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IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

Case number: 583/2017

In the matter between:

D[...] **F[...]** **M[...]** **obo**
N[...] **M[...]**

Plaintiff

And

MEC FOR HEALTH FREE STATE
PROVINCIAL GOVERNMENT

Defendant

HEARD ON: 14, 15, 17 MARCH 2023
& 21 JULY 2023

JUDGMENT BY: DANISO, J

DELIVERED ON: 04 DECEMBER 2023

- [1] On 19 October 2012 the plaintiff then 17 years old, gave birth to a cerebral palsied baby boy (the minor child) at Mofumahadi Manapo Mopeli regional hospital (Manapo) at 18h00 approximately four hours after the minor child suffered foetal distress and about three hours after the plaintiff was transferred from Elizabeth Ross hospital to Manapo for a caesarean section delivery.
- [2] In this action, the plaintiff in her representative capacity as the mother and natural guardian of the minor child seeks to hold the defendant liable for the

minor child's condition on the premise that it was caused by the negligence of healthcare providers (the defendant's employees) who attended to the plaintiff during labour and birth by failing to perform a caesarean section timeously when she experienced prolonged labour with the result that the minor child sustained a brain injury (hypoxic-ischemic encephalopathy) culminating in cerebral palsy.

- [3] It is common cause that prenatally, the plaintiff had enjoyed a normal pregnancy with no congenital abnormalities recorded either with her or the foetus. Negligence is disputed on the grounds that the brain injury was unforeseen, the defendant's employees reasonably and appropriately monitored the plaintiff's progress of labour and the foetal wellbeing and when a caesarean section became indicated, it was performed timeously.

- [4] The parties have agreed to separate and stay quantum for later determination. The only issue I have to adjudicate is the merits of the claim on the basis of the respective parties' expert evidence including the conclusions as expressed in the joint minutes which included the following experts: Diagnostic Radiologists Professor Andronikou and Dr Kamolane, Paediatric Neurologists Professors Pearce and Dr Mogashoa and Gynaecologists / Obstetricians Drs Hofmeyer and Mbokota.

- [5] The experts largely agree that the plaintiff was provided with substandard medical care during labour and birth, the disagreement pertains to whether the substandard treatment contributed to the minor child's brain injury.

- [6] There are preliminary issues to be addressed in addition to the determination of the merits: the plaintiff has objected to the validity of the joint minutes between the Specialist Gynaecologists / Obstetricians Drs Hofmeyer and Mbokota on the grounds that they were in direct conflict with the concluded between Dr Hofmeyer and the defendant's erstwhile expert Dr Malebane (the previous joint minutes) on 28 January 2020.

- [7] It is the plaintiff's case that joint minutes between Drs Hofmeyer and Mbokota must be disregarded as they are intended to introduce evidence which is in direct conflict with the agreements already concluded in the previous joint minutes without providing any reasonable explanation. On the other side, the defendant has objected to the plaintiff's claim is enforceability for want of compliance with the provisions of section 3 of the Institution of the Legal Proceedings Against Certain Organs of State Act (the Act).¹ The premise is that pursuant to the amendment of the particulars of claim to include an averment that the plaintiff was first admitted at Elizabeth Ross hospital before being transferred to Manapo, the plaintiff failed to serve Elizabeth Ross with the notice of her intention to institute legal proceedings (the section 3 notice).
- [8] I am not persuaded by the plaintiff's contentions. Joint minutes may be repudiated provided, a timeous warning of the intended repudiation was given including the reasons for repudiation.² On the facts germane to this matter, the plaintiff was informed about the defendant's intention to repudiate the previous joint minutes by a letter dated 16 November 2022 approximately three months before trial followed by a notice dated 27 February 2023 over a month before trial. The reasons for the repudiation were indicated to be the material contradictions between Dr Malebane and Mbokota's reports. Furthermore, pursuant to the repudiation notification, the present joint minutes were concluded and later handed in at court as evidence by concurrence of both the parties therefore, it cannot be said that the plaintiff is prejudiced thereby. Based on all these reasons, the objection stands to be dismissed.
- [9] There is also no merit to the defendant's assertion that the plaintiff ought to have served a section 3 notice on Elizabeth Ross. The provisions of section 3 of the Act deals with the giving of the section 3 notice of intended legal proceedings by a creditor against an organ of state as a debtor. Besides the fact that Elizabeth Ross hospital is not an organ of state the amendment of the particulars of claim was not intended to add Elizabeth Ross hospital as a party to the proceedings. The defendant is vicariously liable for the negligent conduct of its employees including those stationed at the Elizabeth Ross hospital. This objection is also dismissed.

¹ Act 40 of 2002.

² *MEC Health 7 Social Development Gauteng v MM obo OM* [2021] ZA SCA 128.

- [10] The plaintiff's case rested on the testimony of Professor Anna Getruida Wilheminah Nolte and Dr Franelize Hofmeyer whilst the defendant called Dr Meshack Mbokota and Sister Mmaselo Mirriam Motaung as witnesses.
- [11] All the witnesses, testified based on the medical records namely, the Road Health Chart, Maternity Register, Maternity Case Record, Neonatal records and the Partogram (a graphical recording of the condition of both the mother and foetus during labour).³
- [12] Both the plaintiff's witnesses are of the view that the plaintiff was provided with substandard medical care during labour and birth and also failed to record the maternal and foetal observations as required by the Maternity Guidelines especially when it became apparent that there were abnormalities of the foetal heart rate which essentially indicate foetal distress. Hereunder is a summary of the evidence proffered by the respective parties.
- [13] Professor Nolte is a retired nursing lecturer. She has lectured in both basic and advanced midwifery. Presently she is teaching midwifery on a part time basis at Netcare and Life Health hospitals. About 90% of her former students were from public hospitals therefore she knows what is going on in public hospitals.
- [14] She explained that labour involves latent and active phases. During the latent phase, the cervix is expected to dilate from 2 to 4 cm within ten hours. A latent phase which goes beyond ten hours is regarded as prolonged labour in that instance, maternal observations must be done four hourly and the foetal observations two hourly. During the active phase the cervix dilates from 5 to 10 centimetres at one centimetre per hour. The blood vessels from the mother to the placenta are blocked off during strong contractions as a result, there is no oxygen coming from the mother going to the foetus and when this stage of labour is prolonged the foetus is deprived of oxygen therefore foetal heart rate

³ Exhibit "B".

observations must be performed every two hours to monitor the condition of the foetus. A cardiotocograph (CTG)⁴ is crucial in assessing whether the foetus is getting enough oxygen and functions sufficiently.

- [15] She pointed out that when the plaintiff was admitted at Elizabeth Ross on 18 October 2012 at 12h35, she was already in spontaneous labour including painful contractions and ruptured membranes. Her cervix was two centimetres dilated and the foetal heartrate was a healthy 120 to 140 beats per minute (bpm) therefore, maternal observations had to be performed four hourly and foetal heart observations hourly as required by the Maternity Guidelines. Instead, the next maternal observations were only carried out some five hours later at 17h50. At this stage the cervix was still 2cm dilated, foetal heart rate still at almost the same range and the fluid draining from the ruptured membranes was still clear.
- [16] She stated that the CTG for the period 19h22 and 19h19 showed a deceleration of a foetal heartrate indicating some abnormalities requiring a CTG to have ben continued for an extended time in order to assess the foetal wellbeing but for unknown reasons it was stopped.
- [17] Ten hours later at 21h00 a vaginal examination revealed that labour had not progressed. The plaintiff was still 2cm dilated. The graph for the CTG is not attached to the records. On the next morning at 03h20, the plaintiff was in prolonged latent phase of labour because although she was experiencing stronger contractions she was still 2cm dilated. Fifteen (15) hours had passed since she was in latent labour. The graph for the CTG is again not attached to the records.
- [18] Thirty minutes later at 03h55, Pethidine was administered for pain relief. She was examined by the doctor at 6h00 and it was discovered that she had progressed to just 4cm dilation. There is no proof that the CTG was performed

⁴ An electronic device connected to a mother's belly during labour. It measures foetal heartrate and contractions to assess the foetal wellbeing or compromise.

because there is no graph regarding the readings recorded. The plaintiff was at an active phase of labour now therefore it was expected that she will dilate at least 1cm per hour and if two hours went by without the expected progress she would be referred to another hospital.

- [19] Professor Nolte could not decipher the entries recorded at 07h15 however it is clear that at 09h25 the plaintiff had still not been referred to another hospital. At this stage she was only 6cm dilated even though she should have been 7cm dilated. A CTG also showed a deceleration of a foetal heartrate and in order to determine whether there was foetal compromise arising from the decreased variability, the CTG should have been continued for longer but it was stopped.

- [20] The next CTG which showed decreased variability lasting about 60 seconds was at 12h24 and although a single deceleration of a foetal heartrate does not on its own indicate foetal compromise it is still an abnormality which requires constant monitoring by a CTG. In this case there is no proof that CTG monitoring was continued. At 13h00 it is recorded that the progress of labour was good as the plaintiff had progressed to 9cm dilation as a result, she was transferred to the delivery room however, an hour later at 14h00 it is recorded that progress was poor. The plaintiff did not progress to 10cm, the foetal heartrate was irregular ranging between 109 to 225 bpm.

- [21] It was her testimony that a reading of 109 is too slow and 225bpm is too fast the foetal heartrate was thus varying between Bradycardia (a slow heart rate condition) and Tachycardia (too fast heart rate) both abnormal indicators that the oxygenation of the foetus was compromised and indeed the foetus was struggling as it had to be resuscitated by means of oxygen per mask on the plaintiff.

- [22] Despite this catastrophic event, there is no evidence of continuous monitoring with the CTG. The Plaintiff continued to suffer from prolonged labour with strong contractions but no progression. The records reflect that the baby “*seemed stuck, not ascending when asked to bear down.*” According to Professor Nolte, there is no record of what was being done at that time except that the doctor was notified.

- [23] At 15h00 progress was still poor, the dilation was still at 9 cm but it was only at 15h10 that a decision to transfer the plaintiff to Manapo for caesarean section was made. Reasons for the transfer included foetal distress resulting from Cephalopelvic Disproportion (CPD).⁵
- [24] The plaintiff was admitted at Manapo at 16h50. The examination at 16h55 revealed that her cervix was swollen, the urine was also tinted with blood which is an indicator that her bladder had sustained injuries due to the prolonged labour. At 18h10 there was a failed vacuum delivery and this is despite the fact that the reason for transfer from Elizabeth Ross was CPD which is contraindicated for a vacuum delivery. Expectedly, there were more decelerations indicating foetal distress. Again, no indication that a CTG was performed. The minor child was ultimately born at 18h50.
- [25] It was her testimony that, the fact that this was the plaintiff's first pregnancy, that she was a teenager with a small stature weighing only 49 kilograms and 146 centimetres tall she was at high risk of developing complications associated with prolonged labour such as CPD. The eventual outcome was therefore foreseeable.
- [26] In response to the defendant's assertion that the small abnormalities seen on the CTG cannot be relied upon because they were not done continually, Professor Nolte reiterated that CTG monitoring was pertinent under these circumstances and due to the absence of the CTG recordings, it is not possible to determine what the actual foetal condition was at a specific time.
- [27] Dr Hofmeyer, corroborated Professor Nolte's conclusions that the plaintiff's small body stature and this being a teenage pregnancy are signs which ought to have alerted the health care providers that there might be difficulty with the foetus passing through the birth canal due to size disproportions. According to

⁵ A child birth complication which impedes the natural delivery of a baby due to the baby's head being too big to come through the mother's pelvis.

the National Guidelines, active intervention is required once the latent phase exceeds eight hours.

- [28] On the available facts already at 13h00 on 19 October 2021 the plaintiff had already crossed the line which required the staff to take action to expedite labour which include administering Oxytocin. According to the CTG, foetal deterioration started as early as 14h00 at Elizabeth Ross. The doctor should have considered an expedited delivery to avert the brain injury. Had they transferred and performed emergency section earlier the foetal brain injury would have been avoided. Instead, there were further delays at Manapo created by a failed attempt to perform a vacuum which is contraindicated where labour is prolonged by CPD which is a clear indicator of obstruction.
- [29] It is also unknown why caesarean section was not performed at Elizabeth Ross as the transfer to another hospital also contributed in the delay of the caesarean section.
- [30] During cross-examination she was adamant the plaintiff's high risk of developing birth complications was foreseeable and that when it became clear that the plaintiff was suffering from prolonged labour, the defendant's employees failed to expedite the labour as a result thereof, the minor child sustained the hypoxic brain injury.
- [31] Dr Meshack Mbokota conceded that the medical care rendered by the defendant's employees was of substandard quality but denies that it contributed to the minor child's brain injury. He also confirmed that as at 14h00 the foetus was in distress long enough for a hypoxic insult to occur but not an injury. He explained that an insult simply means that "a blow has occurred" whereas with an injury "a bruise" resulting from the blow has manifested.
- [32] He also conceded that the reason for the referral from Elizabeth Ross to Manapo was due to the foetus not doing well but insisted that intervening measures such as vacuum extraction was implemented and the fact that it failed to does not mean it was contraindicated.

- [33] It was put to him that expediting the caesarean section amongst other interventions would have prevented the injury, his response what no one can know the outcome of any action and it is for the same reason that the defendant's employees only took the decision to transfer after 15h00 when complications arose. To determine the presence of CPD, the status of the contractions and foetus together with a full bladder are factors that must be ruled out first because if for instance, the bladder is not emptied it can obstruct the progress of labour.
- [34] He told the court that the delay of the caesarean section was not extreme and even if the plaintiff was transferred earlier or the caesarean section was performed earlier, the minor child's brain injury would still have occurred though the effects would have been less severe.
- [35] Sister Motaung is a registered midwife. She is presently employed at Manapo. On 19 October 2012, she was on duty when the plaintiff arrived by ambulance at 17h10 after having been transferred from Elizabeth Ross.
- [36] It was her testimony that she had no independent recollection of the events but she confirmed the contents of the medical records namely that, the plaintiff was handed over to her by her colleague Sister Moqhai at 16h50. She examined the plaintiff at 17h55 and then called the doctor on duty but he was busy with other patients. By 18h10 the plaintiff still had no effort to push as a result a vacuum was performed by the attending doctor in her presence at 18h20 but it failed. The minor child was thereafter delivered by caesarean section.
- [37] Under cross-examination, she confirmed that in the transfer records from Elizabeth Ross the reasons for the transfer were stated which included foetal distress and CPD requiring delivery by caesarean section. As this was an emergency, the referring doctor contacts the receiving doctor and alert him of the inbound patient and the reasons for the transfer. This is to ensure that time

is not wasted by investigating the history of the patient but she could not remember if this was done in this case.

[38] She could also not remember whether when she contacted the doctor upon the plaintiff's admission she informed the doctor about the reasons why the plaintiff was transferred to Manapo in particular, foetal distress and that the baby "seems stuck" as recorded in the medical records. She could not recall the reason why the vacuum failed.

[39] For the plaintiff succeed with the claim, she must prove on a balance of preponderance that the brain injury sustained by the minor child is attributable to the negligence of the defendant's employees in that, they failed to exercise reasonable intra-partum care to avert the brain damage and that a reasonable person in the position of the defendant's employees would have continuously monitored the plaintiff and the foetus and thereafter expedited the labour when it became clear that the plaintiff experienced prolonged labour and the foetus was struggling, at least by 14h00.⁶

[40] The plaintiff's assertion that the defendant's employees neglected its obligations to render proper intra-partum medical care to the plaintiff and thus negligent is clear from the medical records which its contents are indisputable. They reveal that there was no continuous CTG monitoring as required by the Maternity Guidelines at the pertinent periods where there were decelerations of the foetus' heartrate. The paucity in the CTG evidence does not assist the defendant as it is the responsibility of the defendant's employees to keep proper medical records.⁷

[41] The plaintiff's version that had the defendant's employees expedited the labour by performing the caesarean section timeously the minor child would have been saved from sustaining the brain injury is in my view corroborated by the plaintiff's experts. They rendered a convincing and succinct version

⁶ *Goliath v Members of the Executive Council for Health, Easter Cape* **2015 (2) SA 97** SCA.

⁷ Section 13 of the National Health Act No, 61 of 2003.

regarding the shortcomings of the medical care provided by the defendant's employees and- their impact on the foetus thereby resulting in the minor child being born cerebral palsied.

- [42] On the other side, the defendant's case was simply unconvincing, contradictory and implausible. Dr Mbokota was not an honest witness. In his testimony he insisted that even if the plaintiff was transferred earlier or the caesarean section was performed earlier, the brain injury would still have occurred and this is despite the fact that he had agreed with Dr Hofmeyer in the joint minutes⁸ that the minor child:

"probably suffered a hypoxic brain injury as a result of the prolonged intra-partum period at Elizabeth Ross and Manapo hospitals on 18 and 19 October 2012, and that this has probably resulted in the clinically evident neonatal encephalopathy and cerebral palsy of Neo Motaung which has been confirmed by expert radiological reports and expert paediatric neurologists. The timing depicted in the records provided indicates that this was probably an avoidable birth asphyxia had delivery occurred earlier in the labour process through the adherence to dictated treatment and referral guidelines."

- [43] Similarly, sister Motaung' s memory seemed to fail her when her version was tested under cross-examination to determine the truth in it. She could not remember whether the receiving doctor was informed about the urgency and reasons for the plaintiff's transfer to Manapo. She could not remember what was the reason for the extraction vacuum to fail and this is despite the fact that on her own version, the plaintiff was handed over to her on admission, she examined her, called the doctor, prepared the plaintiff for the vacuum extraction and was also present when it was performed and subsequently failed.

- [44] Experts are for the benefit of the court. Their duty is to assist the court to come to a just and fair decision by providing objective and unbiased information relating to their respective specialist area and not to assume the role of a legal representative by stating facts and even circumvent facts to suit a particular

⁸ See para 12.

litigant. I am not satisfied that the defendant's witnesses were objective and unbiased for that reason, I cannot not rely on their testimony. I find that the plaintiff's version is to be preferred as opposed to the defendant's.

[45] It is important to point out that the plaintiff is not required to establish the causal link between negligence and the actions of the defendant's employees with certainty but a probability.⁹ On the facts germane to this matter, it is indisputable that both the plaintiff and the foetus had no prenatal or postnatal congenital abnormalities prior to labour and that the brain injury suffered by the minor child occurred intra-partum for that reason, I cannot think of any other reason that could have caused the brain injury but for the defendant's negligence. As a consequence of the brain injury, the minor child has been rendered cerebral palsied. The plaintiff's claim succeeds.

[46] On the aspect of costs, I have found no reason for the departure from the general rule that costs follow the result and due to the complexity of this claim the costs of two counsel are warranted.

[47] The following order is granted:

ORDER

1. The defendant is liable for payment of 100% of the proven or agreed plaintiff's damages in her representative capacity as the mother and natural guardian of the minor child who was born cerebral palsied on 19 October 2012.
2. The defendant shall pay, subject to the discretion of the Taxing Master, the plaintiff's taxed or agreed party and party costs including:
 - 2.1. the reasonable costs of obtaining the medico-legal reports, qualifying and reservation fees **if any**, of the following experts:

⁹ *International Shipping Co Ltd v Bentley* **1990 (1) ZASCA** 138 at 700E-H.

- 2.1.1. Dr Gericke, specialist paediatrician;
- 2.1.2. Dr Hofmeyer, specialist gynaecologist;
- 2.1.3. Dr Andronikou, specialist radiologist;
- 2.1.4. Professor Nolte, nursing expert; and
- 2.1.5. Dr Pearce, paediatric neurologist.

2.2. the reasonable costs of the holding of and drafting of joint meetings **if any**, of the following experts:

- 2.2.1. Dr Hofmeyer, specialist gynaecologist;
- 2.2.2. Dr Andronikou, specialist radiologist;
- 2.2.3. Professor Nolte, nursing expert; and
- 2.2.4. Dr Pearce, paediatric neurologist.

2.3. the costs of two counsel, into the trust of the plaintiff's attorneys:

ACCOUNT HOLDER: MOKODUO ERASMUS DAVIDSON ATTORNEYS
 NAME & BRANCH: FIRST NATIONAL BANK,
 ROSEBANK BRANCH
 BRANCH CODE: 253305
 ACCOUNT NUMBER: 6[...]

3. The determination of the plaintiff's quantum is postponed *sine die*.

NS DANISO, J

APPEARANCES:

Counsel on behalf of Plaintiff: Adv. GJ Strydom
 Instructed by: M.E.D. Attorneys
 C/O McIntyre van der Post
BLOEMFONTEIN

Counsel on behalf of Defendant: Adv. M. Salie
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