

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 19101/2011

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

3 MARCH 2015

FHD VAN OOSTEN

In the matter between

BEAUTY BONGIWE NJEJE
ELIAS SHIKHUNDLA

FIRST PLAINTIFF
SECOND PLAINTIFF

And

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH AND SOCIAL DEVELOPMENT
PROVINCE OF GAUTENG**

DEFENDANT

Negligence - claim against defendant for damages in respect of emotional stress and funeral costs - applicants parents of 12 year old girl - girl admitted to children's ward in hospital - diagnosis of suspected meningitis - during early morning girl must have climbed out of bed walked down the corridor into kitchen and through window jumped down a shaft to her death below - grounds of negligence relied on by plaintiffs – failure to prove - absolution from the instance - held: no evidence on which a court could or might find for the plaintiffs - plaintiffs non-suited

J U D G M E N T

VAN OOSTEN J:

[1] This is a tragic case. The plaintiffs' 12 year old daughter, Samkeliswe Shikhundla, (the deceased) died in unusual, puzzling circumstances after having been admitted to the Edenvale Hospital for treatment of what was suspected to be meningitis. The plaintiffs' claim against the defendant, in its representative capacity, is based on negligence. At the inception of the trial and by agreement between the parties I ordered a separation of the merits and the quantum of damages and the trial proceeded on the merits only. Only the first plaintiff, Ms Njeje, testified and no further witnesses were called to testify on the plaintiffs' behalf. At the close of the plaintiffs' case the defendant applied for absolution from the instance which is the application I am now required to determine.

[2] The evidence of the first plaintiff, in summary, was the following: on Friday 19 June 2009, the deceased became ill and she, accompanied by her son, took the deceased to the Edenvale Hospital. Having arrived there the deceased was examined by a medical doctor on duty and provisionally diagnosed with upper respiratory tract infection. She was referred to a nurse for the taking of blood specimens and the administering of a drip. They were taken upstairs to a ward and there the deceased was again superficially examined and the examining nurse told her that she suspected the deceased was suffering from meningitis. The deceased was admitted in a corner cubicle with a single bed in the children's ward which is an infectious ward. Ms Njeje and her son eventually left. Later that evening she received a telephone call from the hospital accusing her that she was causing a rift between the doctor and the nurse at the hospital concerning the suspected meningitis. The next morning she returned to the hospital and after a long wait was informed that the deceased had died in an accident having fallen out of a window. It is common cause that the autopsy report records the cause of death of the deceased as 'Fractured skull. Dislocation cervical spine'. That concluded the evidence.

[3] On this scanty evidence it is seemingly impossible to make any findings. An examination of the plaintiffs' particulars of claim reveals the following. Reliance is placed on an alleged legal duty of the nursing staff at the hospital 'to render such reasonable medical treatment and nursing services as were required by the minor and the plaintiffs in the circumstances' and that 'in providing such medical care or medical treatment and the rendering of such nursing services the defendant was

obliged to provide same with the reasonable requisite degree of skill and expertise, particularly having regard to the fact that the minor was a child given in the care of the staff of the Edenvale Hospital'. The grounds of negligence relied on are that the defendant failed to ensure that adequate numbers of nursing staff were employed or that they were adequately trained and possessed of the 'requisite skill and expertise to care for patients' or that adequate resources were available 'to enable provision of appropriate and adequate care by nursing staff'. No evidence concerning any of these allegations was presented to this court. It is then further pleaded that the nursing staff failed to properly 'supervise' the deceased whilst in their care or to timeously 'observe and supervise the movements' of the deceased or to provide proper and adequate protection to the deceased against 'the possibility or risk of physical bodily harm'. Again, not a shred of evidence concerning any of these allegations exists.

[4] In his opening address counsel for the plaintiffs, with reference to a floor plan of ward 6 where the deceased had been admitted, ventured into a reconstruction of the movements of the deceased for her to have arrived in the duty kitchen where she must have climbed through a window and fallen down an open shaft to her death. The hypothesis was simply left hanging in the air: no evidence was presented in an attempt to prove or in any way explain, the occurrence that had led to the deceased's death. Ms Njeje, at the critical time, was not present and she understandably was unable to offer any assistance in this regard.

[5] The well-entrenched test at this stage of the proceedings is whether this court, applying its mind reasonably, on the evidence before it, could or might find for the plaintiffs (*Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 404 (A)). On the evidence before me I am requested to embark upon speculation and conjecture in support of the wide ranging inferences advanced in argument, merely because of the tragic circumstances of his case. I am unable to do so. No case has been made out against the defendant and it follows that, in my discretion, the defendant must be non-suited (*Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd* 1978 (3) SA 1073 (C) 1076F).

[6] In the result the following order is made:

1. The defendant is absolved from the instance.

2. The plaintiffs are ordered to pay the costs of the action.

FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFFS

PLAINTIFFS' ATTORNEYS

COUNSEL FOR DEFENDANT

DEFENDANT'S ATTORNEYS

DATE OF HEARING
DATE OF JUDGMENT

ADV H KRIEL

EDELING VAN NIEKERK INC

ADV B SHABALALA

THE STATE ATTORNEY

2 MARCH 2015
3 MARCH 2015