THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable
Case No: 355/2015

In the matter between:

DELISILE MBHELE **APPELLANT**

and

MEC FOR HEALTH FOR THE GAUTENG PROVINCE **RESPONDENT**

Neutral citation: *Mbhele v MEC for Health for the Gauteng Province* (355/15) [2016] ZASCA 166 (18 November 2016)

Coram: Cachalia, Tshiqi, Theron and Mocumie JJA and Fourie AJA

Heard: **23 August 2016**

Delivered: **18 November 2016**

Summary: Delict ─ failure to take reasonable care to prevent stillbirth ─ Claim for emotional shock ─ damages awarded in the amount of R100 000 ─ claim for constitutional damages based on the right to rear a child ─ not sustainable.

Practice ─ requirements of stated case in terms of Uniform rule 33 ─ facts must be stated with adequate clarity and specificity ─ role of a trial Judge.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Tsoka J sitting as court of first instance):

1. The application for condonation for the late delivery of the respondent's heads of argument is granted.
2. The appeal is upheld with costs.
3. The order of the court a quo is set aside and substituted with the following:
   '(a) The claim succeeds.
   (b) The defendant is held liable for general damages based on emotional shock which the second plaintiff suffered as a result of the negligent conduct of the defendant's employees on 18 August 2006.
   (c) The defendant is to pay the second plaintiff the amount of R100 000 as general damages.
   (d) The defendant is to pay the costs.'

JUDGMENT

Tshiqi *et* Mocumie JJA (Cachalia and Theron JJA and Fourie AJA concurring):

[1] This court is called upon to decide whether a claim for damages for emotional shock had been proved in the Gauteng Local Division, Johannesburg (which for convenience we shall refer to as the High Court) and whether our law recognises a claim for constitutional damages for the loss of the right to rear a child. The matter came before Tsoka J, as a stated case in terms of Uniform rules 33 (1) and (2).[1]The

[1] The subrules provide the following:
'**Special cases and adjudication upon points of law**
(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.
(2)*(a)* Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable

High Court dismissed both claims as well as the appellant's application for leave to appeal. It dismissed the claim with costs, finding inter alia that:

(a) the particulars of claim and the stated case do not disclose a cause of action (para 11);

(b) the appellant's counsel expressly abandoned the plaintiff's claim for emotional shock (para 8) and;

(c) that South African law does not recognise the right to rear a child and thus no damages are claimable for the violation of the right to rear a child (para 11). It is against these findings and the order mentioned above that the appellant appealed. The appeal is with leave of this court.

[2] The appellant, Ms Delisile Mbhele, second plaintiff in the court a quo, together with the erstwhile first plaintiff, Mr Themba Buthelezi, instituted action against the respondent (defendant a quo), the Member of the Executive Council for Health for the Gauteng Provincial Government (MEC), in her official capacity as the employer of the medical staff at Chris Hani Baragwanath Hospital (CHB). They sued personally, and in their respective capacities as parents of their stillborn baby who was delivered at CHB on 18 August 2006. They claimed that negligence on the part of the medical staff resulted in their baby being 'stillborn'; and that as a result of such negligence they suffered damages. Mr Buthelezi passed away soon after the action was instituted and was not substituted by his executor in the proceedings. Only the appellant participated in the proceedings in the court a quo and thus in the present appeal.

[3] The relevant part of the statement of facts presented to the court reads:

'4.1 The second plaintiff [Ms Mbhele] was transferred from Zola Clinic to Chris Hani Baragwanath Hospital . . . [CHB] as an emergency case due to foetal distress. On admission she was not treated as an emergency case. . . . After more than an hour a doctor saw her and ordered a CTG scan which was also delayed for a long time. Despite the results of the

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the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.

(b) Such special case shall be set down for hearing in the manner provided for trials or opposed applications, whichever may be more convenient.

(c) If a minor or person of unsound mind is a party to such proceedings the court may, before determining the questions of law in dispute, require proof that the statements in such special case so far as concerns the minor or person of unsound mind are true.'

CTG scan showing foetal distress, the second plaintiff was not attended to promptly and the doctor who had ordered the scan did not follow up on the CTG scan. The nursing sister who did the CTG scan neglected to inform the doctor of the result[s] of the CTG scan. [The] second plaintiff was left alone to progress in labour without her labour being monitored, which resulted in her delivering a fresh still birth.

4.2 After her unsuccessful delivery, the plaintiff was taken to the labour ward where she was advised that her baby had died.

4.3 After the loss of [the] baby the [second] plaintiff was inappropriately taken to a ward with mothers of new-born babies. Each bed in the ward has a cot attached to it. Others had their babies there, some feeding their babies, some holding their babies; whereas she had to contend with an empty cot. When she asked to be moved to another ward and for family to be phoned to take her away from the depressing environment she was ignored for about eight hours.

4.4 When she had to identify the baby at the mortuary she collapsed. No one else could identify the dead body of her child. As a result, she had to be comforted and 'compelled' to identify the child.

. . .

4.6 The death of the baby left her with a feeling of emptiness. For months after the death of the baby she shut herself behind closed doors and did not wish to socialise with family and friends . . . She had prepared for the birth of the baby by buying clothes, toys and [baby necessities] . . . After returning home she often took the clothes and the clothes and toys she had bought for Tebogo [the still born baby] out of the chest of drawers that she had specially bought for [him], put them on her bed, and weep over them . . . She squandered all her money after the death of Tebogo because she had lost reason to work . . . When she fell pregnant [again], she found that she had lost enthusiasm that she had had with her first pregnancy. She did not have a baby shower, nor did she buy as much as she did for the first child. She finds that Siyabonga [the second child] has not substituted Tebogo . . . She has a friend whose child would have been the same age as Tebogo. When the child reaches certain milestones she thinks of Tebogo and painfully wonders how Tebogo would have been like or doing at the same age . . . When Siyabonga disappears, she becomes extremely nervous. She cannot overcome the feeling of anxiety the moment she realises that Siyabonga is not present.'

Negligence and causation

[4] The issue whether CHB was negligent in the manner in which it treated the appellant and whether such negligence caused the still birth was not disputed and

can be discerned from the statement of facts and from the medical reports which were tendered in evidence by agreement between the parties. A report dated 6 October 2006, prepared by Professor Buchmann, then an Associate Professor and a Chief Specialist at CHB stated:

'My comment here is that someone should have noted the abnormal CTG tracing, and shown it to a doctor. It appears that foetal distress was not detected because the CTG was not seen by a doctor or experienced midwife, and an opportunity to save this baby was missed. Optimal care would have been a CTG shortly after arrival at [CHB], with immediate interpretation and action, ie caesarean section for foetal distress, possibly at 08h00.'

[5] In his second report dated 28 November 2006 addressed to Dr M E Mtoba, the Senior Clinical Executive at CHB, Prof Buchmann noted:

'We admitted that Delisile [Ms Mbhele] did not receive optimal care. . . .The main problem here is that no-one reported the abnormal CTG to the doctors, and for that reason, the problem with the baby was not appreciated and no specific action was taken. . . . All this was made more painful by possible failure of correct and considerate communication by the staff towards Delisile.'

[6] Professor Buchmann's findings are consistent with those of Dr Ramhitshana, who prepared a report at the request of the appellant. He noted:

'The Zola Clinic and [CHB] maternity were negligent in that they did not follow their own protocols and this led to the loss of the baby.

When she [Ms Mbhele] was at [CHB] maternity, the doctor saw her and ordered a CTG to make a final diagnosis and treatment. However, the doctor did not follow-up on the result of the CTG and he did not hand-over the patient to his colleagues who were coming on duty. Furthermore the sister who did the CTG on her did not inform the doctors about the CTG so that they can act and do C-section in time to save the baby. (Emergency transfer means urgent intervention, ie C-section).'

[7] It thus follows that the conduct of the medical staff at CHB on 18 August 2006 was negligent and that such negligence caused the baby to be stillborn.

The right to rear a child and constitutional damages

[8] The pertinent question in this regard is whether South African law recognises a claim for damages arising from a right to rear a child. In *Pinchin & another, NO v Santam Insurance Co. Ltd,*[2] this court said:

'I hold that a child does have an action to recover damages for pre-natal injuries. This view is based on the rule of the Roman law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage.'

It is clear from this *dictum* that the right is that of a child subsequently born alive. Counsel for the appellant was not able to persuade us on what conceivable basis, a claim based purely on the right to rear a child who was not born alive should succeed. In order to bolster his case counsel sought to refer to foreign jurisprudence, inter alia (*Stanley v Illionis* 405 US 645(1972); *Santosky v Kramer* 455 US 745(1982) but was constrained to concede that none of those matters dealt with this specific issue before this court.

[9] In any event, the issue was raised for the first time in the heads of argument on appeal. It was not pleaded or even argued properly in the high court. It is not sufficient for a party to raise a constitutional issue (the right to rear a child) only in its heads of argument without laying a proper foundation for it in the papers or pleadings.[3] In the circumstances, the appellant has failed to make out a case a recognition of this right. The claim was correctly dismissed by the court a quo.

Emotional shock

[10] The High Court found that the claim for emotional shock was abandoned. Counsel for the appellant submitted that the court erred in making that finding and referred this court to the transcript of the proceedings in the High Court where the issue was raised and debated with the court as follows:

'Court: . . . I am saying what cause of action is stated in the stated case?

. . .

Counsel: . . . No M 'Lord, there is a reason why that is not stated out . . . the parties are in agreement that if the . . . second plaintiff [Ms Mbhele] establishes causation the defendant

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[2] *Pinchin and another, NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) at 260B.

[3] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 para 260B;*Everfresh Market Virginia (Pty)Ltd v Shoprite Checkers (Pty)Ltd* [2011]ZACC 30;2012(1) SA 256 (CC) para 52;*Fischer & another v Ramahlele & others* [2014] (4) SA 614 (SCA) para 13.

[MEC] is liable for the loss of the baby, and that is principally a question of emotional shock M 'Lord [a]lthough you do not see the word . . . emotional shock.'

The debate continued

'Counsel: Well it is not defined there clearly M' Lord, but if you go to the stated case, you would see that the plaintiff, the second plaintiff describes what she has gone through.

Court: I have read the stated case. I had difficulty to understand the nature of the cause of action.

Counsel: The nature of the cause of action therefore M 'Lord, there would be emotional shock and associated suffering of the plaintiff or the second plaintiff

Court: And then as a result of emotional shock probably she consulted doctors, she lost money, is that the case?

Counsel: The consulting of doctors and the loss of the money were never part of the case M' Lord. It ends with the pain, psychological and emotional pain of losing a child

Court: And she must be compensated for that?

Counsel: That is correct M' Lord.'

Counsel for the respondent did not point us to any portion of the record which justified the finding by the court that the claim for emotional shock was abandoned. It must thus be accepted that the court erred in making such a finding.

[11] We now proceed to consider whether the claim for emotional shock was proved. The emotional distress suffered by the appellant after the birth of her baby is outlined in the statement of facts and thus not placed in dispute. After the birth of her still born baby, she was inappropriately taken to the maternity ward where she had to contend with an empty cot; she was made to watch other mothers who were breastfeeding their babies. She collapsed after she had to identify the dead body of the child at the mortuary. Her behaviour months after the death of the baby shows that she had difficulty coping and that she still has not recovered completely. For all those reasons we are satisfied that a case was made for a claim for emotional shock.

Quantum of damages

[12] Before us, counsel for the appellant argued that the issue of the computation of damages was not properly ventilated in the court a quo. When he was referred to the record which clearly indicated that the issue had been properly dealt with, he agreed that this court should deal with it.

[13] In order to determine general damages, courts acting *in arbitrio iudicis* and generally tending towards conservatism[4] have regard to considerations such as awards in comparable cases, inflationary changes in the value of money, and problems arising from collateral benefits.[5] Importantly, in making an award, a court is not bound by one or other method of calculating general damages. It has a wide discretion.[6] As this court frequently pointed out, each case must be determined on its own unique facts.[7]

[14] In *Majiet v Santam Limited*,[8] the plaintiff, a mother of a nine year old boy experienced emotional and psychogenic shock as a result of her coming upon the body of her son lying in the road shortly after he had been struck and killed by a motor vehicle. Having considered all the relevant facts, the court awarded an amount of R35 000 in respect of general damages. This amount adjusted as per R J Koch's *Quantum Yearbook*[9] amounts to R99 000 in 2015.

[15] In *Allie v Road Accident Fund*,[10] the plaintiff suffered emotional shock and trauma after having observed his wife flung through the windscreen of the vehicle and her subsequent injuries and death as a result of the refusal of the police member to summon an ambulance.[11] The court granted general damages to the plaintiff in the amount of R80 000 for emotional shock and the adjusted value with the updated inflation in 2015 amounted to R165 000.[12]

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[4] *Innes v Visser* 1936 WLD 44 at 46; *Sandler v Wholesale Coal Supplies Limited* 1941 AD 194 at 199; *Bay Passenger Transport v Franzen* 1975 (1) SA 269 (A); *De Jongh v Du Pisanie NO* 2005 (5) SA 457 (SCA).
[5] M M Corbett & J L Buchanan *The Quantum of Damages in Bodily and Fatal Injury Cases* 4 ed (1994) at 4-5.
[6] *Southern Versekering v Carstens NO* 1987 (3) SA 577 (A). See also *Allie v Road Accident Fund* [2003] 1 All SA 144 (C) para 37; and *Mngomezulu v Minister of Law and Order* KZD unreported case no 6373/2007 (8 August 2014) para 37.
[7] *Bay Passenger Transport v Franzen* [1975] 1 All SA 658 (A); *Pitt v Economic Ins Co Ltd* 1957 (3) SA 284 (D) at 287F. *Minister of Safety and Security v Seymour* [2006] ZASCA 71; 2006 (6) SA 320 (SCA) para 17; *Minister of Safety and Security v Tyulu* [2009] ZASCA 55; 2009 (5) SA 85 (SCA) para 26; *Rudolph & others v Minister of Safety and Security & others* [2009] ZASCA 39; 2009 (5) SA 94 (SCA) para 26.
[8] *Majiet v Santam Limited* [1997] 4 All SA 555 (C).
[9] R J Kock *The Quantum Yearbook* (2015) at 17.
[10] *Allie v Road Accident Fund* CPD [2003] 1 All SA 144 (C).
[11] Ibid para 37.
[12] Kock op cit at 6.

[16] In *Lett & another v The Minister of Safety and Security & another*,[13] the plaintiffs, who were married, claimed damages as a result of trauma suffered from witnessing their daughter's wrongful shooting. The court awarded the husband R100 000 and the wife R120 000 for damages in April 2011. The adjusted value of the amounts in 2015, are respectively R127 000 and R152 000.[14]

[17] In *Kritzinger & another v Road Accident Fund*,[15] the plaintiff was informed of a collision and discovered that his two daughters had been killed when he arrived at the scene. He suffered from chronic bereavement, post-traumatic stress disorder and a major depressive disorder. He was awarded R150 000 in March 2009. The adjusted value in 2015 amounts to R208 000.[16]

[18] In *Barker v Road Accident Fund*,[17] the plaintiff claimed damages she suffered as a result of the death of her son, who was run down by a motor vehicle while cycling. According to the medico-legal report, the plaintiff presented with what is referred to as an unresolved mourning process concerning her son, developed panic attacks and many other symptoms including memory and concentration difficulties. The plaintiff was awarded R40 000 in general damages, which translated to R47 000 in 2014.

[19] In general, in all the comparative cases referred to above, the plaintiffs suffered more severe *sequelae* than in the present case. In this case there is no medical evidence of lasting trauma, unresolved mourning [18] or chronic bereavement. However, although no medical evidence was presented, there can be no doubt that the appellant experienced severe shock, grief and depression as set out in para 4.6 of the stated case:

'The death of her "baby" left her feeling empty. For months after the death of the baby she shut herself behind closed doors and did not wish to socialise with family

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[13] *Lett & another v The Minister of Safety and Security & another* 2011 (6K3) QOD 1 (ECP) in Kock op cit at 16.
[14] Kock op cit at 16.
[15] *Kritzinger & another v Road Accident Fund* ECP unreported case no 337/2008 (24 March 2009).
[16] Kock op cit at 15.
[17] *Barker v Road Accident Fund* GP unreported case no 26292/2009 (6 May 2011).
[18] *Barker v RAF* (above).

and friends . . . The death of the "baby" came as a shock as she had made preparations for its birth and in expectation thereof had already bought a lot of clothes, toys and other utensils [19]. . . She has since the death of Tebogo; given birth to a child she named Siyabonga.[20] She lost interest in her work and squandered her money. As a result, for months she suffered from depression.'

Taking into account these *sequelae* it is reasonable and fair to award the appellant the amount of R100 000.

[20] One further aspect that is a matter of concern is the manner in which the stated case was drafted. It did not clearly set out the facts giving rise to the claim for emotional shock, nor did it set out the purported right to rear a child and how such right fits under the right to dignity as the appellant asserted. This court in *Minister of Police v Mboweni*,[21] said that a court 'faced with a request to determine a special case where the facts are inadequately stated should decline the request.'[22]

[21] The role of a trial judge is more than to just accept the stated case as presented by the parties. A trial court must have before it, a stated case in which both facts and issues are crisply and clearly set out in order for the proceedings to be truly curtailed. Absent a clearly drafted and articulated stated case, the very purpose of rule 33 would be defeated.

[22] Lastly, it must be mentioned that the manner in which the attorneys for the respondent handled this appeal was not as expected in this court. After the appeal was set down for hearing, nothing was heard from the office of the State Attorney, acting on behalf of the respondent in this matter. No heads of argument were filed within the prescribed period in terms of the rules of this court. Nor was any condonation sought for the late filing of the heads. In addition, two days prior to the hearing of this appeal, counsel for the respondent filed supplementary heads of

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[19] Utensils refer to necessities.
[20] *Buthelezi & another v MEC for Health Gauteng Province* (above) para 4.
[21] *Minister of Police v Mboweni & another* [2014] ZASCA 107; 2014 (6) SA 256 (SCA).
[22] Paragraph 8. See also *National Union of Mineworkers & others v Hartebeestfontein Gold Mining Co Ltd* 1986 (3) SA 53 (A) at 56H-59, applied with approval in *Minister of Police v Mboweni* (above) para 7 and *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd & another* [2015] ZACC 34; 2016 (1) SA 621 (CC) para 61 fn 57.

argument. This conduct is to be discouraged and avoided, particularly in cases of this serious nature.

[23] In the result, the appeal ought to succeed and the following order is made.

1. The application for condonation for the late delivery of the respondent's heads of argument is granted.
2. The appeal is upheld with costs.
3. The order of the court a quo is set aside and substituted with the following:

'(a) The claim succeeds.

(b) The defendant is held liable for general damages based on emotional shock which the second plaintiff suffered as a result of the negligent conduct of the defendant's employees on 18 August 2006.

(c) The defendant is to pay the second plaintiff the amount of R100 000 as general damages.

(d) The defendant is to pay the costs.'

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Z L L Tshiqi
Judge of Appeal

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B C Mocumie
Judge of Appeal

Appearances:

For the Appellant:	F R Memani Instructed by: Lennon Moleele & Partners, Johannesburg Honey Attorneys, Bloemfontein
Attorney for the Respondent:	K G Lekabe Instructed by: State Attorney, Johannesburg State Attorney, Bloemfontein