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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NUMBER: 2016/07322

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|-----|-------------------------------------|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

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SIGNATURE

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In the matter between:

M N

PLAINTIFF

And

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH
AND SOCIAL DEVELOPMENT OF THE GAUTENG
PROVINCIAL GOVERNMENT**

DEFENDANT

JUDGMENT

WINDELL, J:

INTRODUCTION

[1] The plaintiff in this matter, an adult female born on [...] June 1961, instituted action against the defendant in his capacity as the authority responsible for the Department of Health and Hospitals in the Province of Gauteng. The plaintiff claims damages as a result of the alleged negligence of the doctor/doctors and nursing staff on duty during the performance of a parathyroidectomy procedure on 1 December 2014 at Chris Hani Baragwanath Hospital (“the hospital”).

[2] It is not in dispute that Dr Bombil, the surgeon who performed the procedure and the other hospital staff who assisted him, acted within the scope and course of their employment with the defendant.

[3] Merits and quantum have been separated and it was agreed that the matter would proceed on the issue of merits only.

[4] Essentially, the plaintiff’s claim (which proceeds in delict) hinges on two aspects:

4.1 Firstly, that the doctors and nursing staff involved in her parathyroidectomy procedure owed her a duty of care in accordance with generally accepted standards and as a result of their negligence, the plaintiff sustained injuries of the following nature:

- 4.1.1 Paralysis of the left vocal cord;
- 4.1.2 Damage to the left recurrent laryngeal nerve; and
- 4.1.3 Hoarseness of voice.

4.2 Secondly, the defendant failed to obtain the plaintiff's informed consent to the surgery in that it:

- 4.2.1 Failed to inform the plaintiff of all reasonable risks of and complications associated with parathyroidectomy surgery, particularly those possible complications which, although rare or infrequent in experienced hands, may have serious consequences to the plaintiff's life and general well-being.
- 4.2.2 Failed to inform the plaintiff that the person that was allocated to perform the relevant surgery did not have sufficient experience in performing a parathyroidectomy.

THE EVIDENCE

[5] The plaintiff testified and was the only witness called. The defendant called two witnesses, namely, Dr Bombil and Dr Komeni.

[6] The plaintiff was referred to the hospital by the Soweto Community Health Care Centre with a clinical history of memory loss and confusion, general body pains and forgetfulness. On 19 November 2014, the plaintiff was subsequently admitted to ward

20 at the hospital, where she presented with various symptoms in that she complained that she felt dizzy, could not walk and that “her head was not alright”. A provisional diagnosis of EARI and Alzheimer’s disease was recorded.

[7] The plaintiff underwent numerous tests and investigations during her stay in hospital. On 26 November 2014 a medical practitioner in the employ of the defendant started questioning the possibility of a diagnosis of hyperthyroidism/adenoma, and the plaintiff was placed on the theatre schedule for 30 November 2014.

[8] A plan setting out the treatment of the plaintiff being “CMP”, “RVD consented”, “TSH”, “CRP”, a psych review plus “input & output” are all listed in the plaintiff’s medical records.

[9] On 30 November 2014, an informed consent document was completed and signed by the plaintiff with the assistance of Dr Komeni. A layman’s consent form was subsequently also completed by the plaintiff, wherein the plaintiff provided a description of what she understood would occur during the surgery.

[10] The plaintiff’s evidence lacked particularity and she had no genuine recollection of her hospitalisation except for the fact that she suffered from “calcium” and that blood samples had been drawn from her repeatedly. The plaintiff was however able to remember that she was “awake” during the surgical procedure and she observed the actions of the medical practitioners as well as their support staff. She stated that her

medical condition and treatment thereof was never discussed with her. The plaintiff testified that she would have refused to undergo the surgical procedure had she known she would have temporary hoarseness of her voice as a possible complication of the surgery.

[11] The plaintiff suffered from memory loss prior to the surgery and testified that she continued to suffer from memory loss post-operatively.

[12] The plaintiff had employed two experts but elected not to call them. No agreements or admissions were sought by the plaintiff on the status of the expert reports that were filed.

[13] Dr Bombil, who testified on behalf of the defendant, is an experienced surgeon. His evidence can be summarized as follows:

- 13.1 He was the chief medical practitioner of the relevant unit at the hospital and explained the procedure from the plaintiff's referral and admission up to and including the decision to perform surgery as set out in the hospital records.
- 13.2 Amongst other tests, an HIV test was performed on the plaintiff. He also dealt with aspects of the plaintiff's post-operative care and the complication suffered by the plaintiff and the temporary hoarseness of her voice.
- 13.3 As the treating surgeon, he testified that medical practitioners obtained informed consent from patients "as a team".

- 13.4 He testified that the nurses who undertook the recording of the laymen's consent form are not aware of the nature of the surgical procedure to be undertaken.
- 13.5 The plaintiff was initially going to be placed under anaesthesia during the operation but subsequently a decision was made that the plaintiff would receive local anaesthesia so that the plaintiff would not be completely sedated during the surgical procedure.
- 13.6 The plaintiff had an excessive concentration of calcium in her blood. Such a condition was known as hypercalcemia. Hypercalcemia impairs the body's ability to carry out its normal functions. Extremely high levels of calcium can be life threatening. Severe cases of hypercalcemia can cause neurological symptoms such as depression, memory loss, confusion, dementia and coma, which can be fatal. Hypercalcemia causes damage to the kidneys, limiting their ability to cleanse the blood and eliminate fluid. Calcium levels affect bones leading to individuals experiencing bone pain. A patient suffering from hypercalcemia may experience headaches, fatigue, muscle cramps and twitches.
- 13.7 One of the causes of hypercalcemia is an overactive parathyroid gland which is referred to as hyperparathyroidism by medical practitioners. Hyperparathyroidism can stem from a small, benign tumour or enlargement of one or more of four parathyroid glands.
- 13.8 The plaintiff's diagnosis of hyperparathyroidism informed his decision to perform a parathyroidectomy on the plaintiff.
- 13.9 On 1 December 2014, a surgical procedure constituting of a local

excision of a parathyroid adenoma was performed by him and Dr Mitchell by means of a blunt dissection around the thyroid gland through a left neck incision of around one centimetre in diameter.

- 13.10 Dr Bombil explained the positioning of the parathyroid glands in relation to the positioning of the laryngeal nerves. He also explained that the stretching of these nerves could occur as a complication during the procedure.
- 13.11 Hoarseness of the voice was the expected fall out from a stretched laryngeal nerve. He explained that the severing of the laryngeal nerve can result long term and even permanent vocal cord paralysis.
- 13.12 Dr Bombil testified that an injury to the nerve could take as long as eighteen months to heal completely.
- 13.13 He denied that the procedure took unduly long even though the need of a scan arose to detect the glands. According to him, the anatomical position of the parathyroid glands differs from patient to patient.
- 13.14 Post-operatively, Dr Bombil testified to the fact that the plaintiff developed a hoarse voice.

[14] Dr Komeni also testified on behalf of the defendant. He was given the task to explain the informed consent form to the plaintiff in her language of preference, as well as the risks and complications associated with a parathyroidectomy. He testified that he first had sight of the plaintiff's medical records on 30 November 2014 when the plaintiff was finally approved for surgery. He further testified that he did not peruse the plaintiff's medical records completely. Between 4 December 2014 and 5 December 2014, Dr

Komeni referred the plaintiff for speech therapy.

[15] Dr Komeni's testimony was criticised and he was accused of merely testifying that which he told the plaintiff. He attracted further criticism when he testified that, as an intern, he researched what a parathyroidectomy procedure entailed and that he apprised himself of the risks associated with such a surgical procedure before completing the informed consent document with the plaintiff.

[16] Counsel for the plaintiff submitted during cross examination of the defendant's witnesses, that not a single, meaningful discussion took place with the plaintiff regarding the inherent risk factors of surgery, and in particular the positioning of the laryngeal nerves in the area of surgical procedure. It was also put to the witnesses that the plaintiff would never have undergone the procedure had she known what the complications would be. It was contended that there was a deep misunderstanding of the need for the operation at the time and that there was a lack of informed consent.

[17] Both Dr Bombil and Dr Komeni denied that the plaintiff was not aware of the risks involved in performing the procedure and confirmed that the necessary consent was obtained before the procedure was done.

THE ARGUMENTS

[18] In argument, counsel for the plaintiff, Ms Letzler, suggested that should the court find that there was no negligence on the part of the defendant during the performance of the procedure and/or before and after admission and/or treatment of the plaintiff, that

the common law needs to be developed to allow for “*a patient orientated approach*” in medical treatment as opposed to the former patriarchal relationship between doctor and patient and the uneven distribution of power this brought about.

[19] It was maintained that Dr Komeni conducted various investigations into the health and well-being of the Mrs Ntuli prior to him seeking and obtaining the plaintiff’s informed consent, and as such these investigations were performed in contravention of The National Health Act¹, and infringed on the patient’s health and well-being. It was submitted that there was no meaningful engagement between the plaintiff and medical practitioners in so far as discussing the surgical procedure and its associated risks and complications, and that the consent obtained by the plaintiff to perform the surgical procedure was inadequate. It was submitted that the task of obtaining informed consent from the patient in this case was reduced to a mere clerical task.

[20] It was suggested by Advocate Letzler that the plaintiff may not have had the necessary mental capacity to consent to the surgical procedure. This suggestion was strongly objected to by counsel on behalf of the defendant which objection was upheld. It was not the plaintiff’s evidence and it does not form part of the pleaded case.

[21] The court was referred to literature compiled by The Health Professions Council of South Africa (“HPSCA”), namely, booklet 3 which deals with the Patient’s Rights Charter and booklet 4 which canvasses the topic of informed consent by counsel on behalf of the plaintiff. Ms Letzler further amplified her argument with reference to The Consumer

¹ Act 61 of 2003

Protection Act². It was submitted that the defendant is vicariously liable for any actions taken by a clinic, hospital or its staff in contravention of the Consumer Protection Act. It was submitted that in terms of this Act the patient may not waive any obligation or assume any right in terms of service delivery. The obligation is on the hospital staff to adequately inform the patient and not for the patient to ask questions. It can then also never be correct to state that a patient “has to be grateful” for the treatment received, as the patient as a consumer has the various important rights none of which the defendant adhered to in their alleged attempts to obtain informed consent.

[22] Counsel for the defendant contended that the court should reject the plaintiff's evidence. She simply denied discussing her health and treatment with medical practitioners and that they did not explain any of the procedures to her, but were unable to provide specific details. She suffered from memory loss for a substantial period of time prior to the surgery and she testified that she still suffered from memory loss. As a result the plaintiff's evidence cannot be relied upon by the court especially in light of some of the responses elicited from the plaintiff during cross-examination. It was submitted that defendant's evidence was reliable and straight forward and Dr Bombil's evidence was unchallenged. The defendant's main contention is that the plaintiff has not proven any negligence on the part of Dr Bombil or any of the other medical staff during the operation.

NEGLIGENCE

[23] It has long been recognized in our law that an operation on a person is a violation

² Act 68 of 2008

of his bodily integrity and therefore it is *prima facie* unlawful. This is also embodied in s 12(2) of our Constitution. Upon proof of the act of an operation the *onus* shifts to the defendant to prove justification. In this instance the justification relied upon is consent. The well-known ground of justification is expressed as *volenti non fit iniuria*. The question whether consent is present in a given case, is one of fact which has to be proved. If the defendant thought that consent had been given while in fact it was absent, no ground of justification existed and the act would be wrongful. In such a case liability may be evaded on the ground of lack of fault.³

[24] A delict consists of five elements, all of which must be present before the conduct complained of can be classified as a delict. Those elements are an act, wrongfulness, fault, harm and causation.

[25] The main issue in my view, before lack of consent is considered, is whether the plaintiff has discharged the onus of establishing negligence. The test for negligence appears in the following dictum of Holmes JA in *Kruger v Coetzee*⁴:

“There is only one enquiry, namely whether the plaintiff having regard to all of the evidence in the case, has discharged the onus of proving on the balance of probabilities, the negligence averred against the defendant.”

The ultimate analysis is whether in the particular circumstances the conduct complained

³ *Neethling Potgieter and Visser* Law of Delict, 7th ed p 111.

⁴ 1966 (2) SA 428 (A)

of fell short of the standard of a reasonable person or, in this matter, the appropriate standard for the relevant medical personnel applicable.

[26] In *Van Wyk v Lewis*⁵, Wessels JA said the following on the standard of competence of a surgeon:

“...the surgeon will perform the operation with such technical skill as the average medical practitioner in South Africa possesses and that he will apply that skill with reasonable care and judgment...(he) is not expected to bring to bear on a case entrusted to him the highest possible professional skill but is bound to employ reasonable skill and care and is liable for the consequences if he does not.”

[27] In this matter the laryngeal nerve of the plaintiff was inadvertently stretched during a parathyroidectomy procedure performed on the plaintiff, and as a result the plaintiff developed a hoarse voice. It was not disputed by the plaintiff that such a complication may occur during a parathyroidectomy. The question is whether on the appropriate test (viewed in the circumstances as set out above), the surgeon and the relevant support staff conducted themselves in a manner constituting negligence.

[28] In my view, the plaintiff has set an unreasonably high standard for surgeons. In *Buthelezi v Ndaba*⁶, Brand JA held the following:

“After all, as Lord Denning MR observed in *Hucks v Cole* [1968] 188 New LJ 469

⁵ 1924 AD 438 at 456

⁶ 2013 (5) SA 437 (SCA)

([1993] 4 Med LR 393):

‘With the best will in the world things sometimes went amiss in surgical operations or medical treatment. A doctor was not held to be negligent simply because something went wrong.’

[29] The test for negligence was neatly summarized as follows in the matter of *Castell v De Greef*⁷, wherein Scott J held as follows:

“The test remains always whether the practitioner exercised reasonable skill and care or, in other words, whether or not his conduct below the standard of a reasonably competent practitioner in his field. If the error is one which a reasonably competent practitioner might have made, it will not amount to negligence.”

[30] No evidence was placed before the court to prove any negligence on the part of Dr Bombil or Dr Komeni. The plaintiff had two experts available but decided not to call them. The evidence of Dr Bombil is undisputed. It was conceded by Ms Letzler during argument that the plaintiff failed to prove that Dr Bombil or Dr Komeni was negligent during the performance of the procedure on the plaintiff. Ms Letzler is however of the view that negligence had been established in that the doctors failed to obtain the necessary informed consent before performing the procedure. She contends that medical negligence and the absence of informed consent are and should be acknowledge as independent alternative claims.

[31] The plaintiff’s case is set out in the particulars of claim. The allegation during cross examination of the witnesses and during argument that the “*various investigations into*

⁷ 1993 (3) SA 501 (C) at 512A - B

the health and well-being of the plaintiff were performed in contravention of The National Health Act, and infringed on the patient's health and well-being" does not form part of the plaintiff's pleaded case and are irrelevant to the issues at hand. The submission that the defendant is vicariously liable for any actions taken by a clinic, hospital or its staff in contravention of the Consumer Protection Act was also not pleaded and is therefore also irrelevant in determining the real issues between the parties. The plaintiff is bound to her pleadings which are based on the alleged negligence of the hospital personnel during the performance of the procedure.

[32] In *Sibisi v Maitin*⁸, the appellant contested the court *a quo*'s finding on negligence. The appellant also argued that the common law on informed consent should be developed. Lewis JA subsequently held that it was unnecessary to determine the test for informed consent because negligence had not been established, and accordingly there was no need to consider wrongfulness or grounds excluding wrongfulness. The appeal was consequently dismissed.

[33] Ms Letzler contended that the decision in *Sibisi* was incorrect and that the SCA conflated the issues. She submitted that applying the *Sibisi* judgment in future would almost certainly result in legally unsound consequences.

[34] I have considered the arguments on behalf of plaintiff. I have no reason to doubt the correctness of the reasoning in *Sibisi*, I agree with it, and I intend following it. The plaintiff in this matter has not proved negligence as pleaded in paragraph 8.1 to

⁸ 2014 (6) SA 533 (SCA)

paragraph 8.6 of the particulars of claim.

[35] In the result the following order is made:-

35.1 The plaintiff's action against the defendant is dismissed with costs.

L WINDELL

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Attorney for plaintiff: Maria Phefadu Attorneys

Counsel for plaintiff: Advocate M. Letzler

Attorney for defendant: Office of the State Attorney, Johannesburg

Counsel for respondent: Advocate N. Makopo

Date matter heard: 14 June 2017, 15 June 2017, 19 June 2017, 22 June 2017

& 25 July 2017.

Judgment date: 29 September 2017