IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

(1)	**REPORTABLE:**
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED:
(4)	Signature: [redacted] Date: 26/02/26

CASE NO.:A334/2024

In the matter between:

NONYANISO MNTIMBA Appellant

and

MEMBER OF THE EXECUTIVE COMMITTEE

FOR HEALTH, GAUTENG Respondent

JUDGMENT

Kumalo J (Janse van Nieuwenhuizen J et Van der Westhuizen J concurring)

INTRODUCTION

[1]. This is an appeal against the judgment and order of Makhoba J, which was delivered on 16 October 2024, dismissing the Appellant's claim for alleged medical negligence.

[2]. The Court *a quo* granted leave to appeal to the full court of this Division on 6 December 2024.

[3]. The Appellant instituted a delictual claim for damages against the Respondent, alleging medical negligence by the Respondent's employees. At the time, the Appellant was under their care from 26 to 31 December 2018.

[4]. The parties agreed at the pre-trial conference held on 28 September 2022 that the issue of liability should be separated from the remaining issues under rule 33(4) and determined first.

[5]. The separation was applied at the commencement of the trial, and the Court having ruled that the dispute would be limited to what was contained in paragraphs 1 up to and including 9.2 of the Appellant's particulars of claim.

[6]. The Appellant argued that the Court *a quo* erred in dismissing the Appellant's claim with costs.

[7]. The Appellant argued that, having regard to the issues in dispute, the common cause facts, the evidence presented by the Appellant, and the prevailing law, the Court *a quo* should have found the Respondent liable for 100% of the Appellant's proven or agreed damages, together with costs.

[8]. It is further argued that the Court a quo disregarded the fact that, at the commencement of the trial, it was common cause that it was recorded on 30 December 2018 in the records of Charlotte Maxeke Academic Hospital that the Appellant could not move her toes and suffered from decreased sensation since the morning of 29 December 2018.

[9]. It was further argued that, insofar as the Respondent, at the trial, wished to rely on entries in the hospital records which contradict the common cause facts, the Respondent was obliged to present the evidence of the author of those entries, failing which it constituted hearsay evidence in the hands of the Respondent.

[10]. The Appellant argued further that the Court a quo erred in finding that both the vascular surgeons agreed that the Appellant had an uncommon complication.

[11]. It is further argued that the Court a quo erred in finding that Dr. Tsotetsi refuted the Appellant's expert witness testimony that there was poor monitoring, poor recording, and a failure to act on changes in the Appellant's condition.

[12]. Further, it is argued that the Court a quo erred in its finding that the Respondent's employees could not have foreseen the sudden deterioration of the Appellant's leg, because, at the time that the complication arose, they were, and had been, conducting neurovascular checks.

[13]. It is argued that the Court *a quo* erred in not rejecting the evidence of Sr. Senoko, both because it was inconsistent with the objective facts and because, on her own admission, she was biased and was advocating for her colleagues.

[14]. The evidence before the Court *a quo* included the clinical and hospital records, which were agreed between the parties that constituted admissible hearsay evidence in terms of the provisions of section 3 of the Law of Evidence Act, 45 of 1988, read with the provisions of section 34 of the Civil Procedure Act, 25 of 1965. The basis of the agreement is said to relate to the admissibility thereof and not necessarily the weight of the evidence in question.

[15]. The question the Court *a quo* had to decide was whether the Respondent's employees, given the clinical and hospital records and evidence led, were negligent in their conduct and whether there was any nexus between their conduct and the damages suffered by the Appellant.

[16]. More importantly, the question was whether the Appellant's damages were foreseeable in the circumstances.

[17]. The clinical and hospital records indicate that the incident occurred on 26 December 2018 at 22h30. The emergency medical services suggest that the arrival time at the scene is 23h40. The Appellant was lying down with a gunshot wound on the right knee and another on her left leg.

[18]. The emergency admission indicates that she was admitted on 27 December 2018 at 01h18. On the same day, at 07h00, the nurses' progress report suggests that the neurovascular status appears satisfactory: pedal pulses palpable, toes move and are warm to the touch.

[19]. The doctor's note for morning rounds indicated that the vitals were stable, with no mention of neurovascular status.

[20]. The nurse's notes indicate neuro vascular checks at 10h00, 12h00, 14h00, 16h30, 20h00, 22h00, and 24h00 found circulation to be good.

[21]. On 28 December 2018, the nurses' notes indicate that at 02h00 and 04h00, sensation and circulation of both feet were satisfactory, toes were warm and moving, and pulse was present.

[22]. Further, the nurses' notes for 05h30 indicate that Dr. Masaila apparently prescribed a second unit of blood for theatre on the same day.

[23]. Subsequent note indicated a blood transfusion; a consent was signed for theatre to plate the right distal femur and nailing of the left tibia.

[24]. On the same day, at 16h15, the theatre was cancelled due to the timing, but the patient's condition was satisfactory.

[25]. The balance of the nurses' notes for the day indicated a warm sensation and good circulation.

[26]. On 29 December 2018, at 02h00, the sensation was minimal, and capillary refill was good. At 05h38, the Appellant verbalized that she was unable to move the right toes, with intact sensation.

[27]. On the same day, and as late as 16h00, the toes were moving, with good sensation and good capillary refill. It was only on 30 December 2018 at 04h00 that the nurses noted the patient was unable to feel her right foot, was not movable, and was cold to the touch.

[28]. The doctor was informed at 05h20, who stated that he would come and see the patient. Dr. Hamann saw the patient at 06h00

[29]. I need not detail all that was done in preparation for the transfer of the Appellant to Charlotte Maxeke Academic Hospital, nor what was done there.

[30]. Suffice to state that the Appellant was amputated and at some stage transferred back to the Tambo Memorial Hospital.

[31]. The question before the Court *a quo* was whether there was negligence on the part of the medical and nursing staff of the Tambo Memorial Hospital in the treatment of the Appellant, and to determine whether such negligence (if any) caused or contributed to the amputation and other sequelae pleaded.

[32]. The Appellant had led the evidence of Professor Veller, a vascular surgeon, whose opinion was based on the clinical and hospital records admitted by agreement between the parties, and made available to him.

[33]. Professor Veller opined that the Appellant suffered paraesthesia, which was followed by paralysis, which led to what the medical gurus referred to as ischemia.

[34]. He stated that the nurses should have called a doctor when confronted with this condition, who would have been able to make a proper diagnosis. According to him, this was not done promptly.

[35]. Sister E Jansen van Rensburg, a registered nurse, echoed the same sentiments and confirmed that the Appellant had signs of ischemia, and the nurses were supposed to report the condition immediately to a doctor.

[36]. The last witness for the Appellant was Professor JHR Becker, a surgeon. He opined that the Appellant should not have been admitted to the Tambo Memorial Hospital due to her injuries. He also confirmed that when the nurses noticed a change in the patient's condition, they should have phoned a doctor. He opined that had there been an intervention when the patient lost sensation, her leg would most probably have been saved.

[37]. Dr. Tsotetsi, a vascular surgeon, testified on behalf of the Respondent. He noted no abnormalities on the neurovascular checks done on 27 December 2018. He also noted that the patient was seen by Dr. Muvalo, who made a diagnosis of right distal femur fracture and a left tib/fib fracture

[38]. No abnormalities on neurovascular checks on 28 December 2018. No abnormalities were detected on 29 December 2018, despite the Appellant's complaints of pain.

[39]. Dr Tsotetsi's summary indicated that there were no hard signs on presentation (i.e., clinical indicators of a vascular injury). It noted the serial checks to evaluate limb perfusion for at least 48 hours.

[40]. He opined that the Appellant most likely had delayed thrombosis of the popliteal artery and that the limb was not viable at the time of transfer. He filed an addendum disagreeing that the Appellant should have been referred on 29 December 2018 since there was no diagnosis of popliteal artery injury on that day. The Appellant was evaluated by treating physicians and was found to have adequate limb perfusion.

[41]. The diagnosis of acute limb ischemia was made on 30 December 2018, and the correct management steps were taken.

[42]. There is a difference of opinion between the two relevant experts on the matter.

[43]. Dr. Tsotetsi, testifying on behalf of the Respondent, testified during the hearing that arterial thrombosis commonly occurs immediately or a few hours after the injury. It is uncommon after 24 hours, and observation is usually performed for 24 to 48 hours.

[44]. He further stated that the health facility in question had limited Radiology facilities, so no scans were performed to rule out the injury.

[45]. It was submitted on behalf of the Respondent that adequate checks, given the circumstances, were done and that it was not reasonably foreseeable that the Appellant would develop a rare and uncommon complication.

[46]. The clinical records confirmed that neurovascular assessments were done regularly at least in the first 48 hours.

[47]. It is common cause that the Tambo Memorial Hospital was not equipped to deal with possible arterial injury, and, according to Prof. Veller, once diagnosed, the patient had to be transferred.

[48]. Prof. Becker, who also testified on behalf of the Appellant, opined that due to the injuries suffered by the Appellant, she should never have been admitted to the Tambo Memorial Hospital and instead should have been transferred to Charlotte Maxeke Hospital.

[49]. He further opined that when the Appellant lost sensation on 29 December 2018, a fasciotomy could have been performed, or a sister, matron, or doctor in the casualty department should have been informed.

[50]. Lastly, he opined that had there been an intervention at the loss of sensation, the plaintiff's leg would most probably been saved.

[51]. I am unable to accept this part of his expert evidence. It is, at most speculative in my view.

[52]. The evidence before the court at the time was that on 19 December 2018, the Appellant had a pedal pulse at 16h00. Sensation and circulation were good. The toes were moving, and the capillary refill was good.

[53]. The cardinal question in this case is whether the amputation of the Appellant's leg was caused by any negligence on the part of the Respondent's employees, and if this was reasonably foreseeable.

[54]. The standard bearer decision of Kruger v Coetzee, endorsed by the apex court, stated the following:

" For purposes of liability, culpa rises 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 have taken reasonable steps to guard against such an occurrence; and

(b) The defendant failed to take such steps."

[55]. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all, if so. What steps would be reasonable must always depend upon the circumstances of each case. No hard-and-fast rule can be laid down.

[56]. I am of the view that in this instance, the hospital staff cannot be faulted. The cause of the injury was a gunshot. The hospital staff followed accepted guidelines in their observations. The first 48 hours did not present much of a challenge. When the changes occurred, they advised a doctor within 1 hour and 30 minutes.

[57]. There was no positive evidence before the Court *a quo* that, had they reported earlier, the Appellant's leg would have been saved immediately upon detection of the problem.

[58]. I have already alluded to the fact that, in my view, the opinion of Prof. Becker is speculative.

[59]. In the circumstances, I propose the following order –

1. The Appellant's appeal is dismissed.
2. The Appellant is to pay the costs of the appeal. Counsel's fees on scale "B".

Judge of the High Court, Pretoria

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines.

Appearances:

For the appellant: Adv SJ Myburgh SC & Adv E Mann

Instructed by: Werner Boshoff Inc

For the respondent: Adv T Madileng

Instructed by: State Attorney, Pretoria