THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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Dr F Kluever v De Goede (20198/2014) [2015] ZASCA 105 (19 August 2015).

The Supreme Court of Appeal (SCA) today dismissed an appeal against a finding of the court below that two medical practitioners were negligent when they performed surgical procedures on the respondent.

On 5 April 2007, the respondent, whilst playing rugby during a school tournament, sustained a rapture of the patella tendon of his right knee. At that stage, he had been offered a five year contract to play for the Sharks Rugby Franchise from 2008. As a result, the respondent received medical treatment at 1 Military Hospital, Pretoria, where he was initially diagnosed with a sprained knee, but five days later was re-diagnosed to have sustained a rupture of the patella tendon.

On 13 April 2007, Dr F Kluever, an orthopaedic surgeon employed by the Minister of Defence at the aforementioned hospital, performed the surgery to repair the respondent's raptured patella tendon. After the surgical operation, his leg was placed in a brace, which was removed after six weeks on 25 May 2007. Dr Kluever thereafter referred the respondent to a physiotherapist to restore full flexion of the knee. The physiotherapist struggled to achieve this and this led him during September 2007 to refer the respondent to a biokineticist. The latter noticed that the right patella was slightly higher than the left. The respondent was also taken to the High Performance Centre in Pretoria where it was suggested that the circulage wire inserted by Dr Kluever during the primary surgery be removed as it might be hindering the flexing of the knee. The physiotherapist reported this to Dr Kluever, who scheduled a second surgery.

On 1 October 2007 Dr R Bhawani performed the second procedure and removed the circulage wire. The physiotherapist and the biokineticist continued with the rehabilitation programme of the respondent's knee but could not achieve a complete range of movement. During 2008, the respondent joined the Sharks Academy and a biokineticist employed at the Academy attended to his rehabilitation. No significant progress was made. As a result, he referred the respondent to Dr de Vlieg, an orthopaedic surgeon who identified a 'high riding patella'.

On 16 September 2008, Dr de Vlieg performed a remedial surgery known as the 'VY quadriceps plasty' to correct the high riding patella. He found that the damage to respondent's knee was irreversible and that his knee would never be fully functional to enable him to play rugby again.

Consequently, the respondent instituted action against Dr Kluever, Dr Bhawani and the Minister of Defence and claimed damages arising from injuries sustained during the surgical procedures. He alleged that the medical practitioners had been negligent when they performed the two surgical procedures. In their plea, the appellants denied negligence and stated that the doctors had performed the surgeries with due care and skill reasonably expected of medical personnel in their position. In the alternative, they pleaded that the respondent had failed to attend scheduled appointments with medical practitioners and that he had undergone an extensive exercise programme contrary to Dr Kluever's advice. The Gauteng Division of the High Court, Pretoria, found that Dr Kluever had been negligent in that she had failed to place the respondent's patella in its correct position on 13 April 2007; and that Dr Bhawani had failed to identify the problem after the primary surgery and that this was the cause of the high riding patella and the condition of the respondent's knee as discovered by Dr de Vlieg in September 2008.

In this court the issue on appeal was whether there had been negligence on the part of the medical practitioners which led to the respondent's present admitted disability.

The SCA restated the applicable legal test for determining medical negligence that a medical practitioner is not expected to exercise the highest possible degree of professional skill, but is bound to employ reasonable skill and care and the medical practitioner would be liable for the consequences if he or she did not take reasonable skill and care. What is reasonable, the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs.

The SCA having regard to the evidence, held that there was an incremental accumulation of mishaps: the misdiagnosis of the respondent's injury; the improper conduct of Dr Kluever before and during the primary procedure; the failure thereafter to detect and identify the high riding patella and that it was clear that the respondent's present disability was due to Dr Kluever's negligence. The SCA found that the failure by Dr Kluever to place the patella properly during the primary surgery and the subsequent failure by her and Dr Bhawani to recognise and to identify and thereafter to repair the high riding patella, caused the respondent to continue to suffer pain in his knee. The SCA furthermore, concluded that this was the cause of the irreversible damage to his knee as found by Dr de Vlieg. The SCA further concluded that the repair of respondent's patella tendon could have been successful had the operation been performed with the necessary skill and care and had the high riding patella been timeously identified.

Accordingly, the SCA dismissed the appeal with costs and stated that the court a quo had correctly upheld the respondent's claim against the appellants.

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