



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 1054/2014

In the matter between:

PAULINA MAKGETLA

Plaintiff

and

THE MEC FOR HEALTH: FREE STATE PROVINCE

HEARD ON: 6 MAY 2016

JUDGMENT BY: REINDERS, J

DELIVERED ON: 29 SEPTEMBER 2016

- [1] On 3 May 2015 a thyroid lobectomy operation (“the operation”) was performed on Ms Paulina Makgetla at the Pelonomi Regional Hospital in Bloemfontein (“the hospital”). It is common cause that, although the operation performed by Dr Otto Carl Buchel (“Dr Buchel”) was successful, Ms Makgetla sustained burn wounds on her back during the operation.

- [2] Ms Makgetla issued summons against the Defendant claiming damages in the amount of R 1 717 801,00 with interest. It is averred that the doctors in employ of the Defendant at the hospital breached the duty of care owed to Ms Makgetla by not exercising the degree of care, skill and expertise that may reasonably be expected of them, and that the burns occurred as a direct result of the negligent breach of the said duty of care. Ms Makgetla furthermore averred that the functionality of her right arm, hand and leg was also affected as a result of the negligent breach of the said duty of care. At the onset of the trial it was indicated that the latter issue of negligence was no longer pursued. An order in terms of Rule 33(4) was granted and the trial proceeded only in respect of the merits thereof.
- [3] In presenting her case that the Defendant was negligent in causing the burn wounds to her back Ms Makgetla, her daughter Ms Motlagomang Maggy Melk (Ms Melk), and a neurosurgeon Dr Percy Miller (Dr Miller) testified.
- [4] Dr Miller testified that although he is a neurosurgeon and not a specialist in the area of thyroid lobectomy (partial removal of the thyroid gland), he could comment on the burns sustained by Ms Makgetla as these relate to diathermy burns which is a complication that can occur in any kind of surgery. He explained that a diathermy machine is an instrument used to control bleeding during an operation through an electric current. The current is earthed by a conducting pad placed on a secured area of the patient's body. Contact with fluids should be restricted to

avoid an electric short circuit causing burn wounds to a patient and strict preventative protocols must be adhered to. These include using the correct sterilising solutions and placing special swabs on both sides of the patient's neck to prevent blood from running down. He could not dispute that Ms Makgetla did not bleed excessively during the operation causing blood to run down her neck. He could also not deny that all protocols were observed during surgery.

- [5] It was explained by Dr Miller that it is common practice in neck surgery to place an object like a vacolitre (plastic bag containing intravenous fluid) between the shoulder blades of the patient to extend the neck of the patient. He speculated that the vacolitre used on Ms Makgetla during the operation in this way might have been excessively hot causing the burns. He could not dispute that it was not hot at all and in fact covered with a towel. Dr Miller could not dispute that the electric cautery plate that was put on Ms Makgetla fitted her properly and had no defects, nor could he dispute that Ms Makgetla entered the theatre clothed in dry theatre garment. He described the chances of sweat or urine from Ms Makgetla as possibly causing a short circuit as "wildly unlikely" to be the cause. According to him the positioning of the patient should have been with her head elevated and lower body inclined downwards and that a catheter should have been inserted to prevent the patient from wetting herself during the operation. He could however not dispute that neither of these procedures are followed in thyroid lobectomy operations. Dr Miller conceded that the burns sustained by Ms Makgetla was a very rare complication

and his view on how the burns were caused was purely speculative.

- [5] Ms Makgetla is a 67 year old pensioner who was referred to Dr Buchel by one Dr van Rooyen. Dr Buchel consulted with her twice prior to the operation. On 30 April 2013 she was given a choice between having the operation done or not, and chose to have it done after having signed the necessary consent forms. Ms Makgetla denied that possible complications of the operation was discussed with her. She confirmed that she had emptied her bladder before going to the operation theatre and also that her garment was not wet when she was taken into the operating theatre. According to her it was cold in the operating theatre. Her first sensation upon waking from the anaesthesia was severe pains on her back. She complained but was not attended to until much later when she was informed of the burns and the wounds were properly dressed. It was explained to her that it was in her best interest that she be discharged to avoid the risk of a bacterial infection common to hospitals to the wounds. She conceded that the hospital acted in her best interest even post operational. The burn wounds subsequently healed completely whilst being treated by employees of the Defendant at the Universitas Academic Hospital in Bloemfontein. Ms Makgetla made a favourable impression on me, and even though she felt aggrieved by what she perceived as the hospital not giving her proper care, she could not dispute that the doctors who performed the operation on her took all the necessary precautions expected of them to avoid burn wounds. Although she did not think that they were negligent, she added that she also was not at fault.

- [6] The evidence of Ms Melk did not take the case for Ms Makgetla any further as she merely testified to the complaints that she raised with the hospital following her mother's operation and her views on post-operative treatment that her mother received. In fact, she confirmed that the burn wounds were properly dressed and attended to upon her visit to her mother in the hospital shortly after the operation was done. Even though Ms Melk impressed me as an honest witness who clearly had her mother's best interest at heart, she was not present during any consultations or the operation, nor could she give expert evidence on the proper wound care treatment followed by employees of the Defendant.
- [7] The defendant called two witnesses. Dr Buchell testified that he performed the operation on Ms Makgetla under the supervision of one Dr Coetzee. Ms Makgetla experienced medical problems associated with her thyroid. It was enlarged and visible, and during the first consultation with her on April 2013 he gave her a choice in regards to operational intervention or not, as the condition was not life threatening. He explained the procedure after she gave consent and although he cannot recall exactly what it entailed, he can recall indicating that she would be discharged after three days and explained that she might experience hoarseness of the voice which might recuperate after about six weeks. The precautions to avoid injury to Ms Makgetla included that he checked whether the sheets as well as the patient was dry as he would not have proceeded with surgery if this was not the case. It was confirmed that her bladder was emptied pre-operatively. She was washed with hibitane liquid,

specifically used for purposes of rapid evaporation thereof. The electric cautery plate was not defective, was correctly positioned and properly fitted Ms Makgetla. All bony joints were properly covered as should be done to avoid contact with the metal plate and a subsequent electric shortcut. The scrub nurse placed pads on both sides of Ms Makgetla's neck. She did not bleed excessively as he would have noted it. Although the room temperature of the theatre was not documented, it is generally quite hot as he is wet from the shoulders down after having operated for more than two hours. Catheterisation is not indicated for the procedure. He could specifically recall taking the room temperatured vacolitre from the trolley of the anaesthetist, covering it in a towel and placing it between the shoulder blades of Ms Makgetla. It was sealed and did not leak any fluids. It would have been unsafe to examine Ms Makgetla's back again for any wetness immediately before operating on her as it would have to be resterilized again to avoid infection to the open wound. He can only speculate as to what caused the burn wounds as all protocols were followed. Dr Buchell made a favourable impression on me as an honest witness who made concessions where needed.

- [8] Professor SJA Smit is the Head of the Clinical Unit at Pelonomi Hospital. He testified that he satisfied himself after investigating the incident that all standard clinical protocols in regards to the operation on Ms Makgetla were followed in the avoidance of electrical burns by the operating doctors. In his 35 year career as a medical doctor he could only recall two instances where such burns occurred. It is a very rare complication and so negligible

that it does not warrant explaining it to a patient. In his opinion a catheter was not warranted for the operation, and the positioning of Ms Makgetla during the operation would not have been with her head elevated. Although he was not present during the operation, he trained Dr Buchel and does not have any reason to question his honesty in adhering to the prescribed protocol. Dr Smit made a favourable impression on me and I do not have any reason to reject his evidence.

- [9] From the pleadings it is clear that Ms Makgetla based her delictual cause of action thereupon that the employees of the Defendant negligently breached their duty of care to her as a result whereof she suffered burns on her back. It is trite that if a plaintiff relies on a breach of duty of care, he or she must set out the facts that could or should have been foreseen by the defendant.

See: Beurain h/a Toptrans Transport v Regering van die RSA 2001 (4) SA 921 (O)

Furthermore, the particular grounds of negligence must be detailed.

See: SA Fish Oil Producers' Association (Pty)Ltd v Shipwrights & Engineers Holdings Ltd 1958 (1) SA 687 (C)

This was not done. Nor did Ms Makgetla in her pleadings rely on a lack of informed consent. As Mr Mene on behalf of the Respondent submitted, this aspect cropped up during evidence. Mr Gumle on behalf of Ms Makgetla during argument submitted

however that Ms Makgetla does not deny that she gave consent but rather avers that she was not given adequate information to base her decision of opting for the procedure upon. He pressed hard upon me to accept the version of plaintiff that she was not fully informed.

- [10] As a general rule parties are bound to their pleadings (**See: Imprefed (Pty)Ltd v National Transport Commission 1993 (3) SA 94 (A)**) as this defines the issues to be decided by the court. Even if I would have entertained the question as to whether Ms Makgetla was not fully informed of the risks involved in the operation, Ms Makgetla's own expert witness could not dispute that the risk of sustaining burn wounds was extremely rare. Prof Smit testified that the risk of sustaining such burns was less than 5%, and since the risk was negligible, there was no duty on the medical practitioners to warn the patient of such a risk.

See: Louwrens v Oldwage 2006 (2) SA 161 (SCA)

- [11] The issue to be decided by me is whether the burns suffered by Ms Makgetla was as a direct result of the negligence of the employees of the Defendant in performing the thyroid lobectomy operation.
- [12] The test for determining negligence was formulated by Holmes JA in **Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E-F**. It entails that the plaintiff bears the onus to establish that a reasonable person (*diligens paterfamilias*) in the position of the defendant:

- (i) would foresee the reasonable possibility of the conduct (an act or omission) injuring another person or property, and causing that person patrimonial loss;
- (ii) would take reasonable steps to guard against such occurrence;
- (iii) that the defendant failed to take such reasonable step

See also: Kruger v Carlton Paper of SA (Pty)Ltd 2002 (2) SA 335 (SCA)

[13] From the evidence by the surgeons it is clear that electric burn wounds to a patient during surgery is always foreseeable, and therefore protocols exist to avoid such an injury.

[14] It is an implied term of the contract in cases of medical negligence that the medical practitioner who undertakes treatment of a patient will exercise reasonable skill and care of a practitioner in his field. It is incumbent on the court to decide what is reasonable under the circumstances.

See: Streicher v Van Vuuren 2000 (4) All SA 306 (A)

[15] All three surgeons shared the same view that what caused the burn wounds sustained by Ms Makgetla would be speculative. Mr Ngumle pressed hard upon me to reject the evidence of Dr Buchel that he took pre-operative precautionary care in preventing injury to Ms Makgetla as, so he argued, there was no documented evidence as to such care being taken. I can not agree with him. Dr Buchell struck me as an honest witness and a physician who takes pride in his work. I am satisfied that Dr

Buchell and all the other medical personell involved in the operation on Ms Makgetla, took all the reasonable preventative steps expected of them to avoid burn wounds to Ms Makgetla.

- [16] In an appeal against the dismissal of an action for damages suffered as a consequence of paralysis of the left side of the patient's face caused by the allegedly negligent conduct of a surgeon, Marais JA articulated as follows:

“When a patient has suffered greatly because of something that has occurred during an operation a court must guard against its understandable sympathy for the blameless patient tempting it to infer negligence more readily than the evidence objectively justifies, and more readily than it would have done in a case not involving personal injury. Any such approach to the matter would be subversive of the undoubted incidence of the onus of proof of negligence in our law in an action such as this.”

See: Broude v McIntosh and Others 1998 (3) SA 60(SCA) at 75.

- [17] I have already stated that Ms Makgetla impressed me as a witness. Like the medical witnesses of the Defendant I have great sympathy for her. Broude supra warns me not to infer negligence due to such sympathy. The Plaintiff bore the onus to prove negligence of the Defendant on a preponderance of probabilities. The evidence reveal none. Mr Ngumle on behalf of Ms Makgetla did what he could to convince me otherwise. The upshot is that the claim stands to be dismissed.

[18] The normal result is that costs should follow suit. Ms Makgetla as mentioned is 67 years of age and a pensioner. She was fully entitled to have a court to pronounce on the reasons for her misfortune. In my view she should not be burdened with the Defendant's costs herein. In my discretion I intend to have each party to pay its own costs.

[19] Accordingly the following orders are issued:

1. The plaintiff's claim is dismissed.
2. Each party to pay his or her own costs.

C REINDERS, J

On behalf of Plaintiff: Mr L. Ngumle
Instructed by:
Bahlekazi Attorneys
Bloemfontein

On behalf of respondent: Adv. B.S. Mene
Instructed by:
State Attorneys
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