



Reportable:	YES / <u>NO</u>
Circulate to Judges:	YES / <u>NO</u>
Circulate to Magistrates:	YES / <u>NO</u>
Circulate to Regional Magistrates:	YES / <u>NO</u>

**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Case Number: 1098/2018

In the matter between:

VAN DEN BERG RAPHAEL VIVIAN

Plaintiff

And

**MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF HEALTH:
NORTH WEST PROVINCE**

Defendant

Heard: 15 MAY 2024

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be **07 JUNE 2024**

ORDER

I make the following order:

1. The defendant is ordered to pay the plaintiff the amount R2 865 078.00 (TWO MILLION EIGHT HUNDRED AND SIXTY-

FIVE THOUSAND AND SEVENTY-EIGHT RAND) in full and final payment of the plaintiff's claim against the defendant, such payment to be made within 30 days from date of the order, failing which the defendant shall pay interest on such amount from 31 (THIRTY-ONE) days after the order to date of payment.

2. The defendant shall pay the plaintiff's taxed or agreed party and party costs of suit, to date, on the High Court scale, such costs to include (but not necessarily be limited to) the following:

- 2.1. The costs attendant upon the obtaining of the medico-legal reports and/or addendum reports and/or joint minutes, if any, as well as qualifying and/or reservation fees, if any, of the following expert witnesses:

- a. Dr Birrell and Naude;
- b. Dr Collin;
- c. Dr Roper;
- d. A Marais;
- e. N Kotze;
- f. I Morris (actuary); and
- g. The costs of any radiological or other special medical investigation used by any of the aforementioned experts.

- 2.2. The qualifying, reservation and preparation costs, if any, as allowed by the taxing master, of the experts or

whom the Plaintiff gave notice in terms of Rule 36[9][a] and [b]; including but not limited to:

a. Dr Birrell.

- 2.3. The costs attended upon the appointment of counsel, on Scale B, including the reasonable day fees for 14 and 15 May 2024, as well as reasonable preparation and travel;
- 2.4. The costs to date of this order, which shall, subject to the discretion of the taxing master, further include the costs of the attorneys which include necessary travelling costs and expenses [time and kilometres], preparation for trial and expenses [time and kilometres], preparation for trial and attendance at court [which shall include all costs previously reserved]. It will also include the reasonable costs of consulting with the Plaintiff to consider the offer, the costs incurred to accept the offer and make the offer an order of court;
- 2.5. The reasonable costs incurred by and on behalf of the Plaintiff in as well as the costs consequent to attending the medico-legal examinations of both parties;
- 2.6. The costs consequent to the plaintiff's trial bundles and witness bundles, including the costs of 6 [six] copies thereof;
- 2.7. The costs of holding all pre-trial conferences, as well as round table meetings between legal representatives for both the Plaintiff and the Defendant, including

senior-junior counsel's charges in respect thereof, irrespective of the time elapsed between pre-trials;

2.8. The costs of and consequent of the holding of all expert meetings between the medico-legal experts appointed by the Plaintiff [if any];

2.9. Any reserved cost orders, which are unreserved and ordered costs in the cause.

3. The defendant shall pay interest on the plaintiff's taxed or agreed costs of suit at the prescribed statutory rate calculated from 31 (THIRTY-ONE) days after agreement in respect thereof, or from the date of affixing of the taxing master's allocatur, to date of payment.

4. Any payment to be made in terms of this order shall be made into the following account:

NAME: [...]

BANK: [...]

TYPE: [...]

ACC NUMBER: [...]

BRANCH CODE: [...]

REF: [...]

JUDGMENT

DJAJE DJP

- [1] This is an action for damages by the plaintiff in her personal capacity against the defendant for medical negligence during the performance of a hip replacement surgery by the agents and or personnel of the defendant in **2015**. In **2020** the defendant was found to be liable to pay 100% of the plaintiff's agreed or proven damages. The outstanding issue is quantum in relation to loss of income and general damages.
- [2] The parties experts filed reports and completed joint minutes as well. Joint submissions were made on behalf of the plaintiff and defendant and agreed that the statements and documents contained in the various expert reports be admissible as hearsay evidence in terms of section 3(1)(a) of the Law of Evidence Amendment Act 45 of 1988 and section 34(1) of the Civil Proceedings Evidence Act 25 of 1965. The basis for the submission was that it aligned with what was held in **Blyth v Van den Heever 1980 (1) SA 191 (A)** on the admissibility of documents.
- [3] The plaintiff herein went for a hip surgery on **24 June 2015** during which the femoral stem of the prosthesis was inserted far too deep into the femoral shaft. No corrective surgery was done immediately. It is common cause to both parties that there was a further subsidence after the surgery which resulted in the progressive leg shortening and the plaintiff having to receive a built-up shoe. In **2017** a revision surgery was performed on the plaintiff, but the parties agree that it did not cure the period of two

years in which the plaintiff suffered pain from the progressive shortening of the leg. The plaintiff still has a leg length discrepancy of 1cm after the revision surgery in **2017**.

[4] The reports of the experts were dealt with in the joint submission on behalf of the parties as follows:

“5.2. It can be accepted as common cause that further subsidence occurred in the period after the surgery, which subsidence the defendant’s expert described as severe⁷. This subsidence resulted in a progressive leg shortening⁸. This leg shortening resulted in the plaintiff having to receive a built-up shoe.

5.3. The clinical records are indicative of the plaintiff returning to hospital complaining of pain. According to the defendant’s expert, and had the revision surgery been performed earlier, prolonged pain and suffering would have been prevented⁹.

5.4. Even if it is accepted that the revision surgery performed on the plaintiff in 2017 was successful, such surgery did not cure the period of two years in which the plaintiff suffered pain and suffered from a progressively shortening leg. Following the surgery in 2017, the plaintiff still has a leg length discrepancy of 1 cm¹⁰.

ORTHOPAEDIC SURGEONS:

6.1. Relevant for the determination of quantum the plaintiff’s experts opine that the plaintiff will require a second revision hip replacement, which has been accelerated by the failed primary hip replacement.

6.2. The addendum to the Joint Minute (Dr TS Ramokgopa, Dr Naude and Dr DA Birrell) made the following points:

6.2.1. Plaintiff’s experts are of the opinion that the patient is capable of continuing work as an electrician, but not heavy duty work such

as in the mines, but this would anyway have been the case had he had a correct hip replacement the first time. The defendant's expert agrees that he will require a revision hip replacement in the future but only after + 12.5 years due to normal wear and tear and not as a result of the negligent surgery that was carried out during the primary hip replacement.

6.2.2. Defendant's expert observes that the future incapacity relates to any prosthetic joint replacement. In other words, if the first replacement was successful, a similar postulate of early retirement could be true.

6.2.3. The experts agree that all past medical expenses for the revision operation were covered by the State Hospital but past medical expenses such as increased travelling costs, increased private medication etc. related to the second procedure would be justified.

6.2.4. On the revision surgery, plaintiff's experts are of the opinion that the need for a second revision was accelerated by the failed primary surgery, and the "patient therefore now has a claim for the extra revision hip replacement which would be at the private rates around R350 000,00."

6.2.5. The defendant's expert agrees that a revision hip replacement is a possibility but that the revision would be the result of normal wear and tear of the components of the prosthesis and not due to the primary hip replacement.

6.3. The defendant's expert agrees that a revision hip replacement in the future is a possibility that states that the revision would be as the result of normal wear and tear of the components of the prosthesis and not due to the failed primary hip replacement.

6.4. As already stated, supra, this difference is addressed through the use of the median.

CLINICAL PSYCHOLOGISTS:

- 7.1. *The joint minute between the clinical psychologists is to be found on page 631. The underlying report of the plaintiff's clinical psychologist, Leon Roper, is to be found on page 559. The report by the defendant's clinical psychologist is to be found on page 469.*
- 7.2. *The experts agree that the plaintiff presented with a major depressive disorder related to the incident under discussion, and possibly also as well as other factors. They agreed that the plaintiff suffered a loss in his self-esteem related to the physical difficulties resulting from the incident, as well as other factors, such as his reported mild stroke.*
- 7.3. *At this juncture we interpose to state that the plaintiff's previous vulnerabilities and conditions, as well as other factors such as the stroke he suffered, has been considered by the legal representatives in determining the appropriate quantum to be awarded.*
- 7.4. *The experts furthermore agreed that the plaintiff's recreational and interpersonal functioning has been negatively affected by the incident related sequelae, particularly his physical pain and limitations, his social withdrawal and his employment difficulties.*
- 7.5. *They agreed that the plaintiff has been rendered psychologically more vulnerable as a result of the incident and its sequelae.*
- 7.6. *The experts share the opinion that the plaintiff's physical difficulties and neuropsychological difficulties, which cannot be attributed solely to the incident, considering the stroke and head injuries he suffered, contributed to a permanently diminished quality and enjoyment of life.*
- 7.7. *The experts further agreed that the plaintiff's occupational functioning has been negatively influenced by the failed surgeries and the sequelae. Such a negative influence manifested by increased irritability, memory and concentration difficulties, major depressive disorder and self-esteem difficulties.*

7.8. *The experts agreed that the plaintiff would benefit from psychotherapy, between 40 and 50 sessions.*

PSYCHIATRISTS:

8.1. *The joint minute compiled between the psychiatrists are to be found on page 427.*

8.2. *The experts agree that the plaintiff clearly suffered from a major depressive disorder after failed surgery, which disorder was treated adequately, and as such the plaintiff only presented with residual symptoms.*

8.3. *Because of the chronicity of the patient's physical condition and physical pain there is a very high chance of recurrence of the major depressive disorder.*

8.4. *They agree that the plaintiff would benefit from 12 sessions with a psychiatrist.*

8.5. *The experts further agreed that depressive episodes can have a tremendous effect on the functioning of the plaintiff in all aspects of life.*

BIOKINETICISTS:

9.1. *The experts both agreed on the seriousness of the experience of the plaintiff agreed that biokinetic rehabilitation will be of great value.*

9.2. *They both agreed that this rehabilitation should span over a period of 12 months, albeit that they differed on the exact test of rehabilitation.*

9.3. *Such difference has been addressed by the legal representatives in determining the fair and adequate compensation payable.*

9.4. *They further agree that the incident had a high degree impact on the plaintiff, that the plaintiff still experiences pain and discomfort as a result thereof. They further agreed that the plaintiff suffers from emotional distress since the incident.*

OCCUPATIONAL THERAPISTS:

10.1. *The joint minute between the occupational therapists are found on page*

10.2. *In their joint minute the Occupational Therapists agree and point out that the plaintiff required the initial total hip replacement in 2015 due to the development of osteoarthritis as a result of a motorcycle accident in 2003.*

10.3. *They further agree that, in the event of a successful hip replacement in 2015, the plaintiff would have presented with a risk for adjusted approach and execution of leisure tasks and work tasks, exceeding the medium ranges as well as constant (67% to 100% of the time) use of lower limb dynamics.*

10.4. *The experts further agreed that the plaintiff presented with a loss of amenities experienced on both the physical and psychological level, with these two aspects intertwined and thus inseparable, and with the severity of such less intrusive during 2021 and 2022 assessments conducted by the experts as compared to the 2019 assessment conducted by the plaintiff's expert.*

10.5. *They further agreed that the guarded psychiatric prognosis with the prospect of at least two further joint revision surgeries, in combination, probably continues to present catastrophic loss of amenities.*

10.6. *They agreed that the impact of the incident in question has resulted in long-term physical impairment. The plaintiff presented with poorer suitability which leads to a poor job match for his pre-accident duties and thus inability to maintain employment as was indicated pre-accident.*

10.7. *They further agreed that the factual evidence indicates that the plaintiff has been unable to maintain employment consistently since the failed hip replacement and therefore the incident and related sequelae constitute a significant vulnerability for continued unemployment, rendering the plaintiff unemployable.*

- 10.8. *In their joint minute the experts agreed on the occupational therapy from which the plaintiff will benefit. They furthermore agreed on case management, certain devices to assist, general assistance and care as well as transport and accommodation.*
- 10.9. *The joint minute and recommendations agreed upon by the Occupational Therapists were considered by the legal representatives having regard to the difficulties experienced by the plaintiff which are not related to the incident and negligence of the defendant.*
- 10.10 *Having regard to the opinion expressed by other experts, it is clear that the total clinical picture with which the plaintiff presents at the moment is not solely as a result of the negligence of the defendant.*
- 10.11 *The legal representatives therefore discussed and considered the various items opined by the experts, and through the elimination of duplications, and further through the application of contingencies which the legal representatives are regarded as appropriate in the circumstances, the legal representatives agreed on the correct amount to be awarded to the plaintiff in this regard.”*

Loss of earning

- [5] In respect of loss of earning the parties agreed with the actuarial calculations and the contingency deduction of 10% on past loss was warranted. Therefore, the amount of R1 438 384.00 constitutes proper compensation for loss of earnings. Having considered the reports of the experts above I agree that the amount of R1 438 384.00 is appropriate for loss of earnings. The amount of R203 591.00 was agreed as median applied between the approaches of the expert orthopaedic surgeons. On the joint minute of the psychiatrists an amount of R19 619.00 constitutes a fair and reasonable compensation for psychiatric expenses and

R28 890.00 for clinical psychologist expenses. For the biokineticists an amount of R19 334.00 is reasonable. Having considered the joint minute by the occupational therapists the parties agreed that an amount of R755 260.00 constitutes fair and reasonable compensation for this future expense. The total amount being R2 465 078.00.

General Damages

[6] The joint submission by the parties referred to various case law in the determination of general damages. The court in awarding general damages does not intend to punish the defendant but to compensate the plaintiff as a form of solace for the suffering. In **Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194** it was held that:

“---it must be recognised that though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must certainly be uncertain, depending upon the judge's view of what is fair in all the circumstances of the case.”

[7] In determining an appropriate amount for compensation it is important to look at comparable cases and the awards made in those matters. However, these only serve as a guide as each case

should depend on the personal circumstances of the plaintiff, the severity of the condition and the effect thereof on the life of the plaintiff. Having regard to the condition of the plaintiff both parties agreed that the fair and reasonable amount for compensation for general damages is R400 000.00. In my view, this is a fair and reasonable amount for general damages in this matter.

Costs

[8] The plaintiff argued that due to the complexity of the matter the scale of costs in terms of Rule 67A should be on scale C. The defendant in contention argued that there are “no clearly identified features of the case that mark it out as unusually complex, important or valuable”. Therefore, the costs should not be higher than scale B. It is trite that costs are in the discretion of the court and I am in agreement with the defendant’s submission that this is not a complex matter justifying costs on a scale higher than scale B.

Order

[9] Consequently, the following order is made:

1. The defendant is ordered to pay the plaintiff the amount R2 865 078.00 (TWO MILLION EIGHT HUNDRED AND SIXTY-FIVE THOUSAND AND SEVENTY-EIGHT RAND) in full and final payment of the plaintiff’s claim against the defendant, such payment to be made within 30 days from date of the order, failing which the defendant shall pay interest on such

amount from 31 (THIRTY-ONE) days after the order to date of payment.

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- 2.2. The qualifying, reservation and preparation costs, if any, as allowed by the taxing master, of the experts or

whom the Plaintiff gave notice in terms of Rule 36[9][a] and [b]; including but not limited to:

a. Dr Birrell.

- 2.3. The costs attended upon the appointment of counsel, on Scale B, including the reasonable day fees for 14 and 15 May 2024, as well as reasonable preparation and travel;
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- 2.6. The costs consequent to the plaintiff's trial bundles and witness bundles, including the costs of 6 [six] copies thereof;

- 2.7. The costs of holding all pre-trial conferences, as well as round table meetings between legal representatives for both the Plaintiff and the Defendant, including senior-junior counsel's charges in respect thereof, irrespective of the time elapsed between pre-trials;
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J T DJAJE

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING : 15 MAY 2024

DATE OF JUDGMENT : 07 JUNE 2024

COUNSEL FOR THE PLAINTIFF : ADV S J MYBURGH SC

COUNSEL FOR THE DEFENDANT : ADV S OGUNRONBI

