IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO: 590/2008

REPORTABLE

In the matter between:

B. M. **Plaintiff**

and

THE MEC FOR THE DEPARTMENT OF HEALTH,

EASTERN CAPE PROVINCE **Defendant**

JUDGMENT

STRETCH J:

1. This is a delictual action arising from the negligent treatment and death of a one month old infant, L. M. (“Lidume”), while she was hospitalised at the Cecilia Makiwane Hospital (“CMH”) in East London.

2. The action is brought by L.'s mother, B. M., and is for damages arising from severe shock, emotional trauma, psychological pain and suffering and depression which she is alleged to have suffered and continues to suffer as a result of the infant's negligent treatment and subsequent death.

3. At the commencement of the hearing, the defendant conceded that the hospital staff had been negligent in their treatment of L., but denied that this negligence had caused her death. Unless otherwise stated, I shall hereinafter refer to the defendant's servants who were employed as hospital staff at CMH at the time, simply as "the defendant."

4. The parties agreed that the issue of whether L.'s death was caused by the negligent treatment which she had received at CMH should be heard separately.

5. To this end the plaintiff testified that during the third trimester of her pregnancy she was diagnosed as HIV positive. She gave birth to L. on [……]. Both she and the baby were treated with Neverapine. The birth was uneventful and she left the hospital the next day.

6. Subsequent to that she consulted with a Dr Pox and also with Dr Gerber because L. had not been well the day before.

7. Dr Gerber explained to her that L. was suffering from dehydration and that she needed to be admitted to hospital immediately so that she could be administered intravenous fluids. She obeyed and reported with her child to CMH on 2 April 2007.

8. The plaintiff then proceeded to describe the treatment that L. received at this hospital. A synopsis of her evidence together with that which is common cause between the parties is as follows:

All went well until 22h00 on Friday, 6 April 2007 when she noticed that the drip which had been inserted in L.'s head had tissued and was leaking. She reported this to the nursing staff. They advised her to wait until the next morning. Early on the morning of Saturday, 7 April 2007, she was advised to report the leaking drip to the day staff when they reported for duty. This she did. That same morning a specialist paediatrician, Mr Goosen, had prescribed a bowel cocktail for L., and had instructed that the drip should be re-sited. At about 09h00 that same morning the plaintiff reported the leaking drip to Dr Ndabeni who said that she would return later to re-site it. By 11h00 Dr Ndabeni had still not returned. The plaintiff asked the nursing staff to help her. They removed the drip. At 14h00 Dr Ndabeni attended to the ward, but because it was visiting hour, the doctor stated that she would return later to attend to the drip. At 16h00 Dr Ndabeni returned in order to do so. She took L. out of the ward and returned some time later with her. The plaintiff observed that there were marks on L.'s hands, head and feet where unsuccessful attempts had been made to re-insert the drip. Dr Ndabeni said that she would get the help of a more senior colleague to re-site the drip. However, this did not materialise. At 06h00 on 8 April the plaintiff was told that L. did not need a drip. At about 08h00 a Dr Dunga came to examine the child. The doctor was taken aback by L.'s marked deterioration and her serious condition. Dr Dunga had seen L. on previous occasions and had remarked on her improvement. The doctor advised that the prognosis was not good but that she would see what she could do to re-insert the drip. She

took the infant to another room. Shortly thereafter the plaintiff was advised that it was too late. L. died at Cecilia Makiwane Hospital at 09h00 on Sunday, 8 April 2007. She was 37 days old.

9. The plaintiff described the events which transpired during the night before her infant died, and how she experienced them, as follows: During the night L.'s condition deteriorated progressively. She, the plaintiff, did not sleep at all. The infant remained without a drip, with no food and no medication. She frantically clutched the infant to her breast, praying for help and repeating the vows which she had taken to care properly for her newborn child. She observed that her child was dehydrated and begged the nursing staff to summons Dr Ndabeni. According to the plaintiff the nurses did make attempts to do so but could not raise the doctor. She asked to be given the doctor's mobile telephone number. This request was refused. She was crying and pacing the corridor of the hospital with her child in her arms. The nursing staff became angry and abusive when she pointed out that the child was deteriorating, and berated her for giving out that she knew better than they did.

10. Dr Kritzinger practices as a paediatrician and a paediatric pulmonologist at the Christiaan Barnard Memorial Hospital in Cape Town. She testified as a medical expert for the plaintiff. Prof. Cooper, who testified on the defendant's behalf, is affiliated to the Department of Paediatrics at the University of the Witwatersrand.

11. Before this trial commenced these experts had agreed on certain pertinent issues, the most significant of which they had recorded as follows:

"The medical follow up and monitoring by the intern and the medical officer on call during the last 24 hours of life was inadequate as no evidence was found that L .was examined again to assess whether the plan to use oral rehydration fluid was adequate or successful. The medical and nursing team also failed to notice that L. had progressive weight loss (clearly documented over the last 24 hours) and that their treatment plan was therefore failing. *This failure on their part resulted in significant dehydration over the last 24 hours leading up to and contributing to her death on the morning of the 8th of April* (my emphasis)…..

It is highly probable that a young infant with a known hospital acquired infection and other comorbidities, i.e. HIV exposure, malnutrition and dehydration, *will deteriorate if broad spectrum antibiotics are interrupted or stopped* (my emphasis). No alternative antibiotics or route of administration was documented or stated in the nursing or medical notes or retrospective statements of the medical team involved. Hence it is questionable whether L. did in fact receive any antibiotics on the 7th or the morning of the 8th of April……

The probable cause of death of L. was a combination of sepsis and dehydration that led to hypovoleamic and septic shock and cardiorespiratory arrest.

Although we recognize that L. was in a compromised state on admission and that infants with HIV disease have a high morbidity and mortality rate, *the lack of proper medical care and monitoring especially over the last 24 hours of her life, contributed to her deterioration and death* (my emphasis)."

12. This was also the nature of their *viva voce* evidence. Both experts testified that L.'s death was probably caused by the failure to administer antibiotics to prevent sepsis and the failure to provide a route for the administration of fluids to counter dehydration. Prof. Cooper in particular emphasised the crucial importance of the administration of antibiotics. During cross-examination he stated that the administration of antibiotics during the period prior to her death was crucial to L.'s survival and that the failure to do so probably caused her death.

13. He also stated that had L. received proper care during the last 24 hours of her life her chances of survival would have been much greater and that she probably would not have died when she did, but would probably have died (due to other suspected co-morbid factors) a year or two later.

14. In the premises the question for consideration before me is a simple one. It is trite that it is no defence to an action such as this one to contend that the patient would have died in any event. The question is whether the negligence which the defendant has admitted, caused, contributed to or accelerated L.'s death, which was admittedly caused by sepsis and dehydration. The test that is applied to answer this question is commonly referred to as the "but-for" test, designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question.

15. It is common cause that the drip which was utilised to administer treatment for sepsis and dehydration, had tissued and had commenced leaking about 35 hours before the infant died, and was completely removed by a servant of the defendant about 22 hours before death, and that no alternative treatment was administered thereafter.

16. By the close of the defendant's case it was no longer in dispute that this conduct, followed by complete inaction thereafter, caused the child to die when she did, particularly in that L., regard being had to her otherwise pre-morbid status, would have required a heightened degree of care.

17. Applying the law to the facts it is perhaps useful to refer to the much quoted dictum of Corbett JA in *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34E-G:

> "Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to … the harm giving rise to the claim. If it did not, then no legal liability can arise and *cadit quaestio.* If it did, then the second problem becomes relevant viz whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part."

18. Dealing with the second leg of the enquiry, it simply means that it does not necessarily follow that because the negligence of the defendant's servants caused, contributed to or accelerated L.'s death, the defendant is also liable for and caused the emotional shock which the plaintiff alleges she suffered as a result of her child's death.

19. For reasons not particularly clear to me, the parties chose to deal with this leg of the enquiry at a later stage. That being the case, all I am required to determine at this stage, as mentioned at the beginning of this judgment, is whether the defendant's negligence caused L. to die when she did, an issue which to me was patently agreed upon (and correctly so) in the joint memorandum of the experts before this trial commenced.

20. In the premises I am satisfied that it has been borne out by the joint memorandum of the experts as confirmed in material respects by

their evidence and that of the plaintiff, that the defendant's negligence caused L.'s death.

21. One further issue requires determination and seems to have made up the bulk of the argument presented on behalf of the parties.

22. On 13 June 2008 the plaintiff's attorneys penned a letter of demand to the defendant, simultaneously giving notice of intended legal proceedings; alternatively, seeking the defendant's consent for the plaintiff to proceed with her action notwithstanding the fact that the plaintiff's notice did not comply with all the requirements of the Institution of Legal Proceedings against Certain Organs of State Act 40 of 2002 ("the Act"). The granting of this consent is specifically provided for at section 3(1)(b)(ii) of the Act.

23. It appears that the plaintiff's demand was not met, nor was the aforementioned consent forthcoming.

24. The plaintiff accordingly instituted action on 13 August 2008. The defendant, prior to pleading over, raised a special plea of failure to comply with the provisions of section 3(2)(a) read with section 3(3) of the Act which provides that legal proceedings of this nature may only be instituted once notice has been given, which notice should be given within six months of the plaintiff having acquired knowledge of the identity of the defendant and the facts giving rise to the debt.

25. The trial having been set down originally for 24 January 2012, the parties convened a pre-trial conference on 28 May 2010. The

defendant undertook to respond to the queries raised in the plaintiff's detailed agenda, which queries specifically traversed issues of notice and negligence. Despite a number of reminders, the defendant did not revert. On 15 August 2011 the plaintiff placed the defendant on terms to revert by the end of that month, failing which the plaintiff would apply for the holding of a pre-trial conference before a judge in chambers. On 5 October 2011, subsequent to such a conference, Hartle J made an order that the parties had resolved amongst themselves to first deal with the issue of discovery. On 10 January 2012 a further conference was held where it was recorded that the defendant had not yet discovered, despite the trial being two weeks away. The minutes record that the parties had identified the following issues to be determined at the trial:

a. Compliance with the Act with respect to notice;
b. Liability, and in particular whether the defendant's servants had been negligent;
c. Quantum of damages.

26. The minutes further record that the defendant was of the view that the issue of notice, raised in the defendant's special plea, ought to be decided separately. At this conference the defendant declined to admit that the plaintiff had written a complaint after her infant had died, or that this complaint was referred for investigation as early as 26 April 2007, and that an internal investigation was conducted by the defendant into the death of Lidume, which investigation was finalised as early as May 2007.

27. At the same conference, the plaintiff again posed the question as to why, given the history of the matter, the defendant was persisting with its special plea. The defendant declined to reply. The defendant also declined to admit what appears to have been certain findings made at the Department's own internal investigation.

28. All in all, it seems that the defendant's responses to relevant queries raised in order to expedite the matter and to limit trial issues, were singularly unhelpful and paid nothing more than mere lip service to the usual broad-based pre-trial conference categories referred to in rule 37 of the uniform rules of this court.

29. On 18 January 2012 the plaintiff's attorneys wrote to the defendant's attorneys. The letter reads as follows:

"I refer to our telephonic conversation of the 16th instant.

I confirm our advices that your client requires us to apply for condonation in regard to compliance or non-compliance with Act 40 of 2002. This unfortunately has the effect of forcing us to remove the matter from the roll of cases for that day.

I furthermore accordingly confirm our agreement that the matter be removed from the roll, and that costs thereof be costs in the cause.

I have in the circumstances prepared a notice of removal in those terms.

As stated telephonically I am of the view that this matter is eminently settleable, and I encourage you to request your client to give serious consideration thereto."

30. In the light of this history, the plaintiff was constrained to remove the trial from the roll, and to launch a substantive application on motion on 4 April 2012, seeking condonation for the seemingly late delivery of the notice of intended legal proceedings. Not having received a notice of opposition during the period stipulated, the plaintiff, on

3 May 2012, set the application down for hearing on 24 May 2012. On 9 May 2012 the respondent delivered a notice to oppose out of time.

31. In her affidavit in support of the motion, the plaintiff averred that immediately after L. had died on 8 April 2007, she addressed a letter to the Department of Health complaining about the defendant's negligence.

32. In response, the defendant's director of customer care management advised that she would be visiting CMH on 22 May 2007 to investigate the complaint. Subsequent thereto, an internal enquiry was held, and the report relating thereto appears to have been signed off by the department's director of customer care on 1 October 2007. The report raises various concerns which are relevant to this action regarding the conditions in the hospital and the conduct of the defendant's servants.

33. Common sense eventually kicked in, and on 17 May 2012, after having been constrained to deliver an application for condonation in excess of 100 pages long, the plaintiff recorded in a letter to the registrar that the issue of condonation had been settled. It is significant that the defendant, notwithstanding its notice of opposition and insistence that the application should be pursued, failed to deliver any opposition papers.

34. In the premises, and on 24 May 2012, Ebrahim ADJP (as he then was) made a consent order to the effect that the plaintiff had indeed

complied with the provisions of the Act and reserved the costs of the application.

35. On behalf of the plaintiff it was contended that (taking into account the history of this matter which I have outlined above) not only should I make a finding in favour of the plaintiff with respect to the separate issue of L.'s cause of death, but that I should also favour the plaintiff with an award of all the costs she has incurred to date, particularly in that it was clearly on the cards, before this trial commenced, that the defendant's negligence at the very least causally contributed to the infant dying when she did.

36. Counsel for the defendant, at the commencement of this trial, expressed the view that only the issue of quantum ought to stand over for determination, and that both issues of factual and legal causation ought to be disposed of at the trial before me. However (after I had expressed my displeasure that the parties had still not, after such an inordinate delay, been able to effectively manage this trial so as to be in a position to sensibly address me at the commencement thereof as to the proposed conduct of the matter), both counsel agreed that I was only to determine the issue of "whether the defendant's servants' negligent conduct contributed to the child's death".

37. Regarding the merits of what is before me, the defendant's counsel contended that the question of the costs of this trial, and particularly the costs of the condonation application, should be reserved to be dealt with for determination in the final analysis; alternatively, that there should be no order as to costs with respect to the condonation

application. In support of this contention my understanding is that the argument is two-fold:

a. That the plaintiff had a discretion as to whether to launch a condonation application or not;
b. That the defendant was constrained to raise the issue of non-compliance with the Act as a special plea.

38. It goes without saying that it is open to the defendant to raise, *in limine*, the question of failure to comply with or substantively comply with the Act. What I find disconcerting however, is that the history of this matter confirms that this plea was raised either in ignorance or in complete and unjustified denial of what had transpired in the defendant's own house prior to the issue of summons. It is clear from the plaintiff's letter addressed to the defendant immediately after her child had died, that she was of the view that the defendant's servants had been negligent. In my view the plaintiff, having addressed her concerns internally with the defendant, was not dilatory when she waited for the defendant's response, which response was indeed forthcoming after the defendant had reacted with appropriate concern about these allegations, by holding an internal enquiry.

39. In my view there was no inordinate delay between the time when the plaintiff was armed with the results of the internal investigation and the time when she instructed her attorneys to write a letter of demand.

40. But even if I am wrong in this regard, the disinterested stance which the defendant's attorneys adopted from the time that their services

were engaged, is indicative to me of legal representatives failing or refusing to apply their minds to the role they are expected to play in pursuing the best outcome in the circumstances for their clients, and employing damage control when it is prudent to do so. I say this because the Act at section 3(1)(b) clearly makes provision in circumstances such as these, for the defendant to consent to the institution of action without formal notice or against a backdrop of inadequate notice. Not only did the defendant ignore the request for such consent to be granted, but insisted that the issue of notice be adjudicated upon separately, whilst simultaneously refusing to contemplate the reasonableness or otherwise of adopting this unnecessarily litigious approach in the light of the history of the matter. This is further borne out by the fact that the defendant, having noted opposition to this application, at the 11th hour abandoned its stance.

41. In the premises I am of the view that it has been substantially demonstrated on the facts before me, that the defendant's abandonment of opposition to the plaintiff's condonation application, practically *in facie curiae*, and four years after the plaintiff had afforded the defendant the opportunity to consent to the institution of action without formal notice, is conduct which has caused the plaintiff to incur unnecessary costs for which the defendant must be held liable.
42. I am furthermore of the view that there is no reason why the award of such costs ought to be delayed. Whatever may transpire in the future with respect to the outstanding aspects of this claim, cannot affect or have any bearing on the history of the application for

condonation. That is simply water under the bridge and ought to be disposed of sooner rather than later.

43. It is finally necessary for me to express this Court's displeasure regarding the manner in which this action has been dealt with. I fail to see why it was necessary for either or both parties to incur the expense of presenting *viva voce* evidence at all, particularly that of two imminently qualified experts who appear to have made their best endeavours to avoid protracted litigation by putting up what I deem to have been a sensible and well-considered joint minute traversing in no uncertain terms the very issue which I have been required to determine, and which issue ought to have been settled; alternatively, could comfortably have become the subject of a special stated case invoking the provisions of rule 33(1) and (2) of the uniform rules of this court.

44. In this regard I find myself in agreement with the views expressed by Robinson AJ in the unreported judgment of *Lushaba v The MEC for Health, Gauteng* (case no. 17077/2012 delivered in Johannesburg on 16 October 2014) where the learned Judge said the following:

> "The joint minute raises questions around the defendant's reasons for proceeding with the defence. The experts both agree that a caesarean at or shortly after 12h00 would most likely have caused a better outcome for Menzi. Dr Mashamba's attempts to avoid the logical inference of negligence from the failure to perform the caesarean were not impressive. Dr Mashamba was not willing to guarantee a better outcome, but that is not the test in this case, which is whether, on a balance of probabilities, there would most likely have been a better outcome for Menzi.

In my view it was incumbent on the defendant to have considered these matters and to have considered them as soon as possible after receipt of the summons. …Indifferent to the plaintiff's medical needs, the defendant was indifferent to the conduct of litigation.

The defendant should only litigate in the public interest. Any decision of the head of the department relating to litigation should be reasonable and rational. When the defendant does litigate, it should conduct itself in such a manner as to avoid unnecessary delays and cost orders. In my view the mature and timeous consideration of the claim ought to have led the defendant (at minimum) not to contest the allegation of negligence, thereby reducing the issues in dispute. The defendant's persistent denial of negligence raises concerns that it persists in not appreciating its obligation towards the public it is meant to serve. In heads of argument submitted following the end of the viva voce evidence and argument, defendant's counsel submitted that negligence had not been established and that he had therefore not *(sic)* need of concerning himself with causation. Defendant's persistence that a caesarean should not be performed as a matter of urgency in the case of a heavily pregnant woman with symptoms from which abruption must be deduced; that she could validly be left essentially unattended for around 2 hours; speaks of a disquieting indifference towards its public duty. There is no merit in its disregard of the medical evidence to the contrary. Our Constitution and particularly the values enshrined in the Bill of Rights require committed service from the public sector, a commitment eerily absent in this case.

In the circumstances the defendant's conduct warrants a punitive costs order."

45. In the matter which I have referred to it appears that the defendant persisted with a foolhardy and unsupported denial of negligence to the bitter end, resulting in that Court expressing its displeasure by making a punitive costs order against the defendant. In the matter before me, but for the defendant's counsel's candid concessions in argument before me, I would have been inclined to do likewise.

46. In the circumstances I am persuaded that an order in line with that sought by the plaintiff as reflected in counsel's heads of argument is appropriate.

ORDER:

1. **I find that the death of L. M. on 8 April 2007 was caused by the negligence of the medical staff responsible for her treatment at the Cecilia Makiwane Hospital during the period 2 to 8 April 2007.**
2. **The defendant is directed to pay the costs of this action up to and including the costs of this trial (inclusive of the costs of the application for condonation).**
3. **Insofar as it may be necessary, it is directed that the aforesaid costs shall include the following:**
   a. **The cost of two counsel, where so employed.**
   b. **The qualifying fees of the experts Dr F. Kritzinger and Ms P. Hill.**
   c. **The travelling and the accommodation expenses of the aforesaid experts and the plaintiff's advocate incurred for the purposes of preparing for and attending this trial.**

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I.T STRETCH **14 November 2014**

JUDGE OF THE HIGH COURT

Matter heard on: 5 & 6 August 2014

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