REPUBLIC OF SOUTH AFRICA

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

CASE NO: 35055/2016

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

16 AUGUST 2021
DATE

.....
SIGNATURE

In the matter between:

I O obo
N O Plaintiff

and

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

(This judgment is handed down electronically by circulation to the parties' legal representatives by email and uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 August 2021.)

JUDGMENT

MIA, J

[1] On 11 March 2014, the plaintiff's wife was admitted to Chris Hani Baragwanath Hospital. The plaintiff wife was pregnant with her fourth

child. She was scheduled for an elective caesarean delivery as well as a tubal ligation. The baby was delivered by way of caesarean section at 16h13 on 11 March 2014, and the tubal ligation was performed on the same date. The patient was taken to the recovery ward, where she was observed and administered the prescribed ringers lactate solution during the evening. The following morning, she was found unresponsive and declared dead. It was ultimately found that she died as a result of a post-partum haemorrhage. The plaintiff Mr IO, the father and guardian of the child, sued on behalf of the minor child delivered during the caesarean delivery and in his capacity. He claimed the medical and/or nursing staff of the Chris Hani Baragwanath Hospital were negligent in the aftercare of his wife, and their negligence resulted in the death of his wife, the mother of the minor child. Therefore, the plaintiff claims 100% (one hundred percent) of his damages and in his representative capacity for and on behalf of the minor child, which damages flow from the death of his wife and the mother of his child.

ADMISSIONS

[2] At the commencement of the proceedings, the court was informed that the parties agreed that the operation had occurred on 11 March 2014. Furthermore, it was agreed that the plaintiff's wife died not more than twelve hours after the operation.

PLAINTIFF'S EVIDENCE

[3] Counsel for the plaintiff initially intended to call two witnesses, namely the plaintiff and Dr N. Sikakane. He later elected to lead the evidence of the state pathologist, Dr L. Matanga. Both counsel agreed that the joint minutes of the clinical psychologists and the industrial psychologists should be accepted as evidence. The first witness, the plaintiff, Mr I O, testified that he was married to his wife for twenty-two years and had known her for thirty-four years. They had conceived six children, but only three survived. The second, third and fourth pregnancies resulted in miscarriages. The plaintiff testified that the surviving children were twenty-four, twenty-three, and six years old, respectively.

[4] The plaintiff testified that at 18h15, his wife was moved to the recovery room, and she was kept there for two hours. She was then moved to ward sixty-five. She requested toiletries and liquid fruit. In the ward, her bed was two metres from the nurses' station. The plaintiff informed his wife that he would go to work and return early. She informed him that she would only be kept for six hours and then be discharged. He explained that the only risk explained to him was that a caesarean section delivery was safer given his wife's advanced age. They had also decided on a tubal ligation as they did not want further pregnancies. He also testified that they were aware that a blood transfusion might be required, but his wife was a Jehovah's witness and refused a blood transfusion. The plaintiff testified that his wife signed the agreements as he could not access the doctors after being admitted. He testified that it was even impossible to talk to any doctors or get anything to her to eat or drink after she was admitted.

[5] Dr Sikakane, the second witness called by the plaintiff, testified that she qualified with a Bachelor of Science degree from the University of the Witwatersrand in 2001. She completed an Honours in Microbiology in 2002. She completed a Bachelor in Medicine and Surgery (MBCHB) in 2007 from the University of Kwazulu Natal. She did her internship at Chris Hani Baragwanath Hospital from 2008 until 2009. Dr Sikakane served community service at Sebokeng Community Hospital in 2010. She was the Medical Registrar in Obstetrics and Gynaecology for Charlotte Maxeke, Raheema Moosa and Chris Hani Baragwanath Hospital from 2011 to 2014. She worked as a consultant in obstetrics and gynaecology, an area in which she specialised in 2014. She obtained a Diploma from the University of Kiel in 2014 in laparoscopy. In 2015 she worked at Chris Hani as a medical specialist, teaching junior doctors and supervising registrars. She supervised in the labour ward, in theatre during labour, she oversaw the pregnancy clinic and the antenatal and postnatal wards. In 2016-2017 she was appointed as head of obstetrics at Bertha Gxowa Hospital in Germiston. She studied part-

time in 2017 at the University of Cape Town. Since 2018 she has been in private practice at Bedford Gardens Hospital and Genesis Maternity Clinic.

[6] Dr Sikakane's evidence was that the plaintiff's wife was a high-risk patient. She had a history of high blood pressure, cardiac issues and a poor history of three miscarriages. In addition, she had diabetes and had been treated for tuberculosis and completed six months of the treatment. Given her history, there was an obligation to inform her about the risks during her pregnancy. She testified that patients such as the plaintiff's wife were to be informed about their different conditions and referred to the different clinics for supplementary supportive care. She testified further that the spouse of such patients would also be informed of such conditions to enable them to support them.

[7] Furthermore, she testified that upon reading the hospital record that the plaintiff's wife ought to have been sent to the high-risk ward post the surgery in view of the various high-risk factors, namely:

- she had more than four pregnancies and was at an advanced maternal age categorised as *grand multipara;*
- she had high blood pressure;
- she had diabetes;
- she previously suffered from tuberculosis and had a lobectomy of the left lung;
- a caesarean section delivery predisposed the plaintiff's wife to post-partum haemorrhage.

[8] Dr Sikakane testified moreover that the hospital record indicated that oxytocin and ringers lactate were prescribed to be administered to the plaintiff's wife after the baby's delivery. The oxytocin was to be administered to assist with the contraction of the uterus. The plaintiff's wife was given ringers lactate solution as it is replaced sodium potassium, and electrolytes. It also lowered blood pressure as the plaintiff's wife had a history of high blood pressure. The plaintiff's wife

being a Jehovah's witness, would not accept blood. Thus the ringers lactate solution would have assisted with low blood volume and was thus used to resuscitate her. It was Dr Sikakane' s view that if the oxytocin had been administered with the ringers lactate solution, the plaintiff's wife's uterus would have contracted. Furthermore, she noted that the amount of urine was less than expected, suggesting the plaintiff's wife was in shock. In addition, she was not bleeding much, and the mucous was pink. In her view, Dr Sikakane noted from the records that the nurses noted the urination amounts, it was low, and they did not call for a doctor, nor did they administer the oxytocin.

[9] Under cross-examination, counsel for the defendant put to Dr Sikakane that the comments about the plaintiff's wife's lung and heart condition leading to her death could only be determined by a pulmonologist and cardiologist. Dr Sikakane agreed and admitted that those were not her areas of specialisation. She also agreed that the caesarean section operation was uneventful. There was no evidence to suggest that blood vessels were interfered with or left open. She testified that the failure to administer oxytocin was the only step in her view not taken to prevent haemorrhaging in the plaintiff's wife as deduced from the records. The pathologists report, and evidence was not tendered as evidence yet, and she could not comment on the causal link between the haemorrhaging being the cause of death in the patient. She could not comment on the tubal ligation as only the surgeon could give an opinion on this aspect.

[10] She qualified her view that the patient be admitted to the high care ward by her evidence that the high care ward was always full in her experience at Chris Hani Baragwanath Hospital. She was not aware of what the position was when the patient was operated upon. If the high care ward was full, she testified that it would have been appropriate to take her to the labour ward.

[11] The third witness for the plaintiff, Dr Luyolo Leonardo Matanga, testified that he has an MBCHB from the University of Natal and has been a

medical practitioner for fifteen years. He has a Diploma in Forensic Pathology and has dedicated ten of the fifteen years to the practice of pathology. He is employed as a state pathologist at the Medico-Legal Laboratory, Diepkloof. He testified furthermore that he conducted the autopsy on the plaintiff's wife to ascertain the cause of death whilst she was in the hospital and filed a post mortem report marked as exhibit "A". He read part of the report into the record as follows:

" I, Dr Luyolo Leonard Matanga, hereby certify that:

(i) That I examined the body of an adult coloured female on 18 March 2014, at the MEDICO LEGAL LABORATORY, DIEPKLOOF, beginning at 8h30,

(ii) that the body was identified to me,

a. by the Forensic Officer MP Langa as that of DK No. 335/2014

b. with a stated age of 42 years

(iii) that the death occurred as informed on **5 January 2014 at 1h48**."(my emphasis)

[12] He testified furthermore that the information provided to him was that she died within twenty-four hours of having undergone a caesarean section operation. She was found in the ward, and it was suspected that she died from a pulmonary embolism, a blood clot in the lungs. However, after conducting the autopsy, he found the following:

- Evidence of a recent caesarean section and tubal ligation was confirmed (sterilisation procedure);
- The uterine and abdominal surgical sutures were intact, and there was no evidence of intra- peritoneal haemorrhage (the surgery was conducted well, all sutures were intact, and there was no internal bleeding because of the sutures);
- Atonic uterus containing a large amount of blood (after childbirth, the uterus is meant to contract and expel all the contents such as the afterbirth and any blood that remains. In this instance, the uterus had failed to contract and was thus atonic;

- Mucous membranes and internal organs were pale, indicating significant blood loss.

[13] Given the above findings, he concluded that the cause of death was post-partum haemorrhage in a person who recently underwent a caesarean section. He explained moreover that the incision was made during the caesarean section operation, which was successful in the present instance. The uterus was sutured and was supposed to contract due to the hormone oxytocin, released naturally by the body. In this instance, the uterus did not contract normally. The body released a hormone called oxytocin, and the suckling of the baby further facilitated this. He explained that routinely oxytocin was also administered intravenously through a vein to assist with the contractions. This would assist the uterus to contract. The nurses would thereafter check if the placenta is whole and delivered. The remnants of the amniotic sac would be wiped with a swab. The wound would then be sutured. He testified further that the womb still needed to contract even after it was cleaned and sutured as it was filled with arteries and veins, which can continue to bleed slowly and fill the area.

[14] Dr Matanga explained that oxytocin is produced by the body naturally, but it is manufactured to administer to assist the body. The body can still fail to contract, leading to disastrous consequences, and in that instance, a specialist obstetrician would intervene and deal with the issue. He also explained that oxytocin was used in standard delivery to assist and expedite delivery and during a caesarean section after delivery to assist with contraction of the womb. The doctor customarily prescribed the amount, and the nurses administered the oxytocin. He explained that he observed a subendocardial haemorrhage in the left ventricular outlet. This, he explained, was not well understood but had high associations with hypovolemic shock. Hypovolemic shock is a condition when the patient bleeds out. The plaintiff's wife also only had one lung, and the oxygenation of the lung would also have contributed to the inadequate oxygenation of the blood.

[15] Dr Matanga explained that there was a range of complications that occurred, which he explained. The plaintiff's wife was bleeding from the intravascular system in the uterus and bleeding into the womb. There was low oxygen because the deceased had only one lung. The heart tried to compensate by beating faster and, as a result, went into shock. He explained that the tubal ligation procedure was successful, and the fallopian tubes were incised and ligated. The deceased was bleeding within the womb, so there would not have been much bleeding through the vaginal passage onto sanitary pads. He noted on sectioning the endometrial cavity that a blood clot distended it. The bleeding was from the myometrium. This was due to the failure of the womb to contract.

[16] During cross-examination, counsel for the defendant referred Dr Matanga to paragraph 11 of the particulars of claim where the plaintiff averred that defendant:

> *"11.1 performed the bilateral tubal ligation in a manner which fell short of the professional skill reasonably required of a hospital, its staff and a specialist gynaecologist;*
>
> *11.2...*
>
> *11.3 failed to ensure that all the blood vessels of the deceased which were interfered with during the bilateral tubal ligation were adequately and properly closed off to prevent the deceased from haemorrhage;*
>
> *11.4 failed to take reasonable steps in the circumstances to prevent the deceased from haemorrhaging;*
>
> *11.5 failed to ensure that such aftercare procedures as were required in the circumstances were executed;*
>
> *11.6 failed to take such steps as were reasonable in the circumstances to ensure that the deceased did not experience haemorrhage to such an extent as would endanger her life;*

11.7 failed to take such steps as were reasonably necessary in the circumstances as were necessary to prevent the deceased from suffering fatal sequelae.

12. As the results of the defendant's negligence aforesaid, the deceased experienced fatal haemorrhaging in and subsequent to the performance by the employees of the defendant for the bilateral tubal ligation and passed away on the 11 March 2014."

[17] Dr Matanga commented that the sutures relating to the tubal ligation were intact, and there was no bleeding which the plaintiff's wife suffered due to the tubal ligation procedure. The bleeding was inside the uterus and unrelated to the tubal ligation procedure at all. He explained that during the autopsy, he looked at whether there was an omission or a commission. During his examination, he found the tubal ligation was performed correctly, as was the caesarean section. There was no bleeding into the abdominal cavity due to either the tubal ligation procedure or the caesarean section operation. He also expressed the view that the two-centimetre increase in the ventricular heart did not play a role in the death either.

[18] The plaintiff closed its case after leading the evidence of the above three witnesses. The defendant applied for absolution from the instance.

[19] The issues for determination for this court were as follows:

19.1 Whether the medical and nursing staff were the cause of death of the plaintiff's wife as a result of negligence. In other words, whether the act or omission of the defendant, namely, the defendant, including its medical practitioners and staff's negligence amounted to substandard care caused or materially contributed to the harm suffered by the plaintiff as set out in the particulars of claim in paragraph 11, in the circumstances where the plaintiff suffered post-partum haemorrhage causing her death?

19.2 The quantum of the damages arising from the plaintiff's claim if the plaintiff proves negligence.

19.3 Whether absolution from the instance should be granted?

[20] In *Gordon Lloyd Page and Associates v Rivera and another* [2000] 4 SA 241 A at paragraph [2] the Court referred to the test for absolution from the instance as follows:

> "[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H in these terms:
>
> > "... when absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (*Gascoyne v Paul and Hunter* 1917 TPD 170 at p. 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T))."
>
> This implies that a plaintiff has to make out a *prima facie* case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (*Marine & Trade Insurance Co Ltd v Van der Schyff* 1972 (1) SA 26 (A) at 37G-38A; Schmidt *Bewysreg* 4 ed 91-92). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is "evidence upon which a reasonable man might find for the plaintiff" (*Gascoyne loc cit*) - a test which had its origin in jury trials when the "reasonable man" was a reasonable member of the jury (*Ruto Flour Mills*). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another "reasonable" person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises a court should order it in the

interests of justice. Although Wunsh J was conscious of the correct test, I am not convinced that he always applied it correctly although, as will appear, his final conclusion was correct."

[21] Counsel for the defendant submitted that on 10 November 2020, the trial commenced and that despite the evidence led by counsel for the plaintiff, the gynaecologist and the pathologist's evidence did not meet the onus required by the plaintiff. He referred to the plaintiff's amended particulars of claim referring to the allegations of negligence and submitted that the plaintiff failed to demonstrate any form of negligence on the part of the defendant. Moreover, counsel for the defendant referred to *Molele v Van Heerden* (60192/2015) [2018] ZAGPPHC 609 (28 March 2018) (unreported) at paragraph [31] and referred to rule 39. He also referred to the absolution test from the instance Gordon Lloyd Page and Associates above referred to. He argued that the plaintiff had to make out a case relating to all aspects of the case and be reasonable.

[22] He submitted furthermore that the plaintiff's pleadings did not accord with the evidence led. In clarifying, he argued that there were glaring inconsistencies and the plaintiff's pleadings were at variance with the evidence, resulting in the plaintiff falling short of establishing its case on its face. He relied on the four essentials formulations and submitted that the plaintiff's pleadings did not accord with the evidence led. Referring to the above cases, he submitted that the plaintiff should have submitted evidence relating to all aspects of the claim. The evidence must cover all aspects of the claim; the evidence should not be inconsistent with the pleadings. In amplifying his submissions, he submitted that Dr Sikakane did not give any evidence of the defendant's negligence about the tubal ligation. She did not agree with the plaintiff's averments, and neither did the pathologist. He continued and argued that the plaintiff did not lead any evidence in respect of paragraph 11 to prove the defendant's negligence or that of its doctors or nurses concerning the tubal ligation, which is the case which the plaintiff pleaded.

[23] Counsel for the plaintiff relied on several similar authorities to that of the defendant, namely *Hurtwitz v Neofytou* (23542/2015) [2017] ZAGPJHC 137 (2 June 2017) (unreported), where the court referred to the case of *Gordon Lloyd Page and Associates* above and applied the test there as set out in *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 (A) at 409G-H. He also referred to the case of *Liberty Group Limited t/a Liberty Life v K and D Telemarketing and others* [2020] JOL 47303 (SCA) at paragraph [14] where the Court held:

> "[14] The dictum from Steytler cited above makes it clear that it is established practise that a decision of absolution from the instance in a trial has the effect of a definitive sentence. Simply put, a decision on the sufficiency of evidence led in that suit, by way of an order of absolution from the instance, has a definitive effect and is susceptible to appeal. The court is *functus officio* and has no power or jurisdiction to hear any further evidence in relation thereto"

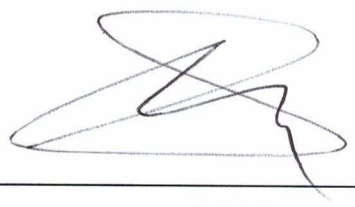
[24] The reference to the *Molele* case above echoes the requirement that the evidence led must establish a prima facie case relating to all of the elements relating to the claim at the end of the plaintiff's case. In the present matter, the plaintiff alleged that the defendant was negligent concerning the performance of the tubal ligation and did not take the necessary care. Neither the evidence of Dr Sikakane nor Dr Matanga confirmed that the procedure relating to the tubal ligation was problematic. There were no omissions in the sense that there was a failure to perform any procedure or commissions in the sense that the procedure performed was done incorrectly, according to Dr Matanga. Dr Sikakane was unable to point out the negligence concerning the plaintiff's pleaded case either. Whilst she alluded to substandard services, such as referring the patient to a high care ward, she acknowledged that such a ward was always fully occupied requiring placement in another ward. She could not explain how the defendant was negligent as averred in the pleadings, namely in relation to the tubal ligation.

[25] When considering the principles and tests applicable to absolution from the instance, it is apparent that the plaintiff did not prove its case as pleaded in the particulars of the claim. The evidence and particulars of the claim were at variance with each other in that the particulars of the claim referred to negligence concerning the tubal ligation, and the evidence did not support this. Furthermore, the pathologist's report indicated the date of demise as 5 January 2014, whilst the pleadings indicate the deceased died on 11 March 2014, and the hospital record reflects that the deceased was checked in the ward and given medication on the morning of the 12 March 2014, she nursed the baby in the ward as well. She was only discovered to be non-responsive and declared dead later that morning on 12 March 2014. In considering the above, I conclude that the plaintiff failed to provide sufficient evidence to establish a *prima facie* case of negligence as pleaded in paragraph 11 of the particulars of the claim. In applying its mind reasonably, this court is unable to find that the plaintiff proved its case or find in its favour. Consequently, the application for absolution from the instance must succeed.

ORDER

[26] For the above reasons, it is thus ordered that:

1. The application for absolution from the instance is granted.
2. The applicant shall bear the costs on a party and party scale.



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

Appearances:

On behalf of the applicant	:	Adv K.K Maputla
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On behalf of the respondents	:	Adv J. Magodi
Instructed by	:	Office of the State Attorney Kmaile@Justice.gov.za
Date of hearing	:	11,12,13 and 16 November 2020, 04 December 2020, 29 March 2021
Date of judgment	:	16 August 2021