

SOUTH AFRICA / JUDGMENT

March v MEC for Health of North West Province (2267/2018) [2023] ZANWHC 85 (15 June 2023)

[2023] ZANWHC 85

COURT

North West High Court, Mafikeng

BEFORE

Malowa M.J.

CASE / FILE NUMBER

2267/2018

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IN

THE HIGH COURT OF SOUTH AFRICA
(NORTH-WEST
DIVISION, MAHIKENG)

Case

Number: 2267/2018

In

the matter between:

THAMSANQA
JAN
MARCH
PLAINTIFF
AND
THE
MEC FOR HEALTH
OF
NORTH WEST
PROVINCE
DEFENDANT
CORAM
:
MALOWA M.J.

JUDGMENT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email. The date and time for hand down is deemed to be on 15th June 2023.

INTRODUCTION

- [1] The Plaintiff is acting as the executor of the estate his late wife Pulane Margaret March (hereinafter referred to as 'the deceased'), who claims damages on her behalf as a result of the negligence of the Defendant's medical staff at Bophelong Provincial Hospital in Mahikeng (hereafter referred to as 'MPH'). The Plaintiff pleads that the medical staff members of 'MPH' failed in their duty of care to 'the deceased' and also the duty to provide the necessary healthcare timeously to her which is expected from medical practitioners. He also pleads that the medical practitioners were negligent as from the 8th April 2017 until 25 July 2017, when 'the deceased' was ultimately transferred to George Mukhari Hospital where she ultimately passed away on the 14 March 2018.
- [2] The Defendant is the MEC for Health, North-West Province being a responsible Member of the Executive Council entrusted with the course and scope of the medical staff at the 'MPH' among other institutions of health in the province. She is being sued for compensation for damages in the amount of R 350 000.00 (Three Hundred and Fifty Thousand) for the medical negligence against the Defendant which is said to have occurred through medical personnel at 'MPH'. The medical negligence claim emanate from the Defendant's failure to timeously detect and treat 'the deceased's cervical cancer disease. The issue of merits and quantum have been separated in terms of Rule 33(4) of the Uniform Rules and an order in that regard was made before the commencement of the trial. For the purpose of this matter, only the issue of negligence has to be determined by the court.
- [3] After summons were issued by the Plaintiff in September 2018 against the Defendant, the latter filed her plea denying any form of liability emanating from the conduct of her medical staff. The Plaintiff testified together with his appointed

specialist physician and medical oncologist, Dr. Moodley as his witness. The Defendant did testify through her two factual witnesses

in their defence against the claim, with Dr. Mothupi, the head of the department and a nurse at Ms. Motwe from 'MPH'. The parties were after closing of their cases directed to exchange Heads of Arguments in the matter. The Plaintiff had filed in his Heads of Argument on the 15th December 2022 and the Defendant had filed hers through the registrar on the 21 December 2022 which were subsequently brought to court's attention around the 19th January 2023.

ARGUMENTS

The Plaintiff's version of the argument is that:

- [4] The Plaintiff alleged that the Defendant had through her medical personnel at 'the MPH' acted negligently and failed on her duty of care on 'the deceased'. The Plaintiff and his witness, among other things, stated that there was medical omissions by the Defendant through 'MPH's medical staff concerned who were grossly negligent in their handling of 'the deceased's medical condition, from which their conduct had caused the death of the Plaintiff's spouse.
- [5] The Plaintiff submitted that the evidence of expert witness specialist physician and medical oncologist, Dr. Moodley who confirmed that the three months delay amount to professional negligence, remain uncontested because there is no equivalent expert witness testimony to the contrary.
- [6] The Plaintiff further submitted that the fact that the Defendant's purpose of doing the biopsy on 'the deceased' was to determine if she had cancer, it is the basis upon which the Defendant should have foreseen the possibility that 'the deceased' could be having cervix cancer, but failed to take such step that as it is reasonable to prevent injuring her or causing patrimonial loss.
- [7] The Plaintiff submitted that the issue of availability of the appointment card on 'the deceased' was not put in cross examination to the Plaintiff and it was not send through discovery affidavit as a fact that has happened, therefore it must not be considered.
- [8] The summary of the Plaintiff's evidence through the oncologist, Dr Moodley is that the Lancet Biopsy Report indicates that the specimen were collected from 'the deceased' on the 12/04/2017, and were received by the laboratory on the same date, however the results were signed on the 18/04/2017. Furthermore the Lancet document clearly shows that the biopsy report was only requested on the 21/07/2017. Dr. Moodley further stated that the step to be taken upon receipt of the results is to contact the patient that day or next day or at least next week to inform him or her about the results, as it is a sensitive matter.
- [9] Dr. Moodley stated that the entry "TCB 3/52" (PP63) as it is written on the medical record may be thought to be important, but it was not enough for the patient to come back after three weeks because of the seriousness of the situation. He further testified that one cannot confirm from the medical records if that recording was actually communicated to the patient being 'the deceased'. The Plaintiff further argued that if a doctor does the test, he must get the result, interpret it, and communicate it to the patient. The job is not done until the patient is informed of the results.
- [10] The Plaintiff submitted that the court should find that the Defendant was negligent because she had duty to provide patient with diagnosis in terms of section 6 of the National Health Act 61 of 2003.

- [11] The Plaintiff in his submission indicated that the Defendant wrongly placed responsibility of treatment of 'the deceased' herself. This responsibility is the one of ensuring that the deceased goes back to 'MPH' after three weeks to obtain results. By so doing, the Defendant wants to absolve herself from negligence and liability. The Plaintiff further submitted that there could not contributory negligence on the part of 'the deceased' when it was not specifically pleaded.
- [12] The Plaintiff submitted that the deceased as the patient is entitled to rely on the medical practitioner to a much degree than a medical practitioner can rely on the patient. The medical practitioner's having skill and care to can foreseen that the patient may harm himself/herself by aggravate his/her condition, unless he/she was warned.
- [13] The Plaintiff submitted that he was informed with 'the deceased' that the biopsy was taken to a lab and results will help the doctor to do diagnosis and that what was required of 'the deceased' was to call the hospital from time to time to check if the results had been obtained and she was never told the results are available.
- [14] The Plaintiff further submitted that 'the deceased' spoke to the female nurses in the female ward whose names are unknown and at no stage was she told to come back to the hospital after three weeks, and she was told she had no reason not to comply.
- [15] It is clear from the afore-going that neither 'the deceased' nor the Plaintiff reported the incident to the Defendant's hospital superiors, as it is incumbent on them in terms of Section 18
- (1) of National Health Act 61 of 2003, which reads thus: "(1) Any person, may lay a complaint about the manner in which he or she was treated at a health establishment and have the complaint

investigated". What is worrying is that the Plaintiff evidence absent the complaint by 'the deceased' as aforesaid, amount to hearsay, which remains unsupported, largely on the basis that this suit and/or Defendant's apparent negligence was only after the demise of the deceased. The Plaintiff in his testimony state that sometimes 'the deceased' called the number purported to be that of, 'the MPH' in his absence. He does not in principle deny the fact that what 'the deceased' told him might not be correct.

- [16] It is not clear which numbers the Plaintiff and 'the deceased' were given to call; what are the names of the personnel they contacted each time a call was made and at what time were those calls made; why after calling several times, they did not decide to go on the 21 July 2017; what 'the deceased' did in terms of treatment for the three months while waiting for the aforesaid result; could both 'the deceased' and Plaintiff after few calls, and taking into account the health scare of 'the deceased' decide to stay for that long without confronting the Defendant's hospital personnel for the results; had a formal complaint being lodged, in terms of the aforesaid section of the Act, that would have afforded the Defendant time to investigate the personnel who allegedly spoke to 'the deceased'; it is not clear if 'the

deceased' was informed to phone, why that was not indicated on the medical file. Thus the improbabilities of 'the deceased' being asked to phone to check the results far outweighs the version of the Plaintiff, as indicated above.

The Defendant's version of the argument is as follows:

- [17] The Defendant submitted that Plaintiff has failed to discharge its onus of proving that the Defendant received the biopsy results on 12 April 2017, but it had sat on them until 'the deceased' went to 'MPH' on 21 July
- 2017. The Plaintiff's case is grounded on the evidence of her Oncologist who had failed to consider the possibility of the failure by 'the deceased' to go back to the "MPH" for her results, it be after a period as alleged to have been informed or immediately after that period.
- [18] The Defendant submitted that Plaintiff's case is marred with contradictions. The Defendant has submitted that 'the deceased' had disregarded the instructions given to her and furthermore, she discharged her responsibility over her health by not adhering to what she was told to do as the patient. The Defendant submitted that her true intention, care and skill is evidenced by the fact that on the 27th July 2017, when the 'the deceased' arrived at the 'MPH', when the biopsy results were found, and the Defendant's medical staff secured an appointment for 'the deceased' at George Mokhari Academic Hospital for treatment and further management of 'the deceased'.
- [19] The Defendant submitted that treatment could not be imposed on 'the deceased' patient, as she failed to play her part or her responsibility to return to 'MPH'. The Defendant submitted that there was a blue card that had a date on it given to 'the deceased'. The fact that 'the deceased' called on weekly basis is not probable as it was not a practice that patients get told to call for their results. Furthermore it is said the files are not kept at the wards.
- [20] The Defendant submitted that there is no entry made in the file that serves as prove that 'the deceased' phoned 'MPH' after she was discharged thereof. The Defendant submitted that the Plaintiff could not even provide a single name of the person that 'the deceased' spoke to regarding the merits and that they are available.
- [21] Furthermore, the Defendant submitted that the Plaintiff failed to prove that there was a delay in diagnosing 'the deceased' with cervical cancer or treatment on the part of the Defendant. The Defendant deny that there is any negligence on any of her medical staff because the date of the 18 April 2017 is not the date of receipt of results blood as thought to be the case by the Plaintiff.
- [22] The Defendant submitted that her medical staff were required to act reasonably swift, diligently and with uppermost care and skills towards the Plaintiff's situation. The said medical staff had acted procedurally by exercising their obligation of analyzing 'the deceased's condition and eliminating the risk first in sending the blood sample for analysis. The risk which the Defendant's medical staff were eliminating was the diagnosis of the

problem of 'the deceased' and 'the deceased' was required to perform her obligation of returning back to 'MPH' for the blood results, which she failed to do.

[23] The Defendant submitted that considering the cumulative medical facts presented by the Plaintiff against, those facts do not constitute medical negligence on the part of the Defendant.

[24] If there was no possible step which the Defendant was expected to take even if she could have taken in foreseeing that 'the deceased' could be having cancer disease when sending the blood sample to the laboratory, or in view of the fact 'the deceased' that was expected to be back at 'MPH' from the date at which the results came back from the laboratory.

[25] In *Oppelt v Department of Health* 2016 (1) SA 325 (CC), it is stated that:-

'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, he is not required to do the impossible or to be a 'medical-police' or 'arresting officer' to arrest a patient who does not want to return back to the hospital for further treatment'.

[26] The Defendant had argued that conduct of the medical staff in the treatment of the deceased was done with care, skill and diligence because 'the deceased' is undisputedly said to have been informed that there is a need for securing of her blood results from 'MPH'. The dispute between the parties is simply when and how the blood results are to be found by 'the Plaintiff' from the Defendant.

[27] The conduct of the Defendant in the treatment of 'the deceased' at 'MPH' was not proven by the Plaintiff to be truthful. The evidence presented by the Plaintiff, did not establish a causal link of wrongfulness on the Defendant's conduct as against 'the deceased's death or escalation of her ill-health as 21st July 2017.

[28] The Defendant submitted that the Plaintiff's claim on the merits ought to fail. This is solidified by the fact that, among others, 'the deceased' did not take upon herself to go to 'MPH' to personally inquire about the blood results, if she were not informed to personally go to 'MPH' in three weeks or when at the time she called 'MPH', the reaction did not yield fruits.

[29] The Defendant further argued that the Plaintiff alleges that 'the deceased' did not attempt to seek an alternative telephone number of 'MPH'. 'The deceased' further failed to seek a telephone number of a person of higher position at 'MPH' to get her results (something she should have done) than the one she had or that of a person of higher position at the hospital to get the results (something she knew should be obtained). There could not be wholly reliable acceptance evidence that she called the hospital as there was no evidence presented and for that reason no cogent weight could be attached to it.[1]

ISSUES

[30] The issues to be determined are;

30.1 Whether there was a delay on the part of the Defendant from the date of taking the blood until the 25th July 2017 when 'the deceased' was transferred to George Mukhari Hospital or cancer disease results were revealed to 'the deceased'.

30.2 Whether or at delay was on the part of the Defendant in not timeously diagnosing and treating 'the deceased' regarding her cervical cancer.

30.3 Whether or not the Defendant's medical personnel were negligent in the circumstances and should, therefore, be held liable for damages allegedly suffered by the Plaintiff.

30.4 Whether is there a different test for negligence in public as opposed to private hospital.

ANALYSIS

[31] Before analyzing the matter further it is important to consider matters of common cause between the parties which are among others the following;

31.1 The date of receipt of results by the 'MPH' is the date 21 July 2017 despite the biopsy being done on the 12th April 2017.

31.2 The result of biopsy were readily available in the laboratory as at 18th April 2017 upon demand by the Defendant's medical staff.

31.3 that it's a period of three months from the date of the availability of results to the date of the results being communicated, or made available to 'the deceased'.

[32] In terms of section 12(11) (c) of the Constitution of the Republic of South Africa, 1996, everyone has a right to be free from personal injury which the fundamental right to freedom from all forms of violence from either public or private sources. 'The deceased' has a right to bodily and psychological integrity in terms of s12 (2) of the Constitution.

[33] There is no evidence that suggests that at the time of the biopsy results obtained the cancer had migrated or not, alternatively the stage of the cancer 'the deceased' was at. The results were the anchor to shed light on whether there was cancer or not. It is not in dispute that 'the deceased' and/or the Plaintiff were informed to obtain the results, the dispute is the method in which they were to, with the Plaintiff alleging that they were informed that they had to call the hospital, and the Defendant stating that an entry in the medical file was the date or timeframe the Plaintiff had to return to hospital so that the results should be checked with the lab, and on availability, requested and given to her.

[34] Certainly the versions are mutually irreconcilable, for which the court has to look into the totality of the evidence tendered, and assess the possibility of each of the parties evidence, and either to find in favour of the Plaintiff or not. Alternatively that the Defendant is liable for the apparent negligence.

[35] Negligence can be defined as the failure to take reasonable care to avoid causing injury or loss to another person. To determine whether someone acted negligently, we apply the objective “reasonable person test” to compare the person’s act or omission to the conduct expected of the reasonable person acting under the same or similar circumstances. In the event that the person’s conduct does not meet the standard expected of the reasonable person, the conduct could be considered negligent.

[36] In *Kruger v Coetzee* 1966 (2) SA 428 (A) Holmes JA, in its judgment, the court held that:-

It is a ‘necessity for Plaintiff to prove not only that the possibility should have been foreseen but also that there were reasonable steps which should have been taken — Defendant having foreseen the possibility and taken certain steps — Onus on plaintiff to establish further steps he could and should have taken’.

[37] The condition in casu which is not a common cause herein is that a reasonable person in the position of the Defendant would have foreseen the possibility of ‘the deceased’ not returning back to the hospital for further treatment. The Defendant in casu does not admit to be conscious of the possibility of the Plaintiff not coming back for treatment timeously, neither can the court find that it was foreseeable and as a result something like what should have happened? Can it be said that ‘the deceased’ should have been collected home on the 3rd week by the medical staff?

[38] The Defendant in casu cannot be liable, as referred to in *Sea Harvest Corporation (Pty) Ltd and Another v Duncan Dock Cold Storage (Pty) Ltd and Another* (12/97) [1999] ZASCA 87, which provides the test for negligence as follows:-

‘That the question of culpability must be determined by asking whether a reasonable person in the position of Defendant would have foreseen the danger’. The danger would not have been foreseen. The court thus held that:

the appeal was dismissed.

[39] Upon his judgment in the above mentioned case, Judge P E Streicher, in his appeal judgment, in his test to determine legal causation, stated that:-

“is a flexible one in which factors such as reasonable foreseeability, directness, absence or presence of a novus actus interveniens, legal policy, reasonability, fairness and justice all play a part”, with reference to the case of Standard Chartered Bank of Canada v Nedperm Bank Ltd [1994] ZASCA 146; 1994 (4) SA 747 (A).

[40] He also stated that, “he agree with Scott JA “that “the evidence establishes that the danger of fire emanating from an external source on the roof of the building with sufficient intensity to ignite the gutter was not reasonably foreseeable; or expressed differently, a reasonable person in the position of Worthington-Smith or Visser would not . . . have foreseen the danger as real enough to warrant precautionary measures”. For this reason the wrongful acts by the first and second appellants, assuming that they acted wrongfully, is not linked sufficiently closely or directly to the loss suffered by the appellants for legal liability to ensue. There are in my view no considerations of reasonableness, fairness or justice which militate against this finding.

[41] With reference to the above mentioned case, what is worse in casu, it was not proven that the Defendant omitted to inform ‘the deceased’ to come back to the hospital, irrespective of after how long.

[42] For the purposes of liability culpa arises if:

a) The diligens paterfamilias in the position of the Defendant:

i) would foresee the reasonable possibility of her conduct (injuring another person

ii) would take the reasonable steps to guard against such occurrence

b) The Defendant failed to take such steps.

[43] According to report from the South African Medical Association, the Plaintiff has the right to the following:

43.1 to privacy which includes protection of personal information, [2] communication, family and property.

43.2 to have access to information held by the state and or/private institutions.

[44] The relevance of the privacy right in this matter is in consideration of the submission made by the Plaintiff that he and the deceased were to phone for the results. The submission is improbable because there is no evidence as to how privacy issue were to be secured if results were to be provided telephonically or their availability were to be made public or to a person who’s identity or vetting could not be done. The nature of the sensitivity of the results could not be done telephonically similar to just confirmation of available funds in the bank account cannot be done without verification of the identity of the caller who seek information about anything to do with the account of a particular account holder.

[45] Other than the rights, ‘the deceased’ has as the patient, according to the report from the South African Medical Association, has the duty to:

45.1 follow the advice of their doctors and fully inform their doctors of their health status.

45.2 deal with their health information in a responsible manner and realize that they may need expert advice on the interpretation thereof.

45.3 look after his/her own health.

[46] The opinion of Dr. Moodley on duty of care and responsibility of the medical staff disregarded the responsibilities of 'the deceased' as a patient and it is premised on private hospital set up but it is ignorant on public hospitals and had not considered or envisaged the reasonable step to be taken by the doctor in public hospital where patient did not return to the hospital. The determination of the medical staff's responsibilities should be done not in the vacuum but in an instance where the patient is awaiting results and the necessary arrangements are to be done on the next available date of patient's treatment. There is no different test of negligence applicable between public and private hospitals however one cannot lose sight of their different processes and procedure applied by each of them considering the available resources, extend of area each one service among other relevant considerations.

[47] The Defendant's responsibility towards the Plaintiff are among others,

47.1 to protect life, within the confines of a patient's right to physical autonomy and decision-making power.

47.2 to protect the privacy and confidentiality of his/her patients and to only disclose health care, treatment, diagnostic and other health information with the patient's informed and written consent or when authorized by law or a court to do so.

47.3 doctors have a responsibility to assist in realizing the right of access to health care, which may include issuing prescriptions

enduring access to the best available treatment.

[48] When applying a provision of the Bill of Rights to a natural or juristic person a court may develop the rules of the common law to limit the right in accordance with the limitations clause section 36(1) and 8(3)(b)); when developing the common law every court must promote the spirit, purport and objects of the Bill of Rights and (section 39(2)). In terms of s27(1) and 2 of the Constitution, everyone has the right to have access to healthcare services, which the state must take reasonable legislative and other measures, within its available resources, progressively to achieve.

[49] Section 6 of the National Health Act 61 of 2003, states the duties and rights of users and health care personnel as follows:

6. (1) Every health care provider must inform a user of-
 - (a) the user's health status except in circumstances where there is substantial evidence that the disclosure of the user's health status would be contrary to the best interests of the user;
 - (b) the range of diagnostic procedures and treatment options generally available to the user;
 - (c) the benefits, risks, terms and consequences generally associated with each option; and

- (d) the user's right to refuse health services and explain the implications, risks, obligations of such refusal.
- (2) The health care provider concerned must, where possible, inform the user as contemplated in subsection (1) in a language that the user understands and in a manner which takes into account the user's level of literacy.
- [50] The Defendant alleges to have complied with her duty and the fact that the Plaintiff dispute that aspect requires the Plaintiff to prove his allegation. It is not the negative consequences of the treatment or the unreasonableness of his omission or conduct that has to be proven that the Defendant did not do his obligation in terms of duty of care.

[51] Having read section 14(d) of the Bill of Rights with section 14(1)-(2) of the National Health Act 61 of 2003, respectively reads as follows:

"everyone has a right to privacy, which includes the right to not have the privacy of their communications infringed"; and;

- (1) All information concerning a user, including information relating to his or her
- (2) Subject to section 15, no person may disclose any information contemplated in health status treatment or stay in a health establishment, is confidential.

Subsection (1) unless-

- (a) the user consents to that disclosure in writing; [3]
- (b) a court order or any law requires that disclosure; or
- (c) non-disclosure of the information represents a serious threat to public health

[52] Section 10 of the National Health Act 61 of 2003, states that:

- (1) A health care provider must provide a user with a discharge report at the time of the discharge of the user from a health establishment containing such information as may be prescribed.
- (2) In prescribing the information contemplated in subsection (1), the Minister must have regard to-
 - (a) the nature of the health service rendered;
 - (b) the prognosis for the user; and
 - (c) the need for follow-up treatment.
- (3) A discharge report provided to a user may be verbal in the case of an outpatient, but must be in writing in the case of an inpatient.

[53] It remains the gravamen of the Defendant's case that 'the deceased' should have returned to 'MPH' for her results as indicated in the medical file and informed by the Defendant's personnel. Although IN THLOOE V MEC FOR DEPARTMENT OF HEALTH, NORTH WEST PROVINCIAL GOVERNMENT (625/2010)

[2021] ZANWHC 45 (12 August 2021), the finding was different and the facts are distinguishable, and the defendant had the same argument in this case. "... It was argued that the Plaintiff had a responsibility in terms of Section 19 of the National Health Act 61 of 2003 to take care of her own health. In doing so the Plaintiff should have attended at the hospital after her discharge for a follow up check-up and to obtain the results from the laboratory. The defendant was hanging its argument on the fact that the Plaintiff as a trained and enrolled nurse ought to have been aware that when samples are taken to the laboratory she needs to return to the treating doctor for results. It was therefore expected of the Plaintiff to return to the hospital for the results". The difference herein is that not only in this case, the Plaintiff had a duty to act in accordance with the obligation cast on her, but she was informed to return on the appointed time, to wit (TCB 3/52" (PP63), which did not happen, instead she allege to have relied on telephone calls, as will be demonstrated below is untenable. Djadje DJP has this to say at para 20 in THLOOE's case: ..." However, the hospital file is missing and there is no evidence that the Plaintiff was informed of the results". In casu, the date in which 'the deceased' had to return for results was in-scripted in the medical file (TCB 3/52), and that is evidence that she was informed than to call as averred by the Plaintiff.

[54] AND IN MEC FOR HEALTH SOCIAL DEVELOPMENT OF GAUTENG PROVINCIAL GOVERNMENT V MACHETE (A70/21; 69859/2017) [2023] ZAGPPHC 21 , the following was stated at para 22: " Therefore, it is not enough to prove that the appellant's staff breached the legal duty of care and that the Respondent suffered harm, it must still be proven that the breach is what caused the harm suffered (AN o.b.o EN V MEMBER OF THE EXECUTIVE COUNCIL FPOR HEALTH EASTERN CAPE [2019] ZASCA 102; [2019] 4 All SA 1 (SCA) para 4)...." . The test for factual causation is whether or not an act or omission of the Defendant has been proven to have caused or materially

contributed to the harm suffered. In casu, a determination has to be made whether the Defendant release of the results to 'the deceased' were late (which lateness was caused by the act of the Defendant) leading to the migration of the caner, and as a result, the Defendant hospital personnel were negligent, which in essence such was avoidable if timeous release to 'the deceased's biopsy results was done. If yes, then there would be factual causation.

[55] When dealing with negligence the issue of foreseeability arises. The question is whether the Defendant or its employees could reasonably foresee that harm could arise and whether they could have taken steps to prevent such harm. Again the test is trite, as indicated in para 7 of MACHETE's case mentioned above, that – "the issue then is whether the respondent has proven the elements of negligence and causation on balance of probabilities."

- [56] Only when the causal link is created between the condition or death of ‘the deceased’ & ‘un-caring’ conduct of the Defendant’s medical staff, it is then that the question of whether that the Defendant should have foreseen, reasonably so, that by her conduct will bring undesirable consequences. The Defendant’s system of informing the Plaintiff’s spouse to come back to the ‘MPH’ for treatment seems to be the ultimate cause of action. In essence, the Plaintiff’s claim of action is interpreted to the effect that the nursing staff of the Defendant whom he telephonically contacted incorrectly informed ‘the deceased’ that the biopsy results were not available when according to the Plaintiff’s version they were in fact available as at 18 April 2017. The Plaintiff could not outline reasonable steps which the Defendant could have taken towards further treatment of ‘the deceased’ in her absence from ‘MPH’.
- [57] The contradictions which the Plaintiff pointed out in his heads of Argument by the Defendant’s witnesses are not assisting the Plaintiff’s case either. Whether ‘the deceased’ was given a card to remind her of the date is immaterial, in that nowhere in the Plaintiff’s testimony was alleged that ‘the deceased’ needed a reminder nor could not remember the date, instead, ‘the deceased’ knew all along about getting results, whether by phone, or going to the hospital personally or sending someone. ‘The deceased’ went to ‘MPH’ on the 21 July 2017 and the process as averred by the Defendant took place. A call was made to the laboratory and the results were forwarded and given to her because she was there, which clearly support the version of the Defendant.[4]
- [58] There is no reason to believe that despite return period written on the medical file, it might have slipped the minds of the medical staff of the Defendant to inform ‘the deceased’ to return to ‘MPH’. It cannot be said that the Defendant negligently omitted to advise ‘the deceased’ to that effect. The Plaintiff on his own alleges that there was communication to him and ‘the deceased’, to have ‘the deceased’ obtain results and the purpose of the results is to return to the ‘MPH’ to have further treatment (which its ultimate end is to return to the ‘MPH’). Although such advice of telephonically contacting the ‘MPH’ first, is illogical, even if it was true and it does not yield fruits, it required ‘the deceased’ to return to ‘MPH’.

CONCLUSION

- [59] Consequently, the Plaintiff has failed to discharge its onus of proving that the Defendant’s medical staff received or could have received the biopsy results long before the 21st July 2017, but failed to do so on their own when they should have done so. The Plaintiff did not prove that it was the Defendant’s failure to obtain results prior to the 21st July 2017 which occasion the harm on ‘the deceased’. The conduct of the Defendant’s medical staff in dealing with ‘the deceased’ regarding her treatment is a sound medical practice and it is based on practice within the public hospital. It is improbable that ‘the deceased’ was not advised to return to the ‘MPH’ in three weeks period despite that in the medical file it was written ‘TCB 3/52’.

[60] It is improbable that contradictory methods of arranging further medical treatment on 'the deceased' was communicated to her verbally than the written method as stated on the medical file, or that there was no communication at all.

[61] When looking into the totality of the evidence presented before this Court, in the absence of standard of proof by the Plaintiff, it cannot be said that the Plaintiff has succeeded to prove his case on a balance of probabilities.

COSTS

[62] It is trite that costs follow the action. There is no reason to depart from the settled principle. Consequently the Plaintiff is liable for costs on the Defendant on party and party scale.

The Order

The Plaintiff's claim is dismissed.

MALOWA AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH-WEST DIVISION, MAHIKENG

APPEARANCES

Date of hearing: 28 November 2022 Judgment Reserved: 30 November 2022 Date of Judgment: 15 June 2023 Counsel for the Plaintiff: Adv. Carel van Jaarsveld Counsel for the Defendant: Adv. K Mongale

[1] Oppelt v Department of Health 2016 (1) SA 325 (CC) 2.South African Medical Association @ <https://www.samedical.org.za>

[1] Oppelt v Department of Health 2016 (1) SA 325 (CC)

2.South African Medical Association @ <https://www.samedical.org.za>

3. Section 12(11)(c) of the Constitution of the Republic of South Africa,1996. 4. Section 36(1) and 8(3)(b) of the Limitations Clause. 5. Section 10(1),(2)-(3) of the National Health Act 61 of 2003. 6. Section 15 of the National Health Act 61 of 2003.

3. Section 12(11)(c) of the Constitution of the Republic of South Africa,1996.

4. Section 36(1) and 8(3)(b) of the Limitations Clause.

5. Section 10(1),(2)-(3) of the National Health Act 61 of 2003.

6. Section 15 of the National Health Act 61 of 2003.

[3] Section 39(2) of the Constitution of the Republic of South Africa, 1996. 3. Section 14(d) of the Bill of Rights. 4. Section 6(1)-(2) of the National Health Act 61 of 2003. 5. Thlooe v MEC for Department of Health, North West 9625/2010) [2021] ZANWHC.

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- [3] Section 39(2) of the Constitution of the Republic of South Africa, 1996.
3. Section 14(d) of the Bill of Rights.
4. Section 6(1)-(2) of the National Health Act 61 of 2003.
5. Thlooe v MEC for Department of ?Health, North West 9625/2010) [2021] ZANWHC.
- [4] MEC For Health and Social Development of Gauteng Province v Machete (A70/21; 69859/20170 [2023]
5. AN o.b.o EN v Member of the Executive Council For Health Eastern Cape [2019] ZASCA 102; [2019] 4 ALL SA 1 (SCA) para 4.
- [4] MEC For Health and Social Development of Gauteng Province v Machete (A70/21; 69859/20170 [2023]
5. AN o.b.o EN v Member of the Executive Council For Health Eastern Cape [2019] ZASCA 102; [2019] 4 ALL SA 1 (SCA) para 4.
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