

SOUTH AFRICA / JUDGMENT

N.E.F v MEC for Health North West Province (1713/2015) [2021] ZANWHC 2 (28 January 2021)

[2021] ZANWHC 2

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks

CASE / FILE NUMBER

1713/2015

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Policy**IN THE NORTH WEST HIGH****COURT, MAFIKENG****CASE NO: 1713/2015****Reportable:**

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Magistrates:

YES/NO

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Magistrates: YES/NO

In the matter between: F[...],
NE
Plaintiff
and
MEC
FOR HEALTH NORTH WEST PROVINCE
Defendant
DATE
OF HEARING
:
01 DECEMBER 2020
DATE
OF JUDGMENT
:
28 JANUARY 2021
FOR
THE APPLICANT
:
ADV. RETIEF
FOR
THE RESPONDENTS
:
ADV. MONGALE

JUDGMENT

ORDER

Consequently, the following order is made:

1. The Defendant is liable to compensate the Plaintiff for 60% of her proven or agreed damages sustained during the period of 18 December 2012 to 29 January 2013, resulting from the treatment and delay thereof the Plaintiff received in the hospitals of the Defendant, after she sustained a Colles type fracture of the left distal radius.
2. The Defendant must make payment of the Plaintiff's taxed or agreed costs, on a party and party High Court scale, which costs shall include the following:
 - 2.1 Costs for the trial of 20 October 2020;
 - 2.3 Costs for trial dates of 30 November and 1 December 2020.
3. The aforementioned Plaintiff's taxed or agreed party and party costs shall include the following:
 - 3.1 All the fees of Senior Junior Counsel on the High Court scale, inclusive of her attendance, preparation and reservation for the days of trial and preparation of the heads of argument in this matter;

3.2 The reasonable taxable costs of obtaining any expert reports from the Plaintiff's expert which were furnished to the Defendant;

3.3 The reasonable taxable preparation and reservation fees, if any, of the following expert:

3.3.1 Dr. D.A Birrell.

3.4 The costs of a consultation, if any, between the Plaintiff and her attorney to discuss the settlement offer received from the Defendant and the terms of this order;

3.5 Reasonable costs occasioned for travel and accommodation arrangements in respect of the expert and witness, and Plaintiffs' attorneys and counsel.

3.6 The above costs will be paid into the Plaintiff's attorneys trust account with the following particulars:

ADAMS & ADAMS Nedbank

Account number : [...]

Branch number : 198765

Pretoria

Ref: NK/RIW/P1169

4. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

4.1 The Plaintiff shall serve the notice of taxation on the Defendant's attorney of record;

4.2 The Plaintiff shall allow the Defendant 30 (thirty) court days to make payment of the taxed costs from date of settlement or taxation thereof;

4.3 Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 7% on the taxed or agreed costs from date of allocator to date of final payment.

4.4 The aforesaid costs shall be payable by direct transfer into the trust account of Adams & Adams attorneys, the details of which are as follows:

Nedbank

Account number : [...]

Branch number : 198765 Pretoria

5. The plaintiff is ordered to pay the costs of 21 October 2020.

HENDRICKS DJP

- [1] On 18th December 2012 Ms. N F[...] (the plaintiff) was a victim of domestic violence. During the ordeal she fell and suffered an injury to her left forearm above the wrist. She went to Tshepong Hospital in Klerksdorp, where her left hand and arm were x-rayed. It was detected that she suffered a Colles type fracture on her left forearm just above her wrist. Plaster of Paris (POP) was applied although the doctor who treated her said that she should undergo corrective surgery. As a result of continued pain she suffered, she went back to the hospital after eight (8) days, on the 27th December
2012. The POP was removed and a new one was applied. The excruciating pain persisted, which caused her to went back to the hospital again on 16th January
2013. Once again the POP was removed and a new one was applied. There was no relief from the pain she experienced. She went back to the hospital again on 22nd January
2013. The POP was again removed and re-applied. This was the fourth time. There was still no improvement. Once again, she went back to hospital but this time she attended at the Potchefstroom hospital on 29th January
2013. The POP was again removed. It was decided that there was a need to operate. On the 14th February 2013 she went back to the hospital but was not assisted. On 18th February 2013, two months after she sustained the injury, she again went to Klerksdorp hospital. It was only then that the corrective surgery was performed to correct the malunion in her left forearm. She was discharged on 19th February 2013.
- [2] Almost a month later, on 16th March 2013, she experienced numbness in her left hand coupled with severe pain. This caused her to visit the Park Street Clinic for medical assistance. On 01st September 2013 she was again a victim of domestic violence. Her left hand got injured in a skirmish when her live-in partner banged the back of it against a refrigerator. She was conservative medically treated. Again on 30th October 2014, she received treatment for the bruises and pain she had to endure. This is the time table for the hospitals and clinic visits she paid for the injury she sustained.
- [3] She obtained legal advice and instituted a claim for damages against the Member of the Executive Committee (MEC) for Health, in the North West Province. The delictual claim is based on professional negligence the plaintiff suffered as a result of the treatment she received at the Tshepong/Klerksdorp and Potchefstroom hospitals. The act of negligence is attributed to the fact that there was an inordinately long delay in applying corrective surgical treatment to the plaintiff's injury; failure to treat the Colles type injury of the forearm correctly; failure to determine the constant and

continuous pain she suffered; failure to prevent the sequel and complications as a result of the negligent acts. At the inception of this trial, liability and quantum were separated in terms of the provisions of Rule 33 (4) and the trial commenced and proceeded with this Court to determine the liability, if any, on the part of the defendant, the MEC. There was a dispute with regard to which party bears the onus and has the duty to begin. This Court ruled that the plaintiff bears the

onus to prove her case and has the duty to begin. The plaintiff testified and also called Dr. Anthony (Tony) Birrell, an orthopedic surgeon, as an expert witness to testify in her case. Dr. Johannes Heymans, an orthopedic surgeon, was called as an expert witness in the case for the defendant.

[4] The evidence of the plaintiff with regard to her attendance at the hospitals (both at Tshepong/Klerksdorp and Potchefstroom) and clinic is undisputed and is in fact common cause. Even the prognosis that she suffered a Colles type fracture just behind the left wrist is common cause. Whether she was properly treated and what the apportionment of negligence should be, that must be apportioned to each party were the issues of much debate. To this end, the evidence of Dr. Birrell and Dr. Heymans need to be carefully considered. Both these witnesses testified as expert witnesses with their expertise

been admitted. Each of them submitted a report and addenda thereto. They also complied a joint minute.

[5] According to the evidence of Dr. Birrell, the delay in receiving the correct treatment and eventually the operation, constitute negligence on the part of the doctors at the Tshepong/Klerksdorp hospital and

the Potchefstroom hospital, for which the defendant is vicariously liable. He disagrees with Dr. Heymans with regard to the degree of the delay and what the apportionment should be. According to him, the apportionment should be 30/70, being 30% apportioned to the plaintiff and 70% apportioned to the defendant. This is based on the fact that the POP's were too tightly applied and had to be redone several times. The operation, which was absolutely unnecessary, was delayed for much too long. The operation comprised of an open reduction and internal fixation (plate and screws) together with an osteotomy. The plaintiff suffered damages as a result of the defendant's negligence in that proper reduction of the distal radial fracture was not possible, which resulted in the shortening of the distal radius with ulna positive variance of the distal radio/ulna joint. This in turn result in painful pro and supination, impaired pro and supination, as well as impaired movement of the left hand, forearm and left wrist. Also, the inability to possibly achieve a complete anatomical reduction.

[6] Dr. Birrell was initially under the impression that one of the screws inserted, protruded into the wrist area. It was later discovered not to be the case. He then made a correction of his report in this regard. Because the POP's were too tightly applied, it had as a sequelae damaged the nerves. Neurologically, the plaintiff suffers from chronic reginal pain syndrome, impinged median nerve of the carpal tunnel and possesses a clinical picture of overwhelmed pain and dysesthesia. This much was confirmed by the neurologist Dr. Fourie. This influenced the decision of Dr. Birrell with regard to the apportionment considerably. This also differs from the opinion of Dr. Heymans, who did not refer the plaintiff to a neurologist to determine the extent of damage to the nerve(s) in the plaintiff's

left hand/fore-arm.

- [7] According to Dr. Birrell, the incident of domestic violence suffered by the plaintiff in which her hand was smashed or banged against the refrigerator, on 01st September 2013, had no impact at all on the injury she sustained on 18th December 2012. It was non-sequelae, as no damage was done to the initial injury that the plaintiff suffered. It was therefore of no consequence as that injury had healed completely. This was also confirmed by the plaintiff. Her testimony of a “small injury” was an injury to her left hand and not her wrist nor did the domestic violence act injure the site of the previous surgery. As a result of the prolonged and negligent treatment of the left hand and wrist injury, the plaintiff’s left hand became weak. She does not have full use of her left hand. Other than impaired wrist movement, the plaintiff suffers also the following complications, namely: muscle atrophy of the left and lower muscles, hypersensitivity of the left hand, chronic pain of the left wrist, widespread secondary osteoarthritis in the left wrist and lagging of the thumb extension. She should have been operated within the first four (4) days after sustaining the injury on 18 December 2012. This was not done. Therefore, this is an added contributing factor that informs his decision with regard to the degree of apportionment.
- [8] Dr. Heymans initially apportioned the negligence on a 50/50 basis to both the plaintiff and the defendant. This subsequently changed to an even less than 20% apportionment to the defendant meaning that the defendant was less than 20% negligent and the plaintiff more than 80%. According to Dr. Heymans, the plaintiff received the best medical treatment that could have been offered to her. The doctors who treated her at the hospitals did an excellent job according to Dr. Heymans, having regard to the Colles type fracture that the plaintiff sustained. As one of the main reasons for this shift in opinion is the fact that no screw protruded into the wrist, as initially opined by Dr. Birrell.
- [9] Both Dr. Birrell and Dr. Heymans are ad idem that the plaintiff was treated negligently at the hospitals in that there was a delay of the corrective surgical treatment. This much is common cause. In addition, Dr. Birrell examined the probable too tight POP that were applied and its sequelae. To this extent, his evidence is corroborated and supported by the neurologist, Dr. Fourie, who conducted a nerve test and gave a report to that effect. The result of the test conducted was the impingement of the median nerve in the carpal tunnel, impairment and dysaesthesia.
- [10] The damage to the median nerve occurred as a result of the too tight POP. According to Dr. Birrell, the lagging thumb, hypersensitivity and forearm atrophy was a result of a compartment type syndrome due to the too tight POP. This was not the opinion of Dr. Heymans. However, both Dr. Birrell and Dr. Heymans agreed that with correct and timely treatment, an anatomical reduction of the left wrist would have been possible. Dr. Birrell stated that 70% of the proven damages are attributed to the negligent delayed surgery, the consequences (sequelae) of a too tight POP, damage to the median nerve, chronic regional pain syndrome, sequelae related to compartment type syndrome due to the too tight POP. This was not the opinion of Dr. Heymans.

The 30% of the proven damages that the plaintiff is not entitled too was attributed to the sequelae which may occur but for the negligence.

- [11] Dr. Heymans, unlike Dr. Birrell, only considered the delay in surgery and its consequences. The percentage of proven damages the plaintiff was to be awarded was 50%, as stipulated in both his reports dated 11th December 2016 and 23rd October 2019, respectively. However, in his report dated 30th January 2020, Dr. Heymans considered another factor namely the incident of domestic violence of the 01st September 2013, which was a separate new act and that the plaintiff should claim her damages arising therefrom, from the perpetrator. This was not raised in the pleadings. He opined therefor that the proven damages be reduced to less than 20%. There is however no basis for this. The incident of the 1st September 2013 had no effect whatsoever on the left forearm and wrist of the plaintiff as the surgery had healed completely. This is corroborated by the medical records which confirms that there was no trauma (“trauma nil”) and scored “o” for a Triage Early Warning Score (TEW). So, it cannot be that the incident of 01st September 2013 had an effect on the initial injury sustained and its sequelae.
- [12] The veracity of the correctness of the clinical records could not be challenged or gainsaid by Dr. Heymans. He could not logically explain the basis for his further reduction of 50% to less than 20% based on clinical records and clinical findings of the doctor who examined the patient shortly after the incident of the 01st September 2013. For this reason, inter alia, the evidence of Dr. Birrell should be accepted above that of Dr. Heymans. As alluded to earlier, Dr. Birrell’s evidence is corroborated and supported by the clinical records.
- [13] I am of the view that the plaintiff succeeded in proving her case on a balance of probabilities. The delay in surgical treatment, the incorrect treatment and the complications as a result of applying the POP too tight, was proven by the plaintiff. The incident of domestic violence of the 01st September 2013 had no effect whatsoever on the injury initially sustained and for which corrective surgery was applied. Therefore, the plaintiff succeeded in proving that she suffered damages as a result of the negligent acts and treatment on the part of the doctors at the Tshepong/Klerksdorp and Potchefstroom hospitals, for which the defendant is vicariously liable.
- [14] As to the percentage that should be awarded, I am of the view that Dr. Birrell place a too high percentage on the defendant’s negligence. In my view, the percentage should be at the ratio of 60/40 and not 70/30. It is quite apparent that the incident of domestic violence of the 18th December 2012 was the cause of the injury that the plaintiff sustained. But for this injury the plaintiff would not have to attend at the hospital. Dr. Birrell testified that after the joint minute meeting, he asked Dr. Heymans to consider reverting to his initial opinion of a 50/50 basis so that they can agree on that, but Dr. Heymans declined. It is evident of the fact that Dr. Birrell was amenable to lower the percentage of negligence on the part of the defendant. This is indeed a noble gesture on the part of Dr. Birrell, even in the face of the

evidence that proves the sequelae of incorrect and delayed treatment. This court has an unfettered discretion to award damages that is fair and equitable, having regard to the evidence tendered.

- [15] Insofar as costs are concerned, it should follow the result and be awarded in favour of the plaintiff. However, there was a Rule 38 application that was brought by the plaintiff to have the evidence of Dr. Birrell presented on affidavit, alternatively via a virtual platform. The request for the virtual hearing was agreed to and allowed by the Court. This was to be heard on the second day of trial, to wit 21st October 2020. Due to technical glitches and WIFI problems, same could not be done. The matter was then remanded and the costs were reserved. It will be grossly unfair to saddle the defendant with the costs of the 21st October 2020. In the interest of fairness and justice, the costs reserved on the 21st October 2020 should be borne by the plaintiff.

Order

- [16] Consequently, the following order is made:

1. The Defendant is liable to compensate the Plaintiff for 60% of her proven or agreed damages sustained during the period of 18 December 2012 to 29 January 2013, resulting from the treatment and delay thereof the Plaintiff received in the hospitals of the Defendant, after she sustained a Colles type fracture of the left distal radius.
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 - 3.4 The costs of a consultation, if any, between the Plaintiff and her attorney to discuss the settlement offer received from the Defendant and the terms of this order;
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4. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:-

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Account number : [...]

Branch number : 198765 Pretoria

Ref

: NK/RIW/P1169

5. The plaintiff is ordered to pay the costs of 21 October 2020.

R D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

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Prepared on 29 October 2026 · Esheria