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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 29632/04

DATE: 2009-02-06

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES/NO
(2) OF INTEREST TO OTHER JUDGES	YES/NO
(3) REVISED	
DATE	21/7/2009
SIGNATURE	

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In the matter between

S BALOYI

and

Plaintiff

MINISTER OF HEALTH GAUTENG PROVINCE

1st Defendant

CONNIE KUBU

2nd Defendant

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J U D G M E N T

POTTERILL A J: The plaintiff is claiming damages from the first and second respondent arising from medical negligence on 8 November 2001 at the Tembisa Hospital. The second defendant had in the course and scope of her employment with the first defendant, administered physiotherapy to the plaintiff, which resulted in alleged burn wounds to his back. As a result of the burn wounds, he sustained the following injuries and I repeat from the particulars of claim,

- "1. Suffering chronic back pain, constant irritation and itching in the burn scar.
2. Being unable to walk straight and having a bent back.
3. Suffering impotence due to pain and back deformity, and
4. Being unable to work and obtain income."

The quantum and merits are by agreement between the parties separated and the only question the court has to decide is whether the
10 second defendant had in fact negligently burnt the plaintiff's back resulting in the injuries as alleged above.

It was also agreed between the parties that the medical records from Tembisa Hospital are not in dispute and that they purport to be what they are.

The defendants closed their case without presenting any evidence.

The plaintiff testified that he had worked for Avis as a driver and was involved in an accident in 1997. He was then fired from Avis. He had been receiving physio treatment at the hospital for two to three
20 months prior to the second defendant allegedly burning him. He had this physio treatment because of pain on his back. Despite having this treatment, he had no problems walking, no back deformity or no stomach problems or suffering from impotence. He even on a part-time basis worked for Nestlé, carrying heavy loads of condensed milk. On 8 November all that changed when he attended for a scheduled physio

appointment. The normal procedure was that Connie, the second defendant, would rub ointment on his back, let him lie on his stomach with arms outstretched, adjust the lights quite close to his back and let him lie there for 30 minutes. On this fateful day, however, she let him lie there for an hour and a half. No other patients or physios wanted to utilise this room at that time, he had no button to press to call for help and the door to this room was open. He no longer had the job at Nestlé and was selling products. After the physio he went to the place he was selling at and the rain caught him. His wife instructed him to take off his wet clothes and this is when she discovered the burns on his back. She showed him in the mirror and they then immediately went to the family physician, Dr Makhote. Dr Makhote then treated his back for these burn wounds on that date, being 8 November, as well as on 9, 10 and 11 November 2001. On 11 November 2001 he received a letter from Dr Makhote referring him to Tembisa Hospital for treatment, as the burn wounds were not healing. He stated that Dr Makhote was his physician for many years and he would be able to inform the court about his pain. Dr Makhote treated these burn wounds by draining the blisters and applying ointment and bandaging the wounds.

He testified that prior to 8 November 2001 he could walk properly, he had no bending to any side of his back or stomach and it was only after the burn that he had picked up all these medical problems. The plaintiff in cross-examination admitted that he went to the hospital initially because, as he put it, "of the shifting of the bones". He could also not deny that on 3 October 2001 at Tembisa Hospital he was diagnosed with scoliosis.

which is the medical term for the bending of the back or the shifting of the bones, as he put it. In fact, in Bundle A1 he is diagnosed with "severe scoliosis." On 4 October 2001 the remarks on page 3 of Bundle A goes further, stating that there is a progressive bending of the torso to the left side, the abdomen is bending towards the left side and his back has severe scoliosis. When confronted with his medical records, the plaintiff had to admit that, as he put it, that had in fact had shifting of the bones. He was therefore sent to a physio due to him having the pre-existing condition of severe scoliosis. In view of the medical documents, the
10 plaintiff and his wife's evidence that he had no medical problems pertaining to his back and stomach before going to the physio on 8 November 2001, is simply not true. It is not their version that the problem was exasperated by the burning, but that the burning caused the back and stomach bending. From the objective medical records their version on the causation of the medical condition is rejected as unreliable and untrue and his claim set out in paragraph 6.1, 6.3 and 6.4 has not been proven. Even this, if at best for the plaintiff there was a negligent burning of his back, there has been no evidence whatsoever to prove that the burning caused the medical problems complained of. The plaintiff has
20 not proved causation and no damages can be granted for negligence in the air.

The next question is whether in fact there was a burning of his back to sustain the claim set out in paragraph 6.1.1. The plaintiff and his wife testified that he was burned on 8 November 2001. Dr Makhote testified that has he treated him for these burn wounds. Dr Makhote does

not in Exhibit C. his clinical notes, remark that the wounds were due to physio treatment, although he testifies that from the form of the burns he did think it to be from physio lamps. Although the plaintiff is adamant that he did not see Dr Makhote after 11 November 2001, Dr Makhote on a letter dated 4 September 2006 (five years after the incident) states that he treated the patient from 8 November to 26 November 2001, a severe discrepancy. The objective medical records show that despite the would-be referral (also not noted on the clinical record of Dr Makhote) for the hospital to treat these wounds that were not healing, the plaintiff only goes
10 to the hospital on 3 December 2001, 21 days later. For wounds oozing and not healing, this is improbable. What is more probable is the medical records reflecting that he had a pressure sore on his lumbar area and he saw the surgeon for this on 7 October 2001. He was in fact treated on a Sunday at Tembisa Hospital for a septic wound on his lower back. On the probabilities it is thus more probable that he had a pressure sore and/or septic wound prior to 8 November 2001 and not a burning on 8 November 2001.

The evidence pertaining to the burning is also improbable. Tembisa Hospital is a hospital with many patients, patients are booked for
20 specific times, as confirmed by the plaintiff's appointment card. How could he be forgotten for an hour and a half? This is just not probable. How could he feel no pain when he was burning blisters? He was transported home, went to attend to his business, and his wife only discovered the burns thereafter; this is not probable. The evidence pertaining to how the burn occurred is furthermore not probable due to the

fact that he says that even if there is no button that he could push, he could move from the bed if he felt that something was burning him. The door was open, he could ask for help.

I therefore find that pertaining to the burning itself, the plaintiff has not proved on a preponderance of probabilities that in fact he was burned and I reject his evidence as being improbable. Accordingly the claim as set out in paragraph 6.1.1 has also not been proven.

ORDER

Accordingly the plaintiff's claim is dismissed with costs.

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APPEARANCES NOT RECORDED
