Reportable:	YES/**NO**
Circulate to Judges:	YES/**NO**
Circulate to Magistrates:	YES/**NO**
Circulate to Regional Magistrates	YES/**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MMABATHO

CASE NUMBER: 99/2019

In the matter between:-

MSEGO BEAUTY PHEKO Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR THE DEPARTMENT OF HEALTH, NORTH WEST Defendant

*This judgment is handed down electronically to the email addresses provided by the parties in their respective heads of arguments. The date that the judgment is deemed to be handed down is **3 March 2026.***

JUDGMENT

FMM Reid J

Introduction

[1] This matter concerns a claim for damages arising from alleged negligent medical treatment received by the plaintiff at Joe Morolong Hospital, a provincial hospital under the control of the defendant. This judgment relates to the finding on the merits of the matter.

[2] The two main issues before this Court for determination are: first, whether the plaintiff's application for amendment of her particulars of claim should be granted; and second, whether negligence on the part of the defendant's employees has been proved.

Material factual background

[3] The following facts are either common cause between the parties through evidence led or are established by the pleadings and evidence.

[4] On 15 February 2016, a brick fell on the plaintiff's right index finger, causing an injury that included laceration of the dorsal aspect of the finger and partial avulsion of the nail.

[5] The plaintiff attended Joe Morolong Hospital on the same day. She was attended to in the Casualty Department, where the injured index finger was cleaned, sutured, and bandaged. X-ray images were obtained, and the attending doctor informed the plaintiff that a bone in her finger was broken. She was discharged with a prescription for Panado and given an appointment to return after one month.

[6] In paragraph 3 of its plea, the defendant concedes that the plaintiff attended Joe Morolong Hospital on the following dates: 15 February 2016, 29 March 2016, 27 April 2016, 6 May 2016, and 7 June 2016.

[7] On 29 March 2016, the plaintiff returned to the hospital as scheduled. Further x-rays were obtained, and she was informed that the broken bone had not healed. A further appointment date for three months later was scheduled.

[8] On the subsequent appointed date, the plaintiff was referred to Dr Mbali, a physiotherapist. Further x-ray imaging

confirmed that the broken bone had not healed. She attended three physiotherapy sessions.

[9] The plaintiff thereafter sought private medical treatment. She consulted with Dr MA Rakgole, a private general practitioner in Vryburg, who administered an injection and recommended that she return to Joe Morolong Hospital for further management. She did so and received a prescription for pain tablets.

[10] She then consulted with another private practitioner, Dr Khan in Vryburg, who referred her for x-ray imaging and informed her that the broken bone had not healed. Dr Khan wrote a referral letter to Joe Morolong Hospital, requesting a reply or report-back.

[11] When the plaintiff returned to Joe Morolong Hospital with Dr Khan's referral, she was refused treatment by a Dr Viljoen, an employee of the defendant, who dismissed Dr Khan's recommendation and reprimanded the plaintiff for seeking private medical treatment.

The application for amendment

[12] The legal principles governing amendments are well-established.

[13] In *Affordable Medicines Trust and Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at paragraph 9, the Constitutional Court affirmed that amendments will normally be allowed unless the amendment is made in bad faith or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend, was filed. Paragraph 9 reads as follows:

> *"[9] The principles governing the granting or refusal of an amendment have been set out in a number of cases. There is a useful collection of these cases and the governing principles in Commercial Union Assurance Co Ltd v Waymark NO 1995 (2) SA 73 (Tk) at 76D - 76I. See also Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another 1990 (3) SA 547 (A) at 565G - 566A.) The practical rule that emerges from these cases is that amendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the*

parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'. (See Moolman v Estate Moolman and Another 1927 CPD 27 at 29.) These principles apply equally to a notice of motion. The question in each case, therefore, is, what do the interests of justice demand?"

[14] In terms of Rule 28 of the Uniform Rules of the High Court, an amendment may be granted at any time before judgment. It has been established that applications for amendments may be entertained and allowed after the parties have closed their cases. An application to amend may also be brought during the hearing of an application for absolution and in certain cases even after the conclusion of argument. See *Kasper v Andrè Kemp Boerdery CC* 2012 (3) SA 20 (WCC) at 34C–G.

[15] Applying these principles to the present case, I am satisfied that the amendment should be granted for the following reasons:

15.1. First, the amendment clarifies a ground of negligence already incorporated by implication in paragraph 5 of the original particulars of claim. Upon a proper reading of the grounds of negligence originally pleaded, the aspect

sought to be amended was covered by implication.

15.2. Second, the amendment raises no new matter that could take the defendant by surprise. Both experts dealt with this ground thoroughly in their initial reports, their joint minute, and their testimony in court. Dr Oelofse's testimony in chief on this aspect was not objected to, and both experts were cross-examined on this aspect extensively.

15.3. Third, each ground of negligence is not a separate cause of action, but forms part of the element of fault in delictual matters, as recognised in *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

15.4. Fourth, even if there were any procedural irregularity in the timing of the amendment, Uniform Rule 28(10) empowers this court, notwithstanding anything to the contrary in the rule, at any stage before judgment to grant leave to amend any pleading or document on such terms as to costs or other matters as it deems fit.

[16] The defendant's objection to the amendment is therefore without merit. The amendment is granted.

The expert evidence

[17] Both parties called orthopaedic surgeons as expert witnesses. Dr LF Oelofse testified on behalf of the plaintiff, and Dr WE Williams testified on behalf of the defendant.

[18] The experts compiled joint minutes on 3 March 2024, which were placed before the court.

[19] The experts were in agreement on several material aspects. Both confirmed that the plaintiff sustained an injury to the right index finger, comprising a laceration overlying the dorsal aspect of the distal middle phalanges and a fracture of the distal phalanx.

[20] Both examiners described the plaintiff's complaints as persistent pain in the right hand exacerbated by attempts at normal functional use, and restricted motion of the index

finger and other fingers of the right hand. Dr Oelofse specifically noted that the restriction had worsened between an earlier assessment in 2017 and his later consultation on 30 May 2023.

[21] Significantly, both examiners found severe restriction of motion of all the digits of the right hand, generalised tenderness of the right hand and wrist, and atrophy of the thenar and hypothenar eminences of the right hand (indicating atrophy of the intrinsic muscles of the hand).

[22] Dr Williams, the defendant's expert, found clinical signs consistent with complex regional pain syndrome (CRPS), including: trophic changes of the skin (surface dullness and hypertrichosis), temperature difference between the two hands, atrophy of the subcutaneous tissues, including the palmar pulp and the pulp of the fingers, decreased perspiration of the right hand, and a coarse tremor of the right arm and hand brought on by simple movements.

[23] X-ray imaging revealed a united or partially-united fracture of

the distal phalanx of the index finger with mild residual deformity. Dr Williams also confirmed the presence of osteopenia of the right hand when compared to x-rays of the left hand.

[24] Dr Oelofse expressed the opinion that the plaintiff should have been admitted to hospital and should have undergone a formal debridement and an open reduction and internal fixation of the fracture. This opinion was based on the view that compound fractures require formal debridement, given the proximity of the fingertip to vulnerable structures such as tendons and nerves that may have been involved in the injury.

[25] Dr Williams, for the defendant, initially expressed the opinion that the initial treatment (cleaning, suturing, antiseptic dressing, Zimmer splint, and antibiotics) was appropriate and adequate, even for a compound fracture. He stated that the fracture was not amenable to internal fixation and that the injury had healed well with minimal residual scarring and deformity.

[26] However, Dr Williams went on to make observations that are fatal to the defendant's case. He stated that the plaintiff's long-term impairment is attributable to a complication of the finger injury, namely complex regional pain syndrome type 1 (CRPS1), which *"was not recognised by any of the treating healthcare professionals"*, with the result that the plaintiff never underwent treatment specifically aimed at this condition.

[27] Dr Williams further stated, and I quote directly from the joint minutes: *"it is regrettable that no healthcare professional who attended to the plaintiff could recognise the presence of CRPS and refer her to the appropriate services or professionals for appropriate treatment."* He concluded that the failure of treatment in this case seems attributable to the fact that none of the healthcare professionals who attended to the plaintiff's hand were familiar with the features of complex regional pain syndrome.

[28] Both examiners were unanimous that the plaintiff developed

a persistent and debilitating pain syndrome as a complication of the injury to the right index finger, and that she retains severe impairment that can be expected to limit her substantially in major life activities, including work and leisure activities.

[29] Dr Williams calculated the plaintiff's whole person impairment (WPI) at 15%.

[30] Crucially, the experts' opinions on the appropriateness of treatment diverged in a manner that ultimately supports the plaintiff's case.

Testimony of the expert witnesses

[31] Dr Oelofse testified in a manner that withstood scrutiny. His credibility was not attacked during cross-examination, and his version held up well. He was an impressive witness on all factors normally considered by this Court.

[32] Dr Williams' testimony unfortunately fell to be criticised. Under cross-examination, he was pressed on his use of the

word "regrettable" in the joint minutes. He conceded that his expression and use of the word "regrettable" is synonymous with negligence, but that negligence is not a word "that he can use" as an expert witness.

[33] The significance of this concession is indicative. The defendant's own expert effectively acknowledged that the failure to recognise and treat the plaintiff's condition constituted negligence, albeit using language that avoided the legal term of art.

Negligence

[34] I turn now to the central question: whether negligence on the part of the defendant's employees has been proved.

[35] In *Minister of Safety and Security v Van Duivenboden* (supra) at paragraph 12, the Supreme Court of Appeal reiterated the principles governing liability for negligence. The test is whether a reasonable person in the position of the defendant's employees would have foreseen the reasonable possibility of harm to the plaintiff and would have taken

reasonable steps to prevent such harm.

[36] Applying this test to the facts of the present case, I am compelled to conclude that the plaintiff has proved negligence on the part of the defendant's employees.

[37] The evidence establishes that the plaintiff attended Joe Morolong Hospital on multiple occasions over a period of several months. Despite repeated presentations with ongoing symptoms and failure of the fracture to heal, none of the treating healthcare professionals recognised the developing complication of complex regional pain syndrome.

[38] Dr Williams, the defendant's expert, was unequivocal: the condition *"was not recognised by any of the treating healthcare professionals,"* and *"it is regrettable that no healthcare professional who attended to the plaintiff could recognise the presence of CRPS and refer her to the appropriate services or professionals for appropriate treatment."*

[39] He further stated that the failure of treatment *"seems to be attributable to the fact that none of the healthcare professionals who attended to the plaintiff's hand were familiar with the features of complex regional pain syndrome."*

[40] Under cross-examination, Dr Williams conceded that his use of the word "regrettable" is synonymous with negligence. This concession was correctly made. The failure to recognise a known complication of a common injury, particularly when the patient presents with classic signs and symptoms over an extended period, falls below the standard of care expected of reasonable healthcare professionals.

[41] The situation was exacerbated when Dr Viljoen, an employee of the defendant, refused to heed the referral from Dr Khan and reprimanded the plaintiff for seeking private medical treatment. This conduct not only denied the plaintiff an opportunity for appropriate care but also demonstrated a dismissive attitude toward the plaintiff's genuine medical concerns.

[42] The consequences of this negligence are severe and ongoing. Both experts agree that the plaintiff developed a persistent and debilitating pain syndrome as a complication of her injury. Both agree that she retains severe impairment that substantially limits her in major life activities, including work and leisure. Dr Williams quantifies the whole person impairment at 15%.

[43] Dr Oelofse's testimony supports a finding of negligence against the defendant.

[44] The causal link between the defendant's negligence and the plaintiff's current condition is clear. Had the healthcare professionals recognised the developing CRPS and referred the plaintiff for appropriate treatment, the debilitating progression of this condition might have been prevented or mitigated. Instead, the plaintiff was left without the benefit of treatment specifically aimed at her condition.

[45] I find that the defendant, through its employees at Joe

Morolong Hospital, breached the duty of care owed to the plaintiff. The failure to properly diagnose and treat the plaintiff's condition, particularly the failure to recognise and address the developing CRPS, constitutes negligence for which the defendant is liable.

[46] The defendant is 100% liable for the damages suffered by the plaintiff.

Quantum of damages

[47] The parties have agreed that the determination of quantum should be postponed *sine die*.

Costs

[48] The plaintiff seeks costs on scale C, inclusive of counsel's fees. The general rule is that costs follow the result. The plaintiff has been successful in her claim for amendment and in establishing negligence on the part of the defendant.

[49] There is no reason to depart from the general rule.

[50] Regarding the scale of costs, the matter involved complex medical evidence, including expert testimony from orthopaedic surgeons on both sides. The joint minutes and the testimony addressed nuanced medical conditions including complex regional pain syndrome.

[51] The matter was of sufficient complexity to warrant the employment of senior counsel. In the circumstances, costs on scale C are appropriate.

Order

[52] In the premise, I make the following order:

i) The plaintiff's application for amendment of her particulars of claim is granted.

ii) The defendant is liable for 100% of the plaintiff's proven or agreed damages.

iii) The determination of the quantum of damages is postponed *sine die*.

iv) The defendant is ordered to pay the plaintiff's costs, such costs to include the costs of counsel, on scale C.

FMM REID
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION
MAHIKENG

DATE JUDGMENT RESERVED: **27 NOVEMBER 2025**

DATE OF JUDGMENT: **3 MARCH 2026**

APPEARANCES:

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