REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 24447/13

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

21/4/2017 .....
DATE SIGNATURE

In the matter between:

GOUWS: DERICK Plaintiff

and

DR GL VAN WYK Fourth Defendant

J U D G M E N T

NOWOSENETZ , AJ:

[1] This is an application by the plaintiff for leave to appeal. Very detailed grounds were submitted by the plaintiff and both parties submitted comprehensive heads of argument at the hearing. Judgment was reserved. Leave was granted to the plaintiff to file a Constitutional Court judgment which had come to the notice of the plaintiff's counsel during this period. The case is *Dudley Lee v Minister for Correctional Services* (decided on 11 December 2012) 2013 (2) SA 144 (CC). The plaintiff also referred in argument to *P A F Daniels v Minister of Defence* 2016 (6) SA 561 (WCC). I will deal broadly with the main areas of contention.

[2] Plaintiff contends that the court erred in placing credence on the defendant's version and that he was a bad witness. Considering that the events were six years ago and the records were poor, he was reasonably consistent though not entirely. The probabilities and context of the events were also taken into account in weighing his evidence and in my view he was sufficiently reliable. More specifically it was argued that it was not pleased that the plaintiff performed a full laparotomy on 31 August 2010 and it should have been found that he did not perform a full laparotomy. In this regard the plaintiff suggests that the defendant's exploration of the plaintiff's abdomen was indequate and that the existence of an abscess or deep seated infection could not reasonably be excluded. The defendant's evidence was that the investigation of the abdomen was impeded by adhesions and it is accepted that a full laparotomy may not have been possible. In my view, he conducted reasonable investigations for the causes of sepsis on 31 August 2010 and even if he did not find any infection or abscess, the plaintiff has not proven that a reasonable surgeon would have found otherwise. Even if another court found that a full laparotomy was not performed this is a causal non sequitur. It was not seriously contended that he totally failed to perform a laparotomy at all. This case is distinguishable for Daniels where no laparotomy was performed at all.

[3] It was submitted that the court erred in not finding that the defendant failed to consider co-morbidities and risk factors of the plaintiff in assessing whether antibiotics should have been prescribed by him. Dr Bornman's evidence was cautious and qualified on the issue of antibiotics and the expert evidence suggests a measure of deference to the surgeons judgment is appropriate in the treatment of

post surgical sepsis. I am not persuaded that another court would take a different view on this issue. As at 31 August 2010 there was no reasonable suspicion of sepsis or an abscess.

[4] It was contended that the court erred in finding the post discharge treatment of the plaintiff sub substandard, having regard inter alia to the concessions made by prof Bizos. These issues were taken into account into account in the judgement. No new reasons are advanced in this application why the findings are wrong.

[5] Even if aspects of the defendant's treatment of the plaintiff were substandard there is not necessarily a causal link between such sub standard treatment and the consequent septic attack suffered by the plainitff. I have considered the above judgments and cannot find any misapplication of the principles relaitg to causation in this case.

[5] It was contended that the court wrongly rejected Prof Bornmans "volcano theory" and preferred the "virulent unknown organism" theory of Prof Bizos. This is an oversimplification and distortion of the findings. It is not the function of a court to necessarily prefer one expert's explanation above another. The finding was tha there as simply no factual foundation in the pathology investigations and further treatment of the Plaintiff after his septic attack to support the existence of a communicated infection from within the abdomen. The overall onus of proof is on the plaintiff and even notionally without a competing explanation for another expert the plaintiff did not establish the case of the septicaemia was attributable to an undetected, pre-existing deep seated abdominal infection or sepsis.

[6] Again much ado was made about the inference made by the court in the defendant not calling sister Ria. The plaintiff always had to option of calling her as a witness and failed to do so. It bears the onus and not the defendant. No adverse inference can be ascribed to the defendant's failure. Nor is the correspondence between the defendant's attorneys and her as to what they expected her to say indicative of what she might or might not have said. This issue in my view has no substance.

[7] The defendant dealt in great detail with each issue raised by the plaintiff and it suffices to mention that without recording these again I am in broad agreement with the submissions made.

[8] In conclusion in my view another court is unlikely to come to a different finding on the assessment of the facts or the legal inferences on negligence. The application for leave to appeal cannot succeed.

ORDER

A The plaintiff's application for leave to appeal is dismissed.

B The plaintiff is ordered to pay the costs of the application including any costs of the application to file the constitutional court judgment after the hearing.

L NOWOSENETZ
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Counsel for the plaintiff: GJ Strydom SC
Instructed by: Edeling van Niekerk Inc
Counsel for the fourth defendant: G Schwartz
Instructed by: Webber Wentzel
Date of hearing: 28 February 2017
Date of judgment: 21 April 2017