REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO:28974/2016

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

05/06/2025
DATE

[redacted]
SIGNATURE

In the matter between:

ALINAH MATLHODI NTHABISENG MASEKO Plaintiff

And

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG PROVINCIAL GOVERNMENT Defendant

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J U D G M E N T

MABESELE J:

Introduction

[1] This is a claim for general damages, arising from medical negligence. It is the plaintiff's case, as pleaded in the particulars of claim, that the defendant's misdiagnosis and/or failure to properly diagnose and, timeously, treat his hip fracture or hip dislocation when he presented himself to the hospital on 24th January 2016 and 28th January 2016, resulted in him enduring severe physical and psychological pain and suffering. The trial proceeded on merits, only.

[2] The plaintiff's counsel, in his opening address, contended that when the X-rays taken of the plaintiff's hip, on the 24th January 2016, did not show a fracture, the medical staff that attended to the plaintiff on his return, on the 28th January 2016, should have referred him for an MRI or CT scan for further investigation.

[3] The central issue to be determined is whether the medical staff that attended to the plaintiff on the 28th January 2016 should have performed further examination, or whether the strong medication that was given to the plaintiff on the 28th January 2016 over and above the medication given on the 24th January 2016, was sufficient to cure the pains on the plaintiff's hip, and, therefore, be considered as proper treatment

Background

[4] The plaintiff passed on, after he had instituted the action against the defendant. His wife, Ms. Maseko, acts in this matter, in her representative capacity as a *nomine officio* of the estate of the plaintiff (now deceased). She has been authorized to do so in terms of a letter of authority, no: 008875/2024, dated 14th April 2024. Accordingly, she is considered to be the plaintiff. In this regard, the Court, in *Nkala V Harmony Gold Mining Company Limited*[1] said the following:

> "A plaintiff who had commenced suing for general damages arising from harm caused by a wrongful act or omission, but who subsequently died, and whose death occurred prior to *litis contestatio* having being reached and who would, but for his or her death, be entitled to maintain the action and recover the general damages in respect thereof, would still be entitled to continue with such action. The action would be for the benefit of the estate of the person whose death had been so caused."

Plaintiff's evidence

[5] Ms Maseko testified that, in the morning of the 23rd January 2016, the deceased went out for a jog. He later came back limping and complaining about the pains that he felt after falling on the ground. The deceased did not enjoy a good sleep that night due to the pains. The next day, that is, 24th January 2016, she accompanied the deceased to the Far East Rand Hospital. The deceased

[1] 2016(5) SA 240 (GT) at 243(F). See, also Du Bois V Motor vehicle accident fund (1992(4) SA 368(T) at 374(G)-375(A) wherein the following was said: 'In the normal course of events this award would have benefited the claimant..... In casu, any award I make for claimant's suffering ultimately devolves on her heirs'

struggled to move his leg. Upon arrival at the hospital the deceased was taken to the doctor's room. She remained outside. Few minutes later, the deceased came out of the room with medication and they both went home. During the night the deceased suffered severe pains. On the 28th January 2016 she accompanied the deceased again, to the hospital. The deceased was on wheelchair which he had borrowed from a friend. Upon arrival at the hospital the medical staff pushed the deceased to the doctor's room. He came out of the room with medication.

[6] Since the 28th January 2016 to 23rd February 2016 she had been noticing changes in the health and mental condition of the deceased. His health deteriorated. He looked depressed, easily irritated and isolated himself from the family members. It is also common cause from the joint minutes of the psychiatrists that a severe hip injury had a significant impact on the physical and mental health of the deceased. Both the experts diagnosed the deceased with a major depressive disorder.

[7] It is common cause that the deceased went back to the hospital on 23rd February 2016. The second X-ray was taken and revealed a femoral neck fracture. Subsequently, a total hip procedure was made on the 7th of March 2016. The deceased was discharged from the hospital on 14th March 2016.

[8] Dr Juan Marin is a specialist orthopaedic surgeon. He performed physical examination on the deceased on the 15th of November 2017. On examination a decrease in range of movement of the left hip and painful fracture of the left

femur neck were noted. The deceased was walking with a short gait. The final diagnosis revealed a fracture of the neck of the left femur with residual pain and a leg length discrepancy. The deceased, according to Dr Marin, walked with constant pain for a period of four weeks. He said that, if the fracture was diagnosed earlier, the deceased would have required screw fixation on the left hip fracture, thereby prevent the total hip replacement. He testified that the doctors who treated the deceased on the 28th of January 2016 missed the opportunity to refer the deceased to the specialists doctors. During cross examination, Dr. Marin said that CT scan should have been used on 28th January 2016.

Defendant's evidence

[9] Dr. Andre Vlok is a specialist orthopaedic surgoen. He performed physical examination on the deceased and noted, among others, the following: (i) a leg length difference of 1.2cm with the left leg being longer than the right leg,(ii) a loss of movement in the left hip,(iii) a femur neck fracture.

[10] The doctor testified that, in the absence of the clinical findings such as a shortened or rotated limb, the diagnosis of the femur neck fracture can be very difficult to make, particularly if the fracture is un-displaced, minimally displaced, or, is impacted. These fractures may not be visible on the standard X-rays. He said that, when the clinical findings support the diagnosis of the femur neck fracture and there is no fractures identified on the X-rays of the hip then the following options should be considered:

(i) to request the other views (X-rays) to help identify the femur neck fracture better,(ii) to request CT scan of the hip using small cuts to identify a possible fracture of the femur neck,(iii) to request MRI of the hip,(iv) to admit the patient for assessment the next day and have the X-rays reviewed by a radiologist. In *casu,* said the the doctor, the clinical findings did not suggest a possible femur neck fracture and there was no fracture identified on the X-rays. He said that, it was unlikely that between the period 24th January to 28th January 2016 the second X-ray would pick up something. He said the fracture is much easier to detect on the X-ray after two to three weeks. The reason being that the fracture becomes more visible during that period.

[11] The doctor testified that, if the deceased could not respond to medication he should have been re-examined or re-assessed, on 28th January 2016. He reiterated this version during cross-examination, and, added, that the medical doctor should, at least, have taken rotational X-ray, and, if nothing came up, referred patient to another hospital for CT scan. He said that the neck femur may deteriorate if not treated, timeously. It can deteriorate to stages one to three. He said that the deceased suffered acute pain for seven to ten days.

[12] The doctor was presented with a publication of the Association of Bone and Joint Surgeons, titled: '*Clinical Orthopaedics and Related Research,* and, was asked to comment on the contents thereof in so far as they relate to the treatment of the non-displaced femoral neck fracture. Firstly, the doctor admitted that the article is legitimate and internationally recognized by the association of orthopaedics doctors. He agreed, with reference to the article

that, 'internal screw fixation with preservation of the femoral head generally is favoured for non-displaced fractures of the femoral neck'.[2] The doctor said that, men around the ages of 50 years stands a 75% chance to safe their hips thought screw fixation. He said that, the deceased who was 50 years then, stood a 50% chance of recovery, had the fixation procedure performed on him.

[13] Dr Junior Kalagobe is the head of department of orthopaedic at the Far East Rand Hospital. His duties include regular visits in the wards to ensure that patients receive proper treatment. The hospital has necessary equipments such as X rays and CT scan. These equipments were available in 2016. The doctor said that, CT scans are preferred and better for examination of bones. On 23rd February 2016 he saw the deceased in the ward. From the said date to 14th March 2016 he had been visiting the deceased's ward and was satisfied that the deceased was receiving proper treatment for comorbidities. His role insofar as it relates to the deceased was to prepare the deceased for theatre. He also took part in decision-making by the medical team that the deceased should undergo hip operation for femoral neck fracture. The decision was influenced by the age of the deceased and his comorbidities. Notwithstanding this version, the doctor said that the doctors who operated the deceased on the 7th March 2016 categorized his health as good. He discharged the deceased from the hospital on 14th March 2016.

Evaluation of evidence

[2] Dr Juan Marin, in his evidence-in-chief, also agreed with the views expressed in the article

[14] The evidence of Ms. Maseko in so far as it relates to the pain suffered by the deceased between 23th January 2016 and 23rd February 2016 was not disputed. It was not disputed, also, that the deceased was on wheelchair to the hospital on the 28th of January 2016. Ms. Maseko's version that, since the 28th January 2016 the deceased was easily irritated and looked depressed, is corroborated by the psychiatrists in their joint minutes. Both the experts diagnosed the deceased with a major depressive disorder and have noted that a severe hip injury had a significant impact on the physical and mental health of the deceased. Dr Juan Marin's version that the deceased walked with constant pain for a period of four weeks corroborates the version of Ms. Maseko in this regard. His version that the medical staff should have used CT scan on the 28th of January 2016 for further examination, is corroborated by Dr Vlok. Dr. Vlok testified that, if the deceased could not respond to the medication given to him on the 24th of January 2016, he should have been re-assessed or re-examined on the 28th of January 2016, and, a rotational X- ray or CT scan could have been used for further examination. According to Dr Marin, if the fracture was diagnosed earlier, the deceased would have required screw fixation on the left hip Fracture and that, would have prevented the total hip replacement being done. This expert opinion is corroborated by Dr Vlok, to a considerable degree. Dr Vlok testified that men around the ages of 50 years stand a 75% chance of saving their hips through a screw fixation. He testified that the deceased was 50 years old and stood a 50% chance of recovery had a fixation procedure performed on him. He went further to state that, the femur neck fractures deteriorate, if not treated, timeously. He testified, however, that both the hip replacement and fixation procedures have pros and cons. He did not elaborate

much on this assertion except to say that a hip replacement may restrict the movement of a patient for a period of two days after operation whereas fixation restricts the movement for a period between two to three weeks after operation. Regard should be had that any difference of opinions between Drs. Vlok and Marin which is unrelated to the dispute between the parties which is identified in paragraph 3, above, is irrelevant for purpose of this enquiry.

[15] Dr Kalagobe saw the deceased on the 23rd of February 2016 when he was preparing him for theatre. He was unable to assist the Court with regard to the events of the 28th of January 2016.That said, his evidence that CT scan is available at the hospital and is preferred and better for examination of bones demonstrates that the medical staff should have resorted to CT scan when the deceased visited the hospital for the second occasion.

Conclusion

[16] The onus of proving negligence on the part of the defendant rests with the plaintiff[3] The test for negligence was stated in *Kruger V Coetzee*[4] as follows:

> "For the purpose of liability culpa arise 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

[3] See, Monteoli V Woolworths (Pty) Ltd 2000(4) SA 735 (w) par. 25
[4] 1966(2) SA 428(A) at 430

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps

[17] The test (for negligence) involves a twofold inquiry[5] . The first is, was the harm reasonably foreseeable? The second is, would the *diligens paterfamilias* take reasonable steps to guard against such occurrences 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 performing 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[6].

[18] On the 24th of January 2016 the medical staff, rightly, took X-rays of the deceased's hip after the deceased had informed them that he fell on the ground whilst jogging. The X-rays did not reveal any fracture of the hip. Four days later, that is, 28th of January 2016, the deceased went back to the hospital, complaining about the same pain which became severe. Importantly, he was put on a wheelchair because he struggled to move his left leg. Despite the circumstances under which the deceased was brought to the hospital, on 28th January 2016, and, were self-evident to the medical staff, the deceased was given medication and sent back home. Both Drs. Vlok and Marin were of the

[5] McIntosh V Premier, Kwazulu- Natal [2008]4 All SA 72 para 12
[6] Ibid.,

view that the medical staff ought to have conducted further examination under those circumstances, using either rotational X-rays or CT scan. It is common cause that the deceased was properly diagnosed on the 23rd of February 2016. The medical staff that attended to the deceased on the 28th of January 2016 did not testify. In any event their evidence would not hold positive results if regard is had to the evidence of the orthopaedic surgeons that the deceased should have been re-assessed on the 28th of January 2016. In view of the evidence presented, in particular that, the deceased was put on a wheelchair because he could not move his leg, the medical staff that attended to him ought to have reasonably foresaw that the condition of the deceased had become serious, and, ought to have conducted further examination. The failure to do so, not only amounts to a breach of duty but demonstrates negligence on their part. Had the medical staff re-examined the deceased, using either rotational X-rays or CT scan which was readily available at the hospital, could have identified the problem earlier, and, opt for screw fixation procedure, thereby, safe the hip of the deceased. As testified by Dr. Vlok, the femur neck fractures deteriorate if not treated, timeously.

[19] I now deal with the issue of costs. The plaintiff's counsel argued that, if costs are awarded in the plaintiff's favour, such costs should include his costs and costs of junior counsel. I agree, except to say that the junior is entitled to fees for 29th and 30th April 2025. Since then, junior counsel did not appear in court.

[20] In view of the above, the following order is made:

1. The defendant is declared to be liable to the plaintiff, in the representative capacity in which she sues, 100% (hundred percent) of the damages suffered by the deceased plaintiff, arising out of his treatment at the hospital, to the extent of which damages remain to be proven.
2. The defendant should pay the plaintiff's costs, including costs of Senior Counsel on scale 'C'. And, junior counsel on scale 'B' for appearances on the 29th and 30th April 2025.

[redacted]

M.M MABESELE

(Judge of the High Court Gauteng Local Division, Johannesburg)

Date of hearing : 29 April-09 May 2025

Date of judgment : 5 June 2025

Appearances

On behalf of the plaintiff : Mr M.W Dlamini SC
Instructed by :Tlaweng Lechoba Inc.

On behalf of the first respondent : Adv H.M Mokale
Instructed by :State Attorney