

SOUTH AFRICA / JUDGMENT

Mhlatshana v Member of Executive Council for Health Eastern Cape Province (1433/2015) [2024] ZAECMHC 19 (18 March 2024)

[2024] ZAECMHC 19

COURT

Eastern Cape High Court, Mthatha

BEFORE

Govindjee

CASE / FILE NUMBER

1433/2015

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE

DIVISION, MTHATHA)

NOT REPORTABLE

Case no: 1433/2015

In the matter between:

SINESIPHO

MHLATSHANA Plaintiff

and

THE MEMBER OF

EXECUTIVE COUNCIL FOR

Defendant

HEALTH, EASTERN CAPE

PROVINCE

REASONS FOR JUDGMENT

Govindjee J

- [1] The plaintiff sues in her personal and representative capacity on behalf of her daughter (referred to for convenience as ‘Sinesipho’).

The issues requiring determination at the commencement of these proceedings were the plaintiff's claims in respect of transportation, carers, domestic and auxiliary services for Sinesipho, pursuant to paraplegia caused as a result of tuberculosis of the spine and due to the defendant's negligent conduct. Sinesipho became permanently paralysed in 2011, at the age of six and has since been confined to a wheelchair.

- [2] The defendant has conceded liability in respect of the plaintiff's claim in her representative capacity. Various issues were postponed for trial, the balance of issues, other than past and future medical expenses, having been determined by agreement and made an order of court before Laing J on 15 March 2023.
- [3] On the pleadings, the defendant accepted that various forms of medical treatment and therapy, special adaptive aids and devices are required by Sinesipho, but denied that permanent and continuous care would be required. In addition, the defendant pleaded that Sinesipho would only require a caregiver from 35 years of age, and not currently. On the plaintiff's pleaded case, Sinesipho requires caregiver assistance immediately, the level of support increasing from age 36 onwards to allow for 'live-in, full-time care and oversight'.
- [4] A further pre-trial minute reflects a figure of R1 032 898,00, being the average between the parties' respective actuarial calculations, for domestic assistance. It may be added that an interim payment in respect of 'carers / domestic workers' in the amount of R 1 million has already been made, and must be factored one way or another. There has been agreement that the plaintiff is entitled to a motor vehicle to the value of R713 421,00 and auxiliary assistance in the amount of R179 567,00 again being the average between the respective actuaries' calculations. The approach adopted by the parties and their representatives in these respects appear to me to be fair and reasonable and I intend to incorporate these amounts in the order to be issued.
- [5] There is no disagreement that the joint minute of the occupational therapists requires the provision of caregiving. Here the combined

average actuarial calculation, including relief caregiving, totals R4 082 011,00. The only real remaining divergence is in respect of whether the plaintiff is entitled to payment of that amount upfront, in which case there is agreement that the amount cited above is to be awarded, or whether 'the defendant is entitled to provide this service to the plaintiff and / or reimburse the plaintiff on proof of invoice'. In that event, there is agreement that no monies are to be awarded in respect of caregiving at this stage, so that the R1 million already paid may be deducted from the amount agreed in respect of domestic worker support.

- [6] The defendant's stance stems from its pleaded reliance on the so-called public healthcare defence and the decision of Griffiths J in *TN obo BN v MEC for Health, Eastern Cape*. In respect of carers, leaving aside its pleaded denial of the need for a caregiver until the age of 35, the MEC pleads as follows:

‘...the Defendant pleads that she is able to provide caregivers to Sinesipho at a reasonable cost and only in the event that the defendant is unable to provide such caregivers, undertakes to pay such caregivers upon an invoice submitted to the defendant by the plaintiff.’

The draft order prayed for by the defendant is along these lines.

The evidence

[7] Ms Bainbridge, an occupational therapist, testified as to the contents of a joint minute she had entered into with Ms Omarjee, the

occupational therapist appointed by the defendant, following various independent assessments by both therapists.

[8] From her evidence, and the latest joint report, it may be noted that there is agreement between the occupational therapists that Sinesipho will benefit from a live-in companion caregiver, for purposes of obtaining necessary assistance, care and security, should she choose to live alone in the community in future. This follows the agreement in the first joint minute (dated 12 October 2021) that Sinesipho would require ‘ongoing assistance by a caregiver trained in the monitoring and management of SCI persons; able to help with the heavier aspects of household and community living’. As Mr Mtshabe for the defendant emphasised, the parties argued the matter on the basis that caregiver support would practically only be required from age 35, with domestic worker support prior to that point being deemed adequate.

[9] That caregiver support will be required is readily apparent from the evidence of Ms Bainbridge and Sinesipho herself, which I accept. The cost of time and energy when attending to basic functioning, absent caregiving, for a person with paraplegia of the kind afflicting

Sinesipho, has been such that it impacted negatively on her studies during 2023. The various positive links between caregiver provisioning and Sinesipho’s ability to reclaim maximum independence, dignity and a sense of agency, was well-explained by Ms Bainbridge. She also expressed concern at the prospect of the state assuming control of caregiver selection, given the intimate

relationship between caregiver and the person being cared for, and the need for flexibility, as well as scepticism as to the state’s

ability to successfully manage such a system with the necessary consistency. She added that the joint reports of the occupational

therapists did not provide for this possibility and that there would be no cost saving in the event that the caregiving services were provided by the state via a private agency.

[10] Sinesipho, now 19 years of age, herself provided background information about her life, including a year spent in a private residence while she studied at Eduvos College in 2023. Her difficulties in coping, including challenges with socialising and resultant depression, were explained. In future, she hopes to stay by herself and be independent, living on her own with the necessary assistance and

support outside of a residential situation.

[11] The need for caregiver support was apparent from her testimony, given the difficulties she experiences, for example, in bathing, and concern as to lack of support should she suffer an asthma attack or become otherwise unwell. She demonstrated concern as to the possibility of state intervention in the process of the appointment of a caregiver to assist her, expressing that she would prefer to make such decisions on her own.

[12] Mr Matshotyana, employed by the defendant as chief director responsible for clinical support services, was the only witness to testify on the defendant's behalf. He explained that a new mechanism had been introduced by the department of health in the province for caregiving pursuant to two cases decided last year, in terms of which a private institution, namely St Bernard's Hospice, in East London, was engaged to provide caregiving services in those two cases, both involving cerebral palsy. The arrangement was for St Bernard's to place the caregivers, attend to training where necessary, supervise and pay the monthly wages of the caregivers.

[13] Mr Matshotyana suggested that it would be possible for similar provisioning to be made in other orthopaedic cases in future, and

referred to a designated medico-legal budget that was being ring-fenced for this purpose, along with the undescribed possibility

of additional ways to continue to provide services if the budget was exhausted, coupled with a multidisciplinary task-team created to monitor such activities on a weekly basis. The present reality was that such services were provided only by St Bernard's in East London in the two instances mentioned, seemingly following court orders. The hoped-for expansion of arrangements would be required to cater for Sinesipho's needs.

[14] Mr Matshotyana suggested that individual involvement of caregiver selection and management may be possible, while acknowledging that private institutions would retain autonomy over the management of staff on their payroll. As for caregiver appointments in Gqeberha, he hoped that St Bernard's might use their network to identify and recruit a caregiver, even though their work was limited to East London, alternatively the department might do so itself. It was clear that the mechanism for such an appointment had not been clearly ascertained or articulated to date, the hope being that this would eventuate once the planned system matured in time-to-come, possibly including the creation of a database of organisations similar to St Bernard's throughout the province. These plans were contained in the 2024/2025 departmental procurement plan, the details of which were not disclosed

during evidence.

- [15] Mr Matshotyana conceded, during cross-examination, that he could not describe with any level of confidence what the picture would look like by time Sinesipho attained the age of 35. He also conceded that the department's track record in respect of timeous payments left much to be desired, but placed reliance on the envisaged system. As for the mechanics of payment, there could be various modalities adopted so as to ensure that a person in Sinesipho's position would not be out of pocket.
- [16] Mr Matshotyana concluded his testimony in chief by assuring the court that a system had been established, coupled with a team that could be mobilised in a short space of time, so as to identify and place a caregiver for Sinesipho in Kariega, properly supported and timeously paid, and that come 2040 this system would run seamlessly. Part of the rationale for the defendant's position was explained as being related to the need to monitor the benefit received by those receiving state funds for healthcare purposes, given the state's duty to provide healthcare to the populace. To this was added the financial benefit to the department in the event that it could avoid paying large lumpsums, which would exhaust its budget, and instead defer such payments in the manner proposed.

The legal position

- [17] Given that this is an Aquilian 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. The purpose of an award of damages is to compensate the victim in money terms for the loss suffered. A plaintiff must allege and prove the quantum of damages suffered because of the defendant's wrongful act. In other words, in this instance it was for the plaintiff to lead evidence establishing the reasonable and necessary cost of future caregiving expenses.
- [18] Although the 'once and for all' rule favours individualism and the free market, the decision in DZ has confirmed that this does not conflict with the constitutional value system. Periodic payment may, however, be countenanced, based on the particular circumstances of a case. As to the public healthcare defence, and the parameters of its applicability in the present instance, I can do no better than to quote the judgment of the SCA in Ngubane v South African Transport Services, which was cited with approval by the Constitutional Court in MEC for Health v DZ, and more recently confirmed by the SCA in Mashinini v MEC for Health, Gauteng:[1]

'Though the onus of proving damages is correctly placed upon the plaintiff ... 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 excessive.’

[19] The court in Ngubane added the following:[2]

‘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’. (Own emphasis).

[20] These principles must apply with equal force in respect of the present claim for caregiver support. The point, as articulated by the Constitutional Court in *DZ*, is that it is for the defendant to produce evidence that medical services, of the same or higher standard, at no or less cost than private medical care, would be available to a plaintiff in future, the emphasis being on cost-saving. To quote:[3]

‘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.’

[21] It is immediately apparent that this case is distinguishable, based on the evidence presented, from *TN obo BN v MEC for Health, Eastern Cape*, as Mr Schoeman for the plaintiff argued.[4] To cite the most obvious illustration, in that matter the court heard the evidence of various expert witnesses, including an esteemed

public finance economist who testified as to state resource constraints in the face of medical negligence claims, undertakings to pay and cost-effectiveness. The evidence in that matter disclosed, in fine detail, the risks associated with lump sum payments and the department’s financial struggles. Perhaps most significantly, at issue was the ability of the department to provide services and supplies, that were of the kind available at public hospitals, at the required standard. The evidence presented in that matter was held to point ineluctably to the conclusion that this was the case.

[22] In deciding whether to develop the common law, the court held that the facts before it were on all fours with the case of *MSM obo KBM v MEC for Health, Gauteng*, and followed that decision in ultimately developing the common law.[5] It must be noted that the SCA has subsequently, in *Mashini v MEC for Health, Gauteng*, and without any reference to *TN obo BN*, criticised the finding of Keightley J in *MSM* that the common law was being developed. [6] The order in *MSM* was, in fact, based on delictual principles.

[23] I do not consider it necessary to pronounce upon the impact of Mashinini, if any, on the development of the common law in TN obo BN. Of importance is that the latter case is clearly distinguishable from the present circumstances. In addition to the reasons already provided for this conclusion, caregiving clearly fell outside the parameters of the decision. That aside, the evidence in the present matter is altogether of a different sort.

[24] Everyone has the constitutional right to have access to healthcare services. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Plans, however laudable, must be reasonable in their conceptualisation and implementation, as detailed by the Constitutional Court in *Government of the Republic of South Africa v Grootboom*.^[7] In support of legislative measures, it has been held that the formulation of a programme is only the first stage in meeting the

state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.

[25] In the present circumstances it is impossible to say whether the plan depicted is workable. It was shorn of all detail and presented in the vaguest of terms, also absent any supporting documentation. The defendant's approach failed to give serious consideration to matters such as the realities of changes in leadership personnel, future budgetary priority changes, and how to accommodate Sinesipho should she move abroad. The logistical, nitty-gritty support for what would be necessary to make the plan a reality was absent, heightening the sense of concern as to the agility of the system being proposed for present purposes. On the evidence, and unsurprisingly considering that state provision of caregivers is in its infancy in the province, there are serious concerns as to the bureaucratic realities associated with the proposal, its scalability and efficacy. Much of what was presented was in hope and anticipation of what might be possible in future. Absent any proof of the pudding, it amounted to nebulous crystal-gazing of the over-optimistic variety.

[26] The application of the various authorities considered by the SCA in Mashinini is instructive on these facts. As was the case in that matter, the plaintiff has discharged the onus of proving, not only that she has suffered damages in respect of which caregiver support will be required in the future (along with domestic and transportation

support, as calculated by the respective actuarial scientists), but also the quantum thereof. In fact, even leaving aside the evidence

led, this is now a matter of agreement between the parties. This constitutes prima facie proof that payment to the plaintiff of such amounts would place her financially in the same position as she would have been in had she not suffered as a result of the defendant's negligent conduct. There is no basis for concluding that the amount of just over R4 million claimed in respect of caregiver support is not a reasonable and necessary amount by which Sinesipho's patrimony was diminished by the conduct of the defendant's employees. As was the case in Mashinini, none of

this has been contested by the MEC and the evidence adduced on her behalf falls short of establishing that the necessary

caregiving services would be available to Sinesipho at the requisite standard 16 years from now at no or reduced cost to the state.

Bearing in mind inflation and the defendant's plan to involve the private sector in identifying and engaging suitable caregivers,

that threshold has not been met.

[27] The position may have been different, as it was in MSM, had the evidence shown that the public sector could provide the same, or better, services than could be received by Sinesipho in the private sector through the payment of monetary compensation by the defendant. In MSM, the MEC discharged an evidential burden showing that the costs of the private healthcare in question were not reasonable or necessary in the circumstances of that matter. As a result, the order for damages excluded those costs. The MEC tendered the requisite services, so that the court made an order granting the relief sought by the MEC by consent, thereby reducing the monetary award for that specific reason. In the present circumstances, the plan is really to utilise the private sector as an intermediary or agent, while retaining a modicum of control over the services to be provided to Sinesipho. As indicated, leaving aside concerns as to the practicalities of the proposed arrangement come 2040, the evidence fails to show that the services to be procured will result in any cost saving for the defendant, which is fatal to the proffered defence.

[28] Having pleaded the public healthcare defence, it was incumbent upon the defendant, who bore an evidentiary burden, to rebut the prima facie case established by the plaintiff. Mashinini is authority for holding that absent the presentation of any evidence of the cost of the provision of caregiver services in the public sector, the public healthcare defence stands to be dismissed. As in that matter, there is simply no evidence that the same, or an acceptably high, standard would be available through public provision at no cost or for less than that claimed by the plaintiff.

[29] While one may speculate, or even take judicial notice of the realities of healthcare challenges in the province, and country, and the alleviation of pressure that may result from reduced lump sum payments, to deprive a claimant of delictual damages to which she is entitled requires a lawful basis, to be determined case-by-case. What the defendant seeks, in effect, is an unprecedented extension of the public healthcare defence to develop the common law in circumstances where the ordinary application of delictual principles results in it being liable for immediate payment of caregiver support for Sinesipho. On the evidence before the court, the invitation to develop the common law must be declined. As Mr Schoeman submitted, the Zulu decision explains the approach to the development of common law and the department has fallen short of making out a case for this.[8] To accept the defendant's position would deprive Sinesipho of a payment to which she is entitled and the independent choice of how to utilise those funds to procure the services she requires.

That significance of that right of selection, as alluded to in Ngubane, ought not to be diminished without proper justification. To do so will, somewhat perversely, afford the defendant, the party responsible for causing the delictual harm she suffered, the option of how to make good, either by providing caregivers, alternatively

paying in the event that this proves difficult 16 years from now.

[30] I have considered the argument that a contingency should be applied to the amounts to be awarded and decline to do so, also on the authority of *P obo P v MEC for Health*. That argument stems from the terms of a further pre-trial minute dated 17 November 2021, which contains reference to the application

of a 5% contingency deduction on future medical expenses. In terms of paragraph 7 of that minute, it was specifically recorded that the plaintiff's compromise of her claim was conditional on the defendant electing to settle the matter in its entirety on the terms contained in that document, failing which it was expressly agreed that the plaintiff would be entitled to proceed to prove her full claim. That argument is therefore without merit.

[31] It is for these reasons that the court made the order dated 23 February 2024, a copy of which is attached.

A GOVINDJEE

JUDGE OF THE HIGH COURT

Heard: 19-22 February 2024

Date of order and ex tempore judgment: 23 February 2024

Written reasons provided: 18 March 2024

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[1] Ngubane v South African Transport Services

[1990] ZASCA 148; 1991

(1) SA 756 (A) at 784C–F.

[2] Ibid at 785C–D.

[3] MEC for Health and Social Development, Gauteng v DZ obo WZ 2018

(1) SA 335 (CC) para 35.

[4] TN obo BN v MEC for Health, Eastern Cape 2023

(3) SA 270 (ECB).

[5] MSM obo KBM v MEC for Health, Gauteng 2020

(2) SA 567 (GJ)

[6] Mashinini v MEC for Health, Gauteng 2023

(5) SA 137 (SCA) para 25.

[7] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) para 42.

[8] MEC for Health and Social Development, Gauteng Province v Zulu [2016] ZASCA 185.

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