

SOUTH AFRICA / JUDGMENT

Marumo v Member of the Executive Council for Health: Free State Province (24/2015) [2024] ZAFSHC 66 (4 March 2024)

[2024] ZAFSHC 66**COURT**

Free State High Court, Bloemfontein

BEFORE

Lekhoaba

CASE / FILE NUMBER

24/2015

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****FREE****STATE DIVISION, BLOEMFONTEIN****Case****no: 24/2015****Reportable: YES/NO****Of****Interest to other Judges: YES/NO****Circulate****to Magistrates: YES/NO****In****the matter between:**

DOLLY
NTOMBIZODWA MARUMO
Plaintiff
and
MEMBER
OF THE EXECUTIVE COUNCIL FOR
Defendant

HEALTH:

FREE STATE PROVINCE

CORAM:

LEKHOABA AJ
HEARD

ON:

14 &
15 NOVEMBER 2023
DELIVERED

ON:

04 MARCH 2024

JUDGMENT

BY: LEKHOABA AJ

INTRODUCTION:

[1] This is a claim arising from an incident that took place on 19 June 2013, at Brandfort, on the N1 Bloemfontein, Free State Province. The plaintiff was in the ambulance and under medical supervision and care of paramedics when she went into labour and gave birth to a still born child. The plaintiff issued summons against the defendant on 6 January 2015,

claiming an amount of R1 500 000 (One Million Five Hundred Thousand Rand) due to negligence on the part of the defendant.

[2] The Defendant is the Member of the Executive Council: Free State Department of Health, who is sued herein in her representative capacity as head of the Free State Provincial Department of Health.

[3] The Plaintiff in her particulars of claim alleges that at all material times when giving birth, she was in an ambulance under medical supervision and care of emergency medical practitioners in Brandfort.

[4] She further alleges that she was under the medical care or supervision of medical staff of Maranatha clinic and Vaalrock Clinic Brandfort. She contends that at all material times thereto the above medical practitioners were in the employ of the Department of Health, Free State, alternatively Maranatha Clinic Brandfort and Vaalrock Clinic Brandfort. She alleges that at all material times the abovementioned medical practitioners and staff had a legal duty of

care towards the Plaintiff during the delivery of her baby.

[5] The plaintiff alleges that the medical practitioners or staff were negligent and acted contrary to the legal duty owed to her on various grounds which are enumerated in the plaintiff's particulars of claim.

[6] It is not disputed that the plaintiff was pregnant and due for delivery; the ambulance arrived at plaintiff's house at 14:16 and that the plaintiff complained about pains in her stomach at around 07:00 and her husband, Mr. Marumo called for assistance at around 09:00. There is no record of the plaintiff's cell number that Mr. Marumo alleges to have been used to summon the ambulance anytime that morning.

[7] The plaintiff's case is pleaded that she gave birth in the ambulance as a result of negligence of personnel at Maranatha clinic and paramedics which resulted in her suffering damages. They failed to assist Mr. Marumo to get hold of the call centre at the time when he was at

Maranatha clinic. When they finally assist Mr. Marumo to get an ambulance dispatched, the paramedics failed to provide and perform the treatment to the plaintiff with the degree of care, skill and diligence prevailing in medical profession and that resulted in the death of the plaintiff's baby.

- [9] The defendant's case is that the unequivocal evidence before the court is that the phone records as well the clinical notes indicating that the plaintiff had only sought assistance of an ambulance at 13:40 being the earliest when he had called Mr. Makhetha. The ambulance departed the station at 14:07 according to Ms. Kujoane's evidence and arrived at the scene at 14:16. This was within 9 minutes. The defendant submitted that had Mr. Marumo called the call centre, his wife's case, which is classified as a priority 1 would have received priority, and the ambulance would have been informed by the call centre of such case within 2 minutes of the call being logged.
- [10] In their Plea, the defendant denies that the plaintiff had been under supervision and care of his employees at all material times during labour and the birth of the baby. The defendant further denies that any of his employees had been negligent.

ISSUES:

- [11] Whether the defendant breached its legal duty owed to the Plaintiff in failing to dispatch an ambulance to the Plaintiff timeously.

I am now turning to deal with the evidence of the parties

EVIDENCE:

- [12] Mr. Marumo testified to the following effect:

That on 19 June 2023, he woke up at around 07:00 to check up on how was the plaintiff doing. Plaintiff complained about pains on her stomach. He further testified that after 08:00 he then prepared the children for school. He took the eldest child to school and the young one remained with his mother. Mr Marumo came back from taking the eldest child and took the youngest one. He alleges that he used the Plaintiff's cellular phone to call the centre number 10177 in order to summon the ambulance. he called number

- (10177) throughout the morning without success. He further testified that the Plaintiff was getting tired and the pain was getting worse and kept on calling the number 10177.

- [13] At 09:00 he walked to Maranatha Clinic, because he knew that ambulances are stationed there. He avers that on his arrival he met with Mr Makhetha, a paramedic outside the clinic and informed him about Plaintiff's condition and Mr. Makhetha informed him that he could not assist and encouraged him to keep on calling the call centre number. He then informed Mr. Makhetha that he had been calling the number 10177 without success.

- [14] He proceeded inside the Maranatha Clinic and met with Me. Tau from whom he requested for an ambulance to fetch the Plaintiff. Me. Tau also could not assist and advised him to keep on calling the call centre number for an ambulance. He testified that when he left the clinic, he took the cell phone number of Mr. Makhetha and left. At around 11:00, when he came back from Maranatha Clinic the Plaintiff informed him that there were fluids coming out of her private parts and He kept on calling the number 10177 again.
- [15] Mr. Marumo further averred that he then called Vaalrock Clinic and spoke to Reggie Mpopetsi who promised to call him back and Mr. Reggie Mpopetsi failed to do so. Mr. Marumo called again and asked Mr Mpopetsi why ambulance was not coming if there are ambulances parked at Maranatha Clinic. Mr. Mpopetsi informed Mr. Marumo that he spoke to Ms. Tsoang and Ms. Tsoang arranged an ambulance to come fetch the Plaintiff.
- [16] Under cross examination, Mr Marumo confirmed that he did not attempt to call the ambulance upon Plaintiff's first complaint of the pains and he further confirmed that the Plaintiff complained between 08:00 - 09:00 that the pains were getting worse. It emerged during gross examination that plaintiff's cell phone record for that particular day was not available
- [17] The second witness for the plaintiff was Dr Kemp and the court noted his qualifications and experience. He is a family practitioner with MBCHB qualification. Dr Kemp completed the medico-legal report on behalf of the Plaintiff. He corroborated Mr. Marumo's evidence as above.
- [18] He testified to the that effect that Mr. Marumo informed him that he walked to Marantha Clinic and he was turned back without being helped with the ambulance. He testified that had Maratha Clinic personnel assisted Mr. Marumo with logging a call at the time when he was at Maranatha clinic that could have saved the plaintiff's baby. His conclusion was that the ambulance was delayed more than seven (7) hours which made the difference between life and death of the baby. It is premised on the fact that calls were made between 7:00 and 8:00 to the call centre and after that Mr Marumo walked to the Maranatha clinic and the staff there did not assist in calling ambulance despite being informed about the condition of the plaintiff.
- [19] During cross examination Dr Kemp indicated that the facts were relayed to him by Mr. Marumo during consultation and he did not consider medical documents that were before him and it was put to him that the first time the Emergency Medical Services ("the EMS") was informed of the Plaintiff's case was at 14:07, as also recorded on the clinical notes. In light of what Mr. Marumo informed him about and the documents that he was referred to, the doctor was asked what made him to reach the conclusion that the ambulance was over seven hours late. He conceded that he only relied on the timelines provided by Mr. Marumo.
- [20] When pointed to the contradiction in what he was relaying to the Court and the earlier testimony of Mr. Marumo, that he called Vaalrock Clinic and did not get assistance, his response was that he never had sight of the telephone records. He conceded that if

telephone records were made available to him, he would have altered his opinion on the delay of seven hours and having seen the said telephone records, he would agree with the Defendant's version. He further conceded that at the time of compiling his report, he did not consider the standard operating procedures and guidelines of EMS in responding to call. He went on to concede that the time frames of Mr Marumo calling Vaalrock Clinic at 13:45 and the clinical notes indicating that EMS arrived at 14:16 and the calls being logged by the personnel after the ambulance had attended to the Plaintiff at 14:25 and 14: 27 respectively was correct.

- [21] Under cross examination he conceded that he was not an expert in the field of obstetrics and gynaecology. He further confirmed that he is not expert to attest to any delays in respect of matters in this field of expertise and general medical knowledge does not suffice. After his testimony the Plaintiff's case was closed. Three witnesses testified on behalf of the defendant.
- [22] The first witness for the Defendant, Ms. Christian Kujoana testified that she is employed as a Basic Ambulance Assistant, providing basic life support. She had 13 years' experience and on the 19 June 2013 was on duty with Mr Makhetha and she was the driver.
- [23] She testified that Mr Makhetha received a call at 14:07 that they must attend to a pregnant person. They departed from the station at 14:07 and arrived at the scene at 14:16. They left the scene at 14:23 heading to Pelonomi Hospital in Bloemfontein and problems occurred along the way, and they had to go to Maranatha clinic instead and arrived at 14:36. They left Marantha clinic at 14:59, and at 15:31 they were met by a response vehicle along the way to Pelonomi Hospital. They arrived at Pelonomi at 16:00. She testified that the reason they drove to the hospital instead of the clinic, was because all emergency cases were transported to Bloemfontein.
- [24] The Defendant's second witness, Ms. Boitumelo Tsoang testified that She is employed as an Intermediate Life Support by the Defendant's EMS Department. She stated that on 19 June 2013, she received a call from Mr Mpopetsi from Vaalrock Clinic, who informed her that there was a woman who was about to give birth. She then informed Mr Mpopetsi that she will log a call with the call centre. She immediately logged the call on behalf of the Plaintiff. She stated that she remembers very well because it occurred during the day around 14:00, she was on her way to pick her manager from a meeting in Bultfontein.
- [25] The Defendant last witness, Mr Towa, testified that he is employed as a Manager by the Defendant and manages the Emergency Medical Services control centre. He further testified that as part of his responsibilities he looks after the systems and ensures that the call centre is able to receive and manage calls. He was employed as such since 2008. He testified that the number 112 was a national emergency number that was introduced in the year 2006, and used to locate Emergency Medical Services anywhere in the Country. It operates in two centres – 1 in Midrand (Gauteng) and another in the Western Cape.

- [26] Mr. Towa testified that the duration on the first call from Mr. Marumo to the number 112 was 30 seconds, the second was 23 seconds and the last was 8 seconds. He submitted that in order to have a successful call the duration must at least be 2 minutes. He concluded that none of the above calls was successful.
- [27] When presented with the report that was contained on page 17 to 20 of the Defendant's bundle. He identified it as an incident report from the system when logging an ambulance request, and testified that the times in that report are generated by the system. He testified that according to the incident report that was before him, the calls were logged by his colleagues on behalf of a community member. He concluded his testimony by stating that the phone records give a clear picture of what transpired on 19 June 2013, even though he has no personal knowledge of the incident.

ANALYSIS:

- [28] Before analysing the matter it is important to consider matters of common cause between the parties which are amongst the following:
- [28.1] Ambulance did arrive.
- [28.2] Mr. Marumo walked to Maranatha clinic and spoke to Mr. Makgetha
- [29] 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 parties evidence, and either to find in favour of the plaintiff or not. Alternatively, that the defendant is liable for the apparent negligence.
- [30] 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 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.
- [31] The plaintiff must show that the defendant staff acted negligently in rendering care, and that such negligence resulted in damages. To do so four elements must be proven: 1. A professional duty owed to the patient; 2) breach of such duty; 3) injury caused by the breach; and 4) resulting damages.
- [32] In *Kruger v Coetzee* 1996 (2) SA 428 (A) Holmes JA, in its judgment, the court held that: It is 'necessary for the 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'

- [33] 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. Only when the casual link is created between the birth of a child and uncaring conduct of the defendant's medical staff. It is then that the question of whether that the defendant should have foreseen, reasonably so, that her conduct will bring undesirable consequences.
- [34] The Court was furnished with the telephone call records which indicated that the plaintiff's husband Mr. Marumo successfully made a call to Mr. Makhetha at 13:40 and at the same time he also made a call to Vlakfontein clinic at 13:45. Mr. Makhetha and Ms. Ntswang when logging a call on behalf of Mr. Marumo their calls clashed. It became apparent that as testified by the last defence witness Mr. Towa the two calls clashed but one call by Ms. Ntswang was successfully logged in for assistance of the Plaintiff, at approximately at 14:07 the ambulance was dispatched to the Plaintiff's place of residence and arrived at the scene at 14:16, the ambulance then left the scene at 14:23. The ambulance arrived at Maranta clinic at 14:36 and later travelled to Pelonomi Hospital and the Plaintiff arrived at Pelonomi at 16:00.
- [35] Given the evidence that was presented before the court the plaintiff started feeling the pains from 07:00 and Mr. Marumo decided to walk to Maranatha clinic when he realised that he was not getting through the call centre to summon the ambulance in person. Instead of a call being logged for him, he was advised to continue to call the call centre. Had a call being logged on behalf of the Plaintiff at the time when Mr. Marumo was at the Maranatha clinic the baby could have been saved.
- [36] I agree with the plaintiff when she states in paragraph 21.8 of her heads of arguments that the defendant witness Mr. Towa confirmed that they got two (2) types of calls which one is where a call was made by his colleague on behalf of the member of the community. It ties in with the evidence of Dr Kemp that the employees of Maranatha clinic had a duty to assist Mr. Marumo when he was there in person.
- [37] The Plaintiff's witnesses contradicted each other in that Dr Kemp testified that Mr. Marumo started calling the number 10177 from approximately 07:00 while Mr. Marumo testified that around 07:00 his wife started feeling the pains and they had to wait for the water to break before they can summon an ambulance. Dr Kemp testified that the delay to dispatch ambulance was 7 hours, and during cross examination he changed and conceded that he did not take into account the medical records that was in his position and he did not had sight of the telephone calls records.
- [38] It is uncontended that Mr. Marumo indeed went to Maranatha clinic and was not assisted but advised to continue to call the call centre. Mr. Makhetha gave Mr. Marumo his cell number. I agree with the plaintiff when they say Mr. Marumo walked to Maranatha Clinic and spoke to Mr. Makhetha and that it is not correct that the first attempt to obtain an ambulance was made at 13:45.

[39] The ambulance arrived at the plaintiff's house at 14:16 and left at 14:23 heading to Pelonomi Hospital in Bloemfontein and according to Ms. Christina Kujoana problems occurred along the way, and they had to go to Maranatha clinic and arrived at 14:36. Clinical and paramedics could not assist the Plaintiff inside the ambulance and upon arrival at Maranatha clinic, instead ambulance left Maranatha clinic to Pelonomi hospital at 14:59, and at 15:31 they were met by a response vehicle along the way to Pelonomi Hospital. They arrived at Pelonomi at 16:00.

[40] National Health Act, 2003 (Act no. 61 of 2003) provide a framework for a structured uniform health system within the Republic, taking into account the obligations imposed by the Constitution and other laws on national, provincial and local governments with regard to health services. Section 11 provides that:

[11.1] Emergencies must be responded to in a co-ordinated and efficient manner by emergency medical service.

[11.2] For the purpose of sub-regulation (1), the emergency medical service must –

- (a) Ensure emergency vehicles are appropriately equipped and staffed, and
- (b) Have systems to ensure that patients are treated in accordance with current evidence guidelines to reduce variations in care and improve patient outcomes.
- (3) For the purposes of sub-regulation (2)-
 - (a) Health care Professionals must have and adhere to evidence- based clinical practice guidelines on stabilising patients before and during transportation of patients.
 - (b) There is a standardised method of patient handover, which is implemented.

[41] In regard to the assessment of witnesses and resolution of mutually destructive versions, including the general probabilities it was stated in National Employers' General Insurance Co Ltd v Jagers 1984 (4) SA 437 (E) at 440 D-G that:

"It seems to me, with respect, that in any civil case, as any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case, the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he satisfies the court on a preponderance of possibilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, the court will accept his version as being probably true. If, however the probabilities are evenly balanced in the sense that they

do not favour the plaintiff's case any more than they do the defendants, the plaintiff can only succeed if the court nevertheless

believes him and is satisfied that his evidence is true and that the defendant's version is false."

[42] In *AM AND ANOTHER v MEC FOR HEALTH, WESTERN CAPE 2021 (3) SA 337 (SCA)* the functions of an expert witness were explained as follows at para 17:

"[17] Something needs to be said about the role of expert witnesses and the expert evidence in this case. The functions of an expert witness are threefold. First, where they have themselves observed relevant facts that evidence will be evidence of fact and admissible as such. Second, they provide the court with abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, they give evidence concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions."

[43] It is common cause that, pursuant to the provisions of Section 11 of, that the defendant has a duty to provide

a co-ordinated and effective emergency medical service. When looking into totality of the evidence presented before this Court, the plaintiff has succeeded to prove his case on balance of probabilities. Maranatha Clinic staff could have foreseen the

possibility of causing harm to the plaintiff and her unborn child by failing to call an ambulance for the plaintiff at the time when Mr. Marumo was at the clinic since the condition of the plaintiff is classified as a priority 1.

CONCLUSION:

[44] After considering the papers and hearing evidence on behalf of both parties. Consequently, I find that the plaintiff has proven, on balance of probabilities:

[44.1] That the defendant had a legal duty to assist Mr. Marumo with calling an ambulance at the time when he was at Maranatha clinic.

[44.2] The employees of the defendant were negligent in failing to assist Mr Marumo in calling the ambulance as this conduct led to the delay in assisting the plaintiff.

[44.3] The defendant is thus vicariously liable for the negligent acts of her employees.

[44.4] That paramedics failed to provide the plaintiff with basic life support during transportation so as to ensure that the baby was born alive thereafter remained alive.

COSTS

[45] It is trite that costs follow the action. There is no reason to depart from the settled principle. Consequently, the defendant is liable to pay costs of action and qualifying fees of the plaintiff's appointed expert, Dr D C Kemp.

ORDER.

[46] In the circumstances, the following order is granted:

[46.1] The defendant shall compensate the plaintiff for 100% of her proven or agreed damages.

[46.2] The defendant to pay the costs.

LEKHOABA, AJ

Appearances: On behalf of the Plaintiff: Adv. D. De. Kock Instructed by: WEBBERS Attorneys
Bloemfontein On behalf of the Defendant: Adv. K Nhlapo-Merabe Instructed by: State Attorney
Bloemfontein

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