JJA and Mali and Siwendu AJJA concurring):**

[1] On 16 May 2014 the appellant, Mrs Mashinini, a 39 year old professional nurse at Chris Hani Baragwanath Hospital, Johannesburg (Chris Hani Baragwanath Hospital), underwent a surgical procedure at Tambo Memorial Hospital, Boksburg for the removal of the gallbladder (laparoscopic cholecystectomy). During the procedure the appellant sustained a major bile duct and hepatic artery injury. This required emergency management, attempted endoscopic management and a bile duct reconstruction which was performed at Greys Hospital, Pietermaritzburg. As a result of the injury arising from the failed operation, the appellant had to undergo various surgical procedures aimed at correcting the damage.

[2] On 18 January 2017 the appellant instituted an action for damages based on medical negligence in the Gauteng Division of the High Court, Johannesburg (high court) against the respondent, the MEC for Health and Social Development, Gauteng (MEC) and a doctor who performed the failed operation. The appellant alleged that the hospital staff involved were negligent and that such negligence had caused her injury and the resultant damages. The appellant claimed for past hospital and medical expenses, future medical expenses, future loss of earnings and general damages.

[3] In relation to the claim for future medical and hospital expenses, the MEC raised the so-called 'public healthcare defence'. In broad terms, the MEC pleaded that the court should develop the common law and order that she (the MEC) should be directed to provide future medical treatment at Chris Hani Baragwanath Hospital, instead of compensating the appellant in monetary terms. In due course the liability to compensate the appellant for the injuries sustained as a consequence of the failed surgery was conceded by the MEC and the matter proceeded only on the quantum of damages arising from those injuries.

[4] The MEC's defence found favour with the high court and Adams J made 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 BH 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 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 judgement 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.'

[5] It is apparent from this that the appellant was not awarded damages for future medical and surgical treatment in money. Instead, the trial court directed that these be provided by the MEC at Charlotte Maxeke Johannesburg Academic Hospital (Charlotte Maxeke Hospital) as and when required and at the same or better level of service than in private health care. It is this part of the order with which the appellant is not satisfied. She sought and obtained leave to appeal against this part of the order from the high court.

[6] The issue is whether the high court was correct in not awarding the appellant the sum of R879 314 for future medical and surgical treatment. The determination of this issue requires an analysis of the relevant pleadings and evidence that was adduced in the trial.

[7] The appellant claimed R1 765 000 for future medical expenses to which the MEC pleaded the 'public healthcare defence' as follows:

8.1 The Defendant denies that it is liable to the Plaintiff for the said damages and further pleads in the alternate that he is in a position to ensure that service and items that have been recommended will be rendered or supplied by his Department or some other State Department at Chris Hani Baragwanath Hospital.

8.2 The Defendant accordingly prays that, taking into account the interest of justice and acting in terms of Section 173 of the Constitution, this Honourable Court should develop the common law and should order that instead of being required to compensate the plaintiff in money in respect of services referred in paragraph 3.1 above, is directed to ensure that the services are rendered or the items are supplied.

8.3 The Defendant will be able to ensure that the services are rendered and the items are provided, both of an acceptable quality and cost that is lower than the amount that the Plaintiff claims.

8.4 The savings will make available more scarce resources for the state to fulfil its obligations under section 27(2) of the Constitution.

8.5 It is accordingly in the interests of justice that an order be made that the Defendant render services and provide items of an acceptable quality rather than compensate the Plaintiff by way of monetary payment.'

[8] In their joint minutes the parties' experts agreed on the nature and extent of medical and surgical treatment that the appellant would require in the future and that an amount

of R879 314 (after applying a 15 percent general contingency) should be provided for such treatment, if provided in a private healthcare setting. It was not disputed by the MEC that the appellant would need the medical services identified by the experts in their joint minutes. What was contested by the MEC is the reasonableness of the cost of providing such services on the sole basis that the MEC could provide the required medical treatment at Chris Hani Baragwanath Hospital as and when required and at the same or better level of service than in the private healthcare sector.

[9] It must be borne in mind that this is an Aquilian action. Under such an action, the defendant is obliged to make good the difference between the value of the plaintiff's estate after the commission of the delict and the value it would have had if the delict had not been committed (*Dippenaar v Shield Insurance Company Ltd*).<sup>1</sup> The purpose of an award of damages is to compensate the victim in money terms for the loss suffered.<sup>2</sup> A plaintiff must allege and prove the quantum of damages suffered because of the defendant's wrongful act. In other words, in this instance the plaintiff must lead evidence which establishes the reasonable and necessary cost of future medical and hospital expenses.

[10] In *Ngubane v South African Transport Services (Ngubane)*<sup>3</sup> this Court referred with approval to the following passage in *Erasmus v Davis*.<sup>4</sup>

'The onus rests on plaintiff of proving, not only that he has suffered damage, but also the quantum thereof. Where, however, a plaintiff leads evidence which establishes the reasonable and necessary cost of repairs to his vehicle damaged in a collision, proof of such cost would, in my judgement, ordinarily be *prima facie* proof that payment to him of such cost would place him financially in the same position as he would have been in had the collision not occurred. If on all the evidence adduced at the trial there is nothing to show that the reasonable and necessary cost of repairs might exceed the diminution in value, the *prima facie* proof may become proof by a preponderance of probabilities and the plaintiff has then succeeded in proving his damages...'

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<sup>1</sup> *Dippenaar v Shield Insurance Company Ltd* [1979] 4 All SA 92 (A); 1979 (2) SA 904 (A) at 917B.

<sup>2</sup> *Member of Executive Council for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018(1) SA 355(CC) para 16 (MEC for Health v DZ).

<sup>3</sup> *Ngubane v South African Transport Services* 1991 (1) SA 756 (A); [1991] 4 All SA 22 (A).

<sup>4</sup> *Erasmus v Davis* 1969 (2) SA 1 (A) at 9E-G.

[11] A 'public healthcare defence' in the form of a 'mitigation of damages defence' was raised in *Ngubane* to oppose a claim for damages in respect of future medical expenses and adaptive aids. There, it was submitted by counsel for the respondent, that once the possible alternative of State medical service is raised '(t)here is no general authority that a plaintiff is entitled to be awarded the costs of a private clinic in preference to the costs of public hospital', and that therefore '(w)hen the possibility that cheaper treatment is possible than that claimed by the plaintiff it becomes his duty in discharge of the general onus resting on him to deal with these possibilities. It is not for the defendant to quantify his damages for him.' This Court rejected this argument as follows:

'Though the onus of proving damages is correctly placed upon the plaintiff, this submission, which is really concerned with the duty to adduce evidence, is to my mind unsound. By making use of private medical services and hospital facilities, a plaintiff, who has suffered personal injuries, will in the normal course (as a result of enquiries and exercising a right of selection) receive skilled medical attention and, where the need arises, be admitted to a well-run and properly equipped hospital. To accord him such benefits, all would agree, is both reasonable and deserving. For this reason it is a legitimate - and as far as I am aware the customary - basis on which a claim for future medical expenses is determined. Such evidence will thus discharge the onus of proving the cost of such expenses unless, having regard to all the evidence, including that adduced in support of an alternative and cheaper source of medical services, it can be said that the plaintiff has failed to prove on a preponderance of probabilities that the medical services envisaged are reasonable and hence that the amounts claimed are not excessive.'<sup>5</sup>

[12] This Court went on to further state that:

'Thus in the instant case the respondent was required to adduce evidence - a "voldoende getuienisbasis" 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.'<sup>6</sup>

This frames the matter clearly within Aquilian principles. It is crucial that this is done within any consideration of 'development of the common law' since one must first

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<sup>5</sup> Ibid fn 3 at 784C-F.

<sup>6</sup> Ibid fn 3 at 785C-D.

determine the ambit of the common law so as to identify whether or not it requires development in the light of the Constitution.

[13] The Constitutional Court in *MEC for Health v DZ* endorsed the approach that was adopted by this Court in *Ngubane* when faced with the 'public healthcare defence'. It expressed the view that *Ngubane* was authority for allowing a defendant to produce evidence that medical services of the same or higher standard, at no or lesser cost than private medical care, will be available to a plaintiff in future. It stated:

'If that evidence is of a sufficiently cogent nature to disturb the presumption that private future healthcare is reasonable, the plaintiff will not succeed in the claim for the higher future medical expenses'.<sup>7</sup>

[14] The appellant testified about the nature of her medical condition and its management by various specialists. She testified that during 2014, after the failed surgical procedure she experienced a very excruciating and burning pain in the abdominal area. The intensity of the pain persisted but subsided after a surgical procedure she underwent at Greys Hospital. The cause of pain was investigated. An accumulation of bile fluid in the appellant's stomach which required to be washed out was identified to be the source of her problem. The appellant was also treated at Charlotte Maxeke Hospital where she was attended to by Professor Bizos. Her medical expenses were covered by GEMS Medical Aid Fund of which she is a member. Professor Bizos explained to her that she still needed to undergo further surgical procedures in future. She was happy with the treatment she had received from Professor Bizos and would prefer to continue with him because of his familiarity with her medical history.

[15] Although the appellant is satisfied with the treatment she received from doctors at Charlotte Maxeke Hospital and Chris Hani Baragwanath Hospital, she complains about the long waiting periods at the casualty sections at these public healthcare facilities. Her evidence was that at these hospitals, except in emergency situations, patients are attended to on a first come, first served basis.

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<sup>7</sup> *MEC for Health v DZ* para 21.



[16] Professor Bizos testified on behalf of the appellant in the trial court. He is, among other things, a Gastro Intestinal Surgeon and the head of Surgical Gastroenterology at the University of Witwatersrand. He also runs a Surgical Gastroenterology Unit at the Charlotte Maxeke Hospital. Apart from that, he also has a small practice at Donald Gordon Medical Centre (DGMC) where he sees some of his private patients. He is the head of Surgery at DGMC, a private hospital owned by the University of Witwatersrand.

[17] He confirmed that in the latter part of 2019 he attended to the appellant at Charlotte Maxeke Hospital and also at DGMC in July 2020. His opinion was that although the medical care which the appellant received at Charlotte Maxeke Hospital in the past had been good, treatment in this hospital is marked by a lack of resources, waiting periods and bed availability. This, in his view, may present a problem for the appellant given the complexity of her clinical condition. His evidence was that the appellant has to have access to a specialist surgeon, hepatobiliary surgeon, and a clinical hepatologist, often on an emergency basis.

[18] Professor Bizos opined that a typical general surgeon, or physician would not have sufficient insight to deal with the nuances of this particular case; more so in view of the surgery that has been done. He stated that although Chris Hani Baragwanath Hospital and Charlotte Maxeke Hospital have a dedicated hepatobiliary unit and Gastro Intestinal unit respectively, unlike at the DGMC, a patient receiving treatment there does not have direct access to a specified surgeon. A patient would have to go to the casualty section first and depending on its assessment of the patient's clinical condition, it would contact the surgeon on call and that surgeon might be someone from the breast unit, or endocrine unit, or the hepatobiliary unit, depending on which date it is.

[19] Professor Bizos concluded that the appellant's case is a complex one and requires direct access to a specified surgeon which is something the state hospitals are unable to provide. Emergency procedures such as to unblock a bile duct can be done at the DGMC at any time of the day or night whereas at the Charlotte Maxeke Hospital they would be done during office hours only. This was because the surgeons working at DGMC have a system in place in terms of which patients with medical

issues can contact them and, if not readily available, a person standing in for those surgeons is available to assist.

[20] In the high court the MEC contended that the future hospital and medical expenses should be dealt with on the basis of the matter of *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government (MSM)*.<sup>8</sup> In that matter, Keightley J granted an order requiring the MEC in question to provide certain specified future medical services to the child of the plaintiff at a particular hospital. In granting that aspect of the relief, she held that she had developed the common law since such an order does not fall under the ambit of delictual relief.

[21] This contention found favour with the high court. It found that ‘the medical services to be provided by Specialist Surgeons are and will be available to [the appellant] in future in the public healthcare system at no or lesser cost than the cost of the private medical care claimed’. In making this finding, the high court had regard to the fact that the appellant is employed as a Registered Nurse by the MEC, and she would be able to exercise her entitlement to the treatment.

[22] On appeal, the appellant submitted that the high court erred in relying on *MSM* as authority for the proposition that the common law rule that delictual damages be paid in money has been developed so as to permit a court to order compensation in kind where it is established that medical services of the same or higher standard will be available to the plaintiff in future in the public healthcare system at no or lesser costs than in the private medical care as claimed. Secondly, it was submitted by the appellant that no factual evidence was presented to substantiate the pleaded argument in respect of the development of the common law. This was said by the Constitutional Court to be necessary before such relief could be considered.<sup>9</sup>

[23] Arguing in support of the order of the high court, counsel for the MEC submitted that the factual material was clear that the appellant had been receiving the required

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<sup>8</sup> *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* [2019] ZAGPJHC 504; 2020(2) SA 567(GJ); [2020] 2 All SA 177 (GJ).

<sup>9</sup> *Member of Executive Council for Health and Social Development, Gauteng v DZ obo WZ* [2017] ZACC 37; 2017 (12) BCLR 1528 (CC); 2018(1) SA 355(CC) para 57.

treatment at the public hospital and that the appellant was not prejudiced in that the pleadings referred to Chris Hani Baragwanath Hospital and not to Charlotte Maxeke Hospital. In this regard it was submitted on behalf of the MEC that the appellant did not object when evidence in relation to the treatment at Charlotte Maxeke Hospital was led.

[24] In my view the appellant discharged the onus of proving, not only that she has suffered damages in respect of which medical treatment will be required in the future, but also the quantum thereof. The evidence which was led on her behalf established that she will need medical treatment in future, that the cost of providing such treatment will be in the amount of R879 314, for which she must be compensated in money as the identified medical services will have to be rendered by a private healthcare. This constitutes *prima facie* proof that payment to the appellant of such cost would place her financially in the same position as she would have been in had the failed operation not occurred. On the evidence there is nothing to show that the amount of R879 314 claimed by the appellant in respect of future medical treatment is not a reasonable and necessary amount by which the appellant's patrimony was diminished by the hospital staff's conduct. In fact, none of this was contested by the MEC.

[25] I agree with the appellant's submission that the high court misdirected itself in the application of the principles established in *MSM*. *MSM* did not develop the common law so as to provide for the implementation of the 'public healthcare defence'. After considering all the evidence, the high court concluded that as far as the identified services were concerned, they were available for the child at the Charlotte Maxeke Hospital and that the standard of service that she would receive there would be the same, if not in some respects even better than, the services she would receive in the private sector if the MEC was ordered to pay monetary compensation. The effect of this was to hold that the MEC had discharged an evidential burden showing that the costs of private healthcare were not reasonable or necessary in the circumstances of that matter. The order for damages thus excluded those costs and, since the MEC had tendered the requisite services, granted the relief sought by the MEC. In essence, this was not an order which went beyond the common law, but one consented to by the defendant in that matter on the basis that this would result in the monetary award being

reduced. In that regard, Keightly J erred in holding that she was developing the common law. The order that she granted was one based on delictual principles.

[26] In the present matter, as the MEC pleaded 'the public healthcare defence', she bore an evidentiary burden to rebut the prima facie case established by the appellant (*Ngubane supra*). The MEC presented no evidence to counter that of Professor Bizos, which was not contradicted, that State hospitals in general because of the manner in which they operate, are not capable of rendering medical services to patients such as the appellant with complicated clinical conditions which require a direct and immediate access to the specialist surgeons. Nor did she present any evidence of the cost to the appellant of such a service, if it had been available.

[27] The MEC's 'public healthcare defence' should accordingly have been dismissed by the high court since there was no evidence before it that medical services of the same, or an acceptably high, standard would be available at no cost or for less than that claimed by the appellant. In fact, the only evidence before it, unchallenged by the MEC was to the contrary. The amount of R879 314 should therefore have been awarded to the appellant for future surgical and medical expenses.

[28] In the result I make the following order:

1 The appeal is upheld with costs including the costs of two counsel where so employed.

2 The order of the high court is set aside and is replaced with the following order:

'Judgment is hereby granted in favour of the plaintiff against the defendant for:

(a) payment of the sum of R3 213 564.40.

(b) payment of interest on the said sum of R3 213 564.40 at the prevailing legal interest rate from the 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 the plaintiff's expert witnesses.

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

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D H ZONDI  
JUDGE OF APPEAL

## APPEARANCES

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