

SOUTH AFRICA / JUDGMENT

Preller Plein Apteek v B.H (A50/2019) [2020] ZAFSHC 71 (26 March 2020)

[2020] ZAFSHC 71**COURT**

Free State High Court, Bloemfontein

BEFORE

Musi, Loubser, Ramlal

CASE / FILE NUMBER

A50/2019

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: A50/2019****In**

the matter between:

PRELLER
PLEIN
APTEEK
Appellant
and
B
H
Respondent

CORAM:

MUSI, JP et LOUBSER, J et
RAMLAL, AJ
HEARD
ON: 21 OCTOBER 2019

JUDGMENT

BY: LOUBSER, J et RAMLAL, AJ

DELIVERED ON: 26 MARCH 2020

- [1] This appeal, which is with the leave of the Supreme Court of Appeal, against the judgment of a single Judge of this division. In the judgment, the Court a quo held the appellant liable to compensate the respondent for the damages she is able to prove arising from an injection that was administered to her by an employee of the Appellant on 23 August 2006 at its premises. The issues pertaining to the merits and the quantum were separated in terms of Rule 33(4). Therefore this judgment, like the judgment of the Court a quo, only deals with the merits of the dispute.
- [2] According to the testimony of the Respondent in the Court a quo, she visited the business premises of the Appellant on 23 August 2006 to receive a second injection as part of a diet program offered by the Appellant. About a week before, she received the first injection from an employee of the Appellant, a Ms. Gousaard. She was then injected almost in the middle of her body more or less near the gluteal cleft at the top. Although she was expecting to be injected on the right buttock, everything went according to plan and she left. On the day in question, that is on the second occasion, she was again injected by the same Ms. Gousaard. Before the injection, she felt the coldness of a swab on the same area as the previous week, and thereafter she felt the prick of the needle more or less in the middle above the gluteal cleft.
- [3] She further testified that within split seconds, she felt an excruciating pain shooting down the back of her left leg and into her foot. This was followed by hot flushes all over her body and she heard ringing noises in her ears. She then suffered an epileptic fit, and shortly thereafter she blacked out and was rushed to hospital by an ambulance. Due to the constant back pain in the following days, an operation was performed on her back on 30 August 2006. She was told afterwards that her disk was totally shattered. The second operation followed in 2008 when her back pain did not dissipate. It was then discovered that pieces of the disc were left behind during the first operation.
- [4] The respondent testified that because of the incident, she was still suffering from constant back pain, and that she had to leave her employment as a result. She also had to take medication for epilepsy, something she never suffered from before.
- [5] Following these events, the Respondent issued summons against the Appellant to recover the damages suffered as a result of the

injection in question. The Respondent alleged negligence on the part of the Appellant in that Ms. Gousaard was not qualified to administer injections of this nature, and that she had failed to administer the injection in the upper quadrant of the buttock in accordance with accepted medical protocol. It is further alleged that the injection was incorrectly administered into a sacral nerve in one of the paramedian sacral foraminae or in the sacral canal via the midline sacral hiatus.

[6] The Appellant denied liability. It pleaded that the injection was in fact administered in the upper quadrant of the right buttock, and that it was impossible for the needle used to reach the sacral nerve. It further pleaded that the chances were very slim, if not impossible, that the disk injury could have been caused as alleged by the Respondent. The Appellant also denied that Ms. Gousaard did not have the necessary medical training to administer injections.

[7] The Court a quo found on the evidence presented, that Ms. Gousaard had only received extremely limited training of one day in the administering of injections. It found that her limited training contributed to her actions when she administered the injection. The trial Judge further evaluated the evidence of the medical experts on both sides, and came to the conclusion that the necessary causal link between the injection and what followed has been established. He found that the conduct of the employee of the Appellant was negligent

in that the injection was administered in the sacral area of the Respondent. This resulted in her suffering an epileptic fit that

resulted in the prolapse of the L5-S1 disk.

[8] The trial Judge applied the well-known test for negligence, as espoused in *Kruger v Coetzee*[1] in coming to his conclusions. In terms of that test, culpa arises if a diligens paterfamilias in the position of the Defendant would foresee the reasonable possibility of his conduct injuring another in his person or property

and causing him patrimonial loss, and would take reasonable steps to guard against such occurrence, and then failed to take such steps. The trial Judge was also alive to the requirement that the aggrieved party must prove causation on a balance of probabilities. In this respect he referred to *Minister of Safety and Security v Duivenboden*[2] and emphasized the principle that the “but for” test requires flexibility and a common sense approach.

[9] As for the evaluation of conflicting evidence presented by expert witnesses, the trial Judge referred to *Michael and Another v Linksfeld Park Clinic (Pty) Ltd and Another*[3] where it was emphasized by the Supreme Court of Appeal that in such instances, it must be determined whether and to what extent their opinions are founded on logical reasoning. He found that the evidence of Dr. Edeling, who testified for the Respondent, was based on sound reasoning, while the opinions of Prof. de Vries and other experts for the Appellant were not supported by any logical reasoning.

[10] According to the testimony of Dr. Edeling, a neurosurgeon, the acute and immediate symptoms that the Respondent described and the intensity of those symptoms are such that the injection could only have been an injection into a nerve. He could contemplate no other mechanism that could cause that kind of acute symptoms. He came to the conclusion that the injection was administered into the sacral nerve, causing a disk prolapse and an epileptic fit. He went on to explain how that very same injection could have caused the sudden pain in the leg of the Respondent. It needs mentioning that Dr. Wagner, a forensic pathologist, was one of the medical experts called by the Appellant to testify. In the end he conceded under cross-examination that Dr. Edeling gave the most probable explanation of what happened to the Respondent. It was on the basis of this evidence that the trial Judge found that the injection was administered in the area of the sacrum and not on the outer upper quadrant of the right buttock. This evidence also served to establish the causal link between the injection and the subsequent symptoms, the trial Judge found.

[11] It needs further mentioning that Dr. Edeling and Dr. Wilkinson, a neurosurgeon instructed by the Appellant, prepared a joint

neurosurgical pre-trial minute which was handed in during the proceedings in the Court a quo. In this minute they agreed that the vertical orientation of the injection site was 2 hand widths above the gluteal fold, and that the horizontal orientation of the injection site was in or close to the posterior midline between the Respondent's buttocks. Based on this, they agreed that the injection was given at a site overlying the sacrum. It was possibly on the basis of these agreed findings that Mr. Van der Walt, appearing for the Appellant, conceded during the hearing of the appeal that the injection was administered at the wrong place.

[12] Mr. Van der Walt, however, went on to devote most of his time to the contention that the Court a quo erred in finding by way of inference that factual causation was proved. In this respect he referred to the testimony of Sister Pretorius to the effect that the Respondent had suffered from severe back pain during the week preceding the day of the injection in question. Mr. Van der Walt submitted that the prolapse of the disk could have happened during that period of time. In other words, before the injection and not immediately thereafter. The Court a quo was therefore wrong in making the inference that it was the injection that resulted in the prolapse of the disk, the argument went.

[13] This argument presents with two difficulties. Firstly, Dr. Edeling opined that the prolapse of the disk was caused by the epileptic

seizure immediately after the injection. He testified as follows:

"Now the time of the prolapse of a disk is marked by the time of onset of pain. And the history that she gave in her evidence yesterday, which is also consistent with everything that I have read in the clinical reports and medical legal reports before, is that the onset of pain was from the time that she awoke from the seizure."

- [14] Secondly, the suggestion of a prolapse before the injection was never put to any of the witnesses who testified for the Respondent in the Court a quo, including Dr. Edeling. The suggestion was raised for the first time at the hearing of the appeal. In such circumstances, and having regard to the evidence of Dr. Edeling, we are not persuaded that the trial Judge had erred in finding a causal link between the injection and the subsequent events.
- [15] Mr. Van der Walt also challenged the admissibility of two EEG reports that were handed in at the trial without the calling of any witnesses in relation thereto. He submitted that the reports therefore contained inadmissible hearsay evidence, on which the Court a quo could not rely. In its judgment the Court a quo referred to these reports, which showed that the Respondent had a brain focus which was present in a latent form all the time. The significance hereof was that the brain focus made the Respondent susceptible to an epileptic fit the moment she was injected into a nerve.
- [16] There are again certain difficulties concerning the suggestion of hearsay evidence by Mr. Van der Walt. Firstly, according to the evidence of Dr. Edeling, an EEG is a device that picks up electrical current that comes from the brain waves. In order to detect the brain waves and the electrical current, electrodes are placed on various points on the scope of the patient. The results of an EEG scan are therefore data generated by electronic means, which brings such data within the ambit of the Electronic Communications and Transactions Act 25 of 2002. Section II of the Act provides that information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message. Section 15 provides that, in any legal proceedings, the rules of evidence must not be applied so as to deny the admissibility of a data message in evidence on the mere grounds that it is constituted by a data message. In the premises, there is no substance in the submissions relating to inadmissible hearsay evidence as far as the EEG reports are concerned. There is in any event a presumption of reliability of electronic evidence. See *The Trustees for the Time Being of the Delsheray Trust v Absa Bank Limited* (2014) 4 All SA 748 (WCC). The presumption has not been displaced in casu.
- [17] The second difficulty in this respect is that Dr. Edeling testified that the Respondent did suffer an epileptic seizure after the injection, and that the prolapse of the disk was caused by the convulsions she suffered subsequently. Incidentally, this testimony

was not disputed by the Appellant in the Court a quo. This means that even if there were no EEG reports in the Court a quo, it would have made no difference to the final outcome of the trial Judge's findings.

[18] It follows that the appeal cannot succeed. The following order is made:

1. The appeal is dismissed with costs, including the costs of two counsel.

P.J. LOUBSER, J

I concur:

A. RAMLAL, AJ

C.J. MUSI, JP

For the Appellant: Adv. D.J. Van der Walt SC

Adv. H.J. Benade

Instructed by: Symington & De Kok

Bloemfontein

For the Respondent: Adv. S. Joubert SC

Adv. H. Botma

Instructed by: Rooth and Wessels

c/o Bezuidenhout Inc.

[1] 1966(2) SA 428 (AD) at 430 E-G

[2] 2002(6) SA 431 (SCA) at para 25

[3] 2001

(3) SA 1188 (SCA) at para 36

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