

SOUTH AFRICA / JUDGMENT

S.R obo Z.R v Member of the Executive Council for Health, Gauteng (41584/18) [2024] ZAGPJHC 51 (26 January 2024) [2024] ZAGPJHC 51

COURT

South Gauteng High Court, Johannesburg

BEFORE

Botsi-Thulare

CASE / FILE NUMBER

41584/18

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE NO: 41584/18

1.

Reportable: No

2.

Of interest to other judges: No

3.

Revised: No

26

January 2024

In

the matter between:

S
[M...] [R...] obo
S
[Z...] [R...]
Plaintiff
and
MEMBER
OF THE EXECUTIVE COUNCIL
FOR
HEALTH, GAUTENG
Defendant
This
judgment is handed down electronically by circulation to the
plaintiff and the defendant's Legal Representatives by e-mail,
publication on Case Lines and release to SAFLII. The date of the
handing down is deemed to be 26th of January 2024.

JUDGMENT

BOTSI-THULARE AJ:

Introduction

- [1] The plaintiff is suing in her personal and representative capacity, as the mother and natural guardian of her minor child, Z[...] (the child), who was born on 15 September 2012 at the Natalspruit.

Therefore, the matter comes before this court in relation to the determination of the defendant's liability in so far as it relates to the damages suffered by the plaintiff in her personal capacity as well as in her representative capacity on behalf of her child.

- [2] The plaintiff in her personal capacity as well as the mother and natural guardian of her minor daughter, who is presently 11 years old, instituted these proceedings against the defendant. The Natalspruit Hospital falls under the auspices of the defendant, who in law is responsible for any injury caused by the negligence of the staff. The plaintiff alleges the staff had been negligent during the birth of her child and that this negligence caused the hypoxic ischemic injury ("HIE") and its sequelae. She alleges that her child suffered a hypoxic ischaemic injury due to perinatal asphyxia or hypoxia, resulting in her child being born with severe brain damage CP1 caused during the labour and birthing process due to the treatment and management administered by the medical professionals at the Natalspruit hospital on 15 September 2012. As a result, she claims damages on her own behalf and on behalf of her daughter.
- [3] The plaintiff claims on behalf of herself for past medical and hospital expenses in the amount of R5 000.00, and on behalf of the minor child the following —

- (1) future hospital, medical and related expenses (R18 770 000.00);
- (2) future loss of earnings/loss of earning capacity (R3 000.00.00);
- (3) general damages for pain and suffering/loss of amenities of life, disability and disfigurement (R3 512 375.00); and
- (4) costs of a trustee (R1 896 553.13).

Factual background

- [4] On 1 September 2012, the plaintiff presented herself at the Khumalo Clinic complaining of lower abdominal pain. Her CTG was reactive. She was then admitted for review. The following day, she was re-assessed by the nursing staff and her BP was noted as 106/64; P72 FHR 132B/PM; CTG reactive; cervix not dilating. She was then discharged.
- [5] On 03 September 2012, the plaintiff presented herself at the Ramokonopi Clinic complaining of abdominal pain and vaginal bleeding and was transferred to the hospital. On 15 September she was examined by a doctor at the hospital who observed that she was passing blood clots vaginally and her cervix was 8 cm dilated and fully effaced, with strong contractions. Five units of oxytocin were administered, and the plaintiff delivered an alive female infant with respiratory distress. The child was admitted into the neonatal ICU with birth asphyxia and respiratory distress syndrome.
- [6] The plaintiff alleges that the nursing and medical staff at the hospital were negligent in that they failed to attend to the vaginal bleeding during labour for approximately 9 hours. Further, they failed to timeously diagnose the abruptio placentae; they had the plaintiff in prolonged active labour; administered oxytocin to the plaintiff despite having good and strong contractions; and failed to perform a caesarean section. This resulted, so the plaintiff contends, in the foetus suffering from a HIE incident causing her to sustain severe brain damage and as a result, suffers from cerebral palsy and epilepsy.

Issues for

determination

- [7] There are two issues for determination before this court. They are —
 - a. first, whether there was negligence on the part of the defendant's employees. In other words —
 - i. whether the injury suffered by the plaintiff's child was directly or causally linked to the failure by the defendant's employees at the hospital to timeously identify that the plaintiff's labour was not progressing normally resulting in their failure to timeously take appropriate action to prevent and ensure that the plaintiff's child does not suffer a hypoxic ischemic injury.

ii. Secondly, whether the defendant's employees at the hospital failed to appreciate the urgency of the need to correctly diagnose the vaginal bleeding, to exclude an Abruptio Placenta, which as a confirmed sentinel event which causes hypoxic ischemic encephalopathy of the kind which the child suffered.

b. Whether the plaintiff's claim in her personal capacity has prescribed.

Law applicable to the facts

a. Negligence

[8] In essence, for the plaintiff to succeed and hold the defendant liable for damages, she must prove on a balance of probabilities, causal connection between the defendant's negligent acts or omission relied upon and the harm suffered. In *Minister of Safety and Security v Van Duivenboden*[1] Nugent JA remarked —

*“Negligence, as it is understood in our law, is not inherently unlawful - it is unlawful, and thus actionable, only if it occurs in circumstances that the law recognises as making it unlawful. Where the negligence manifests itself in a positive act that causes physical harm it is presumed to be unlawful, but that is not so in the case of a negligent omission. A negligent omission is unlawful only if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm. It is important to keep that concept quite separate from the concept of fault. Where the law recognises the existence of a legal duty it does not follow that an omission will necessarily attract liability - it will attract liability only if the omission was also culpable as determined by the application of the separate test that has consistently been applied by this court in *Kruger v Coetzee*, namely whether a reasonable person in the position of the defendant would not only have foreseen the harm but would also have acted to avert it. While the enquiry as to the existence or otherwise of a legal duty might be conceptually anterior to the question of fault (for the very enquiry is whether fault is capable of being legally recognised), nevertheless, in order to avoid conflating these two separate elements of liability, it might often be helpful to assume that the omission was negligent when asking whether, as a matter of legal policy, the omission ought to be actionable.”*

[9] In *E.P.N NO obo E.L v Member of the Executive Council for Health*[2] of the Gauteng Province it was held with reference to the unreported case of the Gauteng Local Division *Vallaro obo Barnard v MEC and McIntosh v MEC*, Kwazulu-Natal and Another that —

*“The second inquiry is whether there was fault, in this case negligence. As is apparent from the much-quoted dictum of Holmes JA in *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-F, the issue of negligence itself involves a twofold inquiry. The first is: was the harm reasonably foreseeable? The second is: would the diligens paterfamilias take reasonable steps to guard against such occurrence and did the defendant fail to take those steps? The answer to the second inquiry is frequently expressed in terms of a duty. The foreseeability requirement is more often than not assumed, and the inquiry is said to be simply whether the defendant had a duty to take one or other step, such as drive in a particular way or perform some or other positive act, and, if so, whether the failure on the part of the defendant to do so amounted to a breach of that duty. But the word “duty”, and sometimes even the expression “legal duty”, in this context, must not be confused with the concept of “legal duty” in the context of wrongfulness which, as*

has been indicated, is distinct from the issue of negligence.

The crucial question, therefore, is the reasonableness or otherwise of the respondents' conduct. This is the second leg of the negligence inquiry. Generally speaking, the answer to the inquiry depends on a consideration of all the relevant circumstances and involves a value judgment which is to be made by balancing various competing considerations including such factors as the degree or extent of the risk created by the actor's conduct, the gravity of the possible consequences and the burden of eliminating the risk of harm. ..."[3]

b. Causal connection

[10] In determining the causal connection, this court is required to ask this: but for the wrongful conduct of the hospital staff, would the plaintiff's loss have ensued or not? It was submitted on behalf of the plaintiff that if the wrongful negligent conduct of the hospital staff was eliminated - and on the assumption that all precautionary measures were satisfied and carried

out –the foetus would not be suffering from a HIE incident, cerebral palsy and epilepsy.

[11] Our Courts have indicated that a plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss. In *Minister of Safety and Security v Van Duivenboden*, [4] the SCA held –

"A plaintiff is not required to establish the causal link with certainty but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics."[5]

[12] Furthermore, in *Minister of Finance and Others v Gore NO*, [6] the SCA observed –

"Application of the "but for" test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday life experiences."[7]

[13] Also important is the oft-quoted caution by the English court in *Ratcliffe v Plymouth and Torbay Health Authority* [8] to not speculate too much. Lord Justice Brooke made the point that –

"... surrounding a procedure which led to an unexpected outcome for a patient. If such a case should arise, the judge should not be diverted away from the inference of negligence dictated by the plaintiff's evidence by mere theoretical possibilities of how that outcome might have occurred without negligence: the defendants' hypothesis must have the ring of plausibility about it. It is likely to be a very rare medical negligence case in which the defendants take the risk of calling no factual evidence, when such evidence is available to them, of the circumstances."[9]

[14] This negligence constitutes, as the plaintiff contends, a breach of the legal duty that rested on the defendant, his employees and/or his authorised representatives. As a result of the breach of legal duty, the child suffers from brain damage and resultant cerebral palsy, is epileptic and developmentally

delayed and has a marked speech delay and speech deficits. The plaintiff argues that the injury suffered by the child was directly

or causally linked to the failure by the defendant's employees to timeously identify that her labour was not progressing normally.

[15] The facts are extracted from the evidence of the plaintiff herself. She was the only factual witness. With regards to expert witnesses, the following expert witnesses gave evidence in support of the plaintiff's case: Dr Henning (Radiologist); Dr.Lefakane (Paediatrician); Dr.Mbokota (Obstetrician Gynaecologist); Prof Nolte (Midwife expert).

[16] The following experts gave evidence for the defendant: Dr Kamolane (Radiologist); Dr Dibote (Paediatrician); Dr Mtsi (Obstetrician Gynaecologist); Dr Ramodike-Chikota (attendant doctor).

[17] In determining whether there was negligence it is important to record the areas of agreement between the experts as well as the aspects which the experts conceded by the defendant's witnesses. The defendant initially denied liability that the medical and nursing staff of the hospital did not act negligently. However, during trial, the defendant's experts (Dr Mtsi, the obstetrician and gynaecologist and Dr Ramodike-Chikota, (the attendant doctor on 15 September 2012) conceded and agreed with the plaintiff's experts that the care received from the hospital during the birth of child was substandard. Plaintiff's evidence and expert witnesses' testimony is largely uncontested, with the defendant's witnesses capitulating and conceding the evidence. By agreement, the joint minutes by the Radiologists and Paediatricians were also admitted by the court as evidence.

[18] It is true, of course, that the determination of negligence ultimately rests with the court and not with expert witnesses. Yet, that determination is informed by the opinions of experts in the field. Although the plaintiff's evidence and expert witnesses' testimony is largely uncontested, with the defendant's witnesses capitulating and conceding the evidence, this court is still expected to enquire whether the plaintiff has proved on a balance of probabilities, causal connection between the defendant's negligent acts or omission relied upon and the harm suffered.

Application to the

facts

- [19] Applying these principles to the present matter, the conclusion seems undeniable that the negligent conduct on the part of the hospital in the form of the substandard care received by the plaintiff of its staff, caused the HIE and led to the cerebral palsy. That is a common-sense logical conclusion to be drawn from the facts in the matter. The defendant's employees failed to properly monitor the plaintiff's labour; to detect foetal distress; to intervene timeously and to assist appropriately with the delivery of the child.
- [20] The facts of this matter indicate that the plaintiff experienced an uneventful pregnancy carrying to full term without any illnesses, infections or complications save for her positive HIV status. She was attended to at the Ramokonopi Clinic on 14 September 2012 when she experienced labour pains.
- [21] On examination she was found to be bleeding vaginally and was then referred to Natalspruit Hospital by the midwives at the clinic. At the Natalspruit Hospital, she was examined by a doctor who made notes
- in the clinical records that she was referred and examined for lower abdominal pain. There is no indication in the clinical records that she was examined or assessed for the vaginal bleeding until 05h30 when vaginal bleeding was noted again by Dr Ramodike. Dr Ramodike ordered that a sonar be performed on the Plaintiff to exclude Placentae Previa and Abruptio Placenta which are both sentinel events which can cause hypoxic ischemic injury or encephalopathy.
- [22] At 06h00 on 15 September 2012 it appears from the clinical notes that the exclusionary sonar was not performed as ordered and/or probably not done. It further appeared from the clinical notes that the monitoring of the foetus and the plaintiff was not done as prescribed by the Maternity Care Guidelines in that the maternal monitoring was not done hourly as prescribed.
- [23] The foetus was not monitored continuously on CTG as prescribed. The vaginal bleeding was not assessed and Abruptio Placenta as the most common differential diagnosis was not excluded. At 07h15, the plaintiff had strong frequent uterine contractions. The plaintiff was 9cm dilated and was still passing blood clots. Dr Ramodike instructed that Syntocinon be administered.
- [24] There was no continuous foetal monitoring on CTG. The labour was allowed to proceed as if normal until delivery. The baby was born depressed and compromised. The baby was immediately admitted to the neonatal intensive care. The baby immediately showed signs of a hypoxic ischemic injury.
- [25] The parties agreed that the joint minutes of the expert witnesses (Radiologists – Dr Henning and Dr Kamolane) would be accepted as evidence without the respective witnesses being called to give evidence. The joint minutes recorded that the dominant injury seen on the MRI is hypoxic ischemic injury. That the findings of the MRI study suggest that genetic disorders as a cause of the child's brain damage is unlikely. Further, that the MRI findings

suggest that inflammatory or infective causes are unlikely as causes of the child's brain damage. Lastly, that the predominate pattern of injury is an acute profound hypoxic ischemic injury in a mature brain.

- [26] The Paediatricians (Dr Lefakane and Dr Dibote) recorded that the antenatal course of Plaintiff's pregnancy was normal with no recognized complications or conditions which could have affected the outcome. Moderately severe neonatal encephalopathy (NE) Grade 2 with seizures was present after birth.
- [27] From the above facts, it is clear that if the birth was properly managed, the stressful situation facing the foetus could and should have been recognised and reacted upon. This is much the experts are agreed and has been conceded. Negligence has therefore been proved.
- [28] Moreover, a direct causal link between the negligence of the defendant and the adverse outcome has been established. If there was proper monitoring and assistance, foetal distress would have been detected and appropriate assistance would have been given with the delivery by a timeous caesarean section to prevent the HIE insult, which resulted in the cerebral palsy.
- c. Has plaintiff's claim in her personal capacity prescribed?
- [29] Based on the above, the only defence the defendant relies on is prescription. The defendant argues that the plaintiff's claim in her personal capacity has prescribed. The alleged breach of legal duty occurred on 15 September 2012. The argument goes that the plaintiff was already aware of the possibility of a claim since she signed a special power of attorney dated 27 May 2013 instructing her attorneys of record to investigate the circumstances relating to the medical negligence incident. She further signed a consent form on 27 May 2013 authorising her attorneys of record to inspect all medical records relating to the medical incident in which the injuries were sustained. The summons instituting this claim was issued on 08 November 2018, well after the prescription period of 3 years as provided for in the Prescription Act 68 of 1969 (the Prescription Act).

"In order to successfully invoke s 12(3) of the Prescription Act, either actual or constructive knowledge must be proved. Actual knowledge is established if it can be shown that the creditor actually knew the facts and the identity of the debtor.

... .

Constructive knowledge is established if the creditor could reasonably have acquired knowledge of the identity of the debtor and the facts on which the debt arises by exercising reasonable care. The test is what a reasonable person in his position would have done, meaning that there is an expectation to act reasonably and with the diligence of a reasonable person. A creditor cannot simply sit back and "by supine inaction arbitrarily and at will postpone the commencement of prescription". What is required is merely the knowledge of the minimum facts that are necessary to institute action and not all the evidence that would ensure the ability of the creditor to prove its case comfortably."^[11]

[34] The defendant pointed this court to a series of events which the defendant alleges that they demonstrate that the plaintiff had constructive knowledge of the facts more than three years before issuing of a summons. In summary, the defendant argues that the plaintiff became aware of the possibility of a claim against the defendant when she signed a special power of attorney on 27 May

2013 instructing her current attorneys of record to investigate the circumstances relating to the medical negligent incident where the alleged injuries occurred. However, the summons instituting this claim was issued in this Court on 8 November 2018 well after the prescription period of three years as provided for in the Prescription Act.

“Furthermore, to say that the meaning of the phrase “the knowledge of . the facts from which the debt arises” includes knowledge that the conduct of the debtor giving rise to the debt is wrongful and actionable in law would render our law of prescription so ineffective that it may as well be abolished. I say this because prescription would, for all intents and purposes, not run against people who have no legal training at all. That includes not only people who are not formally educated but also those who are professionals in non-legal professions. However, it would also not run against trained lawyers if the field concerned happens to be a branch of law with which they are not familiar. The percentage of people in the South African population against whom prescription would not run when they have claims to pursue in the courts would be unacceptably high. In this regard, it needs to be emphasised that the meaning that we are urged to say is included in section 12(3) is not that a creditor must have a suspicion (even a reasonable suspicion at that) that the conduct of the debtor giving rise to the debt is wrongful and actionable but we are urged to say that a creditor must have knowledge that such conduct is wrongful and actionable in law. If we were asked to say a creditor needs to have a reasonable suspicion that the conduct is or may be wrongful and actionable in law, that would have required something less than knowledge that it is so and would not exclude too significant a percentage of society.”[13]

[36] The Constitutional Court in *Links v Department of Health, Northern [Cape] Province*[14] stated —

“...It seems to me that it would be unrealistic for the law to expect a litigant who has no knowledge of medicine to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice. That in turn requires that the litigant is in possession of sufficient facts to cause a reasonable person to suspect that something has gone wrong and to seek advice.”[15]

[37] The plaintiff in 2013 obtained the hospital records after her attorneys of record indicated that they need those records to assess

whether she had a case to litigate. She then handed the medical file to her attorneys of record. The defendant argues that it is at this time that the plaintiff became aware of the possibility of a claim against the defendant. I unfortunately disagree with this line of argument. This line of argument is inconsistent with the reasoning of the Constitutional Court in *Link* above.

Reasons for decision

- [38] The implications of the Link judgment are not that the operation of section 12(3) will now be dependent on a creditor's subjective evaluation of the presence or absence of knowledge or minimum facts sufficient for institution of a claim. In other words, it is still the position that a creditor cannot by his or her supine inaction postpone the commencement of prescription.
- [39] However, the running of prescription in certain medical negligence cases may now involve obtaining medical advice from an expert on the 'facts' from which a claim arises insofar as a plaintiff may not have direct or constructive knowledge from other sources.[16].
- [40] It would therefore be unrealistic to expect the plaintiff, who has no knowledge of medicine, to have knowledge of what caused his condition without having first had an opportunity of consulting a relevant medical professional or specialist for advice. In other words, after obtaining the relevant clinical records from the hospital, it cannot be correct to assume that she was already at that time in possession of sufficient and material facts he needed to have before he could institute legal proceedings. Prescription could, therefore, not have begun running on 27 May 2013 as suggested by the defendant.
- [41] It is trite that in certain cases involving medical negligence matters, a claimant is entitled to first obtain independent medical advice in order for prescription to commence running in circumstances where the claimant is found not to have acquired knowledge of the 'facts'. In the absence of such independent medical advice, a claimant cannot be deemed to have had knowledge of the facts from which a debt arises.
- [42] Against this background and on evaluation of the above evidence, I conclude that the defendant has failed to show that the applicant had knowledge of all the material facts on or before 27 May 2013. Accordingly, the plaintiff's claim against the defendant did not prescribe, therefore the defendants' plea of prescription is dismissed.
- [43] As regards to costs, the general rule is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. I have no reason why I should deviate from the general rule and costs should therefore be awarded against defendant in favour of the plaintiff.

Order

- [44] Accordingly, I make the following order:
- a. The defendant is liable to compensate the plaintiff in her personal and representative capacity for 100% of the plaintiff's agreed or proven damages arising from the brain injury suffered by S [Z...] [R...] (the Minor) at Natalspruit Hospital on 5 September 2012.

- b. The defendant shall pay the plaintiff's taxed or agreed party and party costs of suit on the High court scale in respect of the determination of the issue relating to liability.

MD BOTSI-THULARE AJ

ACTING JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

For the Plaintiff:

Adv D Brown

Instructed by

Jerry Nkeli & Associates Inc.

For the Defendant: Adv S J Coetzee SC and Adv T A Mokadikoa

Instructed by

State Attorney

Date of Hearing:

16 October 2023 to 26 October 2023

Date of Judgment: 26 January 2024

[1] 2002 (6) SA 431 (SCA) para 12.

[2] [2023] ZAGPJHC 15.

[3] Id para 48.

[4] 2002

(6) SA 431 (SCA).

[5] Id at para 25.

[6] 2007

(1) SA 111 (SCA), [2006] ZASCA 98.

[7] Id at para 98.

[8] [1998] EWCA Civ 2000.

[9] Id at para 48.

[10]

[2013] ZASCA 28..

[11] Id at para 9.

[12] [2017] ZACC 33.

[13] Id at para 63.

[14] 2016

(4) SA 414 (CC).

[15] Id at para 47.

[16] Loni v Member of the Executive Council, Department of Health, Eastern Cape Bhisho 2018 (3) SA 335 (CC) para 23.

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