Reportable:	NO
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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

CASE NO: CIV APP FB 04/23

In the matter between:-

K[…] C[…] M[…] obo R[…] M[…] **APPELLANT**

and

THE MEMBER OF THE EXECUTIVE COMMITTEE NORTH WEST DEPARTMENT OF HEALTH **RESPONDENT**

CORAM: HENDRICKS JP, REDDY J, BODIBE- DIBETSO AJ

ORDER

[i] The appeal is dismissed with costs.

APPEAL JUDGMENT

REDDY J

[1] The primary questions in this appeal are whether the medical staff at Moshana Clinic and Lehurutshe Hospital were negligent in the care and treatment of the plaintiff, causing the defendant to be liable in law for the payment of damages for the injuries suffered by the minor child when the plaintiff and the unborn child, ("baby R") were under the care of the staff. The plaintiff avers that the negligence of the staff led to baby R suffering irreversible brain damage leading to cerebral palsy.

[2] The court a *quo* per **Petersen J** dismissed the plaintiff's claim. Central to this finding the court a *quo* found that because of the missing medical records, the experts could not find negligence on the part on the defendant. It followed that no negligence can be attributed to the defendant. To this end, the missing medical records were a neutral factor. In respect of the injury sustained by baby R, it was found to be "acute" as expounded in *AN v MEC for Health, Eastern Cape* (585/2018) [2019] ZASCA 102 (15 August 2019) at paragraph [9] and was therefore (by analogy) sudden and could not

be prevented. It followed, so the court a *quo* reasoned, that the probable cause and time of injury was critical in considering the question of negligence. The plaintiff assails these findings. This appeal is with leave of the court a *quo*. For the purposes of easy reference, the parties shall be referred to by the appellations as in the court a *quo*.

[3] After falling pregnant in December 2007, the plaintiff's first pregnancy was uneventful. On seeing changes in her body, she called at the Moshana Clinic. All visits to the clinic confirmed that baby R was in a healthy condition. She had attended monthly prenatal sessions at this clinic. On 02 September 2008, the plaintiff, was admitted at the Moshana Clinic while experiencing intermittent mild pains indicative that labour had commenced. The plaintiff was examined every two hours by nurses which examination included the insertion of unknown medical instruments into her genitalia. At about 13h00, notwithstanding the plaintiff experiencing severe pain, the same repetitive examination technique proceeded. At about 16h00, the transfer of the plaintiff from Moshana Clinic was initiated by the plaintiff's mother who had contacted the plaintiff's aunt, who was a nursing sister at a hospital.

[4] The plaintiff remained in the delivery ward awaiting her transfer. At about 19h00, she was transferred by ambulance to the Lehurutshe Hospital, approximately sixty (60) kilometers away.At Lehurutshe Hospital, her file was handed over to the medical staff. This was the last occasion that the plaintiff had seen her file. On visiting the hospital sometime after the birth of baby R, the plaintiff was informed

that her file could not be located. The plaintiff avers that another file was opened. The plaintiff confirmed that the clinic card of baby R was handed over to her legal team.

[5] On arrival at the Lehurutshe Hospital, a twenty (20) minute wait ensued, whereafter the plaintiff was escorted to the delivery room. On delivery of baby R, baby R was silent. There were no sounds emanating from the baby R or any crying. Baby R was ferried off and placed on oxygen. A meconium liquid was noted to be present. His Apgar score was noted to be 5/10. A day later, a clinical note was made in the Road to Health Chart denoting a delayed second stage. The plaintiff confirmed that no information had been provided to her in respect of the condition of baby R. A week later, the plaintiff and baby R were discharged from Lehurutshe Hospital.

[6] What followed were three visits to the clinic over a period of six (6) months for the routine checkups of baby R. The plaintiff observed that during the night whilst asleep, baby R would display shaking movements. Baby R was taken to a hospital where this behavior which she could not comprehend was reported. It was then that she was informed that baby R had cerebral palsy.

[7] Arising of these facts, the plaintiff issued summons, pleading that the injury to the baby R was caused by the sole negligence of the defendant whose negligence was explicated in the following manner. The nursing staff at Moshana Clinic failed to monitor the progress of the plaintiff's labour; the nursing staff at Moshana Clinic failed to timeously refer plaintiff to the hospital; the nursing staff, medical doctors and other professionals at the Lehurutshe Hospital

failed *inter alia* to assess monitor and adequately manage the plaintiff's labour and safeguard the unborn child, and that they failed to administer medication and proper medical treatment to the plaintiff; the nursing staff failed to implement such steps to avoid the complication before, during and after birth, when by the exercise of reasonable care and diligence they could have done so.

[8] The defendant denied liability, pleading that there was no negligence on the part of the collective hospital staff. He pleaded that any duty of care owed to the plaintiff and baby R as a foetus she was carrying at the time, was circumscribed by and subject to the reasonable financial, human, and other resources available to the Department of Health to equip staff and maintain the hospital. It was asserted that the hospital rendered the best service it could. However, in the event of the court finding that the monitoring of the foetus was insufficient, such deficiency was not causally connected to the cerebral palsy suffered by baby R.

[9] Dr Mogashoa, a paediatriac neurologist, and her counterpart Dr Rammego, prepared a joint minute where they agreed that baby R had features of stage II hypoxic ischemic encephalopathy (HIE).

[10] A joint minute between the paediatricians Dr Maponya and Professor Cooper agreed that the radiologists reported that the MRI brain scan was compatible with chronic *sequelae* secondary to acute profound to acute HIE in a term infant. This pattern of brain injury typically occurs because of total or near-total cessation of brain perfusion for a period of ten (10) to forty-five (45) minutes prior

to delivery and may follow a sentinel event such as a raptured uterus. Without any material information it is not possible to know when the probable injury was caused or whether it was preventable. Notwithstanding this joint minute, Dr Maponya accentuated that the timing of the injury had to be deferred to for the determination by obstetricians, as a paediatrician Dr Maponya's, full array of medical skills triggers in after the birth of a child.

[11] Dr Burgin and Dr Mbokota prepared a joint minute as Obstetrician/ Gynaecologists. The following was agreed to. There were no antenatal clinic or labour ward records that had been submitted. The birth weight of baby R was 3400 grams and Apgar score was 5/10 (from the Road to Health Chart). Baby R aspirated meconium was asphyxiated and only cured after thirty-five (35) minutes of resuscitation. The second stage of labour was prolonged. Significantly, both experts could not comment on whether there was substandard treatment in the conduct of labour. Whilst the court a *quo* was alive to election of the plaintiff not to lead the evidence of Dr Burgin, instead calling Dr Manthata - Cruywagen, the findings in this joint minute remained extant and apposite. This delayed second stage of labour is factually correct as per the treating doctor's inscription.

[12] Dr Manthata -Cruywagen elucidated on the consequences of this delay as follows. If there is a delay in the second stage of labour, Dr Manthata -Cruywagen, asserted this will have a detrimental effect on baby R. Research has ventilated that a prolonged second stage of labour is associated with adverse perinatal outcome. It is for this reason that time has been allocated to the second stage of labour. The second stage of labour is referred to in the Maternity Care

Guidelines that is divided into two phases, namely, the first and second phases.

[13] The second phase must last for forty-five (45) minutes in a first-time mother, should it exceed this timeline, it is termed delayed or prolonged. Prolonged labour is associated with adverse perinatal outcomes. This is so because the pressures in the second stage of labour are much more. Maternal uterine pressures and uterine contradictions are higher. Collectively they affect foetal oxygenation. The more prolonged the second stage of labour becomes, the longer the poor or reduced oxygen supply will be for the baby and the poorer the outcome. Dr Manthata -Cruywagen contended that "*if with three pushes it is not coming down, then you abandon and you then go for caesarian section*".

[14] Dr Manthata -Cruywagen was of the view that the nature of the injury was still acute, but the insult took time to lead to the final injury which is showing as an "acute" injury on the MRI.

[15] Dr Mbokota continued with the narrative that there was an absence of proper medical records. To this end, Dr Mbokota had a contrary view to that of the plaintiff as regards her contention that her pregnancy was uneventful. Further, he differed with Dr Manthata -Cruywagen about whether there was a prolonged second stage of labour or not. Dr Mbokota opined that to find that the second stage of labour had been prolonged, it had to be determined when the plaintiff was fully dilated, when did she start to bear down so that the timing can be put correct.

[16] Concerning the foetal heart rate monitoring, Dr Mbokota reaffirmed his view that he was unable to comment on the conduct of labour at the clinic and hospital. He differed with the view that the second stage of labour was delayed on the basis that there were no clinical notes to determine the duration of the second stage. To this end, he was unable to assert a view on whether it was prolonged or if the plaintiff was fully dilated. Notably, the mere recording of the presence of meconium in the absence of pertinent clinical notes is of no moment. A grading of the meconium would have been more useful. Put simply, Dr Mbokota opined that a Grade 1 meconium must be treated as clear meconium and an increased risk of foetal distress does not lead to an inference of actual foetal distress.

[17] The factual matrix

There was no evidence to gainsay the plaintiff's contention that her pregnancy was uneventful. Speculation and conjecture cannot nullify this absolute fact. It follows that on her entry to the Moshana Clinic, the plaintiff and baby R had not experienced any complications or abnormalities. The evidence of the plaintiff undeniably confirms that her hospital file was handed over to the staff at Lehurutshe Hospital. As regards the treatment that was received by her, with specific reference to the clinic the court a *quo* found as follows:

"13. **Under cross examination the plaintiff testified that she was treated well at the Clinic as well as the Hospital. The plaintiff further confirmed that upon arrival at the Hospital, there was no delay in the treatment she received, following her labour pains.** The plaintiff confirmed that she lost consciousness (passed out) following the delivery of R and saw R when she woke up at

around 01h00 am the following morning. On why she did not testify in evidence in chief to losing consciousness following R's birth, the plaintiff conceded that she had forgotten about that aspect.

14. The plaintiff testified that she struggled to breastfeed R and received no assistance from the nursing staff in that regard. R was seen during working hours by the medical staff as with the other babies and this was done to her satisfaction. **The plaintiff confirmed that the only issue she had with the nursing staff was with the breastfeeding issue, but once R could suckle, she was discharged with him. Other than that, the plaintiff conceded that herself and R were well taken care of**."

[18] It would be prudent to address the question of the hospital records and the findings of the court *a quo*.

[5] The ante-natal clinical records and the hospital records of the plaintiff on admission at Lehurutshe Hospital were not discovered as it could not be found. The only available clinical notes which have been discovered are of *R* following birth. How is the issue of the missing records to be approached by this Court? In *HAL obo MML v MEC for Health* 2021 SCA 149, Makgoka JA writing for the majority said the following in respect of missing records, which is equally applicable in this matter:

"Much store was placed on the fact that the principal maternity and obstetric records were missing. This does not assist the case of either party. The records were not available, and we do not know what has happened to them. Whether this was due to incompetence in the administration of the records or something nefarious we cannot say. Nor can any inference, favorable or unfavorable be drawn from their absence. As I explain more fully in paras 77 and 78 below, the absence of the hospital records in the context of this case is a neutral point.

There is mutual suspicion by the parties that the other had a hand in the disappearance of the records." (my emphasis)

[19] Having set the background for the consideration of the absence of the hospital records, the court a *quo* concluded:

[46] In the absence of hospital records, nothing conclusive could be said by the radiologists. The radiologist evidence therefore did nothing to advance the plaintiff's case. A distinct difference between this matter and AN v MEC for Health, Eastern Cape, is that hospital records were available, and it was common cause that the hospital staff did not monitor the labour properly. In that matter, the plaintiff too asserted that the damage occurred during the second stage of the active phase. In this matter, there are no hospital records which makes the determination of any negligence as alleged particularly difficult.

[47] The body of evidence in this matter, where consensus is reached by the experts demonstrates that any definitive expert opinion on the cause of the injury to R is hamstrung by the missing medical records. Dr Manthata-Cruywagen as stated above qualifies her statement that it is difficult to attribute negligence to the medical staff in the absence of hospital records but opines that the fact that *R* was asphyxiated at birth most *likely* is from undetected foetal distress and delayed second stage. This statement, however, is immediately followed up with a statement that the maternity case book should be sought to clarify the sequence of events. The last mentioned statement reverts back to the primary conclusion reached by Dr Manthata- Cruywagen, as with all the other experts and takes the matter no further. In all fairness to Dr Manthata Cruywagen, the additional information given to her by the plaintiff regarding fundal pressure and an episiotomy appears to be contributory to the shift in opinion from the body of experts as will be demonstrated below. "

[20] Advocate Van Der Walt SC contended that in the absence of any explanation by the defendant, it was incorrect for the court a *quo* to have readily accepted that the hospital records were missing. Conversely, Advocate Van Der Walt SC asserted that a finding that

ought to have been made was that the defendant had intentionally withheld the hospital records. To reinforce this contention, his written heads expound as follows:

"107. For the following reasons, the court ought to have found that the records are withheld by the defendant:

107.1. On 06 December, this Honourable Court ordered the defendant to make discovery and to pay the costs of the application.

107.2. In compliance with the court order, on 22 January 2020 the defendant duly filed its discovery affidavit wherein, Mr Maabela, the defendant's Deputy Director of Litigation, stated that "The Defendant has in his possession or power the documents relating to the matters in question in this action set forth in Schedule A and Schedule B of the Schedules hereto."

107.3. In Schedule A, the defendant stated that it has medical records in its possession.

107.4. To, date notwithstanding the defendant stating under oath that it has the medical records, no such records were provided to the plaintiff.

107.5. On 13 February 2020, the plaintiff served a notice in terms of Rule 21 requesting the following documents…….

107.6. The defendant failed to provide the requested documents and as a result the plaintiff filed an application to compel the defendant to file the requested further particulars.

107.7. On 11 December 2020, the defendant filed a notice to oppose the application but failed to file an answering affidavit detailing the basis of opposition.

107.8. The matter was subsequently removed from the roll as it had become opposed. At the time of trial, the application to compel was still pending.

108. In the circumstances, it is submitted that the court erred in finding that the medical records are missing or that they could not be found, simply because no one in the department has stated under oath that the documents are missing. The ineluctable conclusion is that the medical records are indeed available as confirmed under oath by Mr Maabela."

[21] Advocate Van Der Walt SC concluded on the issue of the missing records that the court a *quo* ought to have found that the missing records cannot on its own be used to support an argument that the plaintiff was unable to discharge the burden of proof. The submission continued that if regard is had to *Meyers v MEC for Health, EC* 2020 (3) SA 337 (SCA), the defendant would have had a positive duty to lead evidence as to what occurred in the hospital and/or clinic to upset the inference to be drawn of negligence. The only way this could have been done was by way of the medical records. The argument concluded that the defendant can now not hide behind the fact that the medical records (which are required to be protected and kept) were not to be found.

[22] Advocate Yawa retorted that central to addressing the issue of the missing records was the evidence of Dr Mosimane. He confirmed that on receipt of a request for the medical records of the plaintiff, a diligent search was conducted. It culminated in a finding that the medical records of the plaintiff were missing. It was not uncommon for patients to surreptitiously remove medical records. Moreover, where legal disputes arise medical records tend to go missing. To this end, Dr Mosimane found it incredible that the medical records that were being sought and pronounced as missing from the hospital file of the plaintiff, were in possession of the plaintiff.

[23] Afore the finding that the medical records of the plaintiff had gone missing, the defendant on 05 August 2019, caused a notice in terms of Rule 35(14) of the Uniform Rules of Court, ("the Rules"), requesting the plaintiff to provide copies of the medical records of the plaintiff from Moshana Clinic and Lehurutshe Hospital. On 19

August 2019, in acquiescing to the latter notice, the plaintiff served copies of the medical records from Lehurutshe Hospital which included the Road to Health Card on the defendant. The medical records that were served omitted crucial information. Significantly, the plaintiff did not proffer an explanation of how she came to be in possession of medical records that were found to be missing from the hospital. Additionally, there are no records that the plaintiff had requested copies of the medical records from Lehurutshe Hospital. It follows, so the argument continued, that the plaintiff was barred from being in possession of her medical records. Her possession of same was shrouded in suspicion.

[24] Turning to the discovery affidavit of Mr. Maabela, it was submitted that he was in possession of the medical records that was received on 19 August 2019.

[25] It is undisputable that the defendant is declared as a statutory custodian to keep and protect records. This duty is conferred by sections 13 and 17 of the National Health Act, 61 of 2003. In broad strokes, the person in charge of a health establishment must ensure that a health record containing such information as may be prescribed, is created and maintained at that health establishment for every user of health services. It is apparent on a reading of section 17 of the National Health Act that the legislature has taken a serious view on the failure to keep medical records and on their disappearance, falsification or being tampered with. Stiff penalties are prescribed under section 17(2). See: *Khoza v Member of the Executive Council for Health And Social Development of the*

Gauteng Provincial Government (2012/20087) [2015] ZAGPJHC 15; 2015 (3) SA 266 (GJ); [2015] 2 All SA 598 (GJ) (6 February 2015).

[26] To my mind, fundamental to the issue of the missing hospital records, is the rudimentary question; was the hospital records missing? The evidence presented unquestionably establishes that the plaintiff on being transferred from Moshana Clinic, was placed in possession of her hospital file. Likewise, the plaintiff when requested to discover medical records that were in her possession duly complied. These two fragments of evidence lead to the inescapable finding that medical records of the plaintiff existed. In my view, to suggest that the defendant was *mala fide* in intentionally withholding the medical records of the plaintiff is not borne out by the record of proceedings. This contention by Advocate Van der Walt SC, with respect, is misplaced. The discovery affidavit of Mr Maabela is no corroboration for the averment that the defendant was in possession of medical records that was subsequently withheld. To bolster this finding, which the court *a quo* correctly circumvented away, it is necessary to reiterate the timelines relating to the discovery of the medical records that were in possession of the plaintiff.

[27] On 05 August 2019, the defendant, concluding that the hospital records of the plaintiff could not be found at the Moshana Clinic and Lehurutshe Hospital, caused a notice in terms of Rule 35(14) to be delivered. On 19 August 2019, the plaintiff delivered the (plaintiff's) records from Lehurutshe Hospital and the Road to Health Card to the defendant. On 21 January 2020, Mr. Maabela deposed to a discovery affidavit, stating that he is in possession of copies of the medical records. To suggest that the defendant had medical records

which was intentionally withheld is ill-contrived. Such a notion is dispelled by the timelines and the discovery affidavit of Mr. Maabela. The finding of the court a *quo* that the hospital records were missing is unassailable.

[28] Whilst there exists a dearth of authority on missing medical records, relevant case law can only find application within the four corners of a factual backdrop. It was not found that the plaintiff had been instrumental in securing the medical records furtively nor was it found that the defendant had acted *mala fide* in the withholding of the medical records of the plaintiff. Nothing further needs to be said.

[29] I shift focus to the expert evidence that was adduced. In *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*, [2001] ZASCA 12; [2002] 1 All SA 384 (A) paragraph 34 the Supreme Court of Appeal referred with approval to the principle laid down in *Bolitho v City and Hackney Health Authority* [1997] UKHL 46; [1998] AC 232 (H.L.(E).) Therein, the court held that the evaluation of expert evidence entails a determination of whether and to what extent the opinions advanced are founded on logical reasoning. The court is not bound to absolve a defendant from liability for alleged negligent medical treatment or diagnosis based on the evidence of an expert genuinely held and which accords with sound medical practice. A defendant can therefore be held liable despite a body of professional opinion sanctioning his conduct. The court must be satisfied that such opinion has a logical basis, and that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'. *H A L obo M M L v MEC for Health, Free State* [2021] ZASCA 149; 2022 (3) SA 571 (SCA) paragraph 53. In the same

vein, in *Mediclinic v Vermeulen*, [2014] ZASCA 150; 2015 (1) SA 241 (SCA) paragraph 5 it was held that an opinion, which is expressed without logical foundation, may be rejected.

[30] However, it will seldom be correct to conclude that views genuinely held by competent experts are unreasonable, because courts would not be able to assess medical risks without expert evidence. Furthermore, it would be improper to prefer one view where there are conflicting expert views which are both capable of logical support. In *Dingley v The Chief Constable, Strathclyde Police* [2000] UKHL 14, 2000 SC (HL) 77 at 89D-E, the court cautioned that:

'One cannot entirely discount the risk that, by immersing himself in every detail and by looking deeply into the minds of the experts, a judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved – instead of assessing, as a judge must do, *where the balance of probabilities lies on a review of the whole of the evidence*.'

[31] In *Life Healthcare Group (Pty) Ltd v Suliman*, [2018] ZASCA 118; 2019 (2) SA 185 (SCA) para 15, it was held that:

'Judges must be careful not to accept too readily isolated statements by experts, especially when dealing with a field where medical certainty is virtually impossible. Their evidence must be weighed as a whole, and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion.'

[32] The nub of the matter being that a court must consider probabilities alongside the opinion of the experts. This brings into sharp focus the evidence of the primary experts. A joint minute was prepared by

obstetrician/gynaecologists Dr Burgin and Dr Mbokota. Notwithstanding the plaintiff's election to dispense with the oral evidence of Dr Burgin, the joint minute still constituted apposite evidence. In *lieu* of the Dr Burgin's evidence, Dr Manthata-Cruywagen testified. This joint minute reads as follows:

"We agree that:

1. ***NO ANTENATAL CLINIC OR LABOUR WARD RECORDS HAVE BEEN SUBMITTED TO US.***

HISTORY

2. *The baby, a male, was delivered on 9 September 2008 at 20h35 at Lehurutshe/Zeerust Hospital.*
3. *Birth weight was 3400grams and Apgar score was 5/10 (from Road to Health chart).*
4. *The baby aspirated meconium, was asphyxiated and only cured after 35 minutes of resuscitation.*
5. *The Medical Officer stated that second stage if (sic) labour was prolonged.*
6. *Date of discharge from hospital is not recorded.*
7. *The child has been diagnosed as cerebral palsy.*

WE DEFER TO PAEDIATRICIANS AND NEUROLOGIST REPORTS.
***We cannot comment on whether there was substandard treatment in conduct of the labour**."*

(my emphasis)

[33] For purposes of the completeness, Dr Manthata-Cruywagen records the following in respect of her interview with the plaintiff and conclusions in her report:

"3. Maternal interview

3.1 She was 33 yrs old primigravida.

3.2 She booked at Moshana Clinic at 3 months.

3.3 She has no past medical / surgical history.

3.4 She was not using alcohol, nor smoke or snuff.

3.5 On 02/09/2008: she sent to Moshana Clinic experiencing labour pains.

3.6 She arrived there around 06h00.

3.7 The evening shift was still on and they informed her to go lay on the bed as they are about to leave and the day shift will look after her.

3.8 At around 09h00 the nurses examined her. They placed something that looked like a glass on her abdomen and listened. They then proceeded with vaginal examination (internal examination).

3.9 This was done regularly almost at 2hr interval.

3.10 At 13h00 the pain got severe. She called her mother to ask that her brother must come collect her and transport her to hospital as she was in too much pain and the nurses did not assist the pain.

3.11 Her mother called her aunt, who is a midwife at the hospital. Her aunt then called the nurses at the clinic and requested a transfer.

3.12 The nurses were against it saying the hospital will turn the patient back to the clinic.

3.13 At 16h00 the patient experienced unbearable pains and her family demanded for her to be transferred to hospital.

3.14 An ambulance was arranged for her and on arrival at the hospital she was taken to the labour ward.

3.15 She waited for 20 min before she was allocated a bed in the labour ward.

3.16 She was very tired and could not push.

3.17 Her water only broke when the baby delivered.

3.18 A drip was then inserted, an episiotomy was done and she was told to push. Fundal pressure was applied to deliver the baby.

3.19 The delivery did not last long.

3.20 The baby did not cry at birth."

8. <u>Conclusion</u>

8.1 It is difficult to attribute negligence to the management Ms Mathlola received since there were no records.

8.2 Despite this from the available records there was delay in the second stage of labour and the child was born with low Apgar scores that only improved after 35 min.

8.3 The child was asphyxiated at birth most likely from undetected foetal distress and delayed second stage.

8.4 Maternity case book should sort (sic) to clarify the sequence of events.

8.5 I defer to paediatricians and paediatric neurologist."

(my emphasis)

[34] There is no underscoring the documented evidence as regards the treatment of the plaintiff. It is on the scant documentary evidence that the relevant experts based their conclusions.

[35] The general rule regarding the drawing of inferences is trite. The inference that is sought to be drawn must be consistent with all the proved facts, if it is not, then the inference cannot be drawn. See: *S A Post Office v Delacy and Another* 2009 (5) SA 255 (SCA) at paragraph 35. *R v Blom* 1939 AD 188 at 202-203. The position was summarised as follows in *S A Post Office v Delacy and Another* at paragraph 35:

'The process of inferential reasoning calls for an evaluation of all the evidence and not merely selected parts. The inference that is sought to be drawn must be "consistent with all the proved facts. If it is not, then the inference cannot be drawn" and it must be the "more natural or plausible, conclusion from among several conceivable ones" when measured against the probabilities.'

[7] 'Plausible' in this context means 'acceptable, credible, suitable'. Ocean Accident and Guarantee Corporation Ltd v Koch 1963 (4) SA 147 (A) at 159B-D It has also been stated that, where one or more inferences are possible, a

court must satisfy itself that the inference sought to be drawn is the most plausible or probable, even if that conclusion may not be the only one. AA Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982 (2) SA 603 (A). Cooper and Another v Merchant Trade Finance Ltd (474/97) [1999] ZASCA 97 (1 December 1999) para 7; Govan v Skidmore 1952 (1) SA 732 (N) at 734C-E.

[8] If there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture. See *S v Essack & another* 1974 (1) SA 1 (A) at 16C-E, quoting *Caswell v Powell Duffryn Associates Collieries Ltd* [1939] 3 All ER 722 at 733.

[36] The analysis of evidence of the experts by the court a *quo* is not challenged. To this end, it concluded:

"[47] The body of evidence in this matter, where the consensus is reached by the experts demonstrates that any definitive opinion on the cause of the injury to R is hamstrung by the missing medical records. Dr Manthata- Crywagen as stated above qualifies her statement that it is difficult to attribute negligence to the medical staff in the absence of hospital records but opines that the fact that *R* was asphyxiated at birth most *likely* is from undetected foetal distress and delayed second stage. This statement however, is followed up with a statement that the maternity case book be sought to clarify the sequence of events. The last mentioned reverts back to the primary conclusion reached by Dr Manthata-Crywagen, as with all the other experts and takes the matter no further. In all fairness to Dr Manthata- Crywagen, the additional information given to her by the plaintiff regarding fundal pressure and an episiotomy appears to be contributory to the shift in opinion from the body of experts as will be demonstrated below."

[37] As correctly found by the court a *quo,* Dr Manthata- Crywagen's evidence on the fundal pressure and episiotomy, in the absence of

any evidence to that effect by the plaintiff or of any expert, was of no evidential value.

[38] Whilst there may be a positive duty on the defendant in appropriate circumstances to react in the absence of medical records, this should not be conflated with the burden of proof which squarely rests of the plaintiff. In *Pillay v Krishna* 1946 AD 946 at 951-2*,* the general approach was explained as follows:

> "If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it: Where the person against whom the claim is made is not content with a mere denial of the claim, but sets up a special defence, then he is regarded quoad that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it … But there is a third rule, which Voet states… as follows: 'He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is fact that is denied, and that the denial is absolute'. The onus is on the person who alleges something and not on his opponent who merely denies it."

[39] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548, Corbett JA (as he then was) explained the distinction between the burden of proof properly so called and the evidential burden as follows:

> "As was pointed out by Davis AJA in Pillay v Krishna and Another 1946 AD at 952-3, the word onus has often been used to denote, inter alia two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In Brand v Minister of Justice and Another 1959 (4) SA 712 (A) at 715 Ogilvie-

> Thompson JA called it 'the overall onus'. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other."

[40] It serves no moment to proceed on a tangent of speculative hypnoses' that are not founded on primary facts or is not capable of inferential reasons as the plaintiff sought. In the premises I find that the appeal must fail.

Order

[41] Accordingly, I order the following:

The appeal is dismissed with costs.

A REDDY
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA
NORTH WEST DIVISION , MAHIKENG

I, agree

____

HENDRICKS JP
JUDGE PRESIDENT OF THE HIGH COURT

OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG

I, agree

BODIBE-DIBETSO AJ
ACTING JUDGE OF THE HIGH COURT
OF SOUTH AFRICA,
NORTH WEST DIVISION, MAHIKENG

APPEARANCES

For the appellant:	Advocate N. Van Der Walt SC
Instructed by:	Semaushu Attorneys 29 Proctor Avenue, Golfview, Mahikeng
For the respondents:	Advocate Yawa
Instructed by:	The State Attorneys, East gallery, Mega city, Mahikeng
Date judgment reserved:	28 February 2024
Date handed down:	29 October 2024