

**IN THE HIGH COURT OF SOUTH AFRICA  
(NORTH GAUTENG HIGH COURT)**

Case Number: 22956/2011

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE	YES <input checked="" type="radio"/> NO <input checked="" type="radio"/>
(2) OF INTEREST TO OTHER JUDGES	YES <input checked="" type="radio"/> NO <input checked="" type="radio"/>
(3) REVISED	<input checked="" type="checkbox"/>
7/12/12	<i>[Signature]</i>
DATE	SIGNATURE

7/12/2012

In the matter between:

**ANDRE POTGIETER**

**1<sup>ST</sup> PLAINTIFF**

and

**MEMBER OF THE EXECUTIVE COMMITTEE  
FOR HEALTH AND SOCIAL DEVELOPMENT:**

**1<sup>ST</sup> DEFENDANT**

**LIMPOPO**

**DR. A.J. MAHMOOD**

**2<sup>ND</sup> DEFENDANT**

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**JUDGMENT**

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FABRICIUS J.

1.

This is an action for damages in delict against the Defendants as a result of Plaintiff's treatment and management by the medical staff which he received

at the Mokopane Hospital (in Potgietersrus) during April 2008 and thereafter.

There is also another Provincial Hospital in Mokopane, by the name of Voortrekker Hospital.

2.

Plaintiff alleges that the Defendants negligently breached their legal duty which they had to him as a result of a doctor/patient relationship which existed during the relevant periods. It is his case that the medical staff had a legal duty to carry out their duties towards him with such skill and care and diligence as could reasonably be expected of medical staff in their particular position.

3.

In accordance with the provisions of Rule 33(4), I granted an order separating the issue of liability and causation from the issue of the quantum of Plaintiff's claim. The trial therefore proceeded on that basis.

4.

There were a number of interruptions during the trial which I will deal with when I address the question of costs. It is common cause that Plaintiff was stabbed in the stomach near his navel on 31 March 2008. A general practitioner Dr. W. Els attended to him on the same day and diagnosed a non-penetrating injury to the abdominal wall. The wound was septic, and Dr. Els gave Plaintiff a tetanus injection as well as antibiotics and pain medication. His stab wound did not improve and became red and inflamed. He

accordingly went to the Voortrekker Provincial Hospital on 11 April 2008 complaining of. *inter alia*. pain in the area of the stab wound. He was seen by a doctor who assessed this wound to be clean, and antibiotics and pain medication was again given. The stab wound still did not improve and accordingly he attended at the Mokopane Hospital on 15 April 2008 with abdominal pain and nausea. It was noted that the area of the stab wound was healing but that it was inflamed and sometimes drained watery fluid. The rest of his abdomen was tender to palpation but soft. X-rays of the chest and abdomen were taken, and an abdominal sonar was done and the results were reportedly normal. The sonar was not before court. The Second Defendant was consulted and he advised Plaintiff to return to the out-patient department some six days later i.e. on 21 April 2008. No medication was considered necessary on 15 April. Plaintiff was unable to do so on that day, but he attended the Mokopane Hospital on 22 April. According to his evidence the area of the stab wound was getting worse and was more red and inflamed than before. Anti-inflammatory medication was given as well as pain medication and he was instructed to return to the out-patient department the next day. On 23 April 2008 he attended the Mokopane Hospital again and was seen by a doctor. He could not remember whether he saw the Second Defendant on that day, although Dr. Mahmood was sure that he did see him. Nothing seems to turn on this however. His temperature on that day was 35,6° C and the area of the stab wound was very erythematous and tender. He was admitted to the hospital and placed on intervenous antibiotics. His white cell count and C-reactive protein and serum were elevated.

5.

On 24 April his abdomen was noted to be tender with "cellulitis" and he was assessed to have an "acute abdomen". He was informed that he had to undergo an emergency laparotomy operation to see whether there was any injury in the abdominal cavity or bleeding. He was accordingly taken to a theatre later that afternoon where the Second Defendant performed this laparotomy on him. This turned out to be non-therapeutic as the stab wound had not penetrated into the abdominal cavity and no abnormalities were found. On 4 June 2008 Second Defendant removed slough from the stab wound, but according to him the stab wound was never explored or debrided and no samples were ever taken of the watery fluid and or pus that was draining from the stab wound either. Postoperatively, cellulitis of the abdominal wall persisted and it spread to the right groin/ scrotal area, right flank and chest wall with draining pus. On 30 April Plaintiff was discharged on oral amoxicillin. Inflammation of his abdominal wall persisted for several months with purulent drainage from the original stab wound, and separate sinuses which developed in the right groin and above his pubic area. According to his evidence pus also started to drain from the laparotomy wound and an abscess later formed in this wound. This happened despite numerous visits by Plaintiff to the Mokopane clinic for wound care and multiple courses of antibiotics prescribed and given to him.

6.

On 16 June 2008, Plaintiff testified that he awoke that morning with his right shoulder and arm paralysed, a condition subsequently diagnosed as

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idiopathic brachial neuritis. The limb remained completely paralysed for about a year, whereafter the motor function gradually returned, although not completely. An expert surgeon was called on behalf of Plaintiff and testified that he had been left with permanent decreased power of all the muscle groups of his right arm and shoulder girdle with wasting of muscles. His evidence in general was uncontested by the Defendants. Professor Warren testified that although the cause of idiopathic brachial neuritis was largely unknown, it was associated with trauma and ongoing trauma-related sepsis. He was of the view that the likelihood was, on balance of probabilities, that this complication was related to the deficient management of Plaintiff's abdomen, and that he would not have suffered this condition had his cellulitis and sepsis been efficiently and properly treated at the Mokopane Hospital. I will return to other aspects of Professor Warren's evidence presently. In December 2008 Mr Potgieter developed an abscess in his laparotomy wound above the umbilicus. The abscess burst open at one stage and he observed what appeared to be a shiny object in the abscess area of the laparotomy wound. He saw Dr. J. D. Vorster, a general practitioner in Mokopane, on the same day. Dr Vorster discovered a surgical needle in the laparotomy wound, approximately 7 to 8 cm in length, which he removed by means of a pincet. This evidence was also not challenged and Second Defendant testified that he accepted it. He added however that this particular needle had never been used at the Mokopane Hospital and obviously, he then denied that he had left it in the wound.

Dr Vorster immediately noted the fact that he removed the needle from the wound, and this note is contained in a letter of 11 December 2008 which he handed to Plaintiff immediately after he had removed the needle. Plaintiff was eventually referred to the Steve Biko Pretoria Academic Hospital for his idiopathic brachial neuritis. He developed an abscess in his right groin area which was removed surgically at this hospital whereafter a skin graft was performed to cover the area. He also later developed an abscess to his neck which had also to be surgically removed at the same hospital, but Professor Warren testified that he did not consider this abscess to have been connected with the other injuries or their consequences.

7.

As a result of the above facts which I have just summarised, Plaintiff relied on 6 grounds of negligence to establish liability on the part of the First and Second Defendants. I will refer to these and will also, having regard to Defendants' amended plea and the relevant pre-trial minute, mention which grounds were contested or not:

7.1 during Plaintiff's out-patient visits on 15 April 2008 and 22 April 2008, the medical staff at the Mokopane Hospital, including the Second Defendant, did not attach the necessary significance to the inflammation at the site of the stab wound. The initiation of appropriate antibiotic therapy and local wound care measures were accordingly delayed; (This was not contested)

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- 7.2 the administration of the anti-inflammatory agents namely diclophenac and indomethacin, i.e., Voltaren and Indocid on 22 April 2008, was highly inappropriate in the circumstances, and promoted the septic process in his abdominal wall; (This was not contested)
- 7.3 the abdomen was not correctly assessed on 24 April 2008, which led to an unnecessary laparotomy being performed on him;
- 7.4 the doctors and nursing staff at the hospital should have explored and/or drained and/or debrided the infected stab wound, particularly given the negative laparotomy findings on 24 April 2008, or at any stage thereafter, the first debridement only being done more than 2 months later by the Second Defendant on 4 June 2008;
- 7.5 a surgical needle was retained during the unnecessary laparotomy operation of 24 April 2008;
- 7.6 Second Defendant and the medical staff at the Mokopane Hospital failed to microbiologically characterise Plaintiff's sepsis, resulting in the antibiotic therapy that was prescribed and administered being empirical and not necessarily appropriate. (This was not contested).

## 8.

The above mentioned facts were not in issue, but obviously what was disputed was that they disclosed negligence on behalf of the Defendants, having regard to their respective positions, duties and experience. There is also no dispute about the fact that an incisional hernia, which later required repair, was caused by the laparotomy performed on Plaintiff. There was also evidence by Professor Warren that the development of kidney stones was

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promoted by Plaintiffs immobility and general poor health resulting from his treatment at the mentioned hospital. Despite having been notified of Plaintiff's case concerning the needle left behind in the operation wound of the laparotomy, Defendants' case, as it unravelled for the first time at the trial in this context, was that the type of needle found in the wound was not used at the Mokopane Hospital at all, and that all needles were in any event properly accounted for. This part of Defendants' case was never pleaded, and no documents were discovered by Defendants supporting this version. It ought to have been relatively straight forward to have discovered such documents relating to which needles were ordered/ bought/ paid for by First Defendant in this particular context during the relevant time. Despite receiving the summary of Professor Warren's evidence on 2 November 2012, and being forewarned at the pre-trial conference of 7 November 2012, Defendants decided not to give notice of, and make use of the services of an independent expert when the trial commenced on 19 November 2012. When this topic arose during the evidence of Second Defendant I ruled that he could give factual evidence about his involvement and treatment of the Plaintiff, but could not give opinion evidence which contradicted that presented by Professor Warren. My reason was that Plaintiff would have been unfairly prejudiced had I allowed that evidence which, whatever it was going to be, had never been put to Professor Warren for a debate in any event.

9.

In ***Mkhatswa v Minister of Defence 2000 (1) SA 1104 (SCA) par 23*** the Supreme Court of Appeal reiterated that whether or not conduct constitutes negligence ultimately depends upon a realistic and sensible judicial approach



to all the relevant facts and circumstances that bear on the matter at hand. In the present context there is no doubt that the proper standard, that the particular medical personnel has to be held to, is not the highest level of competence: it is a degree of skill that is reasonable having 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.

See: **Van Wyk v Lewis, 1924 AD 438 at 444; Blyth v Van den Heever, 1980 (1) SA 191 (A) at 221A;** and **Castell v de Greef 1994 (4) SA 408 (C) at 415 J to 416 E.** In the context of the laparotomy that was preformed unnecessarily according to Professor Warren, I wish to quote from **Castell v de Greef supra at 511 I to 512 B:** *"It must not be overlooked that, even if it were to be shown that the defendant's decision, involving as it did a clinical judgement, turned out to be the incorrect one. it would not necessarily follow that on this account he was negligent. Indeed. a practitioner is not to be held to be negligent merely because the choice he made or the course he took turned out to be the wrong one. The test remains always whether the practitioner exercised reasonable skill and care or. in other words, whether or not his conduct fell below the standard of a reasonable competent practitioner in his field. If the 'error' is one which a reasonably competent practitioner might have made, it will not amount to negligence. If it is one which a reasonably competent practitioner would not have made, it will amount to negligence."*

In this context Professor Warren testified that the average specialist surgeon should not have preformed this operation. The clinical signs present at the time did not warrant such.

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10.

Before I turn to specific evidence given by Plaintiff, Professor Warren and Second Defendant, it is necessary to mention that it is common cause that at no stage during Plaintiff's treatment did Second Defendant make any clinical notes whatsoever. Those that were presented to court were notes made by a clinical assistant on his instructions. The reason was that he had simply been too busy. It also emerged that Second Defendant would easily have seen and treated a few thousand patients since 2008 and, that he obviously had to rely on such notes when he gave evidence. All the hospital records and the contemporaneous notes made by the various doctors in respect of their clinical observations and treatment of Plaintiff were examined and analysed by Professor Warren. His evidence was founded on logical reasoning largely based on facts which were not an issue, and having regard to the experience and expertise, and the absence of any conflicting expert evidence, I am satisfied on a balance of probabilities that it is safe to accept his evidence.

See: ***Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 at par 36 – 39*** in the context of how an expert's evidence is to be analysed.

11.

Professor Warren could not find any indications of what had changed between the 23<sup>rd</sup> of April, when Plaintiff was seen at the Mokopane Hospital, and the 24<sup>th</sup> when the laparotomy was done. Furthermore, by 24 April it was more than 3 weeks after the infliction of the stab wound, and if the stab wound had in fact penetrated the abdominal cavity causing injury or bleeding, it would

have been unimaginable that such an intra abdominal injury could be present with out surfacing at an earlier stage. He also said that it was necessary to explore, drain or debride the infected stab wound, particularly given the negative laparotomy findings on 24 April. One such ideal opportunity presented itself when the laparotomy was done and nothing abnormal was found. Whilst the patient was under anaesthetic, the stab wound could have been explored and debrided. There was no evidence that this was ever done prior to 4 June. As far as the needle was concerned, Professor Warren also said that the only possibility, given the evidence, was that it was left behind during the laparotomy operation. No other medical procedure had been necessary or had been done in the area of the laparotomy wound subsequent to this operation and until 11 December 2008 when the needle was found. The only reasonable and practical inference therefore in my view is that the needle must have been left behind during the laparotomy procedure. The nurse who assisted Dr. Mahmood during this operation also testified that such needle had never been used at the Mokopane Hospital and that the needle count had in any event been perfect. Second Defendant again testified that all medical supplies and instruments were obtained by the hospital from a so called depo. Voortrekker Hospital is also a provincial hospital, and Dr. Vorster testified that such needle was in fact used by him at such hospital. It is therefore not that inconceivable that the particular needle would have emanated from the same depo. Second Defendant and Sister Mathakala clearly had a personal interest in avoiding liability for their employer and themselves in this case. No documentation in this context was discovered by First Defendant as I have said, and no reasonable possibility or even

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probability was put forward by the Defendants whatsoever as an alternative for the logical inference that the needle was left behind during the laparotomy operation. Having regard to the approach that a court ought to take where irreconcilable versions surface during the trial as set out in ***SFW Group Limited and Another v Martell CIE and Others 2003 (1) SA 11 (SCA) at par 5***, and also taking into account the lapse of time since 2008 and factors such as failing memory, the attending to of thousands of other patients, the evidence of Dr Vorster, and using sound logic and practical reasoning, I must find that the needle had indeed been left behind during the laparotomy operation.

12.

Mr. Phashane on behalf of the Defendants had no real answer when confronted with this type of reasoning and the relevant facts. In fact, in his heads of argument, he conceded that the needle had been left behind by the medical staff at this hospital. As far as the laparotomy was concerned, Second Defendant testified that he was of the view at the time that the operation was necessary to save the patient's life. As I have said, Professor Warren disputed this, and testified that there were no objective criteria at all justifying such a view. It can by no means be said that factors relevant to a "sudden emergency" scenario were present at the time. Plaintiff himself had not been of that view either. I therefore find that the Plaintiff has proven the grounds of negligence relied on.

costs are to be on a party and party scale except in so far as for the 21<sup>st</sup> of November (the Wednesday) Plaintiff must pay his own costs.

14.

The following order is therefore made:

14.1 The First and Second Defendants are jointly and severally declared liable for payment of the Plaintiff's proven or agreed damages arising from the treatment of the Plaintiff at the First Defendant's Mokopane Hospital during the period 15 April 2008 to 30 April 2008, and the consequences of such treatment referred to in the judgment.

14.2 The Defendants are ordered to pay the Plaintiff's taxed costs relating to the trial of 19 to 23 November 2012, on the High Court scale, excluding the wasted costs of Wednesday, 21 November 2012 from 10h40 until 16h00 which costs are to be paid by the Plaintiff.

14.3 The Plaintiff's taxed costs to be paid by the Defendants jointly and severally, referred to in paragraph 2 above, are to include:

14.3.1 the wasted costs occasioned by the fact that the matter did not proceed on Monday, 19 November 2012, such costs to be paid by the Defendants, jointly and severally, on an attorney and own client scale, including the costs of two counsel;

14.3.2 the cost of two counsel;

14.3.3 the reservation and qualifying fees of Professor Warren including his travelling and accommodation costs relating to the 21<sup>st</sup> and 22<sup>nd</sup> November 2012;

14.3.4 the cost of obtaining the medico-legal report of Professor Warren;

14.3.5 Dr. W. Els and Dr. J. D. Vorster are declared necessary witnesses in respect of their attendance at court: Dr. W. Els on Tuesday 20 November 2012 and Dr. J. D. Vorster on Monday 19 November and Wednesday 21 November 2012.



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**JUDGE H J FABRICIUS**  
JUDGE OF THE NORTH GAUTENG HIGH  
COURT