



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

CASE NO.: 378/2019

Matter heard on: 16 November 2022

Judgement delivered on: 6 December 2022

In the matter between: -

ZAMEKA LOBI obo ATHIMNA LOBI

Plaintiff

and

THE MEC FOR HEALTH

Defendant

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

JUDGMENT

SMITH J:

[1] The plaintiff instituted civil action against the defendant personally and in her representative capacity on behalf of her minor child, Athimna, for damages suffered

as a result of an injury that the latter sustained during birth on 6 December 2012 at the Frere Hospital, East London.

[2] It is common cause that Athimna had suffered a brachial plexus injury as a result of shoulder dystocia, meaning that one or both his shoulders got stuck inside the pelvis. The plaintiff averred in her particulars of claim that the injury was caused by the negligence of medical staff at the Frere Hospital, who failed to implement the appropriate procedures when it became clear that Athimna presented with shoulder dystocia. The plaintiff averred, furthermore, that administering of the appropriate procedures would have prevented the shoulder dystocia and the resultant brachial plexus injury to Athimna.

[3] At the request of the parties, I ordered the separation of the issues of liability and quantum of damages. The matter accordingly proceeded on the issue of liability only, and determination of quantum was postponed sine die.

[4] The plaintiff testified and called two expert witnesses, namely Dr Olivier, an orthopaedic specialist and Dr Ebrahim, an obstetrician. They were not subjected to cross-examination, neither were any aspects of their testimonies challenged. Mr Pitt, who appeared for the defendant, confirmed that he was unable to challenge the plaintiff's version or the opinions expressed by her witnesses. Their testimonies were consonant with the opinions of the defendant's experts as confirmed in the joint minutes filed of record. In fact, the only reason why the matter was not settled was because there was not sufficient time for Mr Pitt to take proper instructions.

[5] The only questions which consequently fall for decision are whether:

- (a) the hospital staff were negligent in treating the plaintiff during delivery;
and
- (b) that negligence had caused Athimna's injury.

[6] The plaintiff testified that she had given birth to two large babies before Athimna's birth. When she went to the Empilweni Clinic for her first visit, she was tested for HIV, diabetes and blood pressure. She was HIV negative and her blood sugar levels and blood pressure were normal. On her second visit her blood pressure and urine were tested and found to be normal. The foetal heartrate was also observed and she was told that it was normal.

[7] She was admitted to the Frere Hospital at 7h00 on 6 December 2012, after waking up with abdominal pains earlier that morning. At the hospital, a CTG belt was placed on her. When she felt the need to urinate, the belt was taken off. She went to the toilet and there noticed a blood-stained vaginal discharge. A patient, who was with her in the toilet, told her that she was about to give birth.

[8] She then returned to the bed where the CTG belt was re-applied. She told the nurse about the vaginal discharge and the latter did a pelvic-vaginal examination and told her that she was still some way off from delivering. She thereafter experienced unbearable pain and the nurse gave her an injection. She then slept for a while. When she woke up, the labour pains were severe and she was told to push in order to deliver the baby.

[10] Despite pushing to the best of her ability, the baby did not come out and doctors and nurses came to her assistance. At some point the baby's head had come out but not the rest of the body. One of the medical staff assisted her by pressing on the top part of her abdomen, while others were holding her legs up. She was lying on her back on the hospital bed at the time. Another member of the medical staff then inserted her hand into her vagina and pulled the baby out. The baby was thereafter taken to the nursery and she only saw him the following day. She was told by the nursing staff that he had a right shoulder injury that occurred during delivery.

[11] Athimna was thereafter given four sessions of physiotherapy. After that, they were both discharged. However, despite the physiotherapy, his condition did not improve. Athimna is still unable to use his right arm. It is very weak and she has to

assist him with ablutions and other functions. His right arm is also considerably shorter than the left and the right hand is smaller than the left hand.

[12] Doctor Olivier testified that he had examined Athimna during 2018, when he was seven years old. He confirmed that Athimna had suffered an injury to the brachial plexus nerves (the network of nerves in the shoulders), caused by shoulder dystocia.

[13] Doctor Ebrahim testified that the plaintiff presented with various risk factors for shoulder dystocia, which were not taken into account by the medical staff during delivery. According to him, when presented with the shoulder dystocia, the medical staff failed to apply the appropriate procedures which would have ensured safe delivery of the baby's shoulders without injury.

[14] The risk factors that have been highlighted, included the fact that she had previously given birth to two large babies, had gestational diabetes, was overweight and presented with glycosuria. He was of the view that the medical staff would have been better prepared to handle the shoulder dystocia if these antenatal risk factors were kept in mind, particularly when faced with a prolonged second stage of labour.

[15] He said that the Department of Health has compiled certain management protocols for obstetric emergencies, including shoulder dystocia, which include the following:

- a) immediate call for help;
- b) the patient must be placed on the edge of the bed or turned through 90 degrees so that her buttocks are on the edge of the side of the bed;
- c) the patient must then be adjusted into the McRoberts position, namely lying flat with legs hyper-flexed against the abdomen. The McRoberts position widens the pelvis, flattens the lumbar spine and moves the pubic symphysis. Two assistants may be required to ensure that the McRobert's position is maintained until delivery had been completed.

- d) suprapubic pressure must be applied obliquely to dislodge the impacted shoulder. The application of fundal pressure worsens the impaction and should be avoided. The patient should be encouraged to stop pushing before suprapubic pressure is applied as this also aggravates and increases the risk of injury.

These steps are usually adequate to resolve cases of shoulder dystocia in 90% of cases without further complications for either mother or child.

[16] Dr Ebrahim further testified that the application of fundal pressure by a member of the hospital staff worsened the situation as pressure from above jams the impacted shoulder against the pubic symphysis. In his opinion, if suprapubic pressure had been applied instead of fundal pressure, the amount of traction required would probably have been less and the brachial plexus injury could have been avoided.

[17] He also referred to a joint minute prepared by himself and Dr Batchelder (the defendant's expert obstetrician gynaecologist) in which they agreed that: (a) the plaintiff presented with risk factors for shoulder dystocia, which included macrosomia and prolonged second stage of labour; (b) when managing the shoulder dystocia, the doctor positioned the plaintiff's leg incorrectly. This significantly hindered his ability to overcome the shoulder dystocia; (c) this situation was further aggravated by the use of fundal pressure. If suprapubic pressure had been applied instead of fundal pressure, the shoulders would probably have been delivered normally and the injury would probably not have occurred; (d) the failure to place plaintiff in the McRobert's position and the use of fundal pressure rather than suprapubic pressure probably resulted in the use of greater traction to deliver the baby, thus causing brachial plexus injury in the new-born and significant loss of function to the right arm and; (e) if these manoeuvres were carried out correctly the injury would have been averted and Athimna would have had normal function of his right arm.

[18] The plaintiff was 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 Athimna'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))

[19] In my view it is manifest that the evidence presented by the plaintiff established on a balance of probabilities that:

- (a) the hospital staff were negligent in failing to assess whether the plaintiff, a multigravida, had risk factors for shoulder dystocia. Had that been done timeously, a caesarean section could have been performed, which would have prevented the injuries from occurring;
- (b) once the plaintiff had presented with shoulder dystocia, the hospital staff ought to have applied the procedures prescribed in the protocol. The failure to apply those procedures, and in particular the application of fundal pressure as opposed to suprapubic pressure, has served to worsen the situation and had probably caused Athimna's brachial plexus injury.

[20] There is also little doubt that the medical staff's negligence was the cause of Athimna's brachial plexus injury. Dr Ebrahim has testified that the injury resulted from the shoulder dystocia, which in turn was caused by the failure of the hospital staff to apply the correct procedures, in particular the McRoberts position and application of suprapubic pressure instead of fundal pressure.

[21] In addition, Dr Olivier has confirmed that Athimna suffers from brachial plexus injury of the right arm. In his experience that type of injury usually occurs during a difficult birth, in particular cases of shoulder dystocia. According to him the mechanism of the injury is a traction injury which is caused where a baby's head has presented, but the shoulders are stuck, and there is forceful traction to dislodge the shoulders, without following the appropriate procedure to facilitate dislodgement.

[22] The plaintiff has accordingly established, on a balance of probabilities, that the hospital staff were negligent in the management of the plaintiff's labour and that such negligence has caused Athimna to suffer a brachial plexus injury.

[23] The following order accordingly issues:

23.1. The defendant is liable for such damages as the plaintiff may prove in her personal and representative capacities arising from negligence of the medical staff at Frere Hospital, which caused Athimna to suffer a brachial plexus injury.

23.2. The question of quantum is postponed sine die for later determination.

23.3. The defendant must pay the plaintiff's costs of suit, together with any reserved costs, such costs to include:

23.3.1. Costs of two counsel;

23.3.2. The travelling and accommodation costs of the plaintiff's legal representatives, the costs for preparation for trial and consulting with the experts and preparation and drawing of heads of argument;

23.3.3. The traveling and accommodation costs of the plaintiff and her legal representatives when consulting with the experts, if any; and

23.3.4. The consultation, preparation of medico-legal reports, appearances, engagement in preparation of joint minutes and qualifying expenses, if any, and travelling costs, if any, of the expert witnesses: Drs Olivier, Kara and Ebrahim.

JE SMITH
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Plaintiff : Adv. AM Da Silva SC
: Msitshana Inc.
C/o Squires Smith & Laurie Attorneys
44 Taylor Street
KING WILLIAMS TOWN

Counsel for the Defendant : Adv. D. Pitt
: State Attorneys
C/o Shared Legal Services
Office of the Premier
35 Alexandra Road
KING WILLIAMS TOWN