IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Reportable: YES / **NO**
Circulate to Judges: YES / **NO**
Circulate to Magistrates: YES / **NO**
Circulate to Regional Magistrates: YES / **NO**

CASE NO: 625/2010

In the matter between:

LOUISA DITSHELE TLHOOE Plaintiff

And

MEC DEPARTMENT OF HEALTH
NORTH WEST PROVINCIAL GOVERNMENT Defendant

JUDGMENT

DJAJE J

[1] This is an action for damages suffered as a result of wrongful conception. The plaintiff fell pregnant after believing that she was sterilised at the hospital. The matter proceeded on merits only.

Plaintiff's Evidence

[2] The plaintiff testified that in **December 2006** she gave birth to her third child at George Stegman Hospital and requested sterilisation as she was no longer interested in having more children. Her reasons were that she was infected with a condition that could infect her children. Further that she was not in a financial position to have more children. Plaintiff gave birth by caesarean section and after the

procedure she was informed by a nurse that she gave birth to a baby girl and was sterilised. She was released from the hospital and advised to go to her local clinic for a check-up with the new born baby. She attended at the clinic after a few weeks and as the documents from the hospital indicated that she was sterilised, no advice on contraceptives was given. The only thing that the nurses at the clinic did was to check if her operation from the caesarean section was healing.

[3] In **September 2007** she went to a doctor as she was not getting her menstruation and the test result revealed that she was three months pregnant. She immediately addressed a letter to the Head of the Department of Health to complain that she was pregnant when she was told that sterilisation had been performed at the time she gave birth at George Stegman Hospital. The Chief Executive Officer of the hospital called her and they met. According to her the meeting was at a parking lot of Pick n Pay store and the CEO requested her not to involve third parties. She was then offered an amount of R50 000-00 as settlement. She did not accept the offer and was advised to do an abortion if she did not want another baby. Due to her religious belief she could not agree to an abortion. Plaintiff was advised by her doctor when she gave birth to the fourth baby that her right fallopian tube tissue was not removed and that is how she fell pregnant.

[4] During her cross examination plaintiff confirmed that she did sign a consent form before the sterilisation procedure was done. After the procedure she was not advised of the outcome of the laboratory results or to come back for any results.

[5] Dr Sam Amoa Adu, a registered Gynaecologist and Obstetrician with twenty four years' experience as such, consulted with the plaintiff in **2007** when she fell pregnant. He testified that, during the caesarean section of plaintiff's fourth baby, he removed part of her right fallopian tube as it was not completely removed. Dr Adu indicated that sterilisation is considered as a permanent contraceptive measure and ensures that a woman does not fall pregnant. According to him, after a tissue has been removed from the fallopian tube, it should be sent to the laboratory to confirm if it is indeed a fallopian tube tissue that has been removed. He stated that the laboratory results are very important and should be brought to the attention of a patient. It was his evidence that once there is a realisation that the wrong tissue was

removed then the procedure should be done again as failure to redo will result in negligence.

[6] Dr Burgin who was the defendant's initial expert compiled a report which was discovered by the defendant. Dr Burgin's findings were *that "The right fallopian tube was not ligated on 7/12/2006. The case is not defensible".* Dr Adu testified that in his opinion it was forgivable that the wrong tissue was removed but unforgivable for the hospital not to inform the plaintiff of the laboratory results and redo the procedure. In his opinion the negligence occurred when plaintiff was not informed of the results that the right fallopian tube was not ligated.

[7] The laboratory results were not discovered by the defendant as the hospital file is missing. However the information from the report of Dr Burgin stated that:

> *"A histological report dated 19/12/2006 is reported as follows:*
> *Left fallopian tube- presence of tissue confirmed, Right fallopian tube- no fallopian tube tissue confirmed (GEORGE STEGMAN HOSPITAL)"*

It is clear from the above that Dr Burgin did have sight of the histological report before it mysteriously went missing.

Defendant's Case

[8] The defendant called Dr Meshack Mbokota who is a qualified gynaecologist and obstetrician and practising as such. He compiled a report in this matter and found that there were attempts to ligate the right fallopian tube of the plaintiff that is why there were remnants of the tube. In his opinion there is a higher rate of failure when bilateral tubal ligation is done at birth as the tubes are oedematous (swollen with fluid). He also confirmed Dr Adu's evidence that sterilisation is considered as a permanent form of contraceptive and before the procedure is done the patient must sign a consent form which provides that the procedure is not fail proof. Once the procedure is done the patient needs to come back for the laboratory results and check-up. Dr Mbokota testified that it is not negligence when a wrong tube is

identified and ligated. However failure to inform a patient of the laboratory results is a short fall in the system and is sub-standard.

[9] The last witness to testify in this matter was Mr Tutu Benjamin Seate who was the Chief Executive Officer of George Stegman Hospital in **2006** to **2008.** He knows the plaintiff and aware of the complaint lodged by her about the sterilisation procedure performed at the hospital. He referred the complaint to the legal unit in the department of the health and forwarded the file to one Mr Ramorei. He denied meeting with the plaintiff and making her an offer of R50 000-00 or that she do an abortion.

[10] Mr Seate's evidence was that after receiving the laboratory results, the plaintiff should have been called in and informed of the results. He agreed that it was forgivable that during surgery the doctor missed the correct fallopian tube but that it was unforgivable that the plaintiff was not informed about the laboratory results. He could not testify about the whereabouts of the hospital file and its contents.

Issues to be determined

[11] The issue in this matter is whether there was any negligence on the defendant's employees that resulted in the plaintiff falling pregnant.

Submissions

[12] The plaintiff's argument is to the effect that the defendant's employees were negligent in failing to properly ligate the right fallopian tube. Secondly, that they failed to inform her of the results from the laboratory that the right fallopian tube was not ligated.

[13] It is the plaintiff's case that the defendant's employees had a duty to act with such skill as would be expected in their profession. They however acted negligently failing to inform her that the right fallopian tube was not ligated as requested. As a result of the negligence she fell pregnant when she did not intent to and suffered

damages. The said damages being of carrying a child to full term, pain of labour and economic loss of maintaining the child from birth until age of majority.

[14] In contention the defendant argued that the plaintiff could not have been informed that the bilateral tubal ligation was successful without the laboratory report. It was argued that the plaintiff had a responsibility in terms of section 19 of the National Health Act 61 of 2003 to take care of her own health. In doing so the plaintiff should have attended at the hospital after her discharge for a follow up check-up and to obtain the results from the laboratory. The defendant was hanging its argument on the fact that the plaintiff as a trained and enrolled nurse ought to have been aware that when samples are taken to the laboratory she needs to return to the treating doctor for results. It was therefore expected of the plaintiff to return to the hospital for the results.

[15] It is the defendant's case that since the hospital file went missing, there is no proof that the plaintiff could have been contacted in relation to the laboratory results after they were received on **19 December 2006**.

[16] The other defence argued by the defendant was that the bilateral tubal ligation was performed on the plaintiff as Dr Adu testified that there were remnants of the right fallopian tube from the plaintiff that he removed. It was denied that there was any negligence by the defendant's employees at any stage of performing the bilateral tubal ligation. The procedure was done and the samples were sent to the laboratory as required by protocol. A submission was made that the plaintiff could have fallen pregnant as a result of the recanalization of the ligated fallopian tube.

Law and application

[17] The classic test for negligence was formulated by Holmes JA, in **Kruger v Coetzee 1966(2) SA 428 (AD)** at 430 E-G:

> *"For the purposes of liability culpa arises if –*
>
> *a) a diligens paterfamilias in the position of the Defendant –*

(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case."

[18] In **Premier Western Cape v Fair Cape Property Developers (Pty) Ltd 2003(6) SA 13** at 37 B-C, Lewis JA held:

"State officials, including employees of local authorities, and members of government at every level, are accountable for their decisions. They must, of course, perform their duties without negligence. And where they do not exercise due care, in circumstances where they owe a duty to members of the public to act responsibly and without causing loss or harm, they should be held liable for the damage that they have caused."

[19] In this matter the plaintiff went into the hospital for birth by caesarean section and bilateral tubal ligation. According to the plaintiff after the operation she was informed by the nurse that she gave birth to a baby girl and that sterilisation was done. She was never informed to go back for laboratory results or come back for a check-up. Instead she was referred to her local clinic for a check-up. At the clinic she was not advised on contraceptives as the file she had indicated that she was sterilised. During her cross examination counsel for the defendant focused on the fact that the plaintiff is a nurse and should have known that when tubal ligation is performed the tissue removed is sent to the laboratory and results will confirm if the procedure was successful or not. It is important to note that the plaintiff at the time of admission was admitted as a patient and not in her capacity as a nurse. The duty owed to her by the defendant was that of care to a patient and not as a nurse. The

argument by the defendant that she should have known and made follow up about the results cannot stand.

[20] Both experts testified that even though sterilisation is considered to be a form of permanent contraceptive, it is not fail proof. It is for that reason that the tissue removed should be sent for testing in the laboratory. In this matter the tissue removed was indeed sent in for testing in the laboratory. However, the hospital file is missing and there is no evidence that the plaintiff was informed of the results. The only evidence of the laboratory results is that which is contained from the report by Dr Burgin and not disputed. The doctor who performed tubal ligation on the plaintiff in **2006** was not called as a witness to shed some light on what transpired during the procedure or thereafter. The nurses who were employed at the hospital during that period were also not called to assist the defendant's case.

[21] In the report by Dr Burgin it is stated that the right fallopian tissue not confirmed. This is the only evidence of what was contained in the laboratory report from the hospital. Dr Mbokoto testified that at birth, the tubes in the abdomen are oedematous and the wrong tube or tissue may be removed. As such, this cannot amount to negligence. However, once the laboratory results are received and they indicate that the fallopian tissue cannot be confirmed then the patient should be called back for the procedure to be redone or be advised on some form of contraceptive. Dr Adu's words echoed by Mr Seate were that it is forgivable to miss the right fallopian tube during tubal ligation, but it is unforgivable not to advise the patient of the laboratory results. Dr Mbokota termed it sub-standard.

[22] The plaintiff testified that she did not want to have more children after her third child and hence requested the doctor at George Stegman Hospital to perform sterilisation after the birth of her third child. Her evidence was that she was never informed of the results from the laboratory and hence she did not take any contraceptives. There is no evidence from the defendant that the plaintiff was ever informed to come back for the results or even informed of the laboratory results. It is improbable that the plaintiff would hide having known the results and did nothing to prevent another pregnancy which she initially did not want. On a balance of probabilities the version of the plaintiff is found to be true that she was never

informed of the results from the laboratory that the right fallopian tube tissue could not be confirmed.

[23] The defendant argued that sterilisation was done and there was a possibility of recanalization of the right fallopian tube. This argument is unfortunately without any substantiation and cannot be accepted. No witness was called to testify that indeed both fallopian tubes were ligated at the time the plaintiff gave birth. In the absence of such evidence the version of the defendant is rejected.

[24] The conduct of the defendant's employees by failing to inform the plaintiff of the results that the right fallopian tube was not properly ligated, falls short of the standard of a *diligens paterfamilias* and is classified as negligent.

[25] The plaintiff's claim is that as a result of the negligence of the defendant's employees, she suffered damages. The general principle of causation were reinstated in the case of **International Shipping Co Pty Ltd v Bentley 1990 (1) SA 680 (A)** at 700 E– I, as follows:

> *"As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but for' test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss, aliter, if it would not so ensued. If the wrongful act is shown in this way not to be a causa sine qua non of the loss suffered, then no legal liability can arise. On the other hand, demonstration*

that the wrongful act was a causa sine qua non of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

[26] In the case of **Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape 2015 (2) SA 97 (SCA)** at par 8 the following was stated:

*"The general rule is that she who asserts must prove. Thus in a case such as this a plaintiff must prove that the damage that she has sustained has been caused by the defendant's negligence. The failure of a professional person to adhere to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which he or she belongs would normally constitute negligence (**Van Wyk v Lewis 1924 AD 438 at 444).***

[27] In this matter the issue of factual causation is whether but for the defendant's employees' failure to inform the plaintiff of the laboratory results, plaintiff would have taken contraceptives and the fourth child probably not conceived. The plaintiff's pregnancy which resulted in the birth of her fourth child was directly caused by her belief that she was sterilised when she was not. Further that she was not advised of the outcome of the results confirming same. It is this failure to inform her that resulted in her not taking any contraceptives to prevent another pregnancy.

[28] The next question is whether the conduct of the defendant's employees is sufficiently linked to the loss for legal liability to ensue. The plaintiff in this matter wanted to be sterilised as she was infected with a disease and did not want to expose any of her children. Secondly she stated that she was not in a good financial position to raise another child. These are valid reasons by the plaintiff and the birth of her fourth child was as a direct result of the negligence by the employees of the defendant. This is a foreseeable cost and the defendant is vicariously liable for the

costs claimed by the plaintiff which constitute and include maintenance of the child from birth until at the age of 18 years.

Costs

[29] The submission on behalf of the plaintiff was that costs should be on a normal scale against the defendant except for the costs of **12 April 2021** which should be on a punitive scale. The reason for that submission was that the defendant on **12 April 2021** called an irrelevant witness, Mr Seate who did not assist in the whereabouts of the hospital file. Instead he just confirmed the recklessness of the hospital in failing to keep the patient's records. I am in agreement with this submission on behalf of the plaintiff. This trial was postponed from **10 November 2020** to **12 April 2021** at the request of the defendant for witnesses. On **12 April 2021** the defendant called Mr Seate. Mr Seate was the Chief Executive Officer of the hospital at the time the plaintiff was admitted. He did not know where the records of the plaintiff were and could not assist with what was contained in those records. At best he just confirmed that failure to inform the plaintiff of the results from the laboratory was unforgivable.

[30] The defendant in having the matter postponed for a number of months only to call a witness who did not assists the court let alone the defendant, was an unnecessary delay. I see no reason why a punitive cost order should not be made for the costs of **12 April 2021** against the defendant.

Order

[31] Consequently, I make the following order:

1. The Defendant is ordered to pay to the Plaintiff such damages as the parties might agree upon or as the Plaintiff might be able to prove;
2. Defendant is ordered to pay the Plaintiff's costs on party and party scale which shall include costs of expert Dr Adu.
3. Defendant is ordered to pay the costs of **12 April 2021** on a scale of attorney and client scale.

J T DJAJE
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING	**: 18 JUNE 2021**
DATE OF JUDGMENT	**: 12 AUGUST 2021**
COUNSEL FOR THE PLAINTIFF	**: MR J. NKOMO**
COUNSEL FOR THE DEFENDANT	**: ADV. H. MASILO**