REPUBLIC OF NAMIBIA NOT REPORTABLE

HIGH COURT OF NAMIBIA **MAIN DIVISION, WINDHOEK**

JUDGMENT

Case no: I 3107/2010

In the matter between:

TREVOR BEZUIDENHOUT **PLAINTIFF**

and

JEREMY NEL **DEFENDANT**

Neutral citation: *Bezuidenhout v Nel* (I 3107/2010) [2013] NAHCMD 134 (17 May 2013)

Coram: MILLER AJ

Heard: 05 – 07 November 2012; 11 March 2013; 13 March 2013

Delivered: 17 May 2013

ORDER

The claim is dismissed with costs which include the costs of one instructing and one instructed counsel.

JUDGMENT

MILLER AJ :

[1] On 11 September 2007 and at the Roman Catholic Hospital in Windhoek the plaintiff underwent surgery, performed by the defendant a specialist surgeon to repair an incisional hernia.

[2] It became apparent during the course of the surgery that certain lesions attached to *inter alia* the bowels of the plaintiff which the defendant had to dissect free. This according to the defendant rendered the surgical procedure more difficult than it would have been otherwise.

[3] In the process a small enterotomy or rupture was made. This was however detected immediately and sutured. No further complications or consequences followed from that.

[4] At the conclusion of the procedure, according to the defendant, he tested the plaintiffs' bowels for leaks and none were detected.

[5] Post operatively the plaintiff developed complications as a result of which the defendant was summoned at around midnight on the same day.

[6] There is a dispute on what is an important issue. That dispute is whether or not the defendant had visited the plaintiff at 8h00 on the morning of 12 February 2007.

[7] The plaintiff's case is that he was not seen by the defendant, whereas the latter is adamant he did indeed visit the plaintiff.

[8] The defendant says that on that occasion he gave directions to the hospital staff to give the plaintiff clear fluids and to administer maintelyte at the rate of 100 milliliters per hour.

[9] The defendant refers to Exhibit "L" which is a medication prescription chart of the relevant hospital which contains such instructions and the date of 12 September 2007. It does not however contain the names or particulars of the patient concerned.

[10] Similarly the hospital records kept by the hospital staff, which were produced at the trial have no entry relating to a visit by the defendant to the plaintiff at 8h00 on 12 September 2007.

[11] The evidence of the plaintiff on this issue is not consistent. Whereas he initially stated in evidence that the defendant did not pay him a visit, he conceded in cross-examination that he could not recall whether he was seen by the defendant. His evidence also stands in contradiction to the subsequent letter dated 7 July 2009 and addressed to the Health Professional Council of Namibia. The letter was signed by the plaintiff's wife but it is apparent to me that the plaintiff was instrumental in the drafting thereof. In that letter reference is made to the disputed visit.

[12] In order to resolve this dispute I had regard to the following factors. Firstly there is the direct testimony of the defendant that such a visit took place. The defendant was a good although at times an impatient witness.

[13] There is some corroboration for his evidence in the medication prescription chart mentioned earlier.

[14] Mr. Ipumbu who appeared for the plaintiff submitted that the document has no value because the plaintiff's particulars do not appear on it. It is, however, highly improbable that on the same day some other doctor had given identical directions to some other patient and that fortuitously the defendant came to know about it and more fortuitously that it had found its way to the records pertaining to the plaintiff.

[15] Mr. Ipumbu did not seek to persuade me that I should rely on the evidence of the plaintiff. Instead he sought to rely on the absence of an entry on the plaintiff's hospital records recording the disputed visit.

[16] The short answer to that is that nothing was placed before me to the effect that the records that were kept were complete in the sense that every visit was recorded.

[17] When I consider the evidence and evidential material, the merits and demerits of the witnesses, the probabilities and circumstances surrounding the case I find that the defendant did visit the plaintiff on the morning of 12 September 2007.

[18] To return to summarizing the facts, the plaintiffs' condition deteriorated to the extent that the defendant decided on 13 September 2007 to perform surgery on the plaintiff once more to insert a drain.

[19] During the course of that procedure the defendant noticed that the intra-abdominal fluid of the plaintiff was in fact intestinal fluid which indicated a perforation of the bowel.

[20] A laporatomy was performed and a leak from a small perforation of the bowel in proximity to the previous one which have been sutured on 11 September 2007 was found. The perforation was sutured and appropriate measures were taken to combat the complications this caused.

[21] It is however not in dispute that the medical complications caused by the rupture of the bowel had far reaching consequences for the plaintiff who had to suffer further surgery and an extended stay in hospital together with the pain and discomfort that goes with it.

[22] In the result and on 10 September 2010 the plaintiff issued summons against the defendant. The action is one in delict. In his particulars of claim the plaintiff alleged several grounds upon which it says the defendant was negligent.

[23] At the conclusion of hearing I was informed by Mr. Ipumbu that only two of these were persisted with. These were firstly that the defendant was negligent in that he perforated the plaintiffs' bowels and secondly that the defendant had neglected to rectify the post-operative complications developed by the plaintiff.

[24] The plaintiff claims damage from the defendant in the sum of N$400.000.00.

[25] I may add that further claims relating to a subsequent removal of the plaintiff's gall bladder and a claim for loss of income was not persisted with.

[26] The onus to establish negligence rests on the plaintiff.

[27] On that issue I, apart from the testimony of the plaintiff and the defendant, heard the evidence of Professor Thomson and Professor Warren. They clearly are qualified and quite capable of expressing credible opinions on the issue.

[28] I had the benefit of a joint report prepared by them. In the end both were unanimous in their opinions. As far as the rupture complained of is concerned, they state that either the rupture occurred during the surgery performed on 11 September 2007 and was not detected which is a recognized complication. Otherwise the bowel tissue became damaged and weakened during the course of the surgery and ruptured post-operatively once the bowel had built up pressure. Nothing in any event points to negligence in their opinion.

[29] As far as the post-operative care is concerned they agreed that it would have been negligent not to have seen the plaintiff on the morning of the 12th September 2007.

[30] They further agreed that had such a visit taken place, the steps taken then were based on clinical judgment which was reasonable.

[31] Taking into account the totality of their evidence and their collective wisdom which guide me, I have come to the conclusion that their respective views are sound and can not in any respect be faulted.

[32] It follows that the plaintiff did not prove any of the grounds for negligence relied upon.

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[33] The claim is dismissed with costs which include the costs of one instructing and one instructed counsel.

P J MILLER

Judge

APPEARANCES

PLAINTIFF :	T IPUMBU Of Titus Ipumbu Legal Practitioners
DEFENDANTS:	C VAN DER WESTHUIZEN Of Engling, Stritter & Partners