

**REPUBLIC OF SOUTH AFRICA**



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

**CASE NO: 2010/29310**

**REPORTABLE**

(1)	REPORTABLE YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
27/2/2014	SIGNATURE

In the matter between:

**ELIZABETH MOKGOTHU RAMONYAI**

**Plaintiff**

and

**L P MOLOPE ATTORNEYS**

**Defendant**

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## JUDGMENT

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### MOKGOATLHENG J

(1) The plaintiff has instituted action premised on the defendant's breach of contract in having caused the plaintiff's claim for damages, which arose from the injury and subsequent amputation of her left leg on 4 March 2006 to become prescribed.

### THE PLEADINGS

(2) The plaintiff in her particulars of claim amplified by viva-voce evidence alleges that her claim became prescribed in the defendant's care due to his failure to timeously issue and serve summons against the Soweto Supermarket CC and other entities whose negligent conduct rendered them liable for the damages she suffered as a result of her injury and its *sequelae*.

(3) Further the plaintiff alleges that "*pursuant to the terms of the defendant's mandate as an attorney specializing in personal injury claims, he was obliged to competently prosecute her claim with reasonable care, skill, and diligence.*"

(4) The defendant admits that "*it was an express, alternatively, an implied or tacit term of his mandate to:*

4.1 *investigate the circumstances relating to the said incident; and*

4.2 do all that is necessary to finalise the claim.

(my emphasis)

(5)Further the defendant pleaded that the plaintiff pertinently instructed him to institute action for damages on her behalf only against the Soweto Supermarket CC, consequently, his mandate was circumscribed and limited only to recovering damages exclusively against the latter.

**THE APPLICATION FOR THE AMENDMENT OF THE PARTICULARS  
OF CLAIM**

(6)The plaintiff's counsel launched an application to amend the particulars of claim to add the allegation that: *"the plaintiff instructed the defendant to recover damages from the Soweto Supermarket CC and/or Baragwanath Hospital and its employees or any other third party liable for her damages."*

(7)The amendment was premised on Dr Schnaid's addendum to his medico-legal-report wherein he stated that the cause of the amputation of the plaintiff's left leg, was attributable to the negligence of Baragwanath Hospital's employees in having delayed to promptly diagnose and treat the plaintiff's popliteal artery injury.

(8)The application was opposed on the basis that it was launched after the plaintiff had testified, further that in adducing evidence the plaintiff did not pertinently testify that she had instructed the defendant to recover damages from Baragwanath Hospital and its employees. The defendant's counsel argued that if the amendment is granted, it would introduce a new cause of action which would prejudice the defendant.

(9) **THE PRINCIPLES GOVERNING THE GRANTING OF AN AMENDMENT:**

*"8.1...The general rule is that an amendment of a notice of motion, as in the case of a summons or pleading in an action, will always be allowed unless, the application to amend is mala fide or unless such amendment would cause an injustice to the other side which cannot be compensated by an order for costs, or in other words, unless the parties cannot be put back for the purposes of justice in the same position as they were when the notice of motion, which it is sought to amend was filed" **Devonia Shipping Ltd v MV Luis (Yeoman Shipping Co Ltd Intervening) 1994 (2) SA 363 at 369 F-I.** "The power of the Court to allow material amendments is accordingly, limited only by considerations of prejudice or injustice to the opponent." See **Erasmus Superior Courts Practice at B1-179.***

(10)It is trite that if an application for an amendment is bona fide it may be granted. In principle there is no objection to a new cause of action or defence being added by way of an amendment, even though it has the effect of changing the character of the action and necessitating the reopening of the case for fresh evidence to be led, where that is necessary to determine the real issue between the parties. See **Myers v Abramson 1951 (3) SA 438 (C) at 449 H-450A; Trans-Drakensburg Bank Limited v Combined Engineering (Pty) Limited 1967 (3) SA 632 (D) at 642H-643A; Morgan and Ramsay v Cornelius and Hollis [1910] 31 NPD 262 at 265; Greyling v Nieuwoudt 1951 (1) SA 88 (O).**

(11)In the absence of prejudice to the other party, leave to amend may be granted... *"at any stage, however negligent or careless the mistake*

or omission may have been, and however late may be the application for amendment.” See **Krogman v Van Reenen 1926 (OPD) 191 at 193; SA Steel Equipment Co (Pty) Limited v Lurelk (Pty) Limited 1951 (4) SA 167 (T) at 175D; Mabaso and Others v Minister of Police and Another 1980 (4) SA 31`9 (W) at 323 D.**

(12)“The fact that an amendment may cause the other party to lose his case against the party seeking the amendment is not, of itself, “prejudice” of the sort which will dissuade the court from granting it. “Prejudice” in this context embraces prejudice to the rights of a party in regard to the subject matter of the litigation, provided there is a causal connection which is not too remote between the amendment of the pleadings and the prejudice to the other party’s rights.” See **South-British Insurance Co Ltd v Gllisson 1963 (1) SA 289 (D) at 296A-C; GMF Kontrakteurs (Edms) Bpk and Another v Pretoria City Council 1978 (2) SA 219 (T) at 222H-223A.**

(13)In her testimony, the plaintiff did not allude to the fact that she was aware that Baragwanath Hospital’s employees were guilty of professional negligence in that they delayed in diagnosing and according treatment to her injured left leg. The plaintiff became apprised of the alleged negligent diagnosis and treatment accorded her by Baragwanath Hospital’s employees and the consequent claim arising therefrom, during her cross-examination when confronted by the defendant’s counsel with Dr Schnaid’s addendum to his medico-legal-report.

(14)The objective reality is, it could not have been possible on 8 June 2008 for the plaintiff to have pertinently instructed the defendant to sue

Baragwanath Hospital and its employees for damages arising from their alleged professional negligence. Consequently, the plaintiff could not have pertinently pleaded that she had also instructed the defendant to sue Baragwanath Hospital and its employees for professional negligence which resulted in the amputation of her left leg.

(15) The application was not acceded to due to considerations of equity, and fairness to the defendant. However, the dismissal of the application does not necessarily exculpate the defendant from being liable for professional negligence, that exigency is an issue requiring a different enquiry as the following exposition will demonstrate.

### **THE LAW**

#### **AN ATTORNEY'S LIABILITY FOR BREACH OF CONTRACT**

(16) *“Professional negligence is the failure by an attorney to act with the competence reasonably expected of ordinary members of the attorney’s profession. An attorney must be meticulous, accountable, ... He or she must serve his client faithfully and diligently and must not be guilty of any unnecessary delay. He or she must once he or she has undertaken the client’s case, not abandon it without lawful reason or excuse. An attorney who fails to explain his or her precise instructions and lays possum invites an adverse inference against him or herself. Where a client’s claim prescribes under his or her watch, he or she is guilty of a breach of his or her mandate and duty to his or her client by his or her failure to present countervailing evidence that his or her mandate and instructions were circumscribed and not open ended.”* (my emphasis)

...“An attorney is liable for the consequence of gross negligence if he or she displays a lack of reasonable skill and diligence in the performance

of his or her duties in matters within his or her field of practise, expertise or knowledge”

...“An attorney’s liability arises out of contract and his or her exact duty towards his or her client depends on what he or she is employed to do. In the performance of his or her duty or mandate, an attorney holds himself or herself out to his or her clients as possessing the adequate skill, knowledge and learning for the purpose of conducting all business that he or she undertakes. If, therefore, he or she causes loss or damage to his or her client owing to a want of such knowledge as he or she ought to possess, or the want of such care he or she ought to exercise, he or she is guilty of negligence giving rise to an action for damages by his or her client against him or her.” (my emphasis) (See **Charlesworth on Negligence**, 4<sup>th</sup> ed., paras. 1032-42; **Clark and Another v Kirby Smith**, (1964) 2 ALL E.R. 835, and **Bagot v Stevens Scanlan & Co.**, (1984) 3 ALL E.R. 577); **Honey & Blanckenberg v law** 1966 (2) SA 43 (R) at p46; See also **Halsbury’s Law of England**, 3<sup>rd</sup> ed., Vol 36, para 135.

(17) There is no defence to a claim of negligence where an attorney delayed in issuing summons and if he or she did so after the claim had prescribed, he or she is guilty of the breach of a duty of care in which the plaintiff’s damages loss was foreseeable. See **Mazibuko v Singer** 1979 (3) SA 258 (W) at 261C-D; **Mouton v Die Mynwerkersunie** 1977 (1) SA 119 (A) at 142-3, **Mlenzana v Goodrick and Franklin Inc** 2012 (2) SA 433 (FB).

### **The Nature of an Attorney's Duties**

(18)The nature of a an attorney's contractual duties encapsulates: " *the implied obligation to devote attention to the client's business with the reasonable care and skill to be expected from a normally competent and careful practitioner... that obligation (is not only a compendious or exhaustive definition of all the duties assumed under the contract created by the retainer and its acceptance).... A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one...To conduct a personal injuries action, presumably the solicitor's specific duties include;*

- (1) *obtaining a medical report;*
- (2) *instructing counsel; and*
- (3) *issuing the claim within the limitation period.*

*The solicitor's failure to carry out some necessary step is normally treated as a breach of the general duty to exercise reasonable care and skill."* See **Jackson & Powell on Professional Negligence Fifth Edition; Midland Bank v Hett, Stubb & Kemp 1978 3 ALL ER 571 at p611.**

### **THE ONUS**

(19)The plaintiff contends that the defendant owed her a duty of care to conduct her case with the requisite skill and expertise expected from a reasonably competent and diligent attorney, and alleges that the defendant's failure to prosecute her claim with reasonable care and skill resulted in her claim becoming prescribed thus rendering her to suffer damages. See **Pilbrow v Pearless De Rougemont & CO[1999] 3 ALL ER 355 CA.** See **Fletcher & Son v Jubb, Booth and Helliwell, (1920) 1 K. B. 275; Van Wyk v Lewis, 1924 A. D. 438 at p. 444; McKerron on the Law of Delict, 5<sup>th</sup> ed., pp. 3-5, 32-37.**



(20)The plaintiff bears the onus to show that the defendant is liable for the damages she has suffered as a consequence of the defendant's breach of his contractual mandate by negligently allowing her claim to become prescribed. The plaintiff must establish not only that her damages were caused by the defendant's breach of duty pursuant to such contract but also that the breach of such duty was reasonably foreseeable for liability to result. See ***Thulo v Road Accident Fund 2011 (5) SA 446 (GSJ); Hatting v Ngake 1966 (1) SA 64 [0]; Wilsher v East Essex Area Health Authority [1988] AC 1074; Malyon Lawrence v Messer & Co [1968] 2 Lloyds Rep 539.***

### CAUSATION

(21)In ***S v Mokgethi en Andere 1990 (1) SA 32 (A) at 39*** Van Heerden JA whose remarks I paraphrase held: "*there is no single and general criterion for legal causation applicable in all instances. A flexible approach is accordingly suggested. The basic question is whether there is a close enough relationship between the wrongdoer's conduct and its consequences to be imputable to the wrongdoer having regard to policy considerations, reasonableness, fairness and justice.*" (my emphasis) It is common cause that the plaintiff's claim became prescribed because the defendant did not timeously issue summons against the Soweto Supermarket CC and Baragwanath Hospital and its employees. See ***Neethling Potgieter and Visser: Law of Delict 6<sup>th</sup> Edition, pp187 to 226.***

### THE DEFENDANT'S MANDATE

(22)The defendant's counsel contended that the defendant's mandate was circumscribed and limited only to recovering damages from the Soweto Supermarket CC. Counsel argued that it was never the plaintiff's

case that she had instructed the defendant to recover damages from any other entity except the Soweto Supermarket CC, neither was it the plaintiff's case that she had instructed the defendant to sue Baragwanath Hospital and its employees for professional negligence, consequently, the plaintiff's claim against the latter did not become prescribed in the defendant's care or within the course and scope of his mandate.

(23) In the alternative, the defendant's counsel submitted that there was a *novus actus interveniens* after the Soweto Supermarket CC's negligent conduct had ceased, which either caused or contributed to the amputation of the plaintiff's left leg, namely the negligently delayed diagnosis and treatment accorded the plaintiff by Baragwanath Hospital and its employees. Counsel in bolstering his argument cited the case of ***Fourie N. O v Hansen and Another 2001 (2) SA 823 (WLD) at 842*** where it was held that a *novus actus interveniens* as a subsequent independent cause, excused the defendant from liability in respect of his initial professional negligent act of having caused the plaintiff's claim to become prescribed. See ***Joubert 2<sup>nd</sup> (ed) The Law of South Africa vol 8 part 1 at para 108.***

(24) To determine the scope of the mandate the defendant was entrusted with, it is necessary to examine the essence and nature of the instructions the plaintiff gave to the defendant. The plaintiff's verbatim evidence in regard to the instructions pertaining to the defendant's mandate is: "*I instructed L T Malope to pursue a claim for damages on my behalf. Counsel; For purposes of clarity Ms Ramonyai what was your mandate to your attorney? I asked them to help me concerning my*

*claim, my leg and the injuries I sustained during the accident. Counsel: Against whom did you want compensation from? There I do not know who had to compensate me. Counsel: So would I be correct to say that the mandate to your attorney was an open mandate to recover damages from whomever is responsible? Yes, I asked my lawyers to help me."*  
 (my emphasis)

(25) The defendant did not confront the plaintiff with a written contract or power of attorney encapsulating the circumscription of the scope and ambit of the mandate the plaintiff instructed him to execute. The defendant did not call any witness to testify on his behalf. He closed his case without testifying, consequently, he did not under oath dispute the plaintiff's evidence that she gave him an uncircumscribed open-ended mandate to recover damages on her behalf from all liable persons whose negligence contributed to the cause of her injury and the consequent amputation of her left leg.

(26) The purpose of pleadings is to define issues, parties will accordingly be kept strictly to their pleas where any departure would cause prejudice. See ***Paarlberg Motors (Pty) Ltd t/a Paarlberg BMW v Henning 2000 (1) SA 981 (CPD) at 987H***. In ***Robison v Randfontein Estate Gold Mining Co Ltd 1925 AD 173 at 198*** the following was said:

*"The object of pleading is to define the issues, and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has wide discretion. For pleadings are made for the court, not the court for pleadings. Where a party has had every facility to place all the facts before the trial*

court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by the appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.” (my emphasis)

(27)The plaintiff only pleaded that the Soweto Supermarket CC was liable for her damages. Although the plaintiff is bound by her particulars of claim, she tendered evidence that she gave the defendant an uncircumscribed open-ended mandate. The mandate obliged the defendant to investigate all aspects of the plaintiff's claim and recover damages from all possible liable persons. Consequently, there is no merit in the defendant's counsel's submission that the plaintiff did not pertinently instruct the defendant to sue Baragwanath Hospital and its employees or that the plaintiff's claim against the latter did not become prescribed in the defendant's care or within the purview of his mandate.

(28)The defendant in accepting the mandate to prosecute the plaintiff's personal injury claim, held himself out as a specialist practitioner having the relevant expertise, knowledge and skill in that field of practise and that he would competently handle the plaintiff's claim in all its facts, determine and identify all persons whose negligence rendered them liable for the plaintiff's damages, and consequent, thereupon, recover the damages from such persons on the plaintiff's behalf.

(29)The defendant had a professional obligation and duty to ensure that he complied with the plaintiff's instructions. In terms of the consent and authority the plaintiff signed on 8 June 2008, she in effect gave the

defendant the mandate to apply and obtain from Baragwanath Hospital all the hospital and medical records relating to her treatment. In breach of his mandate, the defendant failed to request the plaintiff's complete medical and hospital records from Baragwanath Hospital.

(30) Because of the fact that when the plaintiff instructed the defendant, she gave him a portion of her medical and clinical records consisting of *pages 14, 15 and 16* dated 14 March 2006. It should have been obvious to a reasonably competent and diligent attorney that these three pages could possibly not constitute the plaintiff's entire hospital and clinical records in respect of the duration of her hospitalisation. The defendant was aware that the plaintiff was treated and hospitalised on 4 March 2008 and discharged on 15 March 2008. Consequently, the defendant as a reasonably competent and diligent attorney was obliged to institute an investigation regarding the location of the plaintiff's entire medical and hospital records.

(31) The defendant as a reasonably competent, diligent and skilful attorney had an obligation to request the plaintiff's complete medical and hospital records and refer same to an orthopaedic surgeon to compile a medico-legal-report. Such report would have enabled the defendant to be apprised of the nature and extent of the plaintiff's injury and its *sequillae*. The report would also have identified Baragwanath Hospital and its employees as the persons whose negligence was the cause of the amputation of the plaintiff's left leg.

(32) Due to the defendant's failure to request the plaintiff's entire medical and clinical records from Baragwanath Hospital, and seek an

opinion in respect thereof from an orthopaedic surgeon, the defendant was not able to timeously establish whether Baragwanath Hospital and its employees were guilty of professional negligence and whether the plaintiff had a claim against them for the negligently delayed diagnosis and treatment accorded to the plaintiff's injury and the consequent amputation of her left leg. The defendant's failure to properly investigate all aspects of the plaintiff's claim rendered him guilty of the dereliction of his duty of care as an attorney specialising in personal injury claims.

(33) Paradoxically the defendant's counsel in contending that the defendant's mandate was circumscribed to recovering damages only against the Soweto Supermarket CC, cannot logically argue that had the defendant timeously applied for the plaintiff's complete hospital and clinical records and obtained a medico-legal-report pursuant thereto indicating that Baragwanath Hospital and its employees were negligent in not promptly diagnosing and according treatment to the plaintiff's injury, with the consequence that such negligence was the cause which led to the amputation of the plaintiff's left leg, that because the defendant's mandate was circumscribed only to recover damages from the Soweto Supermarket CC, the defendant would pertinently not have apprised the plaintiff of such negligence and consequent claim, and would also not because of his circumscribed mandate have timeously issued summons against Baragwanath Hospital and its employees, and simultaneously prosecute the plaintiff's claim against the latter. Such proposition is obviously untenable and inconsistent with the scope of the duties and obligations of the defendant who when accepting instructions from the plaintiff to recover damages consequent upon her injury and

amputation of the left leg, held himself out as practitioner specializing in personal injury claims.

(34) There is no excuse proffered by the defendant regarding his gross negligent conduct in having allowed the plaintiff's claim against the Soweto Supermarket CC and Baragwanath Hospital and its employees to become prescribed. The plaintiff has shown that the defendant's mandate was uncircumscribed and open-ended, because the defendant's instructions in essence incorporated the mandate to investigate, process, lodge and prosecute the plaintiff's claim to finality with reasonable skill, competence and diligence.

(35) The defendant in causing the plaintiff's claim to become prescribed, failed to act in accordance with the reasonable care, skill and diligence expected of an attorney practising in the personal injury field. Consequently, the defendant is guilty of a breach of contract entitling the plaintiff to recover damages from him. See ***Steyn N.O. v Ronald Bobroff and Partners 2013 (2) SA 311 SCA.***

#### **THE RECOVERABILITY OF THE PLAINTIFF'S DAMAGES**

(36) The defendant has not admitted that if he had timeously instituted action against the Soweto Supermarket CC and Baragwanath Hospital and its employees, the plaintiff would have succeeded to prove her damages. The plaintiff bears the onus to prove on a preponderance of probabilities that she would have succeeded to prove the damages she has suffered due to her knee injury and the amputation of her left leg.

(37)The plaintiff contends that she had a valid claim and would have succeeded to prove her damages against the Soweto Supermarket CC and Baragwanath Hospital and its employees had the defendant timeously instituted action against the said entities. Because of the defendant's professional negligence in having caused the plaintiff's claim to become prescribed, the plaintiff should succeed if she is able to show that the breach of contract by the defendant was the cause of her loss. See ***Thoroughbred Breeders Association v Price Waterhouse (2001) (4) SA 551 SCA.***

(38)The defendant disputes that the plaintiff's left leg was amputated as a result of the injury sustained when she slipped and fell on the premises of the Soweto Supermarket CC and pleads that *"the Soweto Supermarket CC took all reasonable steps to ensure the safety of its customers by regularly sweeping and/or cleaning the floor of its supermarket, and alleges that the incident was caused partly by the negligence of the Soweto Supermarket CC and partly by the negligence of the plaintiff in that she failed to keep a proper lookout, and that having regard to the plaintiff's negligence, such damages as she may be awarded should be reduced by the extent of the degree of her negligence as contemplated in Section 1 of the Apportionment of Damages Act 34, 1956."*

### **THE PLAINTIFF'S EVIDENCE ON THE MERITS**

(39)The plaintiff alleges that the cause of her injury was due to the negligence of the Soweto Supermarket CC in having left maize meal strewn on the floor of its premises. On 4 March 2006 at about 11h00 she attended at the Soweto Supermarket CC to purchase eggs. She was the



only customer shopping in the aisle. When she turned and traversed the aisle her gaze was focused on the top shelves where the eggs were displayed. She did not look down at the floor.

(40) Whilst walking in the aisle she slipped, fell and suffered a knee injury which subsequently led to the amputation of her left leg. After investigating the circumstance attended to her fall, she realised that she had slipped and fallen as a consequence of stepping on maize meal strewn on the aisle. There was nothing she could have done to avoid stepping on the maize meal because she could not have anticipated its presence on the aisle.

(41) She does not know how the maize meal got spread on the aisle. During the time she was in the supermarket no-one swept the maize meal strewn on the aisle. The proprietor of the Soweto Supermarket CC and its employees due to their negligence are to blame for her injury which led to the amputation of her left leg because of their failure to sweep the maize meal from the aisle in order to prevent same from posing a danger to customers.

(42) She was taken to Baragwanath Hospital where she received treatment and was hospitalised. On 5 March 2006 her left leg was amputated. She was fitted with a prosthesis and was discharged on 15 March 2006. She is unable to sit or stand for long periods and is unable to walk long distances.

(43) When she instructed the defendant to claim damages on her behalf, she handed him a portion of her hospital records consisting of three

pages numbered 14, 15 and 16 respectively. She became aware of the existence of the remainder of her hospital records in court when confronted with same by the defendant's counsel.

(44)She was not aware of the negligently delayed diagnosis and treatment accorded her by Baragwanath Hospital and its employees, or that such delay caused the amputation of her left leg. Before her accident she was employed as cleaner and a tea server earning R2 200 per month. She did not return to her pre-accident employment because she was unable to perform her duties. Subsequent to her discharge she has developed pain in her lumbar and cervical spine. She also experiences pain in her stump.

#### **THE EVIDENCE DR SCHNAID**

(45)In March 2012, he received additional copies of the plaintiff's hospital records. After perusing and analysing same, he compiled an addendum to his initial medico-legal-report. In his view, the diagnosis and treatment accorded the plaintiff by Baragwanath Hospital and its employees was not in accordance with acceptable medical standards.

(46)The cause of the amputation of the plaintiff's left leg was attributable to the negligence of Baragwanath Hospital and its employees in having inordinately delayed over six hours before diagnosing and treating the plaintiff's popliteal artery injury. There was a 70% chance that the plaintiff's left leg would have been saved if the plaintiff was timeously diagnosed and accorded proper treatment by Baragwanath Hospital and its employees.

(47)The plaintiff has sustained a traumatic above left knee amputation with soft tissue injuries to her shoulders, lumbar and cervical spine. The plaintiff experiences pain which radiates to both shoulders and to her spine. The plaintiff also experiences pain in the left femoral stump. She wears a prosthesis. Physically assessed he does not believe that the plaintiff can resume her pre-accident employment duties.

(48)The prognosis of the left stump, lumbar and cervical spine and both shoulders is poor. The plaintiff has suffered permanent disability in her lumbar and cervical spine, and left leg which have resulted in the loss of amenities of life. The plaintiff's manual and ambulatory capacity has been severely compromised. The plaintiff endured severe pain at the time of the accident and the amputation of her left leg. The pain is still present albeit to a lesser extent.

(49)In respect of the future medical and hospital expenses the need for the lumbar decompression and cervical decompression is approximately 20%. The revision of the stump will be necessary during the life of the plaintiff, and as such, a new prosthesis will be required. He estimated the costs of future medical, hospital and future treatment in the amount of R500 000.00 as categorised in his list.

#### **THE EVIDENCE OF DR GREEF**

(50)In his opinion given the plaintiff's education, intellectual level, employment history and the amputation of her left leg, the plaintiff has no residual earning capacity. He calculated the plaintiff's future earnings based on her actual monthly earnings of R2 200.00 with an added annual salary increment of 7%. The plaintiff's was likely to continue

employment as an unskilled worker until the normal retirement age of 60.

### **THE EVALUATION OF EVIDENCE**

(51) The only evidence regarding the plaintiff's injury and amputation of her left leg is the version tendered by the plaintiff. The defendant has raised the defence of contributory negligence against the Soweto Supermarket CC and Baragwanath Hospital and its employees. Consequently, the defendant bears the onus to prove such alleged contributory negligence against these two entities on a balance of probabilities. The defendant has not adduced any evidence in that regard. See ***Siman & Co (Pty) Ltd v Barclays National Bank Ltd [1984] 1 All SA 87 (A) at 115.***

(52) In any event, the ***Apportionment of Damages Act*** is not "*applicable to a claim for damages for breach of contract where the breach consists of the negligence of a professional duty, consequently, it is incompetent for this court to determine whether and to what extent the plaintiff's claim should be reduced having regard to the degree in which the claimant was at fault in relation to the damage.*" In any event, the plaintiff did not contribute to the ultimate harm. See ***Thoroughbred Breeders Association (supra).***

(53) In my view the defendant's submission in invoking *novus actus interveniens* as a defence supposedly exculpating him from professional negligence is untenable, the fact whether Baragwanath Hospital and its employees were guilty of professional negligence in not timeously diagnosing and treating the plaintiff's knee injury is irrelevant, because

the plaintiff only became aware of the alleged professional negligence in court. In any event, the fact that such alleged professional negligence constituted a *novus actus interveniens* which interrupted the causal effect of the Soweto Supermarket CC's original negligent conduct is irrelevant, having regard to the unlimited, uncircumscribed, open-ended mandate the plaintiff gave to the defendant. See ***Topham v Member of the Executive Committee for the Department of Health Mpumalanga [2013] JOL 30895 (SCA)***.

(54)The defendant's counsel argued that the plaintiff cannot just contend that because she fell after stepping on the spilled maize meal on the premises of the Soweto Supermarket CC, the latter was liable for her damages. I agree. The plaintiff still has to prove that her injury and its *sequelae* were not only attributable to the negligence of the proprietor and employees of the Soweto Supermarket CC but were also attributable to the professional negligence of Baragwanath Hospital and its employees.

(55)Counsel cited the case of ***City of Salisbury v King 1970(2) SA 528 (RA) at 528H-529A*** in support of his argument where it was held:

*"presence of vegetable matter on the floor of the market during hours is not, in itself, prima facie evidence of negligence on the part of the appellant.*

*The onus rested on the respondent to show that the appellant was in some way negligent in allowing the particular vegetable matter on which the respondent slipped and fell to be on the floor of the market at the place where and at the time when the accident occurred."*

(56) In my view, this judgment is not applicable to the present matter because the Soweto Supermarket CC's by its admission of liability it acknowledges that its employees were negligent in having failed to take reasonable precautionary measures to sweep the strewn maize meal from the aisle and thereby prevent same from posing a danger to its customers.

(57) It is unsustainable for the defendant's counsel to argue that nothing prohibited the plaintiff to subpoena the proprietor or employees of the Soweto Supermarket CC to inform the court of the efforts made to warn customers of the danger the spilled maize meal posed, and what steps were taken, if any, to prevent the maize meal from being strewn on the aisle.

(58) The Soweto Supermarket CC has admitted liability to the plaintiff and offered to settle the plaintiff's claim by offering the amount of R85 000 plus costs. The plaintiff has discovered the letters encapsulating the settlement proposals suggested by the Soweto Supermarket CC, which correspondence is not privileged vis-à-vis the plaintiff and the defendant. See ***Jili v South African Eagle Insurance Co Ltd 1995 (3) SA 269 at 275A-D (N)***. Consequently, there was no obligation on the plaintiff to call the proprietor or employees of Soweto Supermarket CC as witnesses to testify as to how the maize meal became strewn on the aisle and what measures were taken to warn customers of the danger the maize meal presented.

(59) Because of the fact that maize meal was spilled on the aisle in the premises of the Soweto Supermarket CC to which customers had

access, its proprietor and employees should have foreseen the possibility of customers slipping and falling on the strewn maize meal. Consequently, the proprietor and employees had a duty of care to take reasonable precautions to warn customers of the strewn maize meal as it posed a danger. The proprietor and employees also had a duty to sweep the maize meal from the aisles to prevent customers from stepping thereon with the resultant dangerous consequences.

(60)I concur with Bam AJ in the judgment of ***Niemand v Old Mutual Investment Group Property Investment (Case NO. 35421/2009)*** reported as **(2012) ZAGPPHC 87** at page 7 delivered on 1 June 2012, where he made the following comments: *"Although there is no evidence on record at what time the spillage had occurred, and how it came to be on the floor, if the location whereof was spilt is borne in mind, the plaintiff's fall could have been prevented if there had been proper monitoring and cleaning of the area after 06h00 proper monitoring of the area, to my mind would, have constituted reasonable precautions to avoid injury to any person."*

(61)In ***Roets v Main Market (2006) ZANWHC) 61 at para 12***, Mogoeng JP (as he then was) referring to ***Brauns v Shoprite Checkers (Pty) Ltd 2004 (6) SA 211 ECD at 217 (F)*** and ***Probst v Pick n Pay Retails (Pty) Ltd 1998 2 ALL SA 186 (W) at 200 D***, made the following comments *"As a matter of law, the defendants (the supermarket) owed a duty to persons entering their shop at Southgate during trading hours, to take reasonable steps to ensure that, at all times, the floor was kept in a condition that was reasonably safe for shoppers, bearing in mind that they would spend much of their time, during trading hours in the shop*

*with their attention focused on goods displayed on the shelves, or on their trolleys and not looking at the floor to ensure that every step they took is safe."*

### **THE EXECUTION ON THE JUDGMENT AGAINST THE SOWETO SUPERMARKET CC**

(62)There is no merit in the defendant's counsel's submission that the plaintiff has failed to lead any evidence in respect of the Soweto Supermarket CC's financial ability to pay any damages the plaintiff may have proved if she obtained judgment in her favour, or that it is unknown whether the Soweto Supermarket CC at the time of the trial still existed or was making a profit. Counsel also erroneously argued that nothing prohibited the plaintiff from calling the proprietor of Soweto Supermarket CC or its auditors in order to prove its ability to pay the plaintiff in satisfaction of any judgment granted against the latter.

(63)There is no legal onus in law on the plaintiff to prove these exigencies, all the law requires is that the plaintiff prove that the Soweto Supermarket CC's contributory negligence rendered it liable for the damages she suffered. The judgment the plaintiff obtains entitles her to extract payment in satisfaction thereof from the Soweto Supermarket CC.

(64)The plaintiff has shown that she had a valid claim and would have succeeded to prove same on a balance of probabilities against Soweto Supermarket CC and Baragwanath Hospital and its employees in respect of the damages she has suffered consequent to the injury to her left leg and the subsequent amputation thereof. The plaintiff has also



proven the damages she has sustained and shown that because of the defendant's professional negligence, the possibility for the recovery of her damages has been frustrated by the defendant's breach of his contractual mandate. See *Thoroughbred Breeders Association (supra)*.

**THE EVALUATION OF EVIDENCE REGARDING GENERAL  
DAMAGES AND FUTURE LOSS OF EARNINGS**

(65) In respect of future loss of earnings, medical and hospital costs, the defendant's counsel's submission that because Dr Schnaid is not an occupational therapist he was unqualified to testify regarding the plaintiff's ability to resume her employment after being fitted with a prosthesis or that he was not in a position to give clear evidence as to the actual reasonable costs the plaintiff might have sustained in relation to future medical and hospital expenses, that consequently, the plaintiff has failed to prove the damages she has suffered in this regard, is unsustainable.

(66) It is not an absolute requirement that an occupational therapist is the only person whose expertise qualifies him or her to proffer an opinion regarding the plaintiff's ability to perform work of a physical nature after suffering lumbar and cervical spine injuries and having had her left leg amputated. In his testimony Dr Schnaid showed that he has sufficient expertise and experience as an orthopaedic surgeon which qualifies him to express an opinion regarding the plaintiff's physical ability to perform the duties she did prior to the amputation of her left leg and permanent injury to her lumbar and cervical spine.

(67) Dr Schnaid's evidence regarding the plaintiff's permanent physical disabilities which have adversely affected her ability to perform her pre-accident employment duties was uncontroverted. The plaintiff's evidence that the amputation of her left leg and the injury to her cervical and lumbar spine have permanently disabled her to such an extent that she is not able to lift heavy objects and move about with same freely in the performance of her pre-accident duties was not disputed.

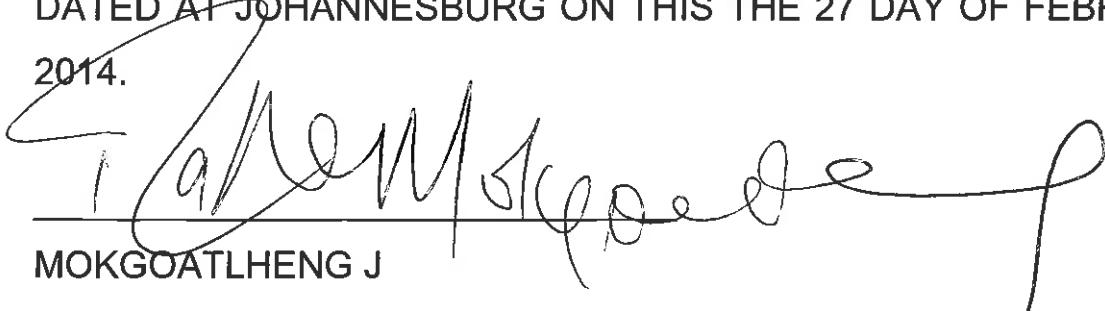
(68) Regarding the damages to be awarded, the facts in the present matter rhyme with facts in the case of *Van Deventer v Premier of Gauteng 2005 JOL 16070 (T)* where the plaintiff, a 49 years old female, healthy, extremely active and independent, engaged in dancing, walking, playing pool and darts and loving to socialise, became withdrawn due to her amputated leg, was awarded damages in the amount of R300 000.00, which at present is valued at R460 000.00. In my view, having regard to the plaintiff's permanent injuries, an award of R500 000.00 in respect of general damages is reasonable and fair.

#### THE ORDER

(69) In the premises the following order is made, the defendant is ordered to pay the plaintiff the amount of:

- (a) R500 000.00 in respect of general damages;
- (b) R500 000.00 in respect of future medical and hospital expenses and costs;
- (c) R528 687.00 in respect of future loss of earnings;
- (d) the defendant is also ordered to pay interest on all the aforementioned amounts at the rate of 15.5% a tempora morae from the date of judgment; and
- (e) the costs of the suit.

DATED AT JOHANNESBURG ON THIS THE 27 DAY OF FEBRUARY  
2014.

A handwritten signature in dark ink, appearing to read 'Mokgoatlheng J', written over a horizontal line.

MOKGOATLHENG J

JUDGE OF THE HIGH COURT

DATE OF HEARING: 21 FEBRUARY 2014

DATE OF JUDGMENT: 27 FEBRUARY 2014

ON BEHALF OF THE PLAINTIFF: M MASHABA

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