

SOUTH AFRICA / JUDGMENT

**Van Heerden and Another v Member of
the Executive Council, Health North
West (593/2018) [2021] ZANWHC 60;
2021 (6) SA 197 (NWM) (12 August 2021)
[2021] ZANWHC 60**

COURT

North West High Court, Mafikeng

BEFORE

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CASE / FILE NUMBER

593/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

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CASE

NO: 593/2018

In

the matter between: HEILIE
PHILIPPINA VAN
HEERDEN
1st
Plaintiff
SANETTE
VAN
HEERDEN
2nd Plaintiff
And
MEMBER
OF THE EXECUTIVE COUNCIL,
Defendant
HEALTH
NORTH WEST

JUDGMENT

DJAJE J

- [1] The plaintiffs in this matter instituted an action against the defendant for damages suffered by the first plaintiff. It is the plaintiffs' case that the cause of action is assault on the first plaintiff in that the hospital failed to prevent an assault on the first plaintiff and the defendant should be vicariously liable. The second plaintiff is the daughter to the first plaintiff and was present during the said assault. The parties agreed to the separation of merits and quantum and the trial proceeded on merits only.

Plaintiff's Case

- [2] At the time of testifying, Mrs Heilie Van Heerden ("first plaintiff") was 81 years old. She is a patient at General De La Rey hospital in Lichtenburg and also at Bophelong hospital in Mahikeng. Both hospitals are in the North West province. She has medical issues relating to high blood pressure and blood circulation in her legs. On 23 September 2015 she was referred to Bophelong hospital from General De La Rey hospital for a CT scan. The scan was not done and she had to go back on 24 September 2015. After that day, she was given the date of 8 October 2015 for results. At all material times she was being transported in the hospital bus belonging to the department of health, from Lichtenburg

to Mahikeng with her daughter, the second plaintiff.

- [3] On 8 October 2015 she travelled again in the hospital bus from Lichtenburg to Mahikeng with the second plaintiff. She went to Bophelong hospital and obtained her CT scan results. She was not the only patient being transported in the bus on that day. After receiving her results and medication at Bophelong Hospital, she waited for the other patients in the bus with the second plaintiff. The driver of the bus was sitting in the bus behind the steering wheel. The second plaintiff was standing outside the bus. Whilst sitting in the bus, first

plaintiff noticed an unknown female boarding the bus and breathing heavily. She was not one of the patients who travelled with them from Lichtenburg. The second plaintiff enquired from the said female if she did not need water to calm down. The bus driver wanted to know where she was coming from but she did not reply. Immediately the bus driver went out to call the security officers to find out who this female was and where she was from.

- [4] In the bus, the first plaintiff noticed that the unknown female sat diagonal to her and asked for a cigarette from the second plaintiff. Second plaintiff did not have cigarette and the female told her to go and buy cigarette for her but she had no money. Immediately thereafter this female stormed at the first plaintiff screaming that she will kill her and uttered the following words in Afrikaans “julle wit velle hoort nie hier nie, want julle het my ouers doodgemaak en hul geld gesteel.” At that time her hands were tight around the first plaintiff’s throat. First plaintiff described her eyes as looking wild. She was too strong for the plaintiff and she could not free herself. The second plaintiff came and managed to assist the first plaintiff. The security officer and the bus driver arrived and took that unknown female away.
- [5] After the attack on the first plaintiff she was in shock and very traumatised. Her blood pressure was very high and had to take medication to lower it. First plaintiff testified that the incident has caused her to have constant night mares. The second plaintiff did not testify. Her claim against the defendant is for emotional shock and psychological trauma experienced as a result of the attack on the first plaintiff.
- [6] No evidence was led on behalf of the defendant.

Submissions

- [7] The plaintiffs claim is that the attack and assault on the first plaintiff was as a result of “

“4.1.1 the hospital has failed, refused and/or neglected to implement measures to prevent injury to the person of the First Plaintiff by her assailant and from being exposed and/or subjected to physical and psychological abuse by her assailant; and/or

4.1.2 the health care personnel and other personnel of the hospital has failed, refuse and/or neglected to give effect to the measures implemented by the hospital to prevent injury to the person of the First Plaintiff by her assailant and from being exposed and subjected to physical and psychological abuse by her assailant; and/or

4.1.3 the driver of the passenger bus ad, despite the fact that it was clear from the behaviour of the assailant of the First Plaintiff that she might pose a risk to the First Plaintiff and others, failed, refused and/or neglected to prevent the assailant of the First Plaintiff from climbing into the passenger bus, to take any steps, alternatively proper steps to prevent the First Plaintiff’s assailant from attacking and assaulting the First Plaintiff and to come to the assistance of the First Plaintiff when her assailant attacked and assaulted her.”

[8] It was argued that the Department of Health as a state organ is bound by the provisions of the Constitution of the Republic of South Africa to promote and respect the rights of the plaintiffs. These rights include the right to privacy and security. It follows that the hospital as a public health establishment falls under the direction of the Minister of Health and must implement measures to minimise injury to persons or damage to property. The bus that the first plaintiff was attacked in, is controlled and owned by the department of health under the direction of the defendant. As such, it was argued that the department has to ensure that the bus is safe and well maintained as provided for in the regulations.

[9] It is the plaintiffs' case that on the day of the incident they relied on the hospital personnel including the driver and the securities to ensure that they were safe. The submission was that the defendant failed to tender any evidence that the driver of the bus instead of leaving the plaintiffs with the attacker in the bus, could have attempted to alert the securities of the presence of the attacker in the bus. Alternatively, that the securities on that day

were posted far from the bus and could not prevent the attacker from entering the bus. As a result the driver and the securities had a legal duty to act positively to prevent the harm and they failed to do so.

[10] In contention the defendant submitted that the issue in this matter is whether there was a legal duty on the defendant and if so, whether that legal duty was breached by a failure to act. It was argued that the plaintiffs have failed to establish that the bus driver neglected to prevent the unknown female from getting onto the bus when she posed a risk to the plaintiff. The defendant submitted that the second plaintiff did not foresee that the unknown female would cause any harm and hence she remained outside the bus whilst talking to her. This is an indication that at that stage the driver who was himself engaging this attacker could also not foresee that the unknown female was about to attack the first plaintiff.

[11] The defendant's case is that the security guards were close to the bus but could not have foreseen that the unknown female getting onto the bus was going to cause harm to the first plaintiff. Defendant argued that Bophelong hospital, is a public hospital and members of the public are allowed to enter subject to being searched for any weapons. As such the security guards could not have stopped the attacker from getting onto the bus if there was no indication that she was going to cause harm to any person.

[12] It was argued that the driver of the bus did not fail to protect the first plaintiff. He firstly asked the woman to identify herself and when she did not respond, he informed the second plaintiff that he was going to get the security guards. At the time the driver left the bus, the attacker did not show any signs of posing a danger to the plaintiff. The argument by the defendant is that the driver could not have foreseen that the first plaintiff would be attacked. The action

by the driver to go call the security guard was reasonable and there was nothing else that he could have done. The submission was

therefore made that there was no wrongfulness or negligence by the driver or the security guards at the hospital on the day of the incident and the defendant cannot be held vicariously liable for any damages suffered by the plaintiffs.

Law

[13] The classic test for negligence was formulated by Holmes JA, in *Kruger v Coetzee* 1966(2) SA 428 (AD) at 430 E-G:

“For the 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 upon the particular circumstances of each case.”

[14] In *Premier Western Cape v Fair Cape Property Developers (Pty) Ltd* 2003(6) SA 13 at 37 B-C, Lewis JA held:

“State officials, including employees of local authorities, and members of government at every level, are accountable for their decisions. They must, of course, perform their duties without negligence. And where they do not exercise due care, in circumstances where they owe a duty to members of the public to act responsibly and without causing loss or harm, they should be held liable for the damage that they have caused.”

[15] 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 would have taken steps to prevent such harm. In *Flanagan v Minister of Safety and Security* (497/2017) [2018] ZASCA 96 (1 June 2018) at par 25 the following was stated: “To determine the reasonableness of guarding against the risk of harm, a number of considerations are relevant. These include the degree or extent of the risk created by the conduct in question; the gravity of the consequences if the harm occurs; and the burden of eliminating the risk of harm. See: *Ngubane v South African Transport Services* [1990] ZASCA 148; 1991 (1) SA 756 (A) at 776H-I.”

[16] In this matter the plaintiffs’ case is that the hospital was obliged to implement measures to prevent injury to people by health care personnel or any member of the public present at the hospital. The first plaintiff testified that there were security officers at the gate of the hospital when they entered and that the bus was searched for any weapons. Thereafter,

when she came back from her consultation with the doctor she found the bus driver seated in the bus behind the steering wheel. The presence of the security guards at the gate is considered as a measure implemented by the hospital to prevent injury to people in the hospital premises. The actions of the security guards, searching vehicles including those that belong to the department of health is another way of the hospital ensuring that no harm befalls the people within the premises of the hospital.

- [17] The plaintiffs allege that the bus driver failed to give effect to the measures implemented by the hospital to prevent injury to the plaintiffs. At the time when the attacker got onto the bus, the driver was present and enquired from her who she was. He did that repeatedly and when there was no response, he informed the second plaintiff that he was going to call the security guards. At the time he left, there was no indication that the unknown female was about to attack the first plaintiff as she was sitting down and busy talking to the second plaintiff asking for cigarette. It cannot be said that the driver could foresee that there was any injury that could befall the first plaintiff and neglected to protect her. In going to call the security guards, he left the first plaintiff with the second plaintiff and there was no attack that had started or imminent. His

actions of going to get help was reasonable and in the circumstances, there was nothing else that he could have done.

- [18] The assault in this matter was perpetrated by an unknown female. According to the first plaintiff, the unknown female was just breathing heavily when she got onto the bus. She was not shouting or acting crazy and giving an indication that she was about to attack anyone. The second plaintiff who was accompanying the first plaintiff as her elderly mother was standing outside the bus when the unknown female arrived and she remained there offering her water. She did not see the need to get into the bus and protect the first plaintiff. She could not foresee that any harm could befall the first plaintiff. It can therefore not be argued that the bus driver or the security guards could have foreseen any harm to the plaintiffs by the unknown female.
- [19] Both the driver and the security guards at the hospital performed their duties with care and acted reasonably in protecting the plaintiffs. The bus driver upon seeing the unknown female enquired who she was and immediately went to call the security guards. The security guards reacted immediately when called by the bus driver and removed the attacker from the bus. In these circumstances, there is nothing more that the defendant's employees could have done to prevent any injury from befalling the plaintiffs. As such, there was no wrongfulness or negligence on their part. In my view, no case has been made out against the defendant and the plaintiffs' claim stands to be dismissed.

Costs

- [20] It is trite that costs follow the result and that costs are in the discretion of the court. The first plaintiff in this matter is an elderly woman of 81 years. She is receiving old age pension and is living with chronic illnesses. It would not be fair to mulct her with the costs of this action

looking at her health and advanced age. The second plaintiff is the daughter to the first plaintiff and assisting to take care of her. Both plaintiffs were fighting for their constitutional rights against the state and seeing that they are not successful, it is not necessary that they be ordered to pay the costs of the defendant. In the result, each party should pay its own costs in this matter.

Order

[21] Consequently, I make the following order:

1. The plaintiffs' claim is dismissed;
2. Each party to pay its own costs.

J T DJAJE

JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING

: 11 JUNE 2021

DATE OF JUDGMENT

: 12 AUGUST 2021

COUNSEL FOR THE PLAINTIFFS : ADV. C ZWIEGELAAR

COUNSEL FOR THE DEFENDANT : ADV. D. SMIT

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