THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 949/2016

In the matter between:

JARON DU PREEZ **APPELLANT**

and

EUGENE PRETORIUS **RESPONDENT**

Neutral citation: *Du Preez v Pretorius* (949/2016) [2017] ZASCA 133 (29 September 2017)

Coram: Lewis, Bosielo and Swain JJA and Molemela and Gorven AJJA

Heard: 1 September 2017

Delivered: 29 September 2017

Summary: Delict: Medical negligence: pleadings: causation: pleaded causation not established: appeal dismissed.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Janse Van Nieuwenhuizen J sitting as court of first instance):

The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

JUDGMENT

Gorven AJA (Lewis, Bosielo and Swain JJA and Molemela AJA concurring):

[1] The appellant was diagnosed with testicular cancer. On 3 November 2010, his left testis was surgically removed. The surgeon referred him to an oncologist, Dr Slabber, but the appellant responded negatively to his bedside manner. He decided to investigate alternative therapies. In doing so, he heard of insulin potentiation therapy (IPT) and came across the respondent, a general practitioner who administered this alternative form of treatment. The respondent treated the appellant between 10 November 2010 and 8 February 2011. The appellant then abandoned this treatment and consulted a conventional oncologist, Dr Rens. The latter administered four cycles of conventional chemotherapy. After this, the appellant's cancer was found to be in remission.

[2] The appellant sued the respondent in the Gauteng Division of the High Court, Pretoria. I will deal with the causes of action later in the judgment. The

parties agreed to a separation of issues under Uniform Rule 33(4). The trial court was requested to determine the issues ventilated in the first 13 paragraphs of the particulars of claim. Janse Van Niewenhuizen J dismissed the appellant's claim with costs. The appeal before us is against this dismissal, with her leave.

[3] The salient facts follow. As indicated, after his surgery, the appellant was referred to an oncologist but did not establish a rapport with him. He came across another patient of his age who had developed a kidney problem and required dialysis as a result of conventional chemotherapy. He was also aware of the severe side effects of conventional chemotherapy. Having researched IPT, the appellant consulted the respondent on 8 November 2010. He handed the respondent records including his CT scan and blood tests. These indicated that he had stage III cancer with metastases. There is a lack of clarity as to what the respondent informed the appellant concerning the pros and cons of IPT. He did explain that, by using insulin, lower doses of chemotherapy than the conventional ones are required to successfully treat cancer. The respondent estimated that there was a high percentage chance of success if IPT was administered. The respondent told the appellant of a previous patient where IPT had been successful. The appellant visited the patient who confirmed this claim. The treatment of the appellant then commenced.

[4] The respondent administered IPT treatments on 9 occasions between 10 November and 9 December 2010. He then went on leave, interrupting it on 20 December 2010 for a further treatment. During the respondent's leave, the appellant, of his own volition, had another doctor administer IPT at least once. The respondent administered further IPT treatments on five occasions, the last being on 8 February 2011. The appellant did not arrive for his appointment for treatment on 22 February 2011.

[5] During the time that the IPT was being administered, the respondent obtained regular blood count results. These showed up two tumour markers; the Alpha-fetaprotein count (AFP) and the Beta-human chorionic gonadotropin count (BHCG). The target for AFP was in the range of 0 to 10 and that for BHCG was in the range 0 to 5. Both markers diminished relatively steadily between the inception of IPT and 11 January 2011. The AFP results were within the target range from 24 December 2010 to 22 February 2011. The BHCG results were in the target range on 17 December, 24 December and 3 January. Between 11 January and 22 February, however, the BHCG count rose steadily from 3 to 253.

[6] The appellant became increasingly concerned when the BHCG results climbed beyond the target range. His wife, who was a theatre sister, suggested that it was time to consult a conventional oncologist. As a result, the appellant did not arrive for his treatment scheduled for 22 February 2011. Dr Rens, an oncologist, was consulted and commenced four cycles of conventional BEP chemotherapy. Since the end of that course of treatment, the cancer of the appellant has been in remission.

[7] The appellant's first cause of action was for negligent misrepresentations inducing him to contract with the respondent and his having suffered damages as a result. His second was characterised as negligent conduct giving rise to a breach of the contract between the parties. The third was for damages caused by the negligent breach of a legal duty arising from the doctor patient relationship.

[8] Three misrepresentations were relied on to found the first cause of action. The first was that the appellant was a suitable candidate for IPT treatment. The second was that the IPT treatment would cure the appellant's condition. The third was that the appellant would have to undergo between 10 and 14 IPT

treatments. These were not pleaded in the alternative. It was averred that the three together induced the appellant to undergo treatment at the hands of the respondent. All three had accordingly to be proved.

[9] The representations were alleged to have been negligent, and to have induced the appellant to contract with the respondent. It was alleged that, as a consequence, the appellant had suffered damages by incurring unnecessary medical and hospital expenses. In order to succeed under this cause of action, therefore, the appellant had to establish that the three representations were made, that they were false, that they were made negligently, that they together induced the appellant to contract with the respondent and that, as a consequence, he suffered damages.

[10] I shall deal with the second and third representations first. The second representation relied upon was that the IPT treatment would cure the appellant's condition. In his testimony, the appellant denied that any such representation had been made. This was confirmed by the respondent. At most, the respondent gave an estimate that there was a 90% chance of the IPT treatment being successful. The respondent testified that the estimate given to the appellant was between 80% and 90%. It was clear from the evidence of both of them, in any event, that even the percentage mentioned was a mere estimate. Quite clearly, it was not established that the representation that IPT could 'cure' cancer had been made.

[11] The third representation was as to the number of treatments required. It was averred that the respondent told the appellant that 10 to 14 treatments would be required. Although the appellant initially mentioned these numbers, he clarified on two occasions that the respondent told him that he could not specify the number of treatments which would be required at that stage. This could only

be assessed as the treatment progressed. This representation was thus also not established.

[12] As for the first representation alleged, the respondent admitted having told the appellant that he was a suitable candidate for IPT treatment. The appellant did not establish that the statement was false. The only evidence sought to be introduced on this issue was that of a book on IPT to which the respondent had written the foreword. Apart from the book not having been proved to be authoritative on the subject, the excerpt relied on did not assist the appellant. He read a passage which described the ideal candidate for IPT as one where, along with other conditions, the cancer had not metastasised. However, the passage went on to say:

'This does not mean that patients to whom one or more of these conditions do not apply, will not benefit from IPT, it is only the determination of the probable course thereof which might not be so clear.'[1]

This comes nowhere close to showing that the respondent's representation was false.

[13] The expert witness called by the appellant, Dr van Niekerk, conceded that he knew nothing about IPT. He contented himself with the assertion that there was no scientific basis for IPT. As a result, he did not apply his mind to whether its use was indicated in the particular case of the appellant. What is interesting is that he did concede that IPT may function to make the cell or tissue more permeable to chemotherapy. He mentioned in vitro studies which show that this may improve the transport of drugs into the cell. He testified that the research was, however, still at an experimental stage. His attitude was that it should not

[1] My translation. The original reads 'Dit beteken nie dat pasiënte op wie een of meer van hierdie voorwaardes nie van toepassing is nie, geen baat sal vind by IPT nie, dit is slegs die vasstelling van die vemoedelike verloop daarvan wat dalk nie so goed sal wees nie.'

be used on humans. He conceded under cross-examination that he was not in a position to judge the efficacy and safety of IPT treatment.

[14] When it was put to him that the respondent had successfully treated someone with similar symptoms to those of the appellant, he was understandably unable to comment. He was forced to concede that, whilst this treatment was being administered, the markers were reduced to within the target range for a period of time. He was constrained to abandon his initial opinion that this was the result of the surgery that preceded the treatment.

[15] This means that, of the three representations relied upon, only one was proved to have been made. This had in any event been admitted. It was not proved, however, that this representation was false. In the result, the first cause of action was not made out.

[16] The second two causes of action were pleaded in a somewhat confused fashion. They were clearly conceived as relying on the concurrent actions in contract and delict which, in some professional relationships, can lie on the same facts.[2] Be that as it may, it was alleged that various grounds of negligence on the part of the respondent gave rise to damages under both contract and delict.

[17] After the pleaded allegations of negligence, the foundation of these two causes of action was set out in paragraph 13 of the particulars of claim:

'As a consequence of the aforegoing, the Plaintiff's condition was not cured and the Plaintiff had to undergo further treatment in the form of "*BEP*" chemotherapy.'

This averment is that the need for conventional chemotherapy was caused by the failure of the respondent to cure the appellant. The clear corollary of this is

[2] *Lillicrap, Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 496D-H.

that if there had been no negligence on the part of the respondent, the appellant would have been cured.

[18] It was quite properly conceded in argument that it cannot be said that it was shown that any conduct of the respondent resulted in the cancer not being cured. Medical science does not speak of a cure. At most it can be said that cancer goes into remission. The entire foundation of the appellant's case was thus not established. In any event, the appellant testified that he was aware that, however high the percentage chance of success might be, there was no guarantee that the IPT treatment would lead to remission. As such, it was always a possibility that he would in any event have to undergo conventional chemotherapy.

[19] In his evidence, the complaint of the appellant was that the IPT, and the interruption in the IPT when the respondent was on leave, both caused resistance to conventional chemotherapy. This meant, according to the appellant, that Dr Rens had to administer more cycles of chemotherapy than would otherwise have been necessary. Once again, however, the evidence did not establish this contention. Dr Van Niekerk testified that if the appellant had sought treatment from him at the outset, he would have administered four cycles of chemotherapy. This is precisely what was done by Dr Rens.

[20] Since it was not proved that any conduct of the respondent caused the appellant to sustain damages as pleaded, the question of whether the respondent was negligent need not be considered. In these circumstances it would be what has been termed negligence in the air. Even if it had been proved that the respondent was negligent in one or more of the respects pleaded, it was not proved that any such negligence resulted in the appellant not being cured. Still less can it be said that it caused the appellant to have to undergo conventional

BEP chemotherapy or additional chemotherapy. No damages were therefore occasioned by any alleged negligence.

[21] The appellant failed to prove that any conduct of the respondent caused him to suffer damages either at a contractual or delictual level. This means that the second and third causes of action were not established. There is therefore no basis on which the appeal can succeed.

[22] In closing, it bears repetition that when rule 33(4) is applied, the issues for determination should be formulated clearly and an order should be issued.[3] The trial court did not, as it should have done, determine whether any damage was caused by the respondent's conduct. This was the result of an inappropriate approach to the separation of issues. A failure to consider the consequence of a separation leaves the litigants and the court in an invidious position.

[23] In the result, the following order is made:
The appeal is dismissed with costs, including the costs occasioned by the employment of two counsel.

T R Gorven
Acting Judge of Appeal

[3] *Absa Bank Ltd v Bernert* 2011 (3) SA 74 (SCA) para 21.

Appearances

For the Appellant:	EC Labuschagne SC (with him JG Van Der Merwe) Instructed by: Savage Jooste & Adams Incorporated, Pretoria Webbers, Bloemfontein
For the Respondent	BP Geach SC (with him D Keet) Instructed by: Van Niekerk Attorneys Incorporated, Pretoria Honey Attorneys, Bloemfontein