IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION – JOHANNESBURG

CASE NO: 2012/35886

In the matter between:

N. X.
obo S. S. N. Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH AND SOCIAL DEVELOPMENT OF
THE GAUTENG PROVINCIAL GOVERNMENT Defendant

JUDGMENT

MAILULA J:

[1] The Plaintiff sues the Defendant in her representative capacity as the mother and natural guardian of the minor child S. S. N. ("S."), for damages as a result of alleged negligence of the medical/nursing staff of Zola Clinic and/or Chris Hani Baragwanath Hospital.

[2] At the commencement of the hearing of the matter the parties applied for separation of the issues of liability and quantum in terms of Rule 33(4) of the Uniform Rules of Court. An order was accordingly granted.

The question of the quantum of damages was postponed sine die. The matter proceeds on the issue of liability only.

[3] The Plaintiff avers that at all relevant times the Defendant:
"was under a legal duty of care to ensure the rendering of medical care, treatment and advice to Plaintiff with such skill, care and diligence as could reasonably be expected of medical practitioners and nursing staff in similar circumstances, obliging the Defendant to ensure that proper, sufficient and reasonable health services are provided to members of the public" and that "the aforesaid legal duty of care extended to [the minor child] S. (initially as an unborn child and subsequent to his delivery as a baby).

[4] Further, that the Defendant breached his duty of care in that the minor child S. developed complications in that he suffered bilirubin-induced brain damage, alternatively known as kernicterus, as a result of which he is suffering from cerebral palsy, mental retardation and epilepsy whilst under the care, management and treatment of the Defendant, his employees and/or his authorised representatives,. She alleges that the minor child S. suffers from the condition aforesaid as a result of the Defendant's, her employees' and/or her representatives' negligence. She avers that:

"The Defendant was negligent in one, more or all of the following respects:

7.1.1 he failed to permanently, alternatively, temporarily employ the services of suitably qualified and experienced medical practitioner who would be available and able to examine, manage and/or give appropriate advice in respect of S.'s neo-natal care;

7.1.2 He failed to permanently, alternatively, temporarily employ the services of suitably qualified and experienced nursing staff, who would

be able to assess, monitor and/or manage S.'s development and condition;

7.1.3 he failed to ensure that Zola Clinic and/or Chris Hani Baragwanath Hospital was suitably, adequately and/or properly equipped to allow for the proper treatment of S.'s condition if and when required;

7.1.4 he failed to take any and/or all reasonably required stepsto ensure the proper, timeous and professional assessment of S.'s jaundice and their monitoring and management of his condition;

7.1.5 he failed to implement such steps as could and would reasonably be required to prevent the occurrence and/or the severity of the complication;

7.1.6 he failed to avoid the complication when by the exercise of reasonable care and diligence, he could and should have done so.

7.2 The Defendant's aforesaid employees and/or authorized representatives were negligent in one or more or all of the following respects, in that he/she/they:

7.2.1 failed to obtain important obstetric history relating to the Plaintiff's first child who suffered from neonatal jaundice and/or they disregarded the history and/or they failed to act appropriately on said history;

7.2.2 failed to acquire important medical history of the Plaintiff's first child who was born at the Zola Clinic in 2008 and who passed away four days after birth as result of jaundice and/or they disregarded the history and/or they failed to act appropriately on said history;

7.2.3 failed to refer S. to a higher level of care based on the Plaintiff's obstetric history;

7.2.4 failed to identify S. as being a high-risk foetus/baby based on previous obstetric history after delivery;

7.2.5 discharged S. from hospital less than 12 hours after he was delivered and not taking cognizance of the fact that the Plaintiff's first baby passed on as a result of early (pathological) jaundice;
7.2.6 failed to admit S. to the clinic for a longer period in order to adequately and properly manage the possibility of the development of early jaundice;

7.2.7 failed to act and administer treatment to S. where the jaundice was clinically observable upon his discharge on 24th of February 2009;

7.2.8 failed to maintain standards of care with regard to the approach and management of a baby with jaundice when neglecting to admit S. during his visit to Zola Clinic on the 27th of February 2009;

7.2.9 failed to conduct serum bilirubin blood tests to determine whether S. was suffering from jaundice and if so, what the severity thereof was;

7.2.10 failed to timeously conduct a blood test and to correct dehydration and acidosis which resulted in a further risk for the development of bilirubin-induced encephalopathy;

7.2.11 failed to prompt the following interventions and/or neglecting to timeously administer the following interventions:

7.2.11.1 Immediate and effective phototherapy;
7.2.11.2 Correcting dehydration and acid-base disturbances;
7.2.11.3 Performing an exchange transfusion with urgency and within a reasonable period after admission;
7.2.11.4 The administering of intravenous antibodies.

7.2.12 failed to provide and/or render the requisite reasonable neo-natal medical, surgical and nursing care with such professional skill and diligence as could reasonably be expected of medical practitioners in the particular circumstances;

7.2.13 failed to prevent S. from suffering a bilirubin-induced incident, causing him to sustain severe brain damage, as a result of which he is suffering from cerebral palsy, mental retardation, epilepsy and hearing loss when, by the exercise of reasonable skill, care and diligence, it could and should have been prevented."

[5] The defendant denies that he/his employees/his authorized were negligent as alleged or at all. In response to the Plaintiff's request to indicate in precise and narrow terms exactly what the Defendant's version is in respect of the issue of liability, and which allegations of negligence the Defendant denies and which allegations the Defendant admits, the latter formulated her defence as follows:

5.1 The minor child was discharged on the 13 March 2009 in a satisfactory condition;

5.2 The minor child was admitted again at Chris Hani Baragwanath hospital on the 16 July 2009 and diagnosed with **ACUTE GASTRO ENTERITIS**;

5.3 The Plaintiff reported that she was using "muthi wenyoni" until the child was four (4) months until she was advised by the hospital to stop doing so;

5.4 It is the defendant's case that both conditions for which the minor child was admitted for on the 27th February 2009 till 13th March 2015 [sic] and again on the 16 July 2009 have an adverse impact on the Neurological system and may result in brain injury; and

5.5 It will be Defendant's case that on 13th March 2009 when the minor child was discharged he was neurological [sic] intact and had not been diagnosed with cerebral palsy.

[6] The parties are agreed that;

6.1 The Plaintiff is the biological mother of the minor child S.;

6.2 The minor child was born on the 23rd February 2009 at the Zola Clinic;

6.3 The minor child was delivered at 21:10 on the 23rd of February 2009;

6.4 The Plaintiff and the minor child were discharged from Zola Clinic on the 24th of February 2009;

6.5 in so far as the State Liability Act is concerned, the Defendant was during 2009 the person responsible in law in respect of any and all contractual and delictual liability of the Department of Health and Social Development of the Gauteng Province;

6.6 During February 2009 both Zola Clinic ("the clinic") and the Chris Hani Baragwanath Hospital ("the hospital")fell under the authority of, alternatively, was controlled, further alternatively, was operated by the Department of Health and Social Development of the Gauteng Province;

6.7 In light of the fact that the Plaintiff has successfully applied for condonation for her non-compliance with the provisions of the Institution of Legal Proceedings Against Certain Organs of State Act No 40 of 2002, the Defendant withdrew the special plea.

6.8 The hospital records were completed by the hospital staff, acting within the scope of their employment;

6.9 The minor child was diagnosed with jaundice at the hospital on the 27th February 2009.

[7] The Court is seized with the questions of negligence and causality.

[8] The Plaintiff testified that she was born on 27 January 1993. She admitted that she had lied about her age to the staff at the clinic when her particulars were entered on the antenatal card at Zola Clinic. She was at the time 15 years of age when she fell pregnant with and gave birth to her first born child S. on [....] 2008. The first born child passed

away five days later. The cause of death was kernicterus. She fell pregnant with the second born child S.. She attended antenatal care at Zola clinic. S. was born on [....] 2009 at the clinic. Both mother and child were discharged the following day. She was told to take the child back to the clinic three days later. At the stage of the discharge she noticed nothing untoward about the child but a day later she noticed the yellowing of the skin on the forehead and on the nose. She also noticed that the child was not feeding well. On the morning of 27th February she did return to the clinic. The child was weighed. It appears that it had lost som weight already. The weight at birth was recorded as 3000g and she said that the child weighed less than three days later. She reported to the staff that she thought the child has jaundice. It was confirmed that the child was suffering from jaundice. She was advised to keep the child in the sun and that the condition would improve. She went back home. It appears that the Plaintiff's mother was worried about the minor child's condition. The Plaintiff had reported to her that the child's weight was two comma something. She advised the Plaintiff to take the child to hospital, which she did. After going through the admission process the child S. was then admitted to hospital at about 14h30 on the same day. The following day when she went back to hospital she found that the child was in high-care. He was detained in hospital for almost three weeks later. She has since given birth to another child. The third born child also presented with jaundice and she immediately took it to hospital. The child is well.

[9] Prof Jan Willem Lotz is a neuro-radiologist. His expertise is not in dispute. He stated that he did an MRI scan on the minor child. He identified some abnormality with the child's brain as depicted in the images taken. He explained that the brain damage suffered by S. was bilirubin induced.

[10] Prof Johan Smith, a neonatologist gave evidence on behalf of the plaintiff. In brief his evidence was to the effect that the plaintiff lost the first baby at neonatal stage as a result of k ernicterus. This is jaundice

related. This should have alerted the staff at Zola clinic to pay more attention to the second born child' condition. Having regard to the history it would have been salutary to send the Plaintiff and child to the hospital for blood test instead of just sending them home. The blood test would have indicated the ABO incompatibility and therefore the possibility of developing jaundice. Preventative measures would have then put in place. Even keeping them at the clinic a bit longer for observation would have been welladvised in the circumstances of the present case. The history put her second pregnancy at high risk. When the child returned to the clinic on 27 February 2009 and it was confirmed that the child has jaundice it was not proper for the nursing staff to send her back home with the illogical advice to keep the child in the sun. When the child was later taken to hospital the treating doctor failed to timeously administer treatment to address hypernatremia and metabolic acidosis. The exchange transfusion was only performed more than seven hours later. The reasonable period to perform same given the severity of the child's condition would have been four hours. In his opinion the child was given substandard management and treatment.

[11] Dr van Toorn is a paediatric neurologist examined the minor child. He confirms that S. has cerebral palsy. There is evidence of athetosis-slow writhing movements, dystonia as well as involuntary movements of the mouth and face. He present with a mild hearing loss on the left ear . he has impaired upward gaze and the dental enamel on the cusps of S.'s primary/deciduous teeth appear severely eroded. The child's cannot sit or roll over. He is wheelchair bound. When pulled to a sitting position he has head lag. He is unable to lift his head from pro e position. He speaks with difficulty. Dr Van Toorn agrees that the MRI scan shows that the cerebral palsy is a result of a kernicterus. He is of the opinion that the child should have been monitored as high risk. The blood test in casu, were indicated for ABO incompatibility. There was a need to keep the child under observation for a longer period. Discharging the child 9 hors after delivery was illadvised. The staff at

Zola clinic gave ill conceived advice which resulted in further delay in treating his condition. He is of the opinion that the treatment was substandard and had the child been given proper treatment the kernicterus coul and would have been avoided.

[12] Prof Mothoadire Patience Mawela agrees that the minor child did suffer brain damage. She was initially of the view that this could have been either jaundice related or could have been caused by hypernatremic dehydration. The hospital records show that the child was admitted at age 3days and was diagnosed with jaundice. Later at age 4months he was admitted with a history of diarrhea and related dehydration. She agrees that the minor child qualified as high risk for jaundice and ought to have monitored and treated as such. The advice given to Plaintiff to keep the child in the sun was not in terms of protocol. She is however aware that sometimes the mothers are given such advice at the clinics. She concedes that the minor child's brain damage was bilirubin induced. Brain damage can occur even where the bilirubin levels are lower than what the child presented with, namely, 671. She was of the view that the medical staff at the hospital did introduce the intervention measures within a reasonable time. It was pointed out to her that the exchange transfusion was performed more than seven hours later and she conceded that there was a time gap. There is no evidence that phototherapy was done but she assumed that it was. She conceded that there should be no delay in implementing treatment as severe harm can result.

[13] It was submitted on behalf of the defendant that both Professors Smith and Mawela agree that there is no evidence that neurotoxicity occurs at a specific bilirubin concentration, and that the minor child, upon admission, exhibited signs that signified adverse neurological impact. According to Prof Mawela some neonates suffer neurological damage at levels as low as 300 umol/L while others would survive levels as high as 500 umol/L. S. presented with levels of bilirubin at 671umol/L and having regard to the clinical symptoms exhibited at the time these

evince that he had already suffered brain damage in the form of kernicterus that is irreversible. In the circumstances, the minor child S. had already been in the morning of 27 February and that any intervention or steps taken at the hospital could only be damage control measures where kernicterus had already set in.

[14] The plaintiff's evidence shows that that S. presented with the signs of brain damage a day after he was discharged from the clinic. On 25 February 2009 she noticed that S. was had become yellow on the nose and the forehead and that he was not feeding well. The nurses on 27 February 2009 confirmed that he was suffering from jaundice.

[15] Further, that having regard to the Bhutani table the minor child S. manifested clinical signs that fell under each of the three columns which is indicative that he had already suffered brain damage at the stage he experienced poor sucking and decreased muscle tone, and definitely at the stage he exhibited lethargy, hypotonia and decreased muscle tone.

[16] The clinical records from Zola Clinic reflect that the delivery was normal. There were no complications. It is recorded that the delivery was spontaneous. The baby cried well at birth. The APGAR score was nine out of ten in the first minute but was ten out of ten within five and ten minutes, respectively. Upon neurological examination he was found to be normal. The minor child was discharged on 24 February 2009. He was in a satisfactory condition. He was sucking well and his colour was pink. He was immunised and given some eye treatment. Chloromax ointment was administered. Nothing abnormal was detected. Clearly the jaundice was not visible according to the examination including the examination of the minor child's eyes and skin, so the argument goes.

[17] It was argued that the clinic's nursing staff followed protocol in respect of the Plaintiff's pregnancy and that they did not act negligently in deciding to discharge the minor child S. on 24 February 2009.

[18] Further, that from the history given by the plaintiff and the clinical signs the child manifested, even before he was taken to the clinic, it appears that the bilirubin levels were high enough to have caused bilirubin induced brain damage. When he was admitted to hospital later that day, 27 February 2009, the same clinical were present and that the interventions by the hospital medical and nursing staff could not reverse the Kernicterus but could only reduce the levels of bilirubin and consequently loss of life. The Plaintiff was negligent in that she noticed the onset of jaundice for two days before taking the child for medical assistance, and that the sole cause of or the major contributor to the kernicterus suffered by S.. In light of the fact that the kernicterus had had already occurred the staff at the clinic and the hospital cannot be held liable even if it could be found that they failed to uphold the standard of care as expected of them., as there would be no causal link between the negligence of the medical staff, which is denied, and the brain damage suffered by the minor child S. and the resultant cerebral palsy.

[19] there can be no question that the child S. suffered bilirubin induced brain damage resulting in cerebral palsy. The Plaintiff's evidence as to what transpired on discharge and when she took the child back to the clinic at age three days stands uncontroverted. There is no reason why same should not be accepted. The fact that she lied about her age does not mean that she lied about the advice she was given. She could not have thumb-sucked this. As Prof Mawela indicated she is aware that such is sometimes given at clinics. Her evidence shows that, given the history of the first pregnancy it was important that the second child's development be monitored at high level, which the staff at the clinic failed to do. They should have kept her under observation for longer. If they did not have the facilities they should have referred her to hospital. The need for ABO incompatibility test was indicated in the present case. The staff at the clinic did nothing about it. Further when the child presented with jaundice on the 27 February 2009 the staff

failed to take appropriate action with the devastating results. When the child was admitted to hospital there was a delay in implementing the intervention measures. As Prof Smith has opined the treatment given was substandard. The submission that the Plaintiff was the party who was negligent is in my view without merit.

[20] It is clear that the devastating brain damage could and should have avoided by taking the necessary measures alluded to above. In the result, I am of the view that judgment ought to be entered in favour of the plaintiff.

[21] I find no reason why costs should not follow the event. It was argued that the Defendant should be ordered to pay at least the costs of two days on the attorney and client costs because the concession that the brain damage is bilirubin induced came late in the day. The plaintiff would still have had to lead evidence to show negligence as well as causation. The Defendant denied advising the Plaintiff was not advised to put the child in the sun and denied breaching protocol or acting negligently at any stage. In the premises I am not persuaded that it would be appropriate to make a punitive costs order.

[22] Accordingly, judgment is entered in favour of the Plaintiff.

22.1 The Defendant is liable to the Plaintiff for damages in the amount agreed upon or proved; plus

22.2 Costs of suit.

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ML MAILULA

JUDGE OF THE HIGH COURT

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Date of Hearing: 04 May 2015 to 14 May 2015; 21 August 2015.
Date of Judgment: 26 October 2016

Appearances:

For Plaintiff: Advocate M Coetzer
Instructed by: Wim Krynauw Incorporated

For Defendant: Advocate G Malindi SC with Advocate N Makopo
Instructed by: The State Attorney, Johannesburg