

SOUTH AFRICA / JUDGMENT

Politis NO v Member of the Executive Council for Health, Limpopo (792/2016) [2017] ZASCA 86 (2 June 2017)

[2017] ZASCA 86

COURT

Supreme Court of Appeal

BEFORE

Navsa, Theron, Wallis, Mbatha, Schippers

CASE / FILE NUMBER

792/2016

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Non Reportable

Case No: 792/2016

In the matter between:

ADVOCATE ALEXANDER POLITIS NO

APPELLANT

and

MEMBER OF THE EXECUTIVE COUNCIL

FOR HEALTH, LIMPOPO

RESPONDENT

Neutral citation: *Politis v MEC for Health, Limpopo* [2017] ZASCA 86 (792/2016) (2 June 2017)

Coram: Navsa, Theron and Wallis JJA and Mbatha and Schippers AJJA

Heard: 15 May 2017

Delivered: 2 June 2017

Summary: Delict : premature discharge by doctor of patient from hospital due to unlawful strike : patient had sustained multiple fractures and was due for orthopaedic surgery : died shortly after discharge : cause of death not determined by pathologist : no reliable expert evidence on which

negligence could be attributed to the hospital : inadequate preparation of action for loss of support : no thought given to holding hospital liable on the basis of failure to have in place emergency plans to deal with strikes : organisers of strike not joined as parties to litigation : in any event primary problem of lack of evidence relating to cause of death not overcome.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mothle J sitting as court of first instance):

The appeal is dismissed.

Navsa JA (Theron and Wallis JJA and Mbatha and Schippers AJJA concurring):

- [1] On 7 August 2010 Ms Zodwa Mmatlaleng Mnisi was struck by a motor vehicle, sustaining extensive injuries in consequence of which she was hospitalised at Philadelphia Hospital Dennilton, Limpopo. The hospital falls under the control of the respondent, the Member of the Executive Council for Health, Limpopo Province (the MEC). It is common cause that Ms Mnisi was discharged prematurely from the hospital on 19 August 2010, due to a strike by hospital staff. Sadly, Ms Mnisi died that very day, leaving her two minor sons Holiday Karabo Mnisi and Ennocent Mnisi, to face the world without their mother. At some stage in the past their father had been shot and killed. Fate has truly been unkind to them. At the time of the death of the deceased, the two boys were eight and three years-old respectively. Their mother had been their only means of support. I shall hereafter refer to Ms Mnisi as the deceased.
- [2] The appellant, Alexander Politis, a practising advocate, appointed curator-ad-litem to the two minor children, instituted action on their behalf in the North Gauteng Division of the High Court, Pretoria against the MEC, for damages for loss of support. The claim for loss of support, in a total amount of R482 000 was based on a breach by the hospital of the legal duty owed to the deceased by the hospital's medical staff, particularised as follows:
- ‘(a) It failed to provide her forthwith with emergency medical care and to stabilise her condition;
- (b) It failed to ensure that she was treated with the necessary skill and care of a hospital treating a patient seriously injured in a motor vehicle collision;
- (c) It failed to complete all necessary procedures and medical interventions to ensure the recovery of the deceased;
- (d) It failed to keep her in hospital until she had sufficiently recovered and Dr Silky Mulenge, acting in the course of and scope of his employment with the Department, discharged her from hospital on 19 August 2010;
- (e) The deceased died at home on 19 August 2010 as a result of the aforesaid breach of duty by the Department, alternatively its employees.’

The appellant sought to have the MEC held vicariously liable.

[3] The MEC's case, as pleaded, was that there had been no misconduct by staff at the hospital, either before the deceased's

discharge, or in relation thereto. During the trial there appears to have been an acceptance on behalf of the MEC that the discharge was premature and that the deceased ought to have been kept in hospital. However it said that unlawful strike action and resulting tension and hostility by striking workers compelled the hospital to close and discharge the deceased. Thus, so it was contended, the MEC was absolved from liability.

[4] The high court (Mothle J), after a consideration of the evidence presented at the trial, held that there had been no negligence in relation to the treatment of the deceased during her hospitalisation. Mothle J found further that a note by a nurse that the deceased's sister had been counselled as to her further treatment at home was adequate and that her premature discharge by the doctor on duty that day, acting on instructions from management, to discharge all patients because of safety concerns, did not constitute negligence. He dismissed the appellant's claims but did not order him to pay costs.

[5] It is against those conclusions and the resultant order dismissing the appellant's action that the present appeal, with the leave of the court below, is directed. The detailed background culminating in the present appeal is set out hereafter.

[6] As a result of the collision referred to in para 1, the deceased sustained compound fractures of her right and left legs (right and left tibia). Her right ankle and pelvis were also fractured. She was admitted to the Philadelphia hospital on the same day. Despite the allegations in the appellant's amended particulars of claim set out in para 2 above, it was unchallenged at trial that up to and until her discharge, the treatment by the medical staff at the hospital, in stabilising the fractures and cleaning the deceased's wounds and generally tending to her well-being, was adequate. The medical doctor who testified in support of the appellant's case acknowledged this. In light thereof, appellant's counsel rightly accepted, before us, that he could not argue that the medical treatment provided by the hospital, upon admission and for the 10 days thereafter until the deceased was discharged, was unsatisfactory or inadequate.

[7] It is common cause that on the day of her discharge from hospital the deceased was scheduled to have orthopaedic surgery in relation to the fractures sustained by her. The main purpose of the intended surgical procedure was to stabilise one or more of the fractures and to clean her wounds. The strike had commenced the day before her discharge. On the day on which the deceased was scheduled to have the surgery, hospital management issued an instruction to doctors at the hospital to discharge all patients because they feared that the strike was gaining momentum and that striking hospital staff would enter the hospital and forcibly remove the patients still present in the hospital as well as any medical staff that might be in attendance. As such, there would be no nurses in attendance to see to patient needs nor would there be any support staff that could ensure clean bedding and see

to it that patients were supplied with meals. Doctors were instructed that after they had discharged patients they were to leave

the hospital grounds, including their living quarters, because the hospital was unable to provide security and guarantee their safety. The strike was a nationwide strike and it appears that it affected all public hospitals as well as related ambulance services.

- [8] On the day of the deceased's discharge, her sister, Ms Shirley Mnisi, received a telephone call from the hospital, instructing her to fetch the deceased and transport her home and return her to hospital after the strike was called off.
 - [9] Ms Mnisi arranged for a small private vehicle, with driver, to collect the deceased and transport her home. Upon their arrival at the hospital they found the deceased still in bed. Ms Mnisi was handed medication in the form of tablets with instructions on how often they were to be taken.
 - [10] According to Ms Mnisi, they pushed the evidently mobile bed toward the car-park. There she and the driver of the vehicle struggled to get the deceased into the car. Finally, Ms Mnisi, with a degree of difficulty, pulled the deceased, into the vehicle.
 - [11] They drove home slowly and the trip took between 15-30 minutes. Once there, Ms Mnisi and the deceased's son struggled to get the deceased out of the car and into the house. They placed her in a chair. The deceased requested water to drink. She then started choking and was ostensibly short of breath. Suddenly she became lifeless. A relative came into the house and determined that she had passed away.
 - [12] During her testimony in the court below, Ms Mnisi confirmed that at the time that she collected the deceased, striking hospital workers were active at the hospital gate.
 - [13] A post-mortem was conducted on the body of the deceased on 26 August
2010. The contents of the post-mortem report, which the parties appeared to have agreed to admit into evidence, states that the cause of death was 'polytrauma (unnatural)'. Counsel for the parties and the doctors who testified during the trial on behalf of both the appellant and the MEC were agreed that the cause of death as expressed in the post-mortem report was unhelpful and had no evidential value in relation to the actual cause of death.
- [14] The remainder of the post-mortem report, whilst noting the deceased's pre-existing injuries, sustained when she was struck by the motor vehicle, repeatedly records that 'no pathology was detected in any part of the body examined by the forensic pathologist'. The list of organs examined by the pathologist is extensive. The precipitous death of the deceased is unexplained by the post mortem-report. The report wrongly states that the body presented was that of a male. One gets the impression that the multiple injuries sustained by the deceased when she was struck by the motor vehicle led to the too ready conclusion that the death was caused by 'polytrauma (unnatural)', without further scrutiny to determine the actual cause of death.

[15] During the trial the appellant's case, curiously, was not that the hospital ought to have had an emergency plan to deal with unlawful strikes by hospital staff of the kind in question, and that its failure to do so led to the deceased's death, but rather that instructions ought to have been properly imparted to the deceased and/or her family by hospital staff in relation to her treatment at home and that doing so would have averted the death of the deceased. This is an aspect to which I shall revert.

[16] The appellant's case was not conducted on the basis that hospital staff were employed in essential services; that as such, the strike was unlawful and the hospital could have obtained an interdict ordering staff to provide the necessary services and that would therefore have had as a consequence that the deceased would not have lost her life. Moreover, the appellant's legal representatives did not join, as a party to the action, the organisers of the strike, either in the form of a trade union or individuals, and seek to have them held jointly and severally liable for the damages suffered in consequence of the death of the deceased.

[17] The record shows that counsel for the appellant accepted, during the trial, that the doctors had been compelled by the prevailing

circumstances – the strike – to discharge all patients, including the deceased. Dr David Isigler, a witness who was called in support of the appellant's case, testified to that effect. Counsel on behalf of the appellant did not disavow that attitude.

[18] In my view the appellant could have been better served by his legal representatives. In addition to what is set out in the preceding paragraphs, there appears to have been inadequate preparation of the appellant's case. First, I point to the appellant's

initial un-amended particulars of claim. The paragraph, purportedly laying a basis for the MEC's liability read as follows:

'The deceased died at home on 19 April 2010 as a result of a lack of medical care of the injuries sustained during the collision.'

That was the sum total of the initial basis of liability. It was lacking in any particularity.

[19] Thankfully, it was later amended and mutated to what is set out in para 2 above. It warrants repeating that during the trial there was an acceptance on behalf of the appellant that treatment by hospital staff up until the deceased's discharge was satisfactory and adequate, that furthermore, the doctors were compelled to discharge patients because of the strike. There was also an acceptance that ambulances could not have been provided because of the strike. The trial then appears to have been conducted on behalf of the appellant primarily on the basis that upon discharge there had been a lack of proper instruction by hospital staff to the deceased and/or her relatives. There was also a suggestion that liability attached to hospital staff because no wheelchair or crutches were provided when the deceased was discharged. I shall, in due course deal with the medical evidence in that regard.

[20] It must have been abundantly clear to the appellant's legal representatives, at the outset, insofar as the appellant's

treatment was concerned, including the question of proper instructions in relation to post-discharge homecare, that the evidence of an orthopaedic specialist would be necessary. The appellant's legal representatives elected, probably due to resource and cost constraints and the limited quantum that was involved, to look to a general practitioner instead, Dr David Isigler, whose experience consisted mainly in working in hospital emergency units. The deceased's sister and Dr Isigler were the only witnesses who testified in support of the appellant's case.

[21] The medico-legal report prepared by Dr Isigler, is revealing. Under the heading 'opinion', the following appears:

'4.1 For the purposes of the medico legal report, comment is confined to the discussion of the general management provided by the attending doctors in the ward.

4.2 Further opinion should be obtained by an Orthopaedic Surgeon regarding current acceptable management of the presenting fracture.

4.2.1 One defers to expert opinion regarding this matter.'(My emphasis.)

[22] Notwithstanding its expressed limited purpose, the medical report nevertheless went on to present a view in relation to the cause of death, once more, with the qualification that one should defer to expert opinion and stated the following:

'4.3.3 It is recorded that while there were no apparent/obvious finding at the time of post-mortem, no definitive diagnosis is forwarded

regarding the cause of death apart from "polytrauma".

4.3.3.1 One defers to expert opinion regarding probable cause of death however notes that the most likely cause of death, considering the nature of the injuries sustained, would be secondary to embolism either resulting from prolonged immobilisation of an unstable

fracture of the right tibia or an acute Fat Embolism syndrome following displacement of the fracture/fractures.

4.3.3.2 It is noted that she was not treated with prophylactic anticoagulation either during the period of admission or at the time

of discharge.'

As can be seen Dr Isigler disqualified his own views. I will, in due course, deal with his evidence during the trial.

[23] It must have been clear to the appellant's legal representatives that certainty regarding the cause of death of the deceased would be paramount in the determination of the MEC's liability and that at the very least, the post-mortem report with its paucity of information required interrogation and the expert opinion of a forensic pathologist. We were informed by counsel on behalf of the appellant that there had been no discussion with a forensic pathologist.

[24] During his evidence-in-chief Dr Isigler further diluted the value, if any, of his report. When he was asked what led to the deceased's death he initially said the following:

'[T]hat is a very broad question. Essentially when you are looking at these type of things ... one would have to consider the entire scenario...she sustained a number of fractures. From an orthopaedic point of view I am not an expert and I don't really want to get into it....But something happened between the time that she was discharged and the time she got home. Or something in and around that time that was of such a nature to be significant and precipitous. So by the time she was discharged she was probably ok. But something happened. Having considered all of the various options I think the most likely...

is that this was a massive event. This was as a result of a deep vein thrombosis, DVT. A clot that developed over time, that gets dislodged and that causes massive compromise. It gets lodged between or somewhere in the lungs, usually in the pulmonary artery. As a result there is a sudden compromise in respiratory function. In other words the patient can't breathe. Second to that there is no oxygen the patient dies.' (My emphasis)

[25] Dr Isigler accepted, during the trial, that 'polytrauma', as it appeared in the post-mortem report, was not a medical diagnosis and was in fact worthless as a true indicator as to what led to the deceased's death. His evidence concerning the alleged inadequacy of the counseling of the deceased and/or her sister received from hospital staff upon her discharge has to be carefully examined. He said that the deceased or her sister should have been told about the number of times a day she was supposed to take the tablets handed to her. He accepted that the deceased had been advised in that regard. He took the view that the seriousness of the fracture ought to have been explained and that care should have been taken to ensure that she was comfortable and managed properly. Significantly, he was of the opinion that the deceased should have been supplied with crutches or a wheelchair. He adopted the attitude that anti-coagulation medication ought to have been considered, which in his view might have prevented her death. Dr Isigler said that the deceased's obesity (78 kilograms), coupled with her prolonged immobilization, meant that she was predisposed to developing deep vein thrombosis (DVT). In presenting this view he accepted that few patients present clinically with problems associated with DVT.

[26] Dr Isigler accepted that the strike was nationwide and that support services were not available. He acknowledged that people were on the rampage and that those were the circumstances under which the deceased had been discharged. Dr Isigler testified that he too would have discharged the deceased, but repeated that it should have been done

properly. Importantly, counsel on behalf of the appellants, in putting to Dr Isigler that ambulances were not available because of the strike appeared to accept that not supplying an ambulance was justified in the circumstances. In following up on a question and prefacing another, counsel said the following:

‘Yes. Because if they are on strike then it throws it out as an option.’

[27] Dr Isigler was of the opinion that the patient should have been accompanied to the car by the doctor discharging her, and that the doctor had to explain how she was to be moved. Under cross-examination, Dr Isigler conceded that acceptable management of the deceased was rightly within the province of ‘orthopaedic opinion’. He was referred to his expert report in which he had said that he deferred to the opinion of an expert regarding the cause of death. He accepted that in addition to the expert opinion of an orthopaedic expert, the opinion of a forensic pathologist was called for. He went on to testify as follows:

‘There would also have to be determined by specific investigation which I have no experience with . . . I would have to rely and in a court of law I would have to defer to the opinion of the pathologist as he would have means as well as experience, which I do not possess.’

[28] Counsel on behalf of the MEC pressed Dr Isigler about the correctness of his conclusion that a clot that had dislodged was the cause of the death of the deceased. Dr Isigler accepted that one should, post-mortem, examine the deceased’s organs for evidence of such a clot. He testified that the heart should be examined and that one should scrutinise the pulmonary vessels and examine the lungs. The following is a question posed by counsel on behalf of the MEC to Dr Isigler:

‘So would I be correct that if the [sudden death] was a result of a clot we would have found a huge clot somewhere located other than those areas that we have mentioned. . . That should have been the finding on the post-mortem.’

[29] Dr Isigler’s subsequent testimony is critical as he went on to accept that from the post-mortem report, it appeared that both lungs had been examined and there had been no indication of a clot. He stated the following:

‘When I read the report I could come to no formal conclusions as the cause of death.’

He conceded that if the cause of death had been a clot the pathologist would have found evidence of it in his examination of the deceased’s organs. Dr Isigler accepted that no such evidence had been found. He agreed that the post-mortem report did not support his thesis, ‘either of DVT or embolism’. He went on to concede that he had engaged in ‘speculation’ that ‘doesn’t have a clinical basis’. A little later he testified as follows:

‘I couldn’t understand how can this lady die and yet on [post-mortem] there is nothing to indicate why’.

[30] When he was cross-examined about his earlier evidence that the hospital should have provided the deceased with a wheelchair or crutches, Dr Isigler admitted that it was debatable whether the deceased, with her multiple fractures, would have been able to use either. The possible use of crutches implicated the question whether she could have balanced her body weight in relation to the fractures she had sustained. He thought that she might have been able to bear down on her left side.

[31] When it was put to Dr Isigler that because the deceased had sustained a pelvic fracture a wheelchair had not been a viable option, as the deceased's weight would bear down on her injury, he responded by stating that there had been no indication of a pelvic fracture. When he was shown hospital records reviewing x-rays, he accepted that the deceased had indeed sustained a pelvic fracture and that the use of a wheelchair would have caused her discomfort but, in what appears to have been a common refrain in his testimony, he stated that the circumstances were not normal. He did, however, concede that the failure to provide a wheelchair could not have been said to have contributed to the death of the deceased.

[32] Under cross-examination about his suggestion that anti-coagulants should have been considered to prevent a blood clot Dr Isigler

admitted that the deceased had in the recent past presented with a low haemoglobin count and had required a blood transfusion. He also accepted that a low haemoglobin count was indicative of bleeding and conceded that one should consider whether such medication might exacerbate bleeding in patients. He went on to say:

'The anti-coagulation is a moot point, it is a difficult one to make a decision on...These were not normal circumstances.'

[33] It was put to Dr Isigler that the treating doctor who had discharged the deceased had taken into account the possibility of internal bleeding before deciding that anti-coagulants should not be administered. He said he could not fault the doctor for that

decision. He also accepted that a patient could die precipitously if his or her haemoglobin count dropped beyond a certain point.

[34] During the latter part of his testimony Dr Isigler stated that the deceased did not die of a fat embolism. He then confined his speculation to DVT being the cause of the death of the deceased, which he reasoned was due to her being moved.

[35] Asked what specific steps he would have taken to prevent the deceased's death he testified as follows:

'Explaining to the patient how to move, how not to move. Demonstrating to the patient basic techniques. Explaining to the patient basic patient education. Letting the patient's relative know what the problems are, what the potential complications are. And potentially giving them some information how to deal with problems.'

[36] Towards the end of his testimony Dr Isigler said the following concerning lack of proper instruction by hospital staff in relation

to the deceased's discharge:

‘Whether educating the patient would have made a difference. I can’t pass comment on that’

[37] Dr Syznon Silkiewicz, the doctor who had treated the deceased during her stay in hospital and who had discharged her, was the only witness who testified in support of the MEC’s case.

[38] At the time of his testimony, Dr Silkiewicz was the head of the Orthopaedic Department at the hospital. Dr Silkiewicz has a

specialist orthopaedic qualification obtained in Poland, which has hitherto not been recognized in South Africa. At the time that he was treating the deceased he worked as deputy to the then head of department.

[39] He confirmed that the deceased had been discharged due to the strike under the conditions described above, with 100 people ‘toy toying’ and running around the hospital, and that doctors felt unsafe. Dr Silkiewicz explained that at the time of her discharge the deceased had been in stable condition.

[40] According to Dr Silkiewicz earlier surgery had been cancelled because of the deceased’s low haemoglobin count and that in consequence she had to have a blood transfusion, comprising five units of blood. When she was discharged she was provided with double anti-biotic medication. In response to the assertion by Dr Isigler regarding anti-coagulation treatment, Dr Silkiewicz testified that he was familiar with anti-coagulation treatment but decided against it. First, because the deceased had sustained a slight head injury when she was struck by the motor vehicle and such treatment might have resulted in a head bleed. Furthermore, she had sustained a pelvic fracture which could cause deadly bleeding and thus anti-coagulation treatment was contra-indicated. The drop in haemoglobin levels was a further factor that militated against it. He did not consider the deceased obese but rather, as indicated in the post-mortem report, saw her as well-built. It was against that background that he did not prescribe the anti-coagulation medication.

[41] Dr Silkiewicz was adamant that providing the deceased with a wheelchair would have been inappropriate because of the pelvic

fracture she sustained. It would, in his view, have proved very painful for her. Dr Silkiewicz stated that even if he had considered

a wheelchair, which he still insisted was inappropriate, persons in the department supplying wheelchairs were not in attendance anyway. Crutches, as far as Dr Silkiewicz was concerned were impractical, given the extent of the deceased’s injuries. In the circumstances under discussion, according to him, there had been no question of proper post-discharge home-treatment as he had anticipated that the patient was due to return. He testified that the deceased

could not have been transferred elsewhere because of the nationwide strike and said that there were no ambulances available. Six patients in total had been discharged from the orthopaedic department on the day in question.

[42] Part of the cross-examination of Dr Silkiewicz was directed at showing that better instructions could have been provided to the deceased's sister in relation to the mode and manner of transporting the deceased back to her home. Dr Silkiewicz stated that patients more often than not, were indigent and thus limited in the means at their disposal.

[43] That then is the full picture against which the appeal falls to be adjudicated.

[44] In *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 837 H-818A the basis for liability in relation to a claim for loss of support is set out:

'An essential and unusual feature of the remedy is that, while the defendant incurs liability because he has acted wrongfully and

negligently (or with *dolus*) towards the deceased and thereby caused the death of the deceased, the claimant (the dependant) derives his right of action not through the deceased or from his estate but from the facts that he has been injured by the death of the deceased and that the defendant is in law responsible therefor. Only a dependant to whom the deceased was under a legal duty to provide maintenance and support may sue and in such action the dependant must establish actual patrimonial loss, accrued and prospective, as a consequence of the death of the breadwinner.'

[45] A primary and insurmountable problem for the appellant is that the cause of the deceased's death was not established, from which one could determine whether the MEC was liable.

[46] It might well have turned out that the inadequate post-mortem report, concerning cause of death, could not subsequently be remedied and that consequently the appellant's action was, in any event, ill-fated. However, that avenue was not explored by the appellant's legal representatives. This is clearly evidenced by their failure to undertake even the most cursory consultation with a forensic pathologist, in conjunction with an orthopaedic specialist.

[47] Dr Isigler's evidence in relation to the cause of death was unhelpful. He did not possess the necessary expertise, which at the outset he acknowledged in his expert report. After abandoning his initial view that the death of the deceased might have been due to a fat embolism, he correctly conceded that his DVT thesis was not supported by the post-mortem findings in that no physical evidence of a dislodged blood clot had been found by the pathologist in the examination and post-mortem of the relevant body parts. His report and testimony at the trial in relation to the cause of death was speculative, without a clinical basis, and ultimately demonstrably flawed.

[48] In respect of the nature and manner of the deceased's discharge it is clear from what is set out above that the complaint concerning the use of a wheelchair and crutches is, for the reasons given by Dr Silkiewicz, and conceded in part by Dr Isigler, wholly unfounded. The complaint about the failure to resort to anti-coagulation medication too was fallacious.

[49] I was careful to look to see if there was even the most tangential reliable medical evidence that had the deceased not been moved she would not have died. The record reveals that there is none. The problem is that without the cause of death established, the alleged failure to provide proper instructions is not of any assistance. In any event, without the expert assistance of an orthopaedic specialist and/or a forensic pathologist, one is left in the dark as to what instructions the hospital staff might have conveyed which might have prevented the death of the deceased. The test for negligence set out in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G, could thus never be met. It reads as follows:

'For purposes of liability culpa arises if –

- (a) a diligens paterfamilias in the position of the defendant –
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case.'

[50] It is necessary to record that counsel on behalf of the appellant was emphatic that in relation to striking hospital staff, the appellant placed no reliance on the decisions of the Constitutional Court in *K v Minister of Safety and Security*

[2005] ZACC 8; 2005 (6) SA 419 (CC) and *F v Minister of Safety and Security & others* 2012 (1) SA 536 (CC), which dealt with an employee's deviation from duties in respect of which, depending on the circumstances, an employer might yet be held vicariously liable. This of course would have involved the question whether the MEC bore any liability for the

conduct of the striking workers for not being at their posts and being unruly, thus causing all the patients to be discharged,

including the deceased. In light of all the foregoing, it is unnecessary to deal with that question.

[51] For all the reasons set out above the appeal must fail. In the totality of circumstances counsel for the MEC rightly did not seek to recover the costs of the appeal.

[52] The following order is made:

M S Navsa

Judge of Appeal

APPEARANCES:

For the Appellant

T P Kruger SC (with him C D'Alton)

Instructed by:

Bares & Basson, Pretoria

Claude Reid, Bloemfontein

For the Respondent:

M C Erasmus SC (with him H A Mpshe)

State Attorney, Pretoria

State Attorney, Bloemfontein

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