IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Case No. 25/2019

HELD AT MBABANE
In the matter between:

THE WOMEN AND CHILDREN'S HOSPITAL **1st Appellant**

DOCTOR SHANDARE KAPUNYAMAYIKA **2nd Appellant**

and

THERESA-MARIE EARNSHAW ZEEMAN **Respondent**

Neutral Citation: *The Women and Children's Hospital and Another vs Theresa-Marie Earnshaw Zeeman* (25/2019) [2020] *SZSC* 15 (01/06/2020)

Coram: **S.P. DLAMINI JA, M.J. DLAMINI JA,**
R. J. CLOETE JA.

Heard: 19th May, 2020.

Delivered: 1st June, 2020.

SUMMARY : *Damages claim- Interpretation of the wording of the Particulars of Claim of the Respondents-found that there was no justification for a rigid and exclusive interpretation- that the acts and omissions of the 2nd Appellant constituted negligence which resulted in severe consequences for the Respondent having to undergo emergency surgery-that there is a dearth of precedents in this jurisdiction relating to medical negligence claims and indeed even across the borders-comparison to the damages awarded in Goliath-general damages decreased accordingly- each party to pay own costs.*

JUDGMENT

CLOETE – JA

[1] The Plaintiff (Respondent herein) is an adult Swazi female born in 1980. She is married and a mother of children born out of the said marriage.

[2] The 1st Defendant (1st Appellant herein) is a private hospital operating in the city of Manzini. At this juncture it may be appropriate to say that there is no dispute between the parties that the 2nd Defendant (2nd Appellant herein) was

at all times in the employ of the 1st Appellant and that as such it would be vicariously liable to the Respondent in the event that this Court finds against 2nd Appellant.

[3] The 2nd Defendant (2nd Appellant herein) is DR. SHANDARE KAPUNYAMIKA, a General Practitioner in the employ of 1st Defendant. (For the purposes of this Judgment she will be referred to as DR. K.)

[4] The following facts are not in dispute:

1. On 27 January 2012, at the premises of the 1st Appellant, Dr. K. performed a consensual caesarean procedure on the Respondent and delivered a child.

2. The Respondent remained in the facility of the 1st Appellant after the procedure and that Dr. K. discharged the Respondent on 30 January 2012 and that she was wheeled out of the facility in a wheelchair on that day.

3. The Respondent returned to the said facility on 31 January 2012 complaining of bleeding and pain. Dr. K. performed an ultrasound scan

on the Respondent and found as a fact that the uterus of the Respondent was “bulky”.

4. On 2 February 2012 and at the Medisun Clinic in Ezulwini, the uterus of the Respondent was removed by Dr. Juka.

[5] On or about 13 July 2012 the Respondent instituted proceedings against the Appellants for damages arising out of the negligence of Dr. K. and the relevant provisions in the Particulars of Claim are the following:

> **“7. Despite the agreement, as aforesaid, the First Defendant’s servants and/or Second Defendant carried out the surgery in particular the caesarean procedure negligently in one or more of the following aspects:-**
>
> **71. failed to perform a complete removal of Plaintiff’s placenta;**
>
> **7.2 failed to attend to complications arising therefrom timeously or at all.”**

[6] The Appellants opposed the action and requested further particulars and the Respondent furnished the following further particulars:

"3.<u>AD PARAGRAPH 3</u>

3.1 As a consequence of the negligent act of the Defendants, Plaintiff suffered pain and suffering due to Defendants' failure to perform the surgery with due care skill and ability, timeously or at all, and;

3.2 Defendants further failed to attend to complications arising from its negligence acts timeously or at all as a consequence thereof Plaintiff sought alternative medical assistance which was reasonable and necessary at the time and during the intervening period Plaintiff suffered pain due to the aforesaid negligent acts of Defendants' including the resultant pain and suffering following operation at Medisun Clinic to treat Plaintiff as a direct consequence of Defendants' negligence."

[7] The Appellants filed a plea in the following terms:

"<u>AD PARAGRAPH 7</u>

2.1 Save to admit that the 2nd Defendant carried out the caesarean procedure, the remaining allegations are denied.

2.2 The second Defendant denies that she was negligent in the manner alleged or in any manner at all."

[8] After all the required formalities were dealt with, the matter finally came to trial on various dates during 2017 and 2018 and the Judgment of the Court *a quo* was duly handed down on 22 March 2019. In a lengthy Judgment the Court *a quo* found in favour of the Respondent and made the following Order:

"[134] In the final analysis, the Plaintiff's claim having succeeded, the Defendants are hereby ordered to pay to the Plaintiff, jointly and/or severally, the one paying the other one to be absolved, a total amount of E466,704.00 which is made up as follows:-

i) Medical Expenses = E16,704.00

ii) General damages = E450,000.00

E466,704.00

iii) Interest on the above amount at the rate of 9 per cent per annum calculated from date of Judgment to date of final payment.

iv) Costs of suit, including costs of counsel in terms of Rule 68 (2) of the High Court rules."

[9] It is opportune to state here that Counsel for Respondent conceded that the Order for costs in (iv) above was wrong as she only drew pleadings and did not appear in the Court a quo and as such that those costs should only relate to fees for drawing pleadings.

[10] On 5 April 2019 the Appellants filed and served an extremely lengthy Notice of Appeal, contents of which will not be repeated herein verbatim but will be dealt with in detail below.

[11] Both parties filed extensive Heads of Argument and Bundles of Authority and the matter was accordingly argued before this Court.

[12] It is neither possible nor necessary to deal with each and every ground of appeal raised by the Counsel for Appellants but the salient and relevant points and grounds can best be summarised as follows:

1. That the Court *a quo* did not understand the pleadings and made findings which are not supported by evidence and are speculative.

2. That paragraph 7 of the Respondents Particulars of Claim, read with the Further Particulars supplied , could only be interpreted to mean that both subsections 7.1 and 7.2 referred specifically to placenta remainings in the uterus to be the negligence complained of and that the word “thereto” in Paragraph 7.2 was a specific reference to remaining placenta.

3. That there was no evidence that after the successful procedure, that any placenta remained behind and as such that Dr. K. was not negligent in anyway.

4. That the hospital notes of Dr. K. and the notes of the duty nurses corroborated each other.

5. That the LANCET Histology report obtained by the Respondent found clearly that no remaining placenta was found in their examination.

6. That the Respondent and her husband were liars as a result of the following evidence:

    1. At Page 189 of the Record, in her evidence in Chief, the Respondent stated by reference to Dr. Juka;

        "**He said the womb was removed because there were fragments of the placenta that caused the infection."**

    2. At Page 320 of the Record the husband of Respondent under cross examination stated:

        "DC: Later the Doctor came to you, was that Doctor Abdisa and said the reason why he had to remove the womb was because there were bits of placenta and it was infected, is that right.

PW2: **That is correct my Lord. He came and used a word that I could not….it is a medical term and I said that I did not understand and I asked him to explain it to me in normal English my Lord and he said to me it is a situation when they are trying to remove the placenta, it tears and that is the bits that remained and it infected her. To save her life his words was he had to remove the womb.**

DC: **He said that the womb was infected.**

PW2: **Yes.**

DC: **And to save her life he had to remove the womb.**

PW2: **Yes.**

DC: **In your evidence in chief you mentioned that the placenta was torn.**

PW2: **Yes.**

DC: **And you said she was lucky to be alive.**

PW2: **Yes my Lord in fact the exact words he used was you were very close to losing your life.**

DC: You were asked did he justify why he had to remove the womb. And you said he explained to you that the placenta remained.

PW2: After tearing it remained yes my Lord."

3. But Dr. Abdisa (Juka) said the following at Page 502 of the Record:

"RC: She also said in her evidence, when she gave evidence in this Court, that it was indicated that you had to remove her womb because he had found fragments of placenta. That is also not true is it.

PW1: No.

RC: Otherwise I was suggesting that your (IN AUDIBLE) for removing uterus because you found fragments of placenta but you did not say that to them did you.

PW1: I explained myself and (IN AUDIBLE).

RC: I accept that, so in other words you did not said the patients (IN AUDIBLE) fragments on placenta.

PW1: We do not move the uterus if there is a fragment (IN AUDIBLE)."

7. That the reason for the infection could only have been because the uterus was atomic and as such would not contract and as such stay the flow of blood.

8. That Dr. K. was an experienced practitioner who had performed in excess of 100 caesarean procedures and that she at all times acted with the required degree of skill and care and that on 31 January 2012 when the Respondent returned, she referred the Respondent to another practitioner who was a qualified gynaecologist as she had diagnosed a soggy (bulky) uterus. The findings of the Court *a quo* relating to her professional ability were accordingly not justified and other findings of the Court were incorrect in that the Court viewed itself as a Court of equity as opposed to a Court of law.

9. That since there was not any evidence that Dr. K. left any placenta in the womb after the procedure, the claim must fail as no negligence of any nature was proven as related to the actual procedure and that the pleadings only dealt with negligence relating to the actual procedure

and specifically that all the placenta had not been removed after the procedure.

[13] In reply Counsel for Respondent submitted the following:

1. That an oral contractual relationship was established on 27 January 2012 and that it was implied that the Appellants would provide professional medical services with professional skill and ability.

2. That regarding negligence of Dr. K. the following was the crux of the dispute:

a) Whether Dr. K. removed the entire placenta and whether the uterus had been swabbed to clear the uterus.

b) The causation of the life threatening condition of the Respondent requiring urgent surgery to remove the uterus.

c) Whether Dr. K. on 31 January 2012 failed to urgently and adequately attend to the symptoms presented by the Respondent after the ultrasound scan.

3. As regards the interpretation of Paragraph 7 of the Particulars of Claim she referred to the following finding of the Court a quo on the application for absolution by the Appellants.

> ***"[18] But before I conclude the ruling I must reflect upon and deal with Advocate Flynn's argument on behalf of the Defendants that the Respondent has not led evidence on all the requirements of the claim, and therefore falls foul of the dictum of Harms J.A. in the case of Gordon Lloyd Page & Associates. The defence's argument is that the Respondent has failed to prove the averments at paragraph 7.1 that the Defendants failed to perform a complete removal of the placenta. The argument proceeds at 7.1 having not been established, 7.2 automatically falls away. Paragraph 7.2 is that the Defendant "failed to attend to complications arising therefrom timeously or at all." The complications can only***

relate to the removal of the placenta, nothing else, so goes the argument. In my view the defence is being over-technical and could well be splitting hairs. At main paragraph 7 the Respondent avers that the defendants were negligent "in one or more of the following respects" and then mentions the contents of sub-paragraphs 7.1 and 7.2 so clearly, according to the Respondent, if the negligence is not in 7.1 it is in 7.2 or both."

4. That at Pages 741 and 742 of the Record it was evident that it was standard procedure for the uterus to be swabbed after procedures of this nature. This is what was said by Dr. K. during cross examination.

"PC: Now if I may refer to page 11. In the first portion of the paragraph. There is no notes to indicate that a swap of the uterus cavity was made. To remove any remaining membranes or placental tissues, can you explain why.

DW1: I had satisfied myself that the placenta was complete from my examination of the placenta.

PC: Had you satisfied yourself that the uterus cavity was empty.

DW1: Yes.

PC: So where is the indication that that was actually carried out or performed. Is it on your notes.

DW1: No.

PC: Is there any indication that the uterus was wiped as you earlier told the court that that was the procedure.

DW1: No.

PC: So how sure there is record that you did not ensure that the uterus cavity was free of any placental tissue or membranes.

DW1: From the examination of the placenta.

PC: I am talking about the uterus now.

DW1: Yes.

PC: Because you told us that the procedure is to wipe it clean.

DW1: Yes.

PC: How sure that nothing remained of any measure that should not be….

DW1: The wiping is not reported.

PC: But you agree it should have been recorded.

DW1: yes.

5. That at Page 744 of the record Dr. K. confirmed that it was necessary that the vilii, which is part of the placenta, be expelled and the exchange was as follows:

PC: Can you also take us through what you understand by chorionic villi, the definition.

DW1: These are finger like projections which are coming from the placenta which are (IN AUDIBLE) into the decedual (IN AUDIBLE).

PC: This is to bring the blood closer to the ……

DW1: Yes the baby's blood and the mothers' blood, the chorionic villi will carry the vessels of the baby closer to the blood of the mother.

PC: Does this also form part of the placenta or membrane and (IN AUDIBLE)

DW1: Yes.

PC: So does it also gets expelled.

DW1: Yes.

PC: In actual fact it is necessary that it gets expelled.

DW1: Yes."

6. That the Histology report found that such villi were present in the uterus they examined. At page 62 of the Record, the Histology report of Lancet states as follows. **"Very scanty degenerate chorionic villi are noted"**

7. That at Page 802 of the record Dr. K. conceded that the non-contraction of the uterus was a serious issue at Page 802 of the Record.

"PC: According to this Doctor and his testimony, he says that the uterus should have been seated at 16 weeks up. And it was not. Therefore very serious, would you agree with me.

DW1: Yes.

PC: You also said the fact that the uterus was not contracting, was a serious matter, would you also agree with that.

DW1: Yes my Lord.

PC: In fact we were told by him that the first course was to extract the fragments to evacuate the uterus to stimulate the uterus either by medication and physical manipulation. Would you agree with that.

DW1: Yes my Lord."

8. That at Pages 804 and 805 of the record Dr. K. conceded that as at 31 January it would have been appropriate to re-examine the Respondent and take her to theatre.

"PC: He having seen it in his view the sitting at 20 weeks, he viewed that very serious and I think you have answered that. He was correct in his analysis, isn't that so.

DW1: That is correct my Lord.

PC: he also informed the court that having found in his view at the time the uterus sitting at 20 weeks, whether it should be sitting at 16 weeks, he was of the view that such a condition would lead to complications. Would you agree with me.

DW1: Yes my Lord.

PC: **He also confirmed to the court in his opinion as a gynaecologist that he would not have discharged her. In fact he informed the court he would immediately re-examine and if necessary even take her to the theatre. And if necessary would demand a second opinion.**

JUDGE: **Can you keep your questions, if you can break them so that the witness does not lose track, she can answer accurately to a specific question.**

PC: **He says he would not have discharged her, that was his opinion, would you agree with him.**

DW1: **Yes my Lord.**

PC: **He also says that he would re-examine her take her to theatre, even if it meant putting her under amnestisia. Would you agree with me too.**

DW1: **I agree but in this situation I did not want to take her to theatre alone and hence I asked for help from Doctor Subira.**

PC: **Does Doctor Subira have theatre facilities at the surgery, do you know.**

DW1: **No I do not know.**

PC: Since you had them at the first Defendants premises why did you not then invite him to come and assist you at the hospital since you had all the facilities.

DW1: I tried, I wanted him to come but he could not make it at the time that I wanted him to come to the hospital."

9. That Dr. K. knew that this was a second caesarean procedure and that extra caution should have been applied. That (As at Page 764 of the Record) the fact that Respondent was wheeled out on 30 January should have indicated some serious concern.

"PC: We are told that the patient had to be wield out of the hospital on the same date by her husband. Is that not an indication that there was something serious there.

DW1: It was."

[14] That on the balance of probabilities the Respondent had proven various acts or omissions of negligence on the part of Dr. K. and as such the Appeal should be dismissed.

[15] This is an extremely difficult matter for lay people to deal with and it is a pity that not more specialised evidence was presented to the Court *a quo* and I hasten to add that I do not agree with all of the findings and the reasons therefore by the Court *a quo* and insofar as I set out my reasons herein, do not believe it necessary to deal with specific findings made by that Court.

[16] What cannot be disputed is that something went badly wrong causing a chain of events culminating in the Respondent's uterus being removed in an emergency procedure and by all accounts a life saving intervention.

[17] I do not believe that one can place a rigid interpretation on the provisions of Paragraph 7 of the Particulars of Claim as Mr. Flynn would have it. I am of the view that a reasonable man would interpret that provision as amplified by further particulars to mean that these are 2 legs to the section namely that Dr. K. was negligent either in respect of the non-removal of the entire placenta as set out in 7.1 **or** attending to complications arising from the procedure as set out in 7. I cannot see how it can be said that 7.2 in fact refers to 7.1 and as such the whole matter should be decided simply on the

basis as to whether the entire placenta had been removed or not during the procedure.

[18] That said, has the Respondent proved any negligence on the part of Dr. K.? If she has then she must succeed.

[19] On an objective analysis of the evidence before the Court *a quo* the following factors evidence weigh heavily in favour of the view that Dr. K. was negligent in some material respects in that she conceded that:

1. She apparently did not follow standard procedure in swabbing the uterus after the procedure, but only did a visual observation and that had she done so it would have been recorded in her notes.

2. There is no recording of any swabbing in any of the notes before the Court *a quo*.

3. That it was necessary that the villi, being projections coming out of the placenta should have been expelled. The histology report finds that villi were present in the examined uterus.

4. That after such a procedure pain should abate after 24 hours but in this case it did not.

5. That the fact that the Respondent was wheeled out of hospital in a wheelchair on 30 January indicated that there was something serious there.

6. That she was aware of the fact that this was to be the second caesarean procedure for Respondent and should have taken extra care.

7. That she agreed with Dr. Juka that he would not have discharged a patient with such a bulky uterus.

8. That she could have admitted Respondent on 31 January as there was cause for concern but she did not and instead tried to abdicate her responsibility to a third party and in any event there is no proof before us that she accordingly referred Respondent to a Dr. Subira and there is certainly no proof of a referral letter or otherwise.

9. That the Respondent should have been taken to a theatre on 31 January. In fact there is no record of any nature of Dr. K. ever having followed up with Respondent or Dr. Subira at any time after 31 January as to the condition of the Respondent after that date.

[20] My decision in that regard is buttressed by the following decisions and references:

> *"4 The following extracts from* **Goliath v Mec for Health, Eastern Cape 2015 (2) SA 97 (SCA)** *and the authorities referred to therein*
>
> ***are apposite:***
>
> ***"[8] The failure of a professional person to adhere to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which he or she belongs would normally constitute negligence (Van Wyk v Lewis 1924 AD 438 at 444). A surgeon is in no different a position to any other professional person (Lillicrap, B Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd 1985 (1) SA 475 (A) at 488C). It***

has been pointed out that a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care (Mitchell v Dixon 1914 AD 512A – B, '(f) the test remains always whether the practitioner exercised reasonable skill and care or, in other words, whether or not his conduct fell below the standard of a reasonably competent practitioner in his field' (cited with approval in Buthelezi v Ndaba 2013 (5) SA 437 (SAC) para 15)."

"[18]…. 'At the end of the trial, after all the evidence relied upon by either side has been called and tested, the judge has simply to decide whether as a matter of inference or otherwise he concludes on the balance of probabilities that the defendant was negligent and that that negligence caused the Respondent's injury. That is the long and short of it.'

"[19]…In that regard it is important to bear in mind that in a civil case it is not necessary for a Respondent to prove that the

inference that she asks the court to draw is the only reasonable inference; it suffices for her to convince the court that the inference that she advocates is the most readily apparent and acceptable inference from a number of possible inferences." (Own emphasis)

[21] Given the facts of the matter I am satisfied that Dr. K. did not display the reasonably required skill and care which the situation required.

[22] Whatever the technical and medical explanations, from a factual point of view taking the above into consideration, it is my view that collectively and accumulatively, Dr. K. was negligent as provided for in either or both of the provisions of Paragraph 7.1 and/or 7.2 of the particulars of claim and as such that she had the 1st Appellant are liable for the damages suffered by the Respondent.

[23] Mr Flynn made much of the allegation that the Respondent and her husband were liars. And it all revolved around what was said to them by Dr Juka

relating to the issue of the placenta and whether the placenta caused the disastrous consequences. With respect, it is extremely difficult for any layman to understand the technical medical aspects of such a procedure and as such an isolated and apparent only play on words can hardly be said to be conclusive evidence that these people were trying to mislead the court *a quo* on the probable cause of the necessity of the life saving procedure but it can be excused as an uninformed innocent situation.

[24] As far as the quantum of damages is concerned, both Counsel confirmed that there was a dearth of precedents and expounded the general principles which are to be applied in matters of this nature.

[25] In this instance the claims were specific. A claim of E100,000 in respect of pain and suffering and a claim of E400,000 in respect of loss of amenities of life and permanent disability. There is no doubt that the Respondent suffered severe pain with the life threatening condition. The main amenity she has lost is the ability to bear more children. In that regard she is fortunate to have had children before this mishap but there is no cogent evidence before us that she wanted to have more children, given that in 2011

she had a difficult pregnancy and required a caesarean procedure then already.

[26] In **Goliath** referred to Supra, the total claim inclusive of shock, pain and suffering, disability, disfigurement and loss of amenities of life was in the sum of E300, 000 and the incident occurred within almost the same time period of the current matter.

[27] It would seem that the injuries suffered by **Goliath** and the consequent heads of claim on more substantial serious grounds certainly exceed thos in the current matter. Under those circumstances I am of the view that a reasonable award for the headings claimed by the Respondent to be in the sum of E250, 000 to which must be added the actual medical expenses incurred in the sum of E16, 704.00.

[28] As far as the issue of costs is concerned, I have dealt with the issue of the certified costs of Counsel in the Court *a quo* above.

[29] Given that the appeal partially succeeds on the issue of quantum of damages I believe it would be equitable for each party to pay its own costs in this Court.

[30] Accordingly the following Order is made:

1. The Appeal of the Appellants is dismissed with each party to bear their own costs.
2. The Order of the Court *a quo* is substituted with the following:

2.1 The Defendants are hereby ordered to pay to the Plaintiff, jointly and or severally, the one paying the other to be absolved a total amount of E266.704.00 which is made up as follows:

i) Medical expenses E16,704.00

ii) General damages E250,000.00

iii) Interest on the above amount at the rate of 9 percent per annum calculated from date of Judgment to date of final payment.

2.2 Costs of suit.

R.J. CLOETE
JUSTICE OF APPEAL

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

I agree

M. J. DLAMINI
JUSTICE OF APPEAL

For the Appellants: L.R. MAMBA & ASSOCIATES

For the Respondent: RODRIGUES & ASSOCIATES