THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 329/10

In the matter between:

THE MEC FOR THE DEPARTMENT OF HEALTH
FOR THE PROVINCE OF KWAZULU-NATAL Appellant

and

DENISE FRANKS Respondent

Neutral citation:	*The MEC for the Department of Health v Denise Franks* (329/10) [2011] ZASCA 84 (27 May 2011)
Coram:	NAVSA, PONNAN, SNYDERS, THERON JJA AND MEER AJA
Heard:	09 May 2011
Delivered:	27 May 2011
Summary:	Delict - factual causation not established – inferences from facts in civil matters.

ORDER

On appeal from: KwaZulu-Natal High Court (Pietermaritzburg) (Patel J sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order by the court below is set aside and replaced with the following:

'The plaintiff's action is dismissed with costs, including the costs of two counsel.'

JUDGMENT

SNYDERS JA (Navsa, Ponnan, Theron JJA and Meer AJA concurring)

[1] The KwaZulu-Natal High Court, Pietermaritzburg (Patel J sitting as court of first instance) decided that the appellant was to be held liable for the paramedics in his employ having transmitted the Human Immunodeficiency Virus (HI Virus) to the respondent, Ms Franks, at the scene of a collision in which she was injured and a pedestrian was killed. The appellant was given leave to appeal by the court below. The conclusion reached by the court below is wrong for the reasons that follow.

[2] On 31 August 2000 the respondent was a passenger in a vehicle that was travelling to Durban on the N3 highway. At approximately 18:30, near the Mooi River Toll Plaza the vehicle collided with a pedestrian, Mr Mthalane, the deceased, causing his death. The respondent, sitting in the front passenger seat, suffered fractures to her skull and several lacerations to the left side of her scalp apparently due to the fact that her head struck the windscreen of the vehicle.

[3] Two paramedics in the employ of the appellant attended to the respondent at the scene of the collision and took her by ambulance to the Pietermaritzburg Medi-Clinic where she received further treatment. After her

discharge from hospital on 5 September 2000 she returned to her home in Johannesburg. Approximately three weeks later she experienced curious symptoms and approximately another three weeks later the symptoms were identified as classic sero-conversion as a result of having contracted the HI Virus.

[4] The doctors treating the respondent informed her that the window period for the HI Virus to manifest in sero-conversion symptoms and a positive blood test is three to six weeks from the date of infection. Calculating backwards from 10 October 2000, when she was first diagnosed, and adopting a process of reconstruction and elimination, the respondent concluded that she could only have been infected as a result of the treatment she received at the scene of the collision, from the paramedics in the employ of the appellant. It was her friend, Ms Ritchie, who was a passenger in the same vehicle, who planted the idea with the appellant that the infection possibly occurred at the scene of the collision.

[5] The respondent's cause of action is based on the alleged negligent causation of bodily harm by the appellant's employees, acting within the course and scope of their employment. The respondent pleaded a positive allegation of fact that the deceased was infected with the HI Virus at the time of the collision and that the appellant's employees negligently caused the transfer of the virus from the deceased's body to her.

[6] During the hearing of the appeal both counsel were agreed, correctly so, that it was essential for the respondent's case to have established the fact that the deceased was infected with the HI Virus. No direct factual proof was introduced at the trial, hence the respondent's counsel relied on four circumstantial facts and a process of inferential reasoning for his submission that the court below correctly found that the deceased was infected with the HI Virus. Firstly, that the deceased had recorded the telephone number of an organisation called AID for AIDS in his diary. Secondly, that the incidence of infection with the HI Virus in KwaZulu-Natal was high. Thirdly, that the collision and treatment received as a result thereof is the only occasion at

which the respondent could have been infected with the HI Virus. Fourthly, that the evidence of the sequence of events at the scene of the collision established the opportunity for the respondent's infection.

[7] The respondent's attorneys retrieved the deceased's diary and introduced it into evidence through the testimony of his father. Mr Mthalane identified the diary and the handwriting therein as that of his son. The diary contains names and numbers of individuals and, what appear to be businesses. The names 'Aid for Aids (Bonitus)' and a telephone number appear twice in the diary.

[8] The finding by the court below that the deceased was infected with the HI Virus reads as follows:

'The plaintiff has at least at a *prima facie* level made out a case that the deceased may have had HIV or for that matter full blown AIDS. In his notebook, it was shown in the deceased's own handwriting that he had noted various HIV/AIDS helpline numbers. In cross-examination, Prof. Smith conceded that only two inferences may be drawn from these notations in the deceased's diary, namely, that either he was an AIDS Councillor or was himself infected with the virus. No evidence was presented that he was an AIDS Councillor nor did defendant's Counsel canvass this possibility with the deceased's father when he testified. People are not in the habit of carrying these numbers unless they have a particular interest. Mthalane having any academic interest in the matter is far fetched and can be easily discounted.

In my view and in the absence of evidence providing an alternative explanation, the only reasonable inference in the circumstances is that Mthalane was HIV positive at the time of the accident. The inference is further strengthened by the incidence of HIV in this province as testified to by Prof Smith and Dr Webber and alluded to hereinbefore.'

[9] The reasoning of the court below is replete with errors. The conclusion that it has been shown 'prima facie' that the deceased 'may have had HIV' does not satisfy the civil burden of proof. Only one HIV/AIDS helpline number is contained in the deceased's diary, repeated twice and not 'various HIV/AIDS helpline numbers'. The concession relied upon from the evidence of the expert witness for the appellant, Prof Smith, on what inferences were to be drawn from the inscriptions in the deceased's diary, was inadmissible. Prof Smith is a specialist virologist, called as a witness to inform the court of, amongst other things in his field of expertise, the characteristics of the HI Virus, its viability outside the body, the possible ways of transfer of the virus

and the window period for finding evidence of the virus in the bloodstream after infection. Whether the deceased was infected with the HI Virus is an inference sought to be drawn from an inscription in a diary, not from facts within the expertise of Prof Smith. Hence the inferential reasoning from the inscription in the diary was within the exclusive domain of the court below and Prof Smith's evidence in that regard is inadmissible. To have expected the appellant to have produced evidence to eliminate some inferences was tantamount to placing an onus of proof on the appellant. The reverse should have been done. The respondent was obliged to put the evidence before the court that warranted the inference sought to be drawn. It was for the respondent's counsel to have asked the deceased's father about the deceased's marital status, interests, morality, health and activities. Such information may have provided the basis for preferring one inference over another. It was furthermore a simple matter for the respondent's legal representatives to have followed up the telephone numbers in the deceased's diary and placed the outcome of the investigation before the trial court. That the deceased may have had an academic interest in the subject matter of the HI Virus was rejected as 'far fetched' without explanation. This rejection is unfounded in view of the absence of any facts about the deceased. The trial court's conclusion that 'the only reasonable inference in the circumstances is that Mthalane was HIV positive at the time of the accident' is untenable.

[10] The difference in standard of proof between criminal and civil litigation has necessitated the adaptation of the second leg of the well known process of inferential reasoning stated in *R v Blom* 1939 AD 188 at 202-203:

'In reasoning by inference there are two cardinal rules of logic which cannot be ignored: (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.'

In *Ocean Accident and Guarantee Corporation Ltd v Koch* 1963 (4) SA 147 (A) at 159B-D the adapted process of reasoning was stated as follows:

'As to the balancing of probabilities, I agree with the remarks of SELKE, J, in *Govan v Skidmore,* 1952 (1) SA 732 (N) at p. 734, namely ". . . in finding facts or making inferences in a civil case, it seems to me that one may, as Wigmore conveys in his work on *Evidence*, 3rd ed., para. 32, by balancing probabilities select a conclusion which seems to be the more

natural, or plausible, conclusion from amongst several conceivable ones, even though that conclusion be not the only reasonable one".

I need hardly add that "plausible" is not here used in its bad sense of "specious", but in the connotation which is conveyed by words such as acceptable, credible, suitable. (*Oxford Dictionary*, and *Websters's International Dictionary*).' [1]

[11] There is no single other fact about the deceased against which to test the consistency of an inference sought to be drawn from the possession of a telephone number of an Aids help-line. The conclusion drawn by the court below is pure speculation. The mere possession of a telephone number does not give rise to the probable inferences sought to be drawn by the court below. Two speculative propositions were suggested during the trial. That the appellant was infected with the HI Virus and that the appellant was involved in assistance and support for people infected with the HI Virus. The respondent preferred the former, arguing that it is improbable that the deceased would have written down the number of an organisation that he worked for. Equally valid or invalid speculation does, however, arise. The deceased could have been a social worker or community conscious individual who referred people with the HI Virus to the organisation Aid for Aids or he could have been interested in the subject matter and in search of information. This exercise illustrates that in the absence of any other facts one can only speculate and there exists no indication why one speculative proposition is more acceptable than any of the others.

[12] Counsel for the respondent submitted that if the inscription in the deceased's diary is reconciled with the remaining three aspects mentioned in para 6 the conclusion that the deceased was infected with the HI virus manifests as the most acceptable of all possible inferences. The trial court not only drew this inference, but also found that it was strengthened by the 'incidence of HIV in this province'. The evidence of Prof Smith was that 'in the year 2000, 20% of the male population of South Africa was HIV positive'. The

[1] See also *AA Onderlinge Assuransie-Assosiasie Bpk v De Beer* 1982 (2) SA 603 (A) at 614G-A and Scwikkard and Van der Merwe *Principles of Evidence* 3 ed 2009 p 538 para 30 5 3.

court below accepted the following as common cause in relation to the statistics:

'The prevalence of the HIV virus in the male population in KwaZulu-Natal in and around 2000 was according to the experts, and I do not think it to be contravened, was in the region of 30%.'

[13] This finding by the trial court is not being challenged by any of the parties, but is, however, not reconcilable with an inference that the deceased, a random member of the society, was part of the statistical 30%. Although the prevalence of HI Virus infection, relatively speaking, is very high, known to be of the highest in the world, the incidence is more reconcilable with a conclusion that the deceased was probably not infected with the HI Virus. Therefore the incidence percentage of HI Virus infection does not assist the drawing of an inference that the deceased was infected.

[14] Given the window period for infection to manifest, it is logical to conclude that the respondent was likely to have been infected towards the end of August, beginning of September. Uncontested evidence by the respondent attempted to exclude her infection in any other way than through contact with infected blood at the scene of the collision. She testified that she had been faithful to her husband during their 20 year marriage. She could not have been infected through sexual intercourse as he has tested negatively for the HI Virus on several occasions after her diagnoses. She had a dental extraction that required surgery and stitching two days before the collision. To exclude that as a cause she led the evidence of Dr Spencer, a specialist in internal medicine and infectious diseases, that the incidence of infection during such a procedure is very low. Dr Chite, a neuro-surgeon who practices at the Pietermaritzburg Medi-Cross testified that the prospects of her having been infected whilst she was treated at the casualty ward of that hospital after the collision, was also very small.

[15] The evidence tendered to exclude the respondent's infection during the dental procedure and the treatment at the casualty ward of the hospital is general and vague in its terms, unrelated to the specific occasion of the

respondent's treatment and given by persons who were not present when she was treated. It contributes little to the specifics of an investigation of a probable occasion of infection and should not have been elevated to that. The evidence does, however, establish that, in general terms, the incidence of infection at dental surgeries and casualty wards of hospitals is small. But that is also true of the scene of the collision. The individuals who treated the respondent testified to safe practises adopted to prevent the transfer of viruses and their evidence exclude the opportunity of transfer of blood from the deceased to the respondent. Assuming for the moment that the deceased was infected with the HI Virus, the expert evidence, in general, was that the virus had limited prospects to remain viable after the collision, considering that the deceased would have died five to ten minutes after impact and that the viability of the virus was dependant on factors such as time passed since death, ambient temperature and viral load. The influence of these factors on a virus outside the deceased's body in congealed blood was even greater and the chances of infection dependant on the quantity of congealed blood transferred. The evidence was that the ambulance arrived approximately 40 minutes after the collision. Prof Smith was of the view that the HI Virus would not have remained viable outside the body for longer than ten minutes. Prof Martin, a virologist, testified that the virus could have survived for longer, but the length of time is uncertain. At best, the evidence shows that the chances of the virus surviving under the circumstances that operated at the scene of the collision and for the respondent to have been infected in the way that she contends, are as small, if not smaller, than at the average dental surgery or casualty ward.

[16] The trial court made credibility findings about the evidence of witnesses that testified to events after the collision and arrived at the conclusion that credible evidence on behalf of the respondent showed that blood from the deceased was transferred to the respondent by the appellant's employees. This is an irrelevant fact if it was not established that the deceased was infected with the HI Virus. However, the court below used this factual finding to assist in drawing the inference that the deceased was infected with the HI Virus, a conclusion defended by the respondent. This reasoning is illogical as

it begs the question and amounts to the drawing of an inference from an inference. Even if the reasoning was sound, the appellant's challenge of the trial court's evaluation of the evidence and the conclusions arrived at should be considered.

[17] An appeal court is slow to interfere with factual findings based on credibility, but if they are plainly wrong, the appellate court is at large to disregard the findings affected by the misdirection and arrive at its own conclusion.[2] The discussion that follows will show that this court is at large to disregard the rejection by the trial court of the evidence of the appellant's witnesses.

[18] The trial court accepted the evidence of the respondent's friend Ritchie. The evidence of the two witnesses for the appellant, Mr Mahabeer and Mr Dayal, was rejected. Mahabeer was in the employ of Toll Road Concessions (Pty) Ltd at the time, tasked to provide roadside assistance and first aid to stranded motorists. He held a basic life support qualification which allowed and enabled him to provide first aid. Dayal was one of the two paramedics in the employ of the appellant that arrived on the scene and attended to the respondent.

[19] The essential difference in the evidence of Ritchie on the one hand and Mahabeer and Dayal on the other, involves the investigation of an opportunity for blood from the deceased's body to have come into contact with the respondent's open head wound. The court below accepted Ritchie's evidence in the following terms:

'Her evidence was that the ambulance personnel, i.e. the defendant's employees, stopped at the body of the deceased before they came to assist the plaintiff. She could not see what they were doing to the deceased, but saw that they were "working on him". She assumed that they were checking for vital signs. They also removed the body from the road surface. They thereafter came to the plaintiff and administered treatment to her. Part of this treatment was an attempt to put an IV-line in the plaintiff's arm. They also put a bandage on the plaintiff's head after manipulating the wound.'

[2] *R v Dhlumayo* 1948 (2) SA 677 (A) at 705-706 and the wealth of subsequent cases that confirm the principle.

[20] Mahabeer testified that he was the first person to arrive on the scene of the collision. He put a dry dressing on the respondent's head wound, without 'manipulating the wound'. The effect of the rejection of Mahabeer's evidence was that the trial court did not accept that he was on the scene and attended to the respondent. Objective evidence introduced at the trial, without any objection, corroborates that Mahabeer was at the scene. A so-called MVC Report, completed by the staff in the control room that notified Mahabeer of the collision and summonsed him to attend, was handed into evidence. This document supports Mahabeer's evidence that he was informed of the collision at 18:40 and arrived on the scene at 18:42. More importantly, it also contains other information supplied by Mahabeer at the time from the scene of the collision to the control room. He confirmed this information during his evidence, namely that the breakdown service arrived at 18:46, the police at 19:05 and the ambulance of the appellant at 19:30.

[21] Dayal corroborated Mahabeer's evidence when he testified that he put a dry bandage on the respondent's head wound over a smaller one that was already in place. Only a conspiracy to be dishonest could account for the evidence by Mahabeer and Dayal. It was never suggested to either of them that their evidence was the result of such a conspiracy.

[22] Criticisms of the evidence of Mahabeer and Dayal were advanced on behalf of the appellant. Inconsistencies in their evidence are on lesser issues and to be expected of witnesses testifying almost five years after the event. There are no indications inherent in the evidence of the two witnesses why their evidence should be rejected. The trial court's list of criticisms of their evidence does not go to the root of their evidence and is equally applicable to the evidence of Ritchie. They all gave evidence long after the event and, to some degree, reconstructed the occasion. Mahabeer and Dayal were assisted by documentation completed at the time. They were also assisted by the routine procedures always adopted by them in the performance of their functions. Although this collision was an event that stood out for Ritchie as unusual, she was involved in the collision and could not have been

emotionally untouched. These factors are not determinative of the reliability of the evidence of any of the witnesses and should not have motivated credibility findings.

[23] Dayal's evidence of the sequence of events was that he and his colleague arrived on the scene and first treated the respondent whilst wearing new gloves, thereafter and before loading her into the ambulance he changed his gloves and went to the deceased, checked the deceased's vital signs, pronounced him dead, returned to the ambulance, discarded the gloves he used when he checked the deceased's vital signs, loaded the respondent into the ambulance and left. Both Mahabeer and Dayal's evidence therefore exclude any opportunity for the actual transfer of blood from the deceased to the respondent.

[24] Ritchie's evidence was inherently no better than that of the appellant's witnesses. However, the court below ignored crucial contradictions between the respondent's pleadings and Ritchie's evidence, the only witness for the respondent of the events on the scene after the collision. In her particulars of claim the respondent pleaded:

'The emergency medical treatment performed by the said employees of the Defendant as set out in paragraph 7 above, was performed on the Plaintiff directly after the said employees had:

8.1 carried the body of Mthalane from the surface of the freeway where it was lying to the side of the freeway;

8.2 attempted to resuscitate Mthalane and/or administered emergency medical treatment to him, which treatment necessitated physical contact between the said employees and the blood of the body or corpse of Mthalane;

8.3 applied dressings and medication to the right leg of Mthalane where it had been amputated.'

[25] The pleaded version was not supported by any evidence on behalf of the respondent. This significant discrepancy in the respondent's case motivated an unopposed application for an amendment at the end of the trial to insert a new paragraph 8.4 into the particulars of claim in the following terms:

'8.4 touched the body of the deceased to look for vital signs.'

[26] If any witnesses' reconstruction of the events led to inconsistencies that affected the reliability of a version, it was that of Ritchie. There is no support in the evidence for a finding that there was an opportunity at the scene of the collision, for transfer of blood from the deceased to the respondent's open wound.

[27] The respondent did not prove her case and should not have succeeded in the court below. Therefore the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order by the court below is set aside and replaced with the following:

'The plaintiff's action is dismissed with costs, including the costs of two counsel.'

_____
S SNYDERS
JUDGE OF APPEAL

APPEARANCES:

For appellant:	Y N Moodley SC (with him T S I Mthembu) Instructed by: The State Attorney, Kwazulu-Natal; The State Attorney, Bloemfontein.
For respondent:	D T v R du Plessis SC Instructed by: Hauptfleish Attorneys, Johannesburg; McIntyre & Van Der Post, Bloemfontein.