



**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – GQEBERHA**

Reportable/Not Reportable

Case No: 3504/2013

In the matter between:

NOMAKAYA GOBELANA

First Plaintiff

XOLELWA SOWAMBI

Second Plaintiff

XOLISANI GOBELANA

Third Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

MAKAULA J:

A. Introduction:

[1] The *lis* between the parties is for loss of support and payment of funeral expenses which is pursuant to the death of Xolisile Gerald Gobelana (the deceased). On 8 December 2008, the deceased was injured in a motor collision with an unidentified motor vehicle. He was taken to hospital. Upon admission, he presented with a fractured left leg, and a head injury i.e. blood was draining from his right ear,

so the hospital records reveal. The left leg was put on a plaster of paris (POP) and he was given analgesics for the headache he complained about. The deceased was discharged from hospital on 9 December 2008.

[2] Evidence has it, that the deceased made several visits to both the hospital and clinic pursuant to his discharge from hospital. On 26 August 2020, the defendant conceded that it shall be liable for 100% of such damages the plaintiff may prove arising out of the death of the deceased. As aforesaid, outstanding are claims for loss of support and funeral expenses.

B. Background facts:

[3] The deceased was married to the first plaintiff, Nomakaya Gobelana (Nomakaya) and had two children Xolelwa Sowambi (Xolelwa) and Xolisani Gobelana (Xolisani). They are the three dependants who are suing for loss of support. They basically testified that they depended on the deceased for support. Xolelwa was in Grade 10 when the deceased passed on. She could not finish her post matric course due to financial circumstances and had to seek employment. She claims an amount of R 23 026.00 for loss of maintenance and support. Xolisani was in Grade 6 when the deceased passed on. He continued until he left school in Grade 12. Nomakaya and Xolisani, jointly claim an amount of R 607 735.00 for loss of maintenance and support.

[4] Nomakaya testified that she visited the scene of the accident and found the deceased injured. The deceased's left leg was broken and had blood draining out of

his right ear. The deceased had convulsions before he was loaded in the ambulance. At the hospital the deceased was put on a POP as aforesaid. She brought it to the attention of the medical staff there was blood that was coming out of the deceased's ear. The deceased was discharged on 9 December 2008. At home and when he went for review, the deceased would complain of headaches and for the blood that was draining from his ear. The deceased died on 6 August 2009. She incurred funeral cost.

[5] Dr P.J.J. Swartz, a Neurologist filed an expert report and also testified. Relying on the hospital records and the interview he had with Nomakaya, Dr Swartz concluded as follows:

“Based on the above information there can be no doubt that Mr Gobelana's demise had been the direct result of significant head trauma sustained in the accident, and that the less than adequate care he had received from health care professionals involved in this case had led to unnecessary suffering of the patient and made his death (which could have been avoided) inevitable. Everything in the information above indicates that the deceased had suffered a skull base fracture at the time of the accident and that he had suffered from and died as a result of complications of a skull fracture.

. . . Unfortunately no attention had been paid to his head injury which had clearly been the cause of his death”. (Emphasis added)

[6] Dr Swartz concluded that the deceased died as a direct result of the head injury suffered by the deceased on the day of the accident.

[7] The defendant neither led evidence nor submitted expert reports. On the day of the trial, the defendant raised as legal argument.

- (a) the issue of *novus actus interveniens*, being the sub-standard medical intervention by the medical staff at the time of admission and post;
- (b) that there is no evidence presented that the deceased was earning R3000.00 and R4500.00 when doing overtime¹ and further submitted that if the court accepts that the deceased was employed, it must apply appropriate contingencies.

C. The issue:

[8] The issue is whether the deceased died as a result of a direct injury sustained in the accident or there is an intervening factor which contributed to his death.

D. Analysis:

[9] In *Minister of Police v Skosana*² Corbett JA defined causation as follows:

“Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to . . . the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio*. If it did, then the second problem becomes relevant, viz – whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part”.

(Footnotes omitted).

¹ In the form of the pay-slips, bank statements, or calling his employer, co-worker or supervisor.

² 1977 (1) SA 31 (A) at 34 E-G.

The same approach was adopted by the Constitutional Court in *Lee v Minister for Correctional Services*³.

[10] In the instant matter there is nothing to gainsay what Dr Swartz opined, that the skull base fracture was the cause of the death of the deceased. It stands to reason that the cause of the skull base fracture was the accident that the deceased was involved in on 8 December 2008. In other words, “but for” the accident, the deceased would not have sustained the injury on his head. In *Minister of Finance and Others v Gore*⁴ the following is said about the “but for” test which applies with equal force in this matter;

“Application of the “but for” test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary persons mind works against the background of everyday – life experiences. Or, as was pointed out in similar vein by Nugent JA in *Minister of Safety and Security v Van Duivenboden*:

‘A plaintiff is not required to establish the causal 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 metaphysics’.

[11] The deceased, had he not been involved in the accident, he would have been alive and able to continue to maintain the plaintiffs. Therefore “but for” the injury, he would not have died. It has been conceded by the defendant that the insured unidentified driver was negligent hence the accident occurred. The negligent,

³ 2013 (2) SA 144 (CC) at B-C.

⁴ 2007 (1) SA 111 (SCA) 125 E-F.

wrongful act of the insured driver led to the accident that eventually caused the injury which is the cause of the death of the deceased.

[12] The defendant submitted that the failure by the medical staff at both hospitals to properly treat the deceased is the intervening factor which broke the chain of events that led to the death of the deceased. In other words had the deceased received proper treatment, he would have recovered from the injury that ultimately caused his demise. In other words, the defendant argues that the lack of or the unskilled medical care the deceased received constitutes a *novus actus interveniens* i.e. an intervening factor which led or caused the death of the deceased.

[13] Undoubtedly, the defendant is raising a special plea which has not been pleaded. A special plea is a plea that raises some special defence that does not flow from the allegations in the particulars of claim and destroys or postpones the operation of the cause of action and it usually precedes the response in the plea to the claim (i.e. plea over)⁵. A special plea raises a special defence apart from the merits of the case. The defendant has not pleaded the defence of *actus novus interveniens* relied upon. It raised the issue in cross-examination and in argument. This procedure cannot be allowed. A defendant who has missed his true defence, or who has learned of it only from the facts which appeared during the trial, must therefore raise the defence formally and have it placed on record. If no amendment is made to the pleadings, the defence will as a general rule not be adjudicated upon⁶. The defendant has not followed the stated procedure. The plaintiffs correctly argued

⁵ Amler's Precedents of Pleadings, 9th Edition, Harms at page 5.

⁶ Erasmus: Superior Court Practice 2nd Ed. Vol 2 D1-25B and the authorities cited therein.

that had the defendant filed a special plea of this ilk, they would have sought a joinder of the entities now blamed by the defendant as responsible for the death of the deceased.

[14] In any event even if the plaintiff would have sought the amendment and filed a special plea, now relied upon, it would not have succeeded in its special plea. I say so because the cause of action relied upon by the plaintiffs is that the deceased died as a direct consequence of the skull base fracture which was as a result of the negligent driving of the insured or unidentified driver. As the plaintiffs submitted, the treatment or lack thereof did not cause the death of the deceased. He died in the same manner and from the same injury as he would have died had he not been taken to hospital. In hospital, the deceased was never treated for the injury that caused his death. No act of negligence can be attributed to the medical staff in the form of what occurred in the decided cases relied upon by the defendants. In *Mkhitha v Road Accident Fund*⁷, the *actus novus interveniens* was as a result of the conduct of the orthopaedic surgeon to an extent that the court reasoned:

“It is accepted from the uncontroverted testimoney (*sic*) of the Plaintiff’s expert that the present sequelae would not have resulted from the injuries sustained if the Plaintiff was properly treated and that the sequelae of the injuries arose from what he termed sub-standard medical treatment intervention by the relevant or orthopaedic surgeon who treated the Plaintiff. (Emphasis added).

The facts of this case are therefore distinguishable from the *Mkhitha* judgment. Though in a criminal context, the following dictum by Williamson JA, in *S v Mini*⁸ is applicable in this matter:

⁷ 1783/2012 [2015] ZAECMHC (1 October 2015) at para 11.

⁸ 1963 (3) SA 188 at 192 B.

“I have read the judgment prepared in this matter by my Brother Hoexter and I agree that on the evidence it does not appear that any fresh cause of death was introduced by the medical treatment received by the deceased. In the circumstances it must be held that the stab wound inflicted by the appellant caused the death of the deceased”.

[15] In the same breath, the lack of medical treatment by the medical staff is not a fresh cause of death. The deceased would have died anyway from the injury even if he had not been taken to the hospital according to Dr Swartz.

E. Damages:

[16] The evidence that the deceased was working is contained in Exhibit A, which is the employment questionnaire. Furthermore, the uncontroverted evidence is that of Nomakaya which states that he earned an amount of R 3000.00 per month and the actuarial report is premised on that amount and it excluded the R 4500.00 which was for overtime. The defendant did not present evidence to gainsay Nomakaya's testimony and I see no basis for the application of contingencies as submitted by the defendant. The plaintiff, through the actuarial reports, has established the damages she has sustained as a result of the accident. The funeral expenses have been proved by the submission of an invoice from the Funeral Parlour which buried the deceased.

F. Costs:

[17] I see no need that the costs should not follow the result.

[18] Consequently, I make the following order.

1. The Defendant is liable to First Defendant in the sum of R607 735.00 for loss of maintenance and support and R3 685.00 for funeral expenses.
2. Defendant is liable to Second Plaintiff in the sum of R23 026.00.
3. Defendant is liable to Third Plaintiff in the sum of R87 924.00.
4. That such amounts are to be paid to the Plaintiff's within 180 calendar days from date of this Order.
5. The interest is to accrue on the said amounts at the legal rate of 7.75% per annum calculated as from 14 days from the date of this Order until the date of payment.
6. The defendant is liable to Plaintiffs, for costs of suit, together with VAT thereon, as taxed, on the party and party scale. Such costs to include:
 - 6.1 The qualifying expenses, if any, of Mr Loots and Dr Swartz;
 - 6.2 The costs of Plaintiff's counsel, including trial fees for the 2 days that the matter was on trial.
 - 6.3 The costs of the preparation of Heads of Argument and the costs of Plaintiff's counsel in presenting further argument on 10 November 2022.
7. That interest is to accrue on the costs at the legal rate of 7.75% per annum payable as from 14 days from date of taxation, until date of payment.

M MAKAULA
Judge of the High Court

Appearance:

Counsel for Plaintiffs:

Adv LA Schubart SC

Instructed by:

Goldberg & De Villiers Inc.

For the Defendant:

Ms OC Phillips

Instructed by:

The Road Accident Fund

East London

Judgment reserved:

23 November 2022

Judgment delivered:

04 April 2023