

SOUTH AFRICA / JUDGMENT

Botha v Coetzee Venter Attorneys (601/2014) [2019] ZAECHGC 47 (25 April 2019) [2019] ZAECHGC 47

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Roberson

CASE / FILE NUMBER

601/2014

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: 601/2014

DATE HEARD: 25 & 26/02/2019

DATE DELIVERED: 25/04/2019

In the matter between

EUGENE ANDRE BOTHA PLAINTIFF

and

COETZEE VENTER ATTORNEYS 1ST DEFENDANT

LEON VENTER 2ND DEFENDANT

JUDGMENT

ROBERSON J:-

- [1] In this action the plaintiff claims damages from the defendants, a firm of attorneys and a partner in the firm respectively (the firm and Mr Venter), for breach of an oral agreement concluded on 28 January 2009 in terms of which they were to institute a claim against the Member of the Executive Council for Health, Eastern Cape (the MEC). The defendants allegedly breached the agreement by allowing the claim to prescribe. In the alternative it was alleged that the defendants owed the plaintiff a duty of care to take the necessary steps to institute the claim and were in breach of that duty of care. The plaintiff's intended claim

against the MEC was one for damages caused by the negligence of staff at Cradock Provincial Hospital.

- [2] It was common cause that on 26 July 2008, a Saturday, the plaintiff, a police captain, fell off a low bridge on his buttocks and a reed penetrated him at a point above the rectum. He was taken by ambulance to Cradock Hospital at 02h00 where he received treatment, including stitching of the wound, and discharged. Two days later he was admitted to St George's Hospital in Port Elizabeth where he remained for 19 days. Pieces of reed, one of which was 12 cm long, which had caused acute sepsis, were removed from the plaintiff's body. The grounds of negligence on the part

of the staff at Cradock Hospital were:

1. Failure properly to investigate the plaintiff's given history of the injury
 2. Failure to inspect the wound properly or at all in order to establish whether or not foreign bodies remained in the wound
 3. Closing of the wound without removing foreign objects
 4. Failure to act professionally and with the required skill and diligence
- [3] The claim was to be for R40 754 for medical expenses and R300 000 general damages for pain and suffering and loss of amenities. The plaintiff claims these amounts from the defendants.
- [4] The defendants denied the mandate alleged, and pleaded that the mandate was to investigate the merits of the claim. These investigations revealed that the plaintiff was extremely inebriated when admitted to hospital, that he refused to be admitted for proper observation, that he demanded that the wound be sutured and that he be discharged, and that he refused further medical treatment. With regard to the intended claim against the MEC, the defendants denied that staff at Cradock Hospital were negligent and that because of his intoxication, the plaintiff did not afford the staff an opportunity to perform a proper assessment or observation.
- [5] It is convenient to reproduce at this stage the medical records of Cradock Hospital relating to the plaintiff's admission and treatment on 26 July 2008. In addition to the plaintiff's personal particulars, including the name of his private doctor, the following was recorded:

"Medical diagnosis: MVA – laceration above rectum.

Male patient admitted via ambulance – stretcher.

Fully conscious – smells of alcohol, aggressive and abusive.

History given of been involved in a motor vehicle accident this morning – he fell from bridge onto the "riete" on bottoms first.

+/- 1cm laceration just above rectum.

Bleeding ++ clots.

Patient very noisy – told staff just to put a dry dressing so he can go home – states he don't need a doctor to be called – states he will go to the doctor the next morning.

(Illegible) got up from stretcher walked around, noisy and wants to go home.

I told him he must get stitches to stop the bleeding – on his consent, stitches was inserted by me.

Chromic 2/0 skin sutures inserted X2.

Dry dressing applied.

A.T.T. 0,5 ml JM given (l) arm.

Discharged from OPD – walking – satisfactory.”

(All sic)

These notes were taken by Mrs Petro Lombard, an enrolled nurse.

[6] The plaintiff testified that on the evening of 25 July 2008 he had been at a restaurant and had a few drinks, he could not remember how many, but it could have been four or five beers. He left the restaurant in his bakkie which occasionally had mechanical problems. On his way home the bakkie stalled and he free-wheeled off the main

road into a side road. He came to a stop on the right hand side of the road, on a bridge, alighted from his vehicle and walked around it to open the bonnet. He assumed he caught his foot on a cement block and lost his balance and fell backwards off the bridge. He loses his balance easily because of an old leg injury. He felt intense pain in his buttocks or back and blood gushed out from his buttocks. He telephoned the police emergency number and two colleagues arrived at the scene, the ambulance arriving shortly thereafter. He was taken to hospital in the ambulance.

[7] The plaintiff was not sure who had given the history of the accident or his personal details, including the name of his doctor, to Mrs Lombard. He could not remember if anyone had asked who he was when he entered the hospital. All he knew was that he was in severe pain. He did not know when the ambulance personnel or his colleagues left the hospital. What he remembered of events at the hospital was that he lay on the table or a stretcher and was examined and treated, he did not know by whom. Mrs Lombard could have been there, but he did not recognise her. He might have seen her previously in town or at the hospital, but they did not meet socially. She had never visited his mother, who had worked at the hospital as a nurse and had retired 22 or 23 years ago. The treatment was to his buttocks and he was told to return the next day, meaning later that day when it was daylight. After the treatment he stood up and put on a pair of trousers which someone had brought, he could not remember who. He was not aware of what treatment he had received. He did not know if he had consented to the insertion of stitches and did not know that stitches had been inserted. He was told later that the wound had been stitched. He did not know that he had been given a tetanus injection.

[8] He denied that he had been aggressive and insulting towards the staff. If he was noisy, it could have been because of the pain. He did not dispute that he smelled of alcohol. He could not remember if he had said a dry dressing should be applied and that he wanted to go home, but he definitely did not walk around and swear. He said that there was nothing that he could remember about mentioning a doctor. He denied saying that he did not need a doctor to be called. He denied telling the staff that he wanted to go home and that he would see his doctor the next morning. This was a false entry in the records. He learned later that one of his colleagues had taken him home. He

denied that the reason for his vague memory of events was because he was severely under the influence of alcohol.

[9] When he got home he was in intense pain and lay on his bed. He did not know if his ex-wife, with whom he lived at the time, had tried to call the doctor. Eventually the next day, the Sunday, his nephew's wife, who is a nurse, was called and she gave him pills. He did not return to the hospital because he could not get up. His leg was swollen and he was in pain. He was not in a condition to telephone anyone.

[10] Dr Neethling was eventually called on the Monday and admitted him to hospital, whereafter he was transferred to St George's Hospital. He underwent surgery and pieces of reed were removed from the passage proceeding from the wound. He remained in hospital for 18 days.

[11] At that time the plaintiff worked at the local magistrate's court and regularly met Mr Venter there. At one meeting he told Mr Venter that he wanted to institute a civil claim in connection with the reed injury and Venter agreed to take on the matter. During cross-examination he said that at this meeting he asked Venter if he, the plaintiff, could institute a claim against the Department of Health. On 28 January 2009 he left a file containing his statement about the incident as well as photographs and other documents with the receptionist at the firm's offices. He did not converse with Mr Venter on that day.

[12] In the statement he said, inter alia, that he felt that the staff at the hospital were negligent in that they did not call the doctor on duty to assist them. If they had transported him to Port Elizabeth he would not have had to endure the pain and suffering that he did. He also said that he wished to institute a civil claim against the relevant institution. This latter sentence was his instruction to Mr Venter to institute a claim.

[13] Sometime later Mr Venter confirmed that he had received the documents and would give the matter his attention. The plaintiff was under the impression that Mr Venter now accepted his claim. The plaintiff did not know what amount would be claimed or in which court the action would be instituted. He assumed that the firm would take their fee from a settlement. Every two or three months the plaintiff would ask Mr Venter about progress and Mr Venter would say

that he was working on the case. At one stage Mr Venter told him there were medical reports which he had to obtain and that he still had to speak to Dr Neethling. The plaintiff never consulted with Mr Venter at his office nor was there any

correspondence between them concerning the case. After about three years the plaintiff felt that Mr Venter was avoiding him.

He also knew that a civil claim must be instituted within three years. He suspected that his claim had prescribed

and instructed his current attorney accordingly. The plaintiff denied that his mandate to Mr Venter was to explore the merits of a claim against the MEC.

[14] Mr Barend van der Westhuizen was one of the ambulance personnel who took the plaintiff from the scene to the hospital. At the scene they found the plaintiff who was bleeding heavily from his lower body. His trousers were soaked in blood. He smelled of alcohol and was unsteady on his feet. They placed the plaintiff on a stretcher and at the hospital transferred him onto the hospital bed and took him in to casualty. The plaintiff was struggling to walk. They tried to see from where the plaintiff was bleeding and together with the nurse, turned him on his stomach and took off his trousers. They observed the wound, which was a cut of about two cm and which was bleeding. They handed him over and left. While Mr van der Westhuizen was there the plaintiff was not insulting or aggressive and did not walk around.

There was one nurse there but the other one could have been elsewhere in the hospital. Mr van der Westhuizen did not see what the nurse did in relation to the plaintiff.

[15] At the time Mr van der Westhuizen did not know the plaintiff. The plaintiff had recently approached him in connection with the case and thereafter so did Mr Venter who took a written statement from him.

[16] Dr Eugene Burger is a qualified medical practitioner. He did not examine the plaintiff nor did he consult with him. He based his opinion on the hospital records. He prepared a main and a supplementary report.

[17] According to his main report, Dr Burger's opinion was that the level of care provided by Mrs Lombard was not commensurate with that expected of medical staff providing such care. Because she had been informed that the plaintiff had fallen from a height onto reeds she was obliged to conduct a proper and thorough assessment of the clinical situation. Such an assessment should have taken into account the possibility of an occult injury, including the retention of a foreign body, especially if Mrs Lombard had been informed that the plaintiff had fallen onto reeds. The need for a thorough examination was underscored by the presence of profuse bleeding, which would not be expected from a comparatively small wound. Had Mrs Lombard conducted such an examination it was likely that she would have detected the presence of the retained foreign bodies and

therefore they would not have been retained in the plaintiff's body for as long as they had been retained. It was also Mrs Lombard's duty to clean the wound prior to suturing and the records did not reflect that this had been done. It was the duty of Mrs Lombard to arrange for appropriate follow-up and to instruct the plaintiff to return the following day for a wound inspection and a follow-up examination, during which it was likely that the presence of the retained foreign bodies would have been detected. If the foreign bodies had been removed in the immediate post-injury period, the plaintiff would not have suffered the complications of abscess formation and sepsis, and the need for surgery and prolonged hospitalisation would in all likelihood have been averted. Dr Burger further stated in his report that the plaintiff consented to the suturing and there was no record that he remained antagonistic during the suturing. Mrs Lombard was therefore not compelled to limit the wound assessment to a cursory examination followed by suturing. If a patient is intoxicated the likelihood of a missed diagnosis is increased and increased vigilance and clinical suspicion are warranted.

[18] In his supplementary report Dr Burger referred to the statutory duties imposed on health care practitioners to provide information to a patient about his medical status, the range of treatment options, and related matters. He also referred to ethical guidelines including that a patient should be informed of the likely prognosis if a condition is left untreated.

[19] In elaboration of his reports, Dr Burger testified that where there is the possibility of a retained foreign body, an attempt should be made to remove it, or the patient should be referred to someone who can remove it. If a small wound bleeds profusely, that is indicative of a deeper injury and warrants further investigation. Either the patient should be referred to a higher level of care or be kept for observation. If a person has fallen onto a fragile body which is likely to break off, one should make sure that that did not happen. If retained, foreign bodies cause complications, chiefly infection. They can also migrate and damage more vital structures. Prior to suturing the wound, if a local anaesthetic

had been given, it would have been possible to probe the wound. When asked If Mrs Lombard would have found the foreign body if she had probed the wound, Dr Burger said it was a difficult question to answer and difficult to say, but it was more likely than not that she would have found the foreign body. If it was a 12cm piece of reed that had been retained in the plaintiff's body, it was very likely that she would have discovered it.

[20] With regard to follow-up, Dr Burger said that many hospitals do not have doctors on duty at night and that it is the duty of nurses either to call out the doctor or to provide for follow-up the next day. Dr Burger was the district surgeon in Barkly-West and said that the nurses there would have called him out if the patient had a wound in a strategic area which was bleeding profusely. The nurses might even have reported that the patient was a "high-ranking" person, in which case Dr Burger would probably have responded. When I asked him if the patient's position should make a difference to the standard of care, he said that unfortunately it often does.

[21] He said that in a small community incidents such as the present case occur commonly and the skills to deal with such a situation should be developed accordingly. There are pressures when dealing with “dignitaries” of the town but one has to have coping mechanisms in such a situation. When asked if the obvious thing for Mrs Lombard to have done was to say to the plaintiff let us get hold of your doctor, Dr Burger said it was possible but that there are different protocols at hospitals and not all doctors have admission rights, but in general you would probably give that option to the patient. When it was put to Dr Burger that the plaintiff had told Mrs Lombard not to call his doctor, he said that if it is a prominent member of society, in this case a high ranking police official, you might not call the doctor. You should however let the doctor know that his patient has asked that he not be called, because he is the doctor’s patient and the local captain of

police, and tell the doctor what treatment you are giving and that you are sending the patient home and that he will come and see you in the morning. This should also be recorded because when you deal with more prominent people in society your record keeping should be very accurate in order to make yourself less vulnerable.

[22] It was put to Dr Burger that if the plaintiff had told Mrs Lombard not to call his doctor and that he would see him the next day, she was not required to explain any consequences. Dr Burger said that perhaps a little discharge note recounting the treatment given should have been given to the plaintiff. Dr Burger agreed that Mrs Lombard could not be blamed for not arranging for the plaintiff to be transferred to hospital in Port Elizabeth.

[23] Dr Burger said that it was very possible that if the plaintiff had seen his doctor the next day the outcome would have been different. Later in his evidence he said it was more than likely that events would have unfolded differently if he had seen his doctor the next day. The sequence of events would not have been as severe or would not have transpired at all, although he would have had to have surgery to remove the reeds, but the sepsis and long term sequelae would not have occurred. Even if Dr Neethling had come out at 02h00 and referred the plaintiff to the surgeon, sepsis could not be excluded but Dr Neethling would probably have administered antibiotics. He agreed that it was possible that if the plaintiff had seen his doctor the next day his doctor would have examined him. Dr Burger himself would have done that and if he had been concerned that the wound had not been properly cleaned he would have inspected it. If he discovered a retained body he

would try to remove it or if not equipped to do so would refer the patient to a specialist. If a foreign body is removed in the immediate post injury period, which Dr Burger said was possibly 24 hours thereafter, further complications are a rarity.

[24] If the plaintiff had been in a lot of pain Dr Burger would have expected him to see his doctor early in the morning. Dr Burger thought it was unreasonable for the plaintiff to have sought treatment from another person rather than see his doctor or go back to the hospital. He agreed that there was nothing that stopped the plaintiff from calling his own doctor or going to see him the next morning. While Dr Burger agreed that in the circumstances one would

expect a reasonable person to go to his doctor, he said that a health care worker cannot delegate his or her duty and it is his or her decision to call out superior knowledge. One cannot expect a patient to make an informed decision about his own health. In the situation where a patient has a wound in an area which he cannot see, a health care worker should be directive and not defer the decision to the patient. Dr Burger said that Mrs Lombard should have called Dr Neethling or any other doctor. An experienced nurse in such circumstances should be able to say to the patient that she is going to do what she thinks is right. When asked what Mrs Lombard should have done given that an intoxicated police captain told her he wanted to go home, Dr Burger said that there is an element of being browbeaten by a person of higher standing or authority and sometimes the health care worker gives in, but then the facts must be properly recorded and it should be stated that the patient left against explicit advice.

- [25] Dr Burger said that there are situations where a health care practitioner has to expedite care, for example if a patient is alone and unconscious, unsettled or manic. Things are done differently when you are under pressure and you have less time to deliberate on your decisions. In that case it is appropriate that you are held to that level of judgment. If a patient refuses treatment it should be recorded and a health care worker should tell a patient that there are consequences of such refusal.
- [26] The plaintiff's current attorney, Mr Frans Smit, testified that he was approached by the plaintiff in 2012, asking for assistance with a matter on which he had instructed Mr Venter and saying that he was not getting satisfactory answers from him. The plaintiff thereafter formally instructed Mr Smit. On 9 October 2012 Mr Smit wrote to the firm expressing the plaintiff's concern that the claim might have prescribed and asking for the contents of their file or copies thereof. There was no response to this letter. During May 2013 Mr Smit met Mr Venter's partner Mr Frikkie Coetzee, and asked him to speak to Mr Venter and revert. Mr Coetzee remarked at the time that he had seen Mr Smit's letter and thought that the claim had prescribed. Mr Smit wrote again to the firm in August 2013 requesting an urgent response to his earlier letter. There was no response to this letter. A final demand to the firm to deliver the file was made by Mr Smit's Grahamstown office. There was no response to this demand. During October 2013 Mr Smit met Mr Venter at court. Mr Venter told him he would deliver the file before the end of the day and confirmed that the matter had prescribed and that he had informed his insurers.
- [27] Mr Smit received the contents of the firm's file which contained the plaintiff's statement given to Mr Venter, photographs, medical accounts and a letter dated 3 February 2009 addressed by the firm to the medical superintendent of Cradock Hospital. The letter was headed "Notice of intention to institute legal proceedings: Eugene André Botha". It referred to the plaintiff's fall, his treatment at Cradock Hospital, and his treatment at St George's Hospital. It was stated that the plaintiff told the nursing staff that he was sure it was reeds which had pierced his body. (This was not the plaintiff's evidence at the trial.) Negligence on the part of the nursing staff at Cradock Hospital was alleged and damages of R265 754.93

were claimed, made up of R40 754.93 past medical expenses, R25 000.00 future medical expenses, and general damages of R200 000.00. The letter concluded by saying that it served as notice of the plaintiff's intention to institute legal proceedings and to join the MEC and staff members. Mr Smit realised that the plaintiff's claim had prescribed and he was instructed to pursue a civil claim against the firm. A letter of demand was sent and summons issued thereafter.

[28] Mr Smit also testified in relation to the costs which were reserved on 31 January 2017 when the trial was postponed. He had asked Dr Burger to keep the day free and did not subpoena him. A notice of intention to amend the defendants' plea was filed on 12 January 2017. The amendment would have been perfected on 27 January 2017. Mr Smit intended to object to the notice of amendment on the grounds that it included the withdrawal of an admission. He was of the view that the matter could not proceed on 31 January 2017 and did not make arrangements for Dr Burger to attend. On 26 January 2017 Mr Smit wrote to the defendants' attorneys stating that the plaintiff was ready to proceed to trial and pointing out the effects of the amendment and the need to make adjustments to the plaintiff's pleadings, including a replication and a request for trial particulars. The letter recorded that the defendants' attorneys intended to perfect the amendment and did not agree to a postponement and that the plaintiff should bring a substantive application. On 27 January 2017 the

defendants withdrew the notice of intention to amend. Mr Smit then tried to secure Dr Burger's attendance but it was too late. An email had been sent from Mr Smit's offices on 25 January 2017 stating that the matter would be heard on 31 January 2017 and asking if Dr Burger would be available to attend. Dr Burger replied the same day to the effect that he would not be available. On 31 January 2017 the presiding judge declined to start the matter if it was to become part-heard because Dr Burger was not available.

[29] Mrs Petro Lombard testified that she has been an enrolled nurse for about 30 years, working most of that time at Cradock Hospital. Prior to the incident she knew the plaintiff, but not personally. She was well known to him because she had worked with his mother who was a nurse.

[30] On the morning in question the plaintiff was brought in by ambulance on a stretcher. Mrs Lombard, who was on duty with a colleague[1], recognised him. The plaintiff was noisy and aggressive and wanted to get off the trolley. He was fully conscious but unsteady on his feet. She could not see immediately what was wrong because he did not co-operate and wanted to go home. The words he used were that they must "fokken help hom hy wil fokken huis toe gaan." He used the word "fokken" several times. He gave the information that he had fallen on his buttocks in the reeds. Eventually they managed to get the plaintiff to lie flat on his stomach on the trolley. He helped them remove his trousers after they asked him a number of times. Mrs Lombard disagreed that Mr van der Westhuizen had been involved in removing the plaintiff's trousers. She saw blood and a one cm laceration above the plaintiff's rectum. She wanted to call a doctor because of the bleeding, which was more than expected from a one cm wound. She told him she must call his private doctor and he said that he did

not need a doctor, he wanted a bandage and would see his doctor the next day. At that stage the plaintiff's doctor did sessions at the hospital. She also suggested that she call the doctor on duty and the plaintiff said he did not need a doctor. She did not call a doctor and assumed that the plaintiff did not want his doctor called because he was intoxicated. The plaintiff did not say why he did not want his doctor called.

[31] Mrs Lombard and her colleague struggled to get the plaintiff to lie still and he repeatedly tried to get up. Because he was bleeding so much the wound had to be stitched. She told the plaintiff that she could not just bandage the wound, she needed to stitch it otherwise the bleeding would not stop. She probed the wound but did not find any visible object. Although it was not noted in the record, it is routine to probe a wound before stitching it, and not always recorded. She did not suspect that a reed had broken off and did not see anything, and the plaintiff did not complain that anything was hurting him. He consented to the insertion of stitches. After he was given an injection and bandaged, the plaintiff said he was going home. He did not complain of pain and discomfort. She asked him to wait a while but he refused and said he would go to his doctor the next day. He walked out of the hospital. Mrs Lombard said that there was nothing more she could have done to persuade him that his doctor be called. She did not want to countermand the plaintiff and he was not in immediate danger. If he had not been a private patient she would have called a doctor. She agreed that nothing prevented her from calling a doctor. If the plaintiff had allowed her to call his doctor matters would have progressed differently. Dr Neethling might have taken x-rays and examined the wound.

[32] Mr Venter did not testify.

[33] In considering whether or not the plaintiff would have succeeded in his claim against the MEC, it is necessary to make a finding on the probabilities concerning the plaintiff's conduct after he was received at Cradock Hospital. On his own version, the plaintiff did not remember much of what happened. Despite knowing Mrs Lombard, albeit not well, he did not recognise her and did not even know who was treating him or what treatment was administered at the time. He did not remember who had given her the information recorded in the notes. His categorical denials that he said that he wanted to go home, that he said he would see his doctor the next day and that he was aggressive and abusive, are therefore very

suspect, and point to a deliberately selective memory. In my view it is highly improbable that Mrs Lombard, not knowing at the time that there would be a claim in the future against the MEC, would falsify the records in order to avoid being accused of negligence. It is common cause that in some respects the record was accurate. The plaintiff had been drinking and did not dispute that he smelled of alcohol, he was bleeding heavily, stitches were inserted and he was given an injection. It was submitted that Mrs Lombard had falsified the records to cover herself because she had been intimidated by the plaintiff's status. This is highly improbable and in any event belies the plaintiff's denial that he was abusive and aggressive. The record Mrs Lombard kept, her evidence, and the plaintiff's lack of memory of what took place lead me to find that Mrs Lombard's account of the events of that morning is far more probable than that of the plaintiff.

This finding importantly includes Mrs Lombard's wish to call a doctor and the plaintiff's indication that he did not need a doctor and would see his doctor the next day. The fact that Mrs Lombard recorded that the plaintiff said he did not need a doctor could only have been because she was the one to raise the need to call a doctor.

[34] I do not think that the contradiction between Mrs Lombard and Mr van der Westhuizen concerning who was involved in taking off the plaintiff's trousers is material. It is so that Mrs Lombard was in court when Mr van der Westhuizen testified and had the opportunity to notify the defendants' counsel that his evidence was incorrect in that respect but she was a witness, not a party. In my view it is an insignificant detail and one must remember that Mrs Lombard was testifying almost 11 years after the event. Mr van der Westhuizen's evidence that while he was present the

plaintiff was not abusive or aggressive was accorded some significance on behalf of the plaintiff. However Mr van der Westhuizen left after assisting with the removal of the plaintiff's trousers. He did not witness further interaction between Mrs

Lombard and the plaintiff. It was also submitted that it had not been put to Mr van der Westhuizen that Mrs Lombard and a

colleague were present, whereas Mr van der Westhuizen said that only Mrs Lombard was there and the other nurse was elsewhere. Again I do not think that this is material. Mr van der Westhuizen was not long at the hospital and even if he initially only saw Mrs Lombard, it cannot be excluded that the other nurse was involved.

[35] I do think that Mrs Lombard's evidence that she probed the wound was problematic. It was not put to Dr Burger that she had, and the plea stated that she did not have the opportunity to examine the plaintiff properly because of his conduct. Again I do not think that this factor is of such significance that it affects the broad probabilities of what took place that evening, namely that the plaintiff behaved as recorded.

[36] Dr Burger's expert evidence must therefore be evaluated against that scenario. Mrs Lombard was dealing with an uncooperative and abusive patient.

[37] I found it difficult to extract from Dr Burger's evidence any unequivocal statement that the treatment administered to the plaintiff fell below the required degree of skill and care, given the particular circumstances. Dr Burger continually qualified his statements, not least by applying to some extent different standards when the patient was a so-called prominent member of society. This clearly cannot be right but it did seem to play a part in his opinion.

- [38] Dr Burger's opinion as contained in his main report that Mrs Lombard should have conducted a proper assessment of the clinical situation is watered down by the plaintiff's obstructive behaviour in resisting proper treatment. I do not think that the fact that the plaintiff consented to stitches makes much difference. This was a last plea on the part of Mrs Lombard to help the plaintiff, in spite of his behaviour. It did not necessarily mean that he would reconsider his decision not to have his doctor called and to go home.
- [39] Dr Burger, with some initial qualification, agreed that the patient should be given the option of calling his doctor. When told that the plaintiff had told Mrs Lombard not to call his doctor, Dr Burger said that if it is a prominent member of society, one might not call the doctor. This was in my view a qualification of his evidence that Mrs Lombard should have overridden the plaintiff's instruction not to call his doctor. Dr Burger also said that sometimes the health care practitioner gives in to the "browbeating" of a person of authority, but that these facts must be properly

recorded. What does one make of this expert opinion evidence? It suggests that Mrs Lombard was not at fault by not overriding the plaintiff. The record she kept is clear enough. She certainly did the right thing in wanting to call a doctor, in view of the extent of the bleeding from the wound. When it was put to Dr Burger that Mrs Lombard did not need to explain any consequences to the plaintiff because he had said he would see his doctor the next day, he said that perhaps a little discharge note should have been given to the plaintiff. He did not deny that there was no need to explain any consequences. He did not suggest that the failure to give the plaintiff a discharge note was culpable.

- [40] I am therefore not satisfied that in all the circumstances the plaintiff established negligence on the part of Mrs Lombard.
- [41] On the question of causation, even if Mrs Lombard should have overridden the plaintiff and called the doctor, was this failure the cause of the consequences of the retention of the reed in the plaintiff's body? Of importance here is the fact that the plaintiff said he would see his doctor the next morning. Even if one can go so far as to say that but for the failure to call the doctor the consequences might not have occurred, and I do not make such a finding, I do not think that the failure is sufficient for legal causation. There was no apparent reason for Mrs Lombard not to believe that the plaintiff would go to his doctor. She knew that he had a private doctor, Dr Neethling. The plaintiff was not an intellectually impaired person. Dr Burger himself said it was unreasonable for the plaintiff not to seek help from his

doctor or to return to hospital. If the plaintiff had seen Dr Neethling later that morning, the events would not have been as severe or would not have transpired at all. As Dr Burger said, if a foreign body is removed in the immediate post injury period, namely 24 hours, further complications are a rarity. It seems to me that the cause of the consequences of the retention of the reed in the plaintiff's body was the plaintiff's failure to see his doctor later that morning, as he said he would.

[42] For all the above reasons I am of the view that the plaintiff did not establish that he would have succeeded in a claim against the MEC.

[43] It is therefore not necessary for me to consider whether or not the defendants were liable to the plaintiff as claimed.

[44] With regard to the costs which were reserved on 31 January 2017, it seems that whatever the position was regarding the defendants' intention to amend their plea, Dr Burger would not have been available on 31 January 2017 and the plaintiff was not fully ready for trial. In that case, the plaintiff should pay the reserved costs.

[45] The following order will issue:

The plaintiff's claim against the defendants is dismissed with costs, such costs to include the costs which were reserved on 31 January 2017.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances

For the Plaintiff: Mr R Smith, instructed by Nolte Smit Attorneys, Grahamstown

For the Defendants: Adv P Jooste, instructed by McCallum Attorneys, Grahamstown

[1] It was not in dispute that this colleague had since suffered a stroke and could not testify.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2019/47.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/botha-v-coetzee-unknown-topic-aecghc-2019>

Prepared on 11 October 2026 · Esheria