REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO:2009/34279

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

……………………………… ……………………

SIGNATURE **DATE**

In the matter between:

DLAMINI WITNESS THOKOZANI Plaintiff

Versus

GAUTENG DEPARTMENT OF HEALTH: MEMBER

OF THE EXECUTIVE COUNCIL First Respondent

CHRIS HANI BARAGWANATH Second Respondent

JUDGMENT

MATOJANE J

Introduction

[1] The Plaintiff was told during the antenatal period that she should await the delivery of twins. She was admitted at Chris Hani Baragwanath on 4 November 2008 for a cesarean section to be performed on 6 November 2008. She signed a consent for a caesarean section for twins and sterilization. On 7 November 2008, a cesarean section was done under spinal anaesthesia. Only one alive female baby was delivered from the uterus. The Plaintiff claims that the defendants have refused to disclose the whereabouts of her second twin.

[2] On 17 July 2009 the plaintiff instituted an action for damages in this court against the Defendants. Her claim was based on the defendants' alleged breach of the Plaintiff's constitutional rights. It is alleged in the particulars of claim that the defendants:

> 4. At all relevant times hereto and in particular during the Plaintiff's ante-natal treatment up to and including the date of delivery as well as her post-natal treatment, during November 2008:
>
> 4.1 the first defendant was (and to date remains) the responsible person in respect of any contractual, electoral and Departmental liability of the Department;
>
> …
>
> 4.3.4.1 was under a legal duty of care to ensure the rendering of medical care, treatment and advice to the Plaintiff and her twins with such skill, care and diligence as could reasonably be expected of appropriately qualified medical practitioners and nursing staff, obliging the defendants to ensure that proper, sufficient and reasonable health services were provided to members of the public (in particular those who could not reasonably make use of medical services provided by institutions other than public hospitals.
>
> 4.3.4.2 is further under a legal duty and obliged to tell the Plaintiff what happened to twin 1, as the Plaintiff has a right to this information in terms of common law as well as the constitution

5. The aforesaid legal duty of care extended to the unborn twins

…

7. The defendants in breach of the Plaintiff's constitutional rights:

7.1 Failed to treat the Plaintiff with dignity

7.2 Failed to provide the Plaintiff with reasonable healthcare services; and

7.3 Denied the plaintiff access to information about what became of twin 1.

8. the defendants breached the Plaintiff's human right, whereas as a mother, the Plaintiff, was deprived of a child, twin 1. This is a gross violation of human rights.

28. The Plaintiff was never given an explanation as to what happened to twin 1

….

29. The first defendant and/or the second defendant aforesaid employees, representatives and/or agents were negligent in one or more or all of the following respects:

29.1 they failed to inform the Plaintiff as to what happened to twin 1; and or

29.2 they failed to adequately monitor the safety and well-being of twin 1

30. As a result of the defendant’s negligence and breach of legal duty referred to above, the Plaintiff does not know what happened to twin 1 to this day.

[3] The Plaintiff sought an order against the first defendant in the following terms:

3.1 making all information regarding what became of twin one available to the Plaintiff within 30 days of the order been granted;

3.2 taking all necessary steps to obtain the required information regarding what transpired during the delivery of the twins on 7 November 2008, and making same available to the Plaintiff within 30 days of the order being granted.

3.3 filing a report to the Registrar of the above Honourable Court within two weeks of the order been granted, stating what steps have been taken to obtain the necessary information;

3.4 payment in the sum of R3 000 000 000.00

Factual Background

[4] The ante-natal clinic notes show that during April 2008, the Plaintiff attended at Lillian Ngoyi Community Clinic, where it was discovered that she was approximately two months pregnant. She was PARA3 Gravida 4, meaning that she had three children and was pregnant for the fourth time.

[5] On 20 May 2008, an ultrasound examination was performed on the Plaintiff. It was reported that the Plaintiff was pregnant with twins. She was then referred to the twin clinic at Chris Hani Baragwanath Hospital to manage the twin pregnancy further.

[6] Dr H Mentis, a private radiologist at Lister building, did an ultrasound scan on the Plaintiff on 2 October 2008. The doctor confirmed a twin pregnancy. He identified two babies as well as two placentas. The ultrasound report states that there was a twin pregnancy of thirty-three (33) weeks and six (6) days gestation. The placentae were said to be on the right flank and another one on the fundus. No measurement of twin 2 was reported. The type of twin pregnancy was diagnosed as DCDA (two babies that were non-identical, each having their own placenta and amniotic fluid bag)

[7] The Plaintiff was admitted to the hospital on 14 October 2008 with a headache. Two fetal heart rates were recorded and documented. It was noted that the patient was diagnosed with a twin pregnancy and was a known asthmatic on treatment.

[8] On 21 October 2008, the Plaintiff was referred to the Baragwanath hospital for further management of her pregnancy. Her twin pregnancy was confirmed by sonar. The plan was to do an ultrasound to check for a separating membrane. The patient was to come on 4 November 2008 for admission and cesarean section. The Plaintiff could not attend the examination as she was admitted to the hospital on that day.

[9] On 4 November 2008, the Plaintiff was admitted at 37 weeks gestation for cesarean section. It was said to be a twin pregnancy dichorionic diamniotic pregnancy (DCDA). The presentation was said to be non-vertex. She was a known asthmatic and was for elective cesarean section on 6 November 2008.

[10] She signed consent forms for the performance of a cesarean section due to twin pregnancy on the day the procedure was done.

[11] On 7 November 2008, according to the doctors' delivery notes, a cesarean section was done for twin pregnancy under spinal anaesthesia, and only one baby, a female, was delivered from the uterus. The report stated further that sterilization was not done at the patient's request. The Surgeon was Dr Sulliman, and Dr Topoulos assisted him. The Anaesthetist was Dr Mazwai. The charge nurse was Sister Maslata, the scrub nurse was sister Saohato, the check nurse was sister Mcunu, and the swabs nurse was sister Skosana. Dr Naidoo joined the team during the delivery.

[12] The first defendant’s case is that the Plaintiff delivered one baby. The twin pregnancy was misdiagnosed by Dr Mentis, a radiologist in private practice.

The legal framework

[13] In light of the starkly contradictory versions of the Plaintiff and the first defendant as to whether the Plaintiff was pregnant with twins that were successfully delivered, the analysis of the evidence would proceed based on the principles identified by the Supreme Court of Appeal in **Stellenbosch Farmers Winery Group Ltd. and Another v Martell & Cie SA and Others** (427/01) [2002] ZASCA 98 (6 September 2002) where the court held:

> “The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues, a court must make findings on (a) the credibility of the various factual witnesses, (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of

> importance, such as (i) the witness's candour and demeanor in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.

[14] In **S v Trainor** 2003 (1) SACR 35 (SCA)[1] in dealing with the correct approach to be adopted in cases involving mutually destructive and irreconcilable factual accounts, the Supreme Court of Appeal stated the following:

> "… A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must coroborative evidence, if any. Evidence, of course, must be evaluated against the onus of any particular issue or in respect of the case in its entirety…".

Credibility of the various factual witnesses

[15] As regards the relative credibility of the Plaintiff there are a number of aspects of her evidence which show that she was not honest with the court. I found her evidence to be inconsistent and contradictory to what was pleaded or put on her behalf.

[1] 2003 (1) SACR 35 (SCA),

[16] Her evidence was that she was two months pregnant when she went to Lilian Ngoyi Community Clinic for anti-natal care. She was sent for an ultrasound examination, and the result was reported as a twin pregnancy. When she went to the clinic on the second occasion, she was referred to Baragwanath hospital, where another ultrasound examination was performed. She consulted with her private doctor, Dr Saed, who performed an ECG scan. Dr Saeed referred her to a private radiologist, Dr Mentis, to do an ultrasound examination to check how the babies were situated in her tummy. She kept the report of Dr Mentis with her until she gave it to Dr Marishane. Dr Marishane testified as an expert for the defendants.

[17] On 4 November 2008, she was admitted to the hospital to deliver her twins. She was informed that she would have to deliver the babies by the Caesarian section as she was carrying twins. She signed a consent form for cesarean delivery of twins and sterilization.

[18] She testified that Dr Mazwai, an anaesthetist gave her a spinal injection. During the operation, she was awake and heard a baby cry. She testified that she decided not to continue with the sterilisation on being told that she was to deliver by the Caesarian section. She lost consciousness and woke up the next day when a nurse only brought a cot with one baby. The baby had a tag labelled Witness Dlamini twin 2. She enquired from the nurse where the other baby was. The nurse went to the sister in charge and explained her situation. The sister in charge came to her to find out what was happening. The nurse then went to look for the baby, only to return an hour later to say that she did not find the baby. She then called her husband to inform him about the missing baby.

[19] On his arrival, her husband spoke with the nurse, and the nurse called the CEO. The CEO told them that "it is not the same as getting nothing; at least they got one baby." When she requested the CEO to call all the doctors who delivered the baby, she was told that the doctors were on holiday. The midwives were called, and they could not give concrete answers to her questions. She never received an explanation as to what happened to the other twin. They requested the clinical

records, and the CEO refused to accede to their request. A matron passing by overhead their conversation, she intervened and told the CEO that they were entitled to the hospital records. The matron then took the file from the CEO and made copies of the file for them. She testified that she was discharged on 9 November 2008 and to date, she has not been informed as to what happened to her other baby.

[20] She was asked under cross-examination at what point did she lose consciousness. She answered that it was after she heard a child scream. She testified that she heard one baby that did not sound correct; the baby sounded as if it was tired. It was put to her that in her letter of demand it was said that she heard two babies screaming, she said that that was the first scream, the second scream was normal.

[21] In paragraph 21 of the particulars of claim, it is pleaded that:

"The Plaintiff went into theatre and was placed on the operating table. Doctors began the procedure, and after a short while, the Plaintiff felt some pressure on her abdomen and then immediately after that, she heard a baby scream. This was, however, an unusual scream, as the baby sounded tired. As the baby screamed, the anaesthetist, however not Dr Mazwai, asked the surgeon, Dr Suluman, that was delivering the twins, where she had learned to do what she was doing. The anesthetist then rushed towards the surgeon. At this stage, the Plaintiff lost consciousness".

[22] When asked when did she withdraw her consent to sterilization, she explained that she thought she was going to give birth normally and when she was informed that she is going to deliver by the Caesarian section, she changed her mind. She testified that she did not agree to sterilization and only consented to a caesarean section. This begs the question of why she signed the consent forms for sterilization on the same day the procedure was to be performed if she did not agree to sterilization.

[23] The Plaintiff could not have thought that she would give birth normally as she had signed a consent to the cesarean section before the procedure. On her version, she was awake during the procedure and, in all probability, changed her

mind about sterilization after she saw and was also told that there was only one baby that was found in her uterus. This finding is confirmed in various respects.

[24] The first of these is the delivery report, which confirms that the Plaintiff withdrew her consent to sterilization after being told that there was one baby in the uterus.

[25] The second is a statement by sister Mamohato Saohatse which reads:

> "I professional nurse was on duty on 7 November 2008 when Dlamini came for a cesarean for twins. I was a scrub nurse, and Suleiman was cutting only one baby was delivered. The mother told there is one baby when asked if she wanted to be sterilized, she said no. Mother transferred to recovery room."

[26] The third is the evidence of Dr Naidoo, an obstetrician and gynaecologist who admitted the Plaintiff to the twin clinic. She testified that she was called to the theatre after one baby was found in the uterus. She found the Plaintiff still on the operating table. A baby had just been delivered. The assistant registrar was still busy. The scrub sister, check nurse, anaesthetist, and neonatologist were all in attendance.

[27] She testified that the Plaintiff saw that one baby was delivered as she had spinal anaesthesia; she was awake and could observe the delivery as there was no screen. Dr Naidoo testified that she explained to the Plaintiff that the ultrasound scan she came with misdiagnosed a twin pregnancy as she was carrying one baby only. She testified that the Plaintiff elected to cancel her sterilization upon being told that only one baby was delivered. Her evidence that she visited the Plaintiff the following day in the ward and again explained that only one baby was delivered was never challenged under cross-examination. She testified that she made notes, but the most important notes are missing in the file she was given.

[28] The Plaintiff and her husband failed to disclose that they lodged a formal complaint with the hospital's Quality Assurance Manager on 11 November 2008. They complained that the doctor who delivered the baby failed to explain to them what happened to the other baby.

[29] Dr Naidoo denied that no explanation was given to the Plaintiff. She explained that the hospital has what it calls a redress process where a patient who has a concern or question is taken through a disclosure process where the patient is allowed to express her concerns, the explanation is given, and all statements are offered to the patient. She testified that the Plaintiff and her husband had two redress meetings. The redress was provided by herself, the surgeon, the head of Quality Assurance and the nursing sister. The Quality assurance is constituted by the head of the Department, head of nursing or matron, the sister, and it was unlikely that the CEO would attend a redress meeting.
[30] She testified that the Plaintiff and her husband could not be convinced otherwise as they maintained that the ultrasound from Dr Mentis showed that the Plaintiff was pregnant with twins. The Plaintiff and her husband refused to sign an attendance register of the redress meeting. Dr Naidoo read a cover page of the hospital file, which read, "Patient not satisfied. Resolution: Litigation.

[31] Mr Tshivase, the Plaintiff's husband, testified that he accompanied the Plaintiff to consult with Dr Saad, who showed them twins on the ECG scan, a boy and a girl. Dr Saad referred them to Dr Mentis for an ultrasound scan as his scan was small. He explained that his mother has three sets of twins, and they started plans as a family to receive twins. They moved to a bigger house to accommodate a bigger family.

[32] He confirmed the Plaintiff’s evidence that the hospital CEO initially refused to provide them with the hospital records they requested until a matron who happened to be passing by informed the CEO that they are entitled to the records. It is then that the CEO gave the records to the matron, who made copies for them.

[33] He testified that on 9 November 2008, the day his wife was discharged from the hospital, he handed over to the CEO proof in the form of Dr Mentis ultrasound scan report to show that they were expecting twins. To date, he and his wife have not received any information or explanation as to what happened to the missing baby. They have reported the matter to the police, media and Human Rights Commission to no avail.

[34] Dr Naidoo testified that she was running the twin clinic in 2008, and the Plaintiff was referred to her because she came with an ultrasound scan from a private radiologist Dr Mentis in which a twin pregnancy was reported. At the time, patients were allowed to bring scans from private radiologists, and the hospital accepted such scans. She relied on this scan to record in the Labour Admission Chart on 4 November 2008 that the type of twin pregnancy was DCDA twins. The presenting complaint was a non-vertex presentation at 37 weeks for delivery by caesarean section.

[35] This evidence contradicts the evidence of the Plaintiff that she never provided the clinic or the hospital with the ultrasound scan from Dr Mentis until she gave it to Dr Marishane, who testified as an expert for the defendants. The same is true for Mr Tshivase's testimony that he handed over Dr Mentis report to the CEO on 9 October 2008 when the Plaintiff was being discharged.

[36] The Plaintiff relied on the expert evidence of Dr Diedericks, an obstetrician and gynaecologist with more than 25 years of experience. In his opinion, the Plaintiff did indeed have a twin pregnancy. The defendants relied on the expert evidence of Dr Marishane, who is also an obstetrician and a gynecologist.

[37] The two experts concluded a joint minute. They agreed that there were several instances where the diagnosis of twin pregnancy was made and that the Plaintiff was managed as having a twin pregnancy. They agree that a note was made suspecting the presence of twin pregnancy in the antenatal clinic notes. The Plaintiff was sent for an ultrasound examination. The result was reported as a twin pregnancy, but the actual report is not available.

[38] The experts further agree that an ultrasound scan report by a private radiologist, Dr Mentis, reported a twin pregnancy. The supplied printed photos were not clear, and they could not make a definitive conclusion from them. The second foetus was not reported, with two placentas seen and recorded.

[39] They agree that the Plaintiff was admitted to the hospital on the 14th of 2008 with a headache. Two fetal heart rates were recorded and documented. The Plaintiff was referred to the hospital for further management of her pregnancy as she carried twins. The delivery report noted that there was only one baby present at the time of the cesarean section and no mention is made of what was said to the Plaintiff, and the placenta was not described. It is not mentioned whether it was a single placenta or multiple placentae.

[40] The disagreement relates to whether the diagnosis of pregnancy was repeatedly misdiagnosed. Dr Marishane is of the view that there is no objective evidence that proves otherwise and Dr Diedericks argues that the Plaintiff indeed had a twin pregnancy.

[41] The disagreement relates to whether the diagnosis of pregnancy was repeatedly misdiagnosed. Dr Marishane is of the view that this is a case of misdiagnosis of a twin pregnancy. Dr Marishane argued that the ultrasound report by Dr Mentis was inadequate and appeared to have been influenced by the history of twins given by the Plaintiff and not what was seen on the scan. He testified that the radiologist should have first established how the fetuses were lying, what the presentation of the twins are, whether phallic or face presentation and how the placenta is in relation to each other. Of importance, he testified, Dr Mentis did not report on whether he saw the separating membrane and how its base was. This, he testified, guides one as to whether the twins are monochorionic or dichorionic.

[42] Dr Diedericks identified four instances in the clinical records where a diagnosis of twin pregnancy was made and reported. He refers to the ultrasound report by Dr Mentis, which was performed on 2 October 2008, confirming the twin pregnancy. Two babies were identified as well as two placentae. The type of twin pregnancy was diagnosed as DCDA, meaning that two babies were none identical, each having their placenta and amniotic fluid bag. He also relies on the fact that throughout the pregnancy, the Plaintiff was managed for a twin pregnancy at the antenatal clinic and was referred to the hospital for further management of her twin pregnancy where she signed a consent form for the performance of cesarean section due to the presence of twin pregnancy with both babies in the breech

position lastly that the hospital did another scan on 21 October 2018, which confirmed the twin pregnancy.

[43] It is true that experts rely on their experience and scientific training to opine whether the Plaintiff was pregnant with twins and whether those twins were successfully delivered. In the present case, there is independently verifiable evidence of eyewitnesses and supporting evidence of the Plaintiff's pregnancy and what happened in the delivery room. The expert opinions in the particular circumstances of this case should give way to credible and direct evidence which is before the court[2].

The evaluation of the general probabilities

[44] On a conspectus of all the evidence, it would appear that one baby and not twins were delivered during the operation on 7 October 2008. If the Plaintiff's version is to be accepted, one must also accept that the 8 or 9 medical staff delivered twins and, in collusion with one another, stole the other twin, which is improbable. The only inference drawn from the available evidence is that Dr Mentis misdiagnosed a twin pregnancy.

[45] When admitting the Plaintiff at the labour ward, Dr Naidoo followed a diagnosis of twin pregnancy by Dr Mentis. The Plaintiff was thereafter managed as having twins. Dr Naidoo commissioned an ultrasound scan for separating membrane to be done on the Plaintiff on 28 October 2008. The scan was never done as the Plaintiff testified that she was in the hospital on that day for a separate appointment. No other ultrasound scan was done until it was discovered that the Plaintiff was not pregnant with twins during delivery.

[46] Both experts agree that the actual report of suspected twin pregnancy in the antenatal clinic notes is not available and that it was not clear at what gestation the diagnosis of twin pregnancy was made. They also agree that electronic heart

[2] See Motor Vehicle Assurance Fund v Kenny 1984 (4) SA 432 E at 437.

monitoring, which was consistent with twin pregnancy, cannot confirm or diagnose twins, especially where one transducer is used.

[47] Dr Marishane explained that it is the practice to annotate labels to be attached to the babies before delivery, and the labels would be attached to the babies when they are born. As it was expected that Plaintiff would deliver twins, two labels were prepared in advance and a label marked twin 2 was attached to the baby that was delivered. The other baby, if it were found in the uterus, would have been labelled twin 1.

The onus of proof

[48] On the question of whether the Plaintiff has discharged the onus of proving on a balance of probabilities the negligence alleged against the first respondent, it bears mentioning as it was held in **Mitchel v Dixon**[3] that a medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill but is bound to employ reasonable skill and care[4]. The SCA in **Goliath v Member of the Executive Council of Health, Eastern Cape**[5] held that:

"A doctor was not to be held negligent simply because something went wrong. For to hold a doctor negligent simply because something had gone wrong would be to impermissibly reason backwards from effect to cause".

[48] I find that the Plaintiff has failed to discharge the onus of proving on the balance of probabilities the negligence it averred against the defendant, and the case falls to be dismissed.

[50] Before the evidence of Dr Naidoo was led, the first respondent brought an application to introduce redress documents that Dr Naidoo brought to court with her. The Plaintiff objected to the late discovery of the documents alleging that it is prejudiced. The bundle contained a written complaint by the Plaintiff's husband

[3] 1914 AD 519 at 525

[4]

[5] 2015 (2) SA 97 (SCA) at para 9

directed to the hospital's Quality Assurance Manager, an acknowledgement of receipt of same, a statement by the scrub nurse who was present during the operation and a copy of the hospital file cover on which it is written Patient not satisfied, Resolution – Litigation.

[51] I allowed the bundle to be provisionally admitted and told the parties that I will consider their admissibility and give my reasons as part of the judgment. These are my reasons. The documents are without a doubt relevant for the purpose of throwing light on the disputed issue of whether Plaintiff delivered twins and whether an explanation was given to the Plaintiff about the whereabouts of the other baby. The statements by Sister Skosana and Sister Mamohato, who were present during the delivery, confirm that Plaintiff decided against sterilization after explaining to her that one baby was found in the uterus. The Plaintiff and her husband cannot complain of prejudice as the documents relate to the interactions that they admit they had with the hospital staff. As the documents proof of disproves a fact in issue, they are relevant and accordingly admissible evidence.

[52] In the result the order I make is the following

(a) The Plaintiff's case is dismissed with costs

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K E MATOJANE
JUDGE OF THE HIGH COURT,
GAUTENG LOCAL DIVISION,
JOHANNESBURG

Appearances

Counsel for Plaintiff: Advocate M Masilo

Attorney for Applicant: Motsekuoa Incorporated Attorneys

Counsel for Defendant:	Advocate A Mofokeng
Attorney for Respondent:	The State Attorney