IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 16850 / 2014

In the matter between:

C S R	First Plaintiff
W R	Second Plaintiff
and	
DR K C DHAVARAJ	Defendant

Coram: Koen J

Heard: 18, 19, 20 & 21 FEBRUARY 2019

Delivered: 11 MARCH 2019

O R D E R

The following order is granted:

1. The plaintiffs' claims are dismissed;
2. Each party is directed to pay their own costs.

J U D G M E N T

Koen J

[1] This is an action for contractual damages by the first plaintiff in her personal capacity, and together with her husband the second plaintiff in their representative capacity as the parents and natural guardian of their minor daughter, J, a girl born on 17 January 2012. They allege that:

(a) they had contracted with the defendant, a specialist obstetrician and gynaecologist, to perform a sterilisation by tubal ligation (hereinafter referred to as a 'TL') on the first plaintiff when their second child, a boy J, was born by caesarean section (C/S) on 15 February 2011;

(b) the defendant failed to perform such TL; and

(c) that as a result the first plaintiff subsequently fell pregnant with and gave birth to J.

[2] The damages claimed include:

(a)	The reasonable costs for the construction of an additional room at their residence	R 98 000.00
(b)	Maintenance in respect of J until she is self-supporting	R1 138 000.00
(c)	General damages inclusive of pain, shock, discomfort and loss of amenities of life in respect of the first plaintiff	R250 000.00
		R1 436 000.00

[3] Although the plaintiffs' particulars of claim also contain allegations of an alleged failure 'to discharge the duty owed to the First Plaintiff', that the defendant allegedly failed 'to employ such skill and care as was required and reasonable', and that the defendant was 'negligent', suggesting a possible cause of action founded in

delict, the plaintiffs have expressly disavowed any reliance on delictual principles and the case proceeded purely as a contractual one. That approach is, no doubt, correct, as no obligation to perform a TL could follow other than from a contract. The defendant had not performed a TL on 15 February 2011. The only issue was whether he had contractually bound himself to perform such a TL. The plaintiffs' case was not that a TL was performed but that it failed, in which instance questions of negligence and substandard professional care might have been involved.

[4] At the commencement of the trial an order was granted in terms of rule 33(4) at the request of the parties, directing that the issue of liability and the possible prescription of the plaintiffs' claims be tried first and that the quantum of the claims will stand over for determination at a later stage, if necessary.

[5] In respect of the contractual claim the plaintiffs in their particulars of claim, as amended during the trial, allege that:

(a) On or about 7 February 2011 and at the medical rooms of the defendant in Raisethorpe, Pietermaritzburg, KwaZulu-Natal and/or on or about 15 February 2011 and at St. Anne's Hospital, Pietermaritzburg, KwaZulu-Natal, the first plaintiff with the assistance of the second plaintiff[1] concluded a partly written, partly oral agreement with the defendant.

(b) The written portion of the agreement comprised the documents relating to the first plaintiff's admission to St. Anne's Hospital.

(c) The material express, alternatively implied, alternatively tacit terms of the agreement were:

(i) The first plaintiff was admitted to St. Anne's Hospital for the purpose of giving birth, which procedure would be conducted by the defendant;

(ii) The treatment to be administered to the first plaintiff was to ensure the successful birth of J;

(iii) The defendant would after the birth of J cause the TL of the first plaintiff's fallopian tubes by surgery, for the purpose of rendering the first plaintiff sterile and incapable of procreating.[2]

(d) The defendant breached the agreement in that he failed to effect the TL of the first plaintiff's fallopian tubes, that he had advised the plaintiffs that the surgery for

[1] The reference to such agreement being concluded with the assistance of the second plaintiff (her husband) was conceded by plaintiffs' counsel to be irrelevant.

[2] There were also further terms alleged regarding the defendant having to conduct the operation with professional skill and care, but these were not relied upon and expressly disavowed.

the TL was successful, and that he failed to administer any birth contraception to the first plaintiff, alternatively to inform the first plaintiff to utilize contraception after the birth of J.

[6] It is common cause on the evidence that the defendant:

(a) attended successfully to deliver J by way of caesarean section on 15 February 2011;[3]

(b) did not perform a TL immediately thereafter.

[7] The defendant's version as pleaded is that he admitted the agreement, between himself and first plaintiff, to deliver J by caesarean section at St. Anne's Hospital in Pietermaritzburg on 15 February 2011, with the care and skill reasonably required of a competent and experienced obstetrician. He however denies an agreement to perform a TL after the birth. He pleaded specifically that on 7 February 2011, during a consultation at his rooms, the first plaintiff informed him that she and the second plaintiff had decided not to have any more children, further that he counselled her on the various methods of contraception which were available and in particular the possibility of a TL, that the first plaintiff was undecided as to whether or not to undergo a TL, and that it was agreed that she would consider her position and that if she decided to go ahead with the TL, she would instruct the defendant accordingly and sign the relevant form consenting to such a procedure. He maintains that at no stage thereafter was he informed by the first plaintiff that she had decided to go ahead with a TL, nor was there any consent form provided in relation to such procedure. Accordingly he did not perform a TL on her. On the day immediately following J's birth, namely 16 February 2011, he informed her that no TL had been done and on the same day prescribed Microval, an oral contraceptive made available to patients at no charge in terms of a government initiative. On 24 February 2011 he advised her to return to him in six weeks' time for a TL to be performed laparoscopically, if she so desired. No such appointment was kept. He admits that J was subsequently born by caesarean section on 17 January 2012 and that immediately thereafter he performed a TL on the first plaintiff as agreed with her.

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[3] The first plaintiff and the defendant have had a long association, the defendant having assisted her initially to fall pregnant with her first child who was born on the 5 June 2004, a subsequent miscarriage, the birth of J on 15 February 2011 and the birth of J on 17 January 2012.

[8] The sole issue in dispute is accordingly whether there was a valid and binding agreement concluded between the parties that the defendant would perform a TL on the first plaintiff on 15 February 2011.

[9] In regard to that issue the versions of the plaintiffs and the defendant are mutually destructive. In such a case it is trite law that the plaintiffs, who bear the *onus* of proof, can only succeed if they satisfy this Court on a preponderance of probabilities that their version is true and accurate and therefore acceptable and that the version advanced by the defendant is false and mistaken and falls to be rejected. As was said in *National Employers General Insurance v Jagers*:[4]

'In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.

This view seems to me to be in general accordance with the views expressed by COETZEE J in *Koster Ko-operatiewe Landboumaatskappy Bpk v Suid-Afrikaanse Spoorweë en Hawens (supra*) and *African Eagle Assurance Co Ltd v Cainer (supra*). I would merely stress however that when in such circumstances one talks about a plaintiff having discharged the *onus* which rested upon him on a balance of probabilities one really means that the Court is satisfied on a balance of probabilities that he was telling the truth and that his version was therefore acceptable. It does not seem to me to be desirable for a Court first to consider the question of the credibility of the witnesses as the trial Judge did in the present case, and then, having concluded that enquiry, to consider the probabilities of the case, as though the two aspects constitute separate fields of enquiry. In fact, as I have pointed out, it is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities.'

[10] Furthermore in considering credibility the judgment in *S v Singh*[5] is instructive (and although it deals with a criminal case, the following comments are apposite):

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[4] 1984 (4) SA 437(E) at 440F to 441A.
[5] 1975 (1) SA 227 (N) at 228F-H.

'…it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. *The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case.* It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt.' (my emphasis)

[11] I turn then to consider the evidence relevant to an assessment of the probabilities in this matter.

[12] In seeking to discharge the onus upon them, the plaintiffs testified and produced various exhibits. The documents handed in as exhibits included the hospital records from Netcare, St. Anne's Hospital.[6] The parties agreed the status of these records to be that they are what they purport to be and as proof of the contents thereof. Copies could be used without the need to produce the originals. In respect of all the other documents introduced, including the clinical records and notes kept by the defendant it was agreed that the documents are what they purport to be and that copies may be used without producing the originals. The truth of the contents thereof was not admitted and would have to be proved.

[13] When considering the probabilities relating to any dispute involving sterilisation, the starting point must be the legislative background contained in the following provisions of the Sterilisation Act[7] and the regulations[8] issued thereunder.

[14] In terms of s 2(2) of the Sterilizaion Act a person capable of consenting may not be sterilised without his or her consent first being obtained. S 4 provides that 'For the purposes of this Act, **"consent"** means consent given freely and voluntarily without any inducement and *may only be* given if the person giving it has—

(*a*) been given a clear explanation and adequate description of the—

(i) proposed plan of the procedure; and

(ii) consequences, risks and the reversible or irreversible nature of the sterilisation procedure;

(*b*) been given advice that the consent may be withdrawn any time before the treatment; and

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[6] Exhibit B.

[7] Sterilisation Act 44 of 1998.

[8] 'The Regulations under the Sterilisation Act, 1998 (Act 44 of 1998)' GN R872, *GG* 20285, dated 16 July 1999.

(*c*) understood and *signed the prescribed consent form*.' (emphasis added)

In terms of s 9 any person who contravenes or fails to comply with the provisions of the Sterilisation Act is guilty of an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding 5 years.

[15] The regulations under the Sterilisation Act inter alia are as follows.

In terms of regulation 2(1):

'A person who is capable of consenting and who requests that a sterilisation be performed on him or her shall complete Part A and Part B of Form 1 and submit such form to the head of the health facility, together with a completed standard consent form'.

In terms of regulation 4:

'A standard consent form for surgical procedures used by the health facility or hospital concerned shall be completed in any request for sterilisation'.

In terms of regulation 5 a 'public or private health facility' is required to be designated as a 'facility in terms of s 5 of the Act', which requires it to comply with certain requirements relating to access to medical and nursing personnel, access to an operating theatre, and the like, as St. Anne's Hospital would be.

[16] It was not disputed that no consent to sterilization was submitted to the 'head of the health facility' at the time that the caesarean section in respect of J was scheduled and performed. The records from St Anne's Hospital signed by the first plaintiff on that occasion merely indicate that a caesarean was to be performed. There is nothing signed by the first plaintiff in respect of a TL. A lawful TL would therefore not have been possible.

[17] The question then arises whether, even in the absence of a formal consent not having been produced to St Anne's Hospital, there was an agreement between the parties that the defendant would perform the TL, which presumably then would extend to some contractual obligation on his part to ensure that the legally required consents were in place, or giving advice to the plaintiffs as to how comply with any such statutory requirements. Although the latter was not specifically pleaded as a contractual obligation, I shall assume it for the purposes of this judgment as it was the plaintiffs' evidence that what they had to do was sign the consent produced by the defendant and hand it in to his rooms, and on their version, no more.

[18] The probability as to whether there was an agreement to perform the TL must be assessed in the light of the evidence. I do not intend setting out a summary of all the evidence in this judgment but shall only refer to the material parts relevant to a consideration of the probabilities. However in reaching the conclusion at the end of this judgment, I have had regard to all the evidence adduced.

[19] It was not in dispute on the evidence that:

(a) The first plaintiff discovered during her pregnancy with her first born, a daughter born on 5 June 2004, that she tested HIV positive;

(b) Having had a daughter the plaintiffs wished to have a son;

(c) During her pregnancy with J, it was confirmed that she was expecting a boy;

(d) By the time she would give birth to J, she would already be 39 years old and hence probably approaching the latter stages of her child bearing years;

(e) During that pregnancy it was suggested that she should not have any further children thereafter because of her condition generally. Various options were discussed between the defendant and the plaintiffs. Although the plaintiffs' were unable to state the exact date of such discussions, it seems from the defendant's clinical notes and a claim by the defendant processed by Bonitas Medical Fund, the medical aid of the plaintiffs, and for which the defendant was paid, that such visit occurred on 7 February 2011.

(f) At that visit the plaintiffs' were provided with a standard written consent form headed 'Operation Consent' devised and generated by and generally used in the practice of the defendant. The actual consent form provided to the plaintiffs could not be produced. The consent dated 12/01/12 signed in respect of the TL subsequently performed at the birth of J was produced. The evidence was that this was the standard consent form that has been used in the defendant's practice over many years. The consent form that would have been handed to the plaintiffs on 7 February 2011 relating to the birth of J would have been similar in format and content.

(g) This standard consent form used by the defendant is addressed to the 'Sister in charge, OT,[9] St. Anne's Hospital'. It lists the procedures contemplated, which would have included 'elective C/S' with procedure code '2615', and 'TL' with procedure code '2492'. That was not disputed. The consent is required to be signed

[9] Operating theatre.

by the first plaintiff as the patient. The plaintiffs were also required to obtain[10] an authorisation number from their medical aid and insert it where indicated on the form. The document concludes with an inscription in bold at the bottom, which reads:
'*** **This form to be handed to the doctor in theatre**'.

[20] Ms Padayachee, a receptionist/creditors' clerk employed at the defendant's practice for the last 17 years confirmed the evidence of the defendant that the operation consent form would be completed by the insertion of the procedures and codes, according to her by the defendant in his room, and following a print command being given, be printed on a printer in the reception area. On the patient emerging from the doctor's room, this form would then be handed to the patient. Her evidence was that sometimes, but not always, an unsigned copy is kept on the patient's file. It is not in dispute that such a consent form was handed to the plaintiffs on that day.

[21] The defendant's evidence was that the plaintiffs were still undecided on the issue of sterilisation and that he advised them to go and reflect on it and then to sign the form indicating their election, as he could not proceed with the TL in the absence of a clear consent that it was what they desired (leaving aside the requirements of the Sterilisation Act). The defendant was adamant that the form was to be taken to the hospital upon admission, being addressed to the 'sister in charge' after the required authorisation number would have been obtained and inserted on the form. He was corroborated as to that general practice by the evidence of Ms Padayachee who testified that the staff at the rooms of the defendant explain to patients that they must take this consent form, get authorisation from their medical aid and then hand it to the sister at the hospital on the day of admission for the procedure. She said that these forms do not find their way to the hospital any other way. If the form was sought to be handed to the defendant's staff at his rooms, then the patient would be advised to take the consent form to the hospital on admission.

[22] The plaintiffs maintain that they signed this consent form at the defendant's rooms after existing from his room, and that they handed it to a member of his staff immediately after that consultation. (This contrasts to the consent form in relation to the birth of J where the first plaintiff's evidence was that the consent had been furnished and was taken away by her and her husband to their home where it was

[10] The authorization number could either be obtained in advance or after receipt of the consent form.

signed on the 12 of January 2012 and witnessed by K, their neighbour at the time. This from was in this St. Anne's Hospital file).

[23] Ms Padayachee described that when the consent form is printed in the reception area, the details appearing thereon relating to the name of the patient and the procedures to be conducted would be inserted in the defendant's diary for the day for which the procedures are scheduled. The day before the scheduled operation she would prepare the 'theatre slate'. This takes the form of an email which is sent to the hospital concerned, with a copy supplied also to the defendant, setting out the names of patients and their scheduled procedures for that particular theatre day. She would also confirm the anaesthetist and paediatrician who would be in attendance. The hospital will prepare the theatre on the basis of what is scheduled as per the theatre slate.

[24] Ultimately all the procedures scheduled for a particular day as per the theatre slate, might not be carried out. Specifically in this case, in addition to the caesarean the TL might not necessarily be performed, depending on whether the patient had confirmed all the procedures, and in particular had provided the written consent for the TL.

[25] The records of St. Anne's Hospital, the contents whereof were admitted as the truth, revealed that the first plaintiff was admitted early on the morning of 13 February 2011. The reason for the admission was stated to be 'elective C/S'. In the demarcated space in response to the enquiry whether the 'written consent from doctor' was submitted, 'NO' was indicated. The first plaintiff (although initially hesitant as to whether it was her signature on the form) confirmed that she had signed the form.

[26] In a separate record, headed 'Peri-operative document', it was recorded under the 'Pre-operative phase (preparation for surgery)' that the consent for the ward, that is for an elective caesarean had been obtained, but that no consent for the theatre had been obtained. Under the heading 'Particulars of operation' it was recorded that a 'lower segment caesarean section' was performed and 'one live male infant extracted at 09h32'.

[27] The aforesaid records from St Anne's Hospital staff may be contrasted to those of 17 January 2012 in relation to the birth of J. There the admission forms likewise reflected the 'reason for admission' simply as 'elective ceaser' (sic) but in response to the question whether the 'written consent from doctor' was submitted,

the reply was a circled ‘YES’. The ‘Nursing progress report’ however recorded that ‘patient admitted for elective caesarean section and bilateral tubal ligation. Admitted by night staff’. The ‘Peri-operative document’ recorded in regard to ‘consent’ that consent had been obtained both in the ward and theatre. The ‘Nature of the operation’ was also recorded to be ‘lower segment caesarean section’ and ‘bi-lateral tubal ligation’.

[28] The evidence of the defendant was that apart from his clinical notes kept in the patient file he also keeps a billing sheet wherein, in relation to various attendances indicated in date form, he records the procedure codes for his billing staff to issue invoices to his patients and their medical aid societies. In respect of the visit on 7 February 2011 he recorded procedure codes 0147 and 2603 (which represents external cephalic version - excluding aftercare) and 2610, (which represents tacocardiograph pre-natal and intrapartum - including stress and non-stress test; own machine - excluding aftercare). Immediately below that he inserted ‘next week C/S & TL assist’. Although the latter appeared opposite the date ‘15/2/2011’ he testified that these entries were all made on 7/2/2011 and were in respect of the procedures then contemplated to be performed depending on the final decision of the plaintiffs as to whether the first plaintiff wanted to proceed with the TL. The clinical notes of the defendant for 7/2/11 record ‘to sign written consent – C/S- TL’, which he explained meant that the first plaintiff was to go away, consider the TL and that if required, she was to sign the written consent for the caesarean and the TL and present it at the hospital on the day the procedures were to be performed.

[29] He was criticized in cross examination on his version that he had not received any written consent from the first plaintiff, but nevertheless proceeded with the C/S. He explained however that the C/S clearly had to be performed and that would be obvious, but the TL was significant and not necessarily required. The first plaintiff was in any event according to the hospital admission records admitted for a caesarean section.

[30] The first plaintiff and her husband both testified that at the end of the procedure on 15 February 2011 with the birth of J there was much joy in the operating theatre and that the defendant had uttered words to the effect that he would not be seeing the first plaintiff again or that she wouldn’t be returning to theatre again. The evidence in this regard is necessarily vague as the first and

second plaintiffs' were testifying to these events some 8 years after they had occurred. The defendant accepted that apart from contemporaneous clinical and other notes he had made at the time, he too would not have an independent recollection of what transpired. The plaintiffs' sought to suggest that based on these utterances they assumed that the TL had been performed in line with the consent they maintained they had handed to the defendant's staff.

[31] The defendant, apart from contending that he could not independently recall any such statement, pointed to the improbability thereof, namely that no obstetrician / gynaecologist would utter such a statement to convey that a TL had in fact been performed when he could have been in no doubt that no such procedure had been performed only minutes earlier. Further, the theatre staff would immediately have pointed this out. Ultimately in argument, both the plaintiffs and the defendant appear to accept that no reliable inference could be drawn from any such words, even if they were in fact uttered. The plaintiffs explained that what might have been intended was that in view of the first plaintiff's age she would be unlikely to return to hospital with another child, and that now having had a boy as they had wished, they did not plan on having further children. I agree that nothing more can be inferred from the use of those words if they were in fact uttered, and that it was probably simply banter on a joyous occasion.

[32] The first plaintiff testified that when she left the theatre she believed that she had been sterilised.

[33] The defendant's contemporaneous clinical notes of the first day after the caesarean, namely 16 February 2011, record that the first plaintiff was 'advised TL not done TCB 6/52.' The reference to 'TCB 6/52' was explained as that the first plaintiff was 'to come back' to the defendant in 6 weeks' time as to whether she wanted to have a TL done.

[34] The defendant's clinical note for the third day, 18 February 2011, records that the first plaintiff was fit for discharge 'on Microval'. Microval, as mentioned earlier in this judgment,[11] is a government supplied form of oral contraception which is made available to patients free of charge.

[35] The discharge records of St. Anne's Hospital reflect that the 'final diagnosis' was a caesarean section (there was no reference to a TL) and that the first plaintiff

[11] See para 7.

was discharged with Stopayne medication, to be used when necessary. There was no reference to the Microval. The defendant however sought to explain the absence of any reference to Microval on the basis that it was supplied free of charge and as a government initiative and hence not listed.

[36] According to documents from the plaintiffs' medical aid, Bonitas, a claim for R3 212,30 was paid to the defendant's practice on 2 March 2011. This was in respect of the defendant's attendances on 15 February 2011 in respect of an item with code 2615 (which refers to 'Global obstetric care. All inclusive fee for caesarean section, and obstetric care from the commencement of labour until after the post-partem six weeks visit) and code 2492 (which is the code in respect of salpingectomy colon uni- or bilateral sterilisation for accepted medical reasons).

[37] The first plaintiff testified that she consulted a general practitioner, Dr Marrie, during 2011. She was not certain of the date. Although the consultation related to J, she complained to the doctor that she was not feeling well. The doctor then advised her that she was pregnant. When she expressed surprise because she believed she had been sterilised, he suggested that she contact the doctor who attended to the sterilisation forthwith. She recalled that this occurred on a Friday. Her husband then contacted the defendant and the latter indicated that they should meet with him urgently the next morning, on the Saturday. Although it appears that the consultation with Dr Marrie and the subsequent meeting with the defendant might have been a week apart, nothing turns on this apparent discrepancy.

[38] The clinical notes of the defendant reveal that the plaintiffs consulted with him on 20 August 2010. He recorded that the first plaintiff had missed her 6 week check-up after the birth of J. The defendant's clinical note reads that she 'was diagnosed Preg! & wants not for TOP[12] despite status.' He also recorded various findings.

[39] The plaintiffs during argument placed emphasis on the exclamation mark which appears after the word 'Preg' in the defendant's clinical notes interpreting it as expressing surprise. They questioned why the defendant would express such amazement or shock at the first plaintiff being pregnant if he knew he had not performed a TL on her. During argument the defendant submitted that this was insignificant as his clinical notes for 5/1/04 in relation to the first plaintiff's pregnancy with her first born had likewise recorded 'Preg!' The status of that clinical note is of

[12] Termination of pregnancy.

course simply, that it is what it purports without being the truth of the contents thereof, as it was not proved during the evidence. Be that as it may, what the notes do show is that the defendant's use of an exclamation mark is not confined to the first plaintiff being diagnosed pregnant with J. Most significantly however, the use of the exclamation mark does not only permit an inference of amazement indicative of some form of acknowledgement on the part of the defendant that he believed he had previously performed a TL when he fact had failed to do so. Such an inference would also be in conflict with the tenor of the balance of his notes.

[40] The plaintiffs testified that it was during this time that the defendant indicated a willingness to assist them, which it was argued, amounts to an acknowledgment of liability for the position in which the first plaintiff found herself, ie being pregnant again. The import of the first plaintiff's evidence was that this assistance would take some form of financial assistance, whereas the evidence of her husband was that the exact nature of such assistance was not discussed.

[41] The plaintiffs allege that the defendant subsequently reneged on any such undertaking. In the evidence of both plaintiffs the reason, apparently proffered by the defendant, was that he had spent or was spending money on the construction of a temple at his property near Albert Falls outside Pietermaritzburg. The defendant does own an immovable property at Albert Falls which apparently has a home and outbuildings constructed. It includes a general purpose facility which some visitors use as some form of retreat. The defendant confirmed that the property is used for birdwatching and fishing and even prayer by those visitors who were so inclined. The argument on behalf of the plaintiffs was that the plaintiffs would not have been aware of the existence of such a facility unless mentioned by the defendant, and that this could only have been in the context of him reneging on his previous undertaking to assist (possibly financially). This, it was argued, indicated that he accepted liability for the first plaintiff's pregnancy with J due to him not having performed the TL at the time of the birth of J, otherwise there would have been no need for him to accept any responsibility if he had not been contractually obligated to perform a TL and failed to do so.

[42] The defendant's counter to this argument was that he is insured against claims of this nature, and that he wold never acknowledge any liability in respect of a potential claim, as that would cause him to lose his rights of indemnity. He might have mentioned his property at Albert Falls in a different context.

[43] The defendant's clinical notes in respect of the birth of J on 17 January 2012 record 'bilat TL done – Histo'. This indicates that a bilateral TL procedure was performed and the portions of the fallopian tubes excised were sent for histology to confirm the success of the operation.

[44] Summons in this matter was issued on 8 December 2014 and apparently served on the defendant on 9 December 2014. According to the defendant it was during consultations with his professional medical society, which would indemnify him in respect of a claim of this nature, that he only discovered that a claim had been submitted under code 2492 in respect of his 15 February 2011 attendances on the first plaintiff, for payment of the sum of R836,50 for a sterilisation, whereas in fact such a procedure was not performed. He thereupon took steps to have the amount reversed. It was not stated when such steps were taken but in a note received from Bonitas it is recorded that the reversal of the sum of R836,50 was 'actioned' (presumably given effect to) on 13 August 2015. The evidence of the reversal of this fee became available for the first time at the trial. The defendant explained, and to some extent this was confirmed by Ms Padayachee from him office, that he would write the codes on his billing sheet and that the billing sheets would be handed to the accounts lady in their office from time to time who would then lodge the claims with the medical aids concerned. There was some conflict as to whether this would occur before or after procedures are performed, Mrs Padayachee having indicated the authorisation must be obtained in advance but the billing would be done after the procedures are administered or performed. Nothing material turns on this. In some instances claims might be made in advance and in other instances only after the procedures have been performed.

[45] The defendant testified that the submission of the claim for a TL on 15 February 2011 was an administrative error. He testified that an invoice or statement would also have been sent to the second plaintiff, but that no query was ever raised in regard thereto. That would obviously not be surprising, as on the plaintiffs' version they believed that a TL was performed. No query could be expected from the plaintiffs until after the first plaintiff's pregnancy with J was confirmed. However, even thereafter apparently no query was raised.

[46] The raising of that fee with the medical aid and it having been paid by Bonitas would obviously have reinforced the plaintiffs' belief that it was part of their agreement with the defendant that he was to have performed a TL on 15 February

2011. Why charge for such a procedure if it was not done? Otherwise it could be a fraudulent claim. In the ordinary course this would indeed be a strong probability factor against the defendant, unless explained satisfactorily. The defendant's explanation was that administrative staff had in error but based on what was stated in his billing sheet as to the procedures which were contemplated he would perform 'next week', namely CS and TL, raised fees in respect of both procedures. This was unbeknown to him at the time as he did not deal with the raising of fees personally. However no TL had been performed and no fee should have been raised in respect thereof. When he became aware of this error, he asked for it to be reversed.

[47] There was some criticism that it took 8 months' before the reversal was done. That criticism might however be unfair as the documentation refers to the request for the reversal being actioned in August of 2015, but the date of the actual request for reversal is not disclosed. However even accepting a delay of some months before it was reversed, the accusation would be that the reversal was requested to undo the inferences sought to be drawn from this procedure having been charged for in the first place, and to manipulate the outcome of this trial. That would seek to ascribe conduct to the defendant aimed at defeating the proper administration of justice and/or would be tantamount to fraud.

[48] It was also pointed out during argument that in terms of s 17(2) of the National Health Act 61 of 2003:

'Any person who –

(a) …

(b) falsifies any record[13] by adding to or deleting or changing any information contained in that record[14]

…

commits an offence and is liable on conviction to a fine or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment.'

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[13] The 'record' referred to are a user's 'health records'.

[14] s17 (1) requires a person in charge of a health establishment to set up control measures to prevent unauthorised access to health records and to the storage facility in which and all systems by which records are kept. A 'health establishment' is defined as meaning 'the whole or part of a public or private institution, facility, building or place whether for profit or not, that is operated or designed to provide inpatient or outpatient treatment, diagnostic or therapeutic interventions, nursing, rehabilitative, palliative, convalescence, preventative or other health services.' *Prima facie* the clinical records kept by the defendant in respect of his patients fall within those parameters.

Any amendment or alteration of the defendant's clinical notes would accordingly amount to possible criminal conduct.

[49] In *Gates v Gates*[15] it was said that:

'….the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.'

[50] The defendant's explanation that the claim for the TL fee in respect of his attendances on 15 February 2011 was an administrative error, must also not be adjudged in isolation but viewed against the context of all the other evidence. In particular, it seems that the claims process from his rooms is not always as reliable as the Bonitas records also revealed claims paid out in respect of alleged attendances by the defendant on the first plaintiff on 10 February 2011. His clinical notes however reflect no such attendances on the first plaintiff that day, and no such attendance was ever hinted at by the plaintiffs. This further debit of fees was only discovered during the course of this trial when evidence was being led. The defendant expressed his complete surprise and said he would immediately request the reversal thereof. The defendant's administrative claims process is therefore clearly fraught with problems. Either claims are made for work not done, which would be fraud, by either the defendant or an employee for personal gain, or the administrative process is very unreliable. The primary inference would of course be that the work claimed for had in fact been done and could not now be denied, which no doubt would have weighed heavily with the plaintiffs' legal advisers in having advised the plaintiffs to pursue the action.

[51] In addition the notion that the claims submitted by the defendant's debtor's clerk vicariously constitutes an admission of a contractual obligation to have performed the TL on 15 February 2011, would fly in the face of the defendant's clinical notes, particularly that on the first day after the procedure, he recorded advising her that no TL was performed and she was 'to come back' regarding any possible sterilisation 6 weeks later. One might be sceptical about this note, because why would such advice be required if the required consent which was a precondition

[15] 1939 AD 150 at 155.

to the defendant performing the TL, had not been in place the day before. However, it is also a comment, at the level of probability, which would not necessarily be out of place from an abundance of caution, given the history of dealings between the parties.

[52] A perusal of the topographical lay out of the original clinical notes would not suggest that this statement was inserted fraudulently later. The spacing between lines appears consistent. The rewriting of the particular page or possibly pages, as they are loose leaf and not in a bound document, might not be impossible, but would also constitute illegal or at least immoral conduct, which is not generally accepted as a matter of probability. More importantly though, although the possibility of such deceptive conduct was hinted at faintly during argument, the plaintiffs never confronted the defendant with any such suggestion during his cross-examination to afford him the opportunity to comment thereon. He might have had a very conclusive answer. Fairness and the general principles relating to cross examination require that the defendant should have been confronted with any such accusation if it was to be pursued. The fact that he was not thus confronted is fatal to any argument along these lines.

[53] The plaintiffs' claim is contractual. What the defendant's clinical notes for the consultation on 7 February 2011 and the evidence on probability establish, is that a possible TL on the first plaintiff to be performed on 15 February 2011 was discussed, that it was offered by defendant as a service he could render, that the plaintiffs' might even have been fairly resolute in their determination at that point to have a TL performed, but that the offer of performing such procedure still had to be accepted by the plaintiffs. The acceptance of that offer, to give rise to an enforceable contractual term to perform the TL, had to be communicated to the defendant by the consent of the first plaintiff in the form of a written consent actually coming to his attention. Having regard to the effect of a TL, namely sterilisation of the first plaintiff, nothing less would suffice. This is not an instance where some form of communication of acceptance short of actual recognition by the defendant by the consent being brought to his mind, could result in the consensus *ad idem* on all the terms of an agreement, which a binding and enforceable agreement in law requires.

[54] Where the plaintiffs' claims fail is the absence of proof that such consent actually came to or was brought to the defendant's actual attention. Indeed much of the defendant's cross-examination proceeded on the basis of accepting that he had

not become aware of the consent form which the plaintiffs maintained was handed to them, signed by them and allegedly handed to a member of his staff, who might have misplaced it or not placed it in the patient file. St Anne's Hospital records are consistent with the consent not having been produced at the hospital or being available at the time of the caesarean section in respect of J. The plaintiffs might no doubt *bona fide* have believed, accepting their version, that they had communicated their acceptance for the TL to be performed by the defendant by handing in the consent form to his reception staff, although this was never specifically pleaded, nor any estoppel raised by replication.

[55] They might also no doubt subsequently have been reinforced in that belief by the fact that the TL procedure was charged for and the defendant was paid by Bonitas. Although there was no evidence that they had seen the charge on any statement sent to them and had relied thereon, they would have become aware of the charge raised and paid by Bonitas at the latest before the trial commenced. The request by the defendant for the reversal of the charge for the TL and the actual reverse of the charge only came to their attention during the hearing of the action.

[56] That subjective belief on the part of the plaintiffs might also subsequently have tainted the construction which they placed on words which might have been uttered during the joyous occasion when J was born. The whole of the plaintiffs' evidence is dependent on personal recollection more than eight years later. It is also no doubt subconsciously influenced by the nature of their claim and events, such as that payment was made in respect of the TL procedure, which *prima facie* would suggest that the defendant had indeed agreed to perform such procedure.

[57] As against that evidence, are the contemporaneous notes of the defendant, which have not been impeached. These indicate that there was still uncertainty as regards the TL at the last consultation before the caesarean was performed, the first plaintiff being advised post the caesarean that no TL was performed, and that she was to come back about having such a procedure done. That note cannot simply be ignored. The subsequent claim for such a procedure, which would be a subsequent event and normally strongly indicative of the parties' true contractual agreement, has been explained. That explanation is also not one which can simply be rejected, particularly where other billing errors have also been made and the billing for a TL on 15 February 2011 had not been made by the defendant personally. As remarked earlier, no estoppel was raised in this regard either.

[58] In my view, based on an examination of the aforesaid evidence, the probabilities overall favour the defendant, or at best for the plaintiffs, are evenly balanced in which case the onus becomes decisive. The plaintiffs have not discharged the onus of proving a preponderance of probability in their favour. The defendant is accordingly entitled to be absolved.

[59] This is not a matter in which the *bona fides* of the plaintiffs can readily be questioned. It appears to me more correctly to be one of those instances where both parties, genuinely believing in their respective versions, have contributed to a result where the plaintiffs' claims have failed simply because they were unable to discharge the onus of proving that there was a complete meeting of the minds in regard to every material aspect of their negotiations, as to give rise to consensus *ad idem*.

[60] The result is that the defendant has been successful. However the plaintiffs' persistence with their action, where they were armed with proof that Bonitas had made a payment to the defendant in respect of a TL performed on 15 February 2011 (the reversal of which and the reason therefore never being disclosed to them before the commencement of the trial), was reasonable. In the exercise of my discretion on costs I determine that each party pay their own costs.

[61] In the light of the conclusion to which I have come it is not necessary to consider the defendant's special plea of prescription and I accordingly refrain from doing so.

[62] The following order is granted:

1. The plaintiffs' claims are dismissed;
2. Each party is directed to pay their own costs.

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KOEN J

Appearances

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