

SOUTH AFRICA / JUDGMENT

Kanunu v Member of the Executive Council: Free State Department of Health (4268/2015) [2024] ZAFSHC 143 (6 May 2024)

[2024] ZAFSHC 143

COURT

Free State High Court, Bloemfontein

BEFORE

M Opperman

CASE / FILE NUMBER

4268/2015

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IN

THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION,
BLOEMFONTEIN

Reportable:

NO/YES
CASE NO.: 4268/2015
In

the matter between:

THABO
ISHMAEL KANUNU
Plaintiff[1]
and
THE

MEMBER OF THE
EXECUTIVE COUNCIL:

FREE
STATE DEPARTMENT OF HEALTH
Defendant[2]

Coram:

M Opperman J

Heard:

17, 18 & 20 October 2023 and 2 February 2024

Delivered:

6 May 2024. This judgment was handed down in court and electronically by circulation to the parties' legal representatives via email and release to SAFLII on 6 May 2024. The date and time of hand-down is deemed to be 15h00 on 6 May 2024

Summary: Trial -
merits - medical
negligence

JUDGMENT

- [1] The plaintiff claims delictual damages from the defendant. The issues of liability and quantum were separated at the commencement of the trial. The merits on liability are to be adjudicated here.
- [2] The plaintiffs left leg was amputated above the knee on 14 July 2015. This was due to sepsis that was localized to the left foot of the plaintiff. It became systemic and potentially fatal, hence the amputation.
- [3] The claim is limited to alleged medical negligence of a doctor and/or nursing personnel at the Boitumelo Hospital in Kroonstad on Monday, 6 July 2015. The defendant denies all negligence and pleaded that the plaintiff himself negligently caused and/or contributed to any damages he may have suffered.[3]
- [4] The plaintiff has the burden to prove every element and requirement of the alleged delict on a balance of probabilities.
- [5] No reliance is placed by the plaintiff on the conduct of other medical practitioners that treated the plaintiff and undisputedly so, played a vital role in the chain of events. Their evidence was not adduced and there hangs a legally uncomfortable silence over this aspect and their non joinder.
- [6] Counsel for the plaintiff is however correct that:
3. Based on the available evidence and the opinions of the medical experts, the conduct of the private practitioners admittedly did not comply with the general standard of care expected of them. But the question in this trial is whether Dr Thejane exercised the reasonable skill and care of a practitioner in his field. The answer turns on a remarkably straightforward factual question: did the plaintiff tell Dr Thejane that he was stabbed in the foot with a fork?... (Accentuation added)
- [7] The following evidence served before the court:
1. The plaintiff tendered viva voce evidence before court. The evidence of this witness is that of a single witness without any corroboration on the vital issue whether he informed Dr. Thejane of the incident at the dam with the hayfork. His evidence as a whole is questionable. He did testify that there was not any open injury or bleeding on his ankle after the stabbing.

He was vague in that he alleged that he cannot remember who he spoke to at the hospital as he "was in pain". He could remember that it was a male person with a stethoscope around his neck. The plaintiff conceded that due to the pain and the time that lapsed since the incident, it is possible that he cannot remember everything.

2. An orthopaedic surgeon, Dr. F.P. Du Plessis, presented expert testimony. His report was entered into evidence. Counsel for the plaintiff accepted in their heads of argument that:
26. Dr Du Plessis, the plaintiffs expert witness conceded that if the wound was no visible, and Dr Thejane (sic) did not know of the circumstances of the plaintiffs injury, it would not be expected of Dr Thejane to have been particularly vigilant about the danger of an infection in the plaintiff's foot. Conversely, if Dr Thejane had knowledge of the plaintiff's injury, he ought to have realised the risk of an infection and should have treated the plaintiff accordingly.
3. Dr. Thejane testified on behalf of the defendant. He was the medical practitioner who examined and treated the plaintiff during his first visit to the hospital on 6 July 2015. Dr. Thejane confirmed that he completed portions of the hospital records and he confirmed the contents to be correct. No evidence was adduced to gainsay the evidence that the hospital records are accurate but for the evidence of the plaintiff. Dr. Thejane denies any liability or negligence. He treated the plaintiff on the information and facts as it were available at that instance. He is steadfast in his evidence that he was not informed of the incident with the hayfork.
4. Dr. Thejane was a good witness that impressed the court as one that is willing to take responsibility for his actions. His evidence that the plaintiff did not inform him of the stabbing incident is corroborated by the records that he made. There is not any room for the speculation that he completed the records after the fact. The probability that none of the medical practitioners treated the plaintiff for possible infection after he told them that he was stabbed with a fork whilst fishing in a farm dam, is almost zero.
5. Prof. Becker prepared a medico-legal report, which was accepted into evidence by agreement between the parties but conditionally so. Counsel for the defendant correctly stated that:

10.16 The revised report of Prof. Becker was entered into evidence by agreement between the parties on the basis that certain portions thereof are not agreed to by the Plaintiff.

10.16.1 However, the portions in Becker's report which were not accepted, were to a large extent conceded by Dr. Du Plessis. And insofar as Prof. Becker relied on the notes in the medical records of Dr. Thejane, these were confirmed as correct by Thejane. The credibility of Prof. Becker and the logic of his reasoning is not attacked by the Plaintiff.

10.16.2 In as far as Prof. Becker comments on the negligence of Dr. Ne!, his observations/ opinions stand as undisputed in the light of the fact that the Plaintiff did not call Dr. Nel to testify. In any event, Dr. Du Plessis effectively agreed that Ne! administered suboptimal treatment to the Plaintiff, and further, that the visit to Ne! on the Wednesday was the turning point (when it became clear that the ankle was infected).

10.17 Dr. Du Plessis agrees with Prof. Becker that-

- (i) The amputation of the Plaintiffs leg saved his life;
- (ii) When the Plaintiff was examined / assessed by Dr. Thejane, the classic signs of sepsis were not present;
- (iii) Had Dr. Ne! / Stander treated the Plaintiff aggressively with antibiotics after the visit on the Wednesday, the outcome might have been different, and the Plaintiff's leg may have been saved.

6. A document bundle was utilized throughout by both parties. Not all documents included in the bundle were referred to during evidence. The court will only have regard to the documents utilised during the case. Both expert witnesses referred extensively to the hospital notes and records in their reports. The referral letter from Dr. Stander, also became part of the evidentiary material during the trial and the authenticity and veracity of the contents were not disputed.

[8] The case will in the main be adjudicated on the evidence that is common cause. As indicated; the only real issue is whether the plaintiff informed Dr. Thejane on the 6th of July 2015 of the incident with the hayfork. I will deal with it during the evaluation of the case.

[9] Both counsel in their heads of argument gave extensive summaries of the evidence and it cannot be faulted. I will not regurgitate it in the judgment since the adjudication of the case turns on what is common cause and a ruling on the probabilities presented by the objective proven facts.

[10] This is the undisputed evidence:

1. On Sunday, 5 July 2015 the plaintiff was accidentally "stabbed" near the back of his ankle by a co - worker with a fork.
2. This occurred in a farm dam. The co - worker was using the fork to spear fish in the dam. The plaintiffs feet were submerged in the water at the time.
3. The fork was one typically used for loading hay. It had a long handle with four thin prongs.
4. The co - worker(s) never testified to confirm the incident. It is only the version of the plaintiff that lies before court on this fact.
5. Professor J.H.R Becker whose report was conditionally admitted into evidence for the defendant is correct when he reported[4] that: "The port of entry of the bacteria was never established,..."[5]

6. The plaintiff got out of the water, washed and checked where he was stabbed. There was no visible wound according to the plaintiff himself.
7. When the plaintiff woke up later that night, his left foot was swollen and, as the plaintiff put it, his foot was "no longer functional".
8. The next day, which is Monday, 6 July 2015, the plaintiff called his foreman (as he put it) who took him to the private practice of Dr. J.N. Nel in Kroonstad. The plaintiff was consulted by a female medical practitioner whose name he could not recall.
9. It is undisputed that one Dr. Stander diagnosed the plaintiffs injury on that day as a fracture. The plaintiff was then referred to the Boitumelo Hospital in Kroonstad and he ended up at the casualty unit of the hospital. She did not mention any open wound or stabbing incident in her referral to the hospital.
10. The plaintiff was then seen by Dr. Thejane. Dr. Thejane diagnosed the plaintiff with a "left ankle fracture" and applied a "back slab" to the plaintiffs left foot; it is a form of plaster splint. It is unlike a full plaster cast, which would have encircled the plaintiffs foot and ankle. This is also used to stabilise and address pain. Dr. Thejane then referred the plaintiff for x-rays to be taken.
11. Dr. Thejane did not detect a fracture on the x-rays' and discharged the plaintiff that same evening.
12. The plaintiff was given a health education form by one of the nursing personnel which would have informed the plaintiff how he must look after the back slab and he was told to return to hospital the same Thursday; that is within three days. The plaintiff did not do this.
13. By the Wednesday, the plaintiff experienced increased pain in his injured foot. The plaintiffs foreman took him to the practice of Dr. Nel that same day.
14. It must be noted that this foreman was not called to testify to corroborate any of the evidence of the plaintiff.
15. During this visit, the plaintiff consulted with an, according to the plaintiff, unidentified male, likely a medical practitioner. This practitioner, believing that the bandages were too tight and causing discomfort, made vertical incisions in the bandages around the top of the ankle to alleviate the pressure. This was on all evidence Dr. Nel that treated the plaintiff on this day. The medical practitioner on the evidence at this instance clearly did not consider infection at all. This is again indicative of the fact that the stabbing did not come to the attention of the medical practitioners that treated the plaintiff.
16. The day after this, the plaintiff experienced intense pain, leading him to remove the entire back slab himself. The pain persisted to the extent that he could not manage his own needs. Consequently, his foreman brought him to his wife's care in Steynsrus that same day.

17. The plaintiff's foot had become severely swollen and was giving off a foul odour. On Saturday, 11 July 2015, his wife requested an ambulance which took him to the hospital. The plaintiff was admitted to the hospital's surgical ward.
18. The plaintiffs left leg was amputated above the knee three days later, on 14 July 2015.
- [11] Several medical practitioners were involved in the treatment of the plaintiff over several days and at different instances and does it not make sense why nobody treated the plaintiff for infection if the plaintiff alerted them to the stabbing.
- [12] The case turns on what must be an injury so small that it was beyond any doubt not visible to the naked eye. That is if there was any "breaking of the skin" or injury on the 5th or 6th of July 2015.
- [13] The open wound or injury that caused the infection was not visible on the evidence of the plaintiff himself. This was admitted to in the evidence of the plaintiff as quoted by his counsel in their heads of argument.
8. The plaintiff got out of the water, washed and checked where he was stabbed. There was no visible wound.
- [14] Whether the plaintiff conveyed that he was "stabbed" was not reported anywhere on any of the reports that were handed into evidence. It is highly improbable that if the plaintiff reported the incident as he maintains; that it would not be recorded by any of the medical practitioners; not even the nurse that admitted him.
- [15] Again; there is not any corroboration for the evidence of the plaintiff that he told of the hayfork incident. The evidence supports the evidence of Dr. Thejane that the plaintiff did not report that he was stabbed with a hayfork; it is just not probable that so many medical practitioners will not heed the information and act on it. This, not even when the plaintiff presented to Dr. Nel with a severely swollen leg. He was so unsuspecting of any infection that he merely cut the plaster for relief of the swelling.
- [16] Neither the plaintiff nor Dr. L Stander (the private practitioner that saw the plaintiff on 6 July 2015), Dr. Thejane at the hospital and the nursing personal at the hospital on 6 July 2015 were able to see any wound or "breaking of skin".
- [17] Professor Becker describes the situation, that is undisputed, best on the sepsis that caused the amputation of the leg of the plaintiff when he stated as follows:

07

Signs of sepsis.

The classic stigmata are,

- Rubor = red.

- Tumor= swelling.
- Calor = warmth.
- Dolor= pain.
- Suppuration= pus formation, liquefaction.

The above criteria are classic in what is experienced with the development of a pimple, (ask any teenager), red, swelling, pain,

local warmth, "ripen" pus that needs to be drained.

08i

A pimple is a localized small infection, abscess, that the body can isolate to one area. Depending on the degree of the infection the body can isolate the area and form an abscess that can be drained, or the body cannot isolate the sepsis then the infection will become systemic, involving the entire body.

08ii

In the case of the plaintiff the sepsis was localized to the foot and later to the leg and was on its way to become systemic and kill the patient. The latter manifested with the admission on the 11th/07/15- 14th/07/15 when he became disorientated. The amputation was done in time and saved his life. if it was delayed for a few hours. he would have been dead. (Accentuation added)

09

Delict?

Keeping in mind the discussion above vis.

A

Invasion of organisms,

There have to be a place where the organisms, bacteria, entered the tissue via broken skin, presence of a wound.

- 1) Dr L Stander did not document any wounds. 06/07/15, par 02i.clinically diagnosed a fracture.
- 2) Dr Thejane, 06/07/15, par 02i, document no breach of the skin, treat the possible fracture with a back-slab. POP (Plaster of Paris) behind the ankle to prevent movement secured with circular bandages.
- 3) The nursing notes, p2, 12/07/15, 07:38, did not record a wound.

- 4) It has now transpired according to multiple versions that he was injured with an iron/fork just behind the medial malleolus. It is clear that the environment was not clean and a mixed flora of organisms contaminated the "wound". (Either in the river, dam or on the farm while "spitting"). By "spitting" is meant tilling the ground.

10

B

The next phase is swelling.

After the organisms entered the wound, whereof there is no proof that there was an open wound, the point of entry was not established, but nobody can deny that there were bacteria present, the organisms will multiply and cause an inflammatory response, viz. pain, swelling and redness, we have proof that pain and swelling must have been present on 06/07/15.

In the absence of an open wound and the history of an injury, the diagnosis of a fracture was a possibility, Dr Stander and Dr Thejane thought so.

I would have expected that there would also have been redness with the pain and swelling, it is not recorded.

If the diagnosis of an infection was made at this time, and an aggressive antibiotic treatment regimen followed, the course of events might have been different, and the limb preserved. Dr Stander and Dr Thejane stand to answer about the presence or absence of inflammation, Dr Stander is not part of the defense, but will have to explain what the condition of the foot was when it was examined.[6]

C

The next phase, symptoms get worse. Viz. pain, swelling, warmth and redness.

The plaintiff reports at Dr Nel, between 06-11/07/15, exact date not known, the diagnosis was that the bandages were too tight.

- 1) But what actually happened was that the swelling increased within a closed compartment and gave the impression that the bandages were too tight.
- 2) The pain increased with the increased swelling of the foot due to the progressive nature of the sepsis.
- 3) A thorough examination of the foot and ankle would have shown the clinician that the swelling was due to an infection. Apropos par 07 supra the foot would be red, swollen, warm and painful. The classic stigmata of an underlying infection.

- 4) With the advantage of the retro spectroscope, knowing what the ankle looked like on 11/07/15, black skin, blisters, offensive discharge, it can with a degree of certainty and accuracy, be postulated that there were clear signs of sepsis when Dr Nel saw the patient, unless he did not examine the patient.
- 5) These signs and symptoms were missed by the practice of Dr Nel, a serious delict, Dr Nel must accept responsibility.

This omission cannot be laid on the account of the staff at Boitumelo Hospital, the staff were not afforded the opportunity to examine the patient at the same time as his visit to Dr Nel

- 6) Had the doctors at Boitumelo Hospital seen the patient at the same time as Dr Nel the course of events might have been totally different. The visit to the practice of Dr Ne! is a "Novus actus Interveniens" and cannot be ignored.
- The diagnosis of sepsis was missed.
 - The patient was sent home without antibiotics.
 - The patient was given a false sense of security by the doctor "that everything was under control" "the bandages were too tight", and reported later back at the Hospital when the foot became black, full of blisters and offensive discharge.
 - Had Mr. Kanunu been treated aggressively with antibiotics after the visit to Dr Nel as well as a surgery consultation to drain possible pus. the outcome might have been different, and the limb maybe saved.

D

Overt sepsis, presence of pus and systemic inflammatory response syndrome SIRS. On admission on the 11th/07/15 the "horse had already bolted". Mr Kanunu had an overt necrotizing infection with him rapidly going into SIRS. The treatment that was given from the 11th late afternoon until the 14th was a "last ditch" effort to try and salvage the limb, that turned out to be a futile exercise.

The urgent amputation saved his life.

11

In Summary.

- 1) Mr. I Kanunu was injured with a fork/iron in the river/dam or while working on the farm cultivating (spitting).
- 2) A mixed flora of micro-organisms got inoculated into the tissue, the mechanism is unknown.
- 3) The micro-organisms rapidly proliferated and caused infective response with swelling and pain.

- 4) A private practice was consulted, Dr L Stander saw him, the history was obviously not clear, and a fracture was diagnosed by Dr Stander (private GP) and the Dr Tbejane at Boitumelo Hospital and treated with a back-slab by the doctor at Boitumelo Hospital. X-rays did not confirm the fracture.
- 5) The swelling increased and caused compression of the lower limb, Dr Nel was consulted, he diagnosed tight bandages, he does not pick up signs of sepsis, swelling, redness, pain, and warmth. It is postulated that he did not examine the patient. Had he, it could have made a difference in the course of events, commencement of an aggressive antibiotic regimen and a surgery consultation.
- 6) When Mr. Kanunu reported at Boitumelo Hospital, the ankle was, swollen, skin turning black with blisters and an offensive discharge.
- 7) Mr. Kanunu rapidly deteriorated, within 3 days became confused and was going into septic shock.
- 8) A life-saving emergency above knee amputation was performed.
- 9) The amputation achieved source control and it was possible to save his life.
- 10) He was very catabolic, BMI of 18, S-Albumin of 18, the surgery team need to be complemented with the result.
- 11) A typical case of life over limb was the end result.
- 12) Aggressive early intervention by the practitioners that treated him prior to admission on the 11th/07/15 might have made a difference. (Accentuation added)
- [18] The law on the incident of the 6th of July 2015 is clear. Given the facts it was proven on a balance of probabilities that there was not any presentation of infection or history that there might be infection.
- [19] That said, the defendant was under a legal duty to dispense proficient medical care to the plaintiff. The Constitutional Court in *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* 2016 (1) SA 325 (CC) at paragraph [54] held that:

There is no doubt that the legal convictions of the community demand that hospitals and health care practitioners must provide proficient healthcare services to members of the public. These convictions also demand that those who fail to do so must incur liability.
- [20] The question is if the service rendered on the 6th of July 2015 at the Boitumelo Hospital in Kroonstad was not proficient?
1. In *Topham v MEC for the Department of Health, Mpumalanga* (351/2012)
- [2013] ZASCA 65 (27 May 2013) it was held that:

[6] Professional negligence is determined by reference to the standard of conduct of the reasonably skilled and careful practitioner in the particular field and in similar circumstances. A medical practitioner diagnosing and treating a patient is expected to adhere to the general level of skill, care and diligence possessed and exercised at that time by the members of the branch of the profession to which he or she belongs. It follows that a wrong diagnosis does not per se amount to negligence on the part of the medical practitioner concerned. It will

only be negligence if the practitioner's conduct does not comply with the general standard of care to which I have referred. (Accentuation added)

2. The test for medical negligence was aptly captured in November 2023 by Joubert[7] when he discussed the cases of Chapeikin and Another v Mini (103/2015)

[2016] ZASCA 105 (14 July 2016) and Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape (CCT185/14)

[2015] ZACC 33; 2016 (1) SA 325 (CC); 2015 (12) BCLR 1471 (CC) (14 October 2015). He concluded that:

- a. The existence of negligence for the purpose of liability is that fault arises if a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps.
- b. There are two steps, the first is foreseeability - would a reasonable person in the position of the defendant foresee the reasonable possibility of injuring another and causing loss. The second is preventability - would that person take reasonable steps to guard against the injury happening.
- c. Negligence must be evaluated in light of all the circumstances.
- d. Because the test is defendant-specific the standards are upgraded for medical professionals. The question for them is whether a reasonable medical professional would have foreseen the damage and taken steps to avoid it.
- e. The appellate division noted that this standard does not expect the impossible of medical personnel.
- f. A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care and he is liable for the consequences if he does not.
- g. A practitioner can only be held liable if his diagnosis is so palpably wrong as to prove negligence, that is to say, if his mistake is of such a nature as to imply absence of reasonable skill and care on his part, regard being had to the ordinary skill in the profession.

h. The test is always whether the practitioner exercised reasonable skill and care or put differently, whether his or her conduct fell below the standard of a reasonably competent practitioner in the field.

i. If the error is one that a reasonably competent practitioner might have made it will not constitute negligence.

[21] The final conclusion lies in the words of the expert for the plaintiff as he was quoted in the heads of argument for the plaintiff. Dr. Du Plessis concluded unequivocally that if the wound was not visible, and Dr Thejane did not know of the circumstances of the plaintiffs injury, it would not be expected of Dr Thejane to have been particularly vigilant about the danger of an infection in the plaintiffs foot. The wound was not visible and it was proven that there was no information that the plaintiff was at risk of infection available to Dr. Thejane.

[22] I ruled that there is not any evidence that support the allegation that Dr. Thejane was warned of the incident with the hayfork that took place. This is supported by the medical reports that served as evidence as well as the conduct and treatment of the plaintiff by the other medical practitioners.[8] The plaintiff failed to make out a proper case on which the defendant may be found liable for any damages suffered by him.

[23] Finally: As Lord Denning remarked in *Roe v Ministry of Health* [1954] EWCA Civ 7; [1954] 2 All ER 131 (CA) at 139: [9]

But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong ... we must not condemn as negligence that which is merely a misadventure.

[24] ORDER

The plaintiffs' claim is dismissed on the merits with costs.

M OPPERMAN J

Appearances For plaintiff: W van Aswegen Instructed by: Symington & De Kok Attorneys
BLOEMFONTEIN For defendants: G Wright Instructed by: Office of the State Attorney
BLOEMFONTEIN

[1] "The plaintiff"/ "Mr. Kanunu".

[2] "The defendant". The defendant was cited incorrectly. The citation was corrected by agreement between the parties at the start of the trial. See the heads of argument for the defendant at paragraph 1.2.

[3] See the heads of argument for the defendant at paragraph 1.3.

[4] Pages 213 to 216 of the bundle marked: INDEX - EXPERT NOTICES - 12/6/2023 at specifically paragraphs 9 to 11 of his report.

- [5] See paragraph 06 of Professor Becker's report *supra*. I will deal with this statement later.
- [6] Imperative is that Dr. Thejane did not observe any signs of redness or infection. This stands unrefuted on his evidence. It confirms the evidence that the "port of entry" of the infection was never established nor that there existed any indication of infection or potential infection during the treatment by Dr. Thejane.
- [7] <https://www.millers.eo.za/OurInsights/ArticleDetail.aspx?ArticleID=3121> accessed on 2 May 2024. Also see Joubert, W: WHEN CONSTITUTIONAL GUARANTEES MEET REALITY IN HEALTH CARE, 29 April 2016, Medical Negligence, De Rebus in 2017 (June) DR 42, <https://vzlr.co.za/2016/04/29/when-constitutional-guarantees-meet-reality-in-health-care/> accessed on 2 May 2024.
- [8] Also see the heads of argument of the defendant from paragraphs 6 to 13.
- [9] Also see *Medi-Clinic v Vermeulen* 2015
- (1) SA 241 (SCA) at [33].

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