

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG HIGH COURT DIVISION, PRETORIA

Case no: 31590/2020

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

DATE 16/10/2024 SIGNATURE

In the matter between:

NONYANISO MNTIMBA

PLAINTIFF

And

THE MEMBER OF THE EXECUTIVE COMMITTEE FOR HEALTH

DEFENDANT

JUDGMENT

MAKHOPA, J

- [1] The plaintiff instituted a claim against the defendant for medical negligence which she suffered while under the care of the defendant's employees from the 26 to 31 December 2018.
- [2] By agreement between the parties the issue of liability was separated from the remaining issues and determined first.
- [3] By agreement paragraph 1 to paragraph 9.2 of the particulars of claim including the defendant's plea constitute a proper determination of liability.
- [4] It is common cause that on the 26 December 2018 the plaintiff was shot on both lower limbs and sustained gunshot wounds. She was admitted and treated at Tambo Memorial Hospital from 26 to 31 December 2018.
- [5] The parties agreed further that the clinical and hospital records constitute admissible hearsay evidence in terms of the provisions of section 3 of the Law of Evidence Amendment Act, 45 of 1988 and section 34 of the Civil Proceedings Evidence Act 25 of 1965.
- [6] The agreement relates to the admissibility and not the weight of the evidence. The court admitted and marked the clinical and hospital records as Exhibits A1 to A8.
- [7] It is further common cause that the defendant treated the plaintiff and had a duty of care not to act with negligence towards the plaintiff. Unfortunately, while she was still in hospital her right leg above the knee was amputated.
- [8] The issues before this court is whether there was negligence on the part of the medical and nursing staff of the hospital in treating the plaintiff.

- [9] The court must determine whether such negligence caused or contributed to the amputation and other pleaded sequelae suffered by the plaintiff. It must be determined further whether there is negligence wrongfulness and causation on the part of the defendant.
- [10] On behalf of the plaintiff Professor Veller testified. He is a vascular surgeon. A vascular surgeon is a specialist surgeon that focuses on injuries to arteries and veins other than those located in the heart and brain.
- [11] He confirmed the summary of his evidence uploaded on CaseLines¹. He testified that in gunshot wounds, thrombosis is often caused by barotrauma which caused an injury to the innermost smooth layer of blood vessel.
- [12] According to Prof Veller with reference to the medical records made available to him on 29 December 2018, the plaintiff first suffered paraesthesia (loss of sensation) which was followed by paralysis (loss of movement). This led to what is called Ischemia.
- [13] According to Prof Veller, when confronted with this condition the nurse should have reported it to a doctor who would have been able to interpret it.
- [14] Prof Veller² commenting on Dr Tsotetsi's statement in paragraph 8 of the joint minute where Dr Tsotetsi says, "the plaintiff had an uncommon complication". Prof Veller said it is not uncommon and that it is very well described. He further testified that in the event of popliteal injury, there is a 30% chance of loss of the lower limb.

¹ CaseLines 008 – 78 to 93.

² CaseLines 009 – 4.

- [15] Sr E. Jansen Van Rensburg a registered nurse, testified on behalf of the plaintiff. She confirmed her report³. She testified that the plaintiff had signs of ischemia which is a condition where the plaintiff had pain and decreased sensation. The nurses were supposed to report the condition immediately to a doctor. Only a doctor can make a diagnosis of ischemia.
- [16] She testified further that, the pedal pulse as noted on the hospital records, is not reasonable and was substandard. The strength of the pulse was important in order to identify any changes in the condition of the patient.
- [17] Professor JHR Becker is a professor of surgery, he testified on behalf of the plaintiff that if a hospital cannot treat a patient, the patient must be transferred immediately.
- [18] He testified further that in his opinion due to the injuries suffered by the plaintiff, she should never have been admitted to Tambo Memorial Hospital and rather she should have been referred to Charlotte Maxeke Johannesburg Hospital.
- [19] According to Prof. Becker it is incumbent that the nursing staff must phone the doctor when they notice a change in the condition of a patient. When there was a loss of sensation on the plaintiff on 29 December 2018 a fasciotomy could have been done or a sister, matron or doctor in the casualty department should have been informed.
- [20] He testified further that had there been an intervention at the loss of sensation, the plaintiff's leg would most probably been saved.

³ CaseLines 008 – 66.

- [21] The defendant called Dr Tsotetsi to testify on its behalf. He is a vascular surgeon. In his report⁴ he opines “There were serial checks to evaluate the limb perfusion for at least 48 hours. Lower limb fractures are treated on an urgent basis, they are not an emergency. The delay in operating for the fracture is unlikely to have contributed to the limb loss.
- [22] Dr Tsotesti further opines in his report “No sensation and decreased (impaired motor function) suggests an immediately threatened limb at the least most likely the limb was not viable at the time of transfer”
- [23] Dr Tsotetsi refuted the plaintiff’s expert witness testimony that there was poor monitoring, poor recording and a failure to act on changes in the plaintiff’s condition. According to Dr Tsotetsi the plaintiff was monitored and when the plaintiff complained the doctor was called.
- [24] In regard to paragraph 9 of the joint minute⁵ Dr Tsotetsi testified that he no longer support what it is stated there. According to him whatever happened on 29 December 2018 is an assumption that the loss of sensation was ischemia.
- [25] In his addendum to the joint minutes⁶ he testified that it is not unusual outcome to lose a leg when there is an injury to the popliteal fossa.
- [26] According to Dr Tsotetsi, ischemia presented itself for the first time on the plaintiff on 30 December 2018 and Tambo Memorial Hospital did not have the requisite specialties. The loss of sensation on 29 December 2018 was not a sign of ischemia.

⁴ CaseLines 008 – 97.

⁵ CaseLines 009 – 12.

⁶ CaseLines 009 -12.

- [27] Ms M.J Senoko a registered nurse testified on behalf of the defendant. She testified that the plaintiff was monitored with every two hour interval by nursing staff which is the correct clinical practice for injured limbs. That completes the oral evidence on behalf of the plaintiff and defendant.
- [28] Counsel for the plaintiff contends that the defendant acting through its staff failed to diligently efficiently and without negligence comply with accepted nursing principles and protocols.
- [29] Counsel argue that on 29 December 2018 the defendant's nursing staff failed to arrange for the plaintiff to be seen by a medical doctor.
- [30] Counsel submitted that the mere fact that it was recorded by the nursing staff that "Patient verbalizes that she is unable to move toes on the right foot" and nothing was done about it, this amounts to negligence on the part of the defendant."
- [31] It is further submitted by counsel for the plaintiff that reasonable nurses would have foreseen the ischemia on the plaintiff and would have taken steps to prevent it by reporting it to the doctor.
- [32] In this regard counsel referred the court to the decision in *Oppelt v Department of Health*⁷.
- [33] The plaintiff's counsel further contends that, the plaintiff has discharged the onus of proving causation in that her right leg would probably not have been amputated had the nursing staff acted with reasonable care as such the negligence was wrongful.

⁷ 2016 (10 SA 325 (CC).

- [34] Counsel for the defendant submits that on 29 December 2018 when the plaintiff was transferred, she had a pedal pulse at 16H00. Sensation and circulation were good. The toes were moving, and the capillary refill was good.
- [35] Counsel for the defendant submits further that the plaintiff suffered neurovascular complications which were rare and unforeseeable. The thrombosis was not reasonably foreseeable.
- [36] It is argued that the defendant's medical staff did all that they could, however they were impeded by lack of resources. Thus, there was no causation and ultimately no negligence on the part of the defendant.
- [37] Counsel for the defendant contended that in the alternative the plaintiff failed to prove sufficient link to the negligence by the defendant and it was remote.
- [38] The determination of negligence is a fact bound enquiry⁸. Causation is an element of liability which consist of two enquiries namely:
- 38.1 Whether the negligent act or omission caused the harm giving rise to claim.
- 38.2 If it did not, then that is the end of the matter.
- 38.3 If it did, the question is whether the negligent act or omission is linked to the harm⁹.
- [39] The court must determine whether negligence, causation and wrongfulness have been established. It is trite that the onus rests on the plaintiff to prove her case on balance of probabilities.

⁸ Member of the Executive Council for Health, Eastern Cape v DL obo AL (117/2020) [2021] ZASCA 68 (3 June 2021) at par 25.

⁹ Lee v Minister of Correctional Services 2013 (2) SA 144 (CC) at para 38.

[40] In order to succeed the plaintiff must prove causation, wrongfulness, fault and harm.¹⁰ The court has to determine on the balance of probability whether the defendant's carelessness or omission caused the plaintiff's amputation of the right leg.¹¹

[41] The question is therefore whether the plaintiff's amputation of the leg would not have occurred had the defendant's nursing staff timeously alerted the doctor about any changes in the plaintiff's right leg which could have prevented the amputation of the right leg.

[42] The Constitutional Court has long endorsed the decision in *Kruger v Coetzee*¹² where Holmes JA said the following: "For the purpose of liability culpa arises if –

(a) a *diligens paterfamilias* in the position of the defendant –

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps

....

Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all, if so. What steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down".

[43] In respect of medical negligence the Constitutional Court¹³ said the following "the question is how a reasonable medical practitioner in the position of the defendant would have acted in the particular circumstances".

[44] It is therefore my view that, in this matter before me, the question is whether, on the facts, the defendant's nursing staff foresaw that the plaintiff's right lower

¹⁰ *Oppelt v Department of Health* 2016 (1) SA 325 (CC) at Par 34.

¹¹ *De Klerk v Absa Bank and others* 2003 (4) SA 315 (SCA).

¹² 1966 (2) SA 428 (A).

¹³ *Oppelt* par 71.

limp will develop a neurovascular injury and should have summoned or alerted the doctor instantly.¹⁴

[45] In the hospital records, the plaintiff neurovascular evaluation (check- by nursing staff of the plaintiff's right leg) was recorded as follows:

44.1. On 29/09/2018 at 00H00 and 02H00 sensation minimal

44.2. At 05H38 "Patient verbalizes unable to move toes, sensation is good"

44.3. At 13H00 circulation and sensation good on both legs

44.4 At 16H00 toes moving, warm on touch, circulation and sensation good. At 20H30 circulation and sensation was good.

[46] It is only on 30/09/2018 at 04H00 when the plaintiff reported that she is unable to feel her right foot, toes not moveable and cold when touched.

[47] At 05H20 Dr Haimann was called and notified. At 7H30 the plaintiff was seen by Dr Samba. At 8H30 an ambulance was arranged to transfer her to another hospital.

[48] In my view the defendant's nursing staff provided the necessary care to the plaintiff under the circumstances by checking her condition within reasonable time frames. They discharged the duties according to the general level of knowledge then available to them.

[49] The plaintiff complained about unable to feel her foot at 4H00, at 05H20 the same morning the doctor was called. Within the period of 1 hour 20 minutes the doctor was called. To speculate that 1 hour 20 minutes was long time will be unfair because there is no evidence as to why the nurse took that long.

¹⁴ Oppelt par 73.

[50] In my view the fact of the matter is that the doctor was called and alerted about the plaintiff's condition.

[51] Taking the facts and opinion of the experts in this matter cumulatively, it cannot be said that the sudden deterioration in the plaintiff's right leg was foreseen by the defendant's nursing staff.¹⁵

[52] It is further my view that the defendant's nursing staff by summoning the doctor they took reasonable steps to prevent further deterioration of the plaintiff's right leg.


[53] This court accepts the expert evidence of Doctor Tsotetsi and Prof Veller where they opine that the plaintiff had a rare neurovascular complication.

[54] In my respectful view this complication was not reasonably foreseeable.¹⁶

Therefore, this court finds that there was no negligence on the part of the defendant.

[55] I make the following order.

55.1 The plaintiff's claim is dismissed with cost.



MAKHOPA J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

¹⁵ Oppelt par 73

¹⁶ Member of the Executive Council for Health, Eastern Cape v DL obo AL (117/2020) [2021] ZASCA 68 (3 June 2021).

HEARD AND RESERVED JUDGMENT: 01 AUGUST 2024

JUDGMENT HANDED DOWN ON: 16 OCTOBER 2024

Appearances:

For the Applicant: Adv SJ Myburgh SC (instructed by) Werner Boshoff Inc

For the Respondent: Adv T Madileng (instructed by) State Attorney, Pretoria.