IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 131/2013

In the matter between:

B PANE Plaintiff

and

MEC, THE DEPARTMENT OF HEALTH,FREE STATE: Defendant

HEARD ON: 1 & 2 MARCH 2016

DELIVERED ON: 21 APRIL 2016

MOCUMIE, J

[1] The plaintiff instituted action against the Member of the Executive Council of the Department of Health, Free State (the MEC) seeking payment in the sum of R3 000 000 (three million rand) and costs of the suit.
The action is defended by the MEC.

[2] As a precursor to the trial the parties agreed to a separation of the issues: the merits from the *quantum* in terms of R33(4) of the Uniform Rules. The agreement was made an order of this court. In the minutes of the pre-trial

conference held between the parties, the parties also agreed on the main issue to be determined by the court: 'whether the employees of the defendant were negligent by cutting the plaintiff's intestine and removing her womb.' Shortly before the trial commenced, the plaintiff applied for an amendment of her particulars of claim as she is entitled to in terms of rule 28(1-(10) of the uniform rules.[1] Although highly opposed by the MEC, the amendment was granted in respect of paragraph 5 of the particulars of claim.

[3] To prove her case on a balance of probabilities, the plaintiff testified and called a gynaecologist, Dr Thembi Khoale (Dr Khoale), as a witness. To rebut the plaintiff's case the defendant called Dr Marthinus Gerhardus Schoon (Dr Schoon) a specialist gynaecologist, Dr Mashokho Pearl Marokane (Dr Marokane) a medical doctor at the hospital in 2010 and Mr Mojalefa Monyane (Mr Monyane) a legal administration officer of the Department of Health, Free State.

[4] Ms Boniswa Pane, the plaintiff, testified that she was a resident of Ha Machabeng, Maseleng, Peolong, Qwa Qwa, Free State. On the 23 January 2010, she suffered an incomplete miscarriage and was admitted to Manapo Hospital Phuthaditjhaba (the hospital) on the same day. A uterine evacuation was done to clear up her uterus as is the normal procedure in such cases. The next day, 24 January, she was however discharged from hospital despite her still feeling pains around her abdominal area, having a swollen stomach and vomiting. She was given medication, antibiotics, and told to come back if she did not feel better.

[5] She testified further that on the 1 February 2010 she suffered from lower abdominal pains, backache, dizziness, nausea and spotting as recorded by the local clinic, Nthabiseng clinic (the clinic). The clinic transferred her to the hospital. On 2 February she was re-admitted to the hospital. The hospital progress report shows that she was admitted by Dr Manoto but was treated

[1] *Affordable Medicines Trust v Minister of Health of Health* 2006 (3) SA 247 (CC) at 261.

by Dr Marokane. The diagnosis reflected on the bottom of the report at page (1(a)) reads: 'perforated uterus + bowel obstruction or urinary retention.' On 4 February, the plaintiff alleged that she was discharged by the hospital despite still feeling sick and experiencing the same symptoms, she alleged, she was discharged by the hospital.

[6] She testified that on 10 February she was re-admitted to the hospital with the same symptoms she displayed on 2 February. She was operated on the 11 February. When she regained consciousness she was told that the doctors had removed her whole uterus and inserted a colostomy bag in which she will relieve herself. The colostomy bag was said to be a temporary arrangement until a specialist from Australia came to South Africa to investigate how this could be reversed.

[7] She also testified that the colostomy bag caused her a lot of discomfort and embarrassment as it leaked from time to time and left a foul smell in the process. Consequently her left her and her children also found the condition unbearable. She is currently on state grant to make ends meet as she can no longer work as a seamstress..

[8] During cross examination she maintained that she was not given any treatment on 2 February. She was challenged with the hospital report that had an inscription that on 2 February the doctor had taken her for a scan, put her on a drip and gave her medication including voltaren as well as antibiotics to relieve the pain. She refused to admit the correctness of such entry but was forced to admit that she was treated on 2 February. She denied that she consented to the operation of 11 February which led to her whole uterus being removed. She indicated that the only operation she agreed to was the explorative laparoscopy. But maintained that even in that respect, nothing was explained to her including the risks and consequences of such operation. Worse that if the doctors found anything which could endanger her life; they could operate on her to save her life, even without her consent. She denied that, through the Discovery process, she provided information and medical records in her possession in piece-meal and thus

made it difficult for the defendant to prepare for this case or plead appropriately.

[9] Dr Khoale is a specialist gynaecologist, in the Free State, practicing out of his own account. His medical track record and expertise in the area is not in dispute. He filed a report dated 29 October 2014.[2] In the report he indicated that after considering the hospital notes as well as some doctor's notes and interviewing the plaintiff, he came to the conclusion that the hospital and its medical staff that attended to the plaintiff in February 2010 were negligent.

[10] In his opinion:

'(a) The patient had a miscarriage and was treated by uterine evacuation and discharged the following day which is acceptable clinic care.

(b) She was readmitted on the 2nd February 2010, and a diagnosis of [a] perforated uterus made but amazingly she was discharged still sick as stated above.

(c) The doctor failed to see the perforation of [the] uterus and bowel injury after the procedure.

(d) The standard of care was neglected during her second admission as well as she should have been operated on during that admission but instead she was discharged again.

(e) Causation of harm was undetected uterus perforation with resultant bowel injury which were not detected and failure to act on her second admission.

(f) If it was not for the above omission to detect the perforation or act on the problem, the patient would not be in a situation that is now … to live [the] rest of her life with [a] colostomy bag that gives problems and abdominal bowel actions with [diarrhoea] and constant smell …

(g) This is the harm that has followed the substandard care of the patient.'

[11] During cross examination he maintained that the failure to take steps on 2 February to arrest the condition at that time led to the plaintiff's re-admission on 10 February in the critical condition she was in. He insisted that he could not find any consent form, which is alleged the plaintiff filled in authorising the medical procedure adopted. He believed that anyone who

[2] Page 83 of the paginated papers.

treated the plaintiff on 2 February should not have discharged her in the state she was in on 4 February. If the plaintiff refused treatment, the medical staff should have noted such and filled in the prescribed form, Refusal of Treatment Form, in that regard. Thus apart from the nurses' notes that she refused to be treated and she agreed to a partial operation, explorative laparoscopy did not exonerate the hospital.[3]

[12] He however conceded *albeit* reluctantly that there was no record and evidence that the plaintiff was discharged by the hospital on 4 February. He stated that he made the reasonable assumption that the plaintiff was discharged by the hospital from the notes of the nurses which end on 4 December without any reference to the plaintiff absconding or refusal to take treatment; until her readmission on 10 February. Although unusual of the nurses, the fact remained that the hospital records do not reflect or mention what steps were taken when the plaintiff allegedly refused treatment including having her sign a form to that effect. Alternatively, according to the normal standard procedure, the doctor on duty noted the refusal of treatment and signing on the form; thus the doctor signed on her behalf.

[13] Dr Schoon is a specialist gynaecologist and Head of the Clinical Services, Pelonomi hospital. His medical qualifications and expertise in the relevant medical field is not in dispute. He testified that in the absence of any formal discharge by the hospital, the impression that can be gained from the nurses and doctors' notes is that the plaintiff discharged herself or absconded; that's why she was not operated on 2 February.

[14] During cross examination, he however conceded that the hospital records left an inexplicable gap between 4 February until the plaintiff's re-admission on 10 February when she was finally operated on 11 February. He too, like Dr Khoale stated that the plaintiff should not have been discharged in the state she was in on 4 February. i.e. if she was indeed discharged by the hospital. But he maintained that in the absence of the original file, which

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[3] Ibid page 5(1)(b) of the paginated papers. Nurses Notes: Progress Report.

disappeared without any trace, no one could say with certainty why the plaintiff was not operated on 2 February except to assume that she absconded. He also admitted that the entry of 4 February in the observation chart: the plaintiff's low blood pressure and other symptoms indicated that the plaintiff was in no condition to be discharged:

[15] Dr Marokane is a medical practitioner with the relevant medical qualifications obtained from the University of Free State. She was working at the hospital during 2010 and at the time of the incident. She is currently based at Universitas where she is continuing with her studies at the University of the Free State. Her qualifications and expertise in the medical field is not in dispute.

[16] She testified that she was part of the medical team on duty on 23 January 2010 when the plaintiff was admitted to the hospital. But it wasDr Akweyo who admitted the plaintiff. On that day the basic uterine evacuation procedure was done. The next day, 24 January, the plaintiff was discharged by the same Dr Akweyo.

[17] She testified further that on 2 February, the plaintiff was re-admitted to the hospital. Due to the symptoms that the plaintiff exhibited: a slightly low blood pressure and nausea, she suspected a perforated uterus. She took her for a sonar and found a dark spot which was indicative of blood outside the uterus. She shared her *prima facie* opinion with the plaintiff and informed her that this meant that the plaintiff had to undergo an explorative laparotomy to establish whether her suspicion on her primary – diagnosis – was correct and then take corrective steps including removing her whole uterus. The plaintiff told her that she did not want her whole uterus removed until she has consulted her family. She however prepared the plaintiff for theatre for the explorative operation by putting her on a drip. The nurses' notes indicate that the plaintiff thereafter requested to be removed from the drip. It is not recorded what happened thereafter.

[18] Dr Marokane testified further that on 10 February the plaintiff was admitted for the third time. Her condition was worse than when she first saw her on 2 February because it was not arrested then. The plaintiff was taken to the theatre on 11 February. The theatre report reflects that the medical team responsible was her, Dr Marokane, as the team leader/surgeon, Dr Khanyile as the assistant and the anaesthetic on duty[4]. During the operation they discovered that the plaintiff's condition was critical and was a matter of life and death. As the team leader, she called Dr Moloi, the Superintendent in charge to request his consent on behalf of the plaintiff as is standard procedure under those circumstances. Dr Moloi consented and the operation was conducted which resulted in the plaintiff's whole uterus removed and a colostomy bag being inserted to relieve herself temporarily until reversed by a specialist from Australia. The plaintiff never returned to the hospital after her discharge on 11 February.

[19] During cross examination, she denied that she did not explain the prognosis of a perforated uterus and the possibility of removing the whole uterus to the plaintiff. She remembered that she and the plaintiff conversed in their mother tongue, Sesotho, and understood each other. She explained everything to the plaintiff on her second admission, 2 February, after Dr Moekeletjie had attempted to do the same but had not succeeded. She could however not state in specific terms what she told the plaintiff were the possible risks she anticipated before the plaintiff was wheeled into the theatre on 11 February. She maintained that the full or complete hysterectomy was the only option available as the medical team could not close the plaintiff up first to seek her consent to operate on her and open her up again to operate on her. She was adamant that she made a conscious decision between removing the septic uterus and saving the plaintiff's life. And she chose the latter as her medical oath demanded of her.

[20] Mr Monyane testified that he was a legal administration officer at the hospital where the incident happened. In essence he confirmed that the original file in

[4] Theatre Report p 7 indicates the anaesthetic as Dr Osriel/Dr Magaga

this matter went missing sometime in 2013.The file could not be traced despite a diligent search by him and his team. The only documents available and relied upon were received from the plaintiff. Cross examination did not elicit anything new.

[21] The issue of medical negligence revolves in most instances around whether proper consent was obtained before any operation/procedure could be embarked upon. Dr Khoale bemoaned the quality of the consent forms used across the country and has even developed his own, to address all the necessary issues including the risks, foreseen and not foreseen but likely, that are related to the medical procedure undertaken.

[22] If this consent form is not properly explained before the operation is undertaken, no matter the good intentions and oath of the medical practitioners - and proper consent was not obtained prior to a procedure, the practitioner will be liable for whatever happened during that procedure adopted[5]. Proper consent includes consent given after all the apparent risks and the obvious steps that the medical team will take in any emergency have been explained to the patient[6]. By appending his or her signature, the patient indicated that (s)he understood what was explained to him or her and accepted the risks. In the event that the patient is in no condition or state of mind to do so, his or her next of kin must be consulted[7].

The Law

[23] In cases of this nature, negligence is a requirement for delictual liability and the plaintiff must allege and prove that the defendant was negligent.[8] It is not sufficient to allege negligence alone. The particular grounds of

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[5] S7(2) of the National Health Act 61 of 2003.
[6] *Sibisi No v Maitin* 2014 (6) SA 533 (SCA) at para [49] - [50]
[7] S7(1)(a) of the National Health Act above.
[8] *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC) at para [17]

negligence must be detailed.[9] It is an implied term of the contract that the medical practitioner who undertakes the treatment of the patient will exercise the reasonable skill and care of a practitioner in her or his field[10]. In deciding what is reasonable, the evidence of qualified physicians is of greatest assistance; however, what is reasonable under the circumstances is a matter for the court to decide.[11] Should the practitioner fail in his or her duty and the patient suffer damages in consequence thereof, the practitioner is bound to compensate the patient for the damages caused by the breach of contract.[12] If a plaintiff relies on a breach of duty of care, (s)he must set out the facts that could or should have been foreseen by the defendant.[13]

[24] The onus rests on the plaintiff[14] to establish that a reasonable person (*diligens paterfamilias*) in the position of the defendant:

(i) would foresee the reasonable possibility of the conduct (whether an act or omission) injuring another's person or property, and causing that person patrimonial loss;

(ii) would take reasonable steps to guard against such occurrence; and

(iii) that the defendant failed to take such reasonable steps.[15]

[25] Whether a reasonable person would have taken steps to guard against foreseeable harm involves a value judgment[16]. Four useful considerations

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[9].*Honikman v Alexander Palace Hotels (Pty) Ltd* 1962 (2) SA 404 (C); *SA Fish Oil Producers' Association (Pty) Ltd; Shipwrights & Engineers Holdings* (Ltd) 1958 (1) SA 687 (C).

[10] *Mitchell v Dixon* 1914 AD at 525, See also *Coppen v Impey* 1916 CPD 309 at 314 and *Oppelt v Department of Health, Western Cape* above at para [107] - [108].

[11]. *Streicher v Van Vuuren* 2000 (4) ALL SA 306 (A) *Oppelt v Department of Health, Western Cape* above para [36].

[12] *Lillicrap, Wassenaar & Partners v Pilkington Bros (SA) (Pty) Ltd* 1985 (1) SA 475 (A); *Mukheiber v Raath* 1999 (3) SA 1065 (SCA).

[13] *Beurain h/a Toptrans Transport v Regering Van die RSA* 2001 (4) SA 921 (O).

[14] *Van Wyk Appellant v Lewis Respondent* 1924 AD 438 at page 444.

[15] *Kruger v Coetzee* 1966 (2) SA 428 (A) at 430E-G. See also *Oppelt v Department of Health, Western Cape* above and *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

[16] *Cape Metropolitan Council v Graham* 2001 (1) SA 1197 (SCA) at para [7]. See also *McIntosh v Premier, Kwazulu-Natal and Another* 2008 (6) SA 1 (SCA) at para [14].

courts rely on are: (i) the degree or extent of the risk created; (ii) the gravity of the possible consequences; (iii) the utility of the actor's conduct; and (iv) the burden of eliminating the risk.[17]

[26] Both parties led evidence of experts to prove their respective cases. The extent to which a court may rely on such evidence has been dealt with in numerous cases. In *Pricewatercoopers Incorporated and others v National Potato Co-operative Ltd and Another* [18] the Court summed up the role of an expert as follows[19]:

'1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.'

[27] According to *Harms*[20]:

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[17] Ibid

[18] Pricewaterhousecoopers Incorporated and others v National Potato Co-operative Ltd and another [2015] 2 All SA 403 (SCA).See also *Schneider & Others v AA & Another* 2010 (5) SA 203 (WCC).

[19] Ibid at 211E-212B.

[20] *Harms Civil Procedure in the Supreme Court at page B266 para [B36.19]*. See also *Zeffertt, Paizes & Skeen The South African Law of Evidence* at 330, citing the English judgment of *National Justice*

'The function of an expert is to assist the court to reach a conclusion on matters on which the court itself does not have the necessary knowledge to decide.'

[28] Both Drs Khoale and Schoon, the two experts called by the parties, were agreed that on 23 January the plaintiff was treated and discharged properly. They were also agreed that because of the condition the plaintiff was in on 2 February, septic shock, she could and should not have been discharged on 4 February. The plan devised by the medical team on 2 February should have been implemented.i.e she should have been operated on, based on the diagnosis. The experts were also agreed that but for the inaction on the part of the medical staff on 2 February or shortly thereafter, the critical condition in which the plaintiff found herself in on 10 February would not have arisen because the condition would have been arrested and attended to appropriately. In other words there would have been no emergency that forced the medical team to operate on by removing her whole womb and inserting the coloscopy bag without her consent. But under the dire circumstances the medical team found itself in on 11 February it had to do just that.

[29] The experts also agreed that there was an inexplicable gap in the progress chart or notes of the nurses on duty on 4 February, the last entry was made at 05h55, until the plaintiff's third re-admission on 10 February which gave no definite indication that the plaintiff was officially discharged.

[30] However Dr Khoale made the following observations: If the plaintiff was discharged officially on 4 February a discharge form would have been filled in as was done on 24 January. The plaintiff and two witnesses would also have signed the discharge form. In this case no such form could be found anywhere. He added that if the plaintiff refused treatment on her second re-admission on 2 February, she had to be made to sign a Refusal of

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Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer') [1993] 2 Lloyd's Rep 68 at 81.

Treatment form (RTF). If she refused to sign that form, the doctor in charge ought to have signed the RTF and made an entry of her refusal. He unrefutedly stated that filling in the necessary forms, the Discharge form and RTF is the responsibility of the medical staff at all times. In this case it was not done.

[31] I have no doubt to accept these two experts' evidence as none indicated any bias. If anything both attempted to present evidence as neutral as they could but were also naturally inclined to agree and support the contention of the party that called them. But in essence, they agreed on the major issues of the medical evidence they presented and where they differed they substantiated their opinions reasonably. They even made concessions where necessary.

[32] The plaintiff was in general a remarkable witness with a good memory. She could remember details such as dates and times she was admitted and discharged and the diagnosis except her 'feigned loss of memory' that she did not receive treatment on 2 February until she was referred to the hospital records which she had in her possession that she in fact received treatment. She could not explain what actually transpired on 4 February after the entry made by the nurses at 05h55 except to say that she was discharged from hospital. Yet, she could not say how was she discharged, by which doctor or nurse and whether she signed a form similar to the one she singed on her discharge on 24 January when she was first admitted. Worse, she could remember very well that at some point after the operation that went horribly wrong, she went to apply for a state grant. When she made the application the hospital records were required. She then went back to the hospital and explained to one nurse what she required. That nurse gave her copies of the documents in the hospital file. Yet again, on this critical aspect she feigned loss of memory on the name of the nurse who gave her such vital information in the file at the hospital. Nor could she even describe her or him. I say feigned memory because as indicated earlier in this judgment, the plaintiff had a remarkable good memory about everything, except these specific aspects which were raised by the defendant as her case was based

on them. Surely, her legal representative took her through her pleadings and possible scenario which will be presented to her as indicated in the exchange of pleadings including these very aspects. I have no doubt to find that, she is, disingenuously so, not an honest witness. Her version on its own is devoid of the truth, to say the least.

[33] The two witnesses called by the defendant gave evidence as best as they could under the circumstances and without reliance on the missing file and notes which were either stolen or destroyed as Mr Monyane implied in his evidence in chief without necessarily relying on this as a defence.

[34] In his heads of argument and in court Mr Mene submitted that there is a variance between the plaintiff's evidence in chief, the closing argument and her pleadings. In her evidence in chief, the plaintiff confirmed in cross examination that her case was based on the horrible operation that went wrong on 11 February. Yet in her pleadings she alleged without any details or description that the employees of the defendant were negligent. He submitted that in line with the agreement in terms of R33 (4) the case of the plaintiff is based on the end result as set out in paragraph 12 of the amended particulars of claim: whether the employees of the defendant were negligent by cutting the plaintiff's intestine and removing her womb. But she failed through the evidence presented to prove that the employees of the defendant were negligent during the performance of the operation on 11 February. To the contrary both experts were agreed that the operation was conducted properly and in accordance with the emergency situation that existed then. Mr Ponoana maintained that there was no variance. The plaintiff proved her case on a balance of probabilities.

[35] Apart from the pleadings which I will refer to later, the evidence presented by the parties is in essence similar. The plaintiff was re-admitted on 2 February and then went missing on 4 February. There is no account of her whereabouts in the hospital records or the medical notes and reports from that date until her re-admission on 10 February. On 11 February she was

operated on and her whole uterus was removed and she was fitted with a colostomy bag to relieve herself.

[36] Although according to all the witnesses including the two medical experts there is nothing untoward or unprofessional that the defendant's employees did on 23 and 24 January or even on the 10 and 11 February, it is relevant that reference be made to what transpired on 23 January until the plaintiff's discharge on 24 January to draw some parallels between the two incidents to establish whether the defendant's employees acted negligently during the admission and treatment of the plaintiff, as I do hereafter.

[37] After the evacuation procedure was conducted, the plaintiff was discharged on 24 January *albeit* with pains. Before her discharge, she, the doctor on duty and two witnesses duly signed a Discharge form[23] as prescribed. She was given antibiotics and pain killers and was advised to come back if she did not feel well. She went home.

[38] On 2 February she returned to the hospital by reference of the local clinic. According to the Admission report from the clinic and the hospital Progress Report discovered by the plaintiff, she displayed the following symptoms: 'lower abdominal pains, backache, dizziness, nausea and spotting'. The report also reflected her blood pressure as lower than normal. She was in what the experts and Dr Marokane described as septic shock which is the state in which the body gets into as a result of septicism and may even lead to death if not treated immediately. She was taken for sonar which depicted a dark spot outside the uterus.

[39] On one hand, the plaintiff maintained without any proof that she was discharged by the hospital despite the serious condition she was in. On the other hand, the defendant maintained that she was not discharged by the hospital but in all probabilities absconded after she was prepared by Dr

[23] DV 1.

Marokane for theatre to undergo the explorative laparoscopy which she had agreed to on 2 February.

[40] The test generally employed by courts in resolving factual disputes in respect of two irreconcilable versions was clearly defined in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others*[24] 2003 (1) SA 11 (SCA) as follows:

'[5] … To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compels it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised, probabilities prevail.'

[41] Thus, the preference of one version over the other ought to be preceded by an evaluation and assessment of the credibility of the witnesses, their reliability and the probabilities.[25]

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[24] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell ET CIE and Others* 2003 (1) SA 11 (SCA).

[25] *Louwrens v Oldwage* 2006 (2) SA 161 (SCA at para [14].

[42] Mr Mene submitted that in the absence of the original file, the only inference that this court must draw is that the plaintiff absconded from the hospital and only returned on 10 February in the serious condition she was in which forced the defendant's employees to remove her whole womb which they found septic once they had opened her up for the explorative laparoscopy. They could not sew her up to ask for consent to do so. But instead sought such consent from the Superintendent in charge as is permissible under the Health Act[26] in such dire circumstances.

[43] The following objective facts are not in real dispute:

43.1 The nurses' records show that the plaintiff was properly resuscitated on 2 February. Thereafter Dr Moekeletjie and Dr Marokane spoke to the plaintiff about 'something' and she refused to listen to them. But then agreed with Dr Marokane on 3 February to do an explorative laparoscopy;

43.2 The plaintiff was then prepared for theatre by putting her on a drip;

43.3 However she requested to be taken off the drip despite her serious condition;

43.4 There was no discharge form amongst the documents that the plaintiff discovered as was the case when she was discharged on 24 January;

43.5 The plaintiff could not remember who discharged her or even who gave her the hospital file which cannot be traced anywhere.i.e. despite remembering vividly that she was discharged and told to come back if she still did not feel well.

[44] As much as the defendant could have led evidence of more witnesses to give a clearer and much better picture of what actually transpired on 4 February after the last entry was made at 05h55, the only inference that I can draw, based on the objective facts set out above is that on 2 February a diagnosis was made and the plaintiff was informed about something which she refused to do. A plan was devised on the action to take. She only agreed to an explorative

[26] S7(1)(ii) of the National Health Act, above.

laparoscopy. Based on her consent, she was prepared for theatre. There is nothing untoward that can be pointed to that the medical staff did from 2 February after preparing her for the operation up until the last entry of 4 February at 05h05.

[45] Between the version presented by the plaintiff and that by the defendant, it is highly improbable and impractical for the medical staff to diagnose, devise a plan to address and arrest the condition and then discharge the plaintiff in the serious condition she was in. It defies logic and could simply not have happened.

[46] Coming back to the amended particulars of claim. The negligence complained about as pleaded by the plaintiff in the amended particulars of claim is as follows:

'PAR 7: At all material times thereto, on the 11th February 2010, the surgical operation went horribly wrong, in that the medical doctor, who performed the operation negligently cut the plaintiff's intestine and had also not sought consent from the plaintiff or anyone else.

'PAR 8: The Defendant employees did not inform the Plaintiff that they would be cutting the intestines and completely removing the womb.

PAR 10: At all material times hereto, prior to the horrible operation, the Plaintiff had not felt anything wrong with her intestines.

PAR 11: Despite the agreement reached between the parties as stated in paragraph 9 above, the Defendant carried out the surgery in one or more of the following respects:

PAR 11.1: There was no informed consent sought from the Plaintiff to cut neither intestine nor removal of her womb.

PAR 11.2: the Defendant's employees failed or omitted to take reasonable steps which any reasonable person ought to have taken to guard against harm, assault and injury to the Plaintiff's body.

PAR 11.3: There was either no explanation provided to the Plaintiff about the possibilities or risks involved or the process of the said agreed term to wit, the cleaning of the womb to remove the blood clot.

PAR 13: The Defendant's employees, having realized their negligent conduct, they then did a colostomy operation to the Plaintiff, which is also giving the plaintiff problems, inconvenience albeit serving as a mechanism to relieve herself.'

[47] From a reading of these amended particulars of claim, the plaintiff's case is based on the end result i.e. the operation of 11 February. The particulars of claim do not state in detail in what way the defendant's employees were negligent on 11 February. The amended para 5 simply gives the historical background of what the plaintiff described as the horrible operation of 11 February. This so taking into account that the experts are agreed that there was nothing untoward that the medical team could have done under the circumstances on 11 February but to save the plaintiff's life by removing the whole septic uterus.

[48] As indicated earlier, regardless of the pleadings, the plaintiff on her own version did not prove her case on a balance of probabilities. She could, expectedly so, not do so without being honest and telling the truth about what actually happened on 4 February after 05h05. I am bound by the objective facts to, ineluctably so, draw the only inference that I have drawn that the plaintiff absconded from the hospital against the doctors' orders and prescription for an operation between 2 and 4 February or as arranged. She created the dire condition in which she ended up in because the condition was left unattended between 4 February and 10 February, 6 days. I can find nothing more that the medical staff had to do beyond what they did on 11 February. The action they took on 11 February saved the plaintiff's life.

[49] The issue of costs. Although this aspect was not argued, the general rule is that costs follow the event. However, in some suitable circumstances the successful party may be deprived of its costs. In this matter, considering the financial position of the plaintiff (plaintiff being a single and unemployed parent beset by health problems and who struggles to make ends meet), would amount to piling Pelion upon Ossa. It would also be unconscionable to order an indigent plaintiff who believed in her case on legal advice to pay the costs in an unsuccessful action against a state institution.

[50] Having considered all the evidence, I am satisfied that the plaintiff has failed to prove her case on a balance of probabilities. Her action ought to be dismissed.

[50] In the result the following order is granted.

ORDER

'1. The plaintiff's action is dismissed.

2. No order as to costs.'

MOCUMIE, J

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