

LOUWRENS v OLDWAGE 2006 (2) SA 161 (SCA)

SUMMARY

- The plaintiff was successful in the High Court in his action for damages for the negligent performance upon him of a surgical procedure by the defendant.
- The plaintiff's success hinged on a resolution in his favour of the essential dispute of fact between the parties, with the Court's choosing to prefer the evidence of the plaintiff and his expert witness to the evidence of the defendant and his expert witness but without providing reasons for its preference.
- Incidental allegations by the plaintiff were that he had not given his informed consent to the surgery and that the defendant had not warned him of the risks inherent in the surgery, specifically, of the harm which allegedly manifested. It appeared from the evidence that the plaintiff had elected to have the surgery actually performed as an alternative to the surgery first recommended when the latter proved unaffordable.
- *Held*, that it was not apparent from the record *why* the Court *a quo* had rejected the evidence of the defendant's experts.
- On a proper approach, the Court ought to have assessed the credibility of the witnesses, their reliability and the probabilities.
- *Held*, further, that the evidence presented to the Court *a quo* merited reconsideration and re-evaluation: the present case was not one in which, even if the Court *a quo had* made credibility findings, the Appeal Court would have considered itself constrained to accept them.
- Moreover, the Appeal Court was naturally entitled to re-evaluate the Court *a quo's* findings of fact which did not depend on credibility but depended, rather, on inferences from the facts and the probabilities.
- *Held*, further, that on a proper evaluation of the evidence, the evidence of the defendant and his expert was to be accepted and the evidence of the plaintiff and his expert was to be rejected.

- *Held*, further, as to the allegation of lack of informed consent, that the defendant had explained in detail to the plaintiff the surgical procedure he planned to do and which was eventually done. In the circumstances, the plaintiff gave informed consent to the operation.
- *Held*, further, that the risk to the plaintiff of the surgery's causing the resultant harm was on the evidence so negligible that it was not unreasonable or negligent of the defendant not to have mentioned it.
- *Held*, further, that the trial Court's uncritical acceptance of the plaintiff's expert evidence and rejection of the B defendant's expert evidence fell short of the requisite standard and the approach laid down by the Supreme Court of Appeal. What was required of the trial Judge was to identify the extent to which the expert opinions were founded on logical reasoning and to compare the competing sets of evidence, in light of the probabilities.
- *Held*, accordingly, that the appeal had to be upheld.