THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 047/10

PREMIER OF THE PROVINCE OF KWAZULU-NATAL Appellant

and

KISHORE SONNY First Respondent

JAYANTHI DEVI SONNY Second Respondent

Neutral citation: *Premier of the Province of KwaZulu-Natal v Sonny* (047/10) [2011] ZASCA 6 (4 March 2011)

CORAM: Mpati P, Navsa and Bosielo JJA

HEARD: 15 February 2011

DELIVERED: 4 March 2011

SUMMARY: Damages claim based on medical negligence – cost of maintaining child suffering from Down's syndrome – hospital failing to inform patient that fetus she was carrying might be afflicted with Down's syndrome – failure to inform of risks attendant upon the pregnancy and to ensure timeous conclusive chromosomal testing to enable a termination of pregnancy in terms of the Choice on Termination of Pregnancy Act 92 of 1996 – held that doctors ought to have involved patient fully in her treatment and the diagnosis of the condition of the fetus – medical staff held to be negligent and liable for damages that might be proved to have been sustained.

ORDER

On appeal from: KwaZulu-Natal High Court (Durban) (Levinsohn DJP sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

NAVSA JA (Mpati P and Bosielo JA concurring)

[1] On Saturday 16 November 2002 at King Edward VIII hospital in Durban, 37 year-old Mrs Jayanthi Sonny, the second respondent, gave birth to her second child, a baby-girl. What ought to have been a period of unmitigated joy for Mrs Sonny (Jayanthi) and her husband, Kishore, the first respondent, was short-lived. Their new-born daughter was afflicted with Down's syndrome.[1] Their joy turned to anxiety and despair. A year later, during December 2003, they instituted action against the appellant, the Premier of the Province of KwaZulu-Natal and the Ethekwini Municipality (the Municipality), claiming damages, comprising, first, the cost of maintaining their daughter for a period of 55 years, which was estimated at R6,6m, and second, an amount of R150 000 was claimed by Jayanthi for what was a bilateral tubal ligation[2] allegedly wrongfully performed.

[2] Broadly speaking the first and second respondents' case against the appellant and the Municipality in the KwaZulu-Natal High Court was that in treating Jayanthi during her pregnancy the nursing staff at the Clare Estate Clinic, a primary health clinic conducted by the Municipality, and the medical personnel at Addington hospital, which is under the control of the appellant, were negligent

1 Down's syndrome babies suffer from a chromosomal abnormality which usually manifests in physical and mental abnormalities.

2 This is a sterilisation procedure which has a reasonable chance of being successfully reversed by way of further surgery.

in that they failed to exercise the professional skill and diligence required of them in the circumstances.[3] More particularly, the respondents alleged that the medical staff at the clinic and hospital failed to take reasonable steps timeously to establish conclusively during the second trimester of her pregnancy that there existed a substantial risk that the fetus that Jayanthi was carrying would suffer from a physical or mental abnormality. The first and second respondents contended that had the medical staff acted with the professional skill and diligence required of them they, as parents–to-be, would have been informed timeously of the risk and would have taken the decision to terminate Jayanthi's pregnancy in terms of the Choice on Termination of Pregnancy Act 92 of 1996.

[3] Furthermore, the first and second respondents claim that when they consented to the bilateral tubal ligation they did so after being advised by a doctor at King Edward VIII hospital that the results of a cordocentesis[4] performed on the fetus indicated that they could expect a baby healthy in all material respects. This proved ultimately to be an erroneous test result and consequently their consent was not properly informed and the bilateral tubal ligation was wrongly performed. King Edward VIII hospital also falls under the control of the appellant.

[4] At the outset in the court below the parties had agreed that the question of liability be decided first and it was directed accordingly. The Municipality initially disavowed liability. During the trial in the court below the Municipality capitulated and conceded liability for 33⅓% of Jayanthi's damages in relation to the birth of the child. The appellant, however, persisted in its denial of liability in respect of both claims and the trial proceeded against him.

[5] After hearing evidence the court below (Levinsohn DJP) found that the medical staff at Addington hospital were negligent in their treatment of Jayanthi and held the appellant liable for such damages the respondents may prove

3 For the general approach followed in matters of this nature see *Blyth v Van Den Heever* 1980 (1) SA 191 (A) at 196A-F.

4 This is a specialised procedure in terms of which fetal blood is drawn directly from an umbilical vain for chromosomal testing – to detect possible chromosomal abnormalities.

arising from the birth of the child. In relation to the claim based on Jayanthi's sterilisation the appellant was absolved from the instance. The appellant was ordered to pay the respondents' costs, including the costs of two counsel. The appellant was also ordered to pay the costs of consultation with experts, including travelling time and expenses. In addition, the appellant was ordered to pay the expenses of necessary witnesses and the reasonable qualifying and attendance fees of named expert witnesses. The liability to pay the abovementioned costs was joint and several with the Municipality, up to and including 1 December 2008 (when liability was conceded by the latter). The present appeal, with the leave of the court below, is against the orders in favour of the second and third respondents.

[6] Before us it was contended on behalf of the appellant that the court below had erred in its finding of negligence. The credibility and factual findings of the court below were challenged. The acceptance of Jayanthi's evidence in preference to the evidence of medical staff employed by the appellant was criticised. In the alternative, it was submitted that the court below ought, at the very least, to have found that there was contributory negligence on the part of Jayanthi.

[7] I proceed to consider the relevant evidence in some detail and to deal with the assessment by the court below.

[8] On Tuesday 25 June 2002 Jayanthi presented at the Clare Estate Clinic located close to her home. On that date she became a patient at the clinic. The nurses at the clinic were made aware that her first pregnancy had been a normal delivery. Jayanthi was diabetic and suffered from high blood pressure. Those two factors coupled with her relatively advanced age of 37 unarguably made her a high-risk patient,[5] requiring hospital attention rather than treatment at a primary healthcare clinic. After a blood pressure and diabetes test had been conducted the clinic referred her to Addington hospital. She was provided with a letter of

5 Advancing maternal age, particularly over the age of 35, increases the risk of Down's syndrome exponentially.

referral. None of the facts set out above are in dispute.

[9] The material parts of Jayanthi's version of events which are disputed by the appellant, appear in this and the following two paragraphs. On Wednesday 26 June 2002 Jayanthi, accompanied by her husband, called at Addington hospital. Jayanthi testified that she overheard a nurse at the hospital announce that persons without a letter of referral would not be seen. After being registered as a hospital patient she underwent a urine, blood tissue and diabetes test. All of this was done by a nurse. Crucially, Jayanthi testified that thereafter she saw a doctor. In his judgment Levinsohn DJP noted the following material parts of Jayanthi's description of the doctor:

'She was an Indian female. She was not a South African.

Why do you say she is not a South African?

Because I could make out from her tone of – the way she spoke.

LEVINSOHN DJP Her accent?

Her accent, the way she spoke.

Who did she speak like? Came from India, or Mauritius? More or less India, if not India, Pakistan or something.'

[10] The doctor examined Jayanthi and referred her to the ultrasound room to have an ultrasound scan performed. When that procedure was completed, a sonographer handed Jayanthi a computer-generated ultrasound report. She was told to take the report to the doctor and was informed by the sonographer that she needed to be rescanned in two weeks' time. Jayanthi recalled looking at the ultrasound report and reading the following words:

'The head was low and difficult to assess.'

The report also contained the following words:

'Suggest rescan in 2 weeks.'

[11] Armed with the report, Jayanthi went back to the doctor she had seen earlier and was told to return in two weeks' time. She was not told why she had to return to the hospital. Neither was she told that she was a high-risk patient and that there might be dangers in her pregnancy. When she asked the doctor for an appointment Jayanthi was told that she had to arrange one through the Clare

Estate Clinic.

[12] Jayanthi returned to the Clare Estate Clinic the same day and found it closed. She knocked at the door and told the nurse who appeared that she was there for a letter of referral. The nurse read the ultrasound report and informed Jayanthi that in total only two ultrasound scans were conducted on expectant mothers: one early in the pregnancy and another towards the end. The nurse told her that her ultrasound report showed nothing untoward. Because of this Jayanthi did not return to Addington hospital. She attended at the clinic on five further occasions thereafter and during that period members of the clinic's nursing staff were aware of the first ultrasound report.

[13] The first ultrasound scan performed on Jayanthi revealed a condition in the fetus referred to as 'ventriculomegaly', which is an increase in the lateral ventricles in the brain. Put differently, it shows that the lateral ventricles are prominent. In the present case the first ultrasound scan showed 'borderline ventriculomegaly', within the margin for error. The medical experts all agreed that ventriculomegaly is a 'soft marker' or indicator for Down's syndrome. In the present case even though at the earlier stage of gestation (17 weeks) it was not particularly distinctive the experts were agreed that at the very least it required further exploration. In any event, the appellant admitted in his plea that the hospital staff had 'picked up what they thought was an abnormality'. Because the fetus in this case was in an awkward position a second ultrasound scan was required for greater certainty and to provide a basis for chromosomal testing by way of amniocentesis[6] or cordocentesis. It is common cause that if Jayanthi had returned in two weeks' time, as suggested by the ultrasound report, the relevant tests could have been conducted and completed within the time allowed for termination of the pregnancy.

[14] On 22 October 2002 when Jayanthi went to the Clare Estate Clinic for a routine examination it was discovered that her blood pressure and her blood-

6 Amniocentesis is a procedure by which fluid containing fetal cells is drawn from around the embryo for chromosomal testing.

sugar levels were unusually high. This caused them to refer her once again to Addington hospital. There a second ultrasound scan was conducted. It revealed a cause for concern and Jayanthi was consequently referred to King Edward VIII, a higher care hospital. Dr Kirsten at King Edward VIII hospital read both ultrasound reports and informed Jayanthi that an investigation into whether the fetus was afflicted with Down's syndrome was necessary. A cordocentesis was performed by Dr Govender and the fetal blood was submitted to an independent laboratory for chromosomal testing. For reasons that are unknown the tests results wrongly showed that there was no chromosomal abnormality.[7] This was communicated to Jayanthi by Dr Kirsten. She and her husband consented to the bilateral tubal ligation on the basis that the child they were expecting was healthy in all material respects.

[15] Soon after the child's birth it appeared that something was wrong. Subsequent testing established conclusively that the child was afflicted by Down's syndrome.

[16] The appellant disputed that Jayanthi was seen by a doctor at Addington hospital. According to the appellant it was hospital policy that sonographers do not communicate with patients in respect of the contents of ultrasound reports. According to the appellant a return visit, for a second ultrasound scan, did not require a patient to be in possession of a letter of referral from a primary health clinic. The established hospital procedure was that after a doctor recommended a second scan the hospital arranged an appointment directly. The appellant theorised that Jayanthi must have wandered off after receiving the ultrasound report. Dr Devjee suggested that she might have departed the hospital without seeing a doctor because of the long queues. It was part of the appellant's case that during the time Jayanthi claimed she saw the doctor on her first visit to Addington hospital the attending doctors were all on ward rounds and not yet in attendance at the hospital's antenatal clinic.

---

7 There was some suggestion that there was maternal blood contamination but that was never proved.

[17] It is necessary to record that the countries of origin of the two female doctors on duty at the antenatal unit at Addington hospital at material times, namely doctors Devjee and Perveen, were India and Bangladesh respectively, fitting the profile supplied by Jayanthi.

[18] Before us, counsel for the appellant was constrained to concede that Jayanthi's testimony, that she attended at the Clare Estate Clinic that very afternoon and had the discussion with the nursing staff set out in para 12 above, could not be disputed.

[19] Stripped to its essentials the appellant's case is that Jayanthi had not seen a doctor on 26 June 2002 and that she was the author of her own misfortune. It was submitted that on her own version of events she knew she had to return to the hospital in two weeks' time. She did not do so and the responsibility for the consequences of her failure, so it was argued, lay with her. The appellant contended that the least that could reasonably have been expected of Jayanthi was for her to have shown some concern for her own wellbeing and that of her unborn child and that her failure to return on her own initiative to the hospital, two weeks later, should count against her and the court below ought to have held that there had been contributory negligence on her part.

[20] Levinsohn DJP said the following about Jayanthi and her husband:

'I would say at once that both plaintiffs, in particular the second plaintiff, made a very good impression on me. I have no doubt whatsoever that they are honest witnesses. The second plaintiff gave me the impression that she was giving an honest and spontaneous account of what occurred on that day.'

[21] Jayanthi's undisputed return to the Clare Estate Clinic on the same day that the first ultrasound scan was performed was seen by the court below as 'an overwhelming probability' in her favour. Why else, asked the court below, would Jayanthi have gone back to the clinic. Dr Devjee testified that in the normal course patients would inevitably see a doctor to review the ultrasound scan. The court below reasoned that having undergone the ultrasound scan it would be

strange and unexpected behaviour for a patient to simply walk away from the hospital.

[22] The court below thought it significant that in response to enquiries made by the respondents, in terms of Uniform rule 37(4),[8] the appellant repeatedly admitted that '[n]ormally the [Clare Estate] clinic makes the booking for the patient'. It is against these admissions that the evidence of Dr Devjee and Dr Perveen, to the effect that the hospital itself made appointments and that a referral letter was not required, was held to have a hollow ring to it. The court below reasoned that this information could only have been provided to the appellant's legal representatives by the main protagonists on the appellant's side and that it supported Jayanthi's version of events. Accordingly, the court below rejected the appellant's version.

[23] In deciding whether the appellant's servants were negligent the court below considered it relevant to ask whether by sending Jayanthi back to the clinic uninformed they created the risk that she might not return to enable the tests to determine whether the fetus was normal. The court below had regard to the test for negligence set out in the well-known case of *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E:

'For the purposes of liability *culpa* arises if –

(a) a *diligens paterfamilias* in the position of the defendant -

  (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

  ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases.'

[24] In applying the *Kruger v Coetzee* test the court below had regard to the

8 This subrule provides for formal enquiries to be directed at the opposing party in advance of a pre-trial conference.

first and second respondents' lack of sophistication. It reasoned that one would expect Jayanthi to adhere to instructions by medical staff attending to her, not only at the hospital but also at the clinic. Levinsohn DJP took into account that the experts who testified were agreed that Jayanthi was a high-risk patient, more so because of her relatively advanced age. The risk of a fetus afflicted by Down's syndrome was ever present. As stated by the court below the first ultrasound was at the very least a 'red flag'.

[25] Levinsohn DJP stated that a reasonable person in the position of the doctor in attendance would have seen the possibility of the patient falling through the cracks of the public health system and failing to return and that she might be wrongly advised or improperly directed by primary health care staff. The court below thought it incumbent on the doctor to inform Jayanthi in detail; of the risks she faced and precisely what the nature and effect was of the inconclusive scan and the absolute necessity of undergoing an urgent second scan. The learned deputy judge president said the following:

'I would go further. Having regard to the foreseeable consequence of some breakdown of communication or gross misunderstanding that may occur in the clinic environment, I think it was at least necessary for the doctor to have given or caused to be given some written instruction to the clinic to make it absolutely clear that the second plaintiff was required to return.'

[26] In coming to this conclusion the court below relied inter alia on Lord Nathan's *Medical Jurisprudence*[9] (pp 46 *et seq*) where the following appears:

'In many cases it is reasonable or even necessary for the medical man to make the patient himself responsible for the performance of some part of the treatment which the medical man has undertaken to give. Where, as often happens, the medical man's course of action depends upon a report by the patient as to his condition or symptoms or as to the progress of the treatment, the medical man has no choice in the matter; he must rely upon the patient for the necessary information by which to determine what action should be taken, and must therefore, in a sense, delegate to the patient part of his own duties. Frequently also it would be quite unreasonable to expect the medical man to be in constant attendance upon the patient or to exercise supervision over every detail of the treatment; he is compelled therefore to delegate to the patient the performance of some part of the treatment or cure. . . . *In all these cases where the medical man justifiably delegates to the patient the performance of some part of the treatment, there is a*

9 Cited in *Dube v Administrator Transvaal* 1963 (4) SA 260 (W) at 268E-H.

special duty towards the patient to give clear and unambiguous instructions, to explain to the patient in intelligible terms what is required of him and to give him any warning which may be necessary in the circumstances; and a failure in any of these respects may amount to a breach of duty and expose the medical man to liability for any injury which occurs.' (My emphasis.)

[27] Levinsohn DJP also quoted the following extract from the Canadian case *Murrin v Janes* (1949) 4 DLR 403:

'I am prepared to believe that in some kinds of cases, particularly in this domain of medicine and surgery, the failure by a doctor or a surgeon to warn a patient as to the meaning of certain symptoms, the significance of which might not be apparent to a layman, might properly expose a practitioner to a charge of negligence. The physician cannot always be in constant attendance upon his patient, who may have to be left to his own devices; and if the former knows of some specific danger and the possibility of its occurring, it may well be part of his duty to his patient to advise him of the proper action in such emergency.'

[28] Professor Ermos Nicolaou, who was the head of the Fetal Medicine Unit at the Chris Hani Baragwanath Hospital of the Fetal Maternal Medicine Centre from January 2003, and who worked at King's College in London, one of the most recognised units in the field of fetal maternal medicine and was also the chairperson of the Maternal Fetal Medicine Society of South Africa, during his testimony on behalf of the first and second respondents, said the following in relation to the information gleaned from the first ultrasound report:

'You see, the decision for any further investigations, any further follow-ups has to be a team decision and the patient is very central in this team decision and therefore needs to be aware of the problem.'

Soon thereafter he said the following:

'In this particular case . . . there was something that was abnormal in the baby's brain and therefore this was placing this particular fetus on a higher risk and therefore further investigation would be necessary and I think the patient should be aware of this as well.'

And almost immediately thereafter:

'[T]he doctor should be doing the counselling and discussing the management of the patient.'

[29] I did not understand counsel for the appellant to take issue with what is set out in the preceding three paragraphs. The appellant's case is that the court below erred in its assessment of the evidence, more particularly in accepting that

Jayanthi had seen a doctor at Addington hospital. Counsel for the appellant correctly conceded that if the material factual conclusions of the court below are upheld the appeal should fail.

[30] One of the criticisms levelled against the court below is that it erred in holding the appellant to statements made in its responses to the respondents' notice in terms of Uniform rule 37(4), referred to in para 22 above. In this regard reliance was placed on *Fourie v Sentrasure Bpk* 1997 (4) SA 950 (NC), where it was held that a court could ignore an admission on the pleadings when it appeared clearly, after full investigation of the facts, that the admission did not accord with the facts and where an injustice would result. In *Fourie* reference was made to the decision of this court in *Rance v Union Mercantile Co Ltd* 1922 AD 312, where the following is stated (at 315):

'When an admission is formally pleaded, it as a rule corresponds to fact. But what if it does not? In such a case the party making the admission is no doubt bound to the extent of that admission (as long as it stands), but assuming that the admission is not in accordance with fact, a court of law by assuming its correctness and by building upon it for the purpose of ascertaining the limits of the contract erroneously admitted, may find a contract proved which has no existence in fact, and which but for such admission it would not have found to be proved. This shows that it is not always safe to build further upon the mere admission of a contract. The fact of the matter is the party making the admission is bound by it to the extent to which the admission goes. To press it against him beyond that, under all circumstances, may lead to inequitable results.'

[31] The facts alluded to in the aforesaid dictum and those in *Fourie* are light years away from the present circumstances. Ordinarily, a factual admission in pleadings has the effect spelt out in the following passage from *Fourie* (at 970B-C):

'Die normale gevolg van die erkenning van 'n feitlike bewering in die pleitstukke is dat dié feit buite geskil geplaas word sodat getuienis daaroor onnodig word. Die party wat die erkenning op die pleitstukke gemaak het kan derhalwe ook geen getuienis aanbied in stryd met die erkenning nie en indien hy dit wil doen, sal 'n aansoek eers gebring moet word om die erkenning van die pleitstukke te verwyder. So 'n aansoek kan uit die aard van die saak dan slegs gebring word namens die party wat 'n erkenning gemaak het.'

[32] In the present case, it was apparent, not only from the pleadings but also

right from the beginning of the trial that a crucial area of dispute was whether Addington hospital had referred Jayanthi back to the Clare Estate Clinic for an appointment to be arranged for the second ultrasound scan. That notwithstanding, the appellant's legal representatives made no attempt at all to apply to withdraw the admissions set out earlier in this judgment. In my view, it does not now behove the appellant to criticise the court below for relying on the admissions.

[33] In our country poverty and a lack of literacy abound. Masses of our people attend public health facilities. Their lack of sophistication and the vulnerability that accompanies poverty are factors that cannot be ignored. They are entitled to be treated in the same way as patients who can afford private medical assistance. That means that they should be fully informed and should be as involved as possible in their own treatment. This does not require a drain on public resources. This case is not about the availability of material resources. It is about a doctor communicating adequately with a patient. What is required is a public health delivery system that recognises the dignity and rights of those who are compelled to use its facilities. It is that basic sensitivity that the Constitution demands.

[34] In my view, the court below cannot be faulted in its reasoning as set out above nor ultimately in its factual conclusions. Insofar as contributory negligence is concerned, none can be attributed to Jayanthi. As could be expected she followed instructions, including the directive that she return to the clinic. The first ultrasound report was not addressed to her but was a 'suggestion' from the sonographer to the doctor. Suggestion is by its very nature something put forward in a tentative form. Put differently, it was put forward for consideration by the doctor. In the present case the doctor did not tell Jayanthi why she had accepted the suggestion, nor did she say why the second ultrasound scan was required. The doctor should have done so and should have informed Jayanthi that the second ultrasound scan was imperative. The failure to do so, coupled with the clinic's reassurance that there was nothing untoward in the ultrasound

report and the nurse's statement that a second scan is only required near the end of one's pregnancy understandably lulled Jayanthi into a false sense of security. I can see no reason to interfere with the conclusions of the court below.

[35] There is one further aspect that requires brief consideration. In the appellant's heads of argument it was submitted that the court below erred by not including in its order a statement that the respondents were only entitled to recover 66⅔% of the damages sustained by them as they had settled with the Municipality for the other 33⅓%. This submission is baseless. The parties were agreed that only the question of liability should be decided and such a direction was made by Levinsohn DJP. He was not in the initial phase required to determine the measure of damages.

[36] In light of the conclusions reached above the following order is made:
The appeal is dismissed with costs including the costs of two counsel.

_____
M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	P D Hemraj SC N Govender Instructed by The State Attorney Durban The State Attorney Bloemfontein
For 1st and 2nd Respondents:	C J Hartzenberg SC M E Van Jaarsveld Instructed by Lister & Lister Pietermaritzburg Symington & De Kok Bloemfontein