

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

CASE NO: 15/12174

In the matter between:

RAMATHAREE PATHER

Plaintiff

And

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

Defendant

SPECIAL PLEA – NON COMPLIANCE

1.

The Plaintiff's claim is a civil action in terms of the National Health Act read together with State Liability Act 20 of 1957 as amended.

2.

The Plaintiff's cause of action is for damages arising out of the Plaintiff's admission at the Helen Joseph Hospital In November 2012 and the MEC of Health (Gauteng) is cited as the Defendant.

3.

Section 3 of the Institution of Legal Proceedings Against Certain Organs of State Act No.40 of 2002 provides:-

1. No legal proceedings for the recovery of a debt may be instituted against an Organ of State unless:-
 - (a) the creditor has given the Organ of State question notice in writing of his or her intention to institute the legal proceedings in question; or
 - (b) the Organ of State in question has consented in writing to the institution of that legal proceedings:-
 - (i) Without such notices; or
 - (ii) Upon receipt of a notice which does not comply with all the requirements set out in the sub-section 2.

2. A notice must:-
 - (a) within six (6) months from the date on which the debt became due, be served on the Organ of State in accordance with Section 4(1); and:-
 - (b) briefly set out:-
 - (i) the facts giving rise to the debt; and
 - (ii) such particulars of such debt as are within the knowledge of the creditor.

4.

The Plaintiff is obliged in terms of Section 3(2)(a) of the aforesaid Act, Act 40 of 2002, to give a written notice of his intention to institute legal proceedings in question against the Defendant within six (6) months from the date on which the debt became due.

5.

The Defendant is not in receipt of the aforesaid notice and there is no proof provided that it was ever served on the Defendant or its appointed attorneys.

6.

By virtue of the facts pleaded above, the Plaintiff has not complied with the provisions of the aforesaid Act, Act 40 of 2002, viz Section 3(2)(a) and therefore barred from instituting civil action against the Defendant.

WHEREFORE the Defendant prays for the dismissal of the Plaintiff action with costs, alternatively the Plaintiff's claim be suspended for the period the notice must have been given.

In the event the Defendant Special Plea is not upheld and in that event only Defendant pleads as follows:-

DEFENDANT'S PLEA

1.

AD PARAGRAPH 1 THEREOF

Save to admit that the Plaintiff is **PATHER RAMATHAREE**, the Defendant has no knowledge of the rest of the allegations, cannot admit same and puts the Plaintiff to the proof thereof.

2.

AD PARAGRAPH 2 THEREOF

The content of this paragraph is admitted.

3.

AD PARAGRAPH 3.28 28.1 TO 28.7 THEREOF

- 3.1 The defendant pleads that the legal duty to render health services, medical services, medical treatment and advice to plaintiff arises from the Constitution, the Nursing Act 1978 and Regulations under the Act, The Nursing Act 2005 and Regulations under it and the National Health Act and Regulations.
- 3.2 Under these statutes, the role of the MEC is defined in section 25 referred to above.
- 3.3 The objects of the National Health Act are to regulate National Health and to provide uniformity in respect of health services across the nation by establishing a national health system which provides **in an equitable manner, the population of the republic with the best possible health services that available resources can afford.[our emphasis]**
- 3.4 The objects of the National Health Act are to regulate National Health and to provide uniformity in respect of health services across the nation by establishing a national health system which provides **in an equitable manner, the population of the republic with the best possible health services that available resources can afford.[our emphasis]**
- 3.5 None of the statutes require the state to provide "proper, sufficient and reasonable health services".
- 3.6 The plaintiff has no cause of action based on statute as neither the Constitution nor the National Health Act and or other statute provide for a remedy to a plaintiff in the event of breach of the duties in those statutes.

Alternatively

- 3.7 ***The Defendant further pleads that enforcement of the duty of care as defined by the Plaintiff amounts to a claim for constitutional damages.***
- 3.8 ***It is denied that Plaintiff is entitled to constitutional damages.***

Alternatively

- 3.9 Plaintiff alleges that at all material times and in particular during March 2006, defendant was under a legal duty of care to ensure-
- 3.9.1 The rendering of medical care to Plaintiff with such skill, care and diligence as could be expected of medical practitioners and nursing staff in similar circumstances.
 - 3.9.2 The rendering of medical treatment to Plaintiff with such skill, care and diligence as could be expected of medical practitioners and nursing staff in similar circumstances.
 - 3.9.3 The rendering of medical advice to Plaintiff with such skill, care and diligence as could be expected of medical practitioners and nursing staff in similar circumstances.
 - 3.9.4 That proper, sufficient and reasonable health services are provided to members of the public (particularly those who could not reasonably otherwise afford such services and who were obliged to make use of the services of a public hospital).
- 3.10 It is denied that the defendant owes such a duty of care to Plaintiff.
- 3.11 As already stated no statute guarantees proper, sufficient and reasonable health services to citizens.
- 3.12 The Constitution and other statutes provide for rendering of health services in an equitable manner and subject to availability of resources.
- 3.13 At best the statutes guarantee the best possible health services that available resources can afford.

- 3.14 No statute obliges the state to provide proper, sufficient and reasonable health services to members of the public.
- 3.15 The health professionals, who have not been joined in these proceedings, owe plaintiff a duty of care whose content is to ensure that they do not cause harm to the plaintiff through their negligent conduct.
- 3.16 No health professional owes a duty of care to render medical, care as defined in the Act with skill, care and diligence. No statute requires professionals to give advice with skill, care and diligence.

Alternatively

- 3.17 According to common law, what the plaintiff defines as the duty of care is the standard of care required of health professionals and not the duty of care owed to Plaintiff;
- 3.18 *According to common law, health professionals owe a duty (positive duty) not to harm a patient;*
- 3.19 The test to determine whether a duty of care was breached is objective. In determining this, the court will take into account the training and experience of the health professionals concerned as well as the particular circumstances of the case;
- 3.20 This test is consistent with the provisions of the Constitution which required considering available resources. This is yet another indication that the common law has been overtaken by statute;
- 3.21 On the face of the Particulars of claim, the plaintiff seeks to establish liability based on omissions;
- 3.22 The defendant pleads that mere omission does not, under the LexAquila, constitute culpa (there is no liability for a mere omission);
- 3.23 Under the common law as it stands, an omission can be regarded as wrongful where the circumstances of the case are such that the omission not only evokes moral indignation, but also the legal convictions of the community require that the omission be regarded as

- wrongful and that the loss suffered be compensated by the person who failed to act positively;
- 3.24 The common law should be applied having regard to the circumstances of the health care and legislation and /or Constitutional requirements;
- 3.25 Having regard to the constitutional and statutory requirements, while omissions may evoke moral indignation, the legal convictions of society cannot require that the loss so suffered should be compensated by the state; The state already statutorily bound to provide free medical treatment to all who are poor.
- 3.26 Any such compensation depletes the funds for health in favour of individual victims and undermines the principle of solidarity and equitability as well as the ability of the state to build a sustainable health system capable of providing health care to all especially the poor;
- 3.27 Because the Constitution makes compulsory for the state institutions not to refuse anyone the right to be admitted to hospitals, the plaintiff will always retain this right even after the payment of damages;
- 3.28 Furthermore, the introduction of access to medical services to all does not introduce risks which were non- existent;
- 3.29 On the other hand, the concept of progressive realization means:-
- 3.29.1 Making state medical institutions accessible to all without regard to their status
- 3.29.2 The staff (doctors and nurses) suddenly have higher doctor to patient ratio because the number and nurses of doctors is not increased;
- 3.29.3 Although more doctors and nurses are being trained, the ratio of untrained nurse/doctor to experienced doctor/nurse gets worse.
- 3.29.4 consequently, more patients will be attended to by unexperienced personnel;

- 3.29.5 Trained and unexperienced personnel will for some time be available for the patients.
- 3.29.6 This is a phenomenon of the third world;
- 3.29.6.1 This is better than the pre-constitutional situation when these facilities were not accessible at all to the poor;
- 3.29.6.2 That is why constitutional damages are not easily available.
- 3.30 Common Law remedies are not at all available since the common law has been substituted by statute.
- 3.31 Further any agreement entered into by an employee of the state acting within the course scope of his employment should be consistent with the provisions of the Act and the Constitution.
- 3.32 The plaintiff has an onus to prove the contract and the person who entered the contract on behalf of the defendant.
- 3.35 It is not sufficient in terms of Rule 18 of the Uniform Rules of High Court for the Plaintiff to rely on an agreement whose terms are not set out.

4.

AD PARAGRAPHS 4,5,6,7,8,9,10,11,12,13,14,15,16,17,18,19 19.1 to 19.13,20, 21,22,23,24,25,26 & 27 THEREOF

The content of these paragraphs are denied and Plaintiff is put to the proof thereof.

5.

AD PARAGRAPH 29 29.1,29.2 29.2.1 TO 29.2.2, 29.3,29.4 & 29.5 THEREOF

5.1 The Defendants denies being indebted to the Plaintiff in the said amounts or any part thereof.

5.2 The content of these paragraphs are denied and Plaintiff is put to the proof thereof.

6.

AD PARAGRAPH 30 & 31 THEREOF

The Defendant denies being indebted to the Plaintiff in the said amounts or any part thereof and puts the Plaintiff to the proof thereof.

7.

AD PARAGRAPH 32 32.1,32.2 & 32.3 THEREOF

As pleaded in the special plea above.

WHEREFORE the Defendant prays that the Honourable Court dismiss the Plaintiff's claim with costs.

DATED at JOHANNESBURG on this the ^{06TH} day of July 2015.



**THE STATE ATTORNEY
DEFENDANT'S ATTORNEY
N. ZIBANI
[Attorney with rights
of appearance in terms of Section 4(2)
of the Rights of Appearance in Court**

Act 1995 (Act No. 62 of 1995)]
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TO: THE REGISTRAR OF THE ABOVE
HONOURABLE COURT
JOHANNESBURG

AND TO: KEKANA HLATHSWAYO RADEBE INC
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Copy hereof received on this
the..... day of 2015

For: PLAINTIFF'S ATTORNEY

K. Hlatshwayo Radebe Inc.
Received Without Prejudice

08-07-2015

Signature: 