

SOUTH AFRICA / JUDGMENT

W v Deist (2013/15818) [2018] ZAGPJHC 582 (11 October 2018)

[2018] ZAGPJHC 582

COURT

South Gauteng High Court, Johannesburg

BEFORE

MAKUME

CASE / FILE NUMBER

2013/15818

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2013/15818

In the matter between:

A W Plaintiff

and

MARK BRENDAN DEIST Defendant

J U D G M E N T

MAKUME, J:

- [1] The Plaintiff A (W) an adult male businessman born on the [...] 1959 is suing the Defendant Dr Mark Brendan Deist (Dr Deist) a specialist ophthalmic surgeon for damages pursuant to the corrective laser eye surgery performed on him by the Defendant on the 25th May 2010 in Johannesburg.

- [2] At the commencement of the trial an order was made by consent in terms of the provisions of Rule 33(4) of the Uniform Rules. The order is that issues of liability and causation pleaded in paragraphs 1 up to 8 of the Plaintiff's particulars of claim as well as issues of causation as pleaded in paragraphs 9, 9.1 and 9.2 are separated from the issues of causation pleaded in paragraphs 9.3, 9.4 and 9.5 of the Plaintiff's particulars of claim as well as the quantification of damages which are to stand over for later determination.
- [3] In this judgment I am accordingly only required to determine whether the Defendant is liable to compensate the Plaintiff based on the evidence placed before me including whether it is as a result of the Defendant's negligence that the Plaintiff now suffers poor and compromised vision including hyperopia, presbyopia, asthenopia as well as severe vitreous floats.
- [4] It is common cause that the Defendant performed an iLasik surgery on the Plaintiff in his consulting rooms in Johannesburg on the 25th May 2010. In his particulars of claim Mr W alleges that the Defendant Dr Deist acted negligently and/or breached his duty of care which has resulted in the Plaintiff suffering the following permanent conditions:
- (a) Poor and compromised vision including hyperopia, presbyopia and asthenopia.
 - (b) Severe vitreous floats.
- [5] Lasik surgery consists of the creation of a corneal flap with femtosecond laser which is hinged aside to enable wave front guided correction whereupon the corneal flap is returned to its position and then healing commences.
- [6] Prior to the procedure it is common cause that the Plaintiff was myopic that is near-sighted. Without glasses the Plaintiff could only see closely, his distance vision was blurred. According to him he at that time wore spectacles for distance vision permanently for which he experienced excellent vision for his intermediate and near vision. He consulted with the Defendant because he desired that the procedure should enable him to dispose of distance spectacles and still be able to retain the need for readers and near vision.
- [7] On the other hand the Defendant contends that it was agreed that the required iLasik procedure would result in full emmetropia that is full distance correction and that he would thereafter rely on multifocal readers for near and intermediate tasks.
- [8] It is clear that there is a dispute as to what exactly the terms of the agreement were. It is therefore necessary to deal with the oral evidence as well as the notes made by the Defendant during the times that he consulted with the Plaintiff prior to the procedure including documents signed by the Plaintiff in order to arrive at an answer as to what exactly was agreed upon.

- [9] In his plea the Defendant besides denying having been negligent or failing to exercise due care in the performance of the operation he attached a document titled “Informed Consent for Laser in situ Keratomi lenses (Lasik)” which he says the Plaintiff signed. The patient consent form is very elaborate. In the opening line the patient says the following:

“In giving my permission for Lasik I understand the following: I have received no guarantee as to the success of my particular case. I understand that the following risks are associated with the procedure.”

The risks are enumerated as being the following:

- (a) Vision threatening complications.
- (b) Non-vision threatening side effects.
- (c) Infection.
- (d) Severe inflammations.
- (e) Delayed clouding of the cornea.
- (f) Corneal scarring.
- (g) Internal bleeding.
- (h) Retinal bleeding.
- (i) Floaters.

- [10] In his replication the Plaintiff dealt specifically with the patient consent form and pleaded that:

- (a) The document was never handed to him on the 9th April 2010 but on the 24th May 2010.
- (b) He signed that document on the morning of the 25th May 2010 shortly prior to the procedure being performed on him.
- (c) When he signed the consent form there was no discussion nor explanation to him concerning the contents of that document. He signed without reading it.
- (d) The consent form relates to Lasik procedure not intralase Lasik procedure.
- (e) The difference between Lasik and iLasik is that the Lasik procedure uses microkeratome mechanical device with a steel blade. The iLasik which the defendant performed does not utilise a microkeratome.
- (f) In the final result he pleaded that the patient consent form was invalid and unenforceable against him as it did not relate to the procedure performed on him.

- [11] In his plea the defendant admitted that he owed a legal duty to the Plaintiff to perform the procedure according to the standard of a reasonable ophthalmic surgeon and denied that the legal duty he owed the Plaintiff was any more extensive than the contractual obligations assumed by him and in particular that the legal duty owed by him was qualified by the patient consent form signed by the Plaintiff.
- [12] The issues in dispute in this matter are the following:
- (a) Whether the Defendant was negligent or not in performing the refractory laser surgery on the Plaintiff on the 25th May 2010.
 - (b) Whether the Defendant in performing the procedure failed to exercise a duty of care.
 - (c) Whether the Plaintiff was informed and thus consented to the procedure in view of the signed patient consent form.
- [13] The Plaintiff testified and also called two expert witnesses namely Dr Donzis and a Dr Lefkowitz both specialists practising out of the United States of America. The Defendant testified and called the following witnesses in support of his version namely:
- (a) Professor Meyer.
 - (b) Ms Myasur.
- [14] In as far as the type of surgery performed by the Defendant is concerned the Defendant in response to the Plaintiff's list or request in terms of Rule 37(4) responded as follows:
- The procedure was performed with customised wave front guided laser (Laser Assisted Intrastromal Keratomileusis – Lasik) and a femtosecond laser for flap creation.
 - That the Defendant discussed the proposed procedure with the Plaintiff and that the Plaintiff was informed, had knowledge of and consented to the aforesaid procedure being performed to improve his distance vision.
 - That the Plaintiff was informed verbally and with written information material during April and May 2010 and verbally consented to the Defendant utilising femtosecond laser and not a microkeratome blade described in the written consent form to create the flap during Lasik procedure.
- [15] Post the surgery the Plaintiff admits that he declined an enhancement procedure offered by the Defendant.
- [16] In the pre-trial conference it was put to the Plaintiff whether he will admit that he had started complaining of floaters and occasional flash in the left eye which symptoms had developed four days prior to the procedure. The Plaintiff chose not to respond to that question. I find that non-response on a crucial aspect of the Plaintiff's case surprising if not amazing. The Plaintiff further admitted during pre-trial questioning that during or about August 2010 and October 2010 he consulted with Dr Kruger an ophthalmologist and at that

time his uncorrected vision was 20/20 for both eyes.

[17] There is documentary evidence that during or about 14 February 2011 the Plaintiff consulted Dr Kruger and that at that time it was documented that he could read 20/20 with each eye unaided. He declined to comment whether it was true or not. The same attitude persisted when he was referred to the consultation that he had with Dr Daniel during July 2012. What is amazing is that it was put to him in a pre-trial question that Dr Daniel had recorded that he Dr Daniel told him that his visual acuity of 20/20 in either eye would qualify him to get a medical certificate for a pilot's licence, further that his visual capabilities

were normal for a 53 year old who had been born emmetropic.

[18] It is not surprising that when the Plaintiff approached Dr Kruger with a request that he alters his medical notes Dr Kruger refused and this resulted in his medical bill not being paid.

[19] Dr Robert Daniel a specialist ophthalmic surgeon consulted with the Plaintiff on the 25th July 2012 and reported as follows:

- That his vitreous floaters were as a result of a process called Syneresis which is an age-related degeneration of the vitreous jelly allowing the clamping of the pre-existing collagen in the vitreous jelly to cast shadows on the retina, thereby producing the perception of floaters.
- He further explained to him that Presbyopia is an age-related loss of ability to focus on nearby objects as a result of the crystalline lens in the eyes becoming too large and too stiff for the ciliary muscles to change its shape.
- He recorded further that Plaintiff accepted this as an explanation to the need for his reading glasses.
- He was advised to submit to enhancement in order to address the problem.

[20] It is against this background that I now deal with the Plaintiff's evidence. It must be kept in mind that the Plaintiff's evidence would be evaluated against the background of the experts' joint minutes wherein the experts agreed on the following:

20.1 That the effect of achieving full distance vision (emmetropia) in a presbyopia patient would destroy the Plaintiff's intermediate vision and would necessitate the Plaintiff requiring multifocal spectacles on a permanent basis.

20.2 Drs Donzis and Lefkowitz on behalf of the Plaintiff and Professor Meyer on behalf of the Defendant agreed that the Plaintiff desired refractive surgery the issue being the type and nature of the refractory surgery such as PRK versus Lasik and full emmetropia v monovision or slight under correction.

20.3 The experts further agreed that full emmetropia was acceptable if the patient's needs and desires were fully explored and understood by both the patient and the doctor and the patient with that knowledge chose full emmetropia.

20.4 That the presence of a signed consent form does not in itself prove valid consent to the treatment, the important factors being the quality, extent and accuracy of the information given beforehand.

20.5 It was further agreed that the consent form is but one of the tools in reaching informed consent which is achieved by a full and comprehensive explanation of the procedures and its outcome as well as a full understanding and appreciation by the patient.

20.6 The experts further agreed that Dr Deist's performance of the iLasik surgery on Mr W was done properly (see joint minute stated the 23rd July

2017) and that there was no error with regards to the actual performance of the Lasik surgery; that the Lasik flap was created

properly.

20.7 That the technical use of the laser was not misapplied to the eye therefore they eliminate as an issue the technical performance of the Lasik.

20.8 That post-operative care was appropriate.

20.9 The experts further agreed that outcomes cannot be guaranteed. That overcorrections as well as under-corrections can and do happen as a normal result of laser surgery.

20.10 On the 23rd July 2017 the experts met and agreed that the patient Mr W wanted full emmetropia and that this procedure is not an exact science both with regards to the results and patient expectation.

20.11 All the experts agreed that enhancement was discussed and offered to the patient which was appropriate behaviour by Dr Deist.

20.12 The experts expressed their views as follows regarding floaters:

"That floaters are a potential consequence of Lasik surgery that was noted in the consent. It is something that just can happen without any negligence in the performance of the surgery. None of us believe that floaters were caused by any improper surgical technique in the performance of the Lasik."

20.13 As regards informed consent the experts all agreed that specific written materials like pamphlets and forms given to the patient complied with the standard of care.

20.14 Drs Donzis and Lefkowitz and Professor Meyer agreed that what had been stated by Dr Deist to Mr W would have constituted appropriate informal consent.

THE PLAINTIFF'S EVIDENCE

- [21] Mr W testified that he was born on the 9th July 1959 and that he was presently 58 years old. He lives in Cape Town and is self-employed in the time share industry.
- [22] Growing up as a child he had perfect vision, later at high school he required glasses for distance to assist him to see what was written on the black board in the classroom, however, on the sports field he required no glasses. When he turned 22 he became myopic and required glasses more frequently. He has since that age been wearing glasses permanently. When he turned age 46 or 47 he became presbyopic and thus required glasses for reading. It was single lens glasses for reading purposes. He still kept glasses for distance, those glasses covered a fair portion of his near, intermediate and distance ranges.
- [23] His eyesight with the use of near and distant glasses was perfect. Sometime in the year 2006 after he had returned from a family holiday in Mauritius he felt the need to undergo laser surgery in order to dispose of his spectacles and to enable him to participate in activities which whilst wearing spectacles would not permit such as water sports and taekwondo. He said the following:
- “I just felt at that stage of my life that I wanted to start enjoying myself and water ski, jet ski and do all those water sport activities that I could not normally do.”*
- [24] The Plaintiff describes himself as pedantic and as a perfectionist. His wife and his staff know him to be like that, for example the phones on their desks have to be positioned in the same spot. Personal pictures hanging up on the wall have to have the same frames even his coat hangers all have to be exactly the same. They all got to match.
- [25] He further testified that he had become unhappy with being a permanent spectacle wearer as it presented him with limitations hence he decided to venture into the possibility of laser eye surgery. He was encouraged by his sister-in-law who had already undergone laser eye surgery who told him that it was a fantastic and a great procedure and that it worked out well. His brother-in-law had also done the procedure and endorsed it. One of his work colleagues told him that the outcome was great.
- [26] He saw Dr Willis and then a Dr Van der Merwe and later Dr Ken Suttle all this during the year 2006. Eventually Dr Carol Lewis told him that he can go ahead and do the laser eye surgery. In the same year his wife underwent laser eye surgery performed by Dr Carol Lewis and it went well.
- [27] It was in the year 2006 that he first went to consult with Dr Deist. The exact date is the 3rd May 2006. He was referred to Dr Deist by a good friend of his a Dr Jeffrey Swartzberg who told him that his brother-in-law recommends Dr Deist as he himself had recently had such procedure done by Dr Deist with excellent outcomes.

- [28] Mr W could not recall all that he discussed with Dr Deist save to say that Dr Deist told him that there was new software in the pipeline which would correct his near and distance vision. He testified that, that appealed to him and he decided to rather wait for that new software. After the tests were done he decided to undergo laser procedure at a later stage. However, his memory of the events of that day is uncertain.
- [29] Later during the year to be precise on the 14th August 2006 after his first meeting with Dr Deist he consulted an optician one Zena Jacobson who conducted tests, then prescribed spectacles for him which gave him perfect reading, vision, close immediate and distance. In the year 2009 he had an infection on his left eye and consulted Dr Anker an ophthalmologist in Cape Town. Dr Anker reported that he saw the Plaintiff on the 2nd November 2009 with a left eye small conjunctival laceration and treated him with antibiotic laser on the 29th March 2010. Plaintiff again consulted Dr Anker who reported that Plaintiff had a tear in the same left eye, Dr Anker had to exercise the flap in the left eye.
- [30] On the 26th February 2010 the Plaintiff acquired a script from Camps Bay Optometrist for new glasses. The quote indicated single lens glasses for both intermediate and distance ranges including a portion of close view.
- [31] After Dr Anker had exercised the flap on his left eye he was given an opportunity to come back on the 27th April 2010 for a check-up. The Plaintiff did not return to Dr Anker and when his counsel asked him why he did not do so he responded in the following words:
- “Ja I felt Dr Anker was perhaps a little bit aggressive in terms of how she dealt with the situation. She I am not an ophthalmologist but she cut this flap of my eye and I brought this incident to Mr Deist’s attention when I saw him not too far from that particular day.”*
- [32] In answer to a question by the court whether it is his evidence that Dr Anker should not have removed the flap the Plaintiff did not give a clear answer and ended up saying that he believes that Dr Anker should have treated the situation with care. He did not explain why he said this. He told Dr Anker that he was considering Lasik surgery whereupon Dr Anker told him that he can do it also. Dr Anker did not tell him that Lasik surgery was not a good procedure. She recommended it.
- [33] It was shortly after that meeting with Dr Anker that he decided to book an appointment to see Dr Deist. This happened on the 9th April 2010. According to him he and Dr Deist only had a discussion and planning for Lasik surgery to take place later that month. He does not recall if any tests were conducted. He told the court that he did mention to Dr Deist the incident he had with Dr Anker.
- [34] Later that month whilst he was in Durban he contracted an infection in his left eye and consulted Dr Pearce who reported as follows:

“Examination showed visual acuities corrected to 6 bilaterally with a myopic spectacle correction. He had a lateral left conjunctival focal modular epicentre causing the inflammation. There was no evidence of corneal ulceration or unvetitis and his slit lamp ocule examination was otherwise normal. He continued with his topical antibiotic drops which appeared to be setting the inflammation condition and was due to be followed up in Cape Town.”

- [35] The Plaintiff mentioned to Dr Pearce that he is considering undergoing eye Lasik surgery soon and that he wants to make sure that his eyes are in a good condition for that operation. He asked Dr Pearce if he can recommend someone upon which Dr Pearce recommended Dr Ivy to do a follow-up.
- [36] On the 10th May 2010 the Plaintiff consulted Dr Ivy and mentioned the issue to him. Dr Ivy had a look and said that it had resolved itself and that he could go ahead with the Lasik surgery he foresees no problems.
- [37] Armed with all the assurances by various doctors as well as other acquaintances about the success of the Lasik surgery Mr W then booked an appointment to consult Dr Deist on the 24th May 2010. According to him the 24th May 2010 was for a pre-op assessment. The 25th May 2010 was for the actual surgery.
- [38] The 24th and the 25th May 2010 are crucial dates in as far as the resolution of this matter is concerned. The Plaintiff's version is that the Defendant did not explain to him the procedure and that he signed the patient consent form without having read it.
- [39] He told the court that he only read the patient consent document after the surgery but cannot recall when save to say it was when he started experiencing problems and when he did read it, it was to him like a nightmare. He and his son then started doing research on the internet and picked up a lot of sites on the international forum about the topic of informed consent. It was only then that he realised that before a person undergoes iLasik surgery he or she has got to go through a lot of hurdles.
- [40] He confirmed that he did not read the patient consent form. He gave that answer after it had been repeated twice with a prefix that, him being an astute and pedantic businessman did not deem it appropriate to read the consent form. He went further to say that his ophthalmologist meaning the Defendant did not tell him or advise him of warning bells and instead told him that he will have an amazing outcome and therefore, it was not necessary for him to read the document.
- [41] The answers given by the Plaintiff around the whole issue of the patient consent form as to why he did not read it is in my view unsatisfactory. It was asked of him if he in his business he hands over to his clients documents that requires signature and does not expect clients to have read the document prior to reading it, his response was rather amazing and borders on arrogance. He responded that it was up to them meaning his clients to decide whether they want to read the document or not.

[42] The next question put to him in this regard produced once more a rather weird response. He was asked if someone signs a contract will he be held to it his answer was devious he said:

"If someone signs a contract and he is not happy with the contract I cancel the contract."

[43] He conceded that after consulting Dr Deist on the 24th May 2010 Dr Deist said to him:

"Here is the informed consent if there is anything in that informed consent that you are not happy with or would like to check or you would like to query please check out my website."

He continued to tell the court that Dr Deist said to him come back tomorrow tell me what is it that you do not understand or you are unhappy with, with that document.

[44] I am satisfied that on the 24th may 2010 Dr Deist took all the trouble as he says he always does with all his patients to discuss the risks involved in the surgery and armed with the patient consent form the Plaintiff had ample opportunity to read, understand and if not he had time to not proceed

with the surgery until he was satisfied that there is nothing that he does not understand.

[45] He was shown the patient consent document which was attached to the quotation. In the quotation document itself it is stressed that the patient must ensure to complete it fully and hand it in on the date of the surgery. What I find strange is that everything that appears on the quotation he complied with except that portion about the completion of the consent form for instance he testified that when he arrived for surgery he kept on asking the receptionist even Dr Deist about the use of deodorants, perfumes and aftershave all that appears as things not to be done on the day of the surgery. This in my view strengthens my resolve that he read all the documents including the patient consent form.

[46] When the Plaintiff was referred to the documents he read them with ease in court on the 8th August 2017 without difficulty eight years since the operation.

[47] When the Plaintiff was referred to that portion of the patient consent form dealing with alternative to Lasik he responded that he signed the wrong document because the document that he signed is for Lasik and yet he wanted iLasik surgery. He concluded that when he signed the document in the morning he was under pressure. He does not say what pressure was placed on him when he had the whole of the 24th to read and sign the document. He eventually conceded that he chose not to read the document and just signed it.

[48] Mr W was asked what prevented him from reading the patient consent document from the time he received it on the 24th May until the morning of the 25th before he handed it in signed, he dilly-dallied and told a long convoluted story eventually he said he had a number of meetings in between. This answer that took him long to say is in my view yet another attempt by Mr W to avoid crucial questions. It makes no sense to me that he should be attending meetings and not concentrate on something that affects his own health. He concluded by saying that he did not read it based on what his doctor told him. He kept on repeating that what he signed was the wrong consent form.

- [49] It was put to him that by handing in a signed patient consent form he represented to Dr Deist that he had read and understood the contents thereof. It is disingenuous for Mr W to suddenly say that on the morning of the 25th Dr Deist was not available to speak to him and to listen to issues that he may have. He says Dr Deist did not invite him to come talk to him because it was automatically assumed that he had read and understood the contents thereof.
- [50] With due respect that explanation does not assist him. He chose not to read the document and in the process misled Dr Deist. He was asked to confirm that the quotation that he received refers to iLasik surgery and not Lasik he responded that he was not an ophthalmologist and could thus not say what the difference was between Lasik and iLasik.
- [51] Mr W conceded that Dr Deist did tell him that in carrying out the procedure a flap would be created of the cornea. Later he changed his thoughts and said he was not sure if the exact technicalities of the procedures were told to him.
- [52] When Mr W was pressed further that he cannot say if there was a difference between Lasik and iLasik he said he does not know even against his earlier response that he was not sure of the exact technicalities of the procedure.
- [53] It was put to him that iLasik is a name given by the manufacturer thereof namely Abbot that there are different manufacturers of the Lasik laser. He said he cannot dispute it.
- [54] Mr W conceded that post the surgery he told Dr Close that he only read the patient consent form some two months after the surgery. He also conceded that he had a memory problem. He said there are certain things that are very clear and yet others are very sketchy. He later said he cannot remember what he told Dr Close and later qualified his response by saying that he refreshed his memory earlier in the day of the trial and noticed that the report reads that he told Dr Close that he only read the consent document two months after the surgery.
- [55] It is clear in my view that Mr W is very selective in remembering what he did and who he spoke to when and at what stage. His evidence as regards certain happenings is very vague.

THE FIRST VISIT BY PLAINTIFF TO DR DEIST ON THE 3RD MAY 2006

- [56] It is common cause that the Plaintiff first consulted with Dr Deist in the latter's consulting rooms on the 3rd May 2006. On a question by his counsel what happened on that day the Plaintiff's recollection is hazy he says for instance that he believes that tests were done but he cannot recall what type of tests were done. All that he remembers is that Dr Deist told him that there is a new technology coming which is to be used to do a reconstruction of his near and distance vision.
- [57] He was shown copies of his file with Dr Deist from which it appeared that at the consultation not only did Dr Deist discuss the new technology with the Plaintiff with him but also of tests were carried out being the Nidek and the ORBS can tests. His response was, "well if the document says that then it must have happened".

[58] On the other hand Dr Deist testified about the consultation he had with the Plaintiff on the 3rd May 2006 after which consultation the Plaintiff told him that he will wait for the new technology. Dr Deist's contemporaneous

notes taken during consultation corroborate his version about the tests and also that he addressed the Plaintiff about the PRK

procedure whereupon the Plaintiff indicated that he will wait for the new procedure.

THE SECOND CONSULTATION ON THE 9TH APRIL 2010

[59] What is significant about this second consultation by the Plaintiff with the Defendant is that it took place four years later. Dr Deist made a note that Presbyopia needs to be checked. The World Book Dictionary describes Presbyopia as follows:

"It is a condition of the eye occurring in middle and old age in which only distant objects may be seen distinctly unless glasses with corrective lenses are worn, normal loss of accommodation in the eyesight as the lens of the eye becomes less elastic and loses some of its ability to focus on objects closer to the eyes."

[60] Mr W gave the impression that when he consulted with Dr Deist on the 9th April he and Dr Deist had a discussion only. When asked by his counsel if any tests were done he replied that he does not believe that any test was done. When the consultation notes of Dr Deist were transcribed it turns out that tests were done and that in fact Mr W specifically told Dr Deist that he wants laser. When he was asked by his counsel if he wants to comment on the notes he replied that he has no comment.

[61] Mr W's poor memory about what transpired on the 9th April 2010 is exposed when one has regard to the evidence by Dr Deist about the extensive consultation he had with him. It is on this day that Dr Deist explained to Mr W what is involved in the Lasik procedure. This was later corroborated in the note by Dr Ivy who saw Mr W on the 10th May 2010.

[62] Mr W told Dr Deist that he was now ready to have laser treatment because he wants to get rid of his distance glasses. He wanted to have normal distance vision and knew that he would rely on multifocal readers.

[63] The tests that Dr Deist carried out revealed that Mr W scored 6/6 vision whilst using his distance glasses for both eyes. Then there is proof that a slit lamp examination was done which comprised a clinical examination of the corneas and lenses of both eyes. The findings as recorded on Exhibit 17 of the trial bundle qualified Mr W for laser surgery.

[64] The consultation note on Exhibit 17 of the trial bundle indicates further that Dr Deist noted "Presbyopia Check". This was as a result of the discussion that Dr Deist had with Mr W. Mr W conceded that his Presbyopia had gotten worse since 2006.

[65] Mr W struggled to answer a question put to him whether it is correct that when he saw Dr Deist on this day he had told him that he had no previous trauma to his eyes. He gave a non-committal answer and said the following:

“If there was trauma to my eyes I would have told the doctor.”

Mr W testified further that Dr Deist briefly discussed the PRK eye procedure with him and in doing so Dr Deist downplayed the PRK procedure by saying that it is very painful and takes long to heal or rather that the recovery period was longer than laser surgery.

[66] I find it difficult to accept that Dr Deist would have taken the trouble to discuss the pros and cons of the PRK procedure and yet say little or nothing about the Lasik procedure.

THE 24TH MAY 2010 CONSULTATION

[67] Prior to Mr W consulting with Dr Deist on the 24th May 2010, he had earlier on seen Dr Ivy on the 10th May 2010 who recorded that Mr W was myopic and was due to undergo Lasik surgery with Dr Deist. Dr Ivy had recorded that Dr Anker had removed the conjunctival flap on Mr W.

[68] Dr Donzis one of the plaintiff’s expert witnesses also had regard to Dr Ivy’s note and regarded it as corroboration that iLasik was discussed earlier on the 9th April 2010 with the Plaintiff. The consultation with the Plaintiff on the 24th May 2010 must be seen against that

background.

[69] The evidence of Mr W relating to what happened when he arrived at the consulting room of Dr Deist is in my view clear that once more a discussion ensued about the procedure to be performed. In his own words Mr W tells the court that Dr Deist said to him:

“Your consent forms are attached to this quotation. Please ensure you complete them fully and remember to bring them with you on day of surgery.”

[70] Earlier on before he consulted with Dr Deist in the afternoon he had undergone a number of tests amongst other the Custom Vue Test and the Nidek OPD Scan. The Nidek OPD Scan was identical to that used by the 2006 OPD Scan. Dr Deist explained that this was a safety check in which he used a machine to reproduce Mr W distance reflection.

[71] The Custom Vue Scans provides not only the refraction for both eyes but also the so-called higher order aberrations which are not detectable through normal optometrist measurements.

[72] In his evidence-in-chief Mr W testified that when he left Dr Deist's room on the 24th May 2010 he was quite excited and looking forward to the procedure to be performed the following day. In my view he could only be excited because he knew exactly what was involved after Dr Deist had gone through the tests with him and informed him fully about the iLasik procedure. I see no reason why he should be excited about something that he does not know or understand.

[73] Mr W remained non-committed in answering some of the questions under cross-examination for instance at some point it took counsel for the Defendant several repeat questions to get Mr W to admit that he did tell Dr Deist that he want HD.

[74] In the afternoon of the 24th May 2010 when Dr Deist consulted with the Plaintiff in preparation for the following day's procedure he utilised the values

determined by the Custom Vue software which are then placed into a physical frame. He then used the so-called duo chrome testing

equipment which is a screen divided vertically by a red and green background. According to Dr Deist Mr W participated actively in deciding on the surgical parameters to have his distance vision corrected. The use of the trial frame confirmed the agreement

reached between Dr Deist and Mr W in relation to his requirement to have his distance vision corrected.

[75] The Plaintiff's version of events that took place on the 24th May 2010 at the Defendant's consulting room is in my view not true. I see no reason why after a person had waited four years for a particular procedure and when he eventually is ready to do it, the Defendant would not have explained to him all the advantages and risks involved in the procedure. It is in my view unthinkable that Dr Deist would have omitted to do that. He kept notes about the Plaintiff for four years about the desired procedure. I am satisfied that after Dr Deist had explained fully the procedure he then handed over the patient consent form to the Plaintiff on the 24th May 2010 with the instruction that please read it and if there is something not clear speak to me before the surgery.

THE 25TH MAY 2010

[76] Mr W arrived at the surgery at 08h00 signed the patient consent form. His initials and full signature appear nine times on the six page document. It is significant to note that his initials appear 6 times next to the words: "I have read and understood this page." Mr W had no question to ask and handed in the consent documents and proceeded to have the surgery.

[77] The Plaintiff's version about what happened on the morning of the 25th May 2010 is in my view hard not to be believed. He wants the court to believe that he was pressurised into signing the consent form before he had read it, is in my view disingenuous of him. Mr W describes himself as a strict or pedantic businessman I cannot accept that he would have allowed himself to be bullied by a doctor's assistant to sign a document that he had not read.

[78] There is evidence corroborated by the experts in their joint minute that the procedure was carried out correctly. Mr W himself testified that when he left the operating room to go join his wife who was waiting for him in the waiting room he was able to see not only her but also other anxious patients waiting to go in for their procedure.

POST-SURGERY VISITS THE 26TH AND 27TH MAY 2010

[79] Mr W says the same night of the 25th May when he arrived home he could not see his hands or food and this caused him to go see Dr Deist again the following day. The doctor did further tests and advised him to use eye drops.

[80] It is clear that Mr W is an impatient person he expected quick results and quick healing he forgets that by the time he did the procedure he was already advanced in age and Presbyopia had set in. In any event the consent form that he signed having read it clearly indicates on paragraph 5 as follows:

“I understand that I may not get full correction from my Lasik procedure and this may require future enhancement procedures such as more laser treatment or the use of glasses or contact lenses.”

[81] Sometime in July or August 2010 Dr Deist offered the Plaintiff enhancement procedure which he declined for no reason. His own expert

Witnesses Drs Donzis and Lefkowitz do comment that enhancement was indeed offered. It is also unthinkable that Dr Deist could not have made Mr W aware about the risks involved in the procedure. These are well described and appear as follows in the patient consent form:

- “Despite the best of care, complications and side effects may occur, should this happen in your case, the result might be affected even to the extent of making your vision worse.”
- “In giving my permission for Lasik I understand the following: I have received no guarantee as to the success of my particular case.”

THE PATIENT CONSENT FORM

[82] When Mr W testified in-chief and when cross-examined he gave the impression that he was rushed up and pressurised to sign and had in the patient consent form before he had, had an opportunity to read it. Not only was this never pleaded when Ms Myasur the receptionist testified it was never put to her that she in fact pressurised Mr W to sign and hand it in without reading.

[83] The evidence of Ms Myasur remains unchallenged that she requested Mr W to hand the signed form to her on the morning of the surgery. The procedure of handing the patient consent form to a client prior to surgery is understandable. It is a long document which requires time to read and understand hence it was handed to Mr W on the 24th May 2010. This was to afford him ample opportunity to read and understand and where he does not he still had an opportunity to ask.

- [84] In *George v Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) Fagan CJ dealt with the instance of a party seeking to renege on the consequence of having signed a document which he maintains he had not read. At page 472 G-H the learned judge said the following:

“So now he knew that he was signing a document which contained terms of his contract. Just below the items he had filled in, but above the space for his signature, he saw what he himself in his evidence described as “a long passage the merest glance at it would have shown him that it commenced with the words ‘I hereby agree’. But he “did not bother to read it. Yet he signed putting his signature below the English version, not the Afrikaans, this prima facie indicating that it was the English version by which he chose to be bound.”

“But he knew that he was assenting to something and indeed to something in addition to the terms he had himself filled in. If he chose not to read what that additional something was, he was, with his open eyes, taking the risk of being bound by it. He cannot then be heard to say that his ignorance of what was in it was a Justus error”.

- [85] In *Afrox Healthcare (Pty) Ltd v Strydom* 2002 (6) SA 21 (SCA) Brand JA confirmed the legal position that, the fact that a party signed a document without reading it does not lead to the position that such a party is not bound by the contents thereof.
- [86] Having regard to the unchallenged evidence of Ms Myasur as opposed to the poor version by Mr W and having regard to the legal position set out in *George Fairmead and Afrox Healthcare v Strydom* I have come to the conclusion that Mr W the Plaintiff is bound by the contents of the patient consent form which he not only signed but I have no doubt that he read it. After all when he signed it, it was after Dr Deist had explained to him the risks involved in the procedure, this Dr Deist did on the 9th April 2010 and the 24th May 2010, besides that numerous person that he spoke to had assured him of the success of the procedure amongst them are ophthalmologists.

EXPERT WITNESSES

- [87] The Plaintiff's expert witnesses and that of the Defendant compiled joint minutes and agree on crucial issues that put paid to the Plaintiff's case for instance in a joint minute dated the 23rd July 2017 they noted that Mr W wanted full emmetopia. This is in direct contradiction to what the Plaintiff testified. This therefore means that his own witnesses corroborate the Defendant's version as to what was agreed upon.
- [88] Further not only do the experts all agree that the surgery was done correctly they also confirm that in such procedures outcomes cannot be guaranteed. This is exactly what appears in the patient consent form. What is further damaging of the Plaintiff's conduct is that he refused to subject himself to enhancement post the operation. His own experts confirm that enhancement was discussed and offered to the Plaintiff. Plaintiff declined it and could furnish no reason why he declined the offer of enhancement.

IS THERE EVIDENCE THAT DR DEIST ACTED NEGLIGENTLY AND NOT IN ACCORDANCE WITH THE STANDARDS OF A SPECIALIST OPHTHALMIC SURGEON

- [89] It is common cause that Dr Deist is a specialist ophthalmologist. He testified that his practice is a low volume more personalised patient experience laser vision practice. He continues to say that in a week he chooses not to do more than six patients for this he says he finds it that he can deliver his best with that volume. He clearly says that he is uncomfortable to do more than that even though the technology can easily accommodate more.
- [90] Both Dr Donzis and Lefkowitz who examined the Plaintiff have found nothing wrong with the way the procedure was conducted. The Plaintiff has pleaded something that he has been unable to prove. Professor Meyer who testified on behalf of Dr Deist said that a manifest refracture equals total patient participation which means that there was no way that Dr Deist could have proceeded with the distance correction of Mr W vision if he was not fully participating in the rows of numbers of which he can see best. Professor Meyer reiterated that he and Drs Donzis and Lefkowitz reached a unanimous conclusion that the flap, the surgical procedure was performed in accordance with what one would expect and that the flap was similarly created in accordance with good practice.

In my view that is the end of the Plaintiff's case he has no evidence to prove that Dr Deist performed the procedure negligently.

WHAT CAUSED THE PLAINTIFF TO HAVE POOR COMPROMISED VISION INCLUDING HYPEROPIA, PRESBYOPIA ASTENOPIA AND VITREOUS FLOATERS

- [91] The Plaintiff Mr W attributes the above condition to what he says was the negligent manner in which Dr Deist conducted the procedure on him. I have found that there is no evidence to support any form of negligence.
- [92] Similarly the conditions that he is now complaining about have no relevance to the manner in which the procedure was carried out. Firstly Mr W when testifying in court was being referred to various documents which he could read with ease accordingly his reason for poor vision is not supported by evidence. It is possible that on the 26th and 27th May 2010 and some weeks thereafter he may have experienced poor or compromised vision. This is normal he was still in the healing process. He was in too much a hurry and did not give the medical process an opportunity to heal. He kept on seeing a specialist after specialist even long before the 3 months expired. If anything he is to blame to having interfered with the healing process.
- [93] Mr W was already Presbyopic when he underwent the procedure so it cannot be linked to the procedure. The experts all agree that he was myopic and that condition naturally leads to presbyopia it is an age related condition that sets in even before any medical procedure.

- [94] On the question of vitreous floaters Prof Meyer testified that all three experts that is including himself agreed that the floaters are a potential consequence of Lasik surgery.
- [95] In testifying about presbyopia Prof Meyer said that multifocal glasses were designed and developed purely for presbyopia. Now we know that W was presbyopic long before the procedure so he was bound to have to use multifocal glasses in any case. All three experts remark that Presbyopic is ubiquitous which means that almost every single human being develop presbyopia starting from around about age 45 and that it starts whether you are myopic, near-sighted or whether you are a hyperope farsighted. Or whether you are an emmetropic, normal sight. As a human being you will develop presbyopia.
- [96] In conclusion and as commented to by Prof Meyer Mr W complained and alleged poor or compromised vision does not accord with the 20/20 vision. There is evidence that post the surgery Mr W had 20/20 uncorrected vision. He definitely does not have poor or compromised vision.
- [97] On allegation or complaint about asthenopia Prof Meyer told the court that all presbyopic persons will experience asthenopia. Presbyopic patients will have eye strain if they do not wear multifocals.

EVALUATION OF EVIDENCE

- [98] The evidence of Dr Deist and that of his witnesses is more reliable and easily demonstrable than that of Mr W. Mr W gave conflicting versions as to what the agreement was between him and Dr Deist. He was not a satisfactory witness he avoided answering crucial questions and does not have a good memory.
- [99] In the result on the separated issues as pleaded in paragraphs 1 to 8, 9, 9.1 and 9.2 of the Plaintiff's particulars of claim the Plaintiff's claim falls to be dismissed. I accordingly make the following order:
1. The Plaintiff claim as pleaded in paragraphs 1 to 8, 9, 9.1 and 9.2 of the Plaintiff's particulars of claim is dismissed.
 2. The Plaintiff is ordered to pay the Defendant's taxed costs on a party and party scale.

DATED at JOHANNESBURG on this the 11th day of OCTOBER 2018.

M A MAKUME

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Trial: 07 August 2017

Date of Judgment: 11 October 2018

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Prepared on 9 October 2026 · Esheria