THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1482/2024

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH OF THE GAUTENG PROVINCIAL GOVERNMENT **APPELLANT**

and

C B M **RESPONDENT**

Neutral citation: *The MEC for Health of the Gauteng Provincial Government v C B M* (1482/2024) [2026] ZASCA 80 (28 May 2026)

Coram: SCHIPPERS, MBATHA, HUGHES and KOEN JJA and KOOVERJIE AJA

Heard: 7 May 2026

Delivered: 28 May 2026

Summary: Medical negligence – whether hysterectomy caused by negligence of appellants' employees – absence of medical records – prima facie evidence of negligence – evidentiary burden to adduce evidence – not rebutted.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Francis-Subbiah J, sitting as a court of first instance):

1 The appeal is upheld in part.

2 Paragraph 57(b) of the order of the high court is set aside and is substituted with the following:

‘(b) (i) The defendant is directed to pay the plaintiff's proven or agreed damages suffered as a result of the hysterectomy performed on her by the defendant's employees on 24 April 2016;

(ii) The plaintiff's claim for damages on the ground that the defendant's employees failed to provide her with the necessary support, failed to refer her to counselling, or provide her with any information pertaining to the effects of the hysterectomy, alleged in paragraph 9.5 of the particulars of claim, is dismissed.’

3 The appellant shall pay the costs of the appeal.

JUDGMENT

Koen JA (Schippers, Mbatha and Hughes JJA and Kooverjie AJA concurring)

Introduction

[1] While undergoing a caesarean section (the caesarean) on 24 April 2016, the respondent, Ms CBM, suffered severe post-partum haemorrhage (PPH). This required her to undergo a total abdominal hysterectomy. She instituted an action against the appellant, the Member of the Executive Council for Health of the Gauteng Province, seeking damages, claiming that the medical care she received

was substandard resulting in the hysterectomy and further, that she was not provided with counselling thereafter.

[2] The Gauteng Division of the High Court, Johannesburg (the high court), found that the appellant's employees were negligent in their treatment of the respondent. It ordered the appellant to pay 100 per cent of her proven or agreed damages. The appeal is against that order with the leave of the high court.

The background

[3] At around 09h00 on 23 April 2016, shortly before she was expected to give birth to her first child, the respondent's membranes ruptured. She went to the municipal clinic at Soshanguve (the clinic), arriving there at around 15h00. She was examined and referred to the Dr George Mukhari Academic Hospital, a public hospital (the hospital), where she arrived at around 16h30.

[4] She testified that she was not attended to until 23h00. An ultrasound was performed. She was examined by a student doctor who noted a yellowish discharge in her genital area. He checked the foetal heart rate, which was normal and advised her not to panic. He later returned with a qualified doctor. This doctor was unavailable to attend to the respondent as he was busy with other patients. Around 02h00, she was taken to an operating theatre for a caesarean, but there were no doctors available to attend to her, so she was returned to the ward where she fell asleep.

[5] On 24 April 2016, according to the respondent's particulars of claim at around 07h00, an ultrasound was performed. The respondent was informed that the baby's heartbeat was suppressed. She was taken to the theatre. A caesarean was performed at 09h00 under general anaesthesia, as, according to her, the doctors

could not locate her spinal cord to administer epidural anaesthesia. Her next recollection is waking up in the intensive care unit (ICU) some three days later.

[6] She had suffered a severe, life-threatening PPH during the caesarean. PPH is the leading cause of maternal mortality. The PPH necessitated an emergency total abdominal hysterectomy. While recovering in the ICU a professor, whose name was not disclosed, told her that her uterus had been removed. She was not provided with a full explanation.

[7] She was subsequently moved to the high care section and later to a general ward, where she remained until she refused further treatment, stating that she was well and wished to be with her family. She discharged herself from the hospital on 29 April 2016. The RHT (Refuse Hospital Treatment) form which she signed, did not refer to a 'lack of treatment'. She returned to the hospital on two subsequent occasions to have stitches removed. Her baby was born without any complications or cerebral palsy and was normal.

The pleadings and evidence

[8] The respondent pleaded, in support of the allegation of negligence, that the appellant's employees: failed to urgently attend to her as per the referral note from the clinic, when they could have done so; delayed inordinately in providing medical care to her and her unborn baby; failed to perform the caesarean without any harm to her when they could and should have done so; failed to adequately conduct the caesarean, thus resulting in the removal of her reproductive structures without any justifiable cause; failed to provide the necessary support and/or to refer her to counselling and to provide her with information pertaining to the effects of the delayed performance of the procedure on her child; and failed to display skill and expertise in treating her. The appellant denied these allegations.

[9] The respondent testified and adduced the testimony of Dr Mpho Stella Pooe (Dr Pooe), a medical doctor with 18 years' experience in obstetrics and gynaecology. The appellant adduced the evidence of Dr Joseph Simson Mogwane (Dr Mogwane) and Dr Allen Lebogang Anne Manthata-Cruywagen (Dr Manthata-Cruywagen). Dr Manthata-Cruywagen is a specialist obstetric gynaecologist, with a Fellowship and a Master's degree in Obstetrics and Gynaecology. She has practiced as such since 2000 and is the head of department at One Military Hospital, Pretoria. The evidence of these witnesses is set out below.

The respondent's evidence

[10] The respondent's testimony was that she was in labour when her membranes ruptured at around 09h00 on 23 April 2016. She disputed that the rupture of the membranes occurred pre-labour.

The documentary evidence

[11] Dr Mogwane, a senior clinical executive at the hospital, testified that the majority of the respondent's medical records pertaining to her admission and treatment were unavailable and could not be located despite a diligent search. Only the maternity register, ICU book, and theatre book were available, none of which recorded the cause of the PPH and hence the need for the hysterectomy. Laboratory tests subsequently conducted on the uterus, confirmed the absence of infection. All other information would have been recorded in the patient's file, which was not available. Although not called as an expert witness, he confirmed, by virtue of his training as a medical doctor, that the presence of meconium-stained grade II liquor would indicate that a caesarean had become necessary. If not performed, the baby could die.

The medical evidence

[12] Dr Pooe and Dr Manthata-Cruywagen submitted expert reports and prepared a joint summary of points of agreement and disagreement. Dr Pooe's thesis was anchored to the respondent already being in labour when her membranes ruptured on 23 April 2016. She accordingly opined that there was an inordinate delay which caused the PPH and necessitated the hysterectomy.

[13] Dr Manthata-Cruywagen disputed that there was an inordinate delay. She concluded that the respondent was not in labour when admitted to the hospital. A pre-labour rupture of the membranes does not indicate that the respondent was in labour. She attributed the PPH to the following possible causes: infection of the uterus, a 'mistake' during the operation, or a naturally damaged uterus that does not contract (an atonic uterus).

The judgment of the high court

[14] The high court accepted the respondent's evidence. It found, inter alia: that she was already in labour when she arrived at the hospital; that meconium-stain grade II liquor was present in the vaginal discharge on 23 April 2016 after her admission, which indicated that immediate emergency attention was then required; and that there were inordinate delays in attending to her before the caesarean was performed at 09h00 on 24 April 2016. It concluded inter alia: that the *res ipsa loquitur* (the facts speak for themselves) maxim applied; that negligence could be inferred because the appellant provided piecemeal medical records which did not explain the critical care the respondent received or should have received; that an adverse inference had to be drawn against the appellant that the missing records would have supported the respondent's contentions; and, that the probable inference is that there was no justifiable explanation, other than a negligent failure to perform the caesarean timeously and without error.

[15] As regards the application of the *res ipsa loquitur* maxim the high court correctly pointed out, with reliance on *HAL obo MML v MEC for Health, Free State (HAL)*,[1] that the maxim does not find application in cases where there is no evidence of what caused an injury and when it occurred. It reasoned as follows. For the maxim to apply it had to be established what went wrong and that in this case, it was the removal of the respondent's uterus. What caused the PPH remained a mystery because of the missing medical records. Whether an act by the respondent's employees could be identified as a cause depends on a conclusion to be drawn from the available evidence and relevant probabilities.

[16] The high court stated that the onus was of critical importance. Where it is impossible for a plaintiff to provide sufficient evidence on a particular aspect, less evidence will suffice to establish a prima facie case. Once an inference of negligence has been drawn, a defendant may offer an explanation which must be reasonable and not speculative, of how the incident occurred particularly where, as in medical cases, the treatment accorded to a plaintiff is peculiarly within the knowledge of the medical staff. If this evidential burden cannot be discharged, the probability of negligence is not destroyed and negligence is established.

Discussion

[17] It is common cause that the respondent suffered PPH and that this necessitated the hysterectomy. The central inquiry is whether the respondent discharged the onus of proving, on a preponderance of probabilities, that the PPH was caused by negligence, as pleaded, on the part of the appellant's employees. A number of issues arise for consideration.

---

[1] *HAL obo MML v MEC for Health, Free State* [2021] ZASCA 149; [2022] 1 All SA 28 (SCA) (*HAL*) para 81.

The absence of the patient file and other documents

[18] The absence of the medical records featured prominently in the high court's judgment and findings. The uncontroverted evidence of Dr Mogwane, however, established that some of the documents were no longer available because they had been mislaid or were lost. The appellant presented a plausible explanation for the absence of the documents. It was not suggested, and rightly so, as there was no basis for finding that the medical records were available but were deliberately withheld. The appellant demonstrated good faith. An affidavit had also been submitted explaining the absence of the records.

[19] As much as the absence of documentary evidence might make it impossible for the respondent to provide all the relevant evidence on a particular aspect, the same applies to the appellant. The absence of the documents should have been treated as a neutral factor, as in *HAL*.[2] No adverse inference should have been drawn by the high court against the appellant due to the lack of documentary evidence. In doing so, the high court erred. The merits of the respondent's claim fell to be decided on the remaining available evidence.

The res ipsa loquitur maxim

[20] The *res ipsa loquitur* maxim also featured prominently in the high court's reasoning. Over a century ago, this Court, in *Van Wyk v Lewis*,[3] warned that the maxim should rarely, if ever, be used in cases of alleged medical negligence, especially when the facts are not proven and expert opinions are based on speculation, leading to multiple equally plausible explanations for how an injury occurred. In medical malpractice, negligence does not automatically result from

---

[2] Ibid.
[3] *Van Wyk v Lewis* 1924 AD 438 at 462.

something having gone ‘wrong’. As this Court noted in *Buthelezi v Nwaba*,[4] referencing *Hucks v Cole*:[5]

‘[w]ith the best will in the world things sometimes went amiss in surgical operations or medical treatment. A doctor was not to be held negligent simply because something went wrong.’[6]

[21] The application of the *res ipsa loquitur* maxim simply involves the weighing of all evidence, which a court has to undertake, to determine whether the onus of proof has been discharged. In *Goliath v MEC for Health, Eastern Cape*,[7] this Court said:

‘Thus in every case, including one where the maxim *res ipsa loquitur* is applicable, the inquiry at the end of the case is whether the plaintiff has discharged the onus resting upon her in connection with the issue of negligence . . . That being so, and given what Holmes JA described as the “evolved mystique of the maxim”, the time may well have come for us to heed the call of Lord Justice Hobhouse to jettison it from our legal lexicon . . .

Medical negligence cases do sometimes involve questions of factual complexity and difficulty and may require the evaluation of technical and conflicting expert evidence. But the trial procedure, which is essentially the same as in other cases, is designed to deal with those and thus no special difficulty ought to be involved in determining them . . .

. . . as Innes CJ stressed in *Van Wyk v Lewis* at 445, each case ultimately depends upon its own facts. In that, Kotze JA was at one with the Chief Justice when he observed (at 453) “the question of negligence or no negligence must be ascertained from a consideration of all the facts viewed as a whole.” So too was Wessels JA when he stated (at 461-462):

“We cannot determine in the abstract whether a surgeon has or has not exhibited reasonable skill and care. We must place ourselves as nearly as possible in the exact position in which the surgeon found himself when he conducted the particular operation and we must then determine from all the circumstances whether he acted with reasonable care or negligently. Did he act as an average surgeon placed in similar circumstances would have acted, or did he manifestly fall short of the

---

[4] *Buthelezi v Ndaba* [2013] ZASCA 72; 2013 (5) SA 437 (SCA) para 15.
[5] *Hucks v Cole* [1968] 118 New LJ.
[6] Ibid at 469.
[7] *Goliath v MEC for Health, Eastern Cape* [2014] ZASCA 182; 2015 (2) SA 89 (SCA) paras 12, 13 and 15.

skill, care and judgment of the average surgeon in similar circumstances? If he falls short he is negligent."'

[22] The maxim is part of inferential reasoning applied when evaluating conflicting or mutually contradictory evidence, to determine whether a particular factual inference can be drawn from the facts, having regard to the probabilities and the credibility of the witnesses. It is not a presumption of law[8] or fact. The question is simply whether, in the case of a civil dispute, the probabilities support a particular inference as the more probable one. Removing the respondent's uterus to save her life was not an error. The real issue was what caused the PPH and whether it resulted from any negligent conduct by the appellant's employees.

The possible causes of the PPH

[23] The evidence confined the possible causes of the PPH to: the alleged inordinate delay in attending to the respondent (Dr Pooe's thesis); uterine infection; a 'mistake' during the operation; and a natural failure of the uterus. A subsequent laboratory test on the uterus found no infection. Although a possible ascending infection was alluded to, there was no factual basis for such a finding. The possibility that the PPH resulted from an infection was thus safely ruled out. That left the alleged inordinate delay, a mistake during the operation, or a natural failure of the uterus.

The standard of negligence

[24] Professional negligence is determined by reference to the standard of conduct of the reasonably skilled and careful practitioner in the particular field and in similar circumstances. A medical practitioner diagnosing and treating a patient

---

[8] *Goliath v Member of the Executive Council for Health, Eastern Cape* 2014 ZASCA 182; 2015 (2) SA 97 (SCA) para 10 and *Pringle v Administrator Transvaal* 1990 (2) SA 379 (W) at 384H.

is expected to adhere to the general level of skill, care and diligence possessed and exercised by members of the branch of the profession to which he or she belongs. It will only be negligence if the practitioner's conduct does not comply with that standard of care[9] – *imperitia culpae adnumeratur*.[10] The care which the appellant's employees were required to display must be evaluated having regard to, inter alia, the standards prescribed in the Guidelines for Maternity Care in South Africa, 4th edition 2015 (the Guidelines).

The alleged inordinate delay

[25] The respondent's case proceeded solely on Dr Pooe's thesis that the removal of her uterus was caused by prolonged labour, with foetal distress. The high court determined that the delay was excessive, that a problem already existed and that further medical attention could not have waited. In reaching that conclusion, the high court erred, as the care rendered was in accordance with the standards set out in the Guidelines, as shall be demonstrated below. This discussion requires a brief analysis of Dr Pooe's evidence.

[26] I commence with a few general observations regarding Dr Pooe as an expert witness. Of grave concern is that Dr Pooe sought to testify as a medical expert, relying on her status as a medical practitioner, when she had been suspended by the Health Professions Council of South Africa. The consequence of suspension is that a medical practitioner is disqualified from practising and her registration is deemed to be cancelled until the period of suspension has expired.[11] Dr Pooe should have disclosed her suspension to the high court. On the evidence, she did not disclose this fact to the respondent's legal team; it emerged during cross-examination. When she testified she was engaged in mining. Her suspension,

---

[9] *Topham v MEC for the Department of Health, Mpumalanga* (351/2012) [2013] ZASCA 65 (27 May 2013) para 6.
[10] If someone professes to have specific skills but acts with incompetence, they are held liable for negligence.
[11] Section 44 of the Health Professions Act 56 of 1974.

whatever the reasons may be, disqualified her from practising as a medical practitioner. Another cause for concern was her stubborn refusal to concede that she never qualified as a specialist obstetrician and gynaecologist.

[27] Dr Pooe's thesis of an inordinate delay in performing the caesarean was based on the respondent already being in labour when she experienced the membrane rupture at 09h00 on 23 April 2016. She sought to support her thesis from the clinic's referral of the respondent to the hospital, which she maintained indicated that the respondent was already at risk and needed individualised attention, because she was in labour.

[28] For the contention that the respondent was already in labour, Dr Pooe relied mainly, it seems, on the respondent's own assessment that she was in labour when her membranes ruptured at 09h00 on 23 April 2016. Such self-diagnosis, particularly by a primigravida (first-time mother), was explained by Dr Manthata-Cruywagen and accepted by Dr Pooe to be notoriously unreliable. False labour might be mistaken for true labour. Dr Pooe conceded that without medical records, no one knows when labour actually commenced.

[29] Whether a mother is in labour, furthermore, has a very specific meaning, as defined in the Guidelines. On the evidence of Dr Manthata-Cruywagen, the necessary criteria to conclude that the respondent was already in labour had not been satisfied. Dr Pooe's retort that not all the factors indicated in the Guideline had to be present, did not support her opinion. As Dr Manthata-Cruywagen pointed out: the respondent did not have pain; uterine contractions had not commenced (it was false labour); there was a yellowish vaginal discharge, which indicates normal

meconium-stained grade I liquor;[12] a vaginal examination was conducted, which did not cause alarm; and the respondent managed to sleep until the next morning. The respondent was accordingly required to wait for spontaneous labour to occur, because where a mother's 'water broke', induction, according to the Guidelines, is required to start between 12 to 24 hours. This is what happened with the caesarean being performed at 09h00 on 24 April 2016.

[30] The respondent was referred by the clinic to the hospital because this is what the protocol requires in instances of a pre-labour rupture of membranes. The clinic could not attend to her as a mother with pre-labour ruptured membranes and more than 34 weeks pregnant. This left no choice but to refer her to a hospital, but a natural birth was still an option. It is only at the hospital where the doctors would decide how to medically manage the respondent's condition. The referral *per se*, did not mean that there was already something wrong.

[31] Dr Pooe also questioned why the respondent was placed under general anaesthesia and rhetorically asked whether that was not because the respondent was already in a compromised situation. The respondent had, however, explained that the doctors attending to her could not locate her spinal cord, presumably referring to epidural anaesthesia having been attempted, but this was abandoned in favour of a general anaesthetic.

---

[12] The meconium-stained grade II discharge was detected only on the morning of 24 April 2016, meaning that the foetus was distressed in the morning, necessitating the caesarean during which heavy bleeding, occurred. From this the high court wrongly concluded that the respondent deserved special management but was not attended to despite the foetus being in distress, whereas in fact, the yellow discharge, which is meconium grade I, and not grade II as per the laboratory results, required no special management. Detailed evidence was led on the colour of meconium staining: grade I is yellow, grade II is yellowish greenish fluid, and grade III is green. On detection of meconium grade II, the respondent was taken for a caesarean section, and the baby was born with no adverse *sequelae*.

[32] Dr Pooe's suggestion of complications during the caesarean, due to prolonged labour, was without any factual or medical foundation. She nevertheless persisted that the respondent suffered prolonged labour with foetal distress, which caused the PPH. This opinion also cannot be sustained on the evidence. If the respondent was already in labour at 09h00 on 23 April 2016, then the foetus, as explained by Dr Manthata-Cruywagen, would have endured a labour phase of more than 24 hours before it was born by caesarean section the next day.

[33] Prolonged labour of that duration would have resulted in the baby being stillborn or suffering some hypoxic or similar injury, resulting in, for example, cerebral palsy. Yet the baby was born healthy, with no signs of cerebral palsy and achieved Apgar scores of 7 at 11 minutes and 8 at 35 minutes, which are normal. Thus, on the probabilities, the respondent could not yet have been in labour when her membranes ruptured, nor was the time until the baby was born an inordinate delay. Dr Pooe disagreed that the baby was unaffected, indicating that the clinical history supplied by the respondent of her baby's symptoms were consistent with autism. This opinion was speculative, without any any foundation in fact, and without a formal diagnosis to that effect. On the contrary, Dr Manthata-Cruywagen stated that autism is not a consequence of prolonged labour.

[34] In regard to Dr Pooe's groundless opinion that the child's behaviour was consistent with autism, the dictum of Wessels JA stated in *Coopers (South Africa)*, bears repetition:[13]

'[A]n expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the

---

[13] *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung mbH* 1976 (3) SA 352 (A) at 371G.

process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'

[35] This dictum was cited with approval by the United Kingdom Supreme Court in *Kennedy*,[14] in which Lord Reed and Lord Hodge said:

'If anything, the suggestion that an unsubstantiated ipse dixit [an assertion without proof] carries little weight is understated; in our view such evidence is worthless.'

[36] That is the case with most of Dr Pooe's evidence. She could not produce the medical textbooks on which she relied for her opinion that the respondent was in labour (her view was contrary to the Guidelines) and indicated that these textbooks were referred to in the experts' joint minute. When it was pointed out to her that the textbooks were not cited there, she then suggested that the minute (which she had signed) was 'totally wrong'. She testified that because the respondent was a primigravida, 'she might prolong to dilate'. In the next breath she said, 'it could be that she was not really a primigravida', and that the respondent 'did have a previously delivery which was another factor'.

[37] Having regard to the lack of any foundation supporting the opinion expressed by Dr Pooe and the poor quality of her evidence generally, I have no hesitation in accepting the evidence of Dr Manthata- Cruywagen where it is in conflict with that of Dr Pooe. Before us, counsel for the respondent fairly and correctly conceded that this Court cannot place much reliance on Dr Pooe's evidence. The opinion of Dr Manthata-Cruywagen, in contrast to that of Dr Pooe, was based on cogent reasoning, followed the terms of the Guidelines, was clear, supported by facts and studies, and presented in a fair manner without favour to either side.

---

[14] *Kennedy v Cordia (Services) LLP* [2016] UKSC 6; [2016] 1 WLR 597 para 48.

[38] The respondent was monitored after her admission to the hospital and managed in accordance with the Guidelines. It was not established on a preponderance of probabilities that there was a culpable, inordinate delay by the employees of the appellant which resulted in the PPH, hysterectomy and the removal of the uterus.

A mistake during the operation and the uterus failing naturally

[39] The remaining causes of PPH identified by Dr Manthata-Cruywagen were a mistake during the operation, or the uterus failing naturally. When specifically asked whether there was any mismanagement in that regard, she replied that it was difficult to say. Whether either of these two eventualities arose, would only be known to the doctors who performed the operation on the respondent, namely Dr Mebele and Dr Thobejane. These are facts which would fall peculiarly within their knowledge.[15] They were, however, not called as witnesses. It was also not placed on record that they were not available to give evidence. It must therefore be accepted that they were available and could give evidence.

[40] A mistake during the operation could only be attributed to an act or omission by the appellant's employees. Statistically, there is a very high probability against a hysterectomy becoming necessary in the ordinary course of a caesarean, unless there was some culpable mistake.

---

[15] *Ntsele v MEC for Health, Gauteng Provincial Government*) [2012] ZAGPJHC 208; [2013] 2 All SA 356 (GSJ) paras 5 and 121.

[41] Where facts fall peculiarly within the knowledge of an alleged wrongdoer then, as this Court stated in *Gericke v Sack*,[16] quoting from *Union Government (Minister of Railways) v Sykes*:[17]

> 'less evidence will suffice to establish a *prima facie* case where the matter is peculiarly within the knowledge of the opposite party than would under other circumstances be required.'

On the evidence, the remaining and most likely prima facie cause of the PPH and hysterectomy was a mistake that occurred during the operation. This cast an evidentiary burden on the appellant to adduce evidence in rebuttal of negligence on the part of the medical practitioners who performed the operation. The appellant failed to do so. Although this was not the main ground of negligence relied upon in the respondent's particulars of claim, the grounds alleged were sufficiently wide to cover this claim.

[42] Accordingly, the high court was correct to direct the appellant to pay the plaintiff's proven or agreed damages suffered as a result of the hysterectomy performed on her by the appellant's employees on 24 April 2016.

The failure to provide rehabilitative therapy

[43] The respondent testified that the professor who attended to her and cautioned her against discharging herself from the hospital told her that arrangements had been made for her to consult with a social worker, a psychologist, and a gynaecologist. These arrangements were in the process of being finalised. She conceded that he had promised that she would meet with these experts so that she could be fully informed of the background of what had happened to her. She lost that opportunity because she discharged herself. She accordingly never allowed the process of counselling to unfold. Moreover, the unchallenged evidence is that the

---

[16] *Gericke v Sack* 1978 (1) SA 821 (A) 827F-G.
[17] *Union Government (Minister of Railways) v Sykes* 1913 AD 156 at 173-174.

hospital could not force the respondent to remain in hospital: patient autonomy must be respected.

[44] The respondent subsequently returned to the hospital on two occasions to have stitches removed, but even then, did not request counselling. If there were still some obligation to offer counselling, it was previously, by her conduct, rejected. In these circumstances, there was no culpable omission on the part of the appellant to render counselling. The high court erred in awarding damages for an alleged failure to offer counselling.

Conclusion

[45] It has not been shown that the high court was incorrect, in paragraph 57(b) of its order, to have directed the appellant to pay the respondent's proven or agreed damages suffered as a result of the hysterectomy performed on her by the appellant's employees on 24 April 2016. The order directing the payment of damages on the ground that the appellant's employees failed to provide her with the necessary support, failed to refer her to counselling, or failed to provide her with any information pertaining to the effects of the hysterectomy, alleged in paragraph 9.5 of the particulars of claim, however, cannot stand. To that extent, the order of the high court must be set aside and substituted with an order dismissing that part of the respondent's claim for damages.

[46] The respondent was substantially successful in the appeal. There is no reason why the appellant should not pay the respondent's costs of the appeal.

Order

[47] The following order is granted:

1 The appeal is upheld in part.

2 Paragraph 57(b) of the order of the high court is set aside and is substituted with the following:

'(b) (i) The defendant is directed to pay the plaintiff's proven or agreed damages suffered as a result of the hysterectomy performed on her by the defendant's employees on 24 April 2016;

(ii) The plaintiff's claim for damages on the ground that the defendant's employees failed to provide her with the necessary support, failed to refer her to counselling, or provide her with any information pertaining to the effects of the hysterectomy, alleged in paragraph 9.5 of the particulars of claim, is dismissed.'

3 The appellant shall pay the costs of the appeal.

____

P A KOEN

JUDGE OF APPEAL

Appearances:

For appellant:	L Kalashe
Instructed by:	State Attorney, Pretoria
	State Attorney, Bloemfontein
For respondent:	K Mhlanga
Instructed by:	Maseda Attorneys, Pretoria
	Mavuya Inc., Bloemfontein.