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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE: 13/4/2016
CASE NO: 21415/2012

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

.....13.4.16..... .....

DATE SIGNATURE

In the matter between:

PN MOKOENA obo SM NKOSI PLAINTIFF

And

ROAD ACCIDENT FUND DEFENDANT

JUDGMENT

MSIMEKI, J

INTRODUCTION AND BRIEF BACKGROUND FACTS

[1] Nokuthula Theodorah Dlamini was Siphamandla Menzi Nkosi's mother. She was involved in an accident on 23 February 2009 while she was a passenger in a motor vehicle that was driven by one S Ntshingila. The taxi she was in with registration letters and numbers N[…] collided with the insured motor vehicle bearing registration letters and numbers X[…], at the time driven by one Shai. Siphandla's mother passed on four months after the accident. Siphandla's grandmother has, as a result, instituted an action on behalf of the minor child and in her personal capacity for loss of support which they received from the deceased. Plaintiff contends that the collision was caused by the sole negligent driving of the insured driver alternatively of Ntshingila, alternately of both the insured driver and Ntshingila.

[2] Defendant denies that the insured driver was the sole cause of the accident. It further denies that there is a link between the accident and the cause of death of the deceased, Siphandla's mother.

THE ISSUE TO BE DETERMINED

[3] The issue to be resolved is whether there is a nexus between the injury sustained in the accident and the eventual demise of the deceased four months later.

[4] Advocate MD Köhn (Mr Köhn) and Advocate A Vorster (Ms Vorster) respectively presented plaintiff and defendant when the matter was heard and argued.

[5] In support of her case, plaintiff called Dr Collin Morare, a general practitioner, as her witness. Defendant called no witness. Dr Morare based his evidence on clinical notes and hospital records compiled and completed by respective doctors and nurses who treated the patient, the deceased. The doctor from this source formed his opinion and what he called “speculations”.

[6] Dr Morare diagnosed the deceased with a left leg contusion and made no mention of any chest trauma. This was also not mentioned in the hospital records.

[7] The doctor confirmed that the cause of death was congestive heart failure which was also mentioned as the cause of death on the official death certificate dated 21 June 2009. The cause of death could very easily have been established by an autopsy done by a forensic pathologist or evidence by the clinicians who treated the patient. The autopsy appears not to have been done. None of the clinicians testified to establish the exact cause of death of the deceased. No explanation was given as to why the autopsy was not done and why none of the clinicians testified. What is more, Dr Morare neither saw nor examined the patient.

[8] On 2 July 2015 Dr Morare compiled his report based on the clinical notes and hospital records which were compiled and completed by the respective doctors and nurses who treated the deceased. Testifying about chest trauma, according to the doctor, would amount to speculation which would not be proper in this case. Deceased had been admitted to hospital several times since 2008 due to her cardiac disease. This happened

before the accident. Dr Morare conceded that HIV, oedema of the lower legs as well as renal failure were all systematic conditions.

[9] Dr Morare conceded that the bilateral oedema which the deceased presented with a month after the accident could probably have been caused by her heart failure, renal failure or active HIV. A single leg swelling, according to him, would be an indication of a leg or isolated injury. The notes evidenced that deceased had been HIV positive. Deceased was taken off ARVs (anti-retro viral medication) due to the after effect they had on her.

The ARVs aggravated the illness, according to the doctor. She was not getting any better. He testified that HIV has the effect of accelerating the deterioration in the patient's chronic heart condition. Besides, the HIV was no longer treated. The notes by the nursing staff demonstrated that the symptoms on the patient's chart were similar to those that the patient had presented with prior and after the accident. The patient had been very sick prior to the accident. The doctor could not conclude, based on the evidence at his disposal, to what extent if any, the accident contributed to the patient's deterioration of her heart condition. That, according to him, again would amount to speculation which would not be helpful to the court. His guess was that the accident could have contributed 1% to 40% to the patient's death. It was indeed a guess as it was not based on any clinical studies or proven facts.

[10] The doctor conceded that there was dearth of evidence relating to the before the accident and after the accident conditions. This rendered it

difficult for the doctor to confirm that deceased's condition, as a chronic heart patient, deteriorated in an accelerated manner after the accident. The fact that deceased had been taking Warfrin and Clexane, which are blood thinning medication before and after the accident failed to support plaintiff's case that clots could have formed after the accident contributing to the accelerated deterioration of deceased's chronic heart failure and eventually contributing to her death.

[11] Doctor Morare was unaware if he had all the clinical notes and hospital records at his disposal. He had no evidence to show that clots, if they were there, were worsened by the accident. He also could not tell the court that if there had been accident related clots those clots could eventually have had an effect on the deceased's death which was said to have been caused by congenital heart failure. No evidence demonstrates the presence of clots or their absence. Specifics, in the absence of proven facts, according to the witness, would amount to speculation which, as I have said, is unhelpful to the court.

THE LAW

[12] Plaintiff bore the onus to prove her case on a balance of probabilities. It has to be remembered that the court was called upon to determine if there was a nexus between the accident and the cause of the deceased's death.

[13] It again must be borne in mind that plaintiff, to support her case, relied on the evidence of Dr Morare and the clinical notes of nurses and doctors who treated the deceased.

[14] In *Minister of Safety and Security v Van Duivenbodan* 2002 (6) SA 431 (SCA) at [24] pages 448-449 NUGENT JA confirmed what CORBETT JA said in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 at 700 regarding causation. CORBETT CJ (as he then was) at page 700E-J said:

> "As has previously been pointed out by this court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to 'as factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; aliter, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to

ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is, sometimes called 'legal causation'."

(See also *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E-35A, 43E-44B; *Standard Bank of South Africa Ltd v Coetsee* 1981 (1) SA 1131 (A) at 1138H-1139C; *S v Daniëls en 'n Ander* 1983 (3) SA 275 (A) at 331B-332A and *Simane & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 914F915H).

[15] There has to be a reasonable connection between the harm threatened and the harm done. Were it not so, an excessive burden would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his conduct. For instance, an American judge once said: "this would not have happened had one not been born".

[16] In *Minister of Safety and Security v Van Duivenboden* (*supra*) NUGENT JA at 449E-F said:

"A plaintiff not required to establish the casual 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."

[17] In *Rose Lilian Judd v Nelson Mandela Bay Municipality*, a reportable case number CA149/2010 of the High Court of South Africa, Eastern Cape, Port Elizabeth at [8] the court said:

It is commonly recognised that an actionable wrong or delict has 5 elements or requirements, namely:

(a) the commission or omission of an act (*actus reus*);

(b) which is unlawful or wrongful (wrongfulness);

(c) committed negligently or with a particular intent (culpa or fault);

(d) which results in or causes the harm (causation); and

(e) the suffering of injury, loss or damage (harm).

[18] CORBETT J in *Wells & Another v Shield Insruance Co Ltd and Others* 1965 (2) SA 865 (CPD) at 868H – 869A-B dealt with causation. He considered the words "caused by" and "arising out of" when he discussed problems pertaining to driving. He found that the two phrases are not synonymous. The former phrase, according to him, has no wider connotation which the latter has. At 869A-B of the same case he said:

> "(2) The words 'caused by' refer to the direct cause of the injury, whereas the word 'arising out of' refer to the case where the injury, though not directly caused by the driving, is nevertheless causally connected with the driving and the driving is a *sine qua non* thereof. This proposition involves

> an entry into the difficult and controversial field of causation. The term 'direct cause' is one commonly employed in determining liability for damages in delict."

[19] At 870A dealing with the search for some limit lying between direct causation and the vast and unrestricted field of the *causa sine qua non* he said:

> "… the Court must, I think, be guided by a consideration of the object and scope of the Act and by notions of common sense."

The death or bodily injury for which compensation is claimed, according to him, must be causally related to the negligent or otherwise unlawful act and also to the driving of the vehicle. At 870D-E he said:

> "Where the direct cause is some antecedent or ancillary act, then it could not normally be said that the death or injury was 'caused by' the driving; but it might be found to arise out of the driving. Whether this would be found would depend upon the particular facts of the case and whether, applying ordinary, common-sense standards, it could be said that the causal connection between the death or injury and the driving was sufficiently real and close to enable the Court to say that the death or injury did arise out of the driving."

(See also *Minister of Safety and Security v Road Accident Fund and Another* 2001 (4) SA 979 (NPD) at 984H-J to 985A-D wherein reference is made to the case of *Wells and Another v Shield Insurance Co Ltd and Others* (*supra*) and *Road Accident Fund v Russell* 2001 (2) SA 34 (SCA).

[20] Mr Köhn, for the plaintiff, submitted that defendant had no expert witness to refute plaintiffs evidence and that all defendant offered were bare denials to plaintiff's particulars of claim. According to him, defendant attributed negligence to Ntshingila in a signed pre-trial minute which was faxed from defendant's office.

[21] Mr Köhn submitted that plaintiff, on 23 March 2009, exhibited signs of coughing up blood sputum and vomiting which were not there before the accident. No nurse or doctor who treated deceased testified. It becomes difficult, as a result, to conclude that those signs did not exist prior to the accident.

[22] It was Mr Köhn's submission that the accident, in addition to deceased's pre-existing heart condition, could have caused an accelerated and/or aggravated degeneration of deceased's health. This evidence, apart from the doctors' and nurses' evidence, could also have come from plaintiff, deceased's mother. She was not called.

[23] While it may well be so that defendant called no expert witness to testify on deceased's status of health or possible cause of death, sight should not be lost of the fact that plaintiff bore the onus to prove her case on a

balance of probabilities. The question remains whether the onus has been discharged.

[24] Dr Morare testified that a blunt trauma on deceased's chest would cause her to cough blood. This conclusion is not borne out by proven facts. Hospital record did not demonstrate this. The doctor himself does not refer to this in his evidence.

[25] The doctor testified that deceased complained of pain on the lower limbs after the accident, however, deceased even before the accident in 2008 presented with similar problems. No one other than Dr Morare testified about this and what the hospital notes showed. Dr Morare testified that deceased's complaints a month after the accident could show that there is a link between the accident and the death. However, this, according to him would be the case in the absence of other causes. He added that cardiac patients have problems of swollen lower limbs.

[26] The witness confirmed that deceased had been put on Warfrin and Claxen before and after the accident. She suffered from heart failure. She further had HIV and renal failure. Warfrin and Claxen helped keep deceased's blood thin. Warfrin and Claxen are associated with the deterioration of the heart. On 12 November 2008, long before the accident, deceased had complained of pain, difficulty in breathing and swelling of the lower limbs.

[27] Asked, in evidence in chief, if deceased but for the accident would still be alive the doctor answered that deceased had not been so ill as doctors

stopped her from using HIV medication. He added that the accident accelerated her demise. He contradicted this under cross-examination. Still in his evidence in chief, he testified that either trauma caused by accident (of which he said nothing in his report) or HIV or cardiac problems would have resulted in the death of deceased. The evidence is in direct contradiction with his earlier statement. He testified that deceased did not cough blood before the accident but he at the same time testified that he could not tell the court that he had been provided with a complete hospital record.

[28] Cross-examined, he testified that deceased, after the accident on 23 February 2009, had been given Bruffen tablets and Panado which she had to take three times a day. He conceded that he could not describe the seriousness of deceased's condition after the accident. He later said that the condition could have been 1% impairment which, in my view, was not serious at all.

[29] The witness conceded that deceased had been to hospital several times before the accident due to her heart problems. Having conceded that he had not noted chest trauma he further conceded that chest trauma was not applicable in this case. According to him, it was common for HIV patients to have oedema and that cardiac patients had it too. He conceded that a patient with HIV would get worse if not treated. This indeed contradicted his earlier evidence. Treatment of deceased's HIV was stopped because she reacted negatively to the treatment. He conceded that she had been taken off the HIV treatment not because she had been doing well. This again contradicted his earlier evidence.

[30] He further conceded that HIV would have a very negative result on someone with a heart disease. It was his further concession that HIV, if not treated, may accelerate and worsen the heart disease. He agreed that deceased, before the accident, suffered from oedema and cardiac failure. On 27 January 2008 deceased was already on Claxen and Warfrin. He conceded that if not controlled and monitored Warfrin affects the liver. Deceased was not on Warfrin because of the accident.

[31] Clinical notes enabled him to say that the accident helped the worsening of the heart problem yet no one from the hospital or deceased's family shed light on this. He, however, admitted that he speculated in a number of instances. I do not think that this evidence could be regarded as helpful at all.

[32] He conceded that the death certificate gave the cause of death as congestive heart failure. He could not conclusively say that clots, if there, had something to do with deceased's death. He also could not say that the accident caused clots. He merely speculated based on the clinical notes. He conceded that it could not conclusively be said that the accident accelerated the deterioration of the heart condition. This again contradicted his earlier evidence.

[33] It is common cause that the accident took place on 23 February 2009; deceased incurred a contusion of a lower left leg and was treated conservatively with analgesics and discharged; there was no follow up treatment of the soft tissue injury and she was a chronic cardiac patient prior to the accident. She had a mild renal failure and was HIV positive

where its treatment had been stopped and she was again admitted to hospital a month after the accident and passed on four months later.

[34] It is important to keep in mind that plaintiff's case is that deceased was a chronic heart patient who was in an accident and that deceased's condition deteriorated in an accelerated manner after the accident. Clots possibly formed after the accident and that the clots could have accelerated the deterioration of deceased's chronic heart failure resulting in her death. The doctor's evidence does not support plaintiff's case.

[35] To determine if the accident had anything to do with the death of the deceased one has to apply the law discussed above to the facts of the case. The question which immediately springs to mind is whether the facts of the case satisfy the two enquiries, viz the factual and the legal enquiries. There is no evidence to show that "but for" the accident deceased would still be alive today. The doctor merely speculated. Further evidence also does not exist to prove the direct cause of death from the minor injuries (according to the clinical notes), sustained by the deceased in the accident. The reasonable foreseeable test has no application here. It is hardly unthinkable that one can foresee a patient with a leg contusion dying of congenital heart disease four months after the accident. No legal policy finds application in this case.

[36] Ms Vorster submitted that there is no evidence to demonstrate a causal link between the injuries sustained by the deceased in the accident and the eventual death. I agree. Common sense standards, according to her, do not evince that the driving of the vehicle and the injuries or death are

"sufficiently real and close". I agree. The death certificate, in any event, specify, the cause of death as "congenital heart disease" which had been deceased's pre-existing medical condition which existed prior to the accident.

[37] Plaintiff had to discharge the onus of proving her case on a balance of probabilities which rested on her. Evidence has conclusively proved that plaintiff has failed to discharge the onus. I have found evidence showing that there is a causal link or nexus between the accident and the death of the deceased wanting. The test applicable in the determination of the issue has not been satisfied. Plaintiff's claim should therefore be dismissed with costs.

ORDER

[38] The following order is made:

1. Plaintiff's claim is dismissed with costs.

M W MSIMEKI
JUDGE OF THE GAUTENG DIVISION, PRETORIA

Heard on:	3 August 2015
For the Plaintiff:	Adv MD Köhn
Instructed by:	Mangena & Associates Attorneys
For the Defendant:	Adv A Vorster
Instructed by:	Fourie Fismer Inc
Date of Judgment:	