IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 29755/2011

In the matter between:

20/12/17

E M MAPHOSA Plaintiff

and

MEC FOR HEALTH, LIMPOPO Defendant

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

20/12/17
DATE SIGNATURE

JUDGMENT

D S FOURIE, J:

[1] This is a claim for payment of damages instituted against the MEC for Health, Limpopo based on the alleged failure of medical staff to provide proper medical care to the plaintiff. At the commencement of the hearing the parties applied for an order in terms of Rule 33(4) separating the merits and quantum of the claim. Such an order was granted and the trial proceeded on the issue of merits only.

[2] There are only two issues before me, i.e. negligence and causation. It is otherwise common cause between the parties that:

(a) the hospitals where the plaintiff was treated, are all provincial hospitals falling under the responsibility of the defendant;

(b) the medical staff employed by these hospitals were employees of the defendant acting within the course and scope of their employment;

(c) the medical staff who treated the plaintiff owed the plaintiff a duty to take reasonable care in their treatment of the plaintiff.

PLEADINGS:

[3] It is not in dispute that on or about 16 March 2010 and in the vicinity of Musina the plaintiff was assaulted by members of the South African Police Service as a result whereof he was injured. He sustained a compound fracture-dislocation of the right ankle over the medial malleolus. The plaintiff was then admitted to the Musina Hospital and later transferred to other hospitals as well. In paragraph 14 of the particulars of claim it is alleged that the defendant's employees were negligent in one or more or all of the following respects:

(a) they failed to provide proper rehabilitation for a broken leg to the plaintiff;

(b) they failed to operate timeously on the plaintiff's leg;

(c) they failed to treat the plaintiff as an emergency case;

(d) they failed to take the necessary steps to prevent the plaintiff's condition to deteriorate when they could and should have done so.

[4] It is also alleged that as a result of the negligent conduct of the medical staff the plaintiff experienced loss of amenities of life, pain and suffering, a loss of earnings and will have to undergo further hospital and medical treatment in future. These allegations are denied by the defendant and it is pleaded that the plaintiff received proper medical treatment for his injuries.

THE EVIDENCE:

[5] Dr Blignaut testified for the plaintiff and the plaintiff also testified. Pursuant to the close of the plaintiff's case, the defendant's case was also closed without any witnesses having been called.

DR BLIGNAUT:

[6] Dr Blignaut is an orthopaedic surgeon who examined the plaintiff on 17 November 2011. He prepared a medico-legal report as well as an addendum thereto. From his evidence and reports it appears that dressings and a slab were applied over the medial malleolus at the Musina Hospital whereafter the

plaintiff was transferred to the Tshilidzini Hospital. The witness then referred to an *"application for transfer of a patient"* dated 18 March 2010 in which the following has been recorded:

> *"RT ankle fracture sublocation, patient to be transferred back to Musina for dressings, to come back to Tshilidzini for definitive management in June".*

[7] According to the witness the injury suffered by the plaintiff can become a life-threatening condition if it is not properly treated within a period of three days, but no later than 10 days. Taking into account that the plaintiff was injured and hospitalised on or about 16 March 2010 and had to be readmitted *"for definitive management in June"*, the witness was of the view that by that time the fractures would have been partially united and reduction of the fractures would have been extremely difficult. He also indicated that it would be *"severe negligence"* if it is true that the plaintiff had to wait this long before an open reduction and internal fixation could be performed. He also pointed out that no attempt was made to reduce the ankle at the Tshilidzini Hospital which has resulted in severe post-traumatic osteoarthritis at the ankle at present.

[8] According to the witness the plaintiff's ankle is now non-functional and needs immediate and urgent surgical intervention. An arthrodesis of the ankle will have to be performed which will include three to four weeks post-surgical rehabilitation. The plaintiff will then have to wear special orthotics after the arthrodesis for the rest of his life. When he was asked what should have been done, he replied as follows:

"He should have been operated on that same day, not three months later. He now has a second-hand ankle."

[9] When it was suggested to him in cross-examination that the medical personnel did not have the necessary resources to treat the plaintiff timeously, he responded by saying that if that was the position, the plaintiff should have been transferred to another provincial hospital where they could have taken care of him as soon as possible.

THE PLAINTIFF:

[10] The plaintiff testified that on the day in question he was assaulted by the police as a result whereof he suffered a fracture and dislocation of his right ankle. He was then taken to the Musina Hospital where the fracture was reduced and a dressing applied. Thereafter he was transferred to the Tshilidzini Hospital as no orthopaedic surgeon was available to give him further treatment.

[11] At the Tshilidzini Hospital he was waiting for further treatment. Whilst waiting another patient with a similar injury was taken care of immediately, but he still had to wait. Ultimately he was transferred back to the Musina Hospital without any operation having been performed on his ankle. He could see that part of the wound was still open. He did not receive any stitches, neither was his ankle further treated by means of surgery. After about one day at the Musina Hospital he was discharged. He could not walk without the aid of crutches.

[12] About three or four months after he had been admitted to the Musina Hospital for the first time, he was admitted to the Polokwane Hospital for further treatment. There he had to wait for approximately two weeks as a result of a *"backlog"* when he was transferred to the Manguen Hospital. There he was taken to the theatre where surgery was performed on his ankle for the first time. It is not in dispute that this consisted of an open reduction and internal fixation.

[13] In cross-examination the plaintiff conceded that the hospital at Musina did not have the necessary resources to treat him properly. It was also put to him that all the consequences suffered by him were caused by members of the South African Police. He disputed this allegation.

DISCUSSION:

[14] It was contended on behalf of the plaintiff that the medical staff of the hospitals where the plaintiff had been treated, were negligent in that they failed to provide the necessary treatment to the plaintiff timeously. It was argued on behalf of the defendant that due to overcrowding and a lack of resources it was not possible for the medical personnel to provide the necessary treatment any sooner.

[15] Before considering the evidence, it is not only appropriate but also necessary to say something about the credibility and reliability of the witnesses. I have had the opportunity to observe the demeanour of both witnesses and to listen carefully to their evidence and I have no reason to conclude that any one

of them was untruthful or that one should not be able to rely on their evidence. This is a matter that should be decided on the evidence and probabilities.

NEGLIGENCE:

[16] The question of negligence involves a twofold enquiry: first, was the harm reasonable foreseeable? Second, would the *diligens paterfamilias* have taken reasonable steps to guard against such occurrence and did the defendant fail to take those steps? (*Macintosh v Premier, KwaZulu-Natal & Another* 2008 (6) SA 1 (SCA) par 12). The failure of a professional person to adhere to the general level of skill and diligence possessed and exercised at the time by other members of the profession to which he or she belongs would normally constitute negligence (*Van Wyk v Lewis* 1924 AD 438 at 444 and *Goliath v The Member of the Executive Council for Health in the Province of the Eastern Cape* 2015 (2) SA 97 (SCA) par 8).

[17] This does not mean that a professional person is expected to bring to bear upon the case entrusted to him or her the highest possible degree of professional skill, but he or she is bound to employ reasonable skill and care (*Mitchell v Dixon* 1914 AD 519 at 525). The test remains whether the practitioner exercised reasonable skill and care or, put differently, whether or not his conduct fell below the standard of a reasonable competent practitioner in his field (*Castell v De Greeff* 1993 (3) SA 501 (C) at 512A-D). Generally speaking, the answer to the question of negligence depends upon a consideration of all the relevant facts and circumstances.

[18] The first question to be considered relates to foreseeability. Were the consequences as described by Dr Blignaut foreseeable? According to the evidence of the same doctor the injury suffered by the plaintiff (when he was assaulted) can become a life-threatening condition if it is not properly treated within a period of three days, but no later than 10 days. According to the evidence of the plaintiff it was only after about three to four months since he was injured, that surgery was performed on his ankle. At some stage, prior to that, he was even discharged from the Musina Hospital when part of the wound was still open. Taking into account all the evidence in this regard, there can be no doubt that the consequences suffered by the plaintiff as well as those that he will suffer in future, such as a loss of amenities of life, pain and suffering, loss of earnings, further hospital and medical treatment and disability, should have been foreseeable by the medical personnel.

[19] The second leg of the enquiry relates to the reasonableness or otherwise of the conduct of the hospital personnel where the plaintiff was treated. Generally speaking, the answer to this enquiry depends on a consideration of all the relevant facts and circumstances. It also involves a value judgment which is to be made by balancing various competing considerations, including factors such as the degree or extent of the risk created by the conduct of the person(s) concerned, the gravity of the possible consequences and the burden of eliminating the risk of harm (*Cape Metropolitan Council v Grahami* 2001 (1) SA 1197 (SCA) at 1203, par 7).

[20] It is not in dispute that the injury suffered by the plaintiff when he was assaulted was of a very serious nature. It could have become life-threatening if

not treated properly and timeously. According to the evidence of the plaintiff he was transferred at least three times, from one hospital to another, without any surgery having been performed on his ankle. At some stage he was even discharged when part of the wound was still open. It was only after about three or four months that an operation was performed on his ankle. According to the evidence of Dr Blignaut it would be *"severe negligence"* if the plaintiff had to wait this long before an open reduction and internal fixation could be performed.

[21] In cross-examination it was suggested that due to overcrowding and a lack of resources it was not possible for the medical personnel to provide the necessary treatment any sooner. Dr Blignaut responded by saying that if that was the position, the plaintiff should have been transferred to another provincial hospital where they could have taken care of him as soon as possible. It is important to bear in mind that this attempt to blame the system has not been supported by any evidence. No evidence was presented by the defendant to explain the prevailing circumstances at the time when the plaintiff was a patient at these hospitals. It can also not be accepted, without any evidence, that as a result of financial constraints the hospital personnel was not able to treat the plaintiff timeously. As a matter of fact, none of these *"defences"* have been pleaded. On the contrary, it was pleaded *"that the plaintiff received proper treatment for his injury"*.

[22] Dr Blignaut's reference to *"severe negligence"* should not be taken out of context. He was referring to a long period of approximately three months before an open reduction and internal fixation was performed. No doubt, he was referring to a serious deviation from the general level of skill and diligence

possessed and exercised by members of the medical profession. There is no evidence to indicate that this view of Dr Blignaut should not be accepted. In addition to this, it is clear that the plaintiff was sent from pillar to post and it was only after about three to four months that surgery was performed on his ankle. Why was he not transferred to another provincial hospital where the necessary medical care could have been provided within a period of ten days after he was injured? There is no evidence to answer this question. Taking into account all the evidence and circumstances I am of the view that the medical personnel of the hospitals concerned, who had a duty to take proper care of the plaintiff, were negligent by failing to operate timeously on the plaintiff's leg and to take the necessary steps to prevent the plaintiff's condition to deteriorate when they could and should have done so.

CAUSATION

[23] The next question to be considered is whether such negligence caused the plaintiff to suffer all the consequences referred to above? As far as causation is concerned, the following dictum in *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-G is apposite:

> *"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 ... 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 stated, the loss is too remote."

[24] It was contended on behalf of the defendant that all the consequences suffered as well as those still to be suffered by the plaintiff are consequences which have all been caused by members of the South African Police Service when the plaintiff was assaulted. Therefore, so it was argued, the plaintiff failed to prove any factual causation and his claim should be dismissed.

[25] It is possible that conduct of a third party can contribute to or even cause the consequences concerned. This is referred to as a new intervening cause. The learned authors Neethling, Potgieter & Visser (Law of Delict, 7th Ed, p 216) explain it as follows:

"The question of to what extent such an event influences the possible liability of the wrongdoer now arises. Where a novus actus interveniens completely extinguishes the causal connection between the conduct of the wrongdoer and the consequence, with the result that the wrongdoer's act can no longer be considered to be a factual cause of the consequence, the actor obviously goes free. It is, however, more difficult to determine when a novus actus interveniens influences the result to such an extent that the result should no longer be imputed to the actor, although his conduct remains a factual cause of the result."

[26] In *Napier v Collett* 1995 (3) SA 140 (A) a race horse sustained a fracture of the near fore limb during the course of a race. Surgery was conducted to treat the injury. A few months later the veterinarians involved came to the conclusion that the horse was suffering from degenerative joint disease, apparently as a result of the accident and the subsequent surgery. It was then decided to perform an arthroscopic examination under general anaesthetic in order to ascertain the extent of the disease. The horse died during the course of this procedure. The medical cause of death was either heart failure or lung collapse or a combination of these two conditions precipitated by the anaesthetic. The only issue on appeal was whether the horse had died as a result of the injuries he had sustained in the race. The Court had to decide whether the legal causal nexus between the accident and the death of the horse due to the heart and lung problems during an operation seven months later was broken by, *inter alia*, the anaesthetic administered during the operation to determine whether the horse should be put down.

[27] After an investigation of the facts, the Court concluded (at 146F-J) as follows:

> *"The question then is whether there was a sufficiently close relationship between the accident and the death to render one the legal cause of the other ... the causal relationship between the accident and the death is accordingly an indirect and fortuitous one. The accident itself was not fatal. It caused an injury which was treated by surgery ... In these circumstances, it seems to me, the effective cause of (the horse's) death was the administration of anaesthetic which flowed from the attempts by*

the respondents, supported by a mistaken diagnosis, to secure the underwriters' consent to the destruction of the animal."

[28] In the matter before me it appears that a similar question should be considered and that is whether there is a sufficiently close relationship between the injury sustained as a result of the assault and the consequences referred to in paragraph 18 above? It can be argued that had the plaintiff not suffered this injury it would not have been necessary for surgery and therefore these consequences would not have materialised. However, another question to be considered is whether the failure of the hospital personnel to ensure that the necessary surgery was performed timeously, should not be regarded as a new intervening course.

[29] Dr Blignaut was of the view that surgery should have been performed within a period of three days, but no later than 10 days after the plaintiff was injured. He was also of the view that by the time an open reduction and internal fixation was performed, the fractures would have been partially united and reduction of the fractures would have been extremely difficult. He also pointed out that no attempt was made to reduce the ankle timeously which has resulted in severe post-traumatic osteoarthritis in the ankle at present. According to this witness the plaintiff's ankle is now non-functional and needs immediate and urgent surgical intervention. An arthrodesis of the ankle will have to be performed whereafter the plaintiff will have to wear special orthotics for the rest of his life. Taking into account all the evidence in this regard, there can be no doubt that the consequences suffered by the plaintiff after the ten day period referred to above, i.e. from 27 March 2010, as well as those that he will suffer in

future, such as loss of amenities of life, pain and suffering, loss of earnings, further hospital and medical treatment and disability are all consequences caused by the negligence of the hospital personnel where the plaintiff was treated before surgery was performed. This negligence is not only the factual cause of the plaintiff's condition, but also the legal causation thereof.

ORDER:

In the result I make the following order:

1. It is declared that the defendant is 100% liable for payment of the plaintiff's proven or agreed damages with effect from 27 March 2010, suffered as a result of the negligent failure to have the plaintiff's dislocation-fracture of his right ankle professionally treated timeously, with regard to the following:

    1.1. hospital and medical expences, past and future;

    1.2. loss of earnings, past and future;

    1.3. loss of amenities of life, disability and pain and suffering;

2. The defendant shall pay the plaintiff's party and party costs in respect of the determination of the issues with regard to the merits of the claim on the prescribed High Court scale, up to and including date hereof, which costs will include, but not limited to, the following:

2.1. the costs of the preparation of pleadings, notices, pre-trial conferences, discovery, court orders and trial bundles;

2.2. the costs of counsel on a senior/junior scale;

2.3. the costs for attendances to all pre-trial conferences including the pre-trial conference of 18 February 2013 and 3 November 2017;

2.4. the reasonable costs for trial preparation;

2.5. the reasonable costs for all the expert witnesses in respect of the consultations, compiling of medical-legal reports and attending and/or being reserved for the hearing of this matter, where applicable. The expert witnesses as referred to herein are Dr L P G Blignaut and Dr J A de Klerk;

2.6. the reasonable costs of consulting with the plaintiff and Dr L P G Blignaut (if applicable) in preparation for trial.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: 20th December 2017