REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
LOCAL SEAT, JOHANNESBURG

CASE NO: A 5062/17

DATE: 6 MARCH 2019

DELETE WHICHEVER IS NOT APPLICABLE
1. Reportable: Yes / No
2. Of Interest To Other Judges: Yes / No
3. Revised
DATE: SIGNATURE:

In the matter between:

MAGOBOTHA, SEBASTIAN KEITH **FIRST APPELLANT**

McDONALD

and

THE MEMBER OF THE EXECUTIVE COUNCIL RESPONSIBLE FOR HEALTH AND SOCIAL DEVELOPMENT IN THE GAUTENG PROVINCE **SECOND APPELLANT**

and

R, J **RESPONDENT**

JUDGMENT

THE COURT

1. On 10 June 2008 Ms R had a right hip replacement surgical procedure at the Chris Hani Baragwanath Hospital. It was not a success. She issued summons against Professor Magobotha as first defendant, Dr Peer as second defendant and the MEC for Health and Social Development in Gauteng as third defendant. She claims damages allegedly arising from the failed operation. The matter came before Van Der Linde J who, by agreement heard and decided only the questions of negligence and causation, the question of the quantum of damages having been separated from

the other two issues. The learned trial judge found for Ms R. Prof Magobotha and the MEC appeal to this full court with the leave of Van Der Linde J.

2. It is common cause that Prof Magobotha and Dr Peer were employed by the MEC at the relevant time and that they acted within the course and scope of their employment. The MEC accepts that if negligence is proved on the part of either or both doctors, the MEC is vicariously liable for damages suffered by Ms R as a result of that negligence.

3. Ms R testified after Prof Van Der Jacht, an experienced orthopaedic surgeon who gave expert testimony on her behalf, but to set the scene in easier perspective we shall deal firstly with her evidence.

4. Ms R testified that prior to the operation in question Prof Magobotha had operated on her on three occasions between 2003 and April 2008, doing shoulder, left hip and back operations. She trusted him. In June 2008 Prof Magobotha admitted her to Chris Hani for a total right hip replacement, he undertaking to her to do the operation himself. She had the operation on 10 June 2008 but only much later, in January 2009 did she learn that it was not Prof Magobotha but rather Dr Peer who had done the operation. She had been discharged from hospital by Dr Peer about two days after the operation. When she phoned Prof Magobotha on the night of her discharge he was angry on learning that she had been discharged so soon. On 15 June 2008, five days after the operation, Prof Magobotha examined her at his consulting rooms. Ms R testified that "*He pressed on my right leg where the wound was and it burst open… He said there was an abscess in and he is going to admit me at the hospital.* " Ms R was thereupon admitted to and remained in hospital until 25 June 2008. She was treated for *"septicaemia and he called Johnson and Johnson wound cleaning.*"

5. On 11 July 2008, a month after the operation, Ms R was standing still, with the help of crutches, talking to a friend's daughter when she turned her head to her right. Her right leg gave way and she fell. On 19 July 2008 Prof Magobotha successfully "*placed back the hip*" as she had dislocated her hip during the fall.

6. In October 2009, Ms R consulted Dr Steyn, an orthopaedic surgeon in private practice as her hip was very painful. In October 2009 and November 2009 Dr Steyn

did two right hip operations on Ms R at the Glynwood Hospital. The second of the two was because Dr Steyn had told Ms R that there was an infection and her hip had dislocated again.

7. It was common cause that, simply put, the top of the thigh bone is rounded and fits into the concave cup-like acetabulum of the hip, forming what is commonly known as a ball and socket joint.

8. Prof Van Der Jacht, in testimony referred to a minute, which he had authored, of a meeting that he had held with Prof Lukhele in preparation for the trial. Prof Lukhele is an orthopaedic surgeon retained by the defendants prior to the trial but who did not testify. Both doctors had examined Ms R for the purposes of trial. Prof Van Der Jacht testified that he and Prof Lukhele had agreed that the operation was "*not optimally performed resulting in an early dislocation. This was subsequently revised at the Glynwood Hospital with septic sequela resulting in her having an incision arthroplasty or girdlestone. The experts agree that in her opinion, Dr Magobotha was not negligent, he only facilitated the patient's admission into the Baragwanath Hospital and did not perform the surgery. They also agreed that had Dr Peer* [the second defendant] *positioned the acetabular component correctly, there would in all likelihood not have been any dislocation and this Plaintiff would not have required a revision procedure with the documented septic sequela. They agreed that they cannot determine from the information at their disposal whether the septic sequela were as a consequence of the surgery at the Baragwanath Hospital or the Glynwood Hospital. They agreed that because the nexus between the malposition of the acetabular component and cause of events has been established, liability rests with the Baragwanath Hospital and its officers*."

9. Prof Van Der Jacht testified that the replacement acetabulum cup needs to be put in at about 45 degrees to the horizontal so that the hip remains stable, does not dislocate and the wear rate inside the hip is slower. The acetabulum component or cup in this case had been inserted at 80 degrees to the horizontal. Prof Van Der Jacht had made his observation from x-rays taken at Baragwanath Hospital on 4

July 2008, some twenty-four days after the 10 June 2008 operation and about seven days before Ms R fell when speaking to her friend's daughter on 11 July 2008.

10. Regarding sepsis, Prof Van Der Jacht testified that "*the cup was put in at the time of surgery, the sepsis happened afterwards. I do not believe that the sepsis comes into it at this stage. Sepsis is important M'Lord in that with multiple surgical procedures, the chance of an infection goes up and unfortunately one cannot say where the original sepsis occurred whether it was originally at the time of the first procedure at Baragwanath Hospital…[indistinct] near the first subsequent procedures M'Lord.* "

11. Neither side's pleadings raised the question of sepsis.

12. Prof Magobotha testified for the defendants. At the time of the 10 June 2008 operation he was the head of the relevant clinical orthopaedic unit. He assumed that Dr Peer had done the operation under his direct supervision. He could not recall any details of the operation including who had done the operation. While Prof Magobotha seemed to think that the cup had been inserted at 69 degrees rather than 80 degrees, he accepted that the difference is irrelevant. He testified that *'You want the cup between, anything between 40 and 60 degrees, that is stable."*

13. Prof Magobotha decried the fact that x-rays taken immediately after the 10 June 2008 operation were not available as that would have resolved the question of whether or not the cup had been correctly inserted. He testified that he would not have allowed a surgeon to close a wound with hip instability caused by a cup inserted at 80 degrees. He assumed that, because the cup could simply have been repositioned during the procedure, it must have been correctly inserted or he would not have allowed the wound to be closed. He did not remember the actual operation as he does so many and tends to recall only those operations that have complications. This operation did not have complications.

14. We accept readily that Prof Magobotha cannot remember what he says he can't remember. It is understandable that he cannot remember details of a particular operation when he does, or supervises so many. This however, leaves his testimony with limited value. His contemporaneous notes were not available for the trial and

the crucial x-rays, done immediately after the 10 June operation were not to be found.

15. Neither side suggested that prior to 10 June 2008 Ms R had any sepsis problem. Ms R' testimony that the wound opened on touch by Prof Magobotha five days after the 10 June 2008 operation and that he had immediately diagnosed a sepsis problem and kept her in hospital for a further ten days treating the sepsis was neither challenged nor contradicted by the defence. The only plausible inference to draw here is that it is probable that the sepsis problem started during the 10 June 2008 operation.

16. At the heart of the appeal is the role in the causation of damages, if any, played by the possible onset of sepsis during the first of Dr Steyn's two operations. Ms R had been given antibiotics at the time of the 10 June 2008 operation. In spite of that precaution against sepsis it had taken only five days for the wound to burst open, because of septicaemia and on touch by Prof Magobotha. After Ms R fell on 11 July 2008 Prof Magobotha did a corrective procedure on 19 July 2008 to relocate the hip. Neither side suggested that during the 19 July 2008 operation by Prof Magobotha any sepsis problem had been caused. Some fifteen months passed between July 2008 and October 2009 when Dr Steyn did his first procedure. In the circumstances, it is most improbable that a sepsis problem would have remained undetected from the last of Prof Magobothas's procedures until October 2009 when Dr Steyn did his first procedure. On Ms R' evidence, Dr Steyn did his second procedure because of an infection problem. This infection problem could only have arisen during the first of Dr Steyn's procedures.

17. Prof Van Der Jacht had been clear in testimony that the greater the number of procedures performed on a patient the higher the chance of infection. Neither he nor Prof Lukhele had suggested, in the portion of their minute quoted above, that Dr Steyn had been negligent in either of his operations. The complete minute of the Prof Van Der Jacht meeting with Prof Lukhele is not in the record.

18. We do not read Prof Van Der Jacht to have said that the mere fact that there has been a prior procedure to a particular part of a person's body in itself increases the

chance of subsequent infection occurring during the next procedure. We understood him to have said simply that if there is a given chance of infection in a given procedure, then the higher the number of procedures, concomitantly higher is the risk of infection.

19. We would not go as far as to say that just because sepsis sets in consequent upon an operation that the surgeon, or supervising clinical head, is necessarily negligent. Neither Prof Van Der Jacht nor Prof Lukhele suggested that either Dr Peer or Dr Steyn had been negligent in relation to sepsis. Prof Van Der Jacht and Prof Lukhele limited their criticism to the way in which Dr Peer had fitted the cup. It is important to guard against inferring negligence just because the outcome is bad.

20. Prof Van Der Jacht testified, as referred to above, that he did *"not believe* [when referring to the 10 June 2008 operation] *that the sepsis comes into it at this stage."* In my view, this statement does not lie happily with the credible, unchallenged and uncontradicted evidence of Ms R relating to her wound bursting open five days after the 10 June 2008 operation. We are not bound by what an expert says, particularly when the balance of reliable evidence is against what an expert says. See **Bee v RAF** (093/2017 [2018] ZASCA 52 (29 March 2018] at paragraphs 64 – 80. It must be borne in mind that both Prof Van Der Jacht and Prof Lukhele had expressly stated, in the portion of their minute quoted above that they could not determine whether the septic sequelae were as a consequence of the 10 June 2008 operation at Chris Hani or the October 2009 operation at the Glynwood Hospital.

21. In our view, the mal-alignment of the cup during the 10 June 2008 operation was a cause in fact of the consequent dislocations and gave rise, reasonably predictably to the consequent risk of sepsis brought about by the need to perform surgery to correct later dislocations of the hip. In our view, there is a reasonable connection between the 10 June 2008 mal-alignment and the subsequent onset of sepsis, both five days after the 10 June 2008 operation and after the October 2009 procedure by Dr Steyn. See **Lee v Minister for Correctional Services** CCT 20/12 [2012] ZACC 30 at paragraph 68.

22. Prof Magobotha is liable because he was present and in a supervisory role when the cup was fitted.

23. The appeal had lapsed and we heard a reinstatement application together with the appeal. In short, the attorney for the appellants had asked for the record as early as the day after leave to appeal had been granted. There was a delay in obtaining the record, which delay could not be attributed to the appellants' attorney. Part of the delay in prosecuting the appeal was due to the fact that Ms R' attorney delivered a Rule 30 irregular proceeding notice relating to the prosecution of the appeal, only to withdraw the notice much later. In our view, the appeal should be reinstated. There is no prejudice to Ms R. While the merits of the appeal were reasonably arguable, the appellants sought an indulgence relating to the question of reinstatement. The opposition to the reinstatement application was reasonable. At the hearing, Mr Sibuyi SC for the appellants tendered the costs of the re-instatement application. The appeal had been postponed on 24 October 2018 as parts of the re-instatement application, namely the notice of motion and founding affidavit were not in the court file. On that occasion the question of the costs of the day were reserved. At the present hearing it was common cause that the costs of 24 October 2018 should be costs in the cause.

ORDER

1. The lapsed appeal is reinstated.
2. The appellants are jointly and severally to pay the costs of the respondent in the re-instatement application on an opposed basis.
3. The appeal is dismissed with costs, for which the appellants are jointly and severally liable, such costs to include the wasted costs of 24 October 2018.

WRIGHT J

FISHER J

NKOSI -THOMAS AJ

Appearances:

On behalf of the Appellant:	Adv W Sibuyi SC with him
	Adv K C D Motshabi
Instructed by:	State Attorney
	011 330 7600
On behalf of the Respondent:	Adv P Uys
Instructed by:	Schoemans Attorneys
	012 665 4807

Date of Hearing: 6 March 2019

Date of Judgment: 13 March 2019