IN THE HIGH COURT OF ESWATINI

JUDGMENT

Case No. 146/17

In the matter between:

ZANELE CASS DLAMINI **PLAINTIFF**

AND

THE CLINIC GROUP t/a MANZINI CLINIC PRIVATE HOSPITAL

Neutral citation: *Zanele Cass Dlamini vs The Clinic Group t/a Manzini Clinic Private Hospital [146/17] [2019] SZHC 254 (18 December, 2019)*

Coram: FAKUDZE, J

Heard: 23/10/2019 and 21/11/2019

Delivered: 18/12/2019

Summary: *Civil procedure. Absolution from instance – Plaintiff has failed to make a prima facie case against Defendant – Absolution application upheld with costs.*

RULING ON ABSOLUTION FROM INSTANCE

BACKGROUND

[1] The Plaintiff has instituted a claim for damages against the Defendant for certain damages which she has allegedly suffered due to the negligence of the Defendant's employees. The amount claimed totals Two Million One Hundred and Seventy Thousand Emalangeni (E2170,000.00).

[2] The cause of action is clearly spelt out in paragraphs 4,5,6,7, 8 and 9 as follows:

> *"4 On or about the 2nd November, 2015, a telephone call was made to the Defendant by the Plaintiff's employer at Link Pharmacy at the Hub Mall in Manzini, wherein the Defendant was notified that the plaintiff was very ill and in grave need of medical attention.*
>
> *5. To this effect, the Defendant was requested to send its hospital shuttle to come and pick the plaintiff up at her place of employment at Link Pharmacy to which the Defendant obliged.*

6. It is common cause that the Plaintiff's condition was so severe that the plaintiff was heavily disoriented, could not walk and was unaware of her surroundings.

7. The hospital shuttle proceeded to pick the plaintiff up and she was subsequently driven to the defendant's hospital, where upon arrival, the driver dropped the plaintiff off at the main entrance of the Defendant's hospital and told the plaintiff to walk into the reception area and register herself. Subsequent to this, the plaintiff was then referred to the defendant's nurses who instructed the plaintiff to proceed to the consultation room in order for the plaintiff to be attended to. Such instruction was given despite the fact that the plaintiff was heavily disoriented, could not walk and was unaware of her surroundings.

8. The plaintiff then attempted to walk towards the consultation room as instructed and just as the plaintiff was about to reach the consultation room, she suffered a seizure and fell down face first and broke four of her teeth from her upper jaw.

9. It is therefore due to the negligence of Defendant's staff nurses (that is instructing the Plaintiff to walk to the consultation room instead of putting plaintiff in a wheel chair, despite it being obviously clear that the plaintiff was not in a state to so), that the plaintiff sustained the injuries to her teeth. The said nurses were at that material time in the course of and within the scope of their employment to the Clinic Group trading as Manzini Clinic Private Hospital."

[3] The plaintiff led four (4) witnesses and at the close of the plaintiff's case, the Defendant applied for absolution from the instance. This judgment determines whether the Defendant has a case to answer or not.

Summary of evidence

[4] PW 1 was Ordelle Hillary. She was a co-worker with the plaintiff and she was responsible for calling the shuttle. There were no words exchanged between PW 1 and the shuttle driver. The shuttle driver only said that Zanele was not well. The cross examination established that although PW 1 assisted the plaintiff to the shuttle, the plaintiff was not critically ill. She was weak though. She was able to walk on her feet. When asked if PW 1 explained to the driver what the plaintiff was suffering from, she responded by saying that she has a headache and was vomiting.

[5] PW 2 was Zanele Dlamini, the plaintiff. Her evidence was that on the 2nd November, 2015, she had a headache and was feeling dizzy. She also vomited a lot. The shuttle was called by PW 1 who also accompanied her to the back of the shuttle. She slept there and was woken up by the driver on arrival at the defendant's clinic. She then alighted and walked slowly to the reception. After registering she was told to walk to the consultation room. She did not know what happened thereafter. At the reception, she was attended to by the hospital staff but cannot remember who he/she was. PW 1 did not remember reaching the consultation room. The cross examination

established that the plaintiff was walking slowly and no one was helping her. There was one person at the counter who registered her and told her to go to the consultation room. When asked if the receptionist took sometime filling in the Form, the plaintiff confirmed it. The plaintiff was leaning on the counter. She never explained to the receptionist that she was very ill. The plaintiff also did not ask for any assistance. She did not vomit in the shuttle or in the presence of the shuttle driver. The cross examination finally established that if the plaintiff was not showing visible signs of sickness such as vomiting, never asked for help and stood on her feet during the registration at the reception, where is the negligence, the response was that at the plaintiff's work place they provide a chair for someone who is sick. Finally, her attention was drawn to paragraph 6 of the Particulars of Claim where it was alleged that she could not walk. Her response was that this is not true. She was able to walk except that she walked slowly.

[6] PW 3 was Sandile Dlamini the husband to the plaintiff. He received a call that PW 2 was not well. He then went to the defendant's clinic. On arrival there he tried to talk to PW 2 but PW 2 was unconscious. A certain Dr. Fynn explained to PW 3 how PW 2 was injured. The doctor suggested that PW 3 must meet the Director of the hospital and that in the meantime focus should be on PW 2. He later accompanied those who went to Dr. Zondi to have PW 2's teeth fixed. Cross examination established that PW 2 was suffering from meningitis and that PW 2 did not disclose this in her evidence in chief. PW 3 further explained that after the incident of 2nd November, 2015, PW 2 suffers memory lapses. That is why she did not disclose her condition during her examination in chief.

[7] PW 4 was Dr. Bongiwe Zondi. She was a qualified Dentist having practised as such for 18 years. On the 4th November, 2015, the plaintiff was brought to her surgery. She was in the company of her husband (PW 3) and a nurse. PW 4 was told that the plaintiff had fallen on her face and had broken four teeth. This happened at the defendant's place. PW 3 told Dr. Zondi that the plaintiff had a history of epilepsy. The broken teeth were removed and a replacement was done. Cross examination established that the witness had no medical history of the plaintiff. She also confessed that she was told about the event of the 2nd November, 2015. She did not witness it. The plaintiff then closed its case.

ABSOLUTION FROM INSTANCE

The Defendant's case

[8] The defendant states that after consideration of all the evidence placed before court, it is submitted that insufficient evidence has been placed before court to support the plaintiff's claim and on that basis, applies for absolution from the instance. The negligence pleaded by the plaintiff is that the staff nurses instructed the plaintiff to walk to the consultation room and did not provide her with the wheel chair; that is the negligence alleged. For a party to succeed in a claim for damages against the defendant the plaintiff must allege and prove:

(a) That the defendant was negligent;

(b) That there was a legal duty on his part owed to the plaintiff to take care;

(c) The defendant breached that duty;

(d) That the harm contained was attributable to that negligence;

(e) That the plaintiff sustained damages.

[9] PW 1 did not explain the nature of the plaintiff's sickness to the driver but was content with what the driver said "shem uphatsekile" (she is sick). No explanation was made to the driver that the plaintiff had suffered from meningitis previously. The plaintiff was able to walk from her place of work to the shuttle.

[10] When it comes to the evidence of PW 2 (plaintiff), she fell ill whilst at work. She was assisted by PW 1 to the shuttle. No explanation was made to the driver regarding the seriousness of her condition and the driver was not asked to take the plaintiff to the casualty department but simply to the clinic. When the plaintiff got to hospital, she was able to walk alone up to the reception. At the reception she was met by a staff member who later told her to go to the consultation room. She did not meet the nurses as pleaded in paragraph 9 of the Particulars of Claim.

[11] PW 2 did not explain to the receptionist the gravity of her condition. She did not vomit in the shuttle on her way to hospital or at the hospital. She did not explain how ill she was that she felt dizzy or faint. She did not ask for

help at all. There was nothing that she did or said that indicated that she may have been gravely ill.

[12] PW 3's evidence was hearsay. He further informed the court that the plaintiff was suffering from meningitis as previously diagnosed. The plaintiff did not mention this fact in her evidence in chief. A brain or memory lapse on the part of the plaintiff was mentioned by PW 3. He said that this happened after the November 2 event. The evidence of PW 3 conflicted with the evidence of PW 2 in material respects.

[13] PW 4's evidence was hearsay and contrived. It also sought to introduce similar fact evidence in an improper manner. She was also not introduced as an expert witness. It is common cause that the facts surrounding the plaintiff being transported by shuttle to the hospital and the facts surrounding her being taken to the Dentist on the 4th November, 2015 are different and bear no relation to each other. PW 4's evidence is not relevant to the negligence that the plaintiff seeks to prove.

[14] In short the Defendant alleges that the plaintiff has failed to discharge its onus of proving negligence on the part of the defendant in that:-

15.1 her condition was not fully explained to the driver of the shuttle so as to ensure that she is taken to the casualty department as an emergency case;

15.2 the plaintiff was able to walk to the reception, waited while forms were being completed, and did not disclose the possibility that she was dizzy, could faint or could collapse at anytime.

Therefore absolution from the instance must be granted.

The plaintiff's case

[15] The plaintiff's case is that four witnesses gave evidence in support of the plaintiff's case; her work colleague, her husband and a dentist who attended to the plaintiff after the incident. The gist of PW 1's evidence is that the plaintiff was very weak at the time the shuttle arrived. PW 1 assisted the plaintiff to board the shuttle. PW 2 states that on the 2nd November, 2015, she got ill with a severe headache feeling dizzy and she was vomiting badly. After the arrival of the shuttle, she boarded it and slept. After arriving at the hospital, she walked slowly to the reception to register herself. The receptionist asked the plaintiff what was wrong with her and she informed the receptionist that she was dizzy, vomiting and had a headache. The receptionist was a nurse. The receptionist instructed the plaintiff to go to the consultation room. When she was on her way there unassisted and disoriented and weak with severe headache as she was, plaintiff fell on her face first injuring her mouth and teeth.

[16] PW 3 testified that he got a call that PW 2 had been injured. The gist of the PW 3's evidence is that the doctor who attended to PW 2 conceded that he

made a mistake by not informing the plaintiff not to stop taking her medication which will prevent her from fainting again. PW 3 accompanied PW 2 to see PW 4, the dentist. PW 4 explained that she was a dentist. She attended to PW 2's teeth condition.

[17] The plaintiff therefore submits that the evidence of PW 1 and PW 2 establishes that the defendant could or should have done better in dealing with the reality that the plaintiff should have been assisted by the shuttle driver from the shuttle to the Defendant's hospital taking into account that the driver's duty is not only to ferry customers and patients to hospital but to assist the customers and patients in getting the requisite help from the Defendant. There should have also been a proper handover of plaintiff from the shuttle to the reception by the driver working together with the nurses.

[18] From the evidence it is clear that there were vital signs showing disorientation of the plaintiff which were established by PW 1 notwithstanding that she is a work colleague, the nurses at the reception should have assisted the plaintiff to the consultation room as opposed to directing her to walk by herself unassisted to the consultation room. Had the plaintiff received the necessary attention from the hospital staff, the plaintiff would have survived the injuries. The evidence creates a reasonable inference that the defendants could and should reasonably have done more than they did. The Application for absolution should therefore be dismissed.

THE APPLICABLE LAW

[19] The accepted test for the granting of absolution from the instance is, has the plaintiff established a prima facie case? **In Ngwenya V Commissioner of Police and Another (2700/07) SZHC 103 (8th April, 2011)** at paragraph 14, it was stated that:-

> *"When absolution from the instance is sought at the close of the plaintiff's case the test to be applied is not whether the evidence led, the plaintiff establishes what would be required to be established, but whether there is evidence upon which a court applying its mind reasonably to such evidence, could or might (not should nor ought) to find for the plaintiff."*

[20] In the case of **Mabuza V Phinduvuke Bus Service Case No. 66/2017 [2018] SZSC 13 (30 May, 2018),** His Lordship Dr. B.J. Odoki stated as follows:

> *"An Application for absolution from the instance stands much on the same footing as an application for discharge of an accused person at the close of evidence for the prosecution……. It is clear that a trial court should be very chary of granting absolution at the close of the plaintiff's case. The court should not at this stage evaluate and reject the Plaintiff's evidence."*

[21] In **Gascoyne V Paul and Hunter, 1917 T.P.D. 170 Harms J.A.** state the principle as follows:

"This implies that a plaintiff has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim to survive absolution – because without such evidence no court could find for the plaintiff ……. As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one not the only reasonable one."

[22] Finally, in **Ngwenya V Commissioner of Police** (Supra) the Learned Justice stated that:

"The overriding consideration for granting absolution from the instance at the end of the plaintiff's case is that it is considered unnecessary in the interest of justice to allow the case to continue any longer in the absence of a prima facie case having been made out by the plaintiff."

COURT'S ANALYSIS AND CONCLUSION

[23] The informing factor in the granting of an absolution application is that the plaintiff must make out a prima facie case in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence, a court could not find for plaintiff. The question is has the plaintiff, in the mind of the court, tendered evidence upon which a court properly directed and applying its mind reasonably to such evidence, could or might……. find for the plaintiff.

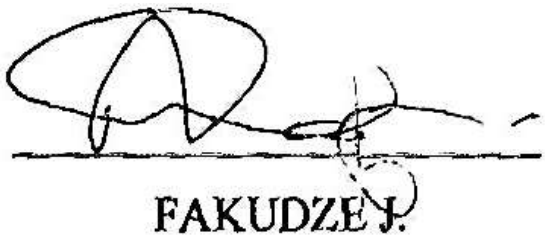
[24] The plaintiff states that the defendant was negligent in that the staff nurses instructed the plaintiff to walk to the consultation room and did not provide her with the wheel chair. It is the defendant's case that the test for negligence is whether a reasonable man, finding himself in the circumstances that the defendant did at the time of the incident, would have acted in the manner in which the receptionists did. It is also worth noting that the receptionists were just receptionists and not nurses.

[25] In motivating the Application for absolution, the defendant avers that the plaintiff did not explain the seriousness of her medical condition to the driver so that special attention may be given to her, for example, taking her to the emergency department. The plaintiff did not also explain her condition to the receptionist and that she also walked to the reception, stood whilst her details were being registered by the receptionist and did not show any signs that she was critically ill. The defendant also avers that the receptionist was not a nurse per se. She therefore did not have the medical expertise to make the determination.

[26] The plaintiff raises a contrary argument when it says that the receptionist should have seen that the plaintiff is critically ill and should have therefore provided a wheel chair which would have been used by the plaintiff instead of walking to the consultation room. The question is would a reasonable person finding himself in the circumstances that the defendant did at the time of the incident and would have acted in the manner the receptionist did given that the receptionist was not even a nurse? The same question lies

with respect to the driver. If the plaintiff's case was that Dr. Fynn acknowledged his mistake that he did not tell the plaintiff to not to stop using the medication the Dr. had prescribed that caused the plaintiff to fall as explained by PW 3, then the defendant would have a case to answer. The plaintiff's case was based on the lack of duty of care on the part of the driver and the receptionist. The plaintiff has therefore failed to make a prima facie case.

[27] In light of all that has been said above the application for absolution is upheld with costs.



FAKUDZE J.

JUDGE OF THE HIGH COURT

Plaintiff: Henwood and Co.

Defendant: Gigi A. Reid Attorneys