

IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 1051/04

In the matter between:

ANNAH FUMBATSILE MTSETFWA

PLAINTIFF

AND

THE GOVERNMENT OF SWAZILAND

1st DEFENDANT

THE ATTORNEY GENERAL

2nd DEFENDANT

CORAM:

MAMBA AJ

FOR PLAINTIFF:

M. MDLULI

FOR DEFENDANTS:

NO APPEARANCE

JUDGEMENT

16th AUGUST, 2006

[1] The plaintiff is an adult Swazi married woman and was born on the 15th day of May, 1958. At all times material hereto she was employed as a cleaner at the Nhlangano National or public library.

[2] Whilst washing her children's cloths on the 3rd August, 2002, a needle that was unknown to her in her children's cloths pierced her on the wrist of her right hand, close to the little finger. The needle broke into two and a substantial part of it remained embedded in her hand. Surgery was necessary to remove this from her hand and she approached first, the Hlathikhulu Government Hospital and later the Mbabane Government Hospital.

[3] At Hlathikhulu two operations were made to remove the needle from her hand and these were unsuccessful. Another unsuccessful operation was made at the Mbabane Government Hospital. Dr M.S. Jere of the Mbabane Clinic successfully operated on the plaintiff and removed the broken needle from her hand.

[4] It is common cause that at all times material hereto the medical staff that attended to the plaintiff at the two Government hospitals were acting during the course and within the scope of their employment as servants and or agents of the 1st defendant. The plaintiff alleges that other than the two botched or unsuccessful operations to her hand which were negligently and incompetently done by the said servants of the 1st defendant and they failed to give her any medical attention or help for a period of 8 days whilst at Hlathikhulu Government Hospital and thus subjected her to severe pain and suffering. At one such botched operation at Hlathikhulu, she was operated on without anaesthetic.

[5] The plaintiff has filed this action against the defendants based on the above acts of negligence and or incompetence. She alleges *inter alia* that:

- (a) After the first attempted operation at Hlathikhulu she was neglected and not given medical attention for a

period of 8 days before she was taken to the theatre for the second unsuccessful operation.;

(b) The doctor at Hlathikhulu left the wound on her hand open as a result of which it started to become septic and ill-smelling and produced a foul discharge.

(c) The medical staff failed to administer all or any of the correct and proper medical procedures or treatment on her to remove the needle that was embedded in her hand and she was eventually discharged from the hospital in a worse condition than she had been when she went to the hospital.

[6] The defendants have not filed a plea herein and therefore the averments made by the plaintiff in her summons are, for purposes of this judgement true and uncontradicted.

[7] Dr M.S. Jere of the Mbabane Clinic who successfully operated on the plaintiff to remove the needle stated his findings as follows:

(a) On the 23rd day of September, 2002 he conducted an operation on the plaintiff and was able to extract the needle from her hand.

(b) The plaintiff was in severe pain as a result of the unsuccessful previous operations that had been conducted in an attempt to remove the needle from her wrist.

(c) As a result of these operations, the plaintiff had developed sepsis and infection in the hand. This caused her more suffering and incapacity.

(d) The failure to remove the needle could be attributed to either the failure to use the proper equipment or inadequate expertise on the doctors performing the operation.

(e) "Apart from the physical pain that [plaintiff] suffered during these six weeks where she had her hand operated upon two times, she also suffered severe incapacity because of the loss of the use of her right hand. ...she had difficulty keeping personal hygiene in bathing or even dressing herself. She continued to have loss of function in her right hand. She had difficulty in washing herself, doing her buttons on her cloths or even combing her hair. ...she was unable to perform domestic chores like cooking for her children or cleaning her bed in the house ... The bending and power in her little finger is impaired. This incapacity is likely to remain permanent. ...This was a direct consequence of the complications following the operations." (f) The severe pain and suffering lasted for about nine weeks.

[8] In the light of the evidence above, there is no doubt in my mind that the defendants are liable to compensate the plaintiff for the incompetent and negligent acts of their medical staff which resulted in the condition to which the plaintiff found herself in after her admission at the Hlathikhulu Government Hospital.

[9] At the time when the plaintiff testified in court, she had already paid E1800-00 in respect of her medical expenses and Dr Jere indicated that she would need a further E5000-00 for physiotherapy. Her past and future medical and hospital expenses therefore stand at E6800-00. She has claimed a sum of E200,000-00 in respect of pain and suffering. I have stated the nature and duration of her pain above and here add that the pain was so severe that plaintiff stated that "I suffered severe pain to an extent that I even preferred to die". The assessment of the gravity or otherwise of the pain suffered is, of course, subjective

in such cases.

"In the assessment of fair compensation for pain and suffering the subjective experience of the plaintiff (which may be established through evidence by the plaintiff, his family and medical staff) is of paramount importance, while awards in previous cases should also be taken into account. A plaintiff's subjective experience is determined by the nature, duration and intensity of the pain and suffering. The plaintiff's actual experience is decisive and the fact that he is, for example, more sensitive to pain does not imply that his compensation has to be based on the pain which an average person in his position would have experienced. Conversely, where a plaintiff is less sensitive to pain than the average person, his damages are also to be calculated in respect of his personal experience. ...It is the physical - mental make-up of the individual plaintiff that has to be established."

(see P J VISSER and J M POTGIETER, LAW OF DAMAGES)

[10] In this case a sum of E50 000-00 is a fair award for pain and suffering. I also order an award of E15,000-00 for loss of amenities of life, disfigurement and permanent disability. I was not referred to any comparable cases in argument nor was I able to find any during preparation of this judgement.

I turn now to the question of costs and interest.

This is a claim for unliquidated damages and the plaintiff has succeeded in her action and she is entitled to be awarded the costs of this suit. In the case of **UNION GOVERNMENT vs JACKSON AND OTHERS 1956 (2) SA**

398 (A) at 412 the court noted that;

"The ordinary rule of our law is that liability for interest does not automatically attach to an unliquidated debt - an obligation which has not yet been reduced to a definite sum of money. The rule was applied in VICTORIA FALLS AND TRANSVAAL POWER CO. LTD vs CONSOLIDATED LANGLAAGTE MINES LTD 1951 AD 1. [where INNES CJ stated] ; the question with which we are concerned is whether in a claim for unliquidated damages only ascertainable as to amount after a long and intricate investigation, the defendant can properly be held liable for interest prior to judgement upon the sum finally assessed. In the present case the defendant was in mora in so far as the supply of electric power was concerned, and for that it must pay damages. But was it in mora with regard to those damages, and therefore subject to an order for interest in addition? Under the common law of England and America that question would probably be answered in the negative, on the ground that the party sued did not know what sum he owed, and therefore could not be in default for not paying. ...The civil law did not attribute mora to a debtor who did not know and could not ascertain the amount he had to pay. ...And the rule was adopted by the courts of Vriesland. ...It has also been followed in our own practice. No South African decision was quoted to us, nor have I been able to find any, in which interest before judgement has been awarded upon unliquidated damages. I do not think, therefore, that they can be given here. I do not say that under no circumstances whatever could such damages carry interest. Cases may possibly arise in which though the claim is unliquidated, the amount payable might have been ascertainable upon an inquiry which it was reasonable the debtor should have made. Such cases should they

occur, may be left open. But the present matter stands in a different position. It was not possible for the defendant to know or ascertain what damage its breach of contract had caused, and it cannot therefore on the principles of our law be held liable for interest prior to judgement upon the amount of the damage."

[12] In the result, I make the following order:

1. Judgement is granted in favour of the plaintiff for E65,000-00 for General damages and E6800-00 in respect of past and estimated future medical and hospital expenses.
2. The defendants are ordered to pay interest on the sum of E71 800-00 at the rate of 9% per annum with effect from the 30th day of August 2006, (in the hope that this judgement would have been brought to the attention of the defendants then).
3. The defendants are ordered to pay the costs of suit.

MAMBA AJ