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

14/7/16
CASE NUMBER: 74157/2013
Reportable: Yes
Of interest to other judges: Yes
Revised.

In the matter between:

J D P Plaintiff

and

DR EUGENE PRETORIUS Defendant

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

[1] The plaintiff instituted a claim for damages against the defendant on the ground of medical negligence. As will appear in more detail *infra,* the dispute pertaining to the medical negligence *in casu,* centres around divergent views pertaining to the conventional *versus* the alternative treatment of cancer.

[2] During November 2010 the plaintiff was diagnosed with a stage 3 semi-nomatous germ cell tumor of the left testis (with metastases to the lungs and pre-aortic area) ("the

condition").

[3] The plaintiff, after consulting an oncologist, decided to investigate alternative treatment regimens and consulted the defendant, a general practitioner who provides Insulin Potentiation Therapy ("IPT").

[4] It is common cause that the plaintiff was treated by the defendant from November 2010 to February 2011. The plaintiff alleges that the defendant was from the inception of the treatment negligent and claims an amount of R 700 000, 00 as damages suffered due to the defendant's negligence.

[5] At the commencement of the trial, I was informed that the parties have agreed to separate the issues of liability and quantum and an order to this effect was made. Consequently the trial only proceeded in respect of the liability issue.

[6] The medical facts pertaining to the plaintiff's condition and subsequent treatment are largely common cause between the parties. The issues in dispute pertain to alleged misrepresentations made by the defendant to the plaintiff *alternatively a* breach of care.

FACTS

[7] The following facts are common cause on the pleadings:

i. the plaintiff was diagnosed with the condition on or about 3 November 2010 and his left testis was surgically removed. The plaintiff was thereafter referred to Dr Piet Slabbert, an oncologist, for chemotherapy treatment;
ii. the plaintiff was not comfortable with the treatment suggested by the oncologist and on or about 8 November 2010 the plaintiff consulted the defendant, who recommended IPT;
iii. the treatment commenced on 10 November 2010 and was, after 9 sessions, temporarily suspended on 9 December 2010;
iv. treatment resumed on 20 December 2010 and the plaintiff received a further 7 sessions of treatment, the last treatment date being 8 February 2011;
v. the plaintiff terminated the IPT treatment and underwent 4 sessions of *"BEP"*

chemotherapy. The plaintiff is in remission.

EVIDENCE

[8] The plaintiff testified that his consultation with the oncologist, Dr Slabbert, did not convince him that the conventional method of curing his condition, to wit chemotherapy, was necessarily the correct decision. Due to the doubts he harboured, he decided to do some research and became aware of IPT as an alternative method of treatment.

[9] During his research he discovered that the defendant administered IPT for cancer patients, which led to the first consultation he had with the defendant on 8 November 2010.

[10] During his first consultation with the defendant, the defendant explained the concept of IPT to him and having perused the plaintiff's pathology reports and CT scan, informed him that he was a candidate for IPT. The defendant further told him that the chances of success were 90% and although it was at that stage not possible to be exact, he most probably would need to undergo 10 - 14 sessions. He could not recall whether the defendant did a physical examination at the first consultation. The cost of the sessions were initially R 6 800, 00 per treatment, which amount increased in January 2011 to R 7 000, 00.

[11] The defendant explained to the plaintiff that IPT involves the administration of insulin which results in a patient's blood sugar levels decreasing. Due to the lower blood sugar levels, the body is more receptive to chemotherapy and therefore it is possible to administer a lower dosage of chemotherapy.

[12] The treatment was administered twice a week and blood tests were done regularly to monitor the plaintiff's condition. Pathology reports were obtained to establish the progress of the treatment. So-called tumor markers indicate the acceptable range within which certain values should be. Two values are significant to wit, Alpha-fetaprotein ("AFT") with a range of 0 - 10 and Beta- human chorionic gonadotropin ("Beta-HCG"), with a range of 0 - 5. The following appears from the pathology reports:

Date	AFT	Beta-HCG
10.11.2010	71	166
16.11.2010	98	227
19.11.2010	142	375
23.11.2010	192	401
26.11.2010	174	267
29.11.2010	158	191
3.12.2010	110	95
6.12.2010	71	46
9.12.2010	48	20

[13] The plaintiff testified that the sessions were terminated on 9 December 2010 due to the fact that the defendant went on holiday. The defendant did not inform him that an interruption in treatment could cause a resistance to further chemotherapy treatment. He, however, out of his own accord attended at the consulting rooms of a certain Dr. Lindeque and received one IPT between 9 and 20 December 2010.

[14] He saw the defendant on 20 December 2011 and received a further treatment. The pathology reports during this period, revealed the following:

Date	AFT	Beta-HCG
14.12.2010	27	7
17.12.2010	15	2
24.12.2010	6	3

[15] According to the plaintiff, the defendant brought him under the impression, shortly before Christmas, that the cancer was in remission. He formed this impression because the defendant told him that the cancer markers were within *"the reference range".*

[16] The pathology reports confirm that the plaintiff's cancer markers were on 24 December 2010 within the prescribed range.

[17] The AFT count improved and on 1 January 2011, the count in respect of both AFP and Beta- HCG was 3. On 11 January 2011, the value in respect of AFP was 2, but the value in respect of Beta-HCG had increased to 21.

[18] Due to the aforesaid increase, the defendant suggested a further course of treatment which treatment commenced on 13 January 2011.

[19] Notwithstanding the further treatment, the Beta-HCG values steadily increased, to wit:

Date	AFP	Beta-HCG
19.1.2011	2	66
24.1.2011	not tested	91
31.1.2011	4	84
3.2.2011	4	122
7.2.2011	5	147

[20] The last treatment date was 8 February 2011.

[21] Follow- up reports, however, indicated that the plaintiff's condition was not responding positively to the treatment, to wit:

Date	AFP	Beta-HCG
13.2.2011	6	184
16.2.2011	6	165
22.2.2011	6	253

[22] The plaintiff testified that according to his recollection, the defendant only once examined him physically during the treatment period.

[23] He concluded his evidence by stating that the reason he instituted a claim against the defendant is due to the fact that the defendant did not inform him of the following:

i. an interruption in the treatment is critical and leads to an increased resistance to further chemotherapy treatment; and
ii. IPT is not suitable for the type of condition he had.

[24] Lastly, the plaintiff was referred to a text book on IPT. The defendant wrote the foreword and the following passages were referred to:

> *"Wie is die ideale pasiënt vir IPT?*
> *Die volgende besonderhede oor die pasient is belangrik:*
> - ….
> - …
> - *Klein gewas lading.*
> - *….*
> - *Geen metastase.*
>
> *Dit beteken nie dat pasiente op wie een of meer van hierdie voorwaardes me van toepassing is nie, geen baat sal vind by IPT nie. Dit is slegs die vasstelling van die vermoedelike verloop daarvan wat da/k me so goed sal wees nie"*

and

> *'Dit is baie belangrik om nie IPT -terapie te staak as die gewas duidelik besig is om te krimp nie. Dtf kan baie gevaarlik wees omdat die kanker weer, waarskynlik met hernude krag, sal begin groei: Dit kan ook weerstand teen die middel veroorsaak as die behandeling onderbreek word* "

[25] During cross-examination the defendant admitted that he has been in remission for the past five years and consequently did not suffer any permanent damage as a result of the defendant's treatment. He, however, mentioned that he suffered financial losses and had to undergo more conventional chemotherapy sessions as a result of the treatment the defendant administered.

[26] When asked what exactly his problem with the treatment administered by the

defendant was, the plaintiff responded that his oncologist, Dr Rens, told him that the low doses of chemotherapy could have made him resistant to further treatment and that the defendant neglected to inform him of this fact.

[27] It was put to the plaintiff that this eventuality did not realise because he has responded positively to further treatment. The plaintiff responded that it appears clearly from the cancer markers that the low doses did at some stage stop working due to a resistance building up to the treatment.

[28] The plaintiff in essence repeated the rationale behind his decision to opt for alternative treatment and added that his decision was also informed by his knowledge of a patient who developed kidney problems due to conventional treatment. He confirmed that the defendant referred him to one of his patients that was successfully treated for testicular cancer.

[29] Asked whether financial reasons played a role in his decision, the plaintiff responded that he did not take it into account, because his life was at stake. He, however, stated that his medical aid paid for conventional treatment but did not pay for the alternative treatment.

[30] When confronted with the fact that the nodes in his lungs reduced in size due to the treatment administered by the defendant, the plaintiff was reluctant, notwithstanding the medical evidence to this effect, to concede thereto.

[31] The plaintiff was also referred to a letter of Dr Rens dated 4 March 2011 in which it is stated that the plaintiff *"met kliniese ondersoek is hy steeds in uitstekende toestand en tans asimtomaties van sy metistatiese siekte.* "

[32] The plaintiff admitted that he consented to IPT on the strength of the information at his disposal at that stage. He, however, insisted that he would not have opted for IPT if he was made aware that the treatment could lead to resistance to further treatment.

[33] The plaintiff admitted that, even in the event of conventional treatment, the measure of success of the treatment could not be guaranteed.

[34] It was put to the plaintiff that he terminated the defendant's treatment prior to its conclusion.

[35] Dr van Niekerk, a specialist oncologist, who had specialist training in prostate cancer, testified that a general practitioner, such as the defendant, does not possess formal training and experience to treat cancer.

[36] In South Africa one finds two types of oncologists. Firstly there are medical oncologists who have ·'done 4 years specialised training and a further two years in oncology. Medical oncologists only specialise in chemotherapy. Clinical oncologists do 5 years post-graduate training in the fields of oncology and are able to treat with both radiation and chemotherapy.

[37] All oncologists in South Africa belong to a body known as the South African Oncology Consortium. The Consortium was established to *inter alia* ensure that treatment of cancer accords with acceptable international standards. The treatment regime for each type of cancer is based on scientific research obtained from numerous clinical trials. Once a treatment regime has been accepted it becomes entrenched in the treatment regime and medical aids will pay for such treatment.

[38] Dr van Niekerk was referred to the reports of the radiologist and explained that it was important to establish the stage of the cancer to determine the long-term outcome, the treatment regime and to prognostically inform the patient of where he is and where he possibly will be.

[39] Having perused the radiologist reports, he was of the opinion that the plaintiff's cancer was at the time at stage 3 due to the lung metastases. Had he been the plaintiff's treating oncologist, he would immediately have induced chemotherapy with conventional high doses. The treatment would have been on a continual basis with each cycle consisting of 21 days. After a cycle the patient is given a week break and thereafter the next cycle commences. The plaintiff would have been subjected to four cycles, which would have culminated in a four month treatment regime. I pause to mention, that the plaintiff, subsequent to terminating his treatment with the defendant, did undergo four

cycles of chemotherapy.

[40] Having had regard to the treatment regime administered by the defendant, Dr van Niekerk testified that, although the defendant used the conventional BEP treatment, the doses were much lower. The doses were around 5% of the conventional dose administered by oncologists in the circumstances.

[41] According to Dr van Niekerk a cycle would have cost R 10 000, 00 to R 11 000, 00 in 2010.

[42] Dr van Niekerk stated that although there are many medical practitioners that claim the efficacy of IPT, it has no scientific basis. Explaining the concept of a scientific basis, Dr van Niekerk stated:

> *"... we need to understand where our end goal will be and that is done by Rhenmar's clinic or trials, in other words one group will get, one would not. Doses are changed and those outcomes are based on statistical analysis through a large group, peer review and come back down to acceptable points of treatment, published in peer review journals, which is the only way a doctor can determine whether a certain treatment is acceptable or not."*

[43] In respect of IPT, Dr van Niekerk explained the treatment as follows:

> *"It seems to claim that what we do know is that we have on certain of the cancer walls and membranes receptors, before we just used to try and kill cancer by poisoning it or killing it with radiation. Now we have started to understand that there are certain switch-on and switch-off mechanisms that may be involved in the activity of the cancer and if we can stop it, we may be able to prevent the cancer, or to kill the cancer. Although these are very experimental at this point. The one thing we have found My Lady is what we are terming insulin-like receptors, also growth receptors."*
>
> *It seems that this has a cascade effect to the cell to kill or to switch off the activity of a cell, where the body will clean it up by itself. And a lot of drug lines are being developed along this basis. It seems that with that the interpretation is that if we*

then give insulin, we make the cell, the tissue more permeable to chemotherapy There seems to be in vitro studies that show that this may have an effect which may also improve the transport of drugs into cells. "

[44] Dr van Niekerk, however, insisted that there is presently no scientific basis to confirm this theory.

[45] According to Dr van Nierkerk, a very serious risk factor associated with IPT, is that the drop in glucose levels in the blood could lead to damage to the brain cells. A further complication is that low doses of BEP, although it might initially yield positive results, at some point have no effect on the cancer and actually start creating a form of resistance to treatment. When this occur an alternative regime known as a salvage regime needs to be followed.

[46] In respect of the plaintiff's cancer markers dropping in the initial stage of treatment, Dr van Niekerk contributed it to the fact that the tumour was surgically removed. In his experience within 10 to 12 days of surgery the counts drop significantly low, because the cancer markers have been washed out of the body.

[47] Dr van Niekerk explained that cancer markers are utilised to determine the progress of treatment. Two types of situations arise, to wit a partial remission and a complete remission. With a stage 3 cancer, a complete remission should occur very quickly and the cancer markers should be undetectable after the second cycle of treatment. AFT should be less than one, because it will always have a reading and Beta-HCG should be below 3. Furthermore and due to the nodes that were visible on the CT-scan, a further CT-scan should be done to make sure that there are no nodes.

[48] Dr van Niekerk testified that it is impossible to determine whether the initial significant drop in the plaintiff's cancer markers is as a result of the surgery or as a result of the treatment administered by the defendant. He, however, stated that in his experience it is more likely that the drop is due to the surgery.

[49] When referred to the evidence of the plaintiff, to the effect that the defendant told him at the end December 2010 that a CT- scan was optional, Dr van Niekerk responded

that a CT-scan is vital and a standard procedure to determine whether the disease has decreased, disappeared or increased.

[50] During cross-examination, Dr van Niekerk admitted that he had no training in IPT. Dr van Niekerk conceded that a general practitioner with long term experience in specialised treatment of cancer, will be in a position to treat cancer. He remarked that a handful of general practitioners with the desired experience work under the South African Oncology Consortium, but stressed that these practitioners follow the acceptable guidelines in their treatment of patients.

[51] It was put to Dr van Niekerk that the defendant has an international qualification in IPT and that IPT treatment is an acceptable form of treatment in certain medical spheres. Dr van Niekerk conceded this, but insisted that IPT is not a recognised treatment regime in South Africa, Mr Geach SC, counsel for the defendant, put it to Dr van Niekerk that there are in essence two schools of thought in respect of cancer treatment.

[52] Dr van Niekerk could not dispute the fact that the defendant had 1O years of experience in the treatment of cancer and that he is a member of the International Organisation of Integrated Cancer Physicians. Dr van Niekerk admitted that the Health Professions Council of South Africa would allow a general practitioner to treat cancer, but emphasised that his conduct would be measured against that of a reasonable oncologist.

[53] Numerous further facts that could not be denied and or concessions followed, to wit:

i. that the defendant attended annual conferences in the United States of America to stay abreast in the field of IPT;
ii. that the defendant have had success in the treatment of cancer by using IPT; and
iii. that it is impossible to judge the efficacy and safety of IPT.

[54] Dr van Niekerk was referred to the CT-scan dated 4 March 2011 and stated that in his opinion the CT-scan showed a significant increase in the disease which called for salvage therapy. He was then referred to the contrary opinion expressed by Dr Rens in

his letter dated 4 March 2011 referred to *supra.* Dr van Niekerk stated that it does not alter his opinion in respect of the same CT-scan.

[55] Dr van Niekerk confirmed that the mere fact that the defendant administered IPT did not make him negligent.

[56] The defendant was the only witness in the defence case. He in essence confirmed the version that was put to the plaintiff and Dr van Niekerk. He testified that the plaintiff's condition could be successfully treated with IPT and that the number of treatments is statistically determined depending on the type of cancer.

[57] He stated that in his experience it has happened that patients initially respond positive to the treatment and thereafter has a fall back. In such cases patients would require more treatment. The defendant testified that he is an accredited tutor with the International Organisation of Integrated Cancer Physicians in the United States of America and that he gives lectures to other doctors at the annual congresses in the USA.

[58] After the initial nine sessions of IPT, the defendant was satisfied that the treatment showed a positive result and decided to give the plaintiff a break of two weeks. Blood was, however, still contentiously drawn and he monitored the plaintiff's condition with reference to the pathology reports.

[59] The defendant testified that he informed the plaintiff on or about 20 December 2010 that the plaintiff has, in a short space of time, responded positively to the treatment and a good chance existed that he could go into remission. He denied that he told the plaintiff that he is in remission. This evidence corresponds with the plaintiff's evidence that the defendant did not tell him he is in remission, but that the contents of the conversation brought him under the impression that he is. The defendant's version in this respect is confirmed by the clinical notes he kept during the treatment of the plaintiff.

[60] The defendant testified that the treatment regime was not concluded when the plaintiff terminated the treatment.

[61] During cross-examination, the defendant agreed that IPT is neither in South Africa nor in terms of the international oncologist association a recognised treatment for cancer is.

[62] When referred to the book on IPT, the defendant stated that he did not agree with all the medical facts in the book and that the author thereof is not a specialist in the administration of IPT. It was put to the defendant that he neglected to inform the plaintiff that IPT treatment could lead to brain damage. The defendant responded that a zero change of brain damage existed in the type of treatment he administered.

[63] The defendant admitted that he did not inform the plaintiff that IPT treatment could lead to a resistance to chemotherapeutic medications, but added that conventional chemotherapy could also lead to resistance to the medication.

[64] It was put to the defendant that he did not examine the plaintiff physical during the course of the treatment. The defendant denied this and referred to his treatment charts which indicates that physical examinations where conducted during the administration of each treatment.

[65] The defendant was referred to his clinical notes and more specifically the note on 12 January 2011 that one cancer marker is normal and one has increased. To this the defendant added the following question *"ander kanker variant?'* When questioned on this remark, the defendant gave the following answer:

> *'Die rede is kanker muteer gedurende terapie, kanker is 'n dinamiese siekte. So, as albei merkers hoog was aanvanklik toe hy by my aangekom het en albei die merkers nou genormaliseer het, U Edele, is die vraag hoekom net een van die kanker merkers opgegaan het en nie beide nie.* "

[66] According to the defendant, the increased count of Beta-HCG of 21 on 12 January 2011, could be attributed to the fact that more cancer cells had died. It is not an unknown phenomenon that dead cancer cells cause a spike in the count.

[67] The defendant testified that, after the nineteenth treatment, he was unsure whether

the treatment is still effective. He, therefore, discussed the prognoses with the plaintiff and gave the plaintiff the option to either continue with the treatment or to seek other treatment.

[68] When referred to the constant increase in the plaintiff's Beta-HCG counts during January and February 2011, the defendant explained that the count varied as it did during the initial treatment, which could have been an indicator that it was on the verge of decreasing. His clinical note on 22 February 2011 stated the following *"HCG weer op na 'n vorige keer geval het ?? Draaipunt voor finale val.* "

[69] This concluded the relevant aspects of the defendant's evidence.

[70] In determining whether the defendant misrepresented certain facts to the plaintiff and/or was negligent in his treatment of the plaintiff it is first of all instructive to have regard to the applicable legal principles. What is, however, clear at this stage is that divergent views between conventional treatment and alternative treatment of cancer exist. Dr van Niekerk and the body of conventional treating doctors he represents, refer to IPT as *"hocus pocus';* no doubt due to the fact that IPT is not based on the science associated with conventional treatment. It is, however, also clear that a portion of the medical fraternity consider IPT to be an acceptable alternative to conventional treatment.

APPLICABLE LEGAL PRINCIPLES

[71] The following extracts from *Castell v De Greef 1994* (4) SA 408 C succinctly summarises the legal principles applicable to medical negligence:

i. The level of skill to be possessed by a medical practitioner is measured against that of his/her peers. [416 A - C]
"In this regard the learned Judge said the following (at 509G-510A):
'Both in performing surgery and in his post-operative treatment, a surgeon is obliged to exercise no more than reasonable diligence, skill and care. In other words, he is not expected to exercise the highest possible degree of professional skill (Mitchell v Dixon 1914 AD 519 at 525). What is expected of him is the general level of skill and diligence possessed and exercised at the time by

members of the branch of the profession to which he belongs. (Van Wyk v Lewis 1924 AD 438 at 444,· see also Blyth v Van den Heever 1980 (1) SA 191 (A) at 221A,· S v Kramer and Another 1987 (1) SA 887 (W) at 893E-895C; Pringle v Administrator, Transvaal 1990 (2) SA 379 (W) at 3841-385E.)" (own emphasis).

ii. The mere fact that treatment was not successful does not in itself constitute negligence. [416C-416E]

"lt must also be borne in mind that the mere fact that an operation was unsuccessful or was not as successful as it might have been or that the treatment administered did not have the desired effect does not, on its own, necessarily justify the inference of lack of diligence, skill or care on the part of the practitioner. (Compare Van Wyk v Lewis (supra at 462).)."

iii. Similarly, a mere error of judgment does not necessarily constitute negligence on the part of the medical practitioner. [416-4161]

"Lord Fraser further observed as follows (at 281b):

Merely to describe something as an error of judgment tells us nothing about whether it is negligent or not. The true position is that an error of judgment may, or may not, be negligent,· it depends on the nature of the error. If it is one that would not have been made by a reasonably competent professional man professing to have the standard and type of skill that the defendant held himself out as having, and acting with ordinary care, then it is negligent. If, on the other hand, it is an error that a man, acting with ordinary care, might have made, then it is not negligent. "

NEGLIGENT MISREPRESENTATION:

[72] The plaintiff alleges that the defendant made the following representations, which representations induced the plaintiff to enter into an agreement with the defendant:

"4.1.1 The recommended treatment for the Plaintiff's condition was IPT and that the Plaintiff was a suitable candidate for the IPT treatment;

4.1.2 The IPT treatment would cure the Plaintiff's condition,·

4.1.3 The Plaintiff would have to undergo between 10 - 14 IPT treatments,·"

[73] The treatment did, however, not cure the plaintiff's condition and therefore the

defendant was negligent in making the representations in one or more or all of the following respects:

> *"6. 1 The Defendant was aware and/or was ought to have been aware that the Plaintiff was not a suitable candidate for IPT treatment,·*
> *6.2 The Defendant was aware and/or was ought to have been aware that the plaintiff's condition has advanced to such a stage that the IPT treatment was not the appropriate treatment regime;*
> *6.3 The Defendant was aware and/or was ought to have been aware that the treatment would not cure the Plaintiff's condition."*

[74] In respect of representations contained in paragraphs 4.1.2 and 4.1.3 *supra,* the plaintiff admitted during evidence that the defendant did not represent to him that the treatment will cure his condition or that he would only have to undergo 10 to 14 treatments.

[75] It is common cause that the defendant did represent to the plaintiff that he is a suitable candidate for IPT. Dr van Niekerk expressed the opinion that, due to the advanced stage of the plaintiff's condition, he required immediate aggressive chemotherapy which therapy is only provided by oncologists.

[76] The defendant did not agree. He testified that he had in the past successfully treated conditions similar to that of the plaintiff with IPT.

[77] According to the defendant, the outcome of treatment differs from patient to patient and is not a forgone conclusion. He added that this principle apply to both IPT and conventional treatment.

[78] The difficulty with the facts under consideration is the absence of expert evidence in the field of IPT. Dr van Niekerk admitted that he has no training in IPT and could only express an opinion from the experience he has drawn from conventional treatment of cancer to wit, oncology.

[79] Without having had the benefit of the evidence of a qualified IPT practitioner, it is

difficult to determine whether the defendant's treatment regime complies with the general level of skill and diligence possessed at the time by members of the branch of the profession to which the defendant belongs.

[80] From the evidence it appears that oncologists in South Africa consider IPT as *"hocus-pocus".* In my view, the mere fact that some medical practitioners elect to administer an alternative treatment regime does not necessarily constitute negligence. The question remains whether the defendant was negligent in representing to the plaintiff that he is a suitable candidate for IPT. Having regard to the evidence as a whole, I am not convinced that the defendant was negligent in this regard. Consequently the plaintiff's claim based on negligent misrepresentation must fail.

DUTY OF CARE

[81] It is common cause between the parties that the defendant owed the plaintiff a duty of care to perform his services with the care and skill to be expected of a reasonable general practitioner and without negligence.

[82] The plaintiff alleges that the defendant failed in this duty in at least eleven respects, to wit:

> *"12.1 He failed to perform a comprehensive and proper physical examination of the Plaintiff on 8 November 2010 or when he attended on the Plaintiff whilst administering the IPT treatments.....*
> *12.2 He failed to:*
> > *12.2.1 To obtain a comprehensive history from the Plaintiff; and alternatively*
> > *12.2.2.To properly note the Plaintiff's history, symptoms and treatment.*
> *12.3 He failed to take note of, alternatively to properly analyse, further alternatively to act in accordance of his noting and analysis of the pathology report dated 10 November 2010.*
> *12.4 He failed to properly explain the nature of the IPT treatment to the Plaintiff.*
> *12.5 He failed to recognise that the IPT treatment was contra-indicated for the Plaintiff;*

12.6 He failed to recognise, alternatively to timeously recognise that the Plaintiff was suffering from a stadium (sic) *3 mixed non-seminomatous germ cell tumor;*
12.7 He failed to act in accordance with the fact that his treatment regime was not improving the condition of the Plaintiff;
12.8 He failed to advise the Plaintiff that the IPT treatments should not be interrupted at all.
12.9 He interrupted the IPT treatments;
12 10 He failed to request a second or specialist opinion in the circumstances where he both could and should have done so;
12 11 He failed to refer the Plaintiff to a specialist oncologist in circumstances where having regard to the Plaintiff's pathology results and failure to respond to the treatment, he both could and should have done so. "

[83] The plaintiff alleges that as a result of the aforesaid negligent conduct, his condition was not cured and he had to undergo further treatment in the form of *"BEP"* chemotherapy. As a result he suffered damages by incurring unnecessary medical costs.

[84] In respect of the first three grounds of negligence, the evidence proved that:

i. the defendant did perform a comprehensive and proper physical examination of the Plaintiff on 8 November 2010 and during subsequent treatments;
ii. the defendant did obtain a comprehensive history from the plaintiff and properly noted the plaintiff's history, symptoms and treatment.
iii. the defendant did take note of, properly analysed and acted in accordance with his analysis of the pathology report dated 10 November 2010.

[85] The aforesaid is borne out by the defendant's evidence and confirmed by the defendant's clinical notes and treatment charts.

[86] In respect of the fourth ground, the plaintiff testified that he did his own research prior to consulting the defendant. The defendant testified that he explained the nature of IPT to the plaintiff and furthermore that he referred the plaintiff to one of his patients who was successfully treated. This evidence was not placed in dispute.

[87] In respect of the remaining grounds of negligence, divergent views in respect of the defendant's diagnoses and treatment of the plaintiff emerged from the evidence.

[88] It is a fact that the plaintiff was not cured by the IPT treatment. As set out *supra,* this, in itself, does not necessarily justify the inference that the defendant lacked the necessary diligence, skill or care expected from practitioners practising in his branch of speciality.

[89] In order to properly analyse the defendant's treatment of the plaintiff, it would, once again, have been useful to have regard to the general level of skill and diligence possessed and exercised by practitioners that have the same expertise as the defendant. This evidence was not presented by the plaintiff.

[90] The plaintiff bears the onus to establish, on a balance of probabilities, that the defendant was negligent in his treatment of the plaintiff.

[91] On the evidence, I am unable to come to such a finding and as result the plaintiff's claim based on a breach of the duty of care, must also fail.

COSTS

[92] The defendant employed a senior and junior counsel. Mr Geach SC, submitted that the issues at hand, justified the employment of two counsel. I agree and such order will follow.

ORDER

In the premises, I make the following order:

The plaintiff's claim is dismissed with costs, which costs include the costs of a senior

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N JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Appearances

Counsel for the Plaintiff	:Advocate E C Labuschagne SC
Instructed by	:Savage Jooste & Adams Attorneys
Counsel for the State	:Advocate B P Geach SC
and	
	: F De W Keet
Instructed by	: Gert Nel Attorneys