IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A435/2011

DATE: 8 AUGUST 2014

In the matter between:

N[...] G[...] Appellant

and

NATIONAL HEALTH LABORATORY SERVICE First Respondent

MEC FOR HEALTH AND WELFARE, LIMPOPO Second Respondent

JUDGMENT

Tuchten J:

1 This is an appeal against a decision of the magistrate of Polokwane. The appellant sued the second respondent ("the MEC") for damages. This is how her claim was pleaded. I omit paragraph numbers:

> Op of omtrent 11 Februarie 2002 en te die Provinsiale Hospitaal, Pietersburg, is die Eiseres deur Matrone Steyn meegedeel sy is HIV positief.
>
> Ten tye van die voorval was matrone Steyn in diens van die Verweerder en sy het in haar diensbestek met die Verweerder opgetree.
>
> Eiseres het by latere twee onafhanklike HIV toetse ondergaan, waarvan die uitslag albei HIV negatief was.
>
> As gevolg van voormelde nalatige optrede van die Verweerder het die Eiseres emosionele skok

opgedoen and skade gely in die bedrag van R100 000.

2 The MEC pleaded to the claim. At that stage, by no procedure discernable from the record, the first respondent ("the NHLS") had become the first defendant and the MEC had become the second defendant. The MEC's plea asserted that the NHLS had prepared a laboratory report on the HIV serology of the appellant which provided (as we now know on the strength of a blood test) that the antibodies of he appellant were insufficient to check HIV serology and that the appellant should repeat the test in 6 weeks. This test, it was pleaded was indeterminate. For the rest, the appellant's allegations were placed in dispute by the MEC. As far as I can tell (but the record was so shoddily prepared that I may be wrong) NHLS at no stage pleaded to the plaintiffs claim.

3 As far as one can tell, this is a claim for damages for negligent misstatement. All concerned seemed to assume that an action lay on much the same way that an action will lie for damage caused negligently to a motor vehicle. But this is wrong. If either of the pleaders had taken the trouble to consult the edition of *Amiens Precedents of Pleadings* available in 2002 when this action was instituted, she would have learnt that a plaintiff in the appellant痴 position must plead and prove that the defendant owed the plaintiff a legal duty not to make a misstatement.[1] So the plaintiffs particulars of claim did not disclose a cause of action.

4 When the matter came to trial, the plaintiff, the MEC and the NHLS were separately represented. The attorney for the appellant opened by informing the court that the court was being asked only to decide *die meriete.* No application was made to the court under rule 29(4). Worse still, no consideration was given to the important question what the "merits" involved and what was to stand over. During the course of the proceedings, I am told, the NHLS and its representative disappeared from the scene. I am informed that this happened by agreement because no case could be made against the NHLS. One does not want to encourage formalism but this kind of informality is most confusing, to say the least. But at least we know that the parties to the appeal are the appellant and the MEC.

5 I have the greatest difficulty in understanding what was in issue before the magistrate and what was not. Both the appellant and the MEC led evidence on what was told to the appellant as well as evidence bearing on the question whether the appellant suffered emotional shock. No attempt was made during the trial to quantify the appellant's alleged damages. The appellant's attorney stated in opening without being controverted that the question of *diensbestek* (vicarious liablity?) was not in issue. I may say that during her evidence Matron Steyn testified that her interaction with the appellant was not part of her duties but something she had done as a volunteer, out of her own generous attempts to mitigate the plight of sufferers from HIV/AIDS

6 Be all that as it may, the trial proceeded on the basis, agreed between the parties, that the issues for decision

by the trial court would be whether the appellant had been told she was HIV positive, whether she thereafter tested negative for this syndrome, the aspect of negligence and damages *(skade).*

7 The appellant gave evidence. She was 28 when the incident forming her cause of action occurred. She had led a difficult life. She had had an unhappy childhood and suffered the misfortune of being married to a man who was sent to prison. Worse still, in April 2001, the appellant's then husband committed suicide in prison by hanging himself. He left a note blaming the appellant.

8 Since 8 November 2001, the appellant had been under the care of a clinical psychologist who treated her for what I might summarise as depression and anxiety arising from her failed relationship with her then husband.

9 In February 2002, the appellant presented with stomach pain and diarrhoea. She attended the provincial hospital in what was then called Pietersburg and had two blood tests to establish her HIV status, the first on 8 February and the second on 10 February 2002.

10 The result of the first test was made known to Dr Ryndine, a Russian speaker who had qualified in Moscow as a doctor of medical science and surgery. He described the result of the first blood test as finding that the appellant was "reactive" which the court below was told meant that the patient was HIV positive. He decided that the appellant should be informed. Dr Ryndine's English was (as appeared from the record of his testimony) poor and he asked Matron Steyn to communicate the result to the appellant.

11 On 11 February 2002, Matron Steyn interviewed the appellant in her office at the hospital. The appellant says that Matron Steyn told her that she, the appellant, was HIV positive. Matron Steyn, on the other hand says that she began the interview by describing how patients in general should manage their HIV positive conditions and then left her office to collect the results of what proved to be the second blood test.

12 The second test result, Matron Steyn said, was contained in a sealed envelope. She says she opened the envelope and discovered that the second blood test result was *indeterminate* which Matron Steyn explained meant that the test did not establish whether or not the appellant was HIV positive.

13 Matron Steyn says that she told the appellant the result of the second test and that the appellant should treat herself as HIV positive until later, conclusive tests established the correct position. Matron Steyn says that she then destroyed the second test result in accordance with standard procedures to protect patients' privacy.

14 The appellant on the other hand, testified that Matron Steyn had not had any test result before her when she told the appellant that she was HIV positive.

15 The factual position is troubled by the evidence of Mr O[...], a friend of the appellant's then boyfriend and now husband, Mr v[...] N[...]. Mr O[...] says that he had learnt that the appellant was in hospital. He was in the area carrying out certain duties associated with his occupation as a traffic officer. On completion of those duties, O[...] says, he went to see the appellant. He says he found her in the hospital passage smoking a cigarette. He says a nurse approached them and asked the appellant to go with her into her office. O[...] says he followed them into the nurse's office, after which an interview commenced between the nurse and the appellant. During the interview, O[...] says, the nurse told the appellant that she had been found to be HIV positive, at which he left the room, not wanting to intrude further on what he regarded as a very private matter.

16 There are two major difficulties with O[...]'s evidence. Firstly, the appellant herself said that she could not remember O[...] being present that day. Secondly. Matron Steyn testified that her invariable policy was to initiate HIV counselling to adults in private, only calling in a spouse if the patient gave permission. Matron Steyn denied that O[...] was present.

17 The magistrate considered the two versions and preferred that of Matron Steyn. The magistrate also found that no damages had been proved. The appeal is against both those findings.

18 In an appeal of this nature based as it is on probability and credibility findings, the appellant must satisfy the appeal court, if she is to succeed, that the trial court was wrong in its evaluation of the evidence. A trial court enjoys certain advantages over an appeal court in this regard. Essentially, the trial court sees and evaluates the witnesses from their performances in the witness box which the appeal court cannot do.

19 Counsel for the appellant submitted that the trial court had incorrectly assessed the probabilities. I do not agree. Matron Steyn was an experienced HIV counsellor. She had an invariable procedure which she followed. There was no reason why she should not have done so on this occasion. The result of the second blood test was available. It would, as she suggested in her evidence, have been a simple matter for her to have gone to get it. If she had obtained the result, she would have shown it to the appellant and then destroyed it.

20 When the matter came to trial in the court below, neither blood test result was available. On the MEC's version, this is explained. Dr Ryndine destroyed the first result and Matron Steyn the second. On the appellant's version, the destruction of the blood test results is left unexplained. Astound ingly, no attempt was made to reconstruct the documents which constituted the blood test results.

21 It is highly improbable that Matron Steyn, sensitive as she was to privacy issues surrounding HIV/AIDS, would have allowed O[...], whom she did not know and to whom on O[...]'s version she was not introduced,

to be present at the interview when this highly sensitive information, whomever one believes, was imparted to the appellant.

22 But I think that the case need not depend solely on credibility. The appellant cannot gainsay the evidence of Dr Ryndine that the result of the first test was that the appellant was HIV positive. Dr Ryndine certainly gave Matron Steyn to believe that the first blood test had demonstrated that the appellant was HIV positive. If that was the case, then by telling the appellant that the blood test which had been in the possession of Dr Ryndine showed the appellant to be HIV positive, Matron Steyn was conveying to the appellant either the true position as known at the time or, if for some reason Dr Ryndine had misread the first test results, what Dr Ryndine had told her was the true position. On the first hypothesis, there was then no misstatement of the facts as known at that stage. On the second hypothesis, it cannot be said that matron Steyn was negligent in communicating to the appellant what Dr Ryndine had told her. And no case was pleaded that the negligence lay in not checking what Dr Ryndine told Matron Steyn. It is not suggested that on Matron Steyn's version, the appellant can succeed.

23 In the result the appellant has not succeeded in showing that the magistrate was wrong and the appeal cannot succeed.

24 There is a further reason why as I see it the appeal cannot succeed. The appellant testified that she had a further blood test done on the day following the interview with Matron Steyn, ie 12 February 2002. The test showed that the appellant was HIV negative. She was understandably still not sure of her status. On Thursday 14 February 2002, she went for what she was told was the best test available. That test showed incontrovertibly that the appellant was HIV negative. She accepted the result of this later test, no doubt with relief and joy, She married Mr v[...] N[...] and some ten months after her ordeal gave birth to a healthy baby boy. Fortunately, the appellant's family rallied round her and her intimate relationship with her present husband, Mr v[...] N[...], went back to normal within a month after the events of 11 February 2002.

25 The difficulty with the evaluation of the appellant's case on damages is that the evaluation seems to have been done on the basis that what she was told about her HIV status aggravated her depression and anxiety. But there is no evidence which compared the following two positions which, on the appellant's version are crucial to her case: firstly, that she ought to have been, but was not, told on 11 February 2002 that she *might be* HIV positive and thus, until the position could conclusively be established; should regard herself as positive; and, secondly, that some three days later, she accepted that she was *not* HIV positive. Assuming the appellant's case for the sake of the argument, would she have been less depressed and anxious if for three days she had thought she *might* be positive rather than thinking that she *was* positive? We do not know. The magistrate was thus right when she found that the appellant had not proved that she suffered any damages.

26 I must end this judgment with two observations. Firstly, this case has been considerably vexed by the unwise decision to litigate by instalment. A separation of issues is not simply to be had for the asking. The default position is that disputes are to be litigated in their entirety so that when judgment is given, all the real issues between the parties are resolved. A judicial officer invited to separate issues must not do so simply because it suits the parties - which regrettably more often than not means the parties' lawyers rather than the parties themselves. Under rule 29(4) of the Rules of the Magistrates' Courts, a separation may be ordered *if it appears to the court* that it the separation would be convenient. So every time the parties ask for a separation, even if they do so jointly, the presiding officer must ask herself if it would be *convenient* to separate. Convenience in this context means advancing the interests of justice. And then, the terms of the separation must be carefully delineated, preferably by reference to the pleadings. By this I mean that an order should ideally state, by reference to paragraph numbers of pleadings, which pleaded issues are to be adjudicated immediately and which are to stand over for later determination.

27 Secondly, I shall say something about the record. It was an atrocious compilation. The documents were not placed iny coherent order. The index was entirely inadequate. One could not identify where the pleadings were to be found or where the individual witnesses' evidence was to be found. An important exhibit, a note apparently prepared by the appellant and perhaps others as a subterfuge to advance the appellant's case, was not in the record. No attempt was made at the trial to reconstruct the documents constituting the vital blood test results of 8 and 10 February 2002. All this made our tasks considerably more difficult. This matter was postponed on no less than three occasions for the appellant's attorney to remedy the deficiencies in the record. I understand from counsel that the record is in considerably better shape now than it was when the appeal was first called in court. This is the fourth time the appeal has come before a bench of two judges in this division.

28 On 30 January 2014, Carelse J and Mali AJ ordered that the appellant might only set the appeal down for hearing once she had complied with Chapter 7 clause 8 of the Practice Directions of this court, which was to be done within 30 days, failing which the appeal would lapse. In fact there was no such compliance because in contravention of clause 8.2 of those Directions, the index before us did not identify each document and exhibit. We were confronted by blanket references to pleadings and notices. There was no reference at all in the index to the voluminous exhibits. I shall mark the court's disapproval of this slovenly conduct by a costs order.

29 I make the following order:

> 1 The appeal is dismissed with costs, including all costs which were reserved when this appeal was previously called in this court.

2 The appellant's representatives may not recover any fees or disbursements for or relating to the record on appeal from the appellant or any other person who has undertaken liability for such fees and disbursements.

NB Tuchten

Judge of the High Court

7 August 2014

I agree.

MJ Mushasha

Acting Judge of the High Court

7 August 2014

footnote1