

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

CASE NO: 1429/2010
Date heard: 6 September 2016
Delivered: 20 September 2016

NOT REPORTABLE

In the matter between

CASPER LÖTTER

Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL,
DEPARTMENT OF HEALTH, EASTERN CAPE

First Respondent

THE MEDICAL SUPERINTENDENT,
LIVINGSTONE HOSPITAL, PORT ELIZABETH

Second Respondent

JUDGMENT

GOOSEN, J.

1. The applicant seeks leave to appeal against this court's judgment delivered on 2 February 2016 in which the applicant's claim against the respondents was dismissed with costs. The notice of application sets out a number of grounds upon which leave to appeal is sought. They essentially fall into five categories, namely:
 - a) That this court erred by "going beyond a Rule 37 agreement" that the exclusive issue of informed consent was to be determined.

- b) That the court erred in ruling that the respondents do not bear the onus to establish that informed consent was not obtained.
 - c) That the court erred in finding that the balance of probabilities favours the respondents' version;
 - d) That the court erred in making a finding of credibility against the applicant; and
 - e) That the court misdirected itself in finding that negligence had not been proved.
2. In order to succeed in an application for leave to appeal the applicant must, with reference to the trial court's findings of fact and/or its application of the law to those facts, establish that there is a reasonable prospect that an appeal court may come to a different conclusion and accordingly that the applicant enjoys prospects of success on appeal.
3. In this application the applicant does not take issue with the court's exposition of the applicable legal principles to be applied nor to the application of those legal principles to the facts. This lack of challenge is significant, insofar as it bears upon some of the grounds upon which leave to appeal is sought.
4. The parties conducted the trial before the trial court on the basis that all of the applicant's previously alleged grounds of negligence which were set out in the particulars of claim, were abandoned, with one exception. The exception related to the alleged failure by the respondents to inform the applicant of possible complications which may arise from the performance of the surgical procedure so as to enable him to give his informed consent to the operation. On the pleadings, therefore, and at trial, the issue of informed consent was integrally bound up with an alleged breach of a duty to inform the applicant.

5. In dealing with the distinct elements of the applicant's delictual claim i.e. unlawfulness and negligence, it was held in favour of the applicant that whereas the issue of consent relates to the unlawfulness element, the negligence element may be established on the basis of the negligent breach of a duty to inform or warn a patient of inherent risk, even in the absence of alleged negligent conduct in the execution of the surgical procedure. It was on this basis that the respondents' argument that the case must fail by reason of the applicant's abandonment of the grounds of negligence, was rejected.
6. In the light of this finding, which is not challenged, the reference to "transcending a Rule 37 agreement" is nonsensical. The abandonment of the pleaded grounds of negligence did not constitute an agreement that negligence was not in issue. The very retention of paragraph 11.12 of the particulars of claim kept the issue alive between the parties and required determination by the court.
7. The acceptance, by the respondents, of the duty to begin leading evidence also did not constitute an acceptance of the onus in relation to the disputed issues. The onus remained upon the applicant to prove that the respondents' conduct was both unlawful and negligent, a proposition accepted by the applicant in argument before this court at the re-hearing of the matter. The question of where the onus lay was in any event not decisive in the matter and there is no suggestion, made by the applicant, that he enjoys any prospect of success on the basis of this court's treatment of the issue.
8. The applicant's central challenge to the judgment is founded upon this court's treatment of the evidence tendered by the parties and the finding that the

probabilities favour the version of the respondent regarding both the ambit of the warnings conveyed to the applicant and the nature of the consent furnished by him.

9. It was submitted by the applicant that this court had erred in its finding of credibility against him. The submission was that this court could not make such findings since it was in no better position than an appeal court having to determine the matter upon a record of evidence. That is of course indeed so. Importantly the applicant could point to no specific misdirection or error upon which an appeal court would come to a different conclusion in relation to the assessment of credibility of the applicant. In any event, credibility is of course not solely a function of observation of the witness to assess demeanour. Demeanour, it should be pointed out, has its own well recognised limitations as a touchstone of credibility. This court was required by the parties to consider the evidence as tendered, and to decide the central factual issue in dispute between the parties. It did not have a prior finding relating to credibility upon which to base its assessment. It was required to consider the evidence as presented by the witnesses and to evaluate the evidence of each of the witnesses in the context of the evidence as a whole. It was required to consider issues of credibility and reliability in relation to the disputed factual issues.
10. In the circumstances the evidence of the parties took the form of a mutually destructive version. In assessing the versions well established legal principles were applied. It was not argued that the court had erred in doing so.
11. The reasoning processes which was applied is set out in detail in the judgment. Apart from a general assertion of alleged error, the applicant did not point to specific misdirections in relation to the treatment of the evidence. In argument the applicant made much of what he described as efforts by counsel for the

respondents having “introduced falsehoods” into the evidence. Such *ad hominem* attacks were a feature of the argument at the rehearing of the matter and the argument in this application. They are entirely without merit and to his credit respondent’s counsel, rightly, did not respond to them.

12. In relation to the court’s treatment of the credibility of the applicant as a witness, all that was said in argument before me was that this court was wrong in its treatment of the evidence. I need not of course be persuaded that I am wrong. I need only be satisfied that another court may reasonably come to a different conclusion. For the reasons that follow, I am not so satisfied.

13. In evaluating the plaintiff’s evidence it was necessary to consider the assertion by him that he was not warned of any possible consequences of the repair surgery and that had he been informed he would not have consented, in the light of the evidence as a whole. Relevant also was the manner in which the applicant had formulated his claim and how he dealt with this in his evidence, in particular under cross-examination. It is not necessary to set out again in this judgment the evaluation of the applicant’s evidence. During argument before me the applicant advanced no specific criticism, either of the reasoning adopted or the consequence. Instead the applicant contended that his abandonment of reliance upon the alleged *sequelae* of the procedure was based on the difficulty of proving his claims. He in no way addressed the fact that his particulars of claim contained assertions of fact which were demonstrated at trial to be false. This demonstration, which is apparent from the record of the proceedings, was the foundation for this court’s assessment and adverse finding in relation to the applicant’s credibility. That adverse finding bears upon the reliability of the applicant’s evidence in relation to the warnings and

