



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – BHISHO)**

CASE NO.: 420/2019

Matter heard on: 26th, 27th October 2022

Judgement delivered on: 8th November 2022

In the matter between: -

NKEMELENG GLADYS MBAKU

Plaintiff

(Born MAKAMOLE)

and

THE MEMBER OF THE EXECUTIVE COUNCIL,

Defendant

DEPARTMENT OF HEALTH, EASTERN CAPE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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Signature

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Date

JUDGMENT

SMITH J:

[1] In the early hours of the morning on 24 May 2013, the highly pregnant plaintiff was admitted to the Maluti Health Centre (the Clinic), Matatiele. About seven hours later she gave birth to a boy by vaginal delivery. Sadly, it was immediately apparent that there was something seriously wrong with the child. He was barely alive, with

low Apgar scores, required resuscitation, was limp and did not cry. He was later diagnosed with hypoxic ischemic encephalopathy. The boy, Mtheteleli, is now nine years old and suffers from dystonic cerebral palsy, has poor cognitive function, with epilepsy and microcephaly.

[2] The plaintiff instituted action against the defendant for damages allegedly suffered by her in her personal and representative capacity as the child's natural guardian.

[3] The plaintiff alleged in her particulars of claim that the defendant was negligent in that he, *inter alia*, failed to: employ a suitably qualified medical practitioner and experienced nursing staff to be present at the Clinic to assess, monitor and manage her labour properly; ensure that the Clinic was properly equipped to enable the timeous and proper performance of a caesarean section if and when required and; ensure that patients admitted to the Clinic could be transported timeously to another hospital or suitable medical facility, should such transfer be required.

[4] She averred furthermore that the defendant is vicariously liable for his employees who were negligent, *inter alia*, in that they failed: properly to assess and examine her upon her admission; to monitor her labour and the foetal well-being appropriately and with sufficient regularity; to appreciate that she had developed complications during the labour and that it was not progressing appropriately as was required in the circumstances; to request examination by a qualified medical practitioner when she had complained about severe abdominal pain; to monitor the foetal heart rate appropriately and with sufficient frequency; to request that a caesarean section be performed on her; and to arrange timeously to transfer her to an appropriate facility for the performance of a caesarean section. The defendant denied those averments and put the plaintiff to the proof thereof.

[5] Since the medical records were introduced into evidence by agreement and their contents admitted, it was unnecessary for the plaintiff to testify. The plaintiff therefore only called three expert witnesses, namely Dr Linda Murray, an obstetrician and gynaecologist; Prof Savas Andronikou, a paediatric radiologist; and Dr Yatish Kara, a paediatrician. Mr *Pitt*, who appeared for the defendant, indicated that since the

opinions of the plaintiff's experts were not in dispute, he would not cross-examine any of them. Their testimonies thus remain unchallenged. The defendant closed his case without calling any witnesses.

[6] Dr Murray testified that the plaintiff's antenatal period was uneventful, save for the fact that she had developed high blood pressure during late pregnancy. She attended clinic on various occasions and no concern in respect of her or the foetus was noted. She was admitted to the Clinic, in labour, on 24 May 2013. On admission, it was discovered that she had high blood pressure. Dr Murray was of the view that she ought to have been immediately referred to hospital in compliance with the Maternity Guidelines.

[7] She was examined at 02h00 and found to be 6 cm dilated. She was therefore in the active phase of the first stage of labour. Her blood pressure remained high. She was thereafter examined at 04h00 and again at 06h00, throughout which time she remained at 6 cm dilated, and her blood pressure remained high. Dr Murray said that the foetal monitoring between 02h00 and 06h00 was therefore contrary to the Maternity Guidelines and consequently substandard.

[8] At 06h00 she had crossed the action line on the partogram – meaning that labour was progressing too slow - and her dilatation remained at 6 cm. This should have caused alarm bells to ring since it is accepted that labour ought to progress at 1 cm per hour. The plaintiff should therefore have delivered by 07h00. Despite this the staff did not take any action in respect of the labour as required by the Maternal Guidelines. Any labour that exceeds the action line requires continuous cardiotocography monitoring, which also was not done in her case.

[9] Dr Murray furthermore said that in view of the fact that the plaintiff had crossed the action line, she ought to have been referred to a hospital. This was never done. Furthermore, no monitoring was done between 06h00 and 09h25 when the plaintiff eventually gave birth. This happened despite the fact that at 07h45 the staff had decided to transfer her to a hospital. For some reason this never happened.

[10] At birth the baby was nearly dead, had a low Apgar score, needed resuscitation, had aspirated meconium, was limp and did not cry. The medical records furthermore indicate that despite the fact that foetal distress was present, the defendant's staff did not take any cognizance thereof and in all likelihood had missed it due to substandard monitoring. She furthermore testified that a combination of foetal distress, the condition of the baby at birth, low Apgar scores and the fact that meconium was present, indicate a high probability that the injury was due to hypoxia during labour. The records furthermore indicate that the child was diagnosed with hypoxic ischemic encephalopathy after birth. She furthermore expressed the opinion that on a conspectus of the evidence it appears highly unlikely that the injury was caused either ante - or post-partum. In addition, she was of the view that no sentinel event had occurred.

[11] She furthermore testified that the condition of the foetus was initially fine and worsened during the course of labour as a result of the failure by the staff to monitor and manage the labour appropriately in accordance with the prescribed guidelines. She said in conclusion that had monitoring been done in accordance with the legal requirements and guidelines, the staff would have picked up the foetal distress and could have taken the appropriate steps which, in all probability, would have prevented brain damage to the foetus. She also confirmed a joint minute which had been concluded with Dr. Janovski, the defendant's expert, who was in agreement with her conclusions and opinions.

[12] Prof Andronikou testified that the injury was a combination of a partial-prolonged and acute-profound injury. The acute-profound injury would have occurred after the prolonged portion of the injury. The MRI scan indicated an injury to a term baby, which excludes the possibility that the foetus was injured early in pregnancy or after birth. In his opinion there is a high probability that the injury occurred during the course of labour, namely intra-partum. He also confirmed that the child's clinical picture and the injury pattern was consistent with the child's present condition. He testified, in addition, that hypoglycaemia was noted, which should be regarded as an additional feature and not as the original cause of the injury. In his opinion the probability that the injury could have been caused by other factors was extremely low.

[13] Dr Kara confirmed that the child is suffering from dystonic cerebral palsy, has poor cognitive function, with epilepsy and microcephaly. He was also of the opinion that the MRI scan clearly indicates that the child's condition was caused by a hypoxic ischemic injury. Insofar as the timing of the injury is concerned, he indicated that there was nothing in the records to indicate the presence of any antenatal risk factor or to suggest that the injury occurred after birth. He said that in his opinion there is almost zero probability that the injury occurred after birth. In his opinion, based on the fact that there was foetal distress, poor progress in labour, meconium liquor, low Apgar score at birth and need for resuscitation, evidence of moderate encephalopathy for several days after birth, and the findings of the MRI scan, there is a high probability that the hypoxic injury which resulted in cerebral palsy occurred during labour.

[14] The test for negligence is whether a reasonable person in the position of the defendant would foresee the reasonable possibility of his or her conduct injuring the person of another or his or her property and causing him or her patrimonial loss; would take reasonable steps to guard against such occurrence; and that the defendant has failed to take such steps. (*Kruger v Coetzee* 1966(2) SA 428 (A) at 430E-F) [33] I am mindful though of the dangers inherent in applying the abovementioned test in an inflexible and rigid manner. In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd and Another* 2000 (1) SA 827 (SCA), at para. 22, Scott JA cautioned against such 'rigid adherence to what is in reality no more than a formula for determining negligence must inevitably open the way to injustice in unusual cases'.

[15] Thus the plaintiff is required to prove, on a balance of probabilities, that the defendant's employees failed to exercise reasonable skill and care, in other words, that their conduct fell below the standard of a reasonably competent practitioner in their field and that the aforesaid negligence caused the child's injury. A medical practitioner is bound to employ reasonable skill and care, and is liable for the consequences if he or she does not. (*Goliath v Members of the Executive Council for Health, Eastern Cape* 2015 (2) SA 97 (SCA))

[16] The plaintiff is not required to prove that the inference she contends for is the only reasonable inference. It is sufficient for her to convince the court that the inference advanced “is the most readily apparent and acceptable inference from a number of possible inferences”. (*Goliath* (supra), at para. 19)

[17] The court should select a conclusion that it deems to be the more natural appraisable conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one. The inferences drawn from the facts must be based on proved facts and not matters of speculation. (*AA Onderlinge Assuransie Beperk v De Beer* 1982 (2) SA 603 (A))

[18] Where a plaintiff is not in a position to produce evidence on a particular aspect, less evidence will suffice to establish a prima facie case where the matter is peculiarly within the knowledge of the defendant. In such a situation there is an evidentiary burden upon the defendant to show what steps were taken to comply with the standards required.

[19] The criterion for determining factual causation, namely the well-known “but-for test” was formulated as follows by Corbett CJ in *International Shipping Co (Pty) Ltd v Bentley* 1990(1) SA 680 (A) ([1989] ZASCA 138) at 700E – H.

“What it essentially lays down is the enquiry — in the case of an omission — as to whether, but for the defendant's wrongful and negligent failure to take reasonable steps, the plaintiff's loss would not have ensued. In this regard this court has said on more than one occasion that the application of the 'but-for test' is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the minds of ordinary people work, against the background of everyday-life experiences. In applying this common-sense, practical test, a plaintiff therefore has to establish that it is more likely than not that, but for the defendant's wrongful and negligent conduct, his or her harm would not have ensued. The plaintiff is not required to establish this causal link with certainty.”

[20] Thus a plaintiff is not required to establish a causal link with certainty, but only that the wrongful conduct was probably a cause of the loss. This calls for sensible retrospective analysis of what would have probably occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs, rather than an exercise in metaphysics. The correct approach is not to search for scientific certainty, but to assess where the balance of probabilities lie on a conspectus of all the evidence adduced in the case (*Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 341 SCA at 25); *Minister of Finance and others v Gore N.O.* 2007 (1) SA 111 (SCA); (*Michael and another v Linksfield Park Clinic (Pty) Ltd and another* 2001 (3) SA 1188 (SCA), at 1201).

[21] In *Oppeldt v Department of Health* 2016 (1) SA 325 CC, at paras. 34 to 50, the Constitutional Court held that the 'but-for' test requires flexibility and a common sense approach when the issue of causation has to be decided on the ground of an alleged negligent omission, as opposed to a negligent commission.

[22] Applying the abovementioned legal principles to the facts of this case, there can be little doubt that the plaintiff has established, on a balance of probabilities, that the child's injury was caused by the negligent conduct of the medical staff at the Clinic. The uncontested evidence clearly established that the defendant's employees were negligent. It was established, soon after the plaintiff's admission to the Clinic, that her blood pressure was dangerously high. Dr Murray was of the view that this should immediately have alerted the nursing staff to the fact that it was going to be at high risk labour. Despite this diagnosis, they neglected to monitor the plaintiff's condition and foetal well-being in accordance with the Maternity Guidelines. Even when it had become clear that the plaintiff had crossed the action line and that labour was progressing dangerously slow, the staff did not take any steps to ensure foetal well-being. It had obviously become clear to them that there was a need for her to be hospitalized, but for some reason this did not happen.

[23] There was also a period of at least three hours when the foetal heart rate was not monitored at all. Dr Murray was of the opinion that it was clear that there was foetal distress and that it would have been picked up had the nursing staff monitored the foetal heart rate in accordance with the Maternity Guidelines. She was also of the

view that had the foetal distress been picked up timeously, steps could have been taken to prevent injury to the child.

[24] The experts were also in agreement that the hypoxic ischemic injury had occurred intrapartum. They have provided compelling reasons why they have excluded the possibility of antenatal or postnatal injury. They were also all in agreement that the brain injury occurred as a result of the substandard treatment administered by the defendant's employees.

[25] I am accordingly of the view that the evidence established that the child's brain injury and consequent cerebral palsy was caused by the negligent management of plaintiff's labour by the defendant's staff. I am furthermore of the view that the evidence also established that if they had acted appropriately and in terms of the Maternity guidelines, the brain injury to the minor child could have been avoided.

[26] In the result the following order issues:

1. The defendant is liable for such damages as the plaintiff may prove both in her personal and her representative capacity on behalf of her minor child, Mtheteleli, in respect of the negligent treatment she received during her pregnancy, labour and the delivery of Mtheteleli on 24 May 2013.
2. The defendant is liable for the costs of trial on the issue of liability, including all reserved costs, if any, together with interest thereon at the prevailing legal rate from 14 days after date of taxation or agreement to date of final payment thereof, which costs will furthermore include;

2.1 the costs of two counsel;

2.1.1. the costs of preparing for consultations and trial, including the costs of consultations with the various expert witnesses and the plaintiff;

- 2.1.2. the traveling and accommodation costs of plaintiff's legal representatives attending consultations and court;
- 2.1.3. the costs of trial from 22 to October 2022 up to and including 27 October 2022, including counsel's day fees;
- 2.1.4. the costs of preparing the heads of argument; and
- 2.1.5. the reservation and appearance fees, if any, together with the qualifying fees, if any, and the traveling costs, if any, of plaintiff's expert witnesses whose reports were filed in terms of rule 36(9) and the costs of preparing their reports and supplementary reports, if any, together with the costs of preparing the joint minutes including the costs of attending consultations and trial.

JE SMITH
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff	:	Adv. Schoeman SC with Adv. Ayerst
	:	Mpambaniso Attorneys
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Counsel for the Defendant	:	Adv. Pitt
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(Ref. 517/16-P17 (Mr. Isaacs))