REPUBLIC OF SOUTH AFRICA

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

Case number: 17077/2012

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No
(3) REVISED.

11 DECEMBER 2014 **R M ROBINSON**

In the matter between:

VUYUSILE EUNICE LUSHABA Plaintiff

and

THE MEC FOR HEALTH, GAUTENG Defendant

JUDGMENT

ROBINSON AJ

1 This is an application for leave to appeal against the finding made by this court on the merits of this matter on 16 October 2014 as well as the order on costs made on 26 November 2014. I shall assume in favour of Messrs Macheke and Matlou and Dr Cele that they are represented in this application.

THE APPLICATION ON THE MERITS

2 Mr Khoza SC, who now appears with Mr Latib for the defendant, argued that the evidence of the expert witnesses, Drs van den Heever and Mashamba should be ignored. This is a rather startling submission, considering:

2.1 the joint expert notice, which left no relevant disputes between the parties;

2.2 the absence of any meaningful challenge to the evidence of the plaintiff's witness, Dr Van den Heever;

2.3 the defendant's consistent stance up till now that it was entitled to defend the matter because of the views expressed by Dr Mashamba;

2.4 the absence of any basis, suggested by Mr Khoza or otherwise, upon which this court should reject the evidence of Dr van den Heever, which evidence it accepted in its entirety.

3 Mr Khoza attempted to avoid the logic of the joint minute by arguing that a duty only arose on the defendant to perform the caesarean once a diagnosis of abruptio placentae had been made. This was not the case of the defendant during the trial, nor was this ever put to Dr van den Heever. In any event, I fail to comprehend how the defendant could render that which is urgent not urgent by failing to identify the urgency as such. The argument appears to me to ignore the consideration that the plaintiff presented at a hospital and that, as such, she was entitled to treatment that would avoid the tragedy that did result. The tragedy was avoidable. This is clear from the uncontested evidence of Dr van den Heever on the effect of the heartbeat. In the absence of an explanation from the defendant for the failure to act expeditiously, it must be assumed that it had no explanation.

4 In these circumstances there is nothing to detract from the general rule that if a person goes to a hospital the hospital authorities are then under a duty of care in their treatment of her.[1] As was stated by Lord Denning:

> Whenever they accept a patient for treatment they must use reasonable care and skill to cure him of his ailment. The hospital authorities cannot, of course, do it by themselves. They have no ears to listen through the stethoscope, and no hands to hold the knife. They must do it by the staff which they employ, and, if their staff are negligent in giving the treatment, they are just as liable for that negligence as is anyone else who employs others to do his duties for him.

5 The decision in *Ntsele v MEC for Health, Gauteng Provincial Government*[2] is to the same effect.

6 It is further of significance that none of the hospital's employees came to testify, apart from Dr Jeebodh, but it has never been the plaintiff's case that Dr Jeebodh was negligent. A judge

> … should not be diverted away from the inference of negligence dictated by the plaintiff's evidence by mere theoretical possibilities of how that outcome might have occurred without negligence : the defendants' hypothesis must have the ring of plausibility about it ...[3]

7 At the close of the plaintiff's case, after Dr van den Heever had testified, there was

> … sufficient evidence which gave rise to an inference of negligence on the part of one or more of the medical staff in the employ of the MEC who attended on her. In that regard it is important to bear in mind that in a civil case it is not necessary for a plaintiff to prove that the inference that she asks the court was the only reasonable inference, it suffices for her to convince the court that the inference that she advocates is the most readily apparent and acceptable inference from a number of inferences ... That being so, the MEC, in failing to adduce any evidence whatsoever, accordingly took the risk of a judgment being given against him. After all, it was open to the MEC to adduce evidence to show that whilst Ms Goliath was undergoing surgery, reasonable care had indeed been exercised by his employees. That he did not do. Nor, for that matter, was so much as a version put during cross-examination to either Ms Goliath or Dr Muller on behalf of the MEC. Moreover, no explanation was advanced as to why the medical staff who attended on Ms Goliath were not called as witnesses. It may well be that in these circumstances an inference may be justified that the MEC feared that if one or more of them were to enter the witness-box, such person's evidence would expose facts unfavourable to his case. Accordingly, as the matter had been fully explored in the evidence, at the conclusion of the trial the task of the court was to decide whether, on all of the evidence and the probabilities and the inferences,

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1 Lord Denning in *Cassidy v Ministry of Health (Fahrni, third party)* [1951] 1 All ER 574 at pp 584-585 and see p588

2 [2013] 2 All SA 356 (GSJ)

3 *Ratcliffe v Plymouth & Torquay Health Authority* at [48] as referred to in *Goliath v the Member of the Executive Council for Health in the Province of the Eastern Cape.* Case no 85/2014 Supreme Court of Appeal

> Ms Goliath had discharged the onus of proof resting upon her on a preponderance of probability.[4]

8 In this case, whilst the defendant called two witnesses, namely Dr Mashamba and Dr Jeebodh, it called no witness to deal with the period during which the plaintiff claimed the defendant's employees were negligent. Thus no witnesses were called to testify about the period between 12h00 and 13h45 and to explain why the emergency caesarean was not performed during that time and why the defendant's employees at the hospital failed to react to the presenting complications such as the irregular heart rate, which was indicative of foetal distress with the reasonable possibility of permanent damage to Menzi. There was also a complete failure of evidence to explain why the defendant's employees failed to take cognisance of the plaintiff's complaints of discomfort and pain which indicated potential complications and possible damage to Menzi.

9 In circumstances where the agreement between the experts is that the plaintiff's symptoms of lower abdominal pain, lower blood pressure and dizziness were indicative of abruptio placenta until proven otherwise and that the caesarean should have been done as soon as possible after 12 o'clock most likely with a better outcome, it is not possible to conceive that another court may arrive at a different conclusion on the merits. That the defendant now submits that the expert evidence should be disregarded is perhaps supportive of the view that there is no such possibility. The defendant relied greatly upon the view of Dr Mashamba that the fact that the plaintiff first presented at the MOU excluded the obligation for an emergency caesarean to be performed. If however it is accepted that the defendant in law has a duty to ensure that the hospital employees at the hospital where the plaintiff presented herself treated herewith reasonable skill, then it must also be accepted that, when she presents as an emergency, she is entitled to reasonably skilled emergency treatment. That she only got 1 hour and 45 minutes after presenting herself and by then it was too late.

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[4] *Goliath v MEC for Health in the Province of the Eastern Cape*, supra at [19]

10 No defence is pleaded by the defendant, apart from a bare denial which even includes a denial that it has a duty of care towards the plaintiff. No defence was revealed in the expert report of Dr Mashamba. The joint expert minute disclosed no relevant disagreement between the experts and no basis for a denial of negligence. The plaintiff was entitled to present her evidence on the basis of this factual matrix. Had the defendant decided to change course, it was incumbent upon it to make clear to dr van den Heever in cross examination that the agreement evident in the joint minute was withdrawn because of the MOU issue.

11 Dr Mashamba had no personal knowledge of the MOU and did not know whether it employed a doctor or not. No reason was advanced why the MOU should be exempt from the general duty on the hospital to treat an emergency as such. Indeed, it appears that the MOU did realise that something serious was remiss as it referred the plaintiff to the labour ward. Dr van den Heever's evidence that the plaintiff's extremely low blood pressure meant that she had to be wheeled from the MOU to the labour ward was not challenged. That means that between 12h00 and 13h00 the defendant's employees did nothing to attend to the emergency situation presented by the plaintiff.

12 There is nothing really to contest the evidence of Dr van den Heever that, with a low blood pressure the plaintiff presented at the MOU, the plaintiff should immediately have been transferred to the labour ward. His evidence in this regard was that, with the clinical signs the plaintiff presented, she should *"wherever she was initially seen at 12h00 she must have been transferred as an emergency within minutes to the labour ward. There is no excuse for an hour delay even if the MOU is some distance from the labour ward. They could have put her on a trolley and wheeled her. I do not know what the setup in the Johannesburg Hospital is, we do not have any notes between*

12h00 and 13h00."[5]

13 The defendant further ignores entirely the experts' agreement that was unacceptable that nothing happened between 12h00 and 13h00. As Dr van den Heever testified, there are no notes between 12h00 and 13h00 apart from the initial observations at 12h00. No action was taken to look for the cause for the low blood pressure and the patient's symptoms and complaints. It was only at 13h00 that a provisional diagnosis was made and then again at 13h45.

14 It is evident from the evidence of Dr van den Heever that it was never put to him that it could not be expected of midwives to appreciate the importance of a heavily pregnant woman with such an extreme low blood pressure. To the contrary, his undisputed and unchallenged evidence was that the plaintiff should immediately upon the recordal of the low blood pressure, have been transferred to the labour unit.

15 In these circumstances, the application for leave to appeal on the merits is dismissed with costs.

THE APPLICATION FOR LEAVE TO APPEAL ON THE COSTS ORDERS

16 On 20 February 2013, Mr Masheke, the legal advisor of the defendant, went on oath to say that the defendant has no relevant documents in his possession. At that stage the summary of the opinion of Dr Van den Heever and liability bundle had not yet been filed and delivered to the defendant. That was done only in August 2013. Accordingly, and when Mr Masheke testified that he had in his possession pleadings and notices, such notices could not have included the medical records pertaining to the antenatal and delivery records. The submission made by Mr Khoza that those notices did include these records must, accordingly, be rejected.

17 Mr Masheke went on oath in his rule *nisi* affidavits to claim that the head of the

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[5] Record p53

institution where the alleged damage occurred is *"requested to provide copies of the claimant's medical records related to the instance"*.[6] He also states that copies of the medical record are forwarded to the State Attorney once received from the institution.[7]

18 In this case, Mr Masheke says that he and Dr Cele, the medico legal advisor at the department, consulted with the employees involved in this matter at the Charlotte Maxeke Johannesburg Academic Hospital.[8] Mr Macheke does not state when he requested the hospital to provide the records, he does not identify the records he would have received, he does not attach a copy of the relevant letter, he does not identify the employees he and Dr Cele consulted with and he does not state when he would have forwarded the antenatal and delivery records to Mr Matlou.

19 Mr Macheke admits that Dr Mashamba's report was forwarded to him. That report very clearly states that the antenatal records had not been provided to Dr Mashamba. Dr Mashamba's report is entirely devoid of any indication of defence on the merits. Therefore, when Mr Masheke and Dr Cele say that they fully considered the merits based upon the medical opinion that clearly supported a reasonable defence, they cannot be said to have acted reasonably and rationally. No defence is exhibited and no defence has been pointed to. No defence could have been determined in the absence of the relevant records.

20 A determinative issue here is that these records, whether they were in possession of Messrs Macheke, Matla and Dr Cele, or not, were not forwarded to Dr Mashamba. All of these witnesses say that they relied totally on the opinion of Dr Mashamba about whether they should proceed with the defence or otherwise. Clearly, it was their duty to obtain the medical records and form a view as to the merits of the case. This is evident from their own evidence and the submission that the responsibility for the decision to

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6 [8] p 41
7 [10] p42
8 [19] p44

proceed rested squarely with counsel is contradicted by the evidence of these witnesses.

21 The medico legal advisor, Mr Macheke, the legal advisor and Mr Matlou, the State Attorney attending to the matter, were content to rely on the opinion of an expert which (1) revealed no defence and (2) was made without the assistance of the vital medical records.

22 In these circumstances I am of the view that there is no reasonable prospect that another court may come to a different conclusion on the costs and, insofar as this aspect of the application for leave to appeal is concerned, leave is likewise refused.

CONCLUSION

23 In the circumstances I make the following order:

Leave to appeal the orders of 16 October 2014 and of 26 November 2014 is refused, with costs, such costs to include the costs of two counsel on the part of the plaintiff.

R M Robinson AJ
04 February 2015

Date of Hearing: 02 December 2014

Date of Judgment: 02 February 2015

Appearances:

For Plaintiff: Adv. Pillay SC

For Respondent: Adv. Khoza SC