NYASHADZASHE RUTH SAI

versus

MEDICAL INVESTMENTS LIMITED t/a AVENUES CLINIC

HIGH COURT OF ZIMBABWE

MATANDA-MOYO J

HARARE, 27 June 2016 & 18 January 2017

**Absolution from the instance**

*BM Bhala*, for the plaintiff

*N Chamisa* and *R Mabwe*, for the defendant

MATANDA-MOYO J: This is an application for absolution from the instance after closure of the plaintiff’s case. The defendant argue that the plaintiff has failed to prove a *prima facie* case against the defendant and the matter ought to be dismissed before putting the defendant on its defence.

The plaintiff sued the defendant for US$400 000.00 for general damages for pain, suffering, discomfort, mental distress and anguish, anxiety, humiliation and a violation of privacy allegedly suffered by the plaintiff as a result of the defendant’s negligence between 7 and 10 January 2014. During that time the plaintiff was admitted in the defendant’s hospital and was allegedly under its care.

The plaintiff averred that she was admitted in the defendant’s clinic in terms of a contract between herself and the defendant. The defendant breached the terms of that contract by failing to take all reasonable steps expected of a private hospital of its reputation to provide the plaintiff with such medical treatment as would be required by her medical condition. The plaintiff also averred that the defendant breached its legal duties to the plaintiff by omission in that she failed to provide reasonable care and attention to the plaintiff and as a result, the plaintiff lost her pregnancy. The plaintiff also complained that the defendant failed to accord her the privacy she deserved in the circumstances by letting her miscarry in a public ward during visiting hours. The plaintiff also alleged her miscarriage was solely caused by the defendant’s negligence. The defendant opposed the relief sought. The defendant averred that she owns hospital facilities that are open to use by different medical practitioners. During the period of her admission the plaintiff was under the care of a Dr Mhlanga. The defendant’s nursing staff were during that period under the direction of Dr Mhlanga. The defendant denied causing the plaintiff’s miscarriage through any act or omission. The plaintiff was admitted to a ward of her choice as directed by her referring practitioner. The defendant also challenged the quantum of damages suffered and prayed that the plaintiff’s claim be dismissed.

The plaintiff’s testimony was that she was admitted to Avenues Clinic based on a contract between the parties. Such admission was on 7 January 2014. On 8 January morning Dr Mhlanga saw her and advised her on what he had instructed the nurses to do. He advised her chances of improving and avoiding a miscarriage were fifty-fifty. She testified that at around 1pm she started experiencing excruciating pains. Despite ringing the nurses’ buzzer no nurse attended to her until after 4pm when her husband arrived. She however remembered a nurse advising her that she would only get some medication after eight hours. The nurses did not call the doctor. She had a pain killer administered on her but it failed to work.

Thereafter she had a miscarriage in the presence of her husband and mother. No nurse was available. Before the miscarriage she testified a nurse informed her she was losing her baby. After the miscarriage she was wheeled to the labour ward in view of visitors. Afterwards Mr Mhlanga took over. She was discharged the following day without counselling. She later complained to the defendant who acknowledged being negligent. On being asked what could have caused her miscarriage she testified that her doctor had put her on strict bed rest but the defendant did not advise her what it meant and she never observed strict bed rest. That could have contributed to her miscarriage.

On being cross-examined she admitted suing on a contract. No copy of the contract was admitted into evidence. No terms of such contract were placed before the court. She was asked to read para 5 of the admission form which stated that a patient is admitted under the care of his/her medical or dental practitioner.

On being asked what caused her miscarriage she said it was failure by nurses to give the doctor adequate information. She however admitted she suffers from anaemia. She admitted that she was admitted due to the threatened miscarriage and an open cervix. She also admitted that she could have forgotten some details due to the pains she experienced.

The plaintiff also admitted that she was put in a public ward at her request. She failed to explain damages of $400 000.00 except to say there are deterrent damages. Under cross examination she admitted she had no medical knowledge of what caused her miscarriage.

Dr M Mhlanga testifies that he attended to the plaintiff in the absence of her usual doctor. He explained the plaintiff’s diagnosis that she had an open cervix and threatened miscarriage. She had 50-50 chances of miscarriage. He prescribed among others bed rest. He saw her on the 8th. He admitted he was informed in the afternoon of the day in question by the nurses that patient was in pain. He explained sudden labour could have occurred as labour can progress fast and it becomes impossible to prepare a patient for delivery. He did not know the reason for miscarriage. He explained that even if he had been informed earlier he doubted he could have saved the baby. The miscarriage was inevitable and could not have been stopped. He said the only thing he could have done is to refer patient to the labour ward earlier. The doctor testified that he adequately informed the plaintiff on the meaning of bed rest. If she failed to comply then she was stubborn. He also testified that with inevitable abortion pain can’t be controlled. He had no proof that the nurses omitted to do anything he instructed. Under cross-examination he stuck to his story. He also said that the baby’s head looked bigger than normal.

Mr Zishiri’s husband testified last. He confirmed that doctor explained in his presence that the plaintiff was on strict bed rest. This was on morning of 8 January 2014. At about 3:50 pm he came back to hospital and observed wife exhibiting excruciating pain. He called nurses. A nurse advised them they were trying to get hold of doctor for further instructions as they had administered pain killer and the next one could only be administered at 8pm. Diclofenac was administered on her. The pain continued until she miscarried. He said the nurses ignored the plaintiff and did not inform the doctor on time resulting in the abortion.

Under cross-examination he said he never heard any nurse whispering to his wife. He maintained no nurse attended to his wife. He admitted he never made a report to the sister – in – charge.

The plaintiff closed her case resulting in defendant applying for absolution. Absolution from the instance is equated to an application for discharge at the close of the state case. If at the end of the plaintiff’s case there is no evidence to support the plaintiff’s claim or there is insufficient evidence upon which a court acting reasonably, might find for the plaintiff then the court is entitled to absolve the defendant from the instance. The test was aptly set out in the case of *Claude Neon Lights* v *Daniel* 1974 (4) SA 403 (A). The court held that;

“When absolution from the instance is sought at the close of the plaintiff’s case, the test to be applied is not whether the evidence led by the plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence could or might find for the plaintiff.”

The plaintiff must have laid the necessary foundation for showing *prima facie* that the defendant is legally liable. See also *Supreme Service Station Pvt Ltd* 1971 4 SA 90 (RA). It has been held that generally it is unjustifiable to place a defendant on his defence where the plaintiff has failed to establish a *prima facie* case against him/her. In *ATW De Klerk* v *Absa Bank Ltd & Ors* SCA 176 – 02 Schults JA said:

“This implied that a plaintiff has to make out a *prima facie* case …… in the sense that there is evidence relating to all the elements of the claim…..”

*Prima facie* case simply means a case in which the evidence produced is sufficient to enable a decision or verdict to be made unless the evidence is rebutted.

The defendant’s basis for the application is that;

(1) the plaintiff failed to give evidence of an existing contract, in order to prove its point that the defendant breached a contract.

(2) there is an absence of a causal link between the defendant’s action and the plaintiff’s loss.

(3) there is no proof of negligence and unwrongfulness on a balance of probabilities. The plaintiff failed to show how the defendant was negligent.

(4) there is no justification for the quantum of damages claimed.

The plaintiff argued that she had made out a *prima facie* case against the defendants. I do not agree. Once there is testimony by the doctor who is the expert herein that miscarriage was inevitable, no reasonable court can impute negligence on the defendant. There is also no proof that the nurses failed to follow any instructions by the doctor. The miscarriage was not as a result of the defendant’s actions or omissions. No such evidence has been placed before the court.

On the issue of bed rest the plaintiff was advised by the doctor and decided to disregard her doctor’s advice. It is the plaintiff’s actions that likely caused her own miscarriage from the evidence proffered by the plaintiff. The doctor testified that pain was inevitable. What I also find disturbing is the lack by the plaintiff of establishing amounts of each and every claim made. There has been no effort on proving damages. What I have is simply a figure struck from the air without any basis.

The defendant quoted a very instructive matter on suing hospitals. Denning L J in *Roe* v *Ministry of Health and Others ; Woolley* v *Saure* (1954) E W C A CIV 7, [1954] 2 ALL ER 131 CA at 139 ;

“But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiatives would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure.”

The mere fact that the plaintiff had a miscarriage which she believed could have been saved must not justify presence of negligence. The plaintiff ought to have provided evidence showing negligence. I am of the view that the plaintiff’s evidence does not prove all elements of negligence nor breach of contract. No reasonable court applying its mind to the case can find for the plaintiff in the circumstances.

Accordingly I order as follows:

(1) The application for absolution from the instance succeeds and is hereby granted.

(2) The plaintiff’s claim is dismissed in its entirety with costs.

*Mundia & Mudhara*, plaintiff’s legal practitioners

*Atherstone & Cook*, defendant’s legal practitioners