IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO.: 2361/2018

In the matter between:

B[...] Z[...] Y[...] Plaintiff

and

DR. S. MDUNA Defendant

JUDGMENT

MHAMBI AJ

Introduction

[1] In this action, the plaintiff claims damages against the defendant relating to the alleged medical negligence.

[2] This claim emanates from the plaintiff's presentation at the practice of the defendant for the choice termination of pregnancy, commonly known as "abortion". The defendant is the medical practitioner with an independent practice at Mthatha.

[3] The plaintiff has alleged in the particulars of claim that upon her presentation at the medical practice of the defendant on 28 May 2015, she entered into an oral agreement with the defendant relating to the choice termination of pregnancy. The plaintiff's medical negligence claim is based on the breach of the aforesaid oral agreement by the defendant. The plaintiff alleged several respects for the alleged breach.

[4] The plaintiff further alleged in her particulars of claim that the defendant's conduct complained of, is the result of her being found permanently sterile by the surgery.

[5] The defendant denies negligence and the subsequent liability. The defendant pleaded that the plaintiff was on 28 May 2015, attended by Dr. Mfolozi, who at the time was a *locum* doctor, and not by himself.

[6] It is Dr. Mfolozi who examined the plaintiff; to that extent, he prepared an examination plan for the plaintiff. The defendant further denied that the plaintiff's damages, as claimed, and alleged that those were the result of the conduct of Dr. Mfolozi.

[7] It is common cause that:-

(a) The plaintiff was attended at the medical Centre of the defendant on the date concerned.

(b) The plaintiff presented herself for choice termination of pregnancy.

(c) The plaintiff was attended by Dr. Mfolozi

(d) The defendant did not attend and examined the plaintiff, nor did the defendant prescribe medication for the plaintiff.

[8] It is trite that; for the plaintiff to succeed with its claim against the defendant in a case where it is alleged that the defendant was negligent in doing something or failed to do something, it must prove that there was a duty of care owed to it by the defendant, which the defendant has breached and that the breach has caused harm to occur, which resulted in damages. Thus, the onus rests on the plaintiff to prove all the elements of the delict in order for its claim to prevail.

[9] Put differently, the elements a plaintiff must establish, on a balance of probabilities, to hold a defendant liable for delictual damages are trite. Our law recognizes five elements, and if a plaintiff fails to establish one of these, the claim cannot succeed. The five elements a plaintiff, seeking to succeed with a claim in delicts, must establish are: (1) the conduct (either act or omission); (2)

wrongfulness; (3) fault (negligence); (4) causation; and (5) that harm was suffered. Without the convergence of all these elements, delictual liability will not ensue.

[10] In *Kruger v Coetzee,*[1] the Supreme Court of Appeal stated the following:

> "(a) "a diligens paterfamilias in the position of the defendant-
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> (i) Would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
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> (ii) Would take reasonable steps to guard against such occurrence; and
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> (b) The defendant failed to take such steps."

[11] In *Le Roux and Others v Dey*,[2] the Constitutional Court stated the following:

> "In the more recent past our courts have come to recognize, however, that in the content of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present –it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, but it concerns

[1] 1966 (2) SA (A) 430
[2] [2011] (3) ZACC SA 274 (CC) at para 122.

the reasonableness of imposing liability on the defendant for the harm resulting from the conduct."

[12] In *Country Cloud Trading CC v MEC Department of Infrastructure Development,*[3] the Constitutional Court stated the following:

> "Wrongfulness is an element of delictual liability. It functions to determine whether the infliction of culpably caused harm demands the imposition of liability or, conversely, whether 'the social, economic and other costs are just too high to justify the use of the law of delict for the resolution of the particular issue'. Wrongfulness typically acts a brake on liability, particularly in areas of the law of delict where it is undesirable and overly burdensome to impose liability".

[13] At the start of the trial, both counsel addressed the court on an application to separate the issues in terms of rule 33(4); consequently, it was ordered that the issue relating to liability is separated from the issue of Quantum in terms of rule 33 (4) of the uniform rules of this court. The matter proceeded on liability (merits) only.

[14] As indicated above, the onus is on the plaintiff to prove all the elements of the delict complained of. Further, in determining whether the plaintiff has discharged the onus placed upon it, the court must consider all the facts and the

[3] [2014] ZACC 28; 2015 (1) SA 1 (CC) at para 20.

circumstances of this case since the plaintiff must prove its case on a balance of probabilities.

[15] In *GC v JC and Others,*[4] the Supreme Court of Appeal stated the following:

> "The onus to prove these requirements rests on the plaintiff. Where a defendant is proved to have initiated a prosecution without reasonable grounds, it does not follow that he acted dishonestly, nor does it necessarily imply that she did so animo inuriandi. However, in the absence of any other evidence the natural inference is that the plaintiff has established both. The defendant thus bears an evidential burden to rebut this inference regarding her state of mind, including any mistake that would exclude her liability".

[16] The evidence of the plaintiff is summarized as follows: she was attended at the medical practice of the defendant on 28 May 2015. It was the first time she was visiting the defendant's medical practice, and as such, she had no knowledge of the defendant.

[17] This issue is common cause between the parties, including how the defendant recognized the address and how the defendant got to know the medical practice of the defendant.

[18] She testified that upon her arrival, she was attended by a doctor she did not know. The doctor concerned was a male doctor. She was examined, and

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[4] Case No 205/2019) [2021] ZSCA 012 (3 February 2021) para 40

according to her evidence, she advised the doctor that she was 16 weeks, 5 days pregnant. The doctor gave her a note to take to the dispensary. She was given 6 tablets and advised on how to use those tablets. She was adamant that, at all material times, the doctor who treated her was the defendant.

[19] She testified that she was negligently treated by the defendant in a manner that resulted in her having a subtotal hysterectomy surgery, which was necessitated by the irreparable uterine tear (rupture). She was rendered permanently sterile by the surgery. The conclusions of fact in her testimony are consistent with the expert report prepared on her behalf by Dr. Ngonyama, an obstetrician and gynecologist.

[20] The defendant testified that, on the date concerned, he was not on duty in his medical practice. Present in the medical practice was Dr. Mfolozi, who was the *locum* doctor at the time. He denied having attended to the plaintiff, and denied liability as the plaintiff alleged in pleadings and in her testimony.

[21] He explained *locum as* the doctor working at the place and in the stead of another doctor, using the medical facility of that doctor, but working on his own (lo*cum*) benefit. The *locum* works independently, *albeit* using the facilities of another doctor. His evidence is consistent with his amended plea and the initial plea.

[22] Notably, I have summarized both parties' evidence, limited only to the issue (s) to be determined. I have not included evidence not relevant to the issue to be determined.

[23] This court has to analyze whether the plaintiff has discharged the onus to establish the defendant's liability. This will be considered from the case made in the pleadings and oral evidence by the plaintiff; similarly, the pleadings of the defendant will be considered to weigh whether they, including oral evidence, have discharged the evidential burden to rebut the liability alleged by the plaintiff.

[24] The defence of the defendant from his pleadings is clear to say:-

24.1 At all material times in particular on 28 May 2015, the plaintiff was attended by a locum, Dr. Mfolozi, and not by the defendant.

24.2 A copy of the plaintiff's medical file to such effect is annexed hereto, marked "A". The front page of the medical file was completed by the defendant's receptionist, and the second page was completed by a locum.

24.3 Further, a copy of a medical certificate booking off plaintiff for the period 28 May 2015 to 30 May 2015, completed by the locum, is annexed hereto, marked "B".

24.4 Defendant is not liable for the action of the locum.

24.5 It is further admitted that a medical doctor is under a legal duty to treat, care and/or advise a patient with the professional skill, care and diligence that are to be expected of a qualified practitioner and for such services to be rendered without negligence on his or her part, as alleged in para 3.3, but defendant repeats his denial that he did not attend on plaintiff.

24.6 The remainder of the allegations are denied. *(sic the defendant's plea).*

[25] This should be viewed with the fact that the particulars of claim make a case of negligence against the defendant.

[26] The plaintiff, having been served with the defendant's amended plea, in fact from the initial plea, elected not to amend its particulars of claim, it remains with a case against the defendant. This was despite the defendant's denial and substantiation that it was the locum who attended the plaintiff. This is an error that weighed heavily against the plaintiff, as will be demonstrated later in this judgment.

[27] On that, this court has no option but to hold on to the common principle that 'a party is bound by his or her founding papers'. The Constitutional court once remarked and held that:-

> "Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty, which is the element of the rule of law, one of the values on which our constitution is founded.[5]

[28] The question then is; whether it would be reasonable to impose a legal duty on the defendant, in circumstances that are clear to say he did not attend to the plaintiff, nor did he prescribe medication to the plaintiff. That, in my view, is not a bare denial for it to be rejected, the defendant substantiated its denial and mentioned the person who attended to the plaintiff on the date concerned.

[29] In this context, it would not be reasonable to impose liability on the defendant; I find no wrongfulness or negligence on the defendant. I am unable to find wrongfulness or negligence on Dr. Mfolozi, too, as no case has been made against him, nor was vicarious liability, if it exists in this case, pleaded in the particulars of claim.

[30] It is both fundamentally unfair and inherently unreliable for a court to make findings against a party based on a legal issue not advanced in the pleadings. It is fundamental to the litigation process that legal matters be decided within the boundaries of the pleadings. It is undesirable for a court to make a finding of liability on an issue not joined in the pleadings; such a finding

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[5] South African and Allied Workers Union and Another v Garvas and Others, 2013 (1) SA 83 (CC) at para 114.

cannot stand. I am bound not to decode issues falling outside the pleadings. *Minister of Safety and Security v Slabbert*[6].

[31] The question is whether the defendant had a legal duty to avoid harm or risk to the plaintiff. The defendant needs to have a positive act towards the plaintiff.[7] In the circumstances of this case, I find that the defendant owed no legal duty to avoid injury or harm to the plaintiff.

[32] Ms *Mantyi–Mfino,* counsel for the plaintiff, argued that the defendant had negligently or fraudulently misrepresented to the plaintiff that he was the doctor attending her, whereas she was attended by the locum. I disagree with this submission as it was not the case made on the particulars of claim. It is impermissible for a party to plead a particular case and seek to establish a different case at a trial.[8]

[33] In conclusion, the plaintiff has failed to discharge the onus of establishing an act of delict towards the defendant. I am unable to find a wrongful act attributable to the defendant; liability can therefore not arise towards the defendant.

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[6] [2010] 2 ALL SA 474 (SCA)

[7] Hollivell v Johannesburg Municipal Council 1912 AD 659 at 652, the court held that, " For the decision of the present dispute it is sufficient to say that where, in consequence to some positive act, a duty is created to do some other act or exercise special care so as to avoid injury to others, then the person concerned is under Roman Dutch Law liable for damage caused to those whom such duty by an omission to discharge it,"

[8] Notyawe v Makana Municipality and Others, 2020 (2) BCLR 136 (CC)

[34] The claim of the plaintiff should fail; costs should therefore follow the result.

Order

[35] In the result, I make the following order;

1. The plaintiff's claim is dismissed with the costs.

M MHAMBI
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Plaintiff	:	P. Mantyi – Mfino
Instructed by	:	S. Z. Jojo Inc. Mthatha
Counsel for the Defendant	:	M. Jozana
Instructed by	:	M.P. Mbuyiswa and Associates Mthatha
Heard on	:	28, 29 and 30 April 2026
Judgment Delivered on	:	26 May 2026