



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates	YES / NO
Circulate to Magistrates:	YES / NO
\	

***IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)***

Saakno: / Case number: 2797/2016
Datum verhoor: / Date heard: 25 / 03 / 2022
Datum gelever: / Date delivered: 4 / 11 / 2022

In the matter between:

CLEMENTINE OFENTSE KAHLA

PLAINTIFF

and

THE MEC HEALTH: NORTHERN CAPE PROVINCE

DEFENDANT

Coram: Coetzee AJ

JUDGMENT

COETZEE, AJ

[1] Plaintiff, a 39 year old married woman, claims damages from the MEC for Health of the Northern Cape Province.

[2] Her claim is based on delict and in particular, what is commonly known as

medical malpractice.

[3] It is common cause between the parties that:

3.1 she was admitted to the Kimberley Provincial Hospital for an elective caesarian section operation which was performed by Dr Oosthuizen on 22 January 2004;

3.2 during the performance of the caesarian section operation Dr Oosthuizen noted a bloodstained discoloring of the urine in the urine bag. In this regard Dr Oosthuizen testified as follows:

*"So as I have said after the **bladder injury** I did note there were some bloodstains in the urine and to be able to make sure that it is not an ongoing thing, you change the bag to get a clear bag to see what the colour of the clean urine be."* (My emphasis)

[4] After the plaintiff's discharge from hospital she developed what has been referred to as complications which was attended to by Dr Von Soest who performed a cystoscopy and a laparotomy and repaired a "laceration" of the bladder.

[5] In a joint minute between Drs Archer and Cronje (defendant's experts) and Dr Pienaar (plaintiff's expert) the following relevant aspects were not in dispute:

"(2) *It was to be expected that there would be adhesions from the previous caesarian section and that the surgery might be more difficult due to this as well as the weight of the plaintiff.*

(3) *The surgery on the plaintiff thus had to be carried out with extra care and diligence in identifying structures with specific reference to the bladder.*

(4) *According to the operative record the baby was delivered 8 minutes after starting the operation.*

- (6) *It seems that the injury to the bladder was considered due to bloodstained urine.*
 - (7) *The urine bag was changed.*
 - (8) *Notwithstanding the finding in paragraph 6 above, no definitive measure such as the installation of fluid/dye into the bladder to identify the area of leakage were applied.*
 - (9) *The fact that bladder injury occurred was confirmed on a cystoscopy and managed according to the standard of care on 26 January 2014.*
 - (10) *The injury could only have been sustained at the time of the caesarian section."*
- [6] Dr Cronje did not contribute to the joint minute, nor did he sign same.
- [7] Dr Van Soest did not testify.
- [8] In view of the facts common cause as referred to above and in the joint minute the injury could only have been sustained during the performance of the caesarian section.
- [9] It is expected that a surgeon performing the operation should and would be able to explain how the injury could or was inflicted. Dr Oosthuizen did not do so. In this regard his proposition that it was caused by a retractor was contradicted by Dr Archer.
- [10] Furthermore, Dr Oosthuizen's proposition that it was a partial tear that opened up after the bladder filled cannot be found to be plausible as:
- 10.1 it was not pleaded;
 - 10.2 it was not put to Dr Pienaar;

10.3 it was not in Dr Archer's report;

10.4 it contradicts Dr Van Soest's finding of a laceration.

[11] As regards the duty resting on the defendant the following has been authoritatively stated:

"We are here concerned with an unconscious patient who has suffered an admitted injury. That being so, the spectre of negligence on the part of the attending surgeon loomed large. At the close of Mrs Meyers' case before Revelas, J her evidence together with that of Dr Pienaar and the documentary exhibits, were sufficient as to place an evidentiary burden upon Dr Vogel who shed some light upon the circumstances attending Mrs Meyers' injury. Failure to do so meant that, on the evidence as it then stood he ran the risk of a finding of negligence against him for, where Mrs Meyers as the plaintiff, bore the overall onus in the case, Dr Vogel nonetheless had the duty to adduce evidence to combat the prima facie case made by Mrs Meyers. It remaining for him to advance an explanatory (though not necessary exculpatory) account that the injury must have been due to some unpreventable cause, even if the exact cause be unknown."

See in this regard: **MEYERS vs MEC, DEPARTMENT OF HEALTH, EASTERN CAPE** [2020] 2 All SA 377 SCA

[12] In my view Dr Oosthuizen did not attempt on plausible grounds to give any explanation for the injury sustained, save for the undisputed evidence that the injury to the bladder must have occurred during the operation.

[13] If this is so, it would have been expected from Dr Oosthuizen to do more than what he tells the court he did in attempting to establish what exactly caused the injury in view of the fact that he realised the possibility of an injury after having noticed the bloodstained urine in the urine bag.

[14] In this regard it is to be noted that the plaintiff's expert as well as the defendant's expert were *ad idem* that no definitive measures such as the installation of fluid/dye into the bladder has been done in order to identify the

area of the leakage.

[15] The only attempts made to establish whether there was an injury was to change the urine bag and to physically inspect the operating area. This, in my view was not enough in view of the fact that other definitive measures, as referred to above, were available as one would expect a diligent surgeon would employ to ascertain whether there was an injury to the bladder.

[15] In the above premises I am of the view that Dr Oosthuizen, in failing to do more than what he did, constitute negligent conduct on his part and I therefore make the following order:

- 1. Judgment is granted in favour of the plaintiff on the merits.**
- 2. The defendant is ordered to pay the plaintiff all damages that the plaintiff will be able to prove, alternatively, as agreed between the parties that emanates from the injury to the bladder of the plaintiff sustained by her during the caesarian section done at the Kimberley Hospital by Dr Oosthuizen on 22 January 2014 and the fact that the presence of the injury was not established during the caesarian section.**
- 3. The defendant is ordered to pay the plaintiff's costs for proving her case on the merits, including the costs of all postponements and interlocutory applications.**
- 4. The above costs to include:**
 - 4.1 the qualifying fees for Dr BH Pienaar;**
 - 4.2 the qualifying fees for Dr Pienaar for the preparation of reports,**

attending consultations and attending the trial;

4.3 the reasonable travelling and accommodation fees of Dr Pienaar for attending the trial;

4.4 it is declared that the witness of the plaintiff referred to in paragraph 4.1 was a necessary expert witness;

4.5 the reasonable travelling and accommodation fees of plaintiff's legal representatives to consult with Dr Pienaar in Pretoria for purposes of preparation of the expert summaries and the trial.

5. The full cost of having the record of proceedings typed.



COETZEE WJ
ACTING JUDGE

<u>For the Applicant:</u>	Adv. Adv C Botha oio Elliot Marris & Hay
<u>For the Respondents:</u>	Adv L Mtukushe oio State Attorney, Kimberley.