



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 782/2022

In the matter between:

M M on behalf of G M

APPELLANT

and

**MEMBER OF THE EXECUTIVE COUNCIL
FOR THE DEPARTMENT OF HEALTH,
NORTH WEST PROVINCE**

RESPONDENT

Neutral citation: *MM obo GM v Member of the Executive Council for the Department of Health, North West Province (782/2022) [2024] ZASCA 52 (18 April 2024)*

Coram: MAKGOKA, HUGHES and MATOJANE JJA and MUSI and CHETTY AJJA

Heard: 14 November 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and release to SAFLII. The date for hand down is deemed to be 18 April 2024 at 11h00.

Summary: Delict – medical negligence – transmissibility of damages to parent on death of minor child. Death of child not reported to Master – effect on mother's *locus standi* to claim damages on behalf of her deceased child. Appeal struck off with costs. Appellant's personal claim for emotional shock – requirements not proved in

high court. High court failing to decide the *lis* between the parties. Appeal Court lacking jurisdiction to substitute its own order. Matter remitted to high court.

ORDER

On appeal from: North West Division of the High Court, Mahikeng (Hendricks DJP, Petersen and Snyman JJ sitting as a court of appeal):

- 1 The order of the Full Court is set aside and replaced with the following:
 - ‘1 The order of the trial court is set aside and replaced with the following:
 - “1. The appellant’s claim for emotional trauma and nervous shock is remitted to the trial court for determination.
 2. The appellant’s claim in respect of the other heads of damages is struck off the roll with costs.”
- 2 The appellant is ordered to pay the costs in this Court.

JUDGMENT

Chetty AJA (Makgoka, Hughes and Matojane JJA and Musi AJA concurring):

[1] This is an appeal against the order of the Full Court of North West Division of the High Court, Mahikeng (the full court). That court dismissed the appellant’s appeal against the dismissal of her claim against the Member of the Executive Council for the Department of Health, North West Province (the MEC) for compensation in her personal and representative capacity as mother and natural guardian of her minor child, GM. The appeal is with the special leave of this Court.

[2] The appeal arises from a medical negligence claim after GM, who was born on 16 October 2010, was later diagnosed with cerebral palsy. The appellant alleged that GM’s cerebral palsy was caused by the negligence of the respondent’s employees at the two hospitals to which she was admitted for obstetric care. She claimed damages for emotional trauma for herself, and future medical expenses, loss of earnings and general damages for pain and suffering on behalf of GM. The issue for determination was whether the medical staff at the Moses Kotane Hospital (MKH) and the Job Shimankana Tabane Hospital (JSTH) were negligent and whether such negligence caused GM to have resultant cerebral palsy.

[3] The trial in the high court came before Gutta J, who found that the hospital staff were negligent in various respects in the treatment and care of the appellant before and during the birth of GM. However, she dismissed the claim on the basis that there was no causal relationship between the negligence and GM's subsequent brain damage. The high court concluded that the cerebral palsy was attributable to an *abruptio placentae*, a complication occurring during pregnancy in which the placenta gradually separates from the uterus while the baby is still in the uterus. This separation diminishes the supply of oxygen to the baby, with the possibility that the baby will suffer foetal distress. Where an abruption occurs with a foetal heartbeat present, experts recommend an emergency caesarean section should be performed to save the baby.

[4] Leave to appeal was granted to the full court on the issue of causality alone. The full court dismissed the appeal with costs. This Court granted special leave to appeal on 12 July 2022. It bears mentioning at the outset that the notice of appeal, dated 5 August 2022, restricted the ambit of the appeal only against the finding that 'the negligence of the employees [of the respondent] was not causal to the damage suffered by the child'.

[5] On 3 November 2023, 11 days prior to the hearing of this appeal, it was brought to the attention of the Registrar of this Court by the respondent's attorneys that they had received information on 31 October 2023 that GM had passed away in August 2022. The respondent's attorneys brought this information to the attention of this Court as they considered that it 'potentially changed the landscape of the appeal'. In response to an enquiry from the Registrar, the appellant's attorney confirmed in writing that GM had passed away. The attorney further indicated that GM's death did not extinguish the appellant's 'entire claim should the appellant be successful' and that the matter 'should proceed as per the papers submitted'.

[6] The appellant approached the matter before this Court without any further written submissions as to whether the passing of the child had any impact on the appeal before us. At the hearing of the appeal, no evidence was tendered to indicate when or how the minor child passed away. A copy of the death certificate, at the very least, ought to have been tendered. Indeed, counsel for the appellant held the view

that the death of the minor child presented no obstacle to this Court determining the issue of causation. The only head of damages not being pursued by the appellant, counsel submitted, was that of future loss of earnings. All other claims for damages, including that of emotional trauma and shock, remained alive. In the event of the appellant being successful in this Court, it was contended that the death of GM would become a relevant factor only to the extent of determining quantum.

[7] What looms large in this appeal is the effect of GM's death on the claims asserted by the appellant, in particular, whether the appellant has the necessary *locus standi* to prosecute the appeal. Before I consider that issue, I propose to dispose of the appellant's claim for emotional trauma and shock.

[8] The appellant, in her personal capacity, claimed an amount of R250 000 set out as follows in her particulars of claim:

'The Plaintiff has been severely shocked and traumatised as a result of seeing her first born in a cerebral palsied state and has suffered general damages for anguish, psychological trauma and loss of amenities of life.'

This allegation was met with a bare denial of liability by the respondent.

[9] The appellant testified in the high court that she was 32 years old at the time of the birth of GM. Her testimony was entirely devoted to the circumstances leading up to and surrounding the delivery of GM on 16 October 2010. She testified about her induced labour, bouts of dizziness and her recollection that the doctors were unable to detect a foetal heartbeat. She endured a lengthy labour from approximately 19h00 on 15 October 2010 to approximately 11h20 the following day, when GM was born. Medical experts testified on her behalf that almost five hours prior to the birth, she suffered an *abruptio placentae*.

[10] Upon GM being born, he cried, much to the relief of the appellant who had earlier been informed that no foetal heartbeat could be detected. The suggestion in this regard was that the baby had died. She was discharged the following day although the baby was kept in hospital in an incubator for about three weeks. Importantly, after the birth she observed the baby to be a 'normal child'. At the time of her testimony in the high court, GM was already eight years old and displayed

signs of cerebral palsy. He was unable to sit by himself, unable to speak and experienced difficulty in being fed.

[11] It is trite that the appellant bears the onus to prove the damages she claims against the respondent, that the respondent's employees owed a legal duty¹ to care for her and her baby, which duty was negligently breached and that a causal nexus exists between the damages suffered and the breach alleged. The quantum generally rests in proving the amounts claimed. *Bester v Commercial Union*² confirmed that a plaintiff who suffers from negligently inflicted 'nervous shock' resulting in psychiatric or psychological injuries is entitled to claim damages for patrimonial loss under the *Lex Aquilia*.³ In *Road Accident Fund v Sauls*, this Court held that in order to be successful in claiming damages for emotional shock a plaintiff must prove that she or he had sustained a detectable psychiatric injury.⁴

[12] More recently, in *Komape v Minister of Basic Education (Komape)*,⁵ where a learner at school fell into a pit latrine and drowned, this Court reaffirmed the position that a plaintiff can only claim damages for emotional shock where it is suffered as a result of detectable psychiatric injury. In contrast, in the present matter there is no evidence that the appellant suffered any emotional trauma or shock. When faced with questions from the Court as to the paucity of evidence to sustain a claim for emotional shock in light of *Komape*, the high watermark of counsel's response was that the appellant was affected by the injury to her child, evidenced when she

¹ *Cape Town City v Carelse and Others* [2020] ZASCA 117; [2020] 4 All SA 613 (SCA); 2021 (1) SA 355 (SCA) para 50.

² *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A) 776D-777A.

³ The authors R Ahmed and L Steynberg 'Claims for "emotional shock" suffered by primary and secondary victims' 2015 (78) *THRHR* 181 at 183 point out that the terminology in this area of the law used to traditionally describe 'shock' or 'nervous shock' now includes reference to terms such as 'psychological lesion', 'psychiatric injury', 'psychological disorder' and 'psychological trauma'; In *Road Accident Fund v Sauls* [2001] ZASCA 135; 2002 (2) SA 55 (SCA), the plaintiff suffered shock and trauma and was entitled to compensation for the psychiatric injury she sustained. According to the medical experts, she was diagnosed with post-traumatic stress disorder which had become chronic;

In *Gibson v Berkowitz* 1996 4 SA 1029 (W), the plaintiff was successful in her claim for damages where she suffered from a nervous and psychological disorder known as a major depressive disorder coupled with anxiety. The court found the defendants liable for all forms of nervous shock and psychological trauma.

⁴ *Road Accident Fund v Sauls* [2001] ZASCA 135; 2002 (2) SA 55 (SCA) at 61I.

⁵ *Komape and Others v Minister of Basic Education* [2019] ZASCA 192; 2020 (2) SA 347 (SCA). Also reported as *RK v Minister of Basic Education (Equal Education as Amicus Curiae)* [2019] ZASCA 192; [2020] 1 All SA 651 (SCA); 2020 (2) SA 347 (SCA).

became emotional while testifying, and started to cry. The transcript reflects that at some stage in her testimony the appellant requested an adjournment. The presiding judge enquired whether 'the witness required time', and court adjourned briefly. That is as far as the record goes.

[13] The appellant's claim for emotional trauma is founded on the ground that special leave to appeal was granted in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013. The parameters of the appeal, as set by the appellant in the notice of appeal were the following:

'The appeal is not against the finding that the Defendant/Respondent's employees are negligent but only against the finding that the negligence of the employees was not causal to the damage suffered by the child.'

[14] In *Leeuw v First National Bank Limited*⁶ it was held that 'this Court is entitled to make findings in relation to "any matter flowing fairly from the record"'. Although neither counsel addressed the issue of the appellant's claim for emotional shock in their heads of argument, the appellant's counsel's contention that the claim for emotional shock and trauma was still being pursued and was the catalyst for this Court's engagement on the issue.

[15] It is unfortunate that GM developed cerebral palsy and would have endured much hardship in his brief lifetime. However, the appellant's claim for emotional trauma must be proven by way of evidence. The appellant failed to meet this standard in the high court. The issue of the appellant's claim for emotional shock proved more vexed than may initially appeared to be the case. The high court's judgment focused solely on the issue of whether the medical staff at the attendant hospitals were negligent in their treatment of baby GM and whether such negligence was the cause of the resultant cerebral palsy. The high court dismissed the plaintiff's claim with costs. Leave to appeal was granted to the Full Court on the issue of causation alone, which that court considered to be 'purely factual' and 'straightforward'. It dismissed the appeal, affirming the decision of the high court.

⁶ *Leeuw v First National Bank* [2009] ZASCA 161; [2010] 2 All SA 329 (SCA); 2010 (3) SA 410 (SCA) para 5.

[16] In this Court, the appellant believed that her 'entire claim', including that for emotional shock, was properly before us for determination. It is in this respect that the appellant was fundamentally mistaken. However, much of this can be attributed to the high court which was seized with deciding both the emotional shock claim and that for damages on behalf of GM. It failed or omitted to decide the *lis* between the parties in respect of the claim for emotional shock and failed to provide any reasons in its judgment to justify its conclusion. On that basis, it is safe to conclude that the high court failed to apply its mind to the claim of damages for emotional shock.

[17] For this reason, after the hearing of the appeal, this Court requested the parties to provide information as to what issues, if any, had been separated in the high court pursuant to Uniform Rule 33(4). It is necessary to note that the appeal record did not contain any record of whether the parties had agreed to a separation of issues. Only the respondent's attorneys responded to the Court's enquiry and advised that a pre-trial conference was held on 6 November 2017 in which it was agreed that liability and quantum would be separated, and that the plaintiff would bear the onus of proof and the duty to begin. No agreement was reached to defer the appellant's claim for emotional shock. In light of this agreement, it remains inexplicable why no evidence was led by the appellant in respect of her claim for emotional shock. It begs the question as to what is the appropriate order for this Court to grant in the circumstances.

[18] A similar predicament arose in *Featherbrooke Homeowners' Association NPC v Mogale City Local Municipality (Featherbrooke)*,⁷ where the high court made several orders against only the municipality, directing it to undertake remedial steps to prevent flooding on a residential estate, and despite it concluding that such duties were attributable to *all* other state parties who were co-respondents. On appeal, the Full Court set aside the order against the municipality and held that the estate itself was liable to take remedial steps to prevent flood damage to its property.

[19] The problem which arose in *Featherbrooke*, by the time the matter reached this Court, was that the high court had failed to address the *lis* between the estate and the State parties when it discharged them from any joint liability for the

⁷ *Featherbrooke Homeowners' Association NPC v Mogale City Local Municipality* [2024] ZASCA 27.

prevention of flooding on the estate. The State parties were not before this Court and no order could be made against them. Similarly, in the present matter, the high court made no order in respect of the appellant's claim for emotional shock. Accordingly, no appeal could lie in respect of that claim as the MEC had not been found liable. The Full Court failed to grapple with this scenario and after considering the factual issue of causation, dismissed the appellant's claim for damages in respect of GM.

[20] In light of the high court and the Full Court not dealing with the claim for emotional shock, I am of the view that this Court does not have the power to pronounce on the claim for emotional shock, despite finding that the appellant failed, in terms of the standard set in *Komape*, to adduce evidence to satisfy the burden of proof. The high court ought to have either dismissed the claim or granted absolution from the instance. It did neither. For this Court to issue either of those orders would be tantamount to clothing itself with jurisdiction where it has none. In large measure, the failure of the high court to pronounce on the claim before it was the seed that influenced how the matter made its way through to this Court. It is not for this Court to prescribe to the high court as to how the matter should be dealt with, at a procedural or substantive level. Accordingly, the proper order to be made is that the appellant's claim for emotional shock be remitted to the high court, with no order as to costs.

[21] I turn now to the rest of the appellant's claims under various heads of damages, in the light of GM's death. The heads of damages are: (a) future medical expenses; (b) estimated future loss of earnings; (c) general damages for pain and suffering. These claims were met with a denial of liability by the respondent in its plea. The first two heads of damages fell away with GM's death. We are therefore left with only the claim for general damages, and whether such a claim is transferable. The law in this regard is settled. In *Government of the Republic of South Africa v Ngubane*,⁸ this Court concluded that such a claim is not transmissible unless *litis contestatio* has been reached. That was recently confirmed by this Court in *Minister of Justice v Estate Late Stransham-Ford*.⁹

⁸ *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) at 606G-H.

⁹ *Minister of Justice and Correctional Services and Others v Estate Late James Stransham-Ford and Others* ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) para 19.

[22] In the present case, *litis contestatio* had long been reached at the time of GM's death. The claim is therefore transmissible to his estate. Thus, only the executor of GM's estate can prosecute the claim. It follows that the appellant does not have the necessary *locus standi* to prosecute the claim. In terms of s 1(1)(d) of the Intestate Succession Act 81 of 1987, the appellant would, potentially, inherit whatever could be paid out in respect of GM's general damages, as was the case in *Wilsnach N.O v M[...] and Others*.¹⁰

[23] In conclusion, the issue of transmissibility of the claims on behalf of the minor child is inextricably intertwined with the *locus standi* of the appellant, in the absence of the minor child, to pursue the appeal before this Court. As Meyerowitz explains:¹¹

' . . . the executor derives his authority to act only by receiving a grant of letters of executorship from the Master. An executor testamentary has no *locus standi* on behalf of the estate until such grant.'

He adds:¹²

'No proceedings can be taken against the estate without making the executor a party to them. Similarly, no person can institute proceedings on behalf of the estate except the executor.'

For these reasons, the proceedings must be stayed pending the appointment of an executor in the estate of GM. The proper order is, therefore, to strike the matter from the roll.

[24] As regards the costs of the appeal, it is self-evident that the merits of the appeal could not be determined owing to the uncertain status of the appellant *vis-à-vis* the remainder of GM's claim for damages. The appellant is solely to blame for this predicament in light of her failure to report GM's death to the Master. For that reason, she must bear what, essentially, are the wasted costs. If an executor is appointed, the matter would most likely return to this Court, at which stage the merits would be determined.

[25] In the result, the following order is made:

1 The order of the full court is set aside and replaced with the following:

¹⁰ *Wilsnach N.O v M[...] and Others* [2021] 1 All SA 600 (GP); 2021 (3) SA 568 (GP).

¹¹ D Meyerowitz *Administration of Estates and their Taxation* 1 ed (2010) para 8.

¹² *Ibid* para 12.2.

'1 The order of the trial court is set aside and replaced with the following:

“1. The appellant’s claim for emotional trauma and nervous shock is remitted to the trial court for determination.

2. The appellant’s claim in respect of the other heads of damages is struck off the roll with costs.”

2 The appellant is ordered to pay the costs in this Court.

M R CHETTY
ACTING JUDGE OF APPEAL

Appearances:

For appellant:

J J Wessels SC

Instructed by:

Munro Flowers & Vermaak Attorneys,

Johannesburg

Webbers Attorneys, Bloemfontein

For respondent:

P Mokoena SC (with him H Cassim)

Instructed by:

Maponya Attorneys, Mahikeng

Phatshoane Henney Attorneys, Bloemfontein.