REPORTABLE (26)

Judgment No. S.C. 38/2000
Civil Appeal No. 206/99

SPIWE THEBE v M. MBEWE t/a CHECKPOINT LABORATORY SERVICES

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & MUCHECHETERE JA
HARARE, MAY 9 & 22, 2000

L Mazonde, for the appellant

J Dondo, for the respondent

MUCHECHETERE JA: The appellant ("Thebe") issued summons in the High Court against the respondent ("Mbewe") for damages in the sum of $150 000.00 together with costs of suit. This was in relation to an HIV/AIDS test carried out at Mbewe's laboratory (Checkpoint Laboratory Services). The court *a quo* found Mbewe liable and awarded Thebe damages in the sum of $2 000 and costs on the magistrate's court scale. Thebe appeals against the quantum of damages awarded and the order of costs. It was submitted on her behalf that she should have at least been awarded damages in the region of $30 000.00 and that the costs should have been on the High Court scale.

It was, on the other hand, submitted on behalf of Mbewe that the court *a quo*'s award and order of costs was proper in the circumstances. Mbewe also counter-appealed against the court's finding of liability on the matter. He submitted that the court erred in finding that there was negligence on his part.

The counter-appeal is also opposed by Thebe.

The facts in the matter are that Thebe was sent to Mbewe's laboratory for the purposes of an HIV/AIDS test to be carried out upon her by her insurance company (First Mutual Life Assurance Company ("the insurance company") because her insurance policy for over $100 000.00 had lapsed. On 22 October 1997 a blood sample was taken by an employee of Mbewe, one Steve Chibukwe ("Chibukwe"). The insurance company was given the results on 27 October 1997 which were to the result that Thebe was positive.

The results were communicated to Thebe by the insurance company on 28 October 1997. She went to her own doctor about the matter on the same day and he referred her to Clinical Laboratories for a further blood test to be carried out upon her. This was done and on 29 October 1997 the blood test report she was given indicated:

> "BLOOD
> TEST FOR HIV:
>
> WELLCOZYNE (MUREX) : Non-reactive
> ROCHE : Non-reactive."

Subsequently that same blood sample was used to carry out what is known as a western blot test and the result, which was communicated to Thebe on 17 November 1997, was that there were no bands seen. All the above indicated that the results for the blood test were negative.

On 27 November 1997 Thebe was once again asked by the insurance company to undergo a further HIV/AIDS test. This time she was sent to Cimas Medical Laboratories. A test was carried out on the same day and the report released on the same day. The Elisa test which was carried out indicated:

> "ELISA TEST FOR HIV
> GENELAVIA MIXT : NEGATIVE
> BIOTEST : NEGATIVE."

This therefore indicated that the blood test was also negative. This information was communicated to the insurance company in December 1997.

Thebe alleged that Mbewe was negligent in that he did not attach to the results of his tests a letter to the insurance company to the effect that Thebe should undergo a further test. In her view, this omission had the effect of leaving his result as conclusive. She further alleged that Mbewe conducted his test negligently, or alternatively that he, an experienced doctor, left the conducting of the tests to his inexperienced assistant who did not perform the tests properly. She also alleged that as a result of the negligence she suffered damages in the form of mental trauma and *contumelia* which resulted in her seeking counselling. She quantified her damages as being in the sum of $150 000.00.

Mbewe denied the allegation of negligence. In his plea he stated that the person who carried out the tests was a qualified technician, Chibukwe. He himself never had any contact with Thebe. He also stated that his technician performed two different Elisa tests on the blood sample he got on the day in question and that they came out with a positive result. He further stated that after receiving

the letter of demand he carried out a western blot test on the blood sample which remained from the first test and that this also came out positive. He also stated that he did not know how Thebe received the results but that the results were sent to a Dr Shabudin of the insurance company marked confidential and not to be disclosed to the client (Thebe).

Mbewe denied that Thebe suffered damages as alleged and challenged her to prove her damages.

Thebe's evidence was to the effect that she initially went for an HIV/AIDS test at the request of Dr Shabudin of the insurance company on 23 January 1997. This was carried out by Cimas Medical Laboratories and the result on the same date was negative. The result read:

> "ELISA TEST FOR HIV
> GENELAVIA MIXT : NEGATIVE
> BIOTEST : NEGATIVE."

However, when her insurance policy lapsed she was, as stated above, sent for another test by Dr Shabudin, this time to Mbewe's laboratory. After the test she telephoned Mbewe's laboratory to find out the results of the test and was told that they had been sent to the insurance company. She then contacted Dr Shabudin and when she later saw him he told her that the results indicated that she was HIV positive. He was apologetic about it but stated that she should not take the results seriously.

Thebe goes on to state that as soon as she was told the said information she felt dizzy and was speechless. According to her, it came to her as if someone had

given her a death sentence. She became suicidal. When she later tried to explain the situation to her friends they distanced themselves from her. Some two days later she went to see her doctor, Dr Browne, who sent her to Clinical Laboratories. As indicated above, they came out with the negative results. And, as also indicated above, a further HIV/AIDS test was carried out by Cimas Medical Laboratories at the request of Dr Shabbudin on 27 November 1997 and it again came out negative.

Thebe's evidence was not shaken under cross-examination. It, however, became clear that the test, a western blot test, in Mbewe's laboratory were carried out by an employee of Mbewe whose name she did not know (Chibukwe) and not Mbewe.

One Professor Peter Robert Marson ("Professor Marson") gave evidence on behalf of Thebe. He is a professor at the University of Zimbabwe involved in laboratory testing. His evidence was to the effect that he has since the middle of the 1980's been involved in HIV research which entailed dealing with three large tests, monitoring some 15 000 to 16 000 people. He was aware of the tests carried out on Thebe. According to him, the test by Mbewe's laboratory merely disclosed the result of the test but did not indicate what the tests conducted were. In this it differed from the three tests carried out on 23 January 1997, 28 October 1997 and 27 November 1997. It was put to him that Mbewe's evidence would be to the effect that an Elisa test was carried out in Mbewe's laboratory and that at a later date a western blot test was carried out on the same sample of blood and that both tests produced a positive result. His comment on that was that it was not possible that the blood status of a person could change or alter in the manner reflected between

Mbewe's test and the two subsequent tests. In his view, there could be no change in the status from HIV positive to negative even with the use of modern medicine.

On what possible explanation there could be for the different results, Professor Marson's response was that there could be errors in the initial collection, labelling and interpretation by the reader. Professor Marson thereafter explained to the court how the HIV/AIDS tests were carried out and that they all had to be done in accordance with the guidelines issued by the World Health Organisation as well as the National Aids Co-ordinating Project ("the guidelines"). He also stated that on all blood samples for HIV/AIDS tests two samples must be tested. It was also Professor Marson's evidence that the western blot test was an exceptional test because it was very expensive and would probably be done with a fresh sample of blood. On his opinion about the test carried out at Mbewe's laboratory and the two subsequent ones, his reply was that Mbewe's test was not consistent with the other two tests and that this indicated to him that there was an error in labelling in Mbewe's laboratory's tests.

Under cross-examination Professor Marson admitted that even with diligence in the conduct of the above tests errors do occur but indicated that this could, however, be avoided. He also indicated that he did not carry out HIV/AIDS tests for insurance companies. He also stated that normally if an HIV/AIDS test's result in a laboratory is positive, the laboratory, in the case of a low risk person, should ask for another blood sample from which another test could be carried out again. He stated that that was also in line with the guidelines. When it was put to him that Mbewe would say that the guidelines were not to that effect

Professor Marson insisted that they were. Professor Marson was reluctant to state that Mbewe's laboratory was incompetent in this matter because of the evidence that a later test by the same laboratory on the same blood sample again produced a positive result. In his view, this indicated that there was an error in the collection and labelling and not in the actual test carried out.

Professor Marson's evidence was also not really shaken under cross-examination.

Mbewe gave evidence for the defence. He testified that Thebe's blood sample was taken and labelled by Chibukwe. He is a qualified laboratory technician with two or three years' experience. Chibukwe thereafter carried out the Elisa tests. These tests gave a positive result. He then informed the insurance company of the results. Thebe later telephoned for the results but was told that the insurance company would get the results.

On what procedure was used when the person to be tested was a low risk person his reply was that his understanding of the guidelines was to the effect that the person who tested positive would be sent to the doctor or technician concerned, that is, the person who sent her for the tests, and if the person sending was not satisfied the person tested would then be sent back for another blood test. He could not recall when he last read the guidelines.

Mbewe also stated that, after receiving a letter of demand, he carried out another test from the remainder of Thebe's blood sample and that that again tested

positive. On the difference between his results and those two subsequent tests carried out by two laboratories his reply was that he was suspicious as to how blood was extracted in connection with the subsequent tests. He denied that there was negligence in the manner the test was carried out in his laboratory.

Under cross-examination Mbewe confirmed that he did not extract the blood sample from Thebe. He, however, agreed that he owed a duty of care to make sure that things were done properly in the testing of Thebe's blood samples. He stated that he would be calling Chibukwe, who carried out the test, to give evidence in the matter. Mbewe also indicated that he disagreed with Professor Marson's evidence on the guidelines and on the question as to whether there was an error in the manner the test was carried out – collection and labelling of the blood.

Mbewe denied that Thebe suffered the trauma she alleged on receiving the test results from Dr Shabbudin. This, according to Mbewe, is because Thebe went for further blood tests and that she could have also come to him for further blood tests.

Mbewe was evasive on whether he would call evidence to indicate that collection of blood samples done in his laboratory was better than that which was done in the other two tests. In the end he did not call any other evidence on the matter.

The learned trial judge preferred the evidence of Professor Marson on the testing of blood samples to that of Mbewe. In particular he accepted that there

must have been an error in labelling at Mbewe's laboratory. He also was of the view, and also in agreement with Professor Marson, that a reasonable professional technician in the position of Mbewe or Chibukwe, when dealing with a low risk person such as Thebe, should, as indicated in the guidelines, have asked Thebe to provide another blood sample so that another test could be carried out once the first test proved positive.

In the result, the learned trial judge found Mbewe negligent on the ground that before sending out the results of Thebe's test to the insurance company he should have first asked her for another blood sample and carried out another test. This, according to the learned trial judge, was because Thebe was a low risk person.

On quantum, the learned trial judge was of the view that the amount being sought by Thebe was exorbitant. His view was that the trauma Thebe suffered could not be other than transitory. This was because, firstly, she was at the time the positive result was communicated to her aware that in January 1997 a similar test resulted in a negative result. Under the circumstances, this should have caused her to doubt the result of Mbewe's laboratory's test. Secondly, some two days later another test resulted in a negative result.

I will deal firstly with the issue of liability. In this connection Mr *Dondo*, for Mbewe, firstly submitted that the learned trial judge erred in finding that Mbewe was negligent in that he failed to treat Thebe as a low risk person, in which case he should not have sent her results to the insurance company before conducting another test with a fresh sample of blood from her in accordance with the

guidelines. Mr *Dondo* argued firstly that the guidelines – which were not produced in either court – did not apply to the situation he was in. Thebe was not his client or patient. She was the insurance company's client. His client was the insurance company and he owed a duty of care to it. His instructions from his client were simply to carry out the test on Thebe and send the results to it. There were no instructions to carry out a second test in the event the results were positive. This is evidenced by the insurance company's form which requested the test. The situation might have been different if Thebe had been his client or patient. I agree with Mr *Dondo's* argument on this. He had no instructions to carry out another test in the event the result was positive. In my view, the obligation to have the second test carried out is on the insurance company who eventually did just that.

Mr *Dondo's* second argument was that even if it could be said that there was an obligation to carry out a second test in accordance with the guidelines this would only come into play on knowledge that Thebe was a low risk person. He argued that in this case there was no way he would have known that, because Thebe was a person simply sent to him by the insurance company. He carried out tests on all persons who were referred to him by insurance companies and other persons. There was no way he could judge as to whether they were high or low risk persons. He would not know their social or medical histories. I again agree with Mr *Dondo's* argument and disagree with Mr *Mazonde's* counter-argument that Mbewe ought to have been aware that Thebe was a low risk person because she had been sent to him by an insurance company and because the insurance policy she wanted renewed was over $100 000.00. It does not follow that persons in that category are low risk.

As a result, I agree that Mbewe should not have been found negligent because of sending the results to the insurance company before conducting a second test on Thebe.

However, the second ground of negligence generally found by the court *a quo* or eventually adopted in this Court by Mr *Mazonde*, which was to the effect that Mbewe was negligent in the collecting and labelling of Thebe's blood sample, was, in my view, proper. In this connection, the learned trial judge relied on the evidence of Professor Marson and the two subsequent tests.

Mbewe's insistence in his assertion that his tests were correct, as evidenced by the second test he later carried out on the remainder of the same blood sample, reinforces, when account is taken of the two subsequent results, the probability that there must have been an error in the collection and labelling of the blood. Mbewe's account was also dented by his failure to call Chibukwe to give evidence. He would have told the court the circumstances surrounding the collection and labelling of Thebe's blood sample, the testing of the sample and the reading of the result. An allegation by Mbewe that the collection of blood samples in the two subsequent tests must have been suspicious or faulty was never persisted in and no evidence was proffered to substantiate it. Further, the two laboratories who carried out the tests independently of each other had good reputations and appear to be used by many medical institutions in the country. In any event, the probabilities favour the finding that there must have been an error in Mbewe's laboratory and that in the circumstances there was liability.

Mr *Dondo* submitted that an error of the nature alleged in this case does not amount to negligence to be visited with damages because it had not been proved that Mbewe's laboratory's actions or inaction fell below the standard expected of a professional in the same position. He cited Jackson and Powell's *Professional Negligence* 2 ed at p 291 6.11 where the learned authors say:

> "Whether he is sued in contract or tort, the medical practitioner is not obliged to achieve success in every case that he treats. His duty, like that of other professional men, is to exercise reasonable skill and care …".

And in *Hauck v Hooper* (1835) 7 C & P 81 TINDALL CJ said:

> "A surgeon does not become an actual insurer; he is only bound to display sufficient skill and knowledge in his profession. If from some accident, or some variation in the frame of a particular individual, an injury happens, it is not a fault of the medical man." (my emphasis)

And further DENNING LJ said, directing the jury in *Hatcher v Black*, *The Times*, July 2, 1954, as part of the summing up (including the passage quoted), and it is also set out by LORD DENNING in *The Discipline of Law* (Butterworths 1979) p 242-244 as follows:

> "You must not, therefore, find him negligent simply because something happens to go wrong; if, for instance, one of the risks inherent in an operation actually takes place or some complication ensues which lessens or takes away the benefits that were hoped for, or if in a matter of opinion he makes an error of judgment. You should only find him guilty of negligence when he falls short of a standard of a reasonably skilled medical man, in short, when he is deserving of censure – for negligence in a medical man is deserving of censure." (my emphasis)

In the first instance, Chibukwe was not called to give evidence and it is therefore not known what diligence he applied in extracting and labelling Thebe's blood sample and the testing itself. Secondly, the error alleged is, in my view, a very

basic procedure which a professional technician is expected to follow, and cannot be said to be an "inherent risk" in an exercise of this nature. It also cannot be said to have consisted of "an error of judgment" or of some "accident or variation in the frame of a particular individual" or that some complication ensued in the exercise. In my view, the cases cited by Mr *Dondo* do not apply in the present situation. Here, the allegation is that Mbewe's laboratory erred in the most fundamental aspect of blood testing – collecting and labelling the blood sample. A professional technician, in my view, is expected to comply with that. In failing to do that he failed to exercise the due skill and care required of him and he deserves censure.

I therefore consider that the finding that Mbewe was negligent in the matter was proper.

On quantum I am again of the view that the learned trial judge's finding is unassailable. In the first place, I agree with Mr *Dondo's* submission that the assessment of damages is left to the discretion of the trial judge and that an appeal court will be reluctant to interfere unless there is a misdirection found. There is no misdirection alleged here. Secondly, I agree that the cases cited by both counsel in the matter are not of much assistance. This is virgin territory. Thirdly, I agree with the view that the trauma Thebe must have suffered was transitory as reasoned by the learned trial judge. Further, no evidence was adduced to indicate that Thebe went for counselling or that she sought medical or psychiatric attention for her condition. There was also no evidence to substantiate the allegation that her family and friends shunned her after she informed them of the results of the first test. Surely she would have also informed them of the results of the much earlier case to the contrary and the

fact that she was undergoing further tests to check the correctness of Mbewe's laboratory's finding.

In the circumstances, I am not inclined to interfere with the award by the learned trial judge.

On the question of costs in the court *a quo*, I am, however, of the view that the learned trial judge should have awarded Thebe costs on the High Court scale. This is because, in my view, this is virgin territory. Matters concerning HIV/AIDS are high profile issues which are presently of the highest concern to the country and indeed the world. It was therefore incumbent upon a superior court, such as the High Court, to make the first pronouncement on the matter. Thebe should not therefore have been punished for bringing the matter in the High Court even though I agree that her claim for $150 000.00 was exorbitant.

In the result, both the appeal and cross-appeal are dismissed with costs. The order of the court *a quo* is, however, amended by the deletion of the words "at the Magistrate's Court Scale".

McNALLY JA: I agree.

EBRAHIM JA: I agree.

Manase & Manase, appellant's legal practitioners

Chinamasa, Muchimu & Chinogwenya, respondent's legal practitioners