

SOUTH AFRICA / JUDGMENT

J.J v Meyer (51155/2014) [2017] ZAGPPHC 285; [2017] 3 All SA 878 (GP) (6 February 2017) [2017] ZAGPPHC 285

COURT

North Gauteng High Court, Pretoria

BEFORE

Avvakoumides

CASE / FILE NUMBER

51155/2014

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THE

HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 51155/2014

DATES

OF HEARING: 31 OCTOBER 2016 & 1 NOVEMBER 2016

DATE

OF JUDGMENT: 6 FEBRUARY 2017

REPORTABLE

OF

INTEREST TO OTHER JUDGES

REVISED

In

the matter between: J
J
Plaintiff
and
DR
ANDRE
MEYER
Defendant

JUDGMENT

AVVAKOUMIDES. AJ

INTRODUCTION

- (1) This is a claim by the plaintiff against the defendant for damages arising from a medical procedure performed by the defendant on the plaintiff. The procedure is called an abdominoplasty also commonly referred to as a "tummy tuck". The language employed during the trial was both in English and Afrikaans and I will utilize both languages herein where appropriate.
- (2) The merits of the case were settled on the basis that the defendant, without admitting his liability to do so other than on terms of the agreement between the parties and undertaking, without prejudice to his rights, without therefor admitting negligence, breach of contract or unprofessional conduct, and in full and final settlement of the issue of liability in this action instituted by the

plaintiff against the defendant, agrees and undertakes to pay 90% of the plaintiff's proven or agreed damages arising from the performance of an abdominoplasty surgical procedure on 12 July 2011 and the complications encountered subsequent to the surgery.

- (3) At the commencement of the trial the plaintiff's counsel indicated that he would lead the evidence of the plaintiff and the appropriate stage he would move for an amendment to the pleadings to include a claim for loss of earnings by the plaintiff. The defendant's counsel objected. The plaintiff filed a notice of intention to amend approximately 41 days prior to the trial date to which the defendant objected. Instead of setting the application down for determination on the proposed amendment, the plaintiff permitted

the time period within which to do so, to expire and then filed two more notices of intention to amend.

- (4) The plaintiff's argument against the objection was that the defendant knew of the proposed amendment some time before and had considered the amendment. The fact remains no amendment was effected, albeit for whatever reason. Having heard argument from both counsel I

dismissed the application for the proposed amendment with costs. This being the case I enquired from the plaintiffs counsel whether the plaintiff wished to carry on with the trial or postpone the case in order to amend her papers. For the second time I adjourned the court so that the plaintiff could furnish instructions. After the adjournment the plaintiff elected to proceed with her action without inclusion of the claim for loss of earnings.

GETUIENIS VAN EISERES

- (5) Die eiseres het as volg getuig: Sy woon in Villieria, Pretoria en werk by Preform en doen ook deelydse werk. Sy het in 2009 vir Dr Andre Meyer gaan sien om vir haar 'n "tummy tuck" te doen. Tydens die ondersoek het die verweerder haar bloeddruk gemeet en ges dat haar bloeddruk bietjie hoog is. Die verweerder het haar gevra oor haar medikasie en hulle het gesels oor haar toestand en cholesterol. Dit is ooreengekom dat die eiseres eers haar bloeddruk onder beheer sou kry en dan terugkom.
- (6) Die eiseres wou 'n "tummy tuck" laat doen omdat die verweerder verduidelik dat sy 'n "middeltjie" sal he en weer mooi sal lyk. Sy het erken dat sy definitief oorgewig was op daardie stadium. Die verweerder het blykbaar baie jare gelede die eiseres se skoonma behandel en dit is hoe sy by die verweerder uitgekom het.
- (7) Die eiseres het getuig dat die verweerder haar gestuur het vir 'n sonar omdat hy gedink het hy sal 'n deurbraak maak deur haar "vetband" te meet hiermee. Sy het die ondersoek laat doen en daarmee is sy weg. Daar was nie 'n reeling tussen hulle wanneer die eiseres moet terugkom nie. Sy het toe vir die operasie gegaan op 12 Julie 2011. Die verweerder het haar ingelig dat die operasie twee en 'n half sal duur maar dit het vier en 'n half uur geduur. Die verweerder het op haar maag "geteken" voor die operasie. Sy het ender die ligte wakker geword en gevra hoekom sy wakker gemaak is. Sy het gedroom van mooi wilgerbome en green gras. Die narkotiseer het langs haar gestaan en aan haar genoem dat daar 'n bloedsirkulasie probleem was en hy bly is dat sy wakker is. Die verweerder het haar meegedeel dat hy omtrent 4 kilogram uitgesny het. Hulle het nie veel gepraat nie en die verweerder is gou weg.
- (8) In die hospitaalkamer het sy die suster geroep omdat die drein blykbaar nie veel gedreineer het nie. Die volgende oggend het die verweerder haar gesien en die pyp dieper ingedruk om die dreinering te bespoedig. Hy het die wand oopgemaak en dit weer toegemaak en vir haar gese sy kan huis toe gaan. Sy moes oor 8 dae weer terugkeer. Sy moes elke dag die volume dreinering meet en die resultate vir die verweerder stuur. Na die agtste dag het sy teruggekeer en die verweerder het die wond oopgemaak en versorg. Die wond was blykbaar nie mooi nie maar sy het dit aanvaar omrede dat dit 'n nuwe wond is. Sy het gereeld gegaan om die wond te versorg. Op die agtiende dag het hy die steke uitgehaal. Die eiseres het die verweerder gebel en gesli dat daar is 'n probleem. Die wond is nie toe nie.

- (9) Die verweerder het haar gevra om na sy spreekkamers te kom. Hy het haar ondersoek en 'n "saline drip" binne in die gat gedruk sodat dit spoel. Die verweerder het hierdie proses op drie verdere geleenthede herhaal en by die vierde geleentheid het die eiseres vir die verweerder gese dat die wond oop bly. Die verweerder het toe lokaal blou steke ingesit met 'n naald wat stomp was. Hy het gesukkel om die steke in te sit. Dit was ongeveer se tot sewe steke.
- (10) Die snit was ongeveer 68 sentimeter en reg oor haar middellyf. Die wond het in die middel oopgegaan en kon sy haar vingers daar indruk. Die eiseres het getuig dat sy die verweerder se voorskrifte gevolg het en sy vermoed dat die wond oopgegaan het omdat die steke te vinnig uitgehaal is. Sy het in haar bed gele en haar huiswerker het haar versorg deur haar te bad en aangetrek. Haar seun Pierre en haar vriend Helgaard het haar per geleentheid na die verweerder geneem en tydens die besoeke het die verweerder die wond behandel en dooie vel en geel vet uitgesny, veral toe hy die steke ingesit het.
- (11) Die wond is behandel met salf en daar is Augmentum is voorgeskryf. Op die 29 Augustus 2011, die vyftigste dag na die operasie, toe sy by die verweerder se kamers opdaag vir 'n besoek, is sy ingelig dat die verweerder aan 'n hartaanval gely het en dat die verweerder se dogter, wie 'n dermatoloog is na haar sal omsien.
- (12) Die verweerder se dogter het die wond oopgemaak en gesê dat haar pa lankal 'n rekonstruktiewe operasie moes doen. Sy het die wond toegemaak en vir Dr Johan van Heerden gaan roep. Dr Van Heerden is 'n rekonstruktiewe chirurg. Hy het vir haar gese sy moet haar goed gaan pak en die volgende dag terugkom. Die wond is weer oopgesny en skoongemaak en 'n masjien is gehuur om die bloedsirkulasie te bevorder. Hierdie masjien is in haar maag geplaas. Haar maag is oopgesny soos 'n halfmaan.
- (13) Die masjien was blykbaar verkeerd gestel en in plaas daarvan dat dit die bloed gesirkuleer het is die bloed gedreineer. Omtrent middernag het sy die suster versoek om die dokter te bel, maar die suster kon horn nie in die hande kry nie. Die volgende oggend was Dr Van Heerden ontsteld oor die aangeleentheid en is die masjien reggestel. Dr Van Heerden het vir die eiseres gese dat hy haar gaan toewerk. Die teater is bespreek en dit was vir haar baie traumaties. Sy het gevoel dat sy dit nie gaan oorleef nie. Sy het gevra dat haar kinders gebel moet word om te kom.
- (14) Dr Van Heerden het die wond toegewerk en daar was twee gaatjies langs mekaar wat nie genees het nie. Hierdie twee gaatjies het een gat geword soos dit genees het. Sy was bekommerd en het vir Dr Van Heerden gebel. Sy vrou het geantwoord. Hy was nie beskikbaar nie. Dr Van Heerden se vrou het gese dat die wond gesond sal word. Sy bel toe die verweerder. Hy het haar versoek om in te kom vir 'n ondersoek. Die verweerder het tydens die ondersoek 'n stuk vel geneem wat hy by die Universiteit gekry het en dit op die oop wond geplaas maar die vel se vervaldatum het reeds aangebreek en daarom het die behandeling nie gewerk nie. Die verweerder het vir haar nog 'n stuk vel gegee sodat sy stukkies vir stukkies kan opsit wanneer sy die wond skoonmaak. Hy het gevra dat sy horn

moet herinner om vir sy sekretaresse te vra om nog 'n stukkie vel te kry by the Universiteit.

- (15) Die nuwe stuk vel se vervaldatum het nog nie aangebreek nei en die wond is in Desember 2011 heeltemal toe. Vir die eerste vyftig dae was sy bedleend. Sy het daarna 'n skildklieroperasie ondergaan en tydens die geleentheid vir die dokter, Dr van Biljon gevra om na haar wond te kyk. Dit was in Julie van 2013. Haar klagte aan Dr van Biljon was dat "die snit bly stukkend gaan. As ek iets dra met 'n belt is... dit gaan stukkend." Die eiseres is toe verwys na Professor Coetzee wat weer 'n rekonstruktiewe "tummy tuck" gedoen het om poog om haar maag "gelyk te maak". Daar was blykbaar 'n "duik in die maag".
- (16) Die eiseres is verwys na fotos van die snit. Hierdie fotos is nie fotos van haar huide voorkoms nie en is die fotos nie op daardie basis aangebied nie. Die fotos is van die snit op die stadium toe daar nog 'n gat in die middel van haar maag was en daar nog steke in was. Die fotos is geneem oor die tydperk van die eerste operasie en die behandeling daarna deur Dr Johan van Heerden. Die wond het oor 'n tydperk van ses maande genees. Die eiseres het getuig dat sy nie ingelig is deur die verweerder oor die moontlike komplikasies wat mag volg nie.
- (17) Indien sy wel ingelig is, sou sy nooit die operasie ondergaan het nie. Sy het verder getuig dat indien sy ingelig is dat sy nie geskik is vir so 'n operasie as gevolg van haar gewig nie, sou sy ook nie daartoe toegestem het nie. Sy getuig dat sy verskriklik pyn gehad het na die eerste operasie asook die tweede en derde operasie.
- (18) Die eiseres het getuig dat sy het tans gereeld pyn het. Wanneer sy sit of staan het sy pyn. Die snit raak dood as sy nie staan nie. Indien sy sit kan sy nie opstaan nie. Sy staan gereeld op by haar werk en beweeg rond. Sy voel dat die wond "te styf is en dat dit sal oopskeur".
- (19) In kruisondervraging is dit aan die eiseres gestel dat sy nie die dokter se voorskrifte nagekom het omdat sy self haar motorvoertuig

bestuur het. Sy het erken dat die dokter haar verbied het om self te bestuur vir vier weke na die operasie. Dit is aan haar gestel dat ene Jeanette Van Den Berg gaan getuig dat sy net vir die eerste twee besoeke opgedaag het met iemand wat haar gebring het, maar daarna het sy self bestuur. Dit is verder aan haar gestel dat Mev Van Den Berg sal getuig dat die eiseres aan haar genoem het dat sy versigtig bestuur, kussings om haar sit en dat sy ook 'n BMW bestuur wat "sag ry". Die eiseres het dit ontken. Die eiseres het ook ontken dat sy vir Mev Van den Berg gevra het om nie vir die dokter te se dat sy self bestuur het nie. Sy het ook ontken dat dit Mev Van Den Berg was wat met haar geskakel het om die operasie te reël.

- (20) Die eiseres het erken dat sy in 2013 haar prokureur gaan sien het oor 'n moontlike eis en dat dit Professor Coetzee was wat vir haar gese het sy "moet dit nie hier los nie." Die eiseres het erken dat sy na die operasie gegly en geval by 'n stadium in Potchefstroom ongeveer 'n jaar gelede. Sy het 'n rib beseer. Sy is behandel en X-strale is geneem. Die oorsaak van die val is omrede sy die trappe nie duidelik gesien het nie. Sy het ongeveer 60cm na benede geval.

- (21) Die eiseres kon nie verduidelik waarom Dokter Van Heerden na die operasie op 31 Augustus 2011 die volgende in sy verslag geskryf het nie. Sy het die korrektheid daarvan ook nie ontken nie: "On 16 May 2014 the patient was requested to follow up with me as I never had the opportunity to evaluate the final result after the reconstructive procedure on the lower abdomen. She gave the history that she consulted a third plastic surgeon to improve the cosmetic result after the wound healing complicationsshe also complained of an abdominal hernia on the right side which was not present in 2011". Die eiseres het ontken dat daar geen breuk in 2011 was nie en aangedring dat Dr Van Heerden dit gemis het. Sy het ook getuig dat Professor Coetzee die breuk gemis het.
- (22) Die eiseres kon nie onthou of sy vir Dokter Van Heerden op 30 Augustus 2011 genoem het dat sy voel asof 'n bult in haar maag haar pla. In Dr Van Heerden se verslag is die volgende gedokumenteer: "on examination it was evident that the wound healing problems with associated scanning occurred in the midline..... All the wounds are healed and the patient mentions that she is happy with the present outcome". Die eiseres het dit ontken. Sy het getuig dat sy op daardie dag haar rekords gaan haal het by Dr Van Heerden. Dr Van Heerden het geweier om sy kliniese rekords oor te handig.
- (23) Die eiseres het verder ontken dat Dr Van Heerden die eerste keer in 2011 oor haar breuk in sy verslag geskryf het. Sy dring aan dat hy die breuk in 2011 gemis het. Dr Van Heerden se verslag lees verder: "on examination it was evident the wound healing....., all the wounds are healed and the patient mentions that she is happy with the present outcome" Sy het aangedring dat sy nooit ondersoek is. Die eiseres het ontken dat sy vir Dr Van Heerden gese dat sy gelukkig is. Sy getuig dat sy gese het dat Professor Coetzee haar voorkoms 'n bietjie verbeter het.
- (24) Die eiseres kon nie ontken dat Dokter Van Biljon in sy brief van Mei 2016 verwys na die "tummy tuck" en skryf "sy het goed herstel en is tans simptome vrj". Sy kan ook nie onthou of sy vir Dr Van Biljon vertel het van die verskriklike pyn nie, dat haar maag dood is, dat sy nie kan nie regop staan as sy klaar gesit het nie ensovoorts. Dit is aan die eiseres gestel dat die pyn wat sy ervaar kon wees van die twee breuke wat sy het. Haar antwoord is dat die pyn nie afkomstig is van die breuke nie maar van die snit.
- (25) Sy is verwys na die verslag van Dr Robson, die eiseres se eie deskundige getuie, wat aantoon dat dit hoogs onwaarskynlik is dat die breuke as gevolg van die operasie ontstaan het. Hy dokumenteer ten aansien van die breuke: "to be typical of the behaviour of an inguinal hernia" en verder....."Also at the time of my examination of the patient I found that there was an inguinal hernia present on the right side. An Incisional hernia would behave differently." Die eiseres kon nie daarop kommentaar lewer nie.

- (26) Dit is aan haar gestel dat sy verskeie klagtes gerapporteer het aan Mev Putter, die Arbeidsterapeut, soos byvoorbeeld dat haar maag verskriklik swel, soggens en veral saans. Die verslag van Mev Putter lees: "current pain and physical complaints"; en verder: "She experiences weakness in her abdominal muscles."... "she is unable and too weak to turn or change sides as normal when lying in the bed."..... "she is unable to sit up straight without the support of her arms." "she

struggles getting up from sitting to standing and has to make use of arm rests to push herself up with her arms".

- (27) Mev Putter se verslag lees verder: "post incident functions" "she experiences feelings of frustration and irritation and she struggles physically to do things which were never a problem". Dit is aan haar gestel dat sy tans 'n huishulp het vir slegs een maal per week in plaas van vyf dae per week soos voorheen. Die verslag van Mev Putter handel oor die eiseres se beperkinge wat die eiseres toeskryf aan stywe maagspiere en "die vel wat so styf is oor die maag".
- (28) Die eiseres is verwys na die gesamentlike verslag van Dokters Robson en Jandera waar hulle die volgende dokumenteer: "Will an abdominoplasty in this case strengthen or weaken her core? "An abdominoplasty would in my opinion be essentially neutral. The possibility of increasing the strength of the core is therein that the rectus abdominis muscles are approximated. However, I would feel that any increase in this would be negligible. A decrease in the core strength would be similarly unlikely." Verder: "Did the operation contribute to the patient's difficulty getting up and sitting down? Die dokters se: "I cannot see any logical mechanism whereby the operation could contribute to her getting up from a sitting position or from the floor. The muscles were not damaged and as noted earlier core strength would be the same so in terms of the operation causing this disability, I cannot see any reason to blame the operation for it." Die eiseres se kommentaar was onder andere dat haar spiere het sag geword van die baie lê.
- (29) Volgens beide Ors Robson and Jandera is dit medies gesproke onwaarskynlik dat die eiseres se maagspiere swakker sal wees as

gevolg van die operasie. Dit is aan haar gestel dat haar vel kan rek soos in die geval van 'n swanger vrou se vel. Dit is verder aan haar gestel dat sy nie teenoor Dr Jandera gekla het oor haar vel se rek probleem nie. Sy het nie die vraag betwis nie. Die eiseres volhard dat die operasie veroorsaak het dat sy fisies ingeperk is en dat sy nie kan doen wat sy voor die operasie gedoen het nie.

- (30) Mevrouw Putter se verslag onder "General Observations" toon dat: "However at times needed external motivation to complete one or more repetitions of a task. Her performance was therefore influenced by self-limiting behaviour which exceeded the accepted limit." En verder ".....she was cooperative and followed instructions however at times she required external motivation to complete one or more repetitions of a task and her performance was therefore influenced by self-limiting behaviour which exceeded the accepted limits according to the Ergo Science FCE. The reported reason for her displayed self-limiting

behaviour was due to a fear of further injury, pain as well as not knowing to which extent she can force her body to assume postures as she reported that her hernia pops out and furthermore she indicated that everything skin and muscles over the abdomen) feel as if it will tear."

- (31) Dit is duidelik uit die terapeut se verslag dat die eiseres se inperkings deur haar eie gedrag veroorsaak is en dat daar geen

mediese verduideliking is vir haar fisiese inperkings nie. Haar gewig ten tye van die eerste besoek aan die verweerder was 106 kilogram en voor die operasie ongeveer 90 kilogram. Sy wou graag die operasie ondergaan omrede sy oorgewig was en haar voorkoms en selfbeeld wou verbeter.

EVIDENCE OF MS ANNELIES CRAMER

- (32) The plaintiff called Ms Annelies Cramer, a clinical psychologist. She testified that she examined the plaintiff on 9 September

2016. She prepared a report dated 23 September 2016. The report deals with the information obtained from the plaintiff which largely accords with the plaintiff's evidence in chief. She conducted several tests on the plaintiff, namely the Beck's Depression Inventory, Post Traumatic Stress and so on. Ms Cramer explained that generally an assessment like this is called a clinical interview with the patient which includes some psychometric tests.

- (33) These tests give a fairly balanced view between a subjective account and then a slightly more objective reporting of symptoms based on standardised questionnaires. However these questionnaires in a case like this where psychological issues are investigated are still self report questionnaires. In other words there are certain structured questions to which the person has to either say true or false, yes or no, or give a rating one to five etc. So it still relies on the patient's self report but it goes through certain syndromes and symptoms in a systematic way and with that, and the clinical interview, one can correlate and determine whether there is a fairly consistent picture.

- (34) The three tests that are selected in this instance were Beck's Depression Inventory which is just a structured questionnaire on symptoms associated with depression a post traumatic stress disorder checklist, which again just in a structured way looks at the trauma and anxiety type symptoms, and the third one a symptom checklist which evaluates quite an array of psychological syndromes of a more severe psychological nature and personality characteristics.

- (35) The aim of the psychological assessment was to determine the nature and extent of the emotional impairment or behavioural change that has occurred as a result of the incident in question. The results of the assessment are used to predict how such changes may impact on the plaintiff's social or occupational functioning. This assessment was performed just more than five years following the plaintiff's surgery. The plaintiff subjectively reported severe symptoms of depression on psychometric assessment along with significant symptoms of post traumatic anxiety and the experience of very significant psychological

distress overall.

- (36) When questioned about her mood, the plaintiff acknowledged she is depressed and noted that she feels hopeless and lacks interest and enjoyment in most activities. She has suffered a severe loss of libido and no longer feels feminine or enjoys her own sexuality

anymore. Her low mood appears to be largely a reflection of her ongoing experience of pain and discomfort. Her loss of independence

and inability to participate activities she previously enjoyed, such as dancing and going to the gym contribute to her low

self-esteem.

- (37) The sequelae of the plaintiff's surgery has had a further impact on her social functioning as she noted that she is no longer interested in socialising with others and she appears to have become somewhat withdrawn. Moreover her high levels of irritability have compromised her relationships with her family members and as a result she appears to have become somewhat isolated. With regards to her symptoms of post traumatic anxiety the plaintiff reported that she has developed a fear of medical procedures and is reluctant to subject herself to any further medical interventions or procedures.

- (38) The plaintiff's surgery and its resultant complications were clearly extremely traumatic for her and have had a significant impact on her emotional and behavioural functioning along with her social functioning and self-esteem. Moreover the plaintiff noted that she has suffered several traumatic experiences following this incident with a loss of two of her family members.

- (39) While these events are likely to have further exacerbated symptoms, her low mood and symptoms of post traumatic anxiety can largely be attributed to the surgery in question and its ongoing sequels. From her subjective account she has clearly had a devastating reaction to perhaps moderate complications although the latter must be agreed upon by the medical specialists. If disproportionate which it may well be, this is an indication of the vulnerability of her personality structure and her pre morbid emotional well-being and her lack of resilience to adversity which has led to such a devastating reaction. The trauma was complicated by emotional losses in the form of unexpected deaths of two family members.

- (40) The plaintiff requires psychological intervention in order to address her symptoms of depression and post traumatic anxiety. Individual psychotherapy is recommended. Given the severity of the plaintiff's depressive symptomatology referral to a psychiatrist is further advised for pharmacological augmentation of her symptoms.

- (41) In cross examination Ms Cramer was asked to explain the scores of the plaintiff in the Beck's test. Ms Cramer stated that the plaintiff's responses were also consistent with her clinical presentation and is very consistent with the way she presented in court as well. It is also consistent with the way the plaintiff describes her social functioning and behavioural changes. Thus there are direct consequences in terms of the way the plaintiff lives her life which is not something you expect to find with frank malingering.
- (42) Ms Cramer said she was not in a position to comment on the validity of the plaintiff's physical complaints. Ms Cramer's opinion is that the complaints are the plaintiff's experience and her complaints are consistent. Something like pain and discomfort is a subjective complaint. It is very hard to say you have it or you do not have it or to what extent one has it. It was also Ms Cramer's impression at the time that the plaintiff has become hyper sensitised to the stomach and the wound area and this is a psychological interpretation and not a medical one.
- (43) The plaintiff has become overprotective of the area and to that extent would probably have refrained from doing many things like adjusting her posture and convincing herself that certain things are just not possible anymore. People who tend to have a lot of pain even when their pain heals to some extent they remain protective of the area because they fear further injury or they fear further pain and her interpretation of the plaintiff's complaints is exactly that.
- (44) It was suggested to Ms Cramer that the plaintiff portrays characteristics of a person who is malingering. Her response was that in order to simulate a psychological disorder there is a lot of consistency that has to take place if one wants to effectively simulate a psychological disorder. Secondly, anxiety is not as easy to simulate neither is it easy to simulate tears, for instance. Ms Cramer conceded that it is not impossible to simulate but emphasized that it is not easy to simulate this kind of distress or clinical presentation that comes with anxiety.
- (45) In her interview with the plaintiff, the plaintiff was busy with papers all the time trying to show her certain things but she was completely ineffective in trying to do so. In Ms Cramer's experience, people who have made a study and are malingering, have their facts at their fingertips and reporting symptoms is usually smooth. That is one example. The plaintiff was quite distressed more so than she was at the trial. At no point during the assessment did the plaintiff appear happy. She was tearful, upset and got agitated a number of times with Ms Cramer as well as with the person who administered the tests on Ms Cramer's behalf.
- (46) There is a decline in functioning of people with chronic depression and anxiety and in Ms Cramer's opinion that is what is evident in the plaintiff's case. In Ms Cramer's opinion this is not a case of frank malingering. Frank malingering presents slightly different and there would probably be more of a scattered score and test results with some scales being more elevated, others being less elevated, conveying a particular clinical picture. It is Ms Cramer's opinion that the plaintiff's reaction to what happened to her, was more devastating than

perhaps someone else's would have been. That is not proof of malingering as much as it is proof of the underlying personality structure subjected to trauma and a resilience or lack thereof to adversity. Some people are more resilient than others. For some it is the end of the world and others will carry on. People will react differently. Some people can overcome the same trauma in a different kind of way and look better at the end of it, others not.

EVIDENCE OF MS BERNADETTE PUTTER

- (47) The plaintiff called Ms Bernadette Putter, an occupational therapist who had also examined the plaintiff and prepared a report. She examined the plaintiff on 24 May 2016 and prepared her report which is dated 29 June 2016. She testified that the plaintiff presented as an overweight woman of medium stature. She was dressed neatly. She communicated well in Afrikaans. Emotionally she presented as a euthymic affect yet became tearful on several occasions.
- (48) She noted that the plaintiff struggled to relay exact details and dates and used a paper to make notes on to remember timeframe of events. She was cooperative and followed instructions, however, at times needed external motivation to complete one or more repetitions of a task. Her performance was therefore influenced by self-limiting behaviour which exceeded the accepted limit. Ms Putter recorded that when the plaintiff wanted to give up on a task that she was asked to perform, she formed the view that the plaintiff could have done more.
- (49) The particular test provides for up to 20 percent variance for self limiting limitation which is normal behaviour and between 20 or 33 percent which shows that the patient has exceeded the normal limits. A score of more than 33 percent shows a significant deviation from the normal limits. The plaintiffs results were between 20 and 33 percent and taking her whole clinical picture into account Ms Putter is of the opinion that the result is because of the Plaintiffs fear of pain.
- (50) After two hours in the interview with Ms Putter, the plaintiff started to change her position more regularly and reported to be uncomfortable due to pain over the scar area and her thoracic spine area. One of the tests, the General Health Questionnaire is also a self-reporting questionnaire. The plaintiff tested positive for significantly high levels of psychological distress and therefore Ms Putter recommended psychological intervention. The Pain Questionnaire is also a self-reporting test. The Pain Disability Questionnaire results show a rating of 81 over 150 which indicates a moderate disability.
- (51) The plaintiff's perception of herself is that she suffers from a moderate disability taking all the physical disabilities and pain in consideration. The questions specifically rate functional every day tasks. The Neck Disability Questionnaire was done because the plaintiff reported neck and thoracic spine pain on that day. The plaintiff scored 24 out of 50 which is also seen as being moderately disabled in that regard. The conclusion is that the plaintiffs pain description, her pain ratings, the reported influence thereof on her functioning and her non-verbal pain behaviour on that day of assessment, correlates.

(52) In general the plaintiff's pain seems sub-optimally, manageable with basic analgesics, resting and changing of position. Deference is made regarding the relation or apportionment of the neck, thoracic and bilateral knee pain on the incident in question. Deference is made to the relevant medical experts' reports regarding management of her pain. The plaintiff will additionally benefit from recommendations made by Ms Putter.

(53) A physical and function test was performed on the plaintiff. Observations were made and in addition a standardised test, namely

the Ergo Science FCE was performed. Amongst other reports, the plaintiff reported sensation loss and numbness over the scar area.

Her gait presented as normal. She did however walk in a slow manner and her trunk posture tended to be in a more flexed forward position. The latter increased the longer she walked and the longer she participated in physical assessment. When questioned, she indicated that she does this as it feels as if her scar area "will rip" if she stands up straight.

(54) Just to get to that point, Ms Putter noted that the plaintiff was making use of a poor biomechanical posture throughout the day when she was sitting and standing. She questioned the plaintiff about her posture in the light of the absence of a medical or physical reason causing poor biomechanical posture. The plaintiff's response was that she is aware of her poor posture and feels that she needs to assume such a posture in order to protect her body. This is subjective reporting.

(55) Ms Putter's general observations during the Functional Capacity Evaluation tests were that the plaintiff required external motivation to complete one or more repetitions of a task and her performance was therefore influenced by self-limiting behaviour, which exceeded the accepted limits according to the Ergo Science FCE.

(56) Her self-limiting behaviour is related to her fear of further injury, pain and not knowing to which extent she can "force her body to assume postures". She reported that her hernia "pops out" and furthermore she indicated that "everything, the skin and the muscles across the abdomen feels as if it will tear". She could not comment on the possibility of the plaintiff malingering because she did not see the psychological reports, but confirmed that the fear or re-injuring is an emotional approach to the Plaintiff's injury.

(57) External motivation on her part is what Ms Putter engaged in, whilst trying to get the plaintiff to do more of the movements. The plaintiff would respond that she can do more but is afraid. On systemic evaluation Ms Putter commented that the plaintiff's BMI indicates that the plaintiff is overweight which influences her physical functionality. Her blood pressure was also high on that day and she was told to seek medical attention.

(58) The plaintiff reported that she had pain, discomfort and stretching of the skin when trying to achieve full range of movement. She stopped before doing a full range of movement. The plaintiff has difficulty to get up when she has been lying down without holding onto something and from sitting to standing. She uses her arms where another person can stand up without assistance.

(59) The mobility of her torso was reduced but is still functional. The plaintiff is able to assume a full squat considering the range and movement of her hips, knees and ankles, however, she has to hold onto external support like the bed or the chair for balance of her torso and abdomen is weak. She could not stand up by herself. She had to push against or hold onto something to get up which were indications of weakness in her torso.

(60) The remaining evidence of Ms Putter was similar in nature and highlighted the plaintiff's self-limiting difficulties in performing

various tests. The plaintiff denied cognitive difficulties but presented with emotional difficulties which Ms Putter noted as the

biggest contributor to her current loss of amenities and decline in quality of life. Having heard the evidence of Ms Cramer, Ms Putter stated that she agreed that the plaintiff's emotional difficulties caused her functional limitations.

(61) Consequently it is imperative that the plaintiff seeks psychiatric and psychological intervention. The plaintiff has an emotional

overlay of not being physically able to do certain things. The suggested intervention may assist in her regaining her self-esteem

and body image.

(62) The plaintiff will benefit from physiotherapy as recommended. Ms Putter suggested various special and adaptive equipment to assist the plaintiff. It is unnecessary to deal with this in detail.

(63) In cross examination Ms Putter stated that if the plaintiff is given the recommended assistive devices she cannot say that it will address all of the plaintiff's problems. These devices will however assist to improve her posture and experience less pain and problems, more so if she gets the necessary physiotherapy to improve her strength and posture. The variance in test results is the result of the plaintiff's self-limiting approach. Ms Putter conceded that the plaintiff is not struggling from physical disability but rather psychological limitation.

(64) Ms Putter conceded that according to the plaintiff's records she failed to go for physiotherapy after every surgical procedure.

Consequently, the plaintiff never had the opportunity to strengthen her muscles after surgery. Ms Putter conceded thus that

this is the reason for the plaintiff's current inabilities. The absence of therapy after the surgery is the reason why she became

weaker. The weakness is medically not attributable to the surgery.

(65) Save for what Ms Putter observed in her examination, there is no indication by any medical expert that the plaintiff's core muscles are weakened. Ms Putter conceded that, given that the hernia is not surgery related, the defendant cannot be blamed for the pain. She conceded further that many of the plaintiff's complaints are also not related to the surgery but rather to her failure to rehabilitate her body. Ms Putter agreed that the prescribed assistive devices should only be awarded if it is found that the plaintiff's postural imperfection was caused by the incident.

(66) It was put to Ms Putter that two doctors (not involved in the litigation) indicated that, subsequent to Professor Coetzee's

surgery, the plaintiff is happy with the outcome and she does not have any symptoms. If one compares this to the plaintiff's complaints

to the experts involved in the litigation and quantum an entirely different picture is portrayed. Ms Putter was asked if this does not amount to malingering. Ms Putter could not comment. When asked why she could not comment she replied that she agreed with the opinions of the psychologist and that she is not an expert in identifying cases of malingering.

(67) I asked Ms Putter for purposes of clarity whether in her opinion, the plaintiff's condition would improve if she subjected herself to physiotherapy and perhaps therapy by a biokineticist. Ms Putter agreed that this would help but could not confirm that such therapy would resolve all of her problems. There would be an improvement which can result in either resolving or improving the quality of the plaintiff's life and functionally with less pain.

EVIDENCE OF MS LEA NGUBANE

(68) Ms Ngubane expressed the desire to testify in Afrikaans despite her mother tongue being IsiZulu. Ms Ngubane testified that she is employed by the plaintiff for several years. During 2011 when the plaintiff was hospitalised and returned home she took care of the plaintiff. She attended to every need of the plaintiff who could not "fend for herself". One Qom Koos brought the plaintiff home after the operation. After eight days the plaintiff's son took her to the doctor.

(69) Subsequently one Helgaard assisted the plaintiff with transport to the doctor. She denied that the plaintiff drove herself. She confirmed having seen the wound which had opened. She confirmed that the plaintiff was active, would cut the grass and do odd jobs around the house before the operation.

(70) The plaintiff then closed her case.

GETUIENIS VAN MEV JANET VAN DEN BERGH

- (71) Die verweerder het vir Mev Janet Van den Bergh geroep wie getuig het dat sy vir die verweerder in sy praktyk werk sedert 16 September
2010. Sy ken die eiseres and onthou haar goed. Sy het verder getuig dat die eiseres haar gebel het vir 'n afspraak met die verweerder wat gemaak is vir 5 Julie 2011, op daardie datum 'n week later. Die operasie het plaasgevind op 12 Julie 2011.
- (72) Daar was opvolg besoeke twee weke na die operasie. Sy het gereeld vir die eiseres koffie aangebied en een oggend het die eiseres teenoor Mev Van den Bergh bely dat sy self bestuur het. Sy het vir die eiseres gese dat dit die rede is waarom haar wonde nie genees nie, en die eiseres het vir haar mooi gevra om nie vir die dokter te se nie. Dit was gedurende die tweede week na die operasie.
- (73) Die eiseres het vir Mev Van den Bergh verseker dat sy kussings om haar pak, dat sy stadig ry, haar kar sag ry en dat sy sorg dat sy nie by rooi verkeersligte hoef te stop nie. Op daardie stadium het die wond al oopgegaan. By een geleentheid het 'n persoon die eiseres vergesel na die besoek wie aan haar voorgestel is as die eiseres se vriend. Sy was nie by die verweerder se praktyk betrokke in 2009 nie en het eers die eiseres in 2011 ontmoet. Sedert haar indiensneming by die verweerder het sy nog nooit iemand geskakel en uitgenooi om chirurgie te ondergaan nie. Die verweerder het haar nog nooit versoek om so op te tree nie.
- (74) In kruisondervraging het Mev Van den Bergh verduidelik dat die eiseres met 'n oop wond by die spreekkamers aangekom het, maar sy het gebukkend geloop. Sy het nie vir die verweerder vertel dat die eiseres self bestuur nie omdat die eiseres belowe het om dit nie weer te doen nie, ten spyte van die feit dat die wond nie genees nie. Mev Van den Bergh het toegegee dat sy 'n plig het teenoor die verweerder om horn in te gelig het oor die feit dat die eiseres self bestuur het asook lojaal teenoor horn is. Sy het getuig dat die eiseres verduidelik het dat sy nie iemand gehad om haar te bring nie, en sy self by dokter moes uitkom.
- (75) Die eiseres het volgens Mev Van den Bergh gebukkend ingeloopt soos na 'n normale "tummy tuck", maar sy het nie gekla van pyn of enigiets nie. Sy het ten sterkste ontken dat sy die eiseres gebel na die eerste besoek om in te kom vir 'n operasie. Sy het die eiseres wel probeer bel om te sien hoe dit met haar gaan, maar die eiseres het glad nie haar oproepe beantwoord het nie. Mev Van den Bergh het toegegee dat dit haar plig was om die verweerder in te lig dat die eiseres self bestuur en dat sy die verweerder se voorskrifte verontagsaam.
- (76) In herondervraging het Mev Van den Bergh verduidelik dat sy ten alle tye by was toe die verweerder die eiseres behandel het en dat die wond nie heeltemal oop was nie, maar dat dit 'n gaatjie was wat oopgegaan het ongeveer so groot soos 'n 50 sent muntstuk, in die middel van die eiseres se maag. Die verweerder het die wond behandel en Mev Van den Bergh het geglo die wond sal genees.

EVIDENCE OF DOCTOR VIVIENNE BLASTA JANDERA

(77) The defendant then called Doctor Vivienne Blasta Jandera. She testified that she prepared a medico legal report in this case. She examined the plaintiff on 12 July 2016. Her report pertains to the scarring resultant from abdominoplasty surgery performed on the plaintiff on 12 July 2011 and the subsequent post-operative complications which occurred. Under the heading "Present

Complaints" she noted the following:

- (1) that the patient stated she is unhappy about the final appearance of the scar. She indicated that she will never be happy with the result and feels that Professor Coetzee did his best to correct the problem as far as possible.
 - (2) She complained that she struggles to get up from the floor or from a chair. She finds it difficult to turn and she has no feeling in her lower abdomen. She claims that she moved from a 240 square metre house to a bachelor flat as she could not physically maintain the house. She finds her loss of physical mobility difficult to deal with. She is upset that she cannot play with her grandchildren as it is difficult for her to get up from the floor.
 - (3) She says that she is depressed and her whole outlook on life has changed. Even though she has been divorced for 11 years, she has not been involved in any relationships. Much of her feelings are directly related to the physical symptoms indicated above. She is a bookkeeper and does books for clients but has passed on a lot of work to her son, as she is too tired.
 - (4) The plaintiff complains of difficulty getting up from a sitting position as well as turning her body. She personally witnessed this when the plaintiff struggled to get out of her jeans and showed difficulty getting on and off the examination couch.
- (78) Doctor Jandera explained that the plaintiff's depression is directly related to her physical symptoms. She explained further that the plaintiff felt that her quality of life had changed and that she was unable to do some of the things which she could do before the surgery. She complained that she found some loss of physical mobility difficult to deal with.
- (79) Doctor Jandera reported at page 49 of her report the following: "She was casually but neatly dressed and she answered all questions helpfully and was polite. She appeared despondent though. I measured her height at 1.68 metres and her weight at 96.7 kilograms. The following scars were present. She had a 63 centimetre [indistinct] lower abdominal scar. There was a central area of scarring which measured six by seven centimetres. This had healed and was a little indented and there was widened scarring around the umbilicus but the contour of the abdomen was good by which I mean flat and I took photographs of the patient's abdomen on that day and enclosed it with my report."
- (80) Doctor Jandera then referred to the photographs taken by Professor Coetzee prior to the surgery and she then indicated a definite

contour deformity with excess tissue in the upper abdomen as compared to the lower abdomen and mentioned that this is a sub optimal

aesthetic result. She explained that although the wound had all healed, the plaintiff did not have a completely flat contoured

abdomen as one would expect after an abdominoplasty. There was a central fullness above the umbilicus and it was flat below the

umbilicus.

- (81) Doctor Jandera commented that the result obtained by the revision surgery of Professor Coetzee is good. The contour of the abdomen is flat. There is scarring present, quite faded, but that it will not be possible to surgically improve the result because you cannot excise any further tissue in that area to improve the scar.
- (82) Doctor Jandera testified with reference to her report that the plaintiff suffered from delayed or complicated wound healing post operatively in all three operations performed by three different surgeons. She explained this by pointing out that sometimes there are difficulties in wound healing with patients and some patients heal differently and she noted with both the revision surgery by Doctor Van Heerden and the follow up surgery by Professor Coetzee (including the first surgery), that there were some difficulties in healing.
- (83) Doctor Jandera found it difficult to explain why the plaintiff was struggling to get out of her jeans and to get on and off the examination table. She explained that an abdominoplasty usually strengthens the patient's core by opposing the rectus muscles

correctly. The hernia complained of by the plaintiff would also give similar symptoms to that complained of by the plaintiff. When an abdominoplasty is performed on women who have borne children, it often happens that the two rectus muscles separate and there is an area which forms and requires to be repaired as part of a tummy tuck. The relevant literature dictates that it either has no effect on stability, or it can actually improve the stability because a circle of core for the back is created. When this procedure is performed the edges of the rectus muscles are sutured together along its length to restore the circle around the patient but at no point is the vertical distance of that muscle shortened.

- (84) Dr Jandera reported that the physical difficulties complained of by the plaintiff cannot be explained following an abdominoplasty and it is therefore recommended that the plaintiff be evaluated by an occupational therapist. She explained her recommendation from a plastic surgeon's point of view and the experience that she has had with previous patients. She said that she has not had patients with similar complaints to those of the Plaintiff. Most of her patients who have had tummy tucks walk with a slight forward posture but this clears up after a week and there is no damage done to the muscles by such a procedure. The absence of an explanation for the plaintiff's physical complaints are concerning to Dr Jandera.

(85) Doctor Jandera and Doctor Robson (the plaintiffs expert) agreed in a joint report that the plaintiffs symptoms are not incident related. The plaintiff appears to be clinically depressed and has been placed on medication by a general practitioner. The plaintiff has not seen a psychiatrist or psychologist. Dr Jandera opined that the plaintiffs depression has a debilitating effect on her quality of life which seems out of proportion to the abdominal scarring but might be related to physical symptoms.

(86) She explained that she was concerned that the plaintiff had so much physical pathology she complained of, following her physical

inability to do things, which did not fit in with the operation in issue. This is why she recommended that she be seen by an expert in psychology or psychiatry.

(87) Dr Jandera commented on the plaintiff's complaint about the tautness of the skin around her abdomen by stating that during an abdominoplasty one opens the skin flap and then brings the skin down and sutures it. Skin has the capacity to stretch. That is why for example tissue expansions are used to reconstruct burn defects. Pregnancy in women stretches the skin. During normally activity skin stretches in relation to the movement of the body. Dr Jandera was of the opinion thus that the plaintiff's complaints in this regard could not be the result of the surgery.

(88) The cross examination that followed was aimed mainly at the operation report which went missing and which Dr Jandera had not seen, together with the fact that no one performed a sonar or an MRI scan on the plaintiff. Dr Jandera saw the notes that were provided to her as well as the nursing notes which shows no abnormalities. Dr Jandera confirmed that the sonar examination would not reveal any muscle damage although one could see the presence of the muscles and whether they were opposed to each other.

(89) Dr Jandera confirmed that a clinical examination would also reveal whether the repair is intact. She examined the plaintiff clinically while the plaintiff lay on her back by placing tension on the rectus muscles and raising her head from the pillow. These tests cause the muscles to tense and one can digitally palpate whether there is a large gap or not. Dr Jandera did not feel such a gap and the results of her examination were normal.

(90) In re-examination Dr Jandera confirmed her joint report with Dr Robson in which they both agreed that the result of an abdominoplasty

on the core muscle would essentially be neutral. The possibility exists of increasing the strength of the core, but this would be negligible. A decrease in the core strength would be similarly unlikely. She also cannot see any logical reason how the operation

could contribute to the plaintiff's inability to get up from a sitting position or from the floor. Her abdominal muscles were not

damaged as noted earlier and her core strength would have remained the same. The operation did not result in her reported symptoms. This is also the opinion of the plaintiff's own expert, Doctor Robson.

(91) The defendant closed his case.

PLAINTIFF'S CLOSING ARGUMENT

(92) The plaintiff's counsel presented argument along the following lines. It was submitted that it is common cause that there were

complications with the healing of the wound. Secondly, the defendant did not inform the plaintiff of the well-known normally associated

complications with this type of operation. This is what the plaintiff testified which was undisputed. According to Dr Robson's and Dr Jandera's reports, the possible complications are well known.

(93) The plaintiff testified, and this was not disputed, that she was not informed about the possible complications, otherwise she would not have undergone the operation. As a result of the complications two further operations were necessary to remedy the now evident complications. As a result the plaintiff is physically and permanently scarred and she suffered extreme pain during the course of the operations. The plaintiff's counsel conceded though that despite the scar being unsightly as a result of the second and third operations there would by the very nature of the procedure, have been a scar of approximately 64 centimetres.

(94) The plaintiff's counsel submitted that the plaintiff has been suffering from extreme pain, suffering, loss of amenities of life, emotional trauma and emotional distress to date. The plaintiff is emotionally scarred today. The plaintiff's counsel submitted that the emotional sequelae were foreseeable in that the defendant should have foreseen that if complications arise, they could lead to emotional sequelae culminating in psychological block inside her head preventing her from moving as freely as she previously could.

(95) The plaintiff's counsel referred me to the case of Road Accident Fund v Sauls 2002 (2) SA 55 (SCA) wherein a woman who witnessed her fiancée being struck by a motor vehicle, on appeal, successfully claimed damages for emotional shock and distress. The plaintiff's counsel submitted that in the case he referred to, foreseeability was not an issue but negligence was the key factor. I do not follow the reasoning of these submissions but will return to this aspect under the discussion on general damages hereunder.

(96) The plaintiff's counsel, despite acknowledging that the experts on both sides were ad idem that the plaintiff is physically capable of doing the things she testified she cannot do, maintained that the mere fact that the defendant agreed that the plaintiff needs to go for psychological treatment, is an admission that she has a psychological problem. The plaintiff's counsel argued further that the defendant should have informed the plaintiff of the

possible consequences and relied upon the principle of informed consent. He also submitted that the defendant should have taken the plaintiffs BMI (body mass index) into account and the defendant should further have foreseen that there would be consequences because the plaintiff was overweight, and should not have performed the operation.

(97) The plaintiffs counsel submitted that the principle of *dolus eventualis* finds application. The question of liability was settled between the parties and it is difficult to conceptualise the concept of *dolus* playing a role in determining causality and damages, which are issues for determination.

(98) The plaintiff claimed general damages, past medical expenses and future medical expenses. This is set out in paragraph 10.1 of the particulars of claim. The plaintiffs counsel referred me to the case of *De Jongh v Dupisani* NO 2005 (5) SA 457 (SCA). At the heading thereof the following is stated:

(1) "Skadevergoeding

- Omvang van vir persoonlike beserings, algemene skade: Stygende tendens vir toekennings duide/ik waameembaar. Dit kan nie toegeskryf word aan die siening dat suinigheid met vergoeding nie in die samelewing bestaan nie.

Konserwatisme by die toekenning van algemene skadevergoeding het sy oorsprong in die behoefte dat billikheid teenoor die verweerder ook moet geskied.

Vennelde stygende tendens verg nie 'n vennenigvuldiging van vroeëre toekennings met voorafbepaalde faktor nie."

(99) The plaintiff's counsel submitted that as a result of the heading of the said case he is unable to point the court to any particular

parameter in respect of general damages. However he quoted from the said case as follows:

"Die tendens, slegs een van oorwegings wat die hof by die uitoefening van sy diskresie geregtig is om in ag te neem wanneer na vorige toekennings verwys word."

"Die styginge tendens vir toekennings vir a/gemene skade in die meer onlangse verfedes is in uitsprake duidelik waameembaar."

"Die effek van voonnelde waameembare tendens vir toekennings in a/gemene skade is egter weereens nie met matematiese presiesheid bepaalbaar nie."

"Die hof se antwoord op die verweerder se gelykluidende beroep op toekennings in vorige beslissings was hoofsaaklik dat daar in die jongste beslissings 'n neiging by party van ons howe te bespeur is om groter bedrae as algemene skadevergoeding in geval van ernstige beserings toegeken as wat soms in die verlede die geval was en..."

"...het die verhoorhof voorgedaan. Hierdie opwaartse neiging in toekennings vir algemene skadevergoeding in ernstige gevalle is myns insiens te verwelkom."

In ernstige gevalle, soos die onderhawige, is skadevergoeding 'n powerre plaasvervanger vir die menigte genietinge, plesier en vervulling wat 'n gesonde mense die lewe aanbied.

Dit betaan nie die beskaafde samelewing om in verdienstelike gevalle daarmee suinig te wees nie".

- (100) The plaintiff's counsel submitted that the court should use its discretion to determine the award for general damages with reference to the said case and with all the prevailing circumstances in mind. He submitted that an amount of R500 000.00 is an appropriate award for general damages. In respect of the balance of the plaintiff's claim, the figure submitted by the plaintiff's counsel, regard being had to the agreement on the merits, is R244 766.00 (less 10%).

DEFENDANT'S CLOSING ARGUMENT

- (101) The defendant's counsel in her argument submitted that even if there were no complications, there would have been scarring by the very nature of the operation. The only evidence in this regard is that of Dr Jandera who conceded that the scar is a little bit higher than it should or would have been. She submitted that the only evidence was that the scarring is a little higher than it would normally have been but there was no evidence that the scarring is unsightly.
- (102) There is nothing physically wrong with the plaintiff. On the aspect of malingering, the defendant's counsel submitted that despite the evidence of Dr Kramer, who doubted whether the plaintiff was malingering, there is sufficient evidence before the court to sustain a contention that the plaintiff is malingering. Dr Cramer's expert opinion may not be wrong, from an expert's point of view, but the factual assumptions underlying the opinion are wrong.
- (103) Dr Cramer testified that she does not believe that the plaintiff is malingering because the complaints or the difficulties were very consistent throughout. The defendant's counsel relied upon the reports of the doctors who were not involved in this litigation, Dr Van Heerden and Dr Van Biljon, both of whom indicated that after treatment by Prof Coetzee the plaintiff was satisfied and symptom free. The reports in support of the plaintiff's case sketch a different picture.
- (104) The defendant's counsel argued that the only thing wrong with this plaintiff is the fact that she had two additional surgeries and she is now left with a more unsightly scar because it is higher. Psychologically, what was discovered by the psychologist, is nothing but malingering. This is of course an issue of credibility which is reserved for a court to determine.
- (105) The defendant's counsel argued that the proposed depression is a phenomenon usually found in cases like this where plaintiffs actually feign symptoms of fatigue, not enjoying life anymore, crying when they have to, and physically not being able to do certain things. She

argued further that when the psychologist does not diagnose malingering he/she will look at the symptoms and say the plaintiff suffers from depression or post traumatic stress disorder. She conceded that there is no evidence to support an argument for malingering but argued that in the absence of evidence of a physical limitation on the part of the plaintiff one should bear in mind that she may be malingering.

- (106) The defendant's counsel argued further that there is nothing psychologically wrong with the plaintiff based on the evidence

presented and if the court should find that the plaintiff is psychologically compromised, then the issue of foreseeability requires scrutiny. Firstly, the contention that the defendant should have proved that Dr Meyer could not have foreseen the complications

of the operation is incorrect. It is the plaintiff who bears the onus.

- (107) The plaintiff should have proved that Dr Meyer could have foreseen the complications and that the complications could have emotionally scarred the plaintiff to the extent she contends to be. There is no such evidence before the court. The normal complications following surgery, like the sepsis or the opening of the wound, would have been foreseeable but not the psychological limitations as contended by the plaintiff.

- (108) The plaintiff's argument that if the defendant has made provision for the treatment of the psychological difficulties, it implies that the defendant agrees that the plaintiff is indeed so compromised, is incorrect. The provision made is based on a postulation that if the court should find that the plaintiff is psychologically compromised as contended, and that such damages flow from the surgery, then the defendant agrees to the plaintiff undergoing such treatment on the basis that once she receives such treatment she can go on with her life. That is why a figure was calculated with reference to the relevant reports and actuarial calculation.

- (109) With regard to the assistive items suggested by the occupational therapist the defendant's counsel argued that the defendant is willing to provide these items however if the plaintiff's psychological issues are not addressed then none of the items suggested by the occupational therapist will assist the plaintiff. The defendant's counsel argued by way of example that in cases where people are in so much pain that it leads to depression, one cannot adopt the approach that by addressing only the depression, the pain

will also subside.

- (110) On this basis therefore the defendant contends that the items suggested are of no value unless the depression is addressed. The defendant's counsel argued that the items suggested are pointless if the depression is not addressed, but did confirm the therapist's

evidence that the suggested particular mattress and other items would assist in relieving the plaintiff's pain, assist in the plaintiff's

posture and assist the plaintiff in rolling over in bed.

- (111) The plaintiff's counsel referred to amounts in respect of the occupational items suggested on page 132 of the relevant bundle B. Item 17 thereon relates to vehicle maintenance provision. The occupational therapist conceded that this item must be deleted.

Therefore an amount of R137 446.00 must come off from the total of R244 766.00 as well as the amount of R34 000.00 for the psychotherapy

leaving a balance of R73 320.00 before the 10% is deducted in respect of the settlement of the merits.

- (112) With regard to general damages the defendant's counsel similarly could not find case law on abdominoplasty in South Africa. The defendant's counsel contended that she considered as a basis an amount of R500 000.00 and then applied thereto the circumstances and award in *Smith v Road Accident Fund* (Arbitration Forum: Case No. AF001/6/928) dated 31 October 2003, wherein the decision of *RAF v Marunga* 2003 (5) SA 169 (SCA) was considered. The plaintiff was a 5 year old boy with the following injuries as per the headnote:

"An avulsion injury and traumatic amputation of the entire left arm, severe soft tissue damage, rendering re-plantation of limb impracticable. Boy sustaining severe pain, shock and distress as a result of the horrific injury. Hospitalised initially for 2 weeks, but readmitted to hospital 6 months later for revision of amputation stump and removal of most of the residual humeral head. Absence of stump rendering chances of functional prosthesis in the future poor, but a non-functional prosthesis, resembling a human arm, could be considered purely to improve the appearance and boost the self-image.

Behavioural problems in the form of aggression and withdrawal. Psychological intervention may be required, etcetera. What we have here is a permanent disablement." The award for general damages was R250 000.00 per Adv P.A. Corbett acting as an arbitrator. The defendant's counsel submitted that in today's values the award is equal to R500 000.00.

- (113) The defendant's counsel also referred to the decision of *Mqutwa v Road Accident*, Eastern Cape High Court, case number 3178/2006, per Jones J, date of judgment 7 May 2010 where an 11 year old scholar sustained the following injuries: An 11 year old scholar in Grade 3, damage to the left hand, consisting of serious orthopaedic and de-gloving injury, involving loss of bone and soft tissue and skin. He had a traumatic amputation of the 4th and 5th fingers, followed by surgical amputation of the 4th and 5th metacarpal bones through the level of the joint where the metacarpal joints of the hand meet, the metacarpal bones of the wrist. In effect he lost two fingers and half of the palm of his hand. This injury resulted in serious permanent functional disability, although he is right handed. Not only in respect of normal daily living, which involved bilateral activity of hands, where disability is described by slight to moderate, but also in respect of his enjoyment of amenities of life and his capacity to earn a living. It was found that he would suffer significant sporadic discomfort for the rest of his life. The court awarded R250 000 in 2010 which is equivalent to today's

value of R343 000.00.

- (114) The defendant's counsel lastly referred to the case of *Mance v Road Accident Fund Cape of Good Hope Provincial Division: Case No 8339/99*, date of judgment 7 June 2001 wherein the plaintiff sustained the following injuries: A young man in his twenties suffered a mild concussion, amputation of the distal phalanges of the middle and ring fingers of his left hand, dislocation of both left and right shoulders, fracture of the left tibia plateau, fracture of a number of ribs as well as injuries to the left arm, right hand and right foot. He also suffered a fat embolism as well as compartment syndrome in the left calf. The important part of this judgment is that the treatment including initial hospitalisation from 11 August 1994 to 6 September, followed by intensive therapeutic rehabilitation, crutches used for about 1 month, then a calliper to support the left leg for a further 2 months. At the time of the trial the plaintiff had already undergone 11 operations and he was still faced with 2 operations to improve extensive and unsightly scarring, plus further operations to improve and ultimately replace the left knee and right shoulder. The pain in the right shoulder would be a significant factor and there would also be pain in the left knee and back. He was left with permanent physical impairment, causing reduced earning capacity. In this case the court in 2001 awarded general damages in the sum of R85 000.00 and in today's value is equivalent to R197 000.00.
- (115) The defendant's counsel argued that, based on the cases referred to, the amount that the plaintiff would be entitled to should be R150 000.00. She then argued that an amount of R250 000.00 is reasonable which would include the cost of the psychotherapy and any other costs applicable. The R150 000.00 for general damages is submitted as being reasonable on the basis of the *Mqutwa supra* in which the injuries were far more serious and the current value of the general damages in that case is R343 000.00. The plaintiff's submission of R800 000.00 is unrealistic under the circumstances and not proportionate to the injuries in the current matter, regard being had to the cases referred to above.
- (116) The plaintiff's counsel in re-address relied on the fact that no evidence was led on the plaintiff malingering and this was mere speculation. Furthermore, the reliance upon the word "simptoomvry" used by Dr Van den Heever when he saw the plaintiff in 2016 show that that there was nothing wrong with the plaintiff's wound and not that there was nothing wrong with the plaintiff in total.
- (117) The plaintiff's counsel conceded that the report of Dr Van Heerden was filed by the plaintiff herself and if there was any ambiguity this would be on the plaintiff to explain. One cannot simply ascribe an interpretation to a word from the bar without leading evidence to support such interpretation. The authenticity of Dr Van Heerden's report was not contested however if the defendant wished to ascribe an interpretation to anything therein contained, she could have called Dr Van Den Heever to furnish such explanation in evidence, but did not do so.

JUDICIAL REASONING

- (118) The issues to be decided: which of the sequelae complained of arise from the incident and complications arising therefrom and what damages, if any, are to be awarded. During preparation of this judgment I conducted my own research to establish whether there are comparable cases on abdominoplasty to consider. I must at this stage mention that at the commencement of the trial, I was advised by both counsel that only the documents referred to by the parties must be considered. In being so informed, both counsel indicated that the court file is large and voluminous and that as a result, only the relevant parts thereof were handed to me. Included in this bundle were the pleadings.
- (119) In my research I came across two articles on cosmetic surgery, one bearing the heading "COSMETIC SURGERY AND RESPONSIBLE PATIENT SELECTION - DOES A LEGAL DUTY TO SCREEN PATIENTS EXIST?" by Hanneke Verwey and Pieter Carstens, both associated with the University of Pretoria. The second article bears the heading "MEDICAL MALPRACTICE AND COMPENSATION IN SOUTH AFRICA" by LC. Coetzee and Pieter Carstens, Chicago-Kent Law Review Volume 86 Issue 3 June
2011. My attention was immediately drawn to the discussion of the two distinctly different causes of actions against medical practitioners, namely an action based on contract as opposed to an action based on delict (duty of care).
- (120) Having reason to return to the plaintiff's particulars of claim I formed an initial view that the plaintiff's claim may very well be based on contract and that, if indeed so, the plaintiff may not be able to claim general damages in a claim based on contract. See: Administrator of Natal v Edouard [1990] ZASCA 60; 1990 (3) SA 581 (AD). Having considered the Edouard case, I consider it appropriate, if indeed not obligatory, given the opportunity and generally the courts' constitutional duty to develop the common law, if it should appear necessary.
- (121) Before dealing with this aspect I addressed a memorandum to both counsel stating the following:
- "I have considered the above case in detail following two days of trial and am almost ready to hand down judgment. However, in re-considering the basis of the plaintiffs claim as pleaded, I note that the claim is based on breach of contract. If I am correct and the particulars of claim in my possession are indeed the correct particulars (meaning that an alternative claim on the basis of delict has not been pleaded) then the plaintiff may not claim non-pecuniary damages. The purpose of this communication is to request the following by way of short heads of argument:
1. That the parties confirm that the plaintiffs claim is indeed based on contract, and if not, to advise me on what the correct position is;
 2. Whether the court is at liberty to mero motu take note of the plaintiffs claim as pleaded (neither party argued this question before me) and to exclude a claim for general damages on this basis."

- (122) The plaintiff's particulars of claim are based on an alleged agreement between the plaintiff and the defendant containing material express, implied alternative tacit terms thereof. The plaintiff alleged that the defendant, by virtue of the agreement and the existence of a doctor patient relationship which had come into being, was under a legal duty to comply with his obligations terms of the agreement. The particulars also allege lack of informed consent and the defendant, in breach of his legal obligations, was negligent in one more or more ways culminating in damages arising from the defendant's negligent breach of his legal duties.
- (123) Generally speaking, a breach of duty occurs when one person has a duty of care towards another person, but fails to live up to that standard. A person may be liable for negligence in a personal injury case if his breach of duty caused another person's injuries. When considering whether a defendant in a delictual case has breached his duty of care toward the plaintiff, the court would ask several questions, inter alia, including:
- (1) Did the defendant have a duty of care toward the plaintiff? If so, was it a duty of reasonable care, or was it based on professional liability, or another type of relationship between the plaintiff and defendant?
 - (2) Did the defendant use the same amount of reasonable care that another person in his position would have used to prevent harm?
 - (3) Did the defendant foresee the risk of harm to the plaintiff, or should he reasonably have foreseen it?
 - (4) What kinds of alternatives were available that might have prevented the harm?
 - (5) Was the burden of using safer alternatives considerably heavier than the risk involved in not using them?
- (124) No single one of these questions is enough to establish that a breach of duty of care did or did not happen. Rather, in my view, the courts consider them together, applying them to the specific facts of a personal injury or other delictual case in order to determine whether a breach of duty occurred. In a standard negligence case, a breach of duty usually occurs when a person fails to act with the same reasonable care an ordinary person would use in the same circumstances. This standard changes slightly in certain types of personal injury cases, however.
- (125) For instance, in a medical malpractice cases, the question is not whether a medical professional acted as a reasonable ordinary

man-on-the-street would, but whether the medical professional acted like a reasonable medical professional, with the same training and knowledge, would have acted. In the law of delict, a duty of care is a legal obligation, which is imposed on an individual requiring adherence to a standard of reasonable care while performing any acts that could foreseeably harm others. It is the first element that must be established to proceed with an action in negligence.

(126) The claimant must be able to show a duty of care imposed by law which the defendant has breached. In turn, breaching a duty may subject an individual to liability. The duty of care may be imposed by operation of law between individuals with no current direct relationship (contractual or otherwise), but eventually become related in some manner, as defined by common law.

(127) Duty of care may be considered a formalisation of the social contract, the implicit responsibilities held by individuals towards

others within society. It is not a requirement that a duty of care be defined by law, though it will often develop through the

jurisprudence of common law.

(128) I have had regard to the heads of argument furnished by both parties and considered the question of breach of a legal duty as opposed to breach of a duty of care. Although, in my view, the particulars of claim do not clearly set out a cause of action based on breach of a duty of care, but focuses mostly on the contract between the parties, the defendant admitted in his plea that a duty of care existed and denied breach thereof on several grounds.

(129) The question of lack of informed consent was not contested by the defendant and it must consequently be accepted that there was not informed consent. Moreover, the parties approached the court and throughout the trial continued on the basis that the cause of action was indeed based on contract and a breach of duty of care. Given these considerations, I am of the view that I should exercise my discretion in favour of the plaintiff is answering the question the question whether she can claim general damages. In my view, the agreement on the merits and the fact that the defendant did not contest the lack of informed consent disposes of the necessity to examine the issues any further.

(130) I find support for my conclusion in the following: The parties to litigation are limited to their pleadings. A party pleading cannot be allowed to direct the attention of the other party to one issue and then at the trial attempt to canvass another. See: *Minister of Agriculture and Land Affairs v De Klerk* 2014 (1) SA 212 (SCA). Pleadings are there for the court and not the court for the pleadings. It is thus the duty of the court to determine the real issues between the parties and provided that no prejudice is caused to any party, to decide the case on the real issues. See: *Imvula Quality Protection (Pty) Ltd v Loureiro* 2013 (3) SA 407 (SCA) at 423 D-E.

(131) The court has a wide discretion. See: *Robinson v Ransfontein Estates GM Co Ltd* 1925 AD 173 at 198. The court must look at the substantial issue between the parties and not blindly follow the ipsissima verba of the pleadings. See: *Shill v Milner* 1937 AD 101 at 105. Having said so, the Appellate Division, as it then was, has warned that parties should not be encouraged to rely on the court's readiness to consider and deal with unpleaded issues. See: *Middleton v Carer* 1949 (2) SA 374 (A). The cardinal rules pertaining to pleadings remain

and should be properly observed and the trial should not be allowed to become a "free for all" with complete disregard to pleadings.

- (132) A word of caution ought to go out to practitioners on the potential risks in pleading a case incorrectly and the consequences that may follow in particular circumstances. All that remains to decide is whether the plaintiff has proven sequelae as a result of the procedure and the damages which she has claimed. My enquiry, *mero motu*, is justifiable under these circumstances. I am of the view that judges must apply the law and even if the litigants do not raise

legal issues at the hearing of a case, this does not preclude the presiding judge from considering and applying the law.

- (133) I now turn to the heads of damages. The first claim which has been identified and quantified is for psychotherapy. In my view, given all the prevailing circumstances, the plaintiff would benefit vastly from psychotherapy and I have no hesitation in awarding the amount of R30 600.00 (40 sessions at R850 per session less 10% in respect of the merits) for this claim. The amount has been calculated by the actuary and the figure is common cause between the parties.

- (134) The question of the assistive items suggested by the occupational therapist presents more of a problem if one adopts the defendant's

stance that no matter what items the plaintiff is supplied with, she will not benefit from these without the benefit of psychotherapy. In my view the two go hand in hand. The plaintiff is compromised and it would be a futile exercise to determine which part of which therapy will benefit most. The occupational therapist testified that in her view the plaintiff will benefit and I accept her testimony as such. In the premises the plaintiff is entitled to an award of R65 988.00 (R210 766.00 less R137 446.00 agreed between the parties, less 10% in respect of the merits) for this part of her claim.

- (135) The parties informed me on their agreement in respect of past loss of medical expenses which was agreed at R114 000.00 (R126 666.67 less 10% in respect of the merits).

- (136) In the light of my finding that the plaintiff's claim is indeed based on a breach of a duty of care, for reasons advanced, I now turn to the general damages. The principles to be applied when assessing damages for pain, suffering, discomfort and loss of amenities of life were dealt with in the case of *Smit v Road Accident Fund*, reported in "The Quantum of Damages in Bodily and Fatal Injury Cases", Corbett & Honey, Volume VI, page A4-188. Makgoko J said the following:

".....Arriving at an appropriate award for general damages is never an easy task. The difficulty in placing monetary value on pain and suffering, loss of amenities of life and disability, is described by Gauntlett, the learned author in Corbett, *The Quantum of Damages* Vol. 1, 4ed, at pages 4-5 as follows:

'In determining the award of damages to be made under the heading general damages there are of course no scales upon which one can weigh things like pain and suffering and loss of amenities of life, nor is there a relationship between either of them and money which makes it possible to express that in terms of money with any approach to certainty. The broadest general consideration and the figure arrived at must necessarily be uncertain, depending upon the judge's views of what is fair in all circumstances of the case. (Sandler v Wholesale Coal Suppliers Ltd 1941 AD 194 at 199.)'

(137) And further: " The purpose of awarding general damages is to compensate a claimant for the pain, suffering, discomfort and loss of amenities of life to which he or she has been subjected as a result of the particular injuries that were sustained. Although the determination of an appropriate amount in this regard is largely

a matter of discretion, some guidance can be obtained by having regard to previous awards made in comparable cases. Past awards in comparable cases afford a useful guide in determination of general damages. Awards in previous cases can, however, only offer broad and general guidelines in view of the differences that inevitably arise in each case. The process of comparison is not a meticulous examination of awards, and should not interfere upon the court's general discretion (Protea Assurance v Lamb 1971 (1) SA 530 (A) at 535H-536A). The previous awards should obviously be updated to present day values in order to properly serve as a basis for comparison. In making such an adjustment, one should be mindful of the fact that, whereas it is permissible to have regard to the general depreciation in the value of our currency by utilising the consumer price index (CPI) a slavish adherence thereto may lead to undesirable results."

(138) The plaintiff testified that the defendant had not informed her of the possible complications that may occur. This evidence was not contested. No documents were presented at the trial to show informed consent on the part of the plaintiff. The defendant did not testify on this issue. Given all the prevailing circumstances, including the further surgery required and the sequelae thereof, I am of the view that an amount of R200 000.00 is an appropriate amount for general damages.

ORDER

(139) In the premises I make the following order:

- a. The defendant is ordered to pay the sum of R417 920.00 to the plaintiff.
- b. Such amount shall be paid into the trust account of the plaintiff's attorneys, namely G. P. Venter, Standard Bank of South Africa, Hatfield Branch Code 011545, Account Number 012 543 519.
- c. The defendant is ordered to pay the plaintiff's taxed or agreed costs of the action, which costs shall include the costs of the medico legal reports, combined reports, consultations, reservation and qualifying fees, if any, of the expert witnesses Bernadette Putter, Annelies Cramer, Hendrika Kraehmer, Dr R Robson and G W Jacobson.

G. T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

DATE: 6 FEBRUARY 2017

Representation for Plaintiff:

Counsel: G. C. Botha S. C.

Instructed by: G. P. Venter Attorneys

Representation for Defendant:

Counsel: M. Van Antwerpen

Instructed by: MacRobert Attorneys

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