

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



Case number: 41405/2019

Date of hearing: 14 August – 25 August 2023

Date delivered: 22 September 2023

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES /NO	
(3) REVISED	
22/9/22	
DATE	SIGNATURE

In the matter between:

ANDRIES HERMANUS MULDER

Plaintiff

and

DR. A.W.D. KUHN

Defendant

JUDGMENT

SWANEPOEL J:

[1] Plaintiff, a 69 years old male, sues the defendant, a specialist orthopaedic surgeon, for damages allegedly arising from a total right-knee replacement which defendant performed on 17 May 2016. Plaintiff alleges various grounds of negligence. They can all be summarized as follows: Plaintiff alleges that in the period 30 May 2016 to 15 June 2016 defendant failed to recognize the threat of infection in the knee, and he failed to take proper and more aggressive steps to deal with an infection. Plaintiff says that he is a type-2 diabetic, and that added care had therefore to be taken in treating possible infections. The result is, plaintiff says, that the undiagnosed infection culminated in the amputation of plaintiff's right leg above the knee on 21 May 2018.

[2] At the commencement of the trial, at the instance of the parties, I granted an application in terms of rule 33 (4) for the separation of the merits and quantum. Therefore, only the issue of liability is before me. It is common cause that defendant had a duty of care to act with the skill and expertise reasonably expected from a specialist orthopaedic surgeon. Two questions have to be answered. The first is whether it can be held that the amputation of plaintiff's leg was the result of an infection which was present when defendant examined plaintiff post-operatively on 31 May 2016 and 6 June 2016, in other words, whether the defendant's alleged failure to recognize the infection during the examinations, and to aggressively act to treat the infection, has been proven to be causally connected to the loss of plaintiff's leg. The second question is whether defendant was negligent, in other words, whether the standard of care was less than that expected of a specialist orthopaedic surgeon.

[3] The outcome of this matter revolves substantially around a consideration of the evidence as there are two diametrically opposing versions presented by the parties. Plaintiff says that although he had had knee problems in the past, by 2016 the pain in his knees had become worse, and that his right knee was especially painful. Plaintiff approached defendant, and after he was examined, defendant recommended a total right-knee replacement. In anticipation of the operation, plaintiff was required to attend a presentation by defendant in order to prepare him (and other patients) for the operation. At the presentation defendant explained exactly what the operation entailed, and what possible complications may arise.

[4] The operation on 17 May 2016 evidently went well, and plaintiff was discharged on 20 May 2016. A follow up consultation was scheduled for 30 May 2016. It is at this point that the parties' versions start to differ. Plaintiff says that the dressing on his wound was removed by the wound nurse, who was later identified as Sister Helen Wolfaardt. Plaintiff's wound was adhered by metal clips. When Sister Wolfaardt looked at the wound, plaintiff says, she remarked that it did not look good. He says the defendant also examined the wound, and that he also told plaintiff that the wound did not look good. He said that he ought to take plaintiff to theatre, but would rather wait another week. The clips were not removed, and plaintiff left the rooms with only a crepe bandage covering the wound.

[5] Plaintiff says he was told to come back again on 6 June 2016, but in the meantime the wound was to be cleaned every second day with a

salt-water solution. Plaintiff was told to purchase bandages and to apply them after the wound had been cleaned. On 6 June 2016 plaintiff again attended at defendant's rooms. He says that the wound looked rotten at the bottom of the wound, and there was a rotten bloody fluid discharging from the wound. The clips were removed, a transparent plaster was applied, and plaintiff was sent home. Plaintiff says that his wife continued to clean the wound with the salt-water solution every second day, and she also applied a BC 56 solution as prescribed by defendant. Plaintiff says that the wound continued to discharge a fluid at the distal end of the wound. He says that the wound kept opening up. On 15 June 2016 defendant was seen by Dr. Dindar, his local doctor. Dr. Dindar was evidently concerned at the appearance of the wound. He sent defendant a photograph of the wound. whereupon defendant insisted on admitting plaintiff to hospital immediately.

[6] Upon admission to hospital plaintiff was taken to theatre, and a debridement of the wound was performed. Various debridements of the wound followed later, and a skin transplant was performed. Eventually, some four weeks after being admitted to hospital for the second time, defendant referred plaintiff to Dr. Charles Olivier for treatment. Plaintiff says that defendant told him that Dr. Olivier was a friend of his, and that defendant would take it on himself (sal dit op hom vat), intimating that defendant had admitted to some wrongdoing. Plaintiff's further treatment has no bearing on this case, save to say that, tragically, plaintiff's leg had to be amputated on 21 May 2018.

[7] Various photographs of the wound were entered into evidence by the plaintiff. The photographs only came to the fore shortly before the matter was to be heard on 9 May 2022, and their production resulted in the matter having to be postponed. On 22 September 2022 plaintiff deposed to an affidavit in terms of rule 35 (3) in which he stated that he was unaware who the author of each photograph was, nor did he recall the dates on which they were taken. It was only later that plaintiff was able to determine on what days the photographs were taken, and that they had been taken by his daughter. He was adamant that Photograph 1 was taken on 1 June 2016, Photograph 2 on 8 June 2016, and Photograph 3 on 13 June 2016.

[8] Plaintiff also entered a document titled “Mislukte knie vervanging” into evidence. Evidently, after plaintiff was referred to an attorney, he was asked to prepare a summary of events. He testified that he compiled the document on 18 July 2017. He dictated the document, and his daughter typed it for him. In cross-examination plaintiff testified that the document was produced in 2016. He then corrected himself and said that it was drafted in July 2017. When it was pointed out that the document contained a reference to his amputation, which happened in 2018, plaintiff was adamant that it had been drafted in 2017. When the Court asked him whether the document had been drafted in one sitting he confirmed that it had, only later to change his version to say that the document had been supplemented afterwards.

[9] It was put to plaintiff that defendant would deny saying, on 31 May 2016, that he should take plaintiff to theatre, but rather to wait a week. It was also put to plaintiff that when the wound was examined on 6 June 2016 it was healthy and dry, and consequently the clips were removed. Plaintiff denied the allegation and stated that the wound was still 'septic' at that stage.

[10] It was also put to plaintiff that the history of events upon which plaintiff's experts, Drs. Birrel and Naude, a specialist orthopaedic surgeon had partially based their conclusions, and which had been provided to them by plaintiff, differed substantially from the plaintiff's version in court. For instance, Dr. Birrel was told that at the first post-operative examination (presumably on 30 May 2016) some clips were removed but the remainder of the clips remained in situ for another two weeks. In fact, no clips were removed on 30 May 2016. According to Dr Birrel plaintiff was told to go to his general practitioner for wound care every two to three days. Plaintiff's evidence was that he was told to clean the wound himself with a salt-water solution every two days. Dr Birrel makes no mention at all of the examination on 6 June 2016 when the clips were taken out. In re-examination plaintiff tried to repair the damage done by these contradictions by saying that Dr. Birrel must have misunderstood him, or he misinterpreted what was said to him.

[11] Mrs Mulder attended both the examinations on 30 May and 6 June 2023 respectively. She essentially confirmed plaintiff's version. Mrs. Mulder says that on both occasions she sat in the examination room in

close proximity to the examination bed. She heard Sister Wolfaardt remark on 30 May 2016 that the wound did not look good. She also heard defendant say that he should take plaintiff to theatre, but would rather wait a week to see how the wound then looked. Mrs. Mulder said that they were told to go home and wait a week, but that the wound should be cleaned with a salt-water solution every two days. She says that the wound was only covered with a crepe bandage, and not a clear plaster as it had been when plaintiff was discharged on 20 May 2016. She testified that the wound had a dark colour to it at the bottom of the wound, which she found concerning. She was also present at the second post-operative examination on 6 June 2016. On this occasion the clips were removed, although she could not remember who removed them. They were told to purchase a salve, B56, to apply to the wound, and to keep on cleaning the wound with the salt-water solution. Mrs Mulder says that the wound was not healthy and dry on 6 June 2016, but that it was wet, draining a dirty fluid, and that it did not look healthy.

[12] With regard to the photographs, Mrs. Mulder testified that she and plaintiff had had discussions regarding the dates on which the photographs were taken. She could not remember whether her daughter was part of those discussions. They also discussed the events that had occurred. She admitted that when they could not remember a certain aspect, they would talk about it and would jog each other's memories. With regard to the summary document, she said that she could not remember when it was drafted, but she was certain that it had been drafted before the amputation, which is obviously not possible.

[13] Dr. Charles Olivier testified for plaintiff. He specializes in complicated orthopaedic surgeries. Defendant is well known to him as they specialize in the same field. Dr. Olivier was handed the report of Prof. A.L. van Gelder (who is deceased), and was asked to provide comment on its findings. Professor van Gelder based his opinion on facts of unknown origin. The most significant facts that he considered are that when plaintiff went to see defendant on 30 May 2016 the wound was allegedly draining and 70 mm of the wound was still open. Prof. Van Gelder reported that some of the clips were removed on 30 May 2016, which is not correct. He says that on 6 June 2016, at the second examination, the wound was swollen, red and tender.

[14] Prof. Van Gelder believed, based on the facts at his disposal, that defendant had been negligent in not diagnosing an underlying deep wound sepsis. Whether Prof. Van Gelder examined plaintiff and obtained the above history from him is uncertain. Suffice it to say that Dr. Olivier based his opinion fully on the report of Prof. Van Gelder. Having studied Prof. Van Gelder's report Dr Olivier was of the opinion that Prof. van Gelder correctly believed that defendant had *"underestimated the high risk for infection in diabetic patients; as a joint infection it is a severe complication that needs early and aggressive management. Earlier follow-up after post-operative discharge was indicated. He missed a golden opportunity to recognize the beginnings of deep wound sepsis when he saw the patient the 30th May 2016."*

[15] Dr. Olivier also examined the photographs. In a joint minute he agreed with Dr. Vlok, defendant's expert, that Photograph 1 was likely taken on 1 June 2016, Photograph 2 between 10 and 12 June 2016, and photograph 3 between 12 and 15 June 2016. With regard to photograph 1, Dr. Olivier said that the main area of concern was in the distal (bottom) part of the wound, where there was early sign of necrosis of the soft tissue. He said that this area is generally particularly precarious due to its reduced vascularity. He believed that the wound broke down in this area (Zone 3) which compromised the healing of the wound, and could have caused necrosis of the tissues.

[16] In cross-examination it was pointed out to Dr. Olivier that a number of the assumptions upon which Prof. Van Gelder based his opinion were incorrect. For instance, the wound was not gaping open 70 mm on 30 May 2016, no clips were removed on that date, and the wound was found to be red and swollen on 15 June 2016, and not on 30 May 2016. Dr. Olivier had never seen the defendant's clinical notes until they were presented to him in cross-examination. They record the following on 30 May 2016:

"Clips not removed. Wound oozing. To come back at 1/52. Robert Jones applied with postop opsite."

On 6 June 2016 the notes recorded:

"Clips removed. Wound healthy and dry. To come back at 6/52. Postop Opsite applied."

[17] It was put to Dr. Olivier that when defendant saw plaintiff on 30 May 2016 the wound was mildly draining a clear fluid. There was no visible necrosis, but the wound had not healed sufficiently that the clips could be removed. There was no sign of infection. Dr Olivier could not dispute this. Dr Olivier said that if a wound is draining slightly, it would be appropriate to immobilize the wound to give it a chance to heal, which is exactly what defendant did by applying a Robert Jones dressing. Dr. Olivier said that it was reasonable practice to then schedule a consultation a week later, as defendant did. Dr. Olivier could not fault defendant for not conducting blood tests given the condition of the wound as it was described in the clinical notes.

[18] Dr. Olivier expressed his disbelief that defendant would instruct plaintiff to wash the wound every two days, and he said that it specifically did not make sense to clean the wound with a salt-water solution. He confirmed that Photograph 1 did not show any necrosis. It was put to Dr Olivier that on 6 June 2016 the wound was healthy and there was no sign of infection. He could not dispute that this may have been so. In essence, Dr Olivier confirmed that if defendant's evidence, and his clinical notes were to be believed, no negligence could be ascribed to defendant. Dr. Olivier testified that he could not say that defendant should have taken any other course of action. He also said there could have been multiple reasons why plaintiff's leg was eventually amputated.

[19] Defendant testified that he is a specialized general orthopaedic surgeon. Currently, some 70% of his surgeries are elective in nature, with

an emphasis on arthroplasty. He confirmed that he operated on plaintiff on 17 May 2016, and discharged him on 20 May 2016 after a postop opsite dressing was applied. He scheduled a consultation with plaintiff for 30 May 2016. On 30 May 2016 plaintiff was first examined by Sister Wolfaardt, who had been in defendant's employ since approximately 2002.

[20] Sister Wolfaardt reported that there was slight oozing from the wound. When defendant examined the wound, he found it to be largely well-healed. The distal 1/3 of the wound was, according to Sister Wolfaardt oozing fluid, although defendant did not observe the oozing himself. The wound edges were aligned and there were no indications of skin problems. Defendant said that if a wound is oozing fluid, it is not fully healed. Most of the wound was healthy, not swollen nor red, but the distal part of the wound was concerning. Defendant wanted to check the oozing at a later date, and decided to leave the clips in and to examine the wound a week later. He says that it is important to keep a wound waterproof, and that is why a postop opsite dressing is applied.

[21] Defendant saw plaintiff again on 6 June 2016. The wound was healthy and dry and the clips were removed. A postop opsite dressing was applied, and an antibiotic cream (BC 56) was prescribed. Defendant vehemently denied that he would ever instruct a patient to clean the wound with a salt-water solution. When plaintiff returned on 15 June 2016 the wound was in need of debridement and plaintiff was immediately taken to surgery.

[22] In cross-examination defendant vehemently denied the Mulders' version. He said that, although he was somewhat concerned at the state of the wound on 30 May, 2016, when he saw it on 6 June 2016 it was healthy and dry. When he was asked to comment on Photograph 1, which was taken two days after the examination on 30 May, defendant said that it had clearly deteriorated between 30 May and 1 June 2016. Defendant said that had he seen the wound as it was depicted on Photograph 1, he would not have taken plaintiff to theatre, but he would have performed blood tests. He says that the wound must have improved between 1 June and 6 June 2016. Photograph 2, which was taken between 10 and 12 June 2016 showed a clearly unhealthy wound, defendant testified.

[23] It was put to defendant that on 30 May 2016 the wound was red, swollen and hot. He testified that had the wound been in that condition, he would have picked it up, but he had no reason for concern on 30 May 2016. Defendant confirmed that on 30 May a Robert Jones bandage was applied, but he denied that plaintiff would have left the consultation without an opsite dressing being first applied directly to the wound. Defendant testified that he believed that plaintiff had a hematogenous infection which spread internally, but, he said, he never saw any signs of infection.

[24] Sister Wolfaardt has been a qualified nurse since 1977, and she confirmed that she was the author of the clinical notes written on 30 May and 6 June 2016. She explained that on 30 May 2016 she observed slight oozing of fluid from the wound, which caused her to call defendant to

examine plaintiff. Defendant decided to leave the clips in situ, and to see plaintiff again a week later. Sister Wolfaardt testified that if she wrote on the clinical note that she had applied a dressing, she would have done so. She is adamant that she applied a postop opsite dressing and a Robert Jones pressure bandage. She denied that she would ever tell a patient to wash a wound with a salt-water solution. She told plaintiff to return in a week. She always tells patients to advise defendant if they have any concerns about a wound. She saw plaintiff again on 6 June 2016, at which time the wound was healthy and dry. If it had been wet, open and swollen she would have noticed, and she would have written her observations on the clinical notes. Similarly, had there been any sign of necrosis she would have recorded same. She was shown Photograph 3 (taken on or about 13 June) and she said that the wound did not look at all on 6 June 2016 as it is depicted on the photograph.

[25] Dr Vlok testified on behalf of defendant. He is also an orthopaedic surgeon. He said that if there were copious amounts of drainage from the wound, it could be an indication of an infection. It would be appropriate not to operate immediately, but rather to monitor the wound. Mild oozing, in Dr Vlok's opinion, is not indicative of infection. He said that one has to have regard to the smell of the fluid, its volume and colour, and also at the state of the surrounding tissue. It is quite possible for the knee to be infected without any clinical signs being present. Dr Vlok is of the view that, given defendant and Sister Wolfaardt's description of the wound, it would not have been necessary to perform blood tests.

[26] Importantly, Dr. Vlok confirmed Dr. Olivier's evidence that it is possible that a wound could display certain characteristics on 30 May 2016, then deteriorate within a matter of two days, and then recover to appear well healed some five days later. It is therefore quite possible that the wound did not merit great concern on 30 May 2016, deteriorated slightly and then recover so as to appear healthy and dry on 6 June 2016.

[27] In my view the issues to be determined are the following:

[27.1] Which version is to be believed, that of plaintiff and Mrs Mulder, or that of defendant and Sister Wolfaardt?

[27.1] If the version of plaintiff and Mrs. Mulder is to be believed, then has plaintiff proven:

[27.1.1] that the probable cause of the amputation was an infection in the wound that existed between 30 May 2016 and 6 June 2016? and,

[27.1.2] if the answer to paragraph 28.1.1 is in the affirmative, then has plaintiff proven on a balance of probabilities that defendant was negligent in not identifying a possible infection, and in not taking more aggressive action to treat a possible infection?

[28] Plaintiff referred me to the case of *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET Cl and Others*¹ which provides guidelines as to the manner in which disputes of fact should be

¹ 2003 (1) SA 11 (SCA)

approached. In that case the judgment commences with the words “*Recollection can be fallible*”, which seems to me to be equally as applicable to this case. As in *Stellenbosch*, we have irreconcilable disputes of fact in this matter.

[29] In *Stellenbosch* the Court said:

“To come to a conclusion on disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance such as (i) the witnesses’ candour and demeanour in the witness box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the factors mentioned above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability and improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.”

[30] At the outset I must say that I believe that the plaintiff and Mrs. Mulder were honest witnesses, who were relaying what they believe to

be the true version of events. What does concern me regarding their evidence is the reliability thereof. Mrs. Mulder testified that plaintiff had suffered many injuries over the years, and they had attended many doctor's appointments together. It would not be surprising if they were to conflate different doctor's visits. They could hardly have known, when they attended the examinations by defendant, that they would have to testify about the events some eight years later. There is no reason to believe that they would have a particular recollection of these two consultations, what was said, and how the wound looked at each stage.

[31] What is concerning about their evidence is the fact that Mrs. Mulder testified that they did in fact have memory lapses regarding the events of May and June 2016, but that they spoke to one another about their recollections, and where necessary, they jogged each other's memory. I do not think, in those circumstances, that they can be said to have an independent recollection of the events about which they are testifying.

[32] Plaintiff's evidence concerns me on two specific aspects. Firstly, he was adamant that the document titled "*Mislukte knie vervanging*" was drafted on 17 July 2017. Mrs. Mulder was also certain that the document was drafted before the plaintiff's leg was amputated on 21 May 2018. When plaintiff was confronted in cross-examination with the fact that the document could not possibly have been drafted in 2017, as it referred to the amputation in 2018, plaintiff refused to concede that he was wrong. When the Court asked plaintiff whether the document had been compiled

on one occasion, plaintiff said that it had been. Shortly thereafter plaintiff testified that the document had not been drafted in one sitting, but had been supplemented later.

[33] It concerns me that plaintiff was prepared to adapt his evidence in this manner. Furthermore, on 22 September 2022 plaintiff deposed to an affidavit that he did not know when the photographs referred to above were taken, or by whom. After some discussion, it seems, plaintiff remembered that his daughter had taken the photographs and exactly on what days they were taken. These discussions between plaintiff, his wife and his daughter hardly fills one with confidence as far as plaintiff and his wife's independent recollection of events is concerned.

[34] As far as defendant and Sister Wolfaardt are concerned, I take heed of the fact that it would be virtually impossible for them to remember each patient that they see, and that the eight-year delay in bringing the case to trial must of necessity have had an effect on their recollections. However, it must be borne in mind that less than two weeks after the 6 June consultation, defendant was faced with a patient with serious complications to his wound. After treating plaintiff for some weeks, defendant decided to refer him to Dr. Olivier for more specialized assistance. The particular case must have made some impact on defendant, probably making it easier for defendant to recollect the events of May and June 2016. Furthermore, defendant's recollection is supported by his clinical notes (albeit that they were written partially by defendant and partially by Sister Wolfaardt). Defendant also drafted three

contemporaneous reports, and one written on 9 May 2017, which described the plaintiff's condition and the treatment that was administered.

[35] There is no suggestion that the clinical notes are false. The suggestion is simply that they are not accurate. However, in respect of the important aspects of the case, they are clear. When defendant saw plaintiff on 30 May 2016 the wound had not healed fully, and was oozing fluid. Sister Wolfaardt testified that if there had been continuous draining of fluid from the wound, she would have made a note thereof. When defendant saw plaintiff on 6 June 2016 the wound was healthy and dry. I cannot believe that Sister Wolfaardt would make such a note when the exact opposite was the case.

[36] The probabilities also favour defendant. It was evident that he is a careful surgeon. He went out of his way to hold pre-operative briefings to describe in detail to each patient what each procedure entailed, and what the possible pitfalls may be. It is improbable that on 30 May defendant would be so concerned about the wound that he would say that he should take plaintiff to theatre, and then not do so. It is also more probable than not that had defendant seen a wound on 6 June 2016 that appeared as the Mulders described, he would have taken immediate steps to determine the cause of the problem. It is improbable that he would have simply taken out the clips and sent the Mulders on their way.

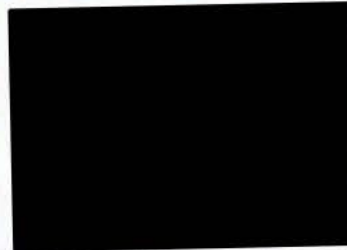
[37] Dr. Olivier testified that if the accepted facts are as defendant testified, then there is no basis to believe that defendant was negligent. His view was confirmed by Dr. Vlok. There is nothing to gainsay their evidence. I accept the defendant's version of events.

[38] Having made the above finding, that is the end of the matter. However, it is possibly important to deal with defendant's contention that plaintiff did not establish causation; that at the time of the examinations on either 30 May 2016 or 6 June 2016 there was an infection present in plaintiff's knee joint, and that the infection was caused the plaintiff to lose his leg. That would normally be the first question to be decided, because, if causation is absent, negligence is irrelevant.

[39] I cannot find any evidence to suggest that, on the probabilities, there was an infection present in the plaintiff's leg on either 30 May or 6 June 2016. There is, moreover, no evidence that an infection that was present during either of those consultations eventually resulted in the loss of plaintiff's leg. If there had been evidence to the effect, for example, that the knee had been infected on 6 June, and that a delay in treating the infection resulted in the amputation of the leg, that would have been sufficient evidence to find for plaintiff on the probabilities. However, there was no such evidence, and in Dr. Olivier's own words, there may be multiple reasons why the leg had to be amputated. In my view, plaintiff has also not established causation.

[40] In the premises I make the following order:

Plaintiff's claim is dismissed with costs.



**SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA**

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ATTORNEY FOR PLAINTIFF:	Kriek Wassenaar & Venter Inc.
COUNSEL FOR DEFENDANT:	Adv. E Botha
ATTORNEYS FOR DEFENDANT:	MacRobert Inc
DATE HEARD:	14 – 25 August 2023
DATE OF JUDGMENT:	22 September 2023