

**IN THE REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

10/11/2016

CASE NO: 75711/13

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

REVISED

**GLYNWOOD HOSPITAL
OPERATING COMPANY
DR JOHANNES SAMUEL
FREDERICK BRINK**

EXCIPIENT/1ST DEFENDANT

EXCIPIENT/2ND DEFENDANT

and

MALCOLM LEONARD KILMISTER

RESPONDENT/PLAINTIFF

EXCEPTION - JUDGMENT

KHUMALO J

[1] The 1st Defendant has taken an Exception to certain paragraphs of the Plaintiff's particulars of claim as amended, on the ground that they lack the necessary averments to sustain a cause of action.

[2] The salient facts are that the Plaintiff, Mr M L Kilmister has instituted an action for damages against 1st Defendant, Glynwood Hospital Operating Company, a registered private hospital, the excepting party, and Dr JFS Brink, the 2nd Defendant, ("Dr Brink"), a cardio vascular and thoracic surgeon. I continue to refer to the excepting party as the 1st Defendant, alternatively "the hospital" and the Respondent as the Plaintiff for the sake of convenience.

[3] Dr Brink assisted by nursing personnel in the employ of the 1st Defendant performed a surgical procedure on the Plaintiff on 23 July 2012 upon Plaintiff's admission at the hospital. An

independent practicing cardiologist based at the hospital had referred the Plaintiff to Dr Brink. The surgery performed was an open heart operation for a triple bypass that involved the undertaking of an arterial transplant and the insertion of a temporary pacemaker.

[4] At the end of the surgical procedure the nursing personnel noticed that a ray- tex swab was missing apparently left in the Plaintiff's body and brought it to Dr Brink's attention. In its amended particulars of claim, the Plaintiff alleges that:

[8.6] Dr Brink, despite having been informed, failed to have any further x- rays taken so as to determine whether the ray-tex swab had been misplaced and left within the body of the Plaintiff.

[8.7] The nursing personnel also failed to take any further steps as to alert the management of the said hospital of the swab still retained in Plaintiff's body, as such an incident could have serious consequences.

[8.8] **Post operation radiological examinations were also performed on Plaintiff, as instructed by Brink, where after Brink informed the Plaintiff that a swab had been detected in his chest that would have to be surgically removed.**

[8.11] Brink informed the Plaintiff that as a result of the retained swab, infection had set in and Plaintiff experienced severe operative pain and shock due to further surgery and infection and also received further conservative medical treatment. He was discharged from the hospital on 19 August 2012.

[9] **The 1st Defendant unlawfully breached its obligations** in terms of the agreement entered into with Plaintiff **and cumulatively therewith unlawfully breached its legal duty of care towards the Plaintiff in being negligent in one or more or all of the following respects:**

[9.1] The nursing personnel **failed to take reasonable steps to inform the management of the hospital that a swab had been retained in Plaintiff's body** subsequent to the surgical procedure performed on 23 July 2012, well **knowing that** such failure would result therein that despite being aware of the risk that the plaintiff had been exposed to, **if not disclosed, would lead to the deterioration of the Plaintiff's medical condition.**

[9.2] **Failed to inform the Plaintiff that there had not been a complete retrieval of all surgical swabs used during the surgical procedure, so as to appraise Plaintiff of the risk that he is exposed to and to grant him the opportunity to take an informed decision as to further medical advice.**

[9.3] **The nursing personnel elected to remain silent as to the risk that Plaintiff was exposed to with the retained swab in his body and therefore associated themselves with the failure by the 2nd Defendant to take adequate preventative steps for removal of the retained swab.**

[5] He further has alleged that:

[6.3] at time of admission to the hospital the plaintiff, acting in his personal capacity and the duly authorized employees of the hospital acting within the course and scope of their employment and in the execution of their duties with the hospital, entered into a verbal, alternatively tacit agreement.

[6.4] The terms of the verbal, alternatively tacit agreement entered into between the parties were that the plaintiff, against the payment, would receive medical management and treatment from the nursing personnel at the hospital, pertaining to his admission and that all such medical management and treatment rendered by the said nursing personnel, will be rendered with the necessary care, skill and diligence as can reasonably be expected from the nursing personnel in similar circumstances.

[11] **As a result of the negligent conduct of 1st and 2nd Defendants the Plaintiff had to undergo surgery for removal of the retained swab which caused the Plaintiff to have contracted infection and Plaintiff still suffers from chronic pain and discomfort.**

[11] As a result of the wrongful and negligent conduct of the 1st and 2nd Defendants the Plaintiff suffered damages in the amount of R1 230 000.00

[6] The 1st Defendant's excepts to the formulation of the Plaintiffs cause of action based particularly on the following two specified grounds,

First Ground,

[7] That a cause of action as formulated by Plaintiff in its amended particulars of claim against 1st Defendant, is premised, *inter alia*, upon an averment:

[7.1] at paragraph 8.5. that: *"At the time of the surgery the Second Defendant was informed by one of the nursing personnel in the operating theatre, that a raytex swab was missing, as confirmed by the Hospital Records (a copy of which is annexed hereto as Annexure "A".*

[7.2] In furtherance of formulating his claim, Plaintiff proceeds to allege at paragraph 9.1. that 1st Defendant's liability arises from: *"The nursing personnel having **failed to take reasonable steps to inform the management** of the hospital that a swab had been retained in Plaintiff's body subsequent to the surgical procedure performed on 23 July 2012, **well knowing that such failure would result therein that despite being aware of the risk that the Plaintiff had been exposed to, if not disclosed, would lead to the deterioration of the Plaintiff's medical condition.***

[7.3] Also, in paragraph 9.2. that: ***Failed to inform the Plaintiff** that there had not been a complete retrieval of surgical swabs used during the surgical procedure, so as to appraise Plaintiff of the risk that he is exposed to and to grant him the opportunity to take an informed decision as to further medical advice"*

[8] Accordingly, 1st Defendant contends that on Plaintiffs own pleaded version, **the acts and/or omissions he complains about, with specific reference to the involvement of the 1st Defendant viz-a-viz its nursing personnel, transpired or occurred ex post the actual conduct ostensibly giving rise to the apparent damages suffered by the Respondent, i.e. the retained raytex swab.**

[9] Further, that in the circumstances, no causal nexus exists between the damages allegedly suffered by the Plaintiffs and the *commissio* and/ or *omissio* by and on behalf of the 1st Defendant and its nursing staff, as alleged by the Plaintiff. Therefore the Plaintiffs amended particulars of claim fail to disclose a cause of action as against the 1st Defendant, in consequence to which no possible evidence to be led by the Respondent in due course can disclose a cause of action.

Second ground,

[10] 1st Defendant contends that Plaintiff, in its amended particulars of claim pleads:-

[9.1] at paragraph 9.3 that: ***"The nursing personnel elected to remain silent as to the risk that Plaintiff was exposed to with the retained swab in his body and therefore associated themselves with the failure by the Second Defendant to take adequate preventative steps for removal of the retained swab."***

[11] And to that extent the Plaintiff pleads:

[11.1] at paragraph 8.3 of its amended particulars of claim that ***"At the time of surgery the Second Defendant was informed by one of the nursing personnel in the operating theatre that a raytex swab was missing, as confirmed by the hospital records, a copy of which is annexed hereto as Annexvre A"***

[12] 1st Defendant declares firstly that by virtue of Section 56 (6) of the Nursing Act 33 of 2005, (as amended) read together with the Regulations published thereunder in the government Gazette, a professional nurse is expressly prohibited by statute from examining any patient for the purpose of making a diagnosis, save for referring such observations to a registered medical practitioner; that,

[13] In the premises the 1st Defendant argues that its nursing staff discharged any and all obligations it had towards the plaintiff in accordance with the relevant statutory duties read together with the applicable scopes of practice and good standards expected from the 1st Defendant and its nursing staff.

[14] Wherefore it alleges that Plaintiff's amended particulars fail to disclose a cause of action as against the 1st Defendant, in consequence of which no possible evidence to be led by the Plaintiff in due course can disclose a cause of action.

[15] It was argued further on behalf of the 1st Defendant that **a professional nurse does not conduct surgical procedures and can therefore not have left a surgical and /or swab and or a foreign object in the body of the Plaintiff.** Further to the aforesaid, a professional nurse does not have the relevant authority to refer a patient for x-ray examination as is pleaded by the Plaintiff. 1st Defendant surmises that the obligations as pleaded by the Plaintiff can only be performed on the express instruction of a medical professional. The Plaintiff has failed to establish that the attending medical professional, which in this case was the Second Defendant, was employed by the 1st Defendant.

Applicable law

[16] Rule 18 (4) of the Uniform Rules of the High Court provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, with sufficient particularity to enable the opposite party to reply thereto.

[17] It is a basic principle that the facts set out as to constitute a cause of action (the premise for the relief sought) must be such that the relief prayed for flows from them, and can properly be granted. Otherwise the summons will be excipiable as disclosing no cause of action; see *Trope v South African Reserve Bank and Another* 1992 (3) SA 208.

[18] The Plaintiff, having specified the remedy it seeks, the facts pleaded must support that remedy, there being a nexus between the relief sought and the conduct it is alleged begets the claim. Basically it means the cause and the action must interrelate, factually and legally.

[19] It is also a basic principle that there should be a consistency of allegations of fact, a greater degree of particularity being required, more so, since non-compliance with Rule 18 amounts to an irregular step; see Rule 18 (12).

[20] The 1st Defendant's first ground of exception that its nursing personnel's **acts and/or omissions complained about took place after the actual conduct allegedly giving rise to the apparent damages suffered by the Plaintiff, i.e. the retained raytex swab, had occurred.**

[21] The Plaintiff has in its particulars alleged **that as a result of the negligent conduct of 1st Defendant and Dr Brink the Plaintiff had to undergo further surgery for removal of the retained swab which caused the Plaintiff to contract infection. The Plaintiff still suffers from chronic pain and discomfort which had resulted in the Plaintiff suffering damages in the stated amount.**

[22] At the same time Plaintiff states in his particulars that he had to undergo further surgery due to a raytex swab having been left in his body by Dr Brink. Besides the inconsistency of the alleged facts, the stated failure to report transpired after the incident has arisen, therefore it was not in consequence of the alleged omission that Plaintiff suffered the alleged mishap. Even if the omission happened prior, it should be borne in mind that an omission per se is not *prima facie* wrongful. As in determining liability the relevant question to

ask would be whether the 1st Defendant's (through its nursing personnel) alleged conduct/omission caused, or materially contributed to the harm sustained by the plaintiff. *Minister of Police v Skosana* 1977 (1) SA 31 (A) 34-35. It is for the Plaintiff to allege sufficient facts to justify the conclusion of wrongfulness. The wrongfulness of failure to report being determinable from the facts alleged in support of the alleged legal duty. The facts alleged in support of the alleged legal duty represent the high-water mark of the factual basis on which the Court will be required to decide the question. If those facts do not prima facie support the legal duty contended for, there is no reason why the exception should not succeed as lacking averments necessary to sustain the action.; see *Lilicrap, Wassenaar and Partners v Pilkington Brothers* 1985 (1) SA 475 (A) 496 in fine-497A; *Indac Electronics (Pty) Ltd v Volkskas Bank Ltd* 1992 (1) SA 783 (A) 801C

[23] Now, Plaintiff's connection of the nursing personnel's omission or failure to report with the damages he suffered due to having to undergo another operation to remove the swab is fallacious. For the nursing personnel to be liable for Plaintiff having to undergo another procedure or contract an infection, their duty is supposed to have arisen prior or when the swab was left in the body of the Plaintiff which is the cause of Plaintiff suffering damages. The allegation therefore that the 1st Defendant is liable as a result of its nursing personnel's conduct is factually and legally not justifiable from the alleged facts and therefore lacks merit and cannot be sustained, which makes the claim against the 1st Defendant excipiable; see *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) and *Bayer Soth Africa (Pty) Ltd v Frost* 1991 (4) SA 559 (A).

[24] Furthermore, the hypothetical negligent conduct of the 1st Defendant's employees referred to, is in contradiction to Plaintiff's assertion that the nursing personnel in fact had reported the missing swab to Dr Brink who incidentally also arranged for the post operation x-rays and notified the Plaintiff of his observation. The medical officer was in charge of Plaintiff's surgical procedure, managing the operation as a result the person responsible and qualified to deal with the problem. Consequently there are no sufficient facts to justify either a conclusion or an inference that the nursing personnel's conduct was wrongful and resulted in the damages suffered by the Plaintiff.

[25] Generally, for liability to arise, there must be a causal link between the Defendant's conduct and the Plaintiff's loss. Such causal link ("causation") has two elements: factual and legal. Factually, the Supreme Court of Appeal (SCA) has accepted that the *conditio must be a sine qua non of the loss*; *Axiam Holdings Limited v Deloitte & Touche* (30312004)[2005] ZASCA 61; [2005] 4 All SA 157 (SCA) (1 June 2005), or "but-for" test, as the one to be applied

and has consistently stated that the causation element involves a second aspect, legal causation or remoteness of damage, which is not concerned with causation so much as with restricting the causal effect of the defendant's conduct. Various tests for legal causation have been suggested but the Appellate Division has opted for a flexible umbrella criterion, which determines the closeness of the link according to what is fair, reasonable and just; see *Cape Town Municipality v Paine* 1923 AD 207 at 216-17.

[26] In related circumstances the damages should have resulted from the conduct of the 1st Defendant vis-a-vis its employees (nursing personnel), agent or any other person for whose actions the 1st Defendant is legally responsible. The Plaintiff has failed to establish a causal nexus between the damages allegedly suffered by the Plaintiff and the *omissio* by and on behalf of the 1st defendant (its nursing personnel). **The conduct allegedly giving rise to the Plaintiff's apparent damages in casu is limited to the extent of Dr Brink's conduct for whom neither the 1st Defendant nor its nursing personnel carry responsibility.**

[27] The second exception is taken against the allegation **that the nursing personnel elected to remain silent as to the risk that Plaintiff was exposed to with the retained swab in his body and therefore associated themselves with the failure by Dr Brink to take adequate preventative steps for removal of the retained swab.** In *Lillicrap, Wassenaar and Partners* at 4961 - 4978 it was held that:

"It is trite law that, to succeed in such a claim, a plaintiff must allege and prove that the Defendant has been guilty of conduct which is both wrongful and culpable; and which caused patrimonial damage to the plaintiff (eg *Van der Walt* (op cit para 2at 2). What has been placed in issue by the Appellant is whether, on the facts pleaded, the appellant's conduct was wrongful for the purposes of delictual liability, and whether the damages alleged to have been suffered, are recoverable in a delictual action."

[28] On this point, Plaintiff seem to have lost sight that the already mentioned fact that nursing personnel perform auxiliary/ secondary functions under the guidance and expertise of the medical officer. They therefore cannot be expected to take decisions and take over the control or functions of a medical officer, going beyond what they are legally bound to do in terms of the statutory functions. These set out the standard of diligence required of the profession. Nurses are therefore incapable of deriving a responsibility for actions or situations beyond their control. The Plaintiff has failed to allege sufficient facts to justify the conclusion that their conduct was wrongful in the delictual sense.

[29] It is the applicable principle that for purposes of deciding an exception the court is obliged to take the pleadings as they stand, assuming the truth of the allegations contained therein. However the principle is limited in operations to allegations of fact and could not be extended to inferences and conclusions not warranted by the allegations of facts; see *Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749.

[30] According to the particulars the nursing personnel reported the missing swab to Dr Brink, the medical officer responsible for Plaintiff's surgical procedure and in charge of the operation therefore qualified to deal with the problem. In line with his responsibility Dr Brink instructed for **post operation radiological examinations to be performed on Plaintiff**, and duly advised the Plaintiff of the swab in his body.

[31] The conduct of the nursing personnel conforms to the statutory requirements that govern their practice, the Nursing Act, Act 33 of 2005 (as amended) read together with the Regulations GNR.2598: Regulations relating to the scope of practice of persons who are registered or enrolled under the Nursing Act, 1978 published thereunder in the Government Gazette. Their observation was brought to the attention of the medical officer. The taking of measures for the removal of the swab is outside the nursing personnel's scope of work. Therefore to find that Dr Brink conduct should be attributable to the nursing personnel or that the nursing personnel by their conduct associated themselves with the failure by Dr Brink to take adequate preventative steps for removal of the retained swab when they are not qualified or duty bound to do so and thereafter find the 1st Defendant liable, is preposterous. Such a conclusion is not warranted by the facts or in law. In such instance the court is not obliged to stultify itself by accepting allegations of fact that are so divorced from reality that they cannot possibly be proved; see *Natal Fresh Produce Growers Association SA* at 749.

[32] Mr Bezuidenhout moved for the particulars of claim to be set aside and that the Plaintiff be granted leave to deliver amended particulars of claim contrary to what 1st Defendant sought in its notice of motion, which is for the Plaintiff/ Respondent's claim as against the 1st Defendant to be dismissed with costs. It however is correct that in accordance with the relevant statutes read together with the applicable scopes of practice and good standards expected from the 1st Defendant's nursing personnel, and what is pleaded by Plaintiff in his particulars of claim, no further evidence probable to be led by the Plaintiff in due course, might possibly disclose any cause of action arising from the conduct of the nursing staff. The 1st Defendant's nursing staff accordingly discharged all the obligations it had towards the Plaintiff.

[33] Under the circumstances the following order is made:

[33.1] The Exception is upheld.

[33.2] The Plaintiff is granted leave to amend its particulars of claim as against the 1st Defendant within 20 days from date of this order

[33.3] The Exception is upheld with costs,

N V KHUMALO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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Instructed by:

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