THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case No: 1221/2015

In the matter between:

MEC FOR HEALTH, EASTERN CAPE **APPELLANT**

and

ONGEZWA MKHITHA **FIRST RESPONDENT**

ROAD ACCIDENT FUND **SECOND RESPONDENT**

Neutral citation: *MEC Health, Eastern Cape v Mkhitha* (1221/15) [2016] ZASCA 176 (25 November 2016)

Coram: Cachalia JA and Dlodlo and Schippers AJJA

Heard: 17 November 2016

Delivered: 25 November 2016

Summary: Delict – negligence – liability for – causation – person unable to walk and confined to wheelchair after medical treatment for injuries sustained in motor collision – negligence of hospital staff a *novus actus interveniens*. Leave to appeal – to be granted only if truly reasonable prospects of success or compelling reason for appeal to be heard.

ORDER

On appeal from: Eastern Cape Local Division of the High Court, Mthatha (Dawood J sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Schippers AJA (Cachalia JA and Dlodlo AJA concurring):

[1] This is an appeal against the dismissal of a special plea by the appellant, the Member of the Executive Council for Health: Eastern Cape Province (the MEC), that he is not liable in law for damages sustained by Ms Ongezwa Mkhitha, the first respondent (the plaintiff), as a result of a collision between two motor vehicles in Ngcobo on 23 January 2011. The plaintiff was a passenger in one of the vehicles.

[2] The plaintiff sued the second respondent, the Road Accident Fund (the Fund) and the MEC for damages in the sum of R5 million as a result of injuries sustained in the collision. The plaintiff's claim against the Fund is that the driver of the insured vehicle drove negligently and caused the collision. Consequently the Fund is obliged to compensate her for damages in terms of s 17(1) of the Road Accident Fund Act 56 of 1996 (the Act). Her claim against

the MEC is based on negligence on the part of the medical practitioners employed by the Eastern Cape Department of Health at Bedford Orthopaedic Hospital (BOH), where she was treated a week after the collision. In her particulars of claim the plaintiff alleges that she received substandard orthopaedic care at BOH. More specifically, she avers that BOH failed to employ medical practitioners with the requisite skill and expertise; that they failed to treat her properly; and that they were negligent. They failed to ensure that two distal interlocking screws were properly placed when repairing a severe compound fracture of her left tibia and did not take post-operative radiographs, which would have shown that a large fragment of bone was displaced. As a result of this negligence, the plaintiff alleges that she cannot walk, cannot function independently, and will require knee surgery and various forms of therapy and special adaptive aids and devices.

[3] The Fund has conceded that the insured driver was negligent and that his negligence caused the collision. Consequently, in 2014 the court below made an order that the Fund is liable for the plaintiff's proved or agreed damages arising from the collision.

[4] The MEC delivered a special plea in which he alleges that the Fund is obliged to compensate the plaintiff for any loss or damage suffered as a result of any bodily injury caused by or arising from the driving of a motor vehicle, if the injury is due to the negligence or other wrongful act by the driver or owner of the vehicle. The damages that the plaintiff suffered, so it is alleged, arose from the driving of a motor vehicle, and therefore they the MEC is not liable for any damages pursuant to the injuries sustained in the collision. In his plea on the merits the MEC also denied that the medical staff at BOH were negligent and put the plaintiff to the proof thereof.

[5] The plaintiff delivered a replication. In it she alleges that the negligence of the MEC's employees was an unforeseeable intervening act that caused her to suffer harm, independent of the negligence of the insured driver; and that the consequences of the negligence of the MEC's employees were not caused by and did not arise from the driving of the insured vehicle, and were also too remote to render the Fund liable for those damages.

[6] At the hearing of the special plea the plaintiff adduced the evidence of Dr D K Kodi, an orthopaedic surgeon. In summary, he testified that in the collision the plaintiff sustained a head injury, a fracture of the right femur and fractures of the right tibia and left tibia. She lost consciousness and was admitted to the intensive care unit at Nelson Mandela Academic Hospital, where she remained for about a week. When she regained consciousness she was transferred to BOH where she had surgery to both legs. She remained in hospital for about three months and was discharged in a wheelchair.

[7] Dr Kodi said that the fracture of the plaintiff's right femur was not properly repaired. The fracture was not reduced, and only internal fixation of the femur was done. Consequently, a large piece of bone was not aligned in the normal position and as a result, the knee joint is incongruent. This has caused a mechanical block in the movement of the knee. Had post-operative x-rays been taken, the problem could have been corrected and the need for major surgery prevented. A distal screw in the left tibia was mal-positioned and fell out when the plaintiff removed her dressing. Her left leg is not straight and there is a 15 degree angulation. This is unacceptable in orthopaedic terms. There is obvious mal-alignment with shortening of the left tibia. Dr Kodi said that there is hope that after reconstructive surgery, the plaintiff will be able to walk albeit with the aid of a walking stick or crutch, but there is a certain degree of impairment that is permanent.

[8] In Dr Kodi's opinion, had the plaintiff received proper orthopaedic care at BOH she would still have been able to walk, albeit with some permanent impairment. She would not, however, have needed a wheelchair. The surgery which she now requires to her knee is entirely due to the negligence of the hospital staff. The angulation of the plaintiff's left leg is also due to substandard orthopaedic care for which BOH is responsible. Dr Kodi's evidence on these aspects was not disputed.

[9] The court below dismissed the special plea. It held that although the initial injury was caused by or arose out of the collision, on the evidence the substandard treatment of the plaintiff by the staff at BOH was a *novus actus interveniens*. The Fund could therefore not be held responsible for the consequences of that conduct.

[10] Mr Notshe, who with Mr Kunju appeared for the MEC, submitted that on a proper interpretation of s 17(1) of the Act, the Fund is solely liable for the damages suffered by the plaintiff, because her injuries were caused by or arose from the driving of a motor vehicle. There was, they contended, a sufficiently real and close link between the driving of the insured vehicle and the harm the plaintiff suffered as a result of her treatment at BOH, to conclude that the harm arose from the driving of the insured vehicle.

[11] These submissions have no merit. Mr Notshe ignores not only the basic principles of causation but also the undisputed evidence that the negligence of medical staff at BOH caused the plaintiff harm.

[12] The liability of the Fund under s 17(1) of the Act to compensate the third party for any loss or damage suffered as a result of any bodily injury caused by

or arising from the negligent driving of a motor vehicle, does not mean that the Fund is liable for all the damages which the third party sustains, merely because the initial injury arose from the driving of a vehicle.

[13] It is trite that causation involves two distinct enquiries: factual and legal causation. Generally, the enquiry as to factual causation is whether, but for the defendant's wrongful act, the plaintiff would not have sustained the loss in question; whether a postulated cause can be identified as a *causa sine qua non* of the loss. The second enquiry, legal causation, is whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue; or whether the loss is too remote.[1]

[14] Whilst it is correct that the plaintiff would not been hospitalised but for the negligent driving of the insured vehicle, as regards legal causation, the evidence clearly establishes that there was a *novus actus interveniens*, namely the negligent treatment of the plaintiff by the medical staff at BOH after she sustained the injuries in the collision, which significantly contributed to the consequences of those injuries.

[15] The special plea was therefore rightly dismissed by court below. It is plainly bad and had no prospect of success on appeal.

[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)*(a)* of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

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[1] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-I.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.[2]

[18] In this case the requirements of 17(1)*(a)* of the Superior Courts Act were simply not met. The uncontradicted evidence is that the medical staff at BOH were negligent and caused the plaintiff to suffer harm. The special plea was plainly unmeritorious. Leave to appeal should have been refused. In the result, scarce public resources were expended: a hopeless appeal was prosecuted at the expense of the Eastern Cape Department of Health and ultimately, taxpayers; and valuable court time and resources were taken up in the hearing of the appeal. Moreover, the issue for decision did not warrant the costs of two counsel.

[19] In the result, the following order is issued:

The appeal is dismissed with costs.

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A Schippers

Acting Judge of Appeal

[2] *S v Smith* 2012 (1) SACR 567 (SCA) para 7.

Appearances

For the Appellant:	M Notshe SC (with V Kunju)
	Instructed by: State Attorney, Mthatha
	State Attorney, Bloemfontein
For the First Respondent:	D Potgieter SC (with G Potgieter)
	Instructed by: Dayimani Sakhela Inc, Mthatha
	Eugene Attorneys, Bloemfontein
For the Second Respondent:	D Potgieter SC (with G Potgieter)
	Instructed by: Potelwa & Co, Mthatha