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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: 28412/2005

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

NOT REVISED

28.08.23

In the matter between:

B.J.DJ

Plaintiff

and

**MEMBER OF THE EXECUTIVE COUNCIL OF
HEALTH, LIMPOPO**

Defendant

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 28 August 2023.

Summary: Delictual claim- the surgeon employed by the provincial department of health performed a hysterectomy procedure on the plaintiff- the plaintiff alleging that the surgeon acted negligently in suturing through her bladder when suturing the vaginal vault.

The defendant conceded that the injury suffered by the plaintiff was due to the suturing of the bladder but contended that it was accidental.

Found that although the plaintiff suffered an injury as a result of the suturing of the

bladder, it cannot, however, in the circumstances, be said that the surgeon's performance of the procedure was below the standard of a competent practitioner in his field. In the circumstances of the matter the court declined to apply the principle that costs follow the results. The plaintiff's claim dismissed with no order as to costs.

JUDGEMENT

Molahlehi J

Introduction

[1] The plaintiff, Ms DJ, instituted action proceedings for damages against the defendant, the Member of the Executive Committee for Health, Limpopo (MEC). The claim arose from the alleged negligent conduct on the part of one of the surgeons employed by the defendant, Dr Mnisi, in performing a total abdominal hysterectomy on 22 August 2002 at the Mankweng Hospital, Limpopo.

[2] Before the hearing of this matter, the parties agreed that the liability issue be separated from that of the quantum of damages. The agreement was made an order of court, and thus the present matter involves only the determination of the defendant's liability.

Background facts

[3] It is common cause that the plaintiff underwent a surgical procedure at Mankweng Hospital, performed by Dr Mnisi.

[4] As alluded to above the procedure, which involved a total abdominal hysterectomy. Before the operation, the plaintiff regularly attended the Petersburg Provincial Hospital. She was transferred to the Mankweng Hospital on 21 August 2022. The surgery was performed by Dr Mnisi under the supervision of Dr Kant.

[5] The postoperative management was performed by Dr Soni, who recorded the postoperative evaluation, which took place over three days; 23, 25 and 26 August

2002. Dr Soni confirmed in his affidavit, which was admitted by agreement in this court, that "no abnormality was at any stage recorded postoperatively".

[6] The plaintiff was discharged from the hospital on 26 August 2002 but was readmitted at Petersburg Hospital three days thereafter on 30 August 2002. She complained of vaginal bleeding.

[7] In September 2002, Dr Olwagen performed closure of the fistula. The problem of urine leakage from the vagina continued even after this procedure according to the plaintiff.

[8] Dr Olwagen did a further Vesicovaginal fistula (VVF)¹ repair in January 2003. The plaintiff was discharged on 7 February 2003 after the postoperative management revealed that there were no leaks detected.

The case of the plaintiff

[9] The plaintiff testified on 16 November 2022, more than 20 years after the incident, how soon after the operation, urine was leaking from her vagina. She was adamant that she complained to the doctor about the problem but was discharged without attending to the problem.

[10] The plaintiff was not aware that VVF was done on her. It was only during cross-examination that she became aware that Dr Olwagen did successfully repair the damage and thereafter expressed in jubilation her appreciation.

[11] The plaintiff suggested in her evidence-in-chief that she did not sign a consent form for the operation. She, however, did not persist with this point in cross-examination.

¹ Vesicovaginal fistula is described in medicalabbr.com as an abnormal opening between the bladder and the vagina that causes continuous urinary leakage from the vagina.

[12] The second witness to testify on behalf of the plaintiff was Dr Sevenster, an expert gynaecologist. In his testimony, he referred to his report of 18 March 2022 and the joint minutes he signed with Dr Koll, the defendant's expert witness.

[13] In his evidence, Dr Sevenster contended that Dr Mnisi was negligent because he failed to take into account the risk factors associated with the plaintiff's condition, namely the obesity of the plaintiff and her enlarged uterus. The other criticism he made relates to the use of a Pfannenstiel incision by Dr Mnisi in performing the surgery. He contended that this was another risk factor because there was insufficient visibility, and, further, that this should have been done by an up-and-down incision.

[14] In the joint minute, Dr Sevenster agreed with Dr Koll on the following aspects:

- "1. The patient was 45 years of age in 2002 and presented with menorrhagia (excessive bleeding during menstruation) due to a multi-fibroid uterus, the size of a 16 weeks' pregnancy.*
- 2. The decision by the doctor to perform a total abdominal hysterectomy and bilateral salpingo-oophorectomy (TAH and BSO) was correct.*
- 3. The procedure was done under general anaesthetic on 22 August 2002.*
- 4. Despite the fact that there was a 16 weeks size fibroid uterus and the patient was obese, it appears that no problems were encountered during the procedure.*
- 5. There is factual record that the bladder was dissected and reflected down from the uterus.*
- 6. There was no problem with the haemostasis (control of bleeding).*
- 7. The bladder catheter was removed on Day 1 after the procedure.*
- 8. According to the hospital records, there were no problems recorded during the post-operative period in the hospital (23 to 26 August). No leakage of urine was documented.*
- 9. The patient was discharged from the hospital on 26 August 2002.*
- 10. A few weeks later the patient presented with urine leaking from the vagina. She was evaluated by a Urologist who found a vesico-vaginal*

fistula surrounded by a Vicryl suture. This is typically in the case of a suture in the bladder.

11. *The patient needed two procedures by the Urologist to repair the vesicovaginal fistula."*

The defendant's case

[15] The first witness for the case of the defendant was Dr M. Mnisi, the surgeon who, as indicated earlier, performed the surgery on the plaintiff. He could not personally recall the details of the matter. He conceded that he did the operation based on the medical note he wrote immediately after completing the procedure.

[16] The plaintiff did not dispute his qualification. After obtaining his primary medical qualification, he did this internship and community service at the Klerksdorp/Tshepang centre for two and half years. He gained experience in performing hysterectomy on the operations he performed on Fridays whilst serving at Klerksdorp and proceeded to train as a specialist at the Mankweng hospital.

[17] As indicated earlier, Dr Mnisi performed the procedure on the plaintiff in the presence of Dr Jackson, who had performed the risk assessment of the plaintiff before authorising Dr Mnisi to perform the operation.

[18] Dr Minisi testified and explained the procedure of performing the surgery. According to him, he did not encounter any complications in the process. He used a vicryl of about 90 cm in length and 0,004 cm in diameter, which is exceptionally thin to suture the vaginal vault. Before suturing the vaginal vault, he removed the cervix, ovaries, tubes and uterus to create space for the suturing. After being satisfied that there was no blood, he washed the abdomen with saline and proceeded to suture the abdomen in layers. He explained that despite reflecting the bladder, it remains close to where the vaginal vault was to be sutured. He was never concerned about perforating the bladder as there was no sign of urine leaking when he washed the abdomen.

[19] During cross-examination, Dr Mnisi testified that he experienced similar complications on two occasions previously.

[20] The second witness of the defendant was Dr Koll, an expert with extensive experience in the area of gynaecology. His evidence is based on his report of 20 April 2022. As indicated earlier, he signed the joint minute with Dr Sevenster, indicating the areas of disagreement. His opinion concerning the issue of reflecting off the bladder, based on the post operation notes of Dr Mnisi, is that:

"the surgeon indicated in the operative notes that the bladder was reflected. The surgeon thus believed that the bladder was out of the way and inadvertently placed a stitch through the bladder. This is a complication of surgery that can happen to any surgeon and it does not indicate negligence. I am of the opinion that the intra-operative complications can and do occur and this fact should be considered in determining negligence. The only way for any surgeon to avoid all complications is to stop operating."

[21] He testified further that he had, during his career, encountered similar complications of suturing through the bladder. He also testified that it is generally accepted that complications to the uretic system in a procedure similar to the current is as high as 4%. He testified during cross-examination that the risk associated with gynaecological procedures such as uretic system and reported damaged bladder is between 2.4. and 2.5 per cent. Based on these considerations, he contended that the complications, such as the present, are recognised and accepted in the circumstances. He claimed in this regard that the complication in the case of the plaintiff could not be said to be due to substandard on the part of Dr Mnisi.

[22] Dr Sevenster contended that Dr Mnisi acted negligently in that in conducting the procedure, he failed to recognise the risk of obesity and the enlarged uterus of the plaintiff.

[23] In the heads of argument, it is contended on behalf of the plaintiff that the inference of negligence should be inferred from the injury to the bladder during the suturing of the vaginal vault. The other criticism against Dr Mnisi was that he needed

to be more experienced before performing this operation and that he needed to act as a reasonable practitioner. In this regard, he is criticised for allegedly failing to recognise that the procedure was complicated and more difficult due to the risks referred to earlier.

[24] There is no dispute that the complication that developed after the operation was due to a vicryl,² which has been described as being 90 cm in length and 0,00 4 cm in diameter, which was placed in the bladder during the suturing.

[25] It follows therefore, that the causality test for determining factual causation which is often referred to as either “but for” or “*sine qua non*” as set out in the *Minister of Police v Skosana*³ has been satisfied.

[26] The question that needs consideration in this judgment relates to the averments made in paragraph 10.2 of the plaintiff’s particulars of claim, namely whether Dr Mnisi was negligent in not performing the total abdominal hysterectomy properly in that there was perforation of the plaintiff’s urinary system during the execution of the operation and the perforation was not detected during the procedure.

[27] The answer to the above question lies in the determination of what a reasonable person would have done in the same circumstances as that of Dr Mnisi, performing the procedure on the plaintiff. The test that is often applied in determining the existence of negligence in a specific case is set out in *Kruger v Coetzee*⁴ as follows:

‘For the purposes of liability culpa arises if—

(a) a reasonable person in the position of the defendant—

² Vicryl is described in <http://en.wikipedia.org/wiki/vicryl> as “a type of suture material that is used to stitch wounds or tissues together. It is made of synthetic polymers that are absorbed by the body over time, so there is no need to remove the stitches later.”

³ 1977 (1) SA 31 (A)

⁴ 1966 (2) SA 428 (A)

- (i) *would have foreseen harm of the general kind that actually occurred;*
 - (ii) *would have foreseen the general kind of causal sequence in which that harm occurred;*
 - (iii) *would have taken steps to guard against it, and*
- (b) *the defendant failed to take those*"⁵

[28] In medical negligence cases, the test for negligence is set out in the following terms in *Goliath v MEC for Health, Eastern Cape*⁶ wherein the court held that:

"The failure of a professional person to adhere to the general level of skill and diligence possessed in exercise at the same time by members of the branch of the profession to which he or she belongs would normally constitute negligence (Van W k v Lewis 1924 AD 438 at 444). A surgeon is in no different position to any other professional person (Lillicra Wassenaar and Partners v Pilkinton Brothers SA Pt Ltd 1985 (1) SA 475 (A) at 488C). It has been pointed out that a 'medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care. 'Mitchell v Dixon 1914 AD 519 at 525). As Scott J put it in Castell v De Greeff 1993 (3) SA 501 (C) at 512A-B, '(t)he test remains always whether the practitioner exercised reasonable skill and care or, in other words, whether or not his conduct fell below the standard of a reasonably competent practitioner in his field' (cited with approval in Buthelezi v Ndaba 2013 (5) SA 437 (SCA) para 15)."

[29] The question of whether a medical practitioner was negligent or not has to be determined, having regard to the circumstances within which the medical treatment or procedure was performed. In this regard, the court has to place itself, as stated in *Van Wyk v Lewis*,⁷ "as nearly as possible in the exact position which the surgeon found himself (or herself) when he (or she) conducted the particular operation." The question of whether a medical practitioner acted with reasonable care or negligently is thus determined on the basis of all the circumstances of the particular case.

⁵ Id at 430 D – F

⁶ 2015 (2) SA 97 (SCA) at paragraph [8].

⁷ 1924 AD 438

[30] In *Castell v De Greef*⁸ the court held that:

*“The test remains always whether the practitioner exercised reasonable skill and care or, in other words, whether or not his conduct fell below the standard of a reasonably competent practitioner in his field. If the “error” is one which reasonably competent practitioners might have made, it will not amount to negligence.”*⁹

[31] In the present matter, the question of whether Dr Mnisi was negligent turns on the evidence of two opposing expert witnesses, namely Dr Sevenster and Dr Koll. As would happen in most cases involving expert witnesses, the testimony of the two expert witnesses in the present matter is contradictory.

[32] As a general rule, the court is not bound by the evidence of the expert witnesses in its determination of negligence. However, the determination is generally informed by the opinion of expert witnesses. In *Buthelezi v Ndaba*¹⁰ the Court held:

“[14] . . . It is true, of course, as the Court a quo accentuated in its judgment, that the determination of negligence ultimately rests with the Court and not with expert witnesses. Yet that determination is bound to be informed by the opinions of experts in the field which are often in conflict, as has happened in this case. In that event the Court’s determination must depend on an analysis of the cogency of the underlying reasoning which led the experts to their conflicting opinions.”

[33] It is generally accepted that negligence does not arise simply because something went wrong during a medical procedure. In *Buthelezi* the SCA dealt with this principle by quoting with approval what Lord Denning MR in *Hucks v Cole*¹¹ where it was said:

⁸ 1993 (3) SA 501 (C)

⁹ Id at page 512A

¹⁰ 2013 (5) SA 437 (SCA)

¹¹ [1968] 118 NTW LJ4 69

“..., with the best will in the world things sometimes went amiss in surgical operations on medical treatment. A doctor was not to be held negligent simply because something went wrong.”

Evaluation

[34] I agree with the defendant that Dr Sevenster adopted a subjective approach in his assessment of the performance of Dr Mnisi. His testimony focused on the two risk factors associated with the obesity of the plaintiff and the large uterus of the plaintiff. He could, however, not sustain his insistence that failure to take into account these two risk factors was the cause of the incision of the suture into the bladder. He conceded under cross-examination that the area where the incision was made was where there was the least amount of fat. His contention that the incision should have been done up and down was also not sustainable because, apparently, that would have resulted in reaching the area with more fat, which could have likely caused complications.

[35] The other issue about Dr Sevenster's testimony is that he sought to interpret the plaintiff's testimony to be that she had "stress incontinence," with urine leaking whenever she laughs, coughs or sneezes, and that is why she was wearing diapers. The plaintiff could not say when did the problem of the leaking of urine commence. As stated earlier, she did not know that Dr Olwagen had successfully repaired the VVF in January 2003.

[36] Accordingly, the evidence of Dr Sevenster does not meet the threshold of logical reasoning expected from an expert witness and should thus be rejected.

[37] The evidence of Dr Mnisi, which is based mainly on the note he made after the procedure was completed, was unequivocal and objective. In this regard it is important to note that Dr Sevenster also conceded that the note made by Dr Mnisi after the operation was extensive, and no criticism could be levelled against it.

[38] At the time of performing the operation, Dr Mnisi, as alluded to earlier, was allocated the surgery by Dr Jackson, who also supervised him during the procedure. More importantly, Dr Jackson conducted the risk assessment before the procedure on the plaintiff could commence. It was only once he was satisfied that it was safe to perform the procedure that he authorised and assigned it to Dr Mnisi.

[39] The defendant criticises Dr Mnisi for saying that the operation was not complicated. This, according to the defendant, is contrary to the opinion of the expert witnesses who agreed that the operation was a complicated procedure because of the identified risk factors referred to earlier. As I understand the evidence of Dr Mnisi, the operation was not complicated because he did not encounter difficulties in executing the procedure. He conceded that the incident occurred during the operation and that it was accidental.

[40] Although Dr Mnisi made no reference to the issue of obesity and the enlarged uterus, there seems to be no doubt that he would have been aware of the condition of the plaintiff.

[41] The evidence of Dr Koll was clear and objective. He conceded in the joint minutes that "although no surgical complications were noted in the records, this is likely to have been a difficult procedure due to the fact that the patient was obese and the uterus was large." He explained where the bladder would have been and whether such suturing would take place even after its reflection. He estimated the distance between the two to be limited to about 11 mm. According to him, even after being reflected down, the bladder remains covered with a thin layer of flash which would make the visibility of the vicryl difficult. He contended further that there could have been no suspicion of the damage to the bladder because no leaking was observed.

[42] Based on the above, Dr Koll's opinion, which I find to be objective, is that Dr Mnisi "believes that the bladder was out of the way and inadvertently placed a stitch through the bladder wall." In the joint minutes, he expressed the following opinion:

"the surgeon indicated in the operative notes that the bladder was reflected. The surgeon thus believed that the bladder was out of the way and inadvertently placed a stitch through the bladder. This is a complication of surgery that can happen to any surgeon and it does not indicate negligence. I am of the opinion that the intra-operative complications can and do occur and this fact should be considered in determining negligence. The only way for any surgeon to avoid all complications is to stop operating."

[43] He further explained that suturing through the bladder is a complication likely to be encountered by surgeons in performing procedures such as that of the plaintiff. The complication to the ureteric system in procedures involving gynaecology is, according to him, as high as 4%. In cross-examination, he testified that the incidents relating to pelvic injuries, such as ureteric and bladder damage, would be between 2.4% and 2.5%. In his opinion, this is the reason why the complication is recognised as being acceptable in the circumstances of this matter. Thus, according to him, the performance of Dr Mnisi cannot be regarded as substandard

[44] In light of the above, I find that Dr Koll's evidence to be based on logical reasoning and thus satisfies the threshold required for the admission of the evidence an expert witness.

[45] Although the plaintiff suffered an injury as a result of the suturing of the bladder, it cannot, however, in the circumstances, be said that Dr Mnisi's performance of the procedure was below the standard of a competent practitioner in his field. Put in another way, it cannot, in the circumstances of this case, be said that Dr Mnisi failed to exercise reasonable skill and care in performing the procedure on the plaintiff. This means that the plaintiff failed to discharge her onus of proving on the balance of probabilities that the defendant was negligent.

[46] For the above reasons, the plaintiff's claim for damages based on the alleged negligence of the defendant stands to fail.

Costs

[47] It is trite that in civil proceedings, such as the present, costs generally follow the results. However, the court does have a discretion whether to grant costs. In the present matter, considering the circumstances of this case, and as correctly conceded by Counsel for the defendant, it seems to me that it would be inappropriate to exercise my discretion in favour of the defendant despite being successful.

Order

[48] In the circumstances, the plaintiff's claim is dismissed with no order as to costs.

E Molahlehi
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, GAUTENG
DIVISION, JOHANNNESBURG.

Representation:

For the applicant:	Adv TP Kruger SC with Adv S Kroep
Instructed by:	Marias Basson Inc.
For the respondents:	Adv S Joubert SC with Adv C K Sioga.
Instructed by:	State Attorney
Heard on:	16 November 2022 and 12, 13, 14 and 15 June 2023.
Reserved:	16 June 2023
Delivered:	28 August 2023.