REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2007/16212

In the matter between:-

MARKUS JOHANNES VAN DER MERWE **Plaintiff**

And

THE PREMIER OF GAUTENG **Defendant**

J U D G M E N T

MATHOPO, J:

[1] The plaintiff sued the defendant, the Premier of Gauteng, for damages on the basis that the medical staff at Steve Biko Academic Hospital in Pretoria were negligent in treating his injured right finger which resulted in the amputation of the finger.

[2] At the commencement of the trial, by agreement between the parties, the issue of liability was separated from the question of quantum. I granted the order in terms of rule 33(4) of the uniform rules of the High Court.

BACKGROUND

[3] On the evening of the 19th March 2007 at or around 21H30, the plaintiff sustained an injury to his right index finger, after his finger got caught in a slamming door at his house.

[4] He attended at the Unitas Hospital where he was seen by Dr Esterhysen at or around 21H50. Dr Esterhysen examined the plaintiff and in the clinical notes, noted that he had sustained a deep laceration of the right index finger which spanned nearly the entire circumference of the finger, the finger was initially white, deformed and dislocated. He reduced the finger and thereafter it (finger) had a good capillary refill (blood supply to the capillaries) and was warm and pink.

[5] The plaintiff did not have medical aid or funds to pay at Unitas Hospital which is a private hospital. Dr Esterhysen personally telephonically arranged with Dr East of Steve Biko Academic Hospital for further treatment. He handed the plaintiff two (2) envelopes marked for the attention of Dr East, one contained a referral letter and another set of X-rays.

[6] The plaintiff arrived at Steve Biko Hospital at around 23H40 and after being admitted he was not attended to until he was transferred to the ward at or about 2H00.

[7] He was seen by Dr Coertze an orthopaedic registrar in his final year and at 10H25, he performed an exploration and debridement

procedure on the plaintiff's right index finger in order to "try and save the finger." In his operative note Dr Coertze noted that the radial neurovascular bundle was severe with a loss of ±1cm and the ulna neurovascular bundle was intact but bruised. He also noted that the capillary refill of the finger was better (after the operation). He also noted that "if dead amputation". He did not attempt any revascularisation of the damaged right index finger.

[8] The day after the operation i.e. 21 March 2007, Mr Van Der Merwe complained of a discoloured (blue) right finger at 05:50 during morning rounds. According to a doctor's note on 21 March 2007 at 05:50, it was found that the right index finger had changed colour from the previous afternoon. There was no sensation on the tip of finger. In the nursing progress report it is specifically noted that at 00:30 on 21 March 2007 that the plaintiff's right hand's fingers were not swollen and were moving well. Thereafter at 03:45 the nurse noted that the plaintiff right index finger was turning blue Dr Kock was notified and she saw the plaintiff at 05:45.

[9] The finger became progressively worse and with the plaintiff in constant pain. Dr East eventually saw him on the 23rd March 2007 and amputated him.

[10] The plaintiff's case is that at no stage from the time of his admission until the time of the first operation on the 20th March 2007 at 10h25 was he ever advised by any medical practitioner that if his finger was to be saved, the operation had to be performed within the first six hours of the injury. Further alternatively the plaintiff avers that the medical staff at Steve Biko Academic Hospital, failed to inform him that they did not have the necessary theatre facilities at that time to perform the operation and consequently failed to inform him that if he wanted the operation done within that period he should consider alternative hospitals in the neighbourhood, i.e Kalafong Hospital, Pretoria West

Hospital, Medunsa Hospital or Chris-Hani Baragwanath Hospital in Soweto.

[11] The plaintiff states that the defendant negligently and in breach of contract through its servants or agents failed to treat him with the necessary skill as result of which sepsis developed in the right index finger which resulted in the distraction of the soft tissue in the injury and finally the amputation thereof. In the amended plea filed during the hearing and prior to the closing of the plaintiff case the following allegations are made:

6.1 "If as alleged by the defendant, the medical staff at the Steve Biko Academic hospital were too busy to timeously attend to the plaintiff and operate timeously on his injured right index finger, they should have informed him that it was imperative to operate on his finger within six hours from the time of injury, that they would not be able to operate on him within that time and that if he wanted to have an operation be done on his finger within six hour period he should consider going to another hospital".

6.2 "They failed to engage a duly qualified and experienced specialist vascular surgeon" or a duly qualified and experienced orthopaedic surgeon versed in hand surgery".

[12] The defendant denied all allegations of negligence.

DISPUTE BETWEEN THE PARTIES

[13] At issue between the parties and the focus of the argument was whether the defendant in breach of the contract negligently failed to treat the plaintiff within the first six (6) hours of the injury, thus resulting in the amputation of the right finger

EVIDENCE OF THE PLAINTIFF

[14] The plaintiff testified that he is a builder, mechanic and does handy work and confirmed that he attended Unitas hospital at 21H30 and arrived at Steve Biko Academic hospital at 23H40 after being referred by Dr Esterhysen, who gave him two (2) envelopes marked for the attention of Dr East, one containing the referral letter and another his X-rays.

[15] Van Der Merwe testified that he told the medical staff at the Emergency department that he has been referred to Dr East but he was told that Dr East was busy with other operations. He also enquired on few occasions as to the availability of Dr East and he was again told that he (Dr East) was still busy in theatre. His unchallenged evidence is that he was only seen by the doctor at 10H00 the following morning.

[16] At no stage was he ever advised by any medical practitioner that if the finger was going to be saved, the golden hours within which it could be done was within the first six (6) hours of the injury and neither was he informed that the medical personnel at the Steve Biko Academic Hospital and the available theatres did not render it possible to perform such operation within the period and that if he wanted such an operation performed he should consider going to other hospitals nearby.

[17] Professor Biddulph, a specialist hand surgeon, who has performed the specialised surgery necessary to revascularise an injured finger such as the plaintiff gave evidence in support of the plaintiff. His evidence was that there was an unacceptable delay of about eleven (11) hours

before the finger was operated and that if the operation had been performed within the six (6) hour period there was a chance that the finger could be saved. In his report he conceded that there was an undue delay in performing the operation unless there were compelling reasons such as the availability of the surgical expertise, theatre facilities and anaesthetists. It was further his evidence that if a theatre was not available or the operation could not be performed timeously, the plaintiff should have been advised that if he wanted his finger to be saved, he had to act within the golden period of six (6) hours and sought help from other hospitals.

[18] During cross examination he conceded that when he prepared his report, he had not been furnished with the Unitas documents/clinical records written by Dr Esterhysen. According to him these documents were furnished to him two (2) days before the trial.

[19] Based on these documents which indicated that on admission, at Unitas, the plaintiff's finger was pink and warm, he stated that the plaintiff should not have lost his finger because, the condition of the finger after Dr Esterhysen had reduced it, showed a good blood flow and there was a 75% chance of saving the finger which the plaintiff could use though stiff and not fully functional.

[20] Dr Serfontein, a partner in the practice where Dr Esterhysen was partner before she emigrated to Australia in 1959, gave evidence and confirmed that the Unitas documents are the clinical notes of Dr Esterhysen. She gave evidence about the procedure used at the practice when a patient is referred to another hospital or doctor. She produced a referral note which in terms of their standard practice is produced after the referring doctor has spoken to the doctor to whom the patient is referred and the latter doctor has agreed to accept the patient. Cross examination of this witness did not advance the defendant's case. Her evidence was unchallenged.

[21] In the light of the fact that Dr Esterhysen was not available to give evidence, the plaintiff acting in terms of the provisions of Section 34(1) of the Civil Proceedings and Evidence Act 25 of 1965 (CPEA) submitted an affidavit by Dr Esterhysen wherein he confirmed the correctness of his clinical notes referred to in evidence by Dr Serfontein.

[22] It was rightly submitted on behalf of the plaintiff that the notes were completed contemporaneously on the 19 March 2007 when he examined the plaintiff. Dr Esterhysen stated that after he had reduced the plaintiff's finger and had established a good blood flow to the distal part of the finger with good capillary refill resulting in the finger being warm and pink, he discussed the plaintiff's condition with Dr Thiart, an orthopaedic surgeon on call at Unitas Hospital with a view to have an open reduction and internal fixation to be performed on the finger. Dr Thiart could not proceed with the operation because the plaintiff did not have any funds to pay for the costs of a private hospital, hence the referral to Dr East. In his affidavit he also confirmed that he was the author of the referral letter marked for the attention of Dr East.

[23] Counsel for the plaintiff submitted that the affidavit was admissible as evidence because the clinical notes were accurate and made contemporaneously and that Dr Esterhysen did not conceal or misrepresent the facts, I agree. The affidavit in essence confirmed the Unitas clinical records which Dr Serfontein identified as being that of Dr Esterhysen. Although Mr Motau raised objection to the affidavit and the Unitas documents, he did not submit any evidence to contradict same. Consequently it is my view that the objection is misplaced and that the affidavit fulfills all the requirements of Section 34(1) of Civil Proceedings and Evidence Act.

EVIDENCE OF THE DEFENDANT

[24] In support of its case, the defendant called Dr Le Roux to give expert evidence on its behalf as well as Dr Coertze and Dr East who performed an open reduction and debridement operation and an amputation of the plaintiff's right index finger on the 20 March 2007 and 23 March 2007 respectively.

[25] Dr Coertze saw the plaintiff on the 20 March 2007 at 10h00 and spoke to the plaintiff about the need to operate on his finger in an attempt to "try and save the finger". He advised the plaintiff that "if the finger was dead" after the operation, amputation would be inevitable. Dr East performed the amputation on the 23 March 2007. Although he testified that he had no recollection about speaking to Dr Esterhysen relating to the subsequent transfer of the plaintiff to the Steve Biko Academic Hospital, he did not deny that such a telephone call could have been made. He gave evidence that on the night in question, he was busy with seven (7) emergency operations until 05h00 the next morning, having started at 20h00, the previous night. He said there were three theatres at that time, namely Orthopaedic, obstetrics and general trauma theatre (or cardio theatre). The obstetric theatre was not supposed to be occupied. The other two theatres were busy and there was no theatre available to accommodate the plaintiff.

[26] He conceded during cross examination that in the event of an emergency, he could call a consultant orthopaedic surgeon who was on standby to assist him. He also conceded that surgeons in theatre rooms are able to take calls during short breaks to attend to emergency situations. He did not contact the consultant or refer the plaintiff to another hospital because according to him there was no threat to life or limb. Neither did he during the break, inform the plaintiff to consider other hospitals if he wanted to save his finger.

[27] Dr Le Roux, a specialist vascular surgeon who has never performed a revascularisation of the vessels of the hand operation was of the view that vascular injury with injury on both sides is extremely difficult to

repair because with this type of injury the vessels occlude afterwards. He further stated that it is difficult to make a decision or finding about the viability of a finger based on the clinical assessment without being objectively measured by way of instruments such as the pulse oximetry or the Doppler flow. He opined that there was little capillary refill on admission.

[28] According to him the finger could eventually die after four to six hours. Immediate intervention could never have saved the finger. He agreed with Professor Biddulph that revascularisation was not attempted in South Africa due to its modicum of success and with 10% chances of recovery if successful. He testified further that if the plaintiff had been taken timeously to the theatre an open reduction operation which was done by Dr Coertze as opposed to a revascularisation would have been done, this is particularly so because in South Africa revascularisation of the digits is not done because it could make the finger worse by trying a bypass, hence such operation was not attempted.

[29] He opined further that availability of theatre was always a problem in provincial hospitals and stood by his earlier report that no negligence could be attributed to the medical staff at Steve Biko Academic Hospital even after the Unitas document.

[30] This is the conspectus of the evidence which I must evaluate. The test to be applied in an action for damages alleged to have been caused by the defendants negligence has been stated in two decided cases of the Supreme Court of Appeals in **Groenewald v Groenewald 1998 (2) SA at 1112G-J** the court said the following:

"In delictual claims of the nature involved in the present case two separate questions arise:

1. Was the defendant at fault?

2. For what consequences caused to the plaintiff in consequence of the defendant's conduct is the defendant liable in damages to the plaintiff?

For the purpose of answering the first question the defendant would be held to be at fault as long as he intended to cause harm to the plaintiff, even if did not intend that the consequences of such conduct would be to cause the kind of harm actually suffered by the plaintiff or harm of that general nature. He would also be held to be at fault if a reasonable person in the position of the defendant would have realised that harm to the plaintiff might be caused by such conduct even if he would not have realised that the consequences of that conduct would be to cause the plaintiff the very harm she actually suffered or harm of that general nature".

In Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000(1) SA 827 (SCA) at 838I-839C, Scott JA writing for the majority of the court said the following:

[21] A formula for determining negligence which has been quoted with approval and applied by this Court time without measure is that enunciated by Holmes JA in Kruger v Cotzee 1966 SA 428(a) at 430E-F it reads:

"For the purpose of liability culpa arises if-

(a) a diligent 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."

[31] In the light of the above approaches and having regard to the present matter, two main questions need to be considered

31.1 whether there was negligence on the part of the medical staff at the Steve Biko Academic Hospital who treated the plaintiff injury to his right index finger;

31.2 whether such negligence caused or contributed to the loss of the right index finger(i.e. amputation).

[32] The plaintiff's action as formulated in the particulars of claim is based on contract, it being a term of the agreement between the parties that the defendant's medical staff would treat and render such care, skill and expertise to the plaintiff, as could reasonably be expected from medical staff in the circumstances. The plaintiff contends that it was a term of the agreement that the defendant's medical staff would not act negligently in their treatment and management of the plaintiff.

[33] Mr Stroh for the plaintiff submitted that this case revolves around the determination of the probable progression of the plaintiff's right index finger after it had been injured by him at approximately 21h30. He argued that according to Dr Esterhysen, on admission, the finger was initially white but after reduction there was a good capillary refill and the finger become warm and pink and plaintiff at that time would move his finger.

[34] He submitted that on the available evidence, Dr Coertze also noted in his operation report that after the operation which he has performed on

the 20 March 2007 at 10h25 the finger's capillary refill was better than prior to the operation, thus criticizing a note in the documents of Steve Biko Academic Hospital made on the 20 March 2007 to the effect that there was a blue index finger.

[35] He contended further that if the finger was blue as contended by the defendant, Dr Coertze would not have considered any operation on the 20 March 2007 because he stated that "if dead amputate" a colour blue is an indication of an almost dead finger. He argued that the good or better capillary refill which was established by Dr Coertze during the operation negate the fact that it was dead but an improved colour of the finger hence the operation.

[36] Mr Stroh further submitted that on the probabilities Dr East was informed about the condition of the plaintiff particularly that he had a good capillary refill and that the operation had to be performed timeously to save the finger and if Dr East was busy, he should have arranged with other doctors particularly the consultant who was on standby or Dr Kitshoff to attend the plaintiff. Alternatively not agreed to accept the referral from Dr Esterhysen.

[37] He argued that the defendant through its agents or servants were negligent because the plaintiff was not informed that he could not be attended to timeously and was also not informed that he should consider other hospitals since the defendant agents or servants were busy. To attend to the plaintiff after 11 hours counsel contends, was conduct consistent with negligence. He argued that the conduct of Dr East fell short of a reasonable man because having agreed to see and treat the plaintiff, Dr East did not consider it urgent to see the plaintiff or at least refer him to another doctor or hospital for immediate treatment.

[38] Finally relying on the evidence of Professor Biddulph, he submitted that the probabilities are that the finger was still viable when he attended Steve Biko Academic Hospital and if the compelling reasons stated by

Professor Biddulph were present, at best for the defendant was to refer the plaintiff to other hospitals or inform him that the hospital will not be able to treat him so that he can make an election. Failure to do so, counsel contended constitutes breach of the agreement and negligence and that the delay in attending to his finger caused the amputation.

[39] In support of his argument, he referred me to the unreported judgment of Gorven J in **TANYA LEIGH BUNGE N.O. v MEC FOR HEALTH, KWAZULU NATAL AND OTHERS** delivered on the 8th October 2009. The ratio of this judgment is to effect, that the hospital and/or doctors are obliged to warn the patient of the seriousness and potential consequences of the patient's condition and in the event of them unable to perform the diagnosis and care to advise the patient accordingly. (my emphasis)

[40] He urged upon me to consider the evidence of Professor Biddulph above that of Dr Le Roux because the latter had never performed a revascularisation of the vessels of the hand operation and his evidence was not based on experience but on what he learnt and read on the subject.

[41] Mr Motau on the new ground alleged by the plaintiff of failure on the part of the defendant to make alternative arrangement, submitted that the plaintiff failed to show:

i) that there were alternative hospitals which the plaintiff could have considered
ii) that such hospitals have available staff and theatre facilities to perform the operation
iii) that if the operation had been performed, the finger could have been saved

Consequently he argued that plaintiff has failed to discharge the onus of establishing any negligence or breach of agreement on the part of the defendant.

[42] Mr Motau also submitted that this new ground is undermined by the fact that it was never raised by Professor Biddulph in his report to found liability. because in his report Professor Biddulph opined that the absence of surgical expertise, unavailability of theatres are compelling reasons justifying the delay and excluding liability.

[43] He argued further that it is not enough for the plaintiff to say he was not afforded an opportunity to make an election to found liability without indicating by way of evidence that the alternative hospitals actually had theatre facilities available to treat him.

[44] He submitted that it was improbable for Dr East to accept the call to treat the plaintiff when he knew that he was busy with 7 operations. He argued further that following the evidence of Dr East, the submission by the plaintiff that he should have been referred to other hospitals is unsustainable because these hospitals were equally busy like the Steve Biko Academic Hospital and the plaintiff failed to discharge the onus that on the day in question they could have treated him promptly.

[45] He urged upon me to reject the evidence of Professor Biddulph because in his initial report and before being provided with the Unitas documents, he concluded that no negligence could be attributed to the actions of the defendant's servants notwithstanding the compelling reasons mentioned in his report and the delay.

[46] He submitted that the evidence of Dr Le Roux, that the finger could have been amputated even if he had been seen earlier should be preferred because both experts were ad idem that revascularisation is a daunting task and never attempted in South Africa. In particular urged me to accept Dr Le Roux's evidence, that due to the nature of

the injury, the nerves and vessels were damaged thus the plaintiff was always a candidate for amputation.

[47] I accept that Dr Esterhysen, after consulting with the plaintiff, he found good capillary refill and the finger was warm and pink and thereafter, he telephonically contacted Dr East at Steve Biko Academic Hospital and the latter agreed to accept the referral from him. I also accept as correct the probabilities that Dr East was told about the condition of the plaintiff and that given his condition his finger required immediate or urgent attention. Dr East in his evidence when asked about the telephone call and referral letter did not deny it save stating that he has no recollection of the call. I accordingly find that the call was made to him and accepted the referral.

[48] I do not think that Dr Esterhysen, given the plaintiff's condition, would have referred him to Dr East without any prior discussion. The objective facts reveals that the necessary call was made to Dr East and he accepted the referral, hence the plaintiff was directly referred to him together with the two letters marked for his attention.

[49] I fail to understand why Dr East accepted the referral when he knew that he will be busy with seven (7) operations. At best for him he should have informed Dr Esterhysen or the plaintiff about his busy schedule. Again and assuming that it was not possible for him to treat the plaintiff, he should have made the necessary arrangements with other doctors to treat him given his tight work schedule. This is especially so because on his evidence, he conceded that there was an orthopaedic consultant who was on standby for emergency situations. If the latter was also not available, at best for him in the circumstances would have been to advise the plaintiff to seek help at alternative hospitals. To accept the urgent referral and not deal with it or make alternative arrangement is to my mind negligent.

[50] I accept that plaintiff arrived at Steve Biko Academic Hospital with a good capillary refill. To delay and only take him to the theatre the next day at 10h25 is unacceptable. I agree with Professor Biddulph that if the operation had been done within the golden six hours, there was a chance that the finger could be saved. Dr Coertze when he operated on him the next day said his sole purpose was to "try and save the finger", he repeated that in evidence in this court. In my view if the operation could not achieve any real purpose as the defendant seem to suggest, I fail to appreciate why Dr Coertze performed the operation. Quite clearly, he knew or was alive to the fact that the finger stood a chance of survival.

[51] I accept that even though revascularisation in South Africa is a daunting task and not attempted in South Africa, if the plaintiff had been informed at Steve Biko Academic Hospital about it, he could have made alternative arrangements. To treat him the way the defendant's agents did and make him wait for eleven (11) hours before being operated is totally unacceptable.

[52] I accept Professor Biddulph opinion that, the plaintiff after the operation would not have acquired full use of his hand but as a labourer, mechanic and handyman, he could still use the hand.

[53] It is trite law that a patient in a hospital is entitled to be treated with due and proper care and skill. The degree of care and skill that is required is that which a reasonable practitioner would ordinarily have exercised in South Africa under similar circumstances.

[54] The standard of care, skill and diligence exhibited by a medical practitioner must be in accordance with the test of reasonableness which has clearly been set out in two important decisions of the Supreme Court of Appeal, **Mitchell v Dixon** and **Van Wyk v Lewis.** In this regard Chief Justice Innes set out the legal principle relating to the

standard of care, skill and diligence exhibited by a medical practitioner as follows in **Van Wyk Lewis:**

> *"It was pointed out by this court, in **MITCHELL v DIXON (1914 AD at 525)** that 'a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care' And in deciding what is reasonable the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that general level."*

[55] It is cold comfort for the defendant to allege that the plaintiff should have proved that there were hospitals in the vicinity with theatre facilities available to take him. To adopt such an approach would be tantamount to placing an onerous duty on the plaintiff. Every right thinking member of society who has been referred to a hospital by a doctor expects to be treated promptly with a respect and dignity.

[56] I find that if it was not possible for the defendant or its agents to treat the plaintiff within the six (6) golden hours referred to by Professor Biddulph, they should have advised him so that he can make an election. It is unacceptable for the defendant to "shrug its shoulder" and allege that since doctors were all busy with no theatre facilities available, nothing could be done to help the plaintiff. The plaintiff was referred to Dr East. In my view Dr East was informed and knew about the plaintiff's medical condition which required immediate attention. To make him wait for eleven (11) hours is not conduct of a reasonable practitioner and constitutes negligence. This inexplicable and unreasonable delay ultimately caused the finger to be amputated.

[57] As to costs it was submitted on behalf of the plaintiff that the services of senior counsel was necessary. The defendant objected and argued that the mater was neither complex nor novel and that it did not warrant the services of senior counsel. I do not agree. In my view, the services of senior counsel was warranted in this matter. I will accordingly allow it.

[58] I therefore conclude that on balance of probabilities, the plaintiff has succeeded in discharging the onus of proving negligence on the part of the defendant.

In the circumstances I make the following order:

1. The defendant is declared liable for any damages suffered by the plaintiff arising out of his amputation following an incident on the 19 March 2007.

2. The defendant is ordered to pay the plaintiff's costs thus far such costs to include:

    a) those occasioned by the employment of senior counsel; and

    b) the reasonable taxable qualifying and reservation fees of the plaintiff's expert, Professor S Biddulph.

RS MATHOPO
JUDGE OF THE HIGH COURT

Appearances:

For the Plaintiff	:	Adv. J STROH SC
Instructed by	:	Swart Redelinghys Nel & Partners
For the Defendant	:	Adv. T. MOTAU
Instructed by	:	The State Attorney Johannesburg
Date of hearing	:	19 February 2010
Date of Judgment	:	11 March 2010