IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BISHO)

CASE NO: 239/19

In the matter between: -

N.J. obo I.J. Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH: EASTERN CAPE PROVINCE Defendant

JUDGMENT

MATEBESE AJ

[1] On 11 September 2009 NJ, the plaintiff, who was 26 years old at the time and pregnant with IJ reported at Baziya Clinic and was later transferred and admitted at Mthatha General Hospital for the purposes of giving birth to IJ. The following morning on 12 September 2009 and at approximately 6h35 IJ ("the baby") was born with a birth weight of 3200g. The baby was delivered through normal vaginal delivery.

[2] The neonatal examination revealed a new born that was pink, afebrile, heart rate of 120bpm (normal), chest that was clear, a normal cardiovascular examination, female genitalia, reflexes: some flexion, moro and sucking reflex present and the assessment at the time was that of low Apgar scores and meconium aspiration. Close monitoring was recommended.

[3] The records of the 12th of September 2009 reflect that the baby was received by the Nelson Mandela Academic Hospital from Mthatha General Hospital with a problem of low Apgar scores and fits. The Apgar scores were recorded as 5/10 and 7/10.

[4] An examination at Nelson Mandela Academic Hospital revealed that the baby had suffered a Hypoxic Ischemic Encephalopathy (HIE) grade II. Dormicum (an antiepileptic sedative) was administered in order to abort seizures.

[5] A neonatal observation dated 13 September 2009 noted the following:

5.1. Hypoxic Ischemic Encephalopathy Grade II;

5.2. An attack of fits with cycling movements at 14h00.

[6] On 14 September 2009 a central nervous system examination was done which revealed a lethargy (a pathological state of sleepiness or deep unresponsiveness and inactivity) and hypotonia (a state of low muscle tone).

[7] On 15 September 2009 it is recorded that no further seizures were noted since the 13th of September 2009. However, lethargy and hypotonia was still evident and HIE score had improved to 7 with no sodium levels in the blood being reported.

[8] On 16 September 2009 HIE Grade II was still reported with no fits or seizures noted on the day. On 17 September 2009, the evaluation once more recorded HIE Garde II and hyponatremia with the examination of the respiratory and cardiovascular systems within normal limits. The baby was reported as still lethargic and dull with weak response to stimulation and the HIE score had improved to 6.

[9] On 18 September 2009 no further attacks were reported, the baby was still noted as dull and floppy and on interpretation she looked very ill.

[10] An MRI brain review done on the 3rd August 2018 (8 years 11 months after the birth of the baby) revealed that

> *"the predominant pattern is that of T2 and FLAIR Hyperintensities in the Peri-Rolandic Cortex and Ventro-lateral aspects of the Thalami. In the appropriate clinical history setting, the pattern and location of injury may be suggestive of an old Hypoxic Ischemic injury in its chronic state of evolution, in a term infant exposed to acute profound Asphyxia. The Thalami may be affected by various other conditions such as infection, systemic or metabolic disease, neuro-degeneration, and vascular conditions, correlation with the clinical history, biochemistry, neonatal and obstetric records is strongly advised to confirm the most probably cause and the timing of the injury".*[1]

The pleaded case

[11] On 23 April 2019 the plaintiff instituted action proceedings against the defendant claiming damages in the total amount of R31 500 000.00 both in her personal as well as her representative capacity as the mother and the natural guardian of the minor child.

[12] In her particulars of claim the plaintiff alleged that the employees of the defendant including the medical practitioners or doctors and nurses who treated the plaintiff at the clinic in Baziya were negligent in that:

12.1. They failed to properly or sufficiently regularly monitor the plaintiff or the condition of her foetus;

12.2. They failed to comply in respect of the monitoring and management of the plaintiff's labour with appropriate guidelines for maternity care;

[1] **See Report of Dr. Z Zikalala dated 3 August 2018.**

12.3. They failed to monitor the plaintiff or her foetus with sufficient care and skill so as to enable the detection timeously of the onset of foetal distress and/or Hypoxia;

12.4. They failed to detect the onset of foetal distress and/or foetal Hypoxia;

12.5. They failed, following the onset of foetal distress and/or foetal Hypoxia, to institute appropriate treatment modalities in respect of the condition or to effect an immediate and timeous caesarean section;

12.6. They failed to prevent the development of Hypoxia and Hypoxic Ischemic Encephalopathy;

12.7. They failed to prevent the occurrence of the injury (the HIE) while the plaintiff and her foetus were under the monitoring and care of the department's employees at the clinic from 09h00 until 22h00 on 11 September 2009;

12.8. They failed to descend or detect either timeously or at all, as they could and should have done, that the plaintiff was candidate for caesarean section; and

12.9. They failed to expedite the transferral of the plaintiff to the hospital when the foetus developed Hypoxia and/or foetal distress.

[13] The plaintiff further alleged in her particulars of claim that the hospital, doctors and nurses who treated the plaintiff were negligent in that:

13.1. They failed to properly treat and manage the foetal condition of Hypoxia and/or foetal distress;

13.2. They failed to immediately or timeously deliver the plaintiff's child, by way of caesarean section if necessary, when they knew or ought to have known that time was of the essence and that the child was severely at risk by reason of Hypoxia and/or foetal distress;

13.3. They failed, following the onset of foetal distress and/or foetal Hypoxia, to institute appropriate treatment modalities in respect of this condition and to effect an immediate or timeous caesarean section;

13.4. They failed to deliver the baby timeously, caesarean section if necessary, when it became medically advisable and appropriate to do so;

13.5. They failed to prevent the development of Hypoxia and Hypoxic Ischemia Encephalopathy;

13.6. They failed to prevent the occurrence of the HIE while the plaintiff and her foetus were under the monitoring and care of the department's employees at the hospital from approximately 22h00 until approximately 6h35 when the plaintiff was delivered on 12 September 2009.

[14] The plaintiff further alleges that the medical practitioners and nursing staff both at the clinic and hospital acted in breach of their duty of care and were negligent in the treatment of the plaintiff and the minor child. They, it is so alleged, treated the plaintiff and the minor child in a sub-standard manner and were negligent in one or more of the following respects:

14.1. They failed to properly assess and diagnose the condition of the plaintiff and her unborn child upon admission and failed to implement proper treatment modalities in respect of the plaintiff and her unborn child;

14.2. They failed to properly monitor the plaintiff and her unborn child and failed to detect the onset of Hypoxia;

14.3. They failed to subject the plaintiff to a CTG machine in circumstances where they could or should have done so;

14.4. They failed to take all necessary and reasonable steps to expedite the delivery of the plaintiff's child through caesarean section in circumstances where they could or should have done so;

14.5. They failed to take all reasonable and necessary steps to ensure the transfer of the plaintiff to a higher level medical facility for the urgent delivery of the plaintiff's unborn child;

14.6. They failed to provide the plaintiff and her unborn child with medical care and attention and monitoring of reasonable standards when they could and should have done so;

14.7. They failed to prevent foetal distress in circumstances where they could and should have taken steps which would have adequately controlled the said condition;

14.8. They failed to take any adequate steps to prevent the developing of Intrapartum Asphyxia in consequence of prolonged labour, in circumstances where they could and should have diagnosed this condition and taken appropriate remedial action in respect thereof;

14.9. They failed to monitor the foetal heart rate either properly or at all and failed to detect the onset of foetal distress;

14.10. They either failed to diagnose prolonged labour and complications associated therewith when they could and should have done so;

14.11. They failed to provide any adequate treatment in respect of foetal distress following upon prolonged labour when they could and should have done so;

14.12. The failed to monitor the minor child immediately after birth in circumstances where they could and should have done so;

14.13. They failed to give regard to the minor child's clinical state including inability to feed and neurological state when they could and should have done so;

14.14. They failed to provide early intervention with supportive care and possible therapeutic Hypothermia to improve the minor child's neurological outcome;

14.15. They failed to immediately transfer the minor to high level hospital immediately after noticing that that she did not cry during birth, was floppy and had seizures when they could have done so;

14.16. They failed to take any/or any adequate steps to prevent the developing of seizures when they could or should have done so.

[15] In his plea the defendant admits that plaintiff and the minor were treated at the clinic and at the hospital and the duty of care towards the plaintiff and the minor child but denies that his employees both at the clinic and at the hospital acted in breach of the duty of care and were negligent as alleged by the plaintiff or at all. The defendant's case is that the nursing staff and doctors both at the clinic and hospital treated the plaintiff and the minor child in accordance with the required and acceptable standards.

The unavailability of the records and the effect thereof.

[16] In this matter there were no prenatal and obstetric records. In particular, there were no records of when the plaintiff started to experience contractions, when she arrived at Baziya clinic, when was she transferred from Baziya clinic to Mthatha General Hospital, when she arrived at Mthatha General Hospital, what time she arrived at Mthatha General Hospital, when was she first attended to by the nurses and the doctors at the Mthatha General Hospital and the type of attention that was given including monitoring intervals, if any. The first record that is available relates to the time of the birth of the minor child and the condition at birth and also the diagnosis and treatment given at the Nelson Mandela Academic Hospital upon transfer of the minor child from Mthatha General Hospital to the Nelson Mandela Academic Hospital.

[17] The expert witnesses who filed reports compiled same on the basis of the limited information on the records and the facts obtained from the plaintiff.

[18] Both parties were, in my view, equally handicapped by the unavailability of the medical records. The plaintiff had to rely on her memory in relation to the events of the 11th of September 2009, which was more than 12 years to date of the hearing of the matter. The defendant on the other hand, as expected in circumstances where there are no records, obviously found it difficult to identify even the witnesses that were involved in the diagnosis, admission, monitoring and treatment of the plaintiff.

[19] The plaintiff argued that the fact that the documents are not available must not be used or cannot be used to prejudice plaintiff and that the court must draw an adverse inference against the defendant in this regard.

[20] I am unable to agree with the plaintiff in this regard. There is no evidence that the defendant had a hand in the disappearance of the records. The defendant is, as I have stated hereinabove, in the same position as the plaintiff regarding the issue of the

unavailability of the records and the impact thereof. That the employees of the defendant may have been negligent in keeping the records, a finding I do not make herein, is, in my view, a side issue to the negligence that needs to be established in this case for the defendant to be held liable.

[21] Accordingly, and in my view, the absence of the records is a neutral factor in this case. It cannot be used in favour of any of the parties. Neither can it be used against any of the parties and, accordingly, no adverse inference can be drawn against any of the parties, at least on the facts of this case.

[22] Having said that I turn to deal with the evidence led during the trial.

The evidence:

[23] During the trial the plaintiff testified and called the evidence of two (2) expert witnesses, Professor Ronald van Toorn and Dr Ashraff Sheik Ebrahim.

[24] The defendant on the other hand called the evidence of Dr Amith Keshave and Dr Vuyelwa Baba.

[25] The plaintiff testified that IJ is her third child. The first one was born by caesarean section and the second one was born by a normal vaginal delivery. She testified that she attended ante natal clinic at Baziya clinic in Mthatha from the fifth month of her pregnancy. There were no reported problems save for a minor discharge that was successfully treated.

[26] On 11 September 2009 she started experiencing labour pains around 18H00, went to the clinic and she arrived at the clinic at 19h00. She stated that on her arrival at the clinic she was examined by means of a certain instrument that was used to hear the baby's heartbeat and a finger was put by the nurse on her and she was told that she was not yet ready to deliver.

[27] She stated that she was advised at the clinic that it would not be proper for her to deliver at the clinic since she had previously had a caesarean section. This in reference to her first child who was delivered by caesarean section in 2003. She was then referred to Mthatha General Hospital.

[28] She was transported to Mthatha General Hospital by means of an ambulance and arrived at the hospital, according to her, at 22h00. She was examined at the hospital through an instrument that is used to listen to the baby's heart rate and they also examined her vaginally and told her that she was still far from delivering. At this time she could still feel the contractions and they were, according to her, strong and painful. She stated that she was not examined through a CTG but an instrument was put on her stomach and the nurses listened through their ears.

[29] She stated that nothing was done on her from 22h00 until 00h00 i.e. midnight when a nurse came and examined her with a finger after which the nurse told her that she was about to deliver. She testified that she was instructed by the nurse to push and nothing happened.

[30] She testified that at Mthatha General Hospital there was no examination of the baby's heart rate except for the first one that occurred at 22h00 until she delivered at 6h30.

[31] She testified that after delivery the baby was taken from her and it was only on the second day that she was advised of the child's whereabouts. She was told that the child was at Nelson Mandela Academic Hospital and she was taken to the Nelson Mandela Academic Hospital where the child was admitted at ICU.

[32] When she was asked if there were any instruments put on the child she answered in the affirmative and stated that there were some tubes that were attached to

the child. When asked if she was bleeding after the delivery she stated that it was just a normal bleed from the vagina as she had given birth.

[33] When she was confronted with the version of Dr Baba in relation to the examination or the assessments at 19h00, 21h00 and 23h00 she denied having told Dr Baba that she had been examined during those periods at the hospital.

[34] She testified that the child is currently unable to eat on her own, she needs to be assisted and the child cannot do anything for herself, she needs permanent assistance.

[35] Under cross-examination she confirmed that she left home around 18h00 on the 11th of September 2009 and arrived at the clinic at 19h00. She also confirmed that she arrived at the hospital around 22h00. She admitted having spoken to Dr Baba virtually or through a virtual platform. She denied however having told Dr Baba that she left home at 16h00 and arrived at the clinic at about 18h00. She also denied that she had arrived at the hospital at 19h00. She also denied having told Dr Ebrahim that she arrived at the hospital at 19h00 she said that she did not know where Dr Ebrahim and Dr Baba got the information that she arrived at the hospital at 19h00.

[36] She further denied that she had told Dr Ebrahim that she delivered just after 00h00 and stated that Dr Ebrahim must be making a mistake in this regard. She also denied that she told Dr Baba that she delivered after 00h00 and stated that she does not know where they would have got the information that she delivered after midnight.

[37] She stated that after the child was born she never saw the child and never saw anything that was done to the child because the child was immediately taken away from her.

[39] When she was confronted with the version of Dr Ebrahim, in his report where the latter stated that she advised him that she saw a nurse doing something to the child's mouth she denied having told Dr Ebrahim so and stated that she does not know where

Dr Ebrahim got this information about the nurse doing something to the child's mouth. She further denied having told Dr Baba that she was examined by a doctor on arrival at the hospital and stated that she only told Dr Baba that on arrival at hospital she found three (3) female nurses and there was no doctor and she did not know where Dr Baba got the information.

[39] She denied what is contained in the doctor's report that she was examined at 23h00 and immediately thereafter she gave birth at around 00h00 and insisted that she gave birth in the early hours of the morning at 6h30 on the 12th of September 2009.

[40] The next witness called by the plaintiff was Professor Ronald van Toorn. He is a paediatrician and a neurologist specialising in foetal brain and child brain from 1 up to 18 years. He testified that he examined the minor child and that his area of expertise does not include the management of labour and starts only after the child is born. As to the adequacy of the management of the labour he deferred to the obstetricians.

[41] Professor van Toorn testified that his opinion as paediatric neurologist was requested regarding the cause and timing of the minor child's brain injury. He testified that in his opinion nothing pointed to the HIE having occurred antenatal because he could not find any reason for concern with the mother. In particular, he testified that the mother had no chronic illnesses, she was generally healthy, no infection, was 26 years and previous births that the plaintiff had were generally well.

[42] He also excluded the possibility of the injury having occurred postnatal period. He testified that any postnatal injury would have been indicated by a jaundice, meningitis or any infection recorded by the Nelson Mandela Academic Hospital. He testified that there was no such recording from the records from Nelson Mandela Academic Hospital.

[43] He testified that he agrees with the MRI analysis and the findings of the radiologists in their joint minutes to the effect that the minor child suffered an acute

profound injury. He, however, testified that in the case of the minor child there was no recorded sentinel event and according to him the injury might have been caused by a series of events over a prolonged period of time. He testified that if there was a sentinel event it would have been recorded in the neonatal record and according to him there is no indication of such a sentinel event from the Nelson Mandela Academic Hospital's records. He stated that the type of injury to the child is a partial prolonged type of injury. This is however inconsistent with the joint minutes of the radiologists. It is also inconsistent with the conclusions in his report where he stated:

> *"I concur with the radiology opinion that she suffered brain injury as a result of acute Hypoxic Ischemic brain injury."*

[44] In his report he concluded *"the depression at birth (poor 1 minute Apgar score), the normal birth weight and head circumference at birth, the moderate neonatal Encephalopathy, the prolonged period of hospitalisation (8 days), the type of cerebral palsy and MRI changes are all supportive of an Intrapartum Hypoxic Ischemic insult."*

[45] In short, his opinion is that the injury to the minor child occurred intrapartum. He stated that it is of vital importance to obtain the maternity case records to ascertain if there were any risk factors of brain injury during the intrapartum period.

[46] He accepted under cross-examination that there is no recording of any foetal distress as there are no maternity case records in the matter. He, however, stated that one can deduct from the condition of the baby like the low Apgar scores and the seizures that there was indeed foetal distress. He conceded that there was nothing on record to suggest that the baby was resuscitated after birth but also stated that if one looks at the features displayed by the baby at birth one would have expected that the baby would have been resuscitated or the baby ought to have been stimulated at birth.

[47] He conceded that an acute profound type of injury is an injury that happens suddenly but insisted that in the case of the minor child there was no recorded sentinel

event and therefore, according to him, the nature of the injury was not an acute profound type of injury but an injury that could have happened over a long period of time. He, however, conceded that this was not his field of expertise but that of the radiologist to opine on.

[48] He stated that he cannot time the injury because of the absence of the maternity case records but agreed that it is unlikely that the child would have survived if the injury had occurred for more than two (2) hours. He testified that where a baby has suffered an acute profound type of injury such a baby will be stillborn within an hour from the onset of such injury.

[49] The next witness to be called by the plaintiff was Dr Ashraff Ebrahim a Specialist Obstetrician and Gynaecologist in private practice at Netcare St Augustine Hospital in Durban. He stated that the plaintiff's maternity case records were untraceable and therefore he had to rely on, *inter alia,* a consultation with the plaintiff which he held on the 13th of August 2018 and on the neonatal records, the discharge summary from the Nelson Mandela Academic Hospital and the clinical records of the minor child from infancy until 2013 and the MRI brain scan that was done on 3 August 2018 which was reported on by Dr Murray Haynes, a Specialist Radiologist.

[50] He testified that according to the information obtained from the plaintiff the plaintiff started having labour like pains at about 15h00 on 11 September 2009 and she then proceeded to the clinic and was admitted at the clinic at about 16h00. She was checked by the nurse and a foetal heart rate as well as a vaginal examination was done after which she was told by the nurse that she was still far and she was informed that she was going to be transferred to hospital because of her previous caesarean section.

[51] He testified that he was informed by the plaintiff that the plaintiff arrived at the hospital at 19h00 and was promptly seen by a nurse who listened to the foetal heart rate and did a vaginal examination and also told her that she was still far and directed her to lie on a bed. He was also told by the plaintiff that at about 22h00 the plaintiff

called out for a nurse but there was no nurse in ward as they were in a separate area watching TV and that a nurse ultimately came at about 23h00 and repeated the vaginal examination after which she was told she was still far. According to him, the plaintiff advised that no foetal heart rate nor CTG was done.

[52] He testified that according to the plaintiff by 23h00 her pains were unbearable, and she could feel pressure in the low pelvic area. She then called out for a nurse and the nurse arrived immediately and did a vaginal examination and listened to the foetal heart rate after which the nurse advised her that she was ready to give birth. According to the plaintiff, so the evidence went, she had a strong urge to bear down just before midnight and by this time another nurse arrived. She then pushed for about 10 minutes in the dorsal position and delivered the baby with the assistance of the nurses and she was not sure of the time. She was not shown the baby at birth because the baby was taken away immediately but she did not hear the baby cry at birth and from her bed she could see the nurse doing something around the baby's mouth.

[53] He testified that labour occurs over three (3) stages. The first stage being the latent stage which is considered the safe stage of labour and it takes approximately eight (8) hours. He testified that during this stage there are no strong contractions and according to the guidelines the foetal heart rate can be checked once every two (2) hours. This stage may be from 1 centimetre to 4 centimetres dilatation. The second stage the active phase of labour is from 4 centimetres dilatation to 10 centimetres dilatation and according to the guidelines the foetal heart rate during this stage must be checked once every half an hour due to the strong contractions. It is during this stage that the nurses and the doctors at the maternity ward must carefully monitor the decelerations because these become warning signs that if the situation continues the baby may be hypoxic. The last stage is the delivery or the birth stage of the child.

[54] He testified that according to the plaintiff she started bearing down or reaching the second stage of labour from about 23h00. He stated that from the low Apgar scores it is clear that the minor child had HIE which is an injury suffered as a result of lack of

oxygen or blood to the brain. He opined that the low Apgar scores are a strong indication that the minor child suffered Hypoxia just before birth.

[55] He testified that the injury pattern on the minor child is an acute profound type of injury but because there is no recorded sentinel event the injury in his view occurred over a period of time. He testified that the cause of the injury to the child is foetal distress which does not occur silently. He testified that there are factors that point one to the condition and that when a foetus suffers distress the injury takes a while to occur unless there is a sentinel event. It takes anything between ninety (90) minutes to four (4) hours for the damage to occur.

[56] He testified that in his view if properly monitored the situation could have been prevented and that the lack of proper monitoring and the failure to spot the warning signs on the part of the defendant constituted negligence.

[57] Under cross-examination he conceded that the pleaded version of the plaintiff in the particulars of claim is not similar to what the plaintiff told him, in particular in relation to her time of arrival at the hospital. In the particulars of claim the plaintiff alleged that she arrived at the hospital at 22h00 when in fact to Dr Ebrahim she said that she arrived at the hospital at 19h00.

[58] He also conceded that the version given by the plaintiff to Dr Baba is similar to the version that the plaintiff gave to him during his consultation with the plaintiff and that the plaintiff told him that she delivered around midnight which was the same story the plaintiff told Dr Baba.

[59] He stated that he only saw it in the medical records that the baby was born at 6h35 on the 12th of September 2009. In fact, he said that he was not aware that the baby was born at 6h35 and never asked the plaintiff about the period between midnight and 6h35.

[60] He testified under cross-examination that if regard is had to the version that the plaintiff gave to him and if one works backwards the plaintiff was probably about 4 to 5 centimetres dilated when she arrived at the hospital.

[61] He also stated that if 6h35 is the correct time for the birth of the child that means the plaintiff was at the latent phase of labour when she was transferred to the hospital. He stated that if the child was delivered at 00h00 and the plaintiff had arrived at 22h00 that would mean that the plaintiff was already at the active phase of labour when she arrived at the hospital.

[62] That the plaintiff was in the active phase of labor when she arrived at the hospital cannot be correct. This is because the objective evidence shows that the plaintiff delivered at 6h35 on the 12th of September 2009 and not at midnight as the plaintiff had stated to him.

[63] He stated that he does not know when the contractions started but only relied on the version given to him by the plaintiff to the effect that she started having pains at around 15h00 or that the contractions started at around 15h00.

[64] This is also inconsistent with what is stated by the plaintiff in her evidence where she says that she started having contractions or pains at around 18h00 and she arrived at the clinic at 19h00.

[65] He disagreed with Dr Baba to the effect that the two (2) hourly monitoring of the plaintiff during the period between 22h00 and midnight on the 11th of September 2009 was proper and in accordance with the guidelines. He stated that the foetal heart rate had to be monitored every half an hour and therefore two (2) hourly monitoring between 19h00 and 23h00 was insufficient according to him.

[66] He also confirmed under cross-examination that when preparing his report he relied on the report of Dr Hayes a Radiologist and not Professor Loots who has filed a

joint minute in the matter. He testified that he never saw the report of Professor Loots and never considered same for purposes of his report. That concluded the plaintiff's case.

[67] Dr Keshave who is a Specialist paediatric neurologist specialising in child neurology testified on behalf of the defendant.

[68] He testified that he consulted with the mother of the minor child and also he examined the minor child. He found the child to be suffering from CP. He testified that in trying to determine the probable cause of the CP one had to look at the baby's head size compared it to the length and the weight of the baby. Unfortunately, with the minor child there was no recorded length and it was only the weight and the head size that were recorded. The head's size was above 97 percentile which was, according to him, above average.

[69] He testified that under normal circumstances, and considering the head size, the normal birth weight of the child ought to have been 3.8kg but in the present case the weight was 3.2kg. He testified that there was a possibility of Intra-Uterine Growth Restriction (IUGR) in this case.

[70] He opined that due to the IUGR the baby had no reserves to go through a birth process and this was according to him the probable cause of the injury suffered by the baby.

[71] He testified that there was no evidence on record of any HIE between 6h35 and 7h35 and that the diagnosis of HIE was only done at 10h15 and there is no explanation for such a delay.

[72] He further testified that the seizures were only noted on the minor child at 11h30 according to the records.

[73] He, however, conceded that there is hypoxic injury which occurred intrapartum but contends that the hypoxic injury could have occurred during the birth process and as a result of the IUGR.

[74] Even under cross-examination he still confirmed that the injury was HIE but stated that it was difficult to point out when exactly the injury occurred.

[75] Under cross-examination he testified that the pattern of injuries shown by the MRI is the type of injury that would have occurred within 10 to 15 minutes otherwise if it persisted beyond that the child would have died.

[76] It was put to him during cross examination that in the joint minute he suggested a Whole Exam Sequencing (WES) which involves the looking at the genes and the metabolic screen of the child so as to exclude other factors that may have caused the CP and that the WES came out negative which he confirmed. It was then put to him that when all the other factors that may have led to the CP came out negative, he then resorted to IUGR to which he responded by simply saying that the child had a predisposing condition in the form of a head circumferences that was above 90 in size and a birth weight that was nearly 25.

[77] It was further put to him that on probability there would be warning signs of any HIE and those warning signs would have been picked up through proper monitoring. He responded by saying that he would rather defer that to Obstetricians but where the child had IUGR the probability is that the injury would have occurred in the last minutes of the delivery.

[78] The next witness called by the defendant was Dr Vuyelwa Baba an Obstetrician and Gynaecologist employed at Chris Hani Baragwanath Academic Hospital.

[79] She testified that she interviewed the plaintiff on 11 December 2020 via zoom and during the interviews the plaintiff was with her daughter IJ born on 12 September 2009.

[80] She testified that according to the plaintiff her lower abdominal pains started around 15h00 on the 11th of September 2009 whilst she was at home and she went to her local clinic around 16h00 and arrived at the clinic around 18h00. She testified that the plaintiff advised that her membranes ruptured at the local clinic and she was then transferred to hospital because she had a previous caesarean section and she arrived at the hospital around 19h00 on the same day.

[81] She was told by the plaintiff that on arrival at the hospital at 19h00 she was assessed and seen by a doctor and was told that the foetal heart rate was fine and that she was still far from delivering. The plaintiff further advised her that she recalls calling for assistance around 21h00 and a nurse came to assist her and she was told that the foetal heart was fine and she was not about to deliver.

[82] At 23h00 the plaintiff, according to her, called again for help and a different nurse came to review and asked her to push the baby as she was ready to deliver and that the baby was born shortly after midnight.

[83] She was told that at birth the baby did not cry and was taken to ICU.

[84] She confirmed that there were no medical records and therefore she relied solely on the information that she received orally from the plaintiff for her report.

[85] She testified that the weight of the baby at birth was 3200g according to the neonatal records and the Apgar score at birth was 5/10 which was low and would have required resuscitation.

[86] In her report she concluded that the clinical management carried out by the staff at the local clinic was appropriate up to the transfer to the hospital. She also concluded that the labour in the hospital according to what the patient said also seemed adequate and following national protocols. She however noted some discrepancy concerning the delivery time as the plaintiff said she delivered around midnight whereas the neonatal records reflect that she delivered at 6h30.

[87] She testified that during the latent phase of labour the guidelines prescribe that the foetal heart rate must be monitored every two (2) hours and that during the active phase of labour they prescribe that monitoring must occur every thirty (30) minutes and before, during and after every contraction.

[88] She confirmed that she had sight of the joint minutes of the radiologists Professor Lotz and Zikalala and that their joint minutes, as obstetricians, refer to Haynes and Zikalala not Lotz.

[89] Under cross-examination she agreed that the absence of maternity records is a huge problem for the case. She stated that as far as she is aware the guidelines say hospital records must be kept for a minimum of ten (10) years.

[90] She stated that during her consultation with the plaintiff she tried to find out from the plaintiff in IsiXhosa whether a CTG was done and the plaintiff was not able to assist her and she is accordingly not in a position to comment whether a CTG was done or not. She, however, testified that the plaintiff advised her or spoke about a "*horn*" that was used to look at the baby's heart. This, according to Dr Baba, the plaintiff said in IsiXhosa.

[91] She confirmed under cross-examination that the plaintiff advised that the foetal heart was checked but the plaintiff did not specify how the foetal heart was checked at 21h00. She confirmed that the Apgar scores at 1 minute were 5/10, at 5 minutes they were 5/10 and then at 10 minutes they improved to 7/10 and that the child was taken

quickly to ICU and transferred to Nelson Mandela Academic Hospital where the child was diagnosed with HIE. She accepted under cross-examination that there was no recorded sentinel event in respect of the minor child. However, she could not agree that the fact that it was not recorded means that it did not exist. She stated that the sentinel event may not have been communicated though it existed and so with the unavailability of the maternity case records one cannot tell whether there was a sentinel event noted at birth which was not communicated to Nelson Mandela Academic Hospital or not.

[92] She conceded that in this case a CTG should have been preferred because of the history of birth by a caesarean section.

[93] She conceded during cross-examination that the plaintiff was labelled a high risk because of the caesarean section scar and that was the reason why the plaintiff was referred to hospital. She stated that according to the guidelines two (2) hourly monitoring for the mother was sufficient during the latent phase of labour and during the active phase of labour half hourly monitoring is prescribed.

[94] Just like Dr Ebrahim she was never furnished with any information regarding the monitoring of the plaintiff from midnight until the birth of the child at 6h35 in the morning.

The radiologists joint minutes:

[95] The parties submitted the joint minutes of Professor JW Lotz and Dr Z Zikalala, the radiologists. The radiologists were not called to testify during the trial. Their joint minutes starts with the following:

> *"We jointly believe that the value of Radiologist's opinion lies in the diagnosis and characterisation of brain injury as evident on diagnostic imaging (MRI), and that the issues of causality and appropriateness of clinical management are best addressed by the relevant clinical experts."*

[96] They then conclude as follows:

> *"4. Our conclusions on the MRI that we were tasked to review can be summarised as follows:*
>
> > *(i) This evidence of previous Hypoxic Ischemic injury in the child's brain;*
> > *(ii) The MRI study defines structural damage to the Peri-Rolandic Cortex and the Basal Ganglia, Thalamic Complex (BGT), constituting a cerebrocortical – deep nuclear pattern in the appropriate clinical context of a sentinel event, the pattern may be referred to as an acute profound Hypoxic Ischemic Injury.*
> >
> > *In the absence of a clear defined sentinel event, the same pattern may occur due to alternative pathways of serial events over prolonged period of time.*
> >
> > *In this context, we attach the most recent communication endorsed by the new born brain society guidelines and publications committee, and defer to clinical and obstetric experts to evaluate the described pattern against the available clinical and obstetrical records.*
> >
> > *(iii) The experts agree that there are no findings or structural or congenital malformation of the brain.*
> >
> > *(iv) The experts agree that there are no signs of an inborn error of metabolism.*
> >
> > *(v) The experts agree that the imaging features do not support a congenital infection with deleterious effects on the central nervous system, such as Toxoplasmosis, Rubella, Cytomegalovirus, or Herpes.*

(vi) The experts agree that a review of the clinical and obstetrical records by appropriate specialists in the field of neonatology and obstetrics to be essential in determining the cause and probable timing of the hypoxic ischemic injury."

[97] In his report Professor Lotz describes an acute profound or severe event as events that occurs suddenly and progress rapidly in term neonates resulting in a primarily central pattern of injury involving the deep grey matter. He describes a prolong partial or insults that develop over a period thus allowing compensatory redistribution of blood flow to occur resulting in a different pattern of injury (peripheral). He states that experiments performed in animal models have demonstrated that episodes of prolonged foetal Hypoxia result in shunting of blood to vital brain structures, such the brain stem, thalami, basal ganglia, hypocampy, cerebellum, at the expense of less metabolically active structures namely, the cerebral cortex and white matter.

[98] Dr Zikalala in his report also states that in the appropriate clinical history setting, the pattern and location of the injury may be suggestive of an old hypoxic ischemic injury in its chronic state of evolution in a term infant exposed to acute profound asphyxia.

[99] In short, both radiologists agree that the injury pattern to the minor child presents itself as an acute profound type of injury and not a partial prolonged type of injury. They also do not categorise it as a mixed pattern of injury.

The issue in dispute:

[100] At the beginning of the trial the parties agreed that the only issue for determination is that of negligence.

The legal principles:

[101] As I have stated herein before, the defendant has admitted that he owed a duty of care to the plaintiff and the minor child to render medical care of a reasonable and acceptable standard, to execute such duty with the professional skill and care, as can reasonably expected from medical practitioners and nurses and not to act negligently and so cause harm to the plaintiff and the minor child.

[102] The case of **Kruger v Coetzee 1966(2) SA 428 (A)**, established the test for negligence, and has been widely followed, making it the *locus classicus* on this aspect. The court held as follows at page 430 E - F:

> *"For the purposes of liability culpa arises if –*
> *(a) a diligens paterfamilias in the position of the defendant –*
> *(i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and*
> *(ii) would take reasonable steps to guard against such occurrence; and*
> *(b) the defendant has failed to take such steps.*
> *…Whether a diligens paterfamilias in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend on the particular circumstances of each case. No hard and fast basis can be laid down."*

[103] However, in cases like the present, involving organs of state, the standard to be applied is not that of the reasonable person but that of a reasonable organ of state. In **Moshongwa v PRASA**[2], the Constitutional Court stated that

> '*the standard of a reasonable person was developed in the context of private persons' and given the fundamental difference between the State*

[2] **Mashongwa v PRASA [2015] ZACC 36; 2016 (2) BCLR 204; 2016 (3) SA 528 (CC) para 40**

and individuals, 'it does not follow that what is seen to be reasonable from an individual's point of view must also be reasonable in the context of organs of state'.

[104] The plaintiff bears the onus of showing that the defendants breached that duty of care and that they did act negligently. The general rule is that he who asserts must prove and the question of onus is of cardinal importance. A plaintiff who relies on negligence must establish it and if at the conclusion of a case the evidence is evenly balanced, a plaintiff cannot claim a verdict; for he or she will not have discharged the onus resting upon him or her.[3]

[105] The plaintiff as a party upon whom an *onus* of proof rests, can only discharge that *onus* on the basis of credible and reliable evidence which establishes that his version is, as a matter of probability, the truth and that of his opponent false.[4]

[106] When dealing with expert evidence a court must determine whether and to what extent the opinions of the experts are founded on logic and reasoning. It must be satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached a defensible conclusion. An opinion expressed without logical foundation can be rejected.[5]

[107] Furthermore, before any weight can be given to an expert's opinion the facts upon which it is based must be found to exist and an opinion based on facts not in evidence, and I add that are non-existent, has no value for the court.[6]

[108] It therefore follows that the credibility and reliability of the factual witness, the plaintiff herein, impacts on the probative value of the expert evidence especially where the expert witness bases his/her opinion on the facts provided by the plaintiff.[7]

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[3] **See HAL obo MML v MEC for Health, Free State 2021 JDR 2607 (SCA) ZASCA Case Number 21/2019 (22 October 2021) para. 82 and the authority referred to therein.**
[4] See **Cotler v Variety Travel Goods (Pty) Ltd** 1974 (3) SA 621(A) at 629H – 630A
[5]**See HAL, supra para. 53.**
[6] See HAL, supra para. 208 and the authorities referred to therein.

Evaluation

[109] The version given by the plaintiff in her pleadings, to her experts and in court is inconsistent. First, she gave a version that she started feeling contractions around 15h00 on 11 September 2009. This is the version she gave to Dr Ebrahim and Dr Baba. She later, during the trial, stated that she started feeling the contractions at 18h00. She denied having told Dr Ebrahim that she started feeling the contractions at 15h00. Where both these doctors could have obtained their version is not explained by the plaintiff. They both claim that the version was given to them, at different times, by the plaintiff.

[110] Second, she stated, to Dr Ebrahim and Dr Baba that she arrived at Baziya clinic at 16h00 and at the hospital at 19h00. This is inconsistent with her version in the particulars of claim and in her evidence. In the particulars of claim, her case is that she arrived at Baziya clinic at 19h00 and at Umtata General Hospital at 22h00.

[111] The effect of the above is that it remains unclear, by reason of the unreliable evidence of the plaintiff to the doctors and in court, whether the plaintiff was in latent or active phase of labour when she arrived at the clinic and later at hospital and what intervals of monitoring were expected. This has an effect on the determination of whether the staff at the hospital failed to act in accordance with reasonably accepted standards or in accordance with their legal duty, as alleged by the plaintiff. It has also affected the cogency of the evidence of the experts.

[112] She testified that at Mthatha General Hospital there was no examination of the baby's heart rate except for the first one that occurred at 22h00 until she delivered at 6h30. To Dr Ebrahim she stated that at 19h00 she was promptly seen by a nurse who listened to the foetal heart rate and did a vaginal examination and to Dr Baba she stated that the foetal heart rate was checked at 21h00 and again at 23h00.

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[7] **See Hal, supra para.71-73**

[113] This is a further area where the evidence of the plaintiff has been unreliable and has detrimentally affected the cogency and reliability of the opinion of the expert witnesses. In fact, even her evidence that she was no monitored from 22H00 until she delivered at 06H35 remains unreliable. It also does not assist her case in the light of what I state herein below.

[114] The joint minutes of the radiologists describe the pattern of injury as an *"acute profound"* pattern of injury, which is an injury to the central part of the brain. They state that in the absence of a sentinel event the pattern may occur due to alternative pathways of serial events over a prolonged period of time. They do not explain how these alternative pathways may cause this type of injury over a prolonged period of time. They simply state that they *"attach the most recent communication endorsed by* ***The Newborn Brain Society Guidelines and Publication Committee*** *and defer to clinical and obstetric experts to evaluate the described pattern against the available clinical and obstetric records"*. No document is attached to the joint minute and no evidence by the radiologists was led.

[115] Dr Ebrahim testified that when there is lack of blood oxygen to the brain, the brain normally shunts blood oxygen to the central vital parts of the brain so as to preserve them and that it is only when the loss of oxygen is sudden and unexpected that the brain will be unable to improvise and shunt the oxygen resulting in damage to the central part of the brain without the outer or peripheral white part being affected. He testified that a foetus with injury to the central part of the brain is unlikely to survive inside the mother's womb for more than 15 minutes. He stated that beyond fifteen minutes the likelihood of death is very high. He however, testified that there was no sentinel event in this case and that suggests, so his opinion went, that the injury might have occurred over a long period of time and that there were warning signs.

[116] The minor child, it is common cause, was born alive. This is indicative of the fact that the injury did not occur over a period longer than 15 minutes whilst the child was

still inside the mother's womb. Otherwise, she would have died, according the Dr Ebrahim,s and Dr Keshave's testimony.

[117] The fact that no sentinel event was recorded in this case, and the fact that no sentinel event may have occurred, does not as a matter of logic detract from the fact that the damage was from the asphyxia typically caused by sentinel events, i.e. profound asphyxia which causes injury over a relatively short period of time. I therefore reject Dr Ebrahim's opinion that the injury might have occurred over a long period of time and that there were warning signs, which were ignored or were not picked up by the defendants due to lack of monitoring.

[118] Furthermore, absent any evidence of how the alternate pathways referred to by the radiologists can create or cause the kind of injury pattern on the foetus, their opinion remains pure speculation and conjecture. In **Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung** MBH the SCA held:

> *'[An] expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'*[8]

[119] The effect of the above, in my view, is that the plaintiff has failed to discharge the onus to prove any negligence on the part of the employees of the defendant.

[120] In the result I make the following order:

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[8] **Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung MBH 1976 (3) SA 352 (A) at 371F-H; PriceWaterhouseCoopers Inc and Others v National Potato Co-operative Ltd and Another [2015] ZASCA 2; [2015] 2 All SA 403 (SCA) paras 97-99.**

The plaintiff's claim is dismissed with costs.

Z.Z. Matebese
Acting Judge of the High Court

Appearances:

For the plaintiff:	**Mr Du Plessis SC (with Mr Sambudla)**
Instructed by:	**Messrs Sakhela Inc.**
For the defendant:	**Mr Mtshabe SC (with Mr Nabela)**
Instructed by:	**State Attorney: East London**
Date Heard:	**8 February 2022**
Date delivered:	**24 May 2022**