IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

CASE NO: 29/2015

In the matter between:

MMAPULA MICKEY GOLIATH Plaintiff
Obo O[..]

And

MEC DEPARTMENT OF HEALTH Defendant
NORTH WEST PROVINCIAL GOVERNMENT

JUDGMENT

DJAJE J

[1] The Plaintiff instituted a claim for damages on behalf of her minor child O who has been diagnosed with cerebral palsy from birth. The matter proceeded only in respect of merits as parties agreed to a separation of merits and quantum. The Plaintiff's claim is based on the argument that the cause of the cerebral palsy was due to the negligence of the medical staff employed at the hospital for which the Defendant is in charge.

[2] It has been admitted that O was born in the early hours of **27 September 2002** and has been diagnosed with cerebral palsy. Further that the medical staff at the hospital were working within their scope and duty of the Defendant. The Defendant admitted that it had a legal duty to render proper service to the Plaintiff but deny any negligence on the part of its employees.

Evidence

[3] The Plaintiff testified in this matter and a number of experts were also called to testify. In the main the Plaintiff testified that O at the time of the trial was sixteen years old. She is a single mother and is unemployed. The reason that she is unable to work is because she has to look after O. She remembers her pregnancy with O albeit not everything. She only started attending her ante-natal clinic visits when she was about five months pregnant. She could not say with certainty how far along in her pregnancy she was. She was attending her clinic visits monthly. On **24 September 2002** she was referred to the Mafikeng Provincial hospital by the nurse at the clinic for a caesarean section ("C-section"). She was admitted at around 22h00 on the same day at the hospital. In the morning of **25 September 2002** the doctor informed her that she was not in labour and discharged her.

[4] Later in the day after she was discharged, she started bleeding and experienced abdominal pains. She went to the clinic and was again referred back to the Mafikeng Provincial hospital. At the time of referral the nurse told her that her pelvic bone would not allow the baby to come out and she required a C-section. She was admitted that evening at the hospital. According to her she spend the whole day of **26 September 2002** bleeding and at around 19h00 the pains got worse and she informed the nurse at the hospital that she could not stand the pain anymore. She was taken to the labour bed and after doing a vaginal examination the nurses told her the baby was close. She was then advised to push when the pain comes. She did as told and as she pushed blood came out instead of the baby. The nurses uttered the words that the birth was difficult and it needed doctors. She was left there alone until in the early hours of the morning when a doctor came and

examined her. The doctor told her the nurses had wasted her time and she was taken to theatre. She was operated on in theatre and she realised that the baby was not crying and he was taken away. She only saw her baby after three days.

[5] When she saw her baby he was in a tube and could not feed on his own and was kept at the hospital for six weeks. Eventually her son was discharged but he was still not feeding from her breast and she was required to take him back to the hospital every month to see the doctor. She testified that Oarabile cannot sit, walk or talk and he needs to be taken care of full time.

[6] Dr Christian Bartel Van Onselen-Sevenster ("Sevenster") was called by the Plaintiff. He is a practicing gynaecologist and obstetrician since **1990**. He consulted with the Plaintiff in this matter and compiled a report having also looked at the maternity records. It was his evidence that the management of pregnancy at the clinic was done properly. His concern was that during labour the doctors and the nurses at the hospital did not examine the Plaintiff as per guidelines and the labour process was prolonged. Dr Sevenster explained that during the active phase of pregnancy monitoring should be done frequently with vaginal examination done every two hours and the foetal heart rate checked every half an hour. However in this matter that was not done by the nurses or doctors at the hospital.

[7] As a result of the poor monitoring the hospital staff could not detect that the Plaintiff's pelvic was too small alternatively the baby's head was too big to allow normal birth. Plaintiff had strong contractions which placed severe pressure on the baby's head resulting in decreased blood flow and oxygen delivery to the baby. He had no doubt that the cause of the cerebral palsy on baby O is as a result of the negligence of the hospital staff and doctors who failed to properly monitor the Plaintiff in the active stage of labour.

[8] The paediatrician neurologist, Dr Hitesh Diar examined O, noted the medical records and compiled a report. He concluded that O has clinically severe

spastic cerebral palsy. In his opinion and having looked at the records, the Plaintiff had uneventful antenatal visits. He commented on the clinic records indicating the presence of leucocytes in the urine that if the Plaintiff had an infection she would have been given antibiotics but no such entry is recorded.

[9] Dr Dipesh Jogi who is a radiologist testified that he did a Magnetic Resonance Imaging (MRI) on O on **31 March 2015** when he was thirteen years old. His conclusion was that the scarring of the brain indicates hypoxic ischemic injury. Hypoxia is oxygen deprivation which in this case occurred either during birth or prior birth stage. He stated that the duration of labour had been prolonged exceeding the time for the baby to auto regulate. Having looked at the hospital records he opined that the brain was well formed when the baby was born. He concluded that the cause of the lack of oxygen was just before or during labour and that there is no record of anything after labour that could have caused the baby to start having seizures.

[10] The Defendant called a nurse who was employed at the Mafikeng Provincial Hospital in **2002**, Thoko Morwalle. Her testimony was mainly around the facilities that the hospital had in 2002 but she did not remember the Plaintiff or attend to her. She testified that the hospital had about sixty two clinics that were referring to it and the ante natal ward at that time only had forty two beds with ten beds in the labour ward. She did confirm that there were two midwives in the labour ward at the time and three doctors in theatre. As regards monitoring, her testimony was that in the active phase of labour monitoring should be done every two hours and if there are complications the doctor can be called in thirty minutes.

[11] The Defendant's gynaecologist and obstetrician was Dr John Mashamba. He qualified in gynaecology and obstetrics in **1996** and has been practicing ever since. He started off his testimony explaining the importance of the last date of the menstrual cycle in determining the duration of the pregnancy. The reason for this is that in his opinion the Plaintiff could have been 41 weeks pregnant when the baby was delivered. He went further to state that there were signs of post-maturity on the baby as the baby had wrinkled skin and the

records indicated that the baby passed meconium in the placenta. According to the doctor prolonged pregnancy leads to the calcification of the placenta which then makes it difficult for the blood vessels to transport blood to the baby. Dr Mashamba testified that he cannot conclude on what could have caused the cerebral palsy on O but can only highlight factors of the mother that point towards the result of cerebral palsy. The doctor noted that the Plaintiff had admitted during one of the ante-natal visits that she was eating soil which could lead to blocking absorption of iron by the baby. The other factor he referred to was that the Plaintiff's weight had decreased on the day she went in to deliver which could be an indication of an illness. He also made reference to prolonged pregnancy which can affect the baby. He concluded that there is no dispute that there was hypoxia but cannot say what the cause was. He did concede that the monitoring of the Plaintiff was infrequent and the foetal heart rate was not adequately monitored.

[12] The paediatric neurologist for the Defendant, Dr Rivonia Mogashoa testified that she examined O on **24 January 2017**. Her testimony was that failure by the Plaintiff to attend ante natal clinic earlier in her pregnancy was fatal as there was no information of any illness she might have had at the time after or just before conception. In her opinion it is important to evaluate the blood results of the Plaintiff and not just oxygen deprivation to determine the cause of the brain injury to the baby. She indicated that the Plaintiff's blood results do not show if any HIV testing was done during her pregnancy but it shows the presence of some bacteria due to the low white blood cells and low lymphocytes. The doctor also referred to signs of post maturity from the hospital records that the child had wrinkled skin indicating that the pregnancy might have gone beyond normal gestational period which means the placenta was not providing adequate nutrition to the baby. In her report she concluded that the child's problems were caused by intrapartum hypoxia with the available information. She went on to explain that if she was given another opportunity to prepare another report she would elaborate more on the effects of HIV, snuff, alcohol and anaemia.

[13] Dr Khakhu Mathivha, a neonatologist compiled a report on behalf of the Defendant in this matter. She testified that from the hospital records O was compromised and had seizures which could have been caused by a hypoxic ischemic event but cannot say when it occurred. In relation to the maternity records her evidence was that there was nothing showing any abnormality.

Issues to be determined

[14] The dispute in this matter is whether the actions of the Defendant's employees were negligent in the treatment of the Plaintiff and O and whether such negligence resulted in O's cerebral palsy.

Submissions

[15] The Plaintiff stated the following grounds of negligence in its heads of argument:

"Plaintiff relies on the following grounds of negligence:

a. The Hospital staff sent Plaintiff home on 25th September 2002 in circumstances when it was reasonably required of them to keep Plaintiff in hospital and to monitor Plaintiff's condition; and /or

b. They failed to examine the Plaintiff and her unborn baby properly; and/or

c. They failed to advise the Plaintiff properly; and/or

d. They failed to treat the Plaintiff properly, to provide to the Plaintiff suitable medication to relief her pain, suffering and discomfort when it was reasonably necessary for them to do so; and/or

e. *They delayed for too long before they conducted a caesarean section on Plaintiff; and/or*

f. *They failed to establish, alternatively to establish properly whether the Plaintiff would be in a position to safely give birth by normal vaginal delivery; and/or*

g. *They failed to adhere to the standard of practice of a reasonable medical practitioner and of a sister or a nurse in their respective position who would have concluded that it was unsafe for both the Plaintiff and the baby, alternatively for the baby, to allow the Plaintiff to give birth through normal vaginal delivery.*

h. *They failed to diagnose the cause of the anterpartum haemorrhage in the Plaintiff.*

i. *They failed to monitor the Plaintiff and the baby, alternatively to monitor properly and at the required intervals, the unborn baby's heart.*

j. *They failed to properly attend to the Plaintiff and in particular did they leave her unattended in circumstances where it was reasonably necessary for them to attend to the Plaintiff.*

k. *They failed to enlist the services of a gynaecologist, alternatively of a duty qualified doctor to assist the Plaintiff in circumstances when it was necessary to do so.*

l. *They failed to manage the birth process responsibly and with due skill and care."*

[16] Counsel for the Plaintiff submitted that all that needs to be established is that negligence did play a role even if there are other factors. It was argued that the version of the Plaintiff's experts is more probable that the lack of oxygen

to the baby was due to pressure on the head as the baby could not be delivered normally. Further that all the experts agree that there was lack of oxygen to the brain and caused cerebral palsy. It is the Plaintiff's case that even if the contractions were moderate, the lack of monitoring caused the baby to be pressured into going into labour and the medical staff would have been able to detect that caesarean section should be done sooner. It became an emergency due to lack of monitoring. Counsel criticised the Defendant for failing to call any of the medical staff to dispute the evidence of the Plaintiff about what happened in the hospital.

[17] In response to the Defendant's version that there were other risk factors that might have contributed to the outcome, counsel for the Plaintiff argued that there is a need to establish those possibilities on a balance of probabilities. Counsel further argued that the risk factors referred to by the Defendant's Drs Mashamba and Mogashoa were not based on any facts or evidence. The issue of post maturity was based on the clinical records but the people who made the inscriptions on the record did not testify on how they calculated the duration of the Plaintiff's pregnancy. Further that in the records of admission of the baby at Neonatal unit it is recorded that the gestational age was 38/40. No one was called to testify on this aspect as well. Dr Mogashoa's evidence was criticised that it was academic and none of it was based on any facts.

[18] In contention the Defendant argued that the cause of O's cerebral palsy was not as a result of prolonged second stage of labour but rather that it is as a result of a combination of factors ranging from:

"(a) non attendance of ANC until about 5.2 month- 6 months;
(b) anemia of 9.3HB during the first and the third trimester;
(c) signs of infection in July 2002 (lower abdominal pains and leucocytes in urine);
(d) pica, alcohol and snuff;
(e) infection (virus and bacteria) in mother's blood stream on 25 September 2002;

(f) prolonged pregnancy of beyond 41 weeks of gestation."

[19] The Defendant argued that its duty to provide health care services can be limited by environmental factors such as lack of resources and equipment. In substantiation counsel referred to the shortage of theatres in **2002** at the Mafikeng Provincial Hospital. The other factors that counsel for the Defendant mentioned as limiting the Defendant's duty are the health status and social standing of the Plaintiff. It was argued that failure by the Plaintiff to attend ante natal care until about five months affects the development of the baby and this is the time when the gestational age or period is determined. In argument counsel criticised the Plaintiff's experts for having failed to analyse the blood results of the Plaintiff before delivery where there was an indication that there was bacteria and virus. Further that the Plaintiff's experts ignored factors such as alcohol and snuff and the extent of their role in the outcome.

[20] On the issue of post maturity it was argued that none of the Plaintiff's experts commented that this was a case of prolonged pregnancy despite the signs of wrinkled skin and the discharge of meconium into the placenta. Counsel submitted that Dr Sevenster as an expert witness failed to apply the same standards of fairness and honesty by not distinguishing between negligence and unfortunate medical outcome. In doing so, Dr Sevenster was criticised for making conclusions with no scientific medical science to prove his contentions. In concluding counsel submitted that the cause of O's cerebral palsy ranged from infection, anaemia, maternal use of snuff and alcohol, infection with traces of both virus and bacteria in the Plaintiff's blood system and prolonged pregnancy beyond forty one weeks of gestation.

Law

[21] The test in medical negligence was succinctly summarised by Corbett JA in the case of **Blyth v Van der Heever 1980 (1) SA 191 (A) at 196E.** The two questions mentioned in that case were:

" (i) what factually was the cause of the ultimate condition of the child;

(ii) did negligence on the part of Defendant cause or materially contribute to this condition in the sense that the Defendant by the exercise of reasonable professional care and skill could have prevented it from developing."

[22] The opinion of medical experts is central to the determination of the required level of care and whether there was a breach of it. The requirement in evaluating such evidence is that expert witnesses support their opinions with valid reasons. Where reasons are advanced in support of an opinion, the probative value thereof is strengthened. **See MEC for Health, Western Cape v Qole (928/2017) [2018] ZASCA 132 (28 September 2018).**

[23] The classic test for negligence was formulated by Holmes JA, in **Kruger v Coetzee 1966(2) SA 428 (AD)** at 430 E-G:

"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 failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a)(ii) is sometimes overlooked. 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 upon the particular circumstances of each case."

[24] In **Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd 2000 (1) SA 827 (SCA)** at paragraph 21 the court reiterated that the benchmark for negligence is what a reasonable person in the same circumstances as defendant would have done.

[25] In determining which of the versions in a trial is more probable the procedure outlined in the case of **Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie & Others 2003 (1) SA 11 (SCA)** should be followed where the following was stated:

> "*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.*"

Analysis

[26] The Plaintiff's case in this matter is that the negligence of the medical staff on probabilities caused the outcome of cerebral palsy. Dr Sevenster pointed towards poor monitoring of the Plaintiff and the foetal heart rate as negligence on the medical staff. The Plaintiff was referred to the hospital for a caesarean section on **24 September 2002** due to cephalo pelvic disproportion (CPD) which meant that the baby' head was either too big alternatively the cervix was too small to allow a normal birth. That being the case **on 25 September 2002** the Plaintiff was sent back home and informed that she was not in labour. This evidence was not disputed by any of the Defendant's witnesses. On **26 September 2002** the records indicate that there was no vaginal examination done and no foetal heart rate at 06h00 and at 08h00. It was only at 00h45 that the doctor noted CPD and the Plaintiff referred for emergency caesarean section. None of the hospital staff members on duty that time came

to testify and explain on the monitoring and examination of the Plaintiff and the baby.

[27] The evidence of Dr Sevenster stands undisputed on the monitoring intervals during the active phase of labour which should be every two hours for vaginal examination and every thirty minutes for foetal heart rate. The records made available in this matter indicate the contrary and no evidence was led to explain the entries or why monitoring was not done according to the prescribed guidelines. The evidence of the Plaintiff that she was told to push and only blood came out also stands undisputed. This is also due to the medical staff from the hospital not testifying in this matter. According to the hospital records made available in court there is no doubt that the monitoring was infrequent.

[28] The experts are all in agreement that the cause of the cerebral palsy was lack of oxygen to the brain (hypoxic ischaemic event "HIE") but the dispute is when it occurred. The Plaintiff's version through the experts is that it occurred during labour as a result of poor monitoring. None of the Defendant's experts could give an opinion on the timing of the event. Dr Mogashoa's evidence was centred on the blood work and that there was an indication that Plaintiff had bacterial infection. In her opinion more investigation should have been done. On the available records there is no indication that further investigation was done by the hospital staff or if there was a need. These results were in the hands of the doctors who examined the Plaintiff but were not called to testify about these results and why no treatment was given to the Plaintiff for the bacterial infection. This makes her evidence as correctly pointed out by counsel for the Plaintiff speculative. She did not opine on the available evidence but rather on what could have been done looking at the blood results available.

[29] In her evidence Dr Mogashoa also emphasised that the intake of snuff and alcohol by the Plaintiff during her pregnancy might have contributed to the outcome of cerebral palsy. However she could not elaborate on how much of

snuff and alcohol did the Plaintiff ingest and for how long. It was also not put to the Plaintiff that she was taking alcohol and snuff during her pregnancy. The Plaintiff was only asked about the soil that she was taking which she admitted to and that she stopped immediately after she was advised not to take soil anymore. There was no medical evidence that pointed to the intake of soil having affected the outcome. This evidence as well was speculative.

[30] Both Drs Mogashoa and Mashamba named post maturity as one of the risk factors to the outcome. This evidence stems from the gestational age which according to Dr Mashamba was forty one weeks at the time of delivery. This evidence is contradicted by the admission records of the baby stating the gestational period as 38 weeks at delivery. There is no evidence in the hospital records supporting the opinion of Dr Mashamba that the gestational period was forty one weeks at delivery. He is basing his opinion on the calculation from the clinic records during the ante natal visits. However fatal to this evidence is the fact that none of the clinic nurses were called to testify on how they determined the gestational age when the Plaintiff first visited the clinic.

[31] The other factor that led Dr Mashamba to conclude on post maturity was that the baby's skin was wrinkled and the meconium stained the water in the placenta. He however conceded that meconium can be released when the baby is not getting enough oxygen and under distress. On the aspect of the placenta calcification he also conceded that no tests were conducted on the placenta to establish if there was any calcification. In its plea the Defendant had not pleaded this aspect of post maturity and as a result it was not taken up with any of the Plaintiff's experts. It is therefore my view that this opinion is without merit and cannot be sustained.

[32] Dr Mashamba did agree that the decision by the doctors to allow labour to progress as reflected in the records was correct only on condition the foetal heart rate was normal. However, there is evidence that there was no proper monitoring of the foetal heart rate. This indicates that the decision to allow

labour to progress without proper monitoring was not correct. He further agreed that the caesarean section was an emergency due to gross CPD which could have been detected if there was frequent monitoring in the form of vaginal examination done every two hours. There is evidence on the records that the hospital staff failed to monitor the Plaintiff as required during the active phase of labour and no explanation given as to why this was not done. There is evidence that the baby's head was swollen after birth which according to Dr Sevenster was as a result of pressure to the head. There is no evidence from any of the Defendant's experts as to what could have caused the swelling on the head. The only probable version is that of Dr Sevenster that there was pressure to the head as a result of prolonged labour.

[33] The Defendant listed anaemia as one of the risk factors which could have resulted in the outcome. There was evidence on the ante natal records that the Plaintiff was given treatment and there was no other record indicating that the Plaintiff was anaemic after it had been corrected at the clinic.

[34] The Defendant in its amended plea, pleaded contributory negligence by the Plaintiff due to factors such as alcohol intake, snuff and soil. As already indicated there was no medical evidence to support such a version and it stands to be dismissed.

[35] The evidence of the Plaintiff and her experts is found to be probable and that the cause of the cerebral palsy on O is as a result of the negligence of the medical staff in the employ of the Defendant by failing to properly monitor the Plaintiff and the unborn baby during the active phase of labour.

Costs

[36] It is trite that costs follow the result and I see no reason why such an order should not be made in this matter. Further that due to the complexity of the matter the appointment of senior counsel was justified.

Heads of argument

[37] In conclusion I see it necessary to comment on the heads of argument submitted by counsel for the Defendant. The heads submitted consisted of 184 pages. It is noted that in the said heads counsel dealt with medical definitions which were already dealt with in evidence by the medical experts during trial. This was unnecessary and I wish to voice my disquiet about such. Furthermore, counsel saw it fit to deal with what he named *"Jurisprudential discourse on the Etiology and epidemiology of cerebral palsy and risk factors"*. This topic is dealt with from page 150 to 166 of the heads of argument. I am unable to comprehend the relevance of such an exercise as this was not a medical conference but a trial to determine the cause of cerebral palsy on the Plaintiff's child with the available evidence. I wish to refer to the dicta in the matter of **Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd and Another 1998 (3) SA 938 (SCA)** where Harms JA said:

> *"There also appears to be a misconception about the function and form of heads of argument. The Rules of this court require the filing of main heads of argument. The operative words are 'main', 'heads and 'argument'. Main refers to the most important part of the argument. 'Heads' means 'points'* ***not a dissertation. (own emphasis)****. Lastly, 'argument' involves a process of reasoning which must be set out in the heads. A recital of the facts and quotations from authorities do not amount to argument".*

Order

[38] Consequently, I make the following order:

1. That the Defendant is ordered to pay to the Plaintiff such damages as the parties might agree upon or as the Plaintiff might be able to prove.

2. Defendant shall furthermore pay the Plaintiff's taxed or agreed party and party costs of this action up to the moment of this order on the High Court scale which shall include the following;

    2.1 The fees of senior counsel on the High Court scale.

    2.2 The reasonable taxable costs of obtaining all experts' Medico legal reports from the Plaintiff's experts which were served on the Defendant in terms of Rule 36(9) (a) & (b) for the trial on the merits.

    2.3 The reasonable taxable preparation, reservation, travelling and accommodation fees of the experts of whom notice has been given for purpose of the trial on the merits and who testified in the action on behalf of plaintiff.

    2.4 The reasonable taxable transportation and accommodation costs incurred by the Plaintiff attending Medico legal consultation with the Plaintiff's and Defendant's experts on the question of the merits inclusive of the reasonable travelling and accommodation costs in attending the trial proceedings, subject to the discretion of the Taxing Master;

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J T DJAJE
JUDGE OF THE HIGH COURT

APPEARANCES

DATE OF HEARING : 30 NOVEMBER 2018

DATE OF JUDGMENT : 28 FEBRUARY 2019

COUNSEL FOR THE PLAINTIFF : ADV. J. PISTOR SC

COUNSEL FOR THE DEFENDANT : ADV. H. MASILO