IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: 1320/2016

In the matter between:

MPHUTHI MALLANE Plaintiff

and

THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF HEALTH THE FREE STATE Defendant

CORAM: WRIGHT AJ

HEARD ON: 17, 18, 20 AUGUST AND 8, 9, 10, 11 NOVEMBER 2021

DELIVERED ON: 24 MARCH 2022

INTRODUCTION

[1] When Mantoa Mallane ("*the deceased*") gave birth to her first child, it was (I expect) a joyous occasion. Both mother and baby left the Bongani hospital in Welkom, Free State Province, in apparent good health. Less than a month later, the deceased was back at the hospital. A few days later she passed away. This case centres around the question whether the doctors and other medical

personnel at the Bongani hospital negligently breached any duty of care they had towards the deceased on her return to the hospital a few weeks after giving birth; and thus, whether the MEC for Health in the Free State should be held liable for her death and pay damages for the resultant consequences thereof for her child. The Plaintiff's claim is not directed at the time that elapsed between the delivery and the deceased's return to the hospital but focuses specifically on the time when the deceased returned to the hospital and during her stay there (prior to the transfer to Universitas hospital).

[2] The Plaintiff, Mr Mphuthi Mallane, is the deceased's brother and was granted guardianship of the deceased's minor child born on 30 April 2015 ("*the minor*"). On behalf of the minor the Plaintiff sued the MEC for the Department of Health, Free State Province, ("*the Defendant*") for damages in the amount of R 25 000 000.00 under the headings of (i) parental loss, pain and suffering, (ii) educational loss of support and (iii) present and future medical and dental care and needs.[1] The parties agreed that the issues relating to the merits of the Plaintiff's claim be separated from the issues relevant to the *quantum* of any damages suffered.

[3] The Plaintiff led the evidence of two witnesses, namely the Plaintiff himself and an expert gynaecologist, Dr. Mokoena Martins Mohosho. Mohosho prepared a report which were filed in terms of the provisions of Rule 36(9), supplemented by extracts from articles / medical textbooks[2]. On behalf of the Defendant several expert witnesses filed reports.[3] These were referred to by Dr. Mohosho and used by Defendant's counsel in attacking the evidence and opinion of the Plaintiff's expert in cross-examination.

[1] The wording of the relevant paragraphs in the Particulars of Claim is inelegant. However, nothing more needs to be said considering that only the merits of the Plaintiff's claim are in issue at this stage.
[2] These were also filed under further notices in terms of Rule 36(9)(b).
[3] The following experts had prepared reports on behalf of the Defendant: Dr. M.K. Malebane, Dr. M.G. Schoon (both Gynaecologists and Obstetricians), Dr. C. Schamroth (a Cardiologist) and Dr. J. Reid (a Neurologist).

[4] After the Plaintiff closed his case, counsel for the Defendant[4] applied for absolution from the instance. This judgment deals with the adjudication of that application for absolution.

LEGAL PRINCIPLES

[5] In cases where absolution is applied for at the end of a plaintiff's case, the test to be applied is different from that which would apply where both parties have presented evidence and/or closed their respective cases. In the latter instances and where the burden of proof rests upon a plaintiff, the question which arises is whether such a plaintiff has proven his/her case on a balance of probabilities. The test for absolution to be applied at the end of a plaintiff's case was formulated in **Claude Neon Lights (SA) Ltd v Daniel[5]** in the following terms:

> "*. . . [W]hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff*."[6]

[6] Earlier cases unfortunately defined the test with reference to the reasonable man,[7] thereby obscuring the discretionary role of a court at this stage of proceedings. A plaintiff has to make out a *prima facie* case, presenting evidence relating to all the elements of the claim. Where inferences are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only

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[4] Initially the Defendant was represented by Advocate Masihelo. The matter was adjourned prior to the commencement of the cross-examination of the Plaintiff's second witness, Dr. Mohosho. When the proceedings recommenced, the Defendant was represented by Advocate Williams SC. The Plaintiff was throughout represented by an attorney, Mr Ponoane.

[5] **1976 (4) SA 403 (A).**

[6] At 409 G – H. Quoted with approval in **Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) SA 88 (SCA)** at 92 F – G.

[7] **Ruto Flour Mills (Pty) Ltd v Adelson (2) 1958 (4) SA 307 (TPD)** at 309 D – E; **Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd and Others 1978 (3) SA 1073 (NPD)** at 1077 G

reasonable one.[8] The question should be asked whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff.[9] A court should be concerned with its own judgment and not that of a "reasonable" person or court.[10]

[7] In deciding whether absolution should be granted at the close of a plaintiff's case it must be assumed that the evidence is true, in the absence of very special circumstances such as the inherent unacceptability of the evidence adduced.[11]

[8] It is generally accepted that absolution at the end of a plaintiff's case should be granted sparingly. When the occasion arises, however, a court should order it in the interests of justice.[12] When confronted with an application for absolution from the instance plaintiffs often fall back on general references to a plaintiff's right to have his/her case be adjudicated fully, including the right to insist that a defendant be put on his/her defence. It is occasionally even argued that the court should refuse absolution so that it could be seen what the defendant's case / evidence is. This last approach of course bears reference to a fishing expedition or a wait and see exercise: "Let's see if the defendant does not maybe present evidence that bolsters the plaintiff's case." Desperate lawyers may even resort to the argument that, as the defendant has been sued and frogged marched to court, he/she is obligated to show to the plaintiff that he/she did nothing wrong. Such incorrect approaches raise their heads quite often, in my experience at least, in cases of medical negligence against public health facilities.

[9] In cases of medical negligence, a court is usually confronted with heart-breaking circumstances on the side of the plaintiff, eliciting natural feelings of sympathy. However, as was stated in **Broude v Mcintosh and Others 1998 (3) SA 60 (SCA)**:

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[8] **Gordon Lloyd Page** *supra* at 92 G – H.
[9] See for example: **Hanger v Regal 2015 (3) SA 115 (FB)** at 117 F – 118 B.
[10] **Gordon Lloyd Page** *supra* at 92 H – J.
[11] **Atlantic Continental Assurance Co of SA v Vermaak 1973 (2) SA 525 (E)** at 527 C – D.
[12] **Gordon Lloyd Page** *supra* at 93 A.

"*When a patient has suffered greatly because of something that has occurred during an operation, the court must guard against its understandable sympathy for the blameless patient tempting it to infer negligence more readily than the evidence objectively justifies . . .*"[13]

[10] A court has a discretion whether to grant absolution from the instance or not.[14] The discretion should be exercised judicially. Justice must be done between the parties, and so far as is possible courts should not allow rules of procedure to cause an injustice.[15]

NEGLIGENCE

[11] The classic **test** for determining negligence in delictual claims was embodied in the matter of **Kruger v Coetzee 1966 (2) SA 428 (A)**:[16]

"*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.
. . .
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*."

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[13] At 75 B – C
[14] See for example: **Ardecor (Pty) Ltd v Quality Caterers (Pty) Ltd and Others 1978 (3) SA 1073 (NPD)** at 1077 D – H.
[1515] Confer: **Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd 1971 (4) SA 90 (RAD)** at 93 F.
[16] At 430 E – G. See also: **Sea Harvest Corporation (Pty) Ltd and Another V Duncan Cold Storage (Pty) Ltd and Another 2000 (1) SA 827 (SCA)** at [21] – [22].

[12] Negligence must be evaluated in light of all the circumstances of a particular case.[17] In cases of medical negligence the question is: how a reasonable medical practitioner in the position of the defendant would have acted in the particular circumstances.[18] In **Mitchell v Dixon 1914 AD 519** it was noted that:

"*A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care . . .*" [19]

[13] One must guard against "*the insidious subconscious influence of* ex post facto *knowledge*".[20]

PLEADINGS

[14] Action proceedings are initiated through the issuing of a summons. In a plaintiff's Particulars of Claim he/she sets out an outline of facts upon he/she will rely for the relief claimed and the nature of his/her case is stated. In medical negligence cases it is expected of a plaintiff to list the grounds of negligence relied on. Parties are generally bound by their pleadings, the reason being that the pleadings set out the basis of a particular party's case.

[15] *In casu* the Particulars of Claim[21] is not a model of clear and proper pleading. *Inter alia* it contains statements and allegations that amount to evidence. It is clear however that the Plaintiff relies on a negligent breach of a duty of care. Condensed to the essential averments, the Plaintiff alleges in his Particulars of Claim that –

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[17] **Oppelt v Department of Health 2016 (1) SA 325 (CC)** at [107]

[18] **Blyth v Van Den Heever 1980 (1) SA 191 (A)** at 221 A – B. Confirmed in **Oppelt v Department of Health 2016 (1) SA 325 (CC)** at [71]

[19] At 525. See also: **Buls and Another v Tsatsarolakis 1976 (2) SA 891 (TPD)** at 893 H – 894 A; **Oppelt v Department of Health 2016 (1) SA 325 (CC)** at [108].

[20] **S v Mini 1963 (3) SA 188 (A)** at 196 E – F

[21] Although the Particulars of Claim was amended to include more specific allegations regarding the deceased and the duty she would have had to maintain her minor child, the inelegant wording of the grounds of negligence remained.

(i) the deceased delivered a healthy baby on 30 April 2015, whereafter she was discharged from hospital;

(ii) on 25 May 2015 she complained of a headache and weakness of the right side of her body;

(iii) she consulted with a general practitioner, Dr. Mulaudzi, and experienced convulsions whilst in his consulting rooms;

(iv) the convulsions related to her earlier pregnancy;

(v) Dr. Mulaudzi stabilised the deceased and summoned an ambulance;

(vi) he wrote a referral letter which accompanied the deceased to the Bongani hospital;

(vii) at the hospital the deceased was negligently made to sit on a chair in the casualty department and was only later admitted to the medical ward, instead of the maternity ward;

(viii) despite "*the proper and precise medical advice given by Dr. Mulaudzi*" in the referral letter, the deceased was negligently misdiagnosed;

(ix) as the deceased was still in the *puerperium* period, she should have been admitted to, and treated, in the maternity ward;

(x) the deceased suffered cardiac arrest;

(xi) the deceased was not seen by an obstetrician;

(xii) by the time that the deceased was referred to the Universitas hospital in Bloemfontein she was terminally ill;

(xiii) the deceased died at the Universitas hospital on 29 May 2015;

(xiv) the deceased should have been diagnosed with eclampsia;

(xv) medical personnel at Bongani hospital failed to diagnose eclampsia and subsequently failed to treat the deceased appropriately.

[16] Throughout the evidence it has been the Plaintiff's case that the deceased had suffered from eclampsia post labour and that, as this was not diagnosed at Bongani hospital, she was not treated correctly. It is ultimately alleged that the misdiagnosis and incorrect treatment caused the deceased to suffer from cardiac arrest and ultimately led to her death. The allegations in the Particulars of Claim focus on the referral letter of Dr. Mulaudzi which allegedly indicated a

diagnosis of eclampsia and instructed the hospital as to the appropriate treatment.

[17] In their Plea[22] the Defendant denies the Plaintiff's allegations of improper diagnosis and treatment. The Defendant denies that the convulsions suffered by the deceased were related to her earlier pregnancy. Although the Defendant admitted that the deceased was still within the puerperium period, it was specifically pleaded that the deceased presented with neurological problems such as cerebrovascular stroke, heart disease and symptoms associated with epilepsy.

[18] The Defendant denies negligence. It was further pleaded that, should it be found that the Defendant's employees were negligent, it is then denied that the negligence was causally connected to the Plaintiff's damages. Unlike the Plaintiff then who seemed to only focus on one element of a delict, namely negligence, the Defendant specially placed causality, a further and separate element, in dispute.

DOCUMENTARY EVIDENCE

[19] The Plaintiff prepared a bundle of documents containing the medico-legal report of Dr. Mohosho, a report from the general practitioner (Dr. Mulaudzi) and clinical and other medical notes from Bongani and Universitas hospitals. Significantly, the referral letter which the Plaintiff heavily relies on, was not included in the documentary bundle prepared by the Plaintiff, although it was listed in the Plaintiff's discovery affidavit. Both parties prepared bundles containing the expert reports of their respective expert witnesses. The referral letter finally made it into the court file when the Defendant's counsel, Adv. Williams SC, prepared a better and more structured evidence bundle and presented it prior to her cross-examination of the Plaintiff's expert, Dr.

[22] The Defendant amended its Plea to include more specific denials.

Mohosho. It then became clear that some nursing notes were not included in the Plaintiff's trial bundle.[23]

[20] The expert reports filed on behalf of the Defendant followed the allegations pleaded by the Defendant. The reports refer to the same medical records and nursing notes relied on by the Plaintiff and generally present different inferences and theories as to the symptoms which the Plaintiff presented with. Of course, the reports do not become evidence simply through the filing thereof. These experts have not testified, and their opinions and views have not been tested through cross-examination. However, the Plaintiff's expert took it upon himself to refer to the reports as prepared by the Defendant's experts and chose to incorporate portions thereof into his own evidence. During argument the Plaintiff's legal representative similarly relied on portions of the Defendants' expert reports.

ORAL EVIDENCE

[a] PLAINTIFF

[21] The Plaintiff testified that the deceased was his younger sister. After delivering her baby in the Bongani hospital she was discharged on 1 May 2015. She was at the time, to use the Plaintiff's own words, "okay". On the morning of 25 May 2015 the deceased complained of a headache. She was taken to Dr. Mulaudzi, a general practitioner, for a consultation whereafter she was transported to the Bongani hospital by ambulance.[24] Around 16h30 that afternoon the Plaintiff went to the hospital and found the deceased sitting on a chair in the casualty department. An intravenous drip was plastered to the wall. When the Plaintiff left at around 20h00, the deceased was still sitting in that fashion. No one had attended to her during that time. The deceased was admitted to the medical ward during the very early morning of the next day. Sometime thereafter the

[23] Mr Ponoane later explained that the Plaintiff's expert advised him as to what documentation should be placed in the trial bundle.

[24] The Plaintiff did not accompany the deceased and was at work during this time.

family heard that she was “suddenly” transported to the Intensive Care Unit. Thereafter the deceased was taken to the Universitas hospital where she was declared dead on arrival.

[22] It is the Plaintiff’s opinion that the treatment which was given to the deceased was not “fair” as Dr. Mulaudzi gave a referral letter, but his instructions were not followed. According to the Plaintiff the referral letter contained advice to the hospital as to how the deceased should be treated.[25] When asked to elaborate on his opinion as to the alleged unfair treatment given to the deceased, the Plaintiff testified that Dr. Mulaudzi requested an ambulance, an act which indicated to the Plaintiff that it was an emergency. When he found the deceased sitting on a bench, he considered that to be ill-treatment, thus unfair.

[23] During cross-examination the Plaintiff stated that he is not aware of any underlying medical condition which the Plaintiff may have suffered from. He repeated that on 25 May the deceased complained specifically of a headache, with no indication of convulsions or seizures. The Plaintiff did not accompany the deceased to the general practitioner. Their sister Josephine[26] went with the deceased and later told the Plaintiff what had happened.

[24] It transpired that the Plaintiff’s expert witness, Dr. Mohosho, had discussions with the Plaintiff whilst the deceased was at Bongani hospital.[27] According to the Plaintiff, a doctor told him that the deceased should not have been admitted to a medical ward but to the maternity ward instead, where she should have been examined and treated by a gynaecologist. The relationship between the Plaintiff and the doctor was not explained by the Plaintiff himself;[28] at least not

[25] It is not clear how the Plaintiff could have known that or when he learned of the alleged contents of the referral letter.

[26] Despite the Plaintiff’s assurances that Josephine Mallane was available, she was not called to testify as to what precisely had occurred whilst Dr. Mulaudzi was examining the deceased. Considering that Dr. Mulaudzi himself also did not testify, any reference to what had occurred in his consulting rooms amounts to inadmissible hearsay and cannot be relied on.

[27] It remains unclear what the exact content of the conversation(s) was.

[28] No attempt was even made to reveal the identity of this doctor. Significantly, only in answer to questions from the Bench was it revealed that the doctor also happened to be the Plaintiff’s expert witness.

until such time as I asked questions for purposes of clarification. It was then revealed that the doctor was none other than Dr. Mohosho, the Plaintiff's expert witness and that Mohosho has "*always been there as a doctor to the family*". They normally consulted him regarding medical issues.[29]

[25] It was later argued on behalf of the Plaintiff that the evidence of the Plaintiff was not disputed. This, to my mind, is an overly simplistic way of viewing the cross-examination of the Plaintiff. Firstly, much of the Plaintiff's evidence amounted to hearsay. His sister, Josephine, and the general practitioner, Dr. Mulaudzi, were not called to testify. In the premises, there was no need for the Defendant to "dispute" those portions of the evidence as it was for the Plaintiff to present admissible and reliable evidence. Secondly, the cross-examination focused on the probability or improbability of the Plaintiff's allegations, examining inferences to be drawn from the facts and hypotheses presented through evidence. Where the evidence presented as improbable, it was so stated to the witness. Thirdly, when the second witness testified contradictions between the evidence of the two witnesses were revealed and then tested during cross-examination. It stands to reason that, should the Defendant have agreed with the Plaintiff's evidence, cross-examination would not have followed the lines that it did. It was clear to me that the Defendant disputed the controversial portions of the Plaintiff's evidence.

[26] The Plaintiff is not a medical expert and did not present evidence as to any duty of care the hospital personnel had towards the deceased; he could not. Nor could he express a reasoned opinion on any negligence there may have been. Accepting for the sake of the application for absolution from the instance that the Plaintiff's evidence was undisputed, it does not assist in any finding relating to liability. All the Plaintiff then contributed to the factual evidence is that the Plaintiff complained one morning of a headache, consulted a doctor and was transported to hospital. And that, after a few days in the Bongani hospital, she was transported to the Universitas hospital where she passed away.

[29] I shall later deal with the evidence of Dr. Mohosho on this point.

[b] DR. MOHOSHO

[27] Dr. Mokoena Martins Mohosho is a gynaecologist and obstetrician. His report is dated 7 June 2017, thus more than two years after the events central to the case. He did not examine the deceased before or during her stay in Bongani. Mr Ponoane for the Plaintiff indicated that Dr. Mohosho wished to testify in his own preferred manner and the impression was given that the witness will present his evidence without being led by the legal representative. The witness was indeed given the floor with hardly any guidance from the Plaintiff's attorney or any attempt to keep his testimony focused on the relevant and important issues. This resulted in prolonged testimony in chief which stretched over several days. The witness meticulously lectured the court on the contents of the medical records as well as the contents of the reports filed on behalf of the Defendant.[30] Attempts from the Bench to keep the witness focused on the issues at hand bore no fruit and requests directed at Mr Ponoane to at least attempt to streamline the evidence also came to nought.

[28] Mohosho concluded that the deceased's death was maternal, "*98% preventable*" and "*a result of Gross Negligence demonstrated by attending clinical practitioners at Bongani Regional Hospital*".[31] According to him, his evaluation of the available hospital and clinical records led him to conclude that the deceased died from eclampsia and that no other possible cause of death should even be considered.

[29] Dr. Mohosho explained that eclampsia is an obstetrical condition that involves all the systems of the body, and which can last for up to four weeks after delivery[32]. It is diagnosed through *inter alia* the presence of proteinuria, generalized oedema, hypertension and convulsions. The disease is fatal if left unattended and when not treated with magnesium sulphate (MgSO4). It

[30] Dr. Mohosho had a tendency to interrupt his own evidence in order to explain something which to his mind the court may want to know, whether relevant to the matter at hand or not.
[31] So stated in his report.
[32] Referred to as the *puerperium* period.

carries a mortality rate as high as 14% in developing countries such as South Africa.

[30]

[31] Dr. Mohosho stressed that, as far as he is concerned, safe and good clinical practice dictates that any woman who presents with convulsions during pregnancy, labour or within four weeks after delivery, must be assumed to suffer from eclampsia and treated as such, until proven otherwise.[33] He labelled eclampsia to be an obstetric emergency. Dr. Mohosho explained that eclampsia is treated *inter alia* through the administration of oxygen, the convulsions are treated with MgSO4 and blood pressure is controlled.

[32] Mohosho insisted repeatedly that Dr. Mulaudzi followed safe clinical practice in his reaction to the deceased's seizures in his consulting rooms. It needs to be remembered that Dr. Mulaudzi himself did not testify. His version of events is to be found in a report dated 27 August 2015.[34] The report sets out that the deceased presented to Mulaudzi's consulting rooms with complaints of "[*i]ntermittent Hemiparesis[35] of the right side of the body with intermittent episodes of seizures since she delivered*".[36] According to the Plaintiff, however, the deceased did not complain of weakness nor did she suffer from seizures (at least not "since she delivered".[37] She attended to Mulaudzi with complaints of a headache. As Mulaudzi did not testify, the apparent contradictions could not be

[33] What the research actually state is that: "*Women in whom convulsions develop in association with hypertension and proteinuria during the first half of pregnancy should be considered to have eclampsia until proven otherwise*." This is an extract from one of the articles presented by Dr. Mohosho, entitled "Diagnosis, Prevention, and Management of Eclampsia", published in February 2005 by the American College of Obstetricians and Gynaecologists, included in one of the Plaintiff's expert bundles as page 18.

[34] The document is essentially typed notes on the practitioner's letterhead, detailing the deceased's complaints and the results of his examination. It concludes with a summary of the alleged contents of the referral letter. The summary in itself formed the subject of part of the cross-examination of the Plaintiff's expert witness.

[35] Weakness or paralysis.

[36] This part of the report confirms generally with the contents of the referral letter.

[37] However, the Plaintiff's letter of demand in terms of Act 40 of 2002 also contained references to repeated convulsions which allegedly began after delivery. The letter was dated 12 October 2015.

investigated through cross-examination. The report concludes with the following paragraph:

> "*A referral letter was then given to the ambulance paramedics when they arrived, with a differential diagnosis of – Eclampsia[38]; CVA[39]; Epilepsy[40] and a request for further investigation and management at the hospital*." [own emphasis]

[33] Mohosho relied on the contents of the report from Mulaudzi, especially in regard to the contents of the referral letter which Mulaudzi gave to the ambulance personnel and the alleged reference therein to eclampsia. I already alluded to the fact that the actual referral letter was not presented to the court as part of the evidence led on behalf of the Plaintiff. And during the cross-examination of Dr. Mohosho he revealed that he only saw the referral letter sometime after he had prepared his own expert report. Mohosho had telephonic contact with Mulaudzi during the time that the deceased was treated at the Bongani hospital. This occurred after the Plaintiff contacted Mohosho to raise concerns regarding the deceased's treatment at the hospital. Mohosho did not attend to the hospital himself nor did he relay his own opinion regarding the deceased's condition to any of the medical staff at the hospital, despite being seriously concerned with the incorrect way she was (according to him) being treated.

[34] As Mohosho relies on the diagnosis and findings of Mulaudzi,[41] it obviously was necessary to examine the referral letter itself. The referral letter reads that the deceased "*delivered on the 30/4/2015. Now presenting with hemiparesis ® side with episodes of seizures*". As differential diagnoses are indicated "*CVA*"; "*Epileptic seizures*". No mention is made of headaches or eclampsia. During cross-examination it was put to Mohosho that the reference to eclampsia entered the report of Mulaudzi because of a suggestion made to this effect by Mohosho during the telephonic contact between the two physicians. Mohosho

[38] The referral letter itself however contains no reference to eclampsia.
[39] Cerebral vascular accident.
[40] The referral letter in this regard refers to "Epileptic seizures" as one of the diagnoses alongside "CVA".
[41] As did the Plaintiff's attorney.

denied this assertion vehemently but testified however that he had explained to Mulaudzi that the deceased most likely had eclampsia and that he had only mentioned eclampsia as a possibility.

[35] In his own report Dr. Mohosho refers to the referral letter as if it contained a reference to eclampsia. During cross-examination it became clear that Mohosho did not actually see the referral letter prior to preparing his own report or whilst assisting the Plaintiff's attorney with the preparation of pleadings. He did not explain why he did not insist on perusing the referral letter himself but explained that he was "told" that there would be such a letter. It is necessary to point out that the Plaintiff's case centres around the alleged misdiagnosis of eclampsia and the hospital's failure to act in accordance with the contents of Mulaudzi's referral letter.[42] It would be reasonable to expect any expert that testifies in this case, especially when supporting the Plaintiff's case, to have perused the actual referral letter or a copy thereof.

[36] Dr. Mohosho indicated that he became involved as an expert after the Plaintiff's attorney approached him and asked whether, should "they" go to court, he would be a witness in their favour. He agreed. Mohosho insisted that he made the diagnosis of eclampsia on "clinical evidence". Considering that Mohosho diagnosed eclampsia prior to the medical records becoming available, it appears reasonable to accept that the "clinical evidence" he relied on was (i) information gathered from the Plaintiff during a telephone call while the deceased was in hospital[43] and (ii) the telephonic conversation he had with Dr. Mulaudzi around the same time. But at the time, he had not yet been approached to act as expert witness or to give his opinion as an expert based

[42] Paragraph of the Plaintiff's letter of demand in terms of Act 40 of 2002 stated in paragraph 12 thereof that the hospital failed to treat the deceased "*in terms of such relevant precise treatment as morely* [sic] *diagnosed by Doctor Mulaudzi*." Paragraph of the letter of demand stated specifically that the hospital personnel ignored the indication by Dr. Mulaudzi of eclampsia.

[43] In which case the Plaintiff would probably have regurgitated information given to him by his sister, Josephine, who had accompanied the deceased to the consulting rooms of Dr. Mulaudzi. And as Josephine did not testify, it remains a mystery as whether she was present when the deceased had convulsions or heard what complaints the deceased explained to the doctor.

on the available medical records, nor has he seen the referral letter or any report by Dr. Mulaudzi. And it has been established that the information that the Plaintiff had regarding the deceased's visit to Muluadzi differed from what seemingly had occurred in Mulaudzi's consulting rooms. Considering that Dr. Mohosho formed his opinion prior to perusing any medical or clinical records and based on contradictory versions, a cautionary approach to his opinions and evidence is justified. At certain points during Mohosho's testimony I gained the distinct impression that he came to an opinion, then perused the clinical records and sought reasons to support his initial opinion (without considering, or even allowing for, another possible diagnosis).

[37] Mohosho spent considerable time dealing with the available clinical records from Bongani Hospital. He insisted that, considering the contents of the referral letter from Dr. Mulaudzi[44] and the time lapse since delivering her baby,[45] the deceased should have been diagnosed with eclampsia. Following such a diagnosis, the deceased should have been treated with magnesium sulphate (MgSO4) to prevent the progression of the disease and halt the occurrence of seizures / convulsions. Furthermore, the deceased should have been admitted to the Maternity Ward, with obstetrical medical personnel attending to her. Further radiological and blood tests should have been conducted to assess the severity of the disease and its possible complications.

[38] According to Dr. Mohosho the deceased was in hospital for three days without a diagnosis of eclampsia having been made. Thus, she was not treated with MgS04 during that time. Mohosho described this scenario as similar to where the deceased had not been admitted to hospital at all. Dr. Mohosho stated in his report that the chances of misdiagnosing eclampsia are close to 0,01% and that all intern doctors are trained in the essential steps in the management of obstetric emergencies.

[44] It seems that Mohosho throughout relied on the (incorrect) version of the letter as stated by Dr. Mulaudzi himself in his report of August 2015.

[45] The deceased was referred back to the Bongani hospital within four weeks after she had delivered her baby.

[39] At the Bongani hospital the deceased presented with generalised body weakness.[46] The deceased was not communicating verbally. On the Progress Report for 26 May 2015[47] it is "further written that the deceased came in "*with history of having had weakness to right side and seizures*". A note on the Triage Form at 23h36 reads, "*History of ® side paralysis since this morning*". No indication is given as to the person who gave this history. Presumably, the nursing staff relied on the referral letter, which would then have alerted them to a diagnosis of CVA and epileptic seizures. At 01h00 it was noted that the deceased was suffering from "*generalised body fits*". A Dr. Ntela ordered an anti-epileptic drug to be administered and advised that, should the seizures ("*fits*") persist, Valium should be administered. At 03h25 the deceased experienced another episode of seizures to her whole body, which lasted plus minus five seconds. The nursing staff administered Valium.

[40] At 09h50 the same morning the deceased's whole body was showing signs of *jerking*. Again, Valium was administered intravenously. The next note was made at 20h15 that evening, indicating that the deceased is weak and that the right side of her body shows signs of weakness.[48] No further seizures had been observed. However, at 21h00 or 22h00[49] the right side of the deceased's body was "*twitching*". Again, Valium was prescribed. At this point a Dr. Moletsane indicated that a bed should be prepared in the Intensive Care Unit.

[41] Dr. Mohosho voiced his concerns about the repeated episodes of seizures / convulsions without any adaption of the prescribed treatment. He conceded that epileptic convulsions may be treated with Valium. In his opinion the medical staff at the hospital should have realised that the deceased is not

[46] This may be seen from the first available nursing note, made in the Medical Ward at 00h01 on 26 May 2015. A further note at the same time reads that the deceased was "admitted in the ward via Casualty on a stretcher escorted by registered nurse Moloi and Nurse Radebe.
[47] At 00h01.
[48] Dr. Mohosho explained that the notes would have been made by nursing staff. Notes made by physicians are done on different forms. Such doctor's notes form part of the medical records in the bundle of documents. The doctor's notes are scant in comparison to the nursing notes. Mohosho explained that this is due to the fact that nursing staff are present at all times, whilst doctors only attend to patients on occasion.
[49] The handwriting for this note is not clear.

responding to the treatment and that their diagnosis (of epilepsy) should be reconsidered. Apart from insisting that a diagnosis of eclampsia should have been made, Mohosho did not react to the obvious fact that the referral letter referenced epilepsy or to the fact that the hospital personnel duly treated the deceased for epilepsy (as advised by Dr. Mulaudzi).

[42] At 22h40 on 26 May 2015 the deceased was moved to the Intensive Care Unit. She was not responding verbally. Oxygen was provided per face mask. The nursing notes made at 23h15 at the Intensive Care Unit read that the deceased was admitted the previous day "*with history of right sided hemiplegia / hemiparesis for ± 1 week,*[50] *had seizure seen by General practitioner. And referred to hospital. She delivered on the 30/4/2014.*"[51] At 07h30 on 27 May 2015 the deceased was seen by Dr. Moletsane. As the Plaintiff's expert was at pains to point out there is no indication whether Moletsane is an obstetrician or a general practitioner (or some other specialist). According to Mohosho the deceased's condition and history demanded the attention of a gynaecological / obstetrical medical specialist. At 09h30 one Dr. Nhuwatiwa visited the deceased. He/she "*promised to come and do a heart sonar at 11h00.*" The further notes then indicate that the deceased had "*done ECG and was due for chest X-Ray*."

[43] The heart sonar was done at 12h15 by Dr. Nhuwatiwa. He/she suggested that the deceased is to be intubated and referred to Bloemfontein "*for urgent scan*". Apparently Nhuwatiwa also recommended that the deceased be examined by a cardiologist. According to the Plaintiff's expert this begs the question: in what capacity did Mhuwatiwa perform the heart sonar if he or she is not a cardiologist?[52] Notes regarding the heart sonar indicate that echo-tachyarrhythmia[53] made assessment difficult. The mitral valve showed a

[50] There is no evidence that the deceased had being experiencing seizures prior to her visit to Dr. Mulaudzi.
[51] This appears to be a writing error. It is common cause that the deceased gave birth on 30 April 2015, not 2014. Be that as it may, an attempt was clearly made to indicate that the deceased had delivered a baby recently.
[52] Dr. Mohosho himself is of course also not a cardiologist.
[53] Dr. Mohosho explained that this indicated a pulse rate that is high and irregular.

thickening of the cusps "*with <u>mild</u> stenosis and regurgitation and possible vegetations*".[54] These notes irked the Plaintiff's expert. He found it curious that the word "mild" had been underlined. He labelled a heart sonar as a diagnostic tool, as compared to a screening tool; thus, phrasing was important. Words like "maybe" and "possible" should not be used. It should have been indicated whether the vegetations were there or not. Further, the valve opening should have been measured, as without measurements the report itself is of no value and does not allow for any diagnosis. It is the opinion of Dr. Mohosho that the heart sonar did not serve its purpose.

[44] The deceased was hereafter intubated. According to the Plaintiff's expert, intubation should have been done much earlier. Some time here after the deceased "*relatives*" came and "*related how she was admitted*".[55] No evidence was led as to which relatives came and what information they relayed to the nursing staff at this point. We know that the Plaintiff, who testified, did not accompany the deceased when she was transported to the hospital. The deceased's blood pressure started to fluctuate, dropping lower overall. At this point a Dr. Kemp became involved with the deceased's treatment. Inotropes were administered in an attempt to increase the deceased's heart rate and so raise her blood pressure. She remained unstable, with no spontaneous respiration. As this situation continued, Kemp consulted Dr. Nhuwatiwa regarding further management of the deceased's treatment. According to the Plaintiff's expert, Dr. Mohosho, a neurological assessment done at 19h00 showed that the deceased's condition has deteriorated to such an extent that she was essentially dead.[56] All the signs indicated to the deceased being brain dead: both pupils were dilated and unresponsive to stimuli.

[45] Accepting at this stage that Dr. Mohosho is correct in this assessment, there is no need to consider further developments at Bongani. The point of no return has been reached and, if there had been a negligent breach of any duty of care

[54] The word "mild" is clearly underlined in the handwritten notes.
[55] This is so noted in the notes made by the nursing staff.
[56] Or to use Mohosho's own exact words, "*This was the neurological assessment of a corpse*".

towards the deceased which caused her death, it would have occurred prior to this point in time. Mohosho did not testify that anything could have been done (or should have been done) to save the deceased's live after her condition had deteriorated so severely. I will therefor not deal with Mohosho's evidence regarding events relating to the deceased's eventual transfer to the Universitas hospital in Bloemfontein where she passed away. In any event, the Plaintiff is not alleging that any negligence occurred at Universitas nor were any grounds of negligence directed at the ambulance personnel who transported the deceased from Welkom to Bloemfontein.

[46] Dr.Mohosho highlighted the following regarding the alleged delay in properly[57] treating the deceased: the deceased experienced several episodes of seizures and she had to be resuscitated more than once. By the time it was decided that the deceased should be transferred to a more advanced hospital (Universitas), she already showed signs of being braindead.

[47] According to Dr. Mohosho there can be no dispute that the deceased died from eclampsia, a condition which should have been diagnosed early on when she presented at Bongani hospital, especially considering the background contained in the referral letter.[58] An early diagnosis of eclampsia, followed by proper treatment with MgSO4 would have saved the deceased's life. The deceased's death was preventable, according to Mohosho.

[48] Dr. Mohosho introduced articles and extracts from medical journals and textbooks to support his opinion. He highlighted selected portions of the texts and elaborated extensively on these. During cross-examination other portions of the articles and textbooks were debated with the doctor. He did not make any concessions. I will succinctly deal with extracts from the literature which are not supportive of Mohosho's opinion.

[57] Dr. Mohosho is adamant that the deceased was not treated properly and/or correctly, mainly because (in his opinion) she was misdiagnosed.

[58] It needs to be remembered that Mohosho was erroneously under the impression that the referral letter indicated a diagnosis of eclampsia.

[49] In an article entitled "*Diagnosis, Prevention, and Management of Eclampsia*"[59] it is stated that eclampsia "is defined as the development of convulsions and/or unexplained coma during pregnancy or postpartum in patients with signs and symptoms of pre-eclampsia." There is no evidence that the deceased suffered from convulsions prior to her visit to Dr. Mulaudzi, weeks after giving birth, nor that he had showed signs of pre-eclampsia. And further that, "the diagnosis of eclampsia is secure in the presence of generalized edema, hypertension, proteinuria, and convulsions." Of these symptoms the deceased only had convulsions, which started weeks after she gave birth. The article also states that there are several clinical symptoms which are potentially helpful in establishing a diagnosis of eclampsia. These include "persistent occipital or frontal headaches". The deceased complaints of a headache were not persistent.

[50] Dr. Mohosho took it upon himself to deal with the reports prepared by the Defendant's medical experts. He highlighted certain portions thereof, often dismissing the findings and opinions as contradictory or unethical. On more than one occasion during cross-examination Dr. Mohosho became visibly upset with the questions directed at him and, especially, with the statement that all the Defendant's expert witnesses disagree with his assessment. He seemingly could not accept that any person would question or doubt his opinions or say-so. During cross-examination several issues were investigated which Dr. Mohosho found irksome.

[51] A contentious topic debated with Dr. Mohosho was his involvement with the deceased's family, especially considering that he is a gynaecologist. He described himself as both doctor and family friend and asserted that the family would consult him for advice and "services". He insisted that, although he specializes in gynaecology, he was not precluded from acting as general practitioner. Even though he was employed by a government entity, he was "*obliged to treat and advise any human being*". Mohosho learned of the

[59] American College of Obstetricians and Gynecologists" Vol. 105, No. 2, February 2005.

deceased's problems whilst she was still being treated at the Bongani hospital. He was informed by her uncle as well as the Plaintiff. After hearing their version, he advised them that the deceased should not have been admitted in a medical ward but that she should have been treated as an obstetric patient. Already then he formed the opinion that the deceased was suffering from eclampsia, based on the fact that she delivered her baby less than four weeks earlier, allegedly complained of headaches and suffered convulsions (in the consulting rooms of Dr. Mulaudzi).

[52] Dr. Mohosho proceeded to contact the general physician initially seen by the deceased, Dr. Mulaudzi. He did so, according to the testimony, because he wanted to find out what the deceased's condition was at the time when she was referred to Bongani. He was aware of the existence of the referral letter but did not ask for a copy.

[53] Joint minutes were prepared between Dr. Mohosho, the Plaintiff's expert, and Dr. M.K. Malebane, the Defendant's expert gynaecologist. They both agreed that the deceased died within our weeks after the delivery of her baby (the puerperium period). They disagree on every other point, with Dr. Malebane contributing the deceased's death to Rheumatic heart disease which caused her to have a damaged mitral valve, complicated by forming vegetations and blood clots. The vegetations and clots moved to the brain, causing the deceased to have a stroke (according to Malebane).

SUBMISSIONS BY DEFENDANT

[54] During her arguments in support of the request for absolution from the instance, Me Williams referred to the Plaintiff's failure / omission to call Dr. Mulaudzi to testify as a big *lacuna* in the Plaintiff's case. She pointed out that, without Mulaudzi's evidence, there are no factual evidence as to what had occurred in his consulting rooms. Nor do we know what complaints the deceased presented with when she attended to him for treatment / advice. These *lacunae*

are exacerbated by the fact that the deceased's sister, who had accompanied her, did not testify. It is also not explained why there is a difference between the diagnosis referred to in the referral letter (for the benefit of Bongani hospital) and that contained in the later report of Mulaudzi.[60] Me Williams further argued that the letter and report of Mulaudzi do not indicate that the deceased had complained of a headache, even though, according to the Plaintiff, the deceased *only* complained of a headache[61] and that that was the very reason why she went to Mulaudzi on the day in question. According to Me Williams eclampsia thus never gains traction in the Plaintiff's case.

[55] Considering the important role played by Mulaudzi's referral letter in the Plaintiff's case as well as in the opinion expressed by the expert, it appears apposite to evaluate the vacuum left by the failure to have Muluadzi testify. I agree with Me Williams's submissions as to the many issues left in the air due to his absence as witness. In order to form inferences, one need factual evidence. Whether the deceased presented with convulsions and/or headaches appear to be important facts which form the basis for conclusions and opinions on the progressive deterioration in her condition, as well as to whether the possibility of eclampsia was to be expected. Dr. Mulaudzi would have been ideally suited to give first-hand and objective evidence on these points.

[56] An important part of the Plaintiff's case rests on the contents of Dr. Mulaudzi's referral letter. The contents of the actual letter differ from the version thereof which were included in the report later prepared by Mulaudzi himself. Questions were raised by the Defendant as to whether eclampsia was suggested to Dr. Mulaudzi. The Plaintiff's expert relies on the alleged diagnosis of eclampsia by Mulaudzi. Thus, it became important for the author of the referral letter (Mulaudzi) to come and explain. Furthermore, the Plaintiff's expert relies on facts learned from a telephonic conversation he had with Mulaudzi. This formed the subject of cross-examination. This, and other lines of, cross-examination

[60] Which then included the reference to eclampsia.
[61] And not of weakness or seizures.

should have alerted the Plaintiff's attorney to the advisability of presenting direct evidence from Mulaudzi himself. Contrary to the Plaintiff's expert, who has a subjective history with the deceased and the Plaintiff's family, Dr. Mulaudzi would in all probability have been the more objective medical practitioner, at least in as far as the presenting of facts goes.[62]

[57] Me Williams highlighted that, even though Dr Mohosho relied on academic and scientific research which list headache as possible indicator for eclampsia, Dr. Muluadzi did not refer to this as one of the problems which the deceased had suffered from or complained about. Furthermore, even if the deceased did complain of a headache, that in itself does not lead to a diagnosis of eclampsia as the only, or even the appropriate, diagnosis as there could have been a variety of possible causes for the deceased's headache.[63] The deceased did not previously present with any of the signs that are indicative of eclampsia. When the deceased suffered a seizure in the consulting rooms of Dr. Mulaudzi he managed to stabilize her. When this occurred again at the hospital, they also brought it under control. In as far as the medical personnel at the Bongani hospital may have been dutybound to act in terms of the referral letter,[64] they did: he mentioned epilepsy and they treated every episode of seizures experienced by the deceased in their presence; he requested them to evaluate the deceased's condition and they did so. The mere fact that Dr. Mohosho would have done something differently does not to my mind lead to the necessary inference of negligence on the side of the hospital personnel.

[58] Me Williams pointed out that Dr. Mohosho was too involved in the matter to give an objective, credible opinion, and that his independence as an expert had been compromised. I understand the submission to mean that she considers this case to be one of the instances where the credibility of the Plaintiff's

[62] No evidence has been led as to whether the deceased had consulted with Dr. Mulaudzi previously.

[63] If in fact the deceased had been suffering from a headache. If she did, there is no evidence suggesting that she had also suffered headaches previously.

[64] The Plaintiff did not plead that the medical staff at Bongani had a duty to act in terms of the contents of the referral letter or that they needed to contact Dr. Mulaudzi to find out more than what had been stated in the letter.

witnesses is to be considered as a factor when adjudicating whether absolution from the instance should be granted or not.

SUBMISSIONS BY PLAINTIFF

[59] At the start of his argument, Mr Ponoane for the Plaintiff expressed his surprise that the Defendant requested absolution from the instance. He was convinced that negligence has been proven. He proceeded to respond to the submissions made on behalf of the Defendant regarding Dr. Mulaudzi's referral letter and was at pains to point out that there are various averments in the Particulars of Claim which do not relate to the referral letter. He placed on record that, at the time when he drafted the Particulars of Claim, the hospital and other medical records were not available.[65] One is left to ponder on what basis then the averments in the Particulars of Claim were made.[66]

[60] The Plaintiff's attorney did not adequately address the incorrect averments in the Particulars of Claim, other than to place on record that he was not possession of any medical records when drafting the Particulars of Claim. Such incorrect averments relate to the allegation that the deceased complained of weakness of the right side of her body and that Mulaudzi discovered that the deceased had been suffering from convulsions since the birth of her baby. It was also incorrectly averred that Mulaudzi had advised the Bongani hospital of a diagnosis of eclampsia.

[61] Mr. Ponoane insisted that the medical personnel at the Bongani Hospital should have diagnosed eclampsia as the deceased was still in the puerperium period

[65] This of course does not explain why there was never an attempt to amend the Particulars of Claim to bring the pleadings more in line with the medical records. Nor does it provide an explanation as to why the Plaintiff's own expert continued with his report despite not having seen the actual referral letter. And of course, it does not explain why the referral letter did not form part of the Plaintiff's trial bundle.

[66] During cross-examination of Dr. Mohosho he was questioned on his role in bringing the case to court. Although his responses were somewhat vague and tended to steer away from the issue, I got the impression that Mohosho may have been involved from the start, thus even prior to the issuing of summons. That would then explain how the Plaintiff's attorney was able to draft the Particulars of Claim without any insight into medical or other relevant documentation.

and had complained of a headache. Unfortunately for Mr. Ponoane this is too simplistic an approach to the matter. Only the Plaintiff testified that the deceased complained of a headache. There is no evidence as to whether she listed a headache as complaint to Mulaudzi. Furthermore, Mulaudzi, the physician who initially examined the deceased and expressed an opinion on possible diagnoses, referred to epilepsy as possibility and the medical personnel at Bongani in fact treated the deceased accordingly. The reports prepared by the Defendant's experts (which the Plaintiff's own expert introduced into his evidence) suggested other possible diagnoses.

[62] In response to a question as to how the hospital personnel could have known of the headache (considering that the deceased was not communicating verbally nor did the referral letter mention headaches), Mr. Ponoane simply replied that, "they should have known". Mr. Ponoane attempted to steer away from this incongruity by seizing onto the repeated episodes of convulsions suffered by the deceased whilst in care of the hospital personnel. He stressed Dr. Mohosho's opinion that the convulsions should have been treated with MgSO4. On this point he ignores the concession made by Dr. Mohosho during cross-examination that epileptic convulsions are not typically treated with MgSO4. Also, that the differential diagnosis by Dr. Mulaudzi, who physically examined the deceased,[67] included epilepsy.

[63] Mr. Ponoane submitted that there is a *prima facie* case in favour of the Plaintiff. He then made a curious submission by insisting that the contents of the expert reports filed on behalf of the Defendant be considered at this stage. The submission is curious considering that all the Defendant's experts disagree with Dr. Mohosho, the Plaintiff's expert, on his diagnosis of eclampsia and none of them considers untreated eclampsia to have been the cause of the deceased's death. Pondering this curious submission, I will accept for the sake of the Plaintiff that Mr. Ponoane meant to argue that there are aspects which the

[67] Unlike the expert, Dr. Mohosho, who never examined the deceased or had any communications with her.

Defendant's experts agree with (such as the fact that the deceased was still in the puerperium period).

[64] The Defendants' other experts who prepared reports include a cardiologist and a neurologist. Dr. C. Schamroth, a specialist cardiologist, specifically analysed the deceased's blood pressure readings as recorded by Dr. Mulaudzi and at Bongani hospital, and came to the conclusion that the readings did not indicate hypertension,[68] at least not to the extent that it could reasonably be associated with eclampsia. He concluded that the exact cause for the deceased's demise "*may not ever be known as there is no post-mortem data*" and that, whilst the deceased "*may indeed have had eclampsia, this is a diagnosis that would not have been suspected on admission to hospital as there was/is no evidence to support such a diagnosis*". Thus, it is Schamroth's opinion that even if eclampsia caused the deceased's death, Bongani hospital was not negligent in failing to diagnose it. The conclusion by Dr. Schamroth hits at one of the flaws in the Plaintiff's case and arguments: even if it is accepted that the deceased had died of eclampsia, negligence if not the only reasonable inference from the facts at hand.

EVALUATION

[65] One could easily be seduced into the trap of focusing too intently on the peculiar (some may say slightly disturbing) aspects of the Plaintiff's version. For example, the Plaintiff's evidence that the deceased was initially seated on a chair with the drip plastered to a wall. Although this is listed as a ground of negligence in the Particulars of Claim, no causal link to the deceased's death was established. Or put differently: there is not sufficient evidence that that situation in itself led to the demise of the deceased.

[66] On the other hand, there is the unexplained and contradictory aspects of the Plaintiff's case. For example: the deceased complains of a headache, visits a

[68] One of the warning signs or symptoms for eclampsia.

doctor for that very complaint, and then no mention thereof is made by Dr. Mulaudzi. And: Dr. Mulaudzi mentions a history of seizures, even though there is no evidence that the deceased had ever before experienced such. And then there is of course the unexplained mention of eclampsia in the report of Dr. Mulaudzi even though this was not mentioned in his referral letter to Bongani (the very referral letter which the Plaintiff and his expert rely).

[67] The Plaintiff's case hinges on the testimony of his expert, Dr. Mohosho. The Plaintiff himself had very little to contribute in the way of clear-cut facts on which the case can be adjudicated, not having been present at the consulting rooms of Dr. Mulaudzi nor having spoken to Dr. Mulaudzi himself. Factually, the Plaintiff's own evidence revealed one or two contradictions and left several aspects unexplained (and unsatisfactorily so).

[68] Dr. Mulaudzi did not testify. His referral letter, the springboard of the Plaintiff's case, is before court and does not support the essence of the Plaintiff's case, namely that the general physician diagnosed (at least the possibility) of eclampsia and that Bongani hospital failed to treat the Plaintiff accordingly. In as far as the referral letter differs from the contents of the later report by Dr. Mulaudzi, and considering the essence of the Plaintiff's case, I am of the view that the referral letter stands on its own legs and should be considered as indication of what Mulaudzi wished the hospital to know. No other finding seems acceptable considering the failure by the Plaintiff's attorney to call Dr. Mulaudzi to testify. The referral letter thus did not alert the hospital to the possibility of eclampsia.

[69] The failure to call Dr. Mulaudzi as witness is problematic. It is not possible to surmise what detail his evidence may have revealed. At the very least he would have been able to explain precisely what complaints the deceased had when she visited his consulting rooms. He would also have been in a position to explain why he referred to eclampsia in his report but not in the initial referral letter. I do not consider the failure to call Mulaudzi to testify as necessarily fatal

for the Plaintiff's case. We have the hospital records and nursing notes from Bongani (although not for the period spent by the deceased in the Casualty department). It will never be known what conclusion(s) Mulaudzi would have come to if the deceased did not convulse whilst in his consulting rooms.

[70] Having experienced Dr. Mohosho in the witness box over a period of several days, I am tempted to comment on his demeanour and attitude towards the case and the various role-players taking part in the drama of the litigation. However, an unpleasant demeanour does not necessarily reflect on the validity of an expert's opinion. I will evaluate the evidence presented by Dr. Mohosho using the generally accepted principles relating to expert evidence.

[71] In order for a court to evaluate the correctness of an opinion pronounced by an expert, it is necessary to consider the **reasoning process** which led to the opinion, as well as the assumptions on which it is based.[69] When the evidence of an expert is evaluated it should be determined whether and to what extent the opinion advanced is founded on **logical reasoning**.[70] It is for the Court, and not the expert witness, to determine whether there has been negligence or not.[71]

[72] There is an essential difference between scientific and judicial measure of proof. The following warning appears apt, namely 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*

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[69] **Visagie v Gerryts en 'n Ander 2000 (3) SA 670 (CPD)** at 681 C

[70] **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA)** at [36]. See also: **Medi-Clinic v Vermeulen 2015 (1) SA 241 (SCA)** at [5]; **Louwrens v Oldwage 2006 (2) SA 161 (SCA)** at [27].

[71] **Pringle v Administrator, Transvaal 1990 (2) SA 379 (WLD)** at 395 A; **Buls and Another v Tsatsarolakis 1976 (2) SA 891 (TPD)** at 894 C; **Buthelezi v Ndaba 2013 (5) SA 437 (SCA)** at [14].

lies on a review of the whole of the evidence."[72] The court in the case of **Linksfield Park Clinic** specifically emphasized the fact that expert witnesses sometimes fail to differentiate between what is *possible* as to what is *probable*.

[73] Experts may legitimately differ in opinion regarding a certain set of facts. So, in **Medi-Clinic v Vermeulen**[73] it was stated that:

"*Experts may legitimately hold diametrically opposed views and be able to support them by logical reasoning. In that event it is not open to a court simply to express a preference for the one rather than the other and on that basis to hold the medical practitioner to have been negligent. Provided a medical practitioner acts in accordance with a reasonable and respectable body of medical opinion, his conduct cannot be condemned as negligent merely because another equally reasonable and respectable body of medical opinion would have acted differently*."

[74] In **Schneider *No* and Others v AA and Another**[74] Davis J said:

"*In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased an opinion, based on his or her expertise, as possible. An expert is not a hired gun who dispenses his or her expertise for the purpose of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictate by the scientific knowledge which that expert claims to possess.*"

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[72] **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA)** at [40].
[73] **2015 (1) SA 241 (SCA)** (at 243 G – H)
[74] **2010 (5) SA 203 (WCC)** at 211 J – 212 B. See also **STOCK V STOCK 1981 (3) SA 1280 (A)** at 1296 E.

[75] To my mind it is not sufficient to argue that evidence was presented of an expert witness who opined that someone had acted negligent. The opinion should be evaluated in the light of acceptable factual evidence presented and the nature and quality thereof. Where an expert relies on flawed or unconvincing facts, his opinion should of necessity be treated with circumspection.

[76] In his reasoning Dr. Mohosho relied *inter alia* on an alleged diagnosis by the general practitioner, Mulaudzi, who did not himself testify. Thus, the starting point of his reasoning process was flawed. From there Mohosho launched into an attack on the personnel at the Bongani hospital as if they were aware of the diagnosis of eclampsia made by Mulaudzi. Mohosho had a subjective, personal, relationship with the Plaintiff and the family of the deceased, preventing him from being entirely objective. He became so involved in the Plaintiff's case that he even considered Mr. Ponoane, the Plaintiff's attorney, to also be his attorney.[75] Mr. Ponoane further explained during arguments on the compilation of the trial bundle that Dr. Mohosho assisted him as to what should be contained in the bundle and what to use during evidence.

[77] Mohosho did not so much come to assist the court but to lecture all concerned. His personal and insulting comments directed at the Defendant's experts were uncalled for and presented as an attempt to raise himself higher in the court's estimation. His disdain for the Defendant's counsel was palpable. He became visibly angry at the questions and statements put to him by the Defendant's counsel, despite admonishments from the bench.[76] To Dr. Mohosho the deceased's plight was personal. He was not an objective witness; alternatively put, he was not sufficiently objective to assist the court with an unbiased, logic-based and well-reasoned expert opinion.

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[75] Dr. Mohosho repeatedly referred to Mr Ponoane as "my attorney".

[76] Initially I dealt with the outbursts and inappropriate comments of Dr. Mohosho by explaining the role of all concerned and by pointing to his own verbal attacks at the Defendant's experts. Towards the latter part of cross-examination Dr. Mohosho's visible anger with Me Williams nearly escalated into something more and stern words from the Bench were needed to stop anything more from happening. Once again, a transcription of the proceedings will not convey the tone of voice or the gestures and reactions that were on display during these episodes.

[78] I referred earlier to the test for negligence. It consists of two legs of enquiry: whether the experienced harm was reasonably foreseeable and whether there were steps to take in order to prevent the harm from occurring. *In casu* the first question may be simplified: was it reasonably foreseeable, on the evidence presented by the Plaintiff, that the deceased had eclampsia? Or to phrase it differently for the purposes of absolution from the instance: was evidence presented on which it may be found that it could reasonably have been expected from the hospital to diagnose eclampsia? In my view the answer is no. The CT-scan done on 28 May 2015 indicated multiple possible causes of the deceased's symptoms, none of which referenced eclampsia. The scan was done at the Universitas hospital and after the deceased had been placed in the obstetric ward. Dr. Mohosho throughout insisted that an obstetrician would have known how to diagnose the deceased correctly. And more importantly, the Plaintiff's case is not that any negligence had occurred at Universitas. Thus, although Mohosho had much to say about the wording of the results as set out in the CT-scan, no negligence has been raised regarding the scan or against any of the medical personnel at the Universitas hospital.

[79] This case is not simply analogous to the scenario which confronts a court when a defendant has not given any evidence. The Plaintiff's own expert referenced the expert reports prepared by the Defendant's experts. He was selective in the passages he referred to, focusing rather on those passages which supports his own opinion but neglecting to fairly present the portions of the reports which contradict his opinion. Sufficed to say that the court was invited to consider a few selective portions of the reports. It would however be unfair to then expect me to close my eyes to the bulk of the reports which do not at all support Dr. Mohosho's testimony.

[80] It is of course so that the Defendant's experts have not testified, and their opinions have not been tested through cross-examination. However, one cannot simply reason as Dr. Mohosho and the Plaintiff's attorney seems to do, namely to say that it is for the Defendant's experts to now come and defend the

remaining portions of their reports. Should the fact that no other expert supports the conclusions formulated by Mohosho be ignored, it would fly in the face of justice and be markedly unfair in the circumstances.

[81] After due consideration of the positive and negative aspects of the evidence presented by the Plaintiff, and applying a reasonable mind, I am of the view that the Plaintiff did not present evidence on which this court could find that the medical personnel at the Bongani hospital were negligent as alleged.

[82] Should I be wrong in my conclusions regarding the element of negligence, it would not automatically lead to a decision that a *prima facie* case has been made out or to a finding of liability against the Defendant. The evidence presented on behalf of the Plaintiff focused primarily on the aspect of negligence. Negligence is of course not the only requirement that needs to be considered in a delictual claim. The element of causality also needs to be adjudicated.

[83] Dr. Mohosho is adamant that the failure to diagnose the deceased with eclampsia and the related failure to administer treatment for eclampsia led to her suffering cardiac arrest. He is confident that her death could have been avoided if an obstetrician had examined her and treated her with MgSO4. There is of course no evidence indicating that, should an obstetrician have examined the deceased at Bongani he/she would have diagnosed her with eclampsia (not epilepsy) and proceeded to treat her differently. A reading of the reports prepared by the Defendant's experts, which the Plaintiff's expert introduced and discussed, reveal that there is at least one other possible explanation for the deceased's condition. This is further borne out by the results of the CT scan of 28 May 2015 which recorded "[p]*ossible preceding massive right internal carotid/middle cerebral artery infarction, with subsequent mass effect and haemorrhagic transformation, leading to secondary brain injury. Dural sinus thrombosis with extensive venous infarction cannot be ruled out as another possible cause*."

[84] Much was made of the fact that the deceased had to sit on a chair in the casualty department for some time and that she was then admitted in a medical ward, not the maternity ward. Even should that be accepted as negligent for the sake of argument, it does not necessarily support the inference which the Plaintiff stresses, namely that the deceased died due to untreated eclampsia. In fact, considering the matter holistically, it presents simply as a leap too far. No *prima facie* case had been made out that any negligence at Bongani caused the deceased's death.

CONCLUSION

[85] I am satisfied that having regard to the particular circumstances of this case it would be proper and in the interests of a fair and just adjudication of the case to grant absolution from the instance. I do not see sufficient evidence upon which a court could or might find for the Plaintiff.

COSTS OF APPLICATION FOR ABSOLUTION FROM THE INSTANCE

[86] An order of absolution from the instance is essentially an order against a plaintiff. Or stated differently: an order in favour of the defendant. Costs should then follow the event, and thus, it is normally ordered that absolution from the instance is granted with the plaintiff to pay the costs of suit.

[87] Me Williams, on behalf of the Defendant, placed on record that she holds instructions that, should the application for absolution from the instance be granted, each party should pay its own costs. This is a very generous gesture from the Defendant and its attorneys and presents as exceptionally fair towards the Plaintiff. There is no reason not to make an order in terms of the Defendant's favourable suggestion.

POSTPONEMENT

[88] One last issue needs to be dealt with, namely the costs of a postponement requested by the Defendant partway through the evidence of Dr. Mohosho.

[89] Trials do not always run smoothly and when hiccups do occur, most legal representatives are adept at dealing with them in the appropriate manner. Proper attention paid during the pre-trial phase more often than not ensure that trials run without unnecessary interruption. As *dominus litis* it is the duty of a plaintiff (or more appropriately his or her attorney) to ensure that all pleadings and notices which have been exchanged in the build-up to the trial are not only in the court file, but are furthermore neatly bound, indexed and paginated. This is not only to make the presiding judge's job a little easier. It also serves as an exercise to ensure that every document which will be referred to by witnesses are in the court file and presumably presents an opportunity for practitioners to double-check that everything document in the court file had also been served on the opposing party. It may be accepted that, if the court file is in order, it serves as an indication that all pleadings and notices have been properly exchanged and that the legal representatives of the parties made sure that they and their opponents are in possession of the relevant documentation which will be dealt with during the trial.

[90] In this case the trial ran anything but smoothly. From the get-go the court file appeared shabby, as if pleadings and bundles of documents were simply thrown in without any regard as to proper order. I doubt whether the Plaintiff's attorney inspected the file prior to the allocation thereof to a judge so as ensure that it is in order and that all the necessary documentation have been filed, indexed and paginated. In fairness to the parties and so as not to waste time, I had the trial commence, not using the state of the court file as an excuse to delay proceedings. Unfortunately, the lack of attention paid to the court file flowed over to the presentation of the evidence.

[91] It was especially during the testimony of the Plaintiff's expert that it became apparent that not all documentation have been served, filed and/or properly

indexed by the Plaintiff's attorney. Documents were missing or bound in incorrect or illogical court bundles. An adjournment to allow the Plaintiff's attorney to straighten out the mess only led to a slovenly attempt at the renumbering of pages. Even thereafter missing pages and documents needed to be handed up. The trial proceeded regardless.

[92] Deep into the examination-in-chief of the Plaintiff's expert Mr Masihleho, who then represented the Defendant, indicated that the witness was referring to "articles" which had not been made available to the Defendant. As it later turned out, the documents were in fact extracts from textbooks prescribed to medical and nursing students. The extracts were filed in terms of Rule 36(9)(b) as if supplementary reports by Dr. Mohosho. They formed part of a bundle filed under cover of a notice headed "*Notices in terms of Rule 36(9)(a) & (b), Dr. Mokoena Martins Mohosho (Supplement Expert Witness Evidence)*". There was no indication that the bundle was served on the Defendant's attorney of record. The copy of the notice that had made it into the court file does not indicate that it had been filed with the office of the Registrar. Mr Masihehlo requested a postponement of the matter to allow him an opportunity to peruse discuss the supplementary documents with the Defendant's experts. He insisted that the postponement should be granted before the witness continued with his evidence.

[93] I stood the matter down to allow Mr Masihehlo an opportunity to receive copies of the missing documentation from the Plaintiff's attorney, consider them, and discuss them with his witnesses. After the adjournment I was informed that the Defendant still insists on a postponement as the documentation received refers to further articles which the Defendant's legal team and panel of experts wish to consider prior to proceeding. Mr Ponoane responded on behalf of the Plaintiff by explaining that, prior to the first day of trial, the matter had been "in court" on several occasions. It was his opinion that the missing documentation were probably given to the Defendant on one of those dates. Mr Ponoane could not substantiate his opinion. He went further and pointed to the document headed

"Index for Plaintiff's Expert Witnesses" which in his opinion should have alerted the Defendant that it refers to documentation not in their possession and the matter could then have been attended to by means of a "courtesy call". Should the Defendant's attorney and counsel have failed to pay proper attention to the index, the Plaintiff should not be held responsible.

[94] Mr Ponoane further indicated that during the adjournment copies of the documents were handed to the Defendant's counsel. Mr Masihehlo replied that it was in fact the candidate attorney of Mr Ponoane who attended to the documentation together with himself (Masihehlo), and that Mr Ponoane left the court room when there was an attempt to further discuss the matter.

[95] By this time I have already noticed an almost tangible atmosphere in the court between the two sets of legal representatives. Body language and whispered comments are of cause not reflected on record. It became clear to me however that tempers were flaring and that personal opinions were overriding common sense, good manners and courtesy. This was later also borne out by the contents of the affidavits filed by the legal representatives on my request. This was not conducive to a proper administration of justice and might have been to the disadvantage of one of the parties (or maybe even both). All parties to my mind needed time and space to calm down and start focusing on the ball (metaphorically speaking) rather than the man.

[96] The matter had been set down for a Tuesday, Wednesday and Friday, as per the norm in this Division. Mr Masihehlo's dilemma raised its head during the latter part of the morning session on the Wednesday. The adjournment and presenting of submissions continued into the afternoon session. I considered the request from the Defendant's counsel within the context of available court time. I also considered the insistence from the Defendant's counsel that he needed to further discuss the missing "articles" with the Defendant's experts prior to any further evidence being presented. This could to my mind easily be done prior to the commencement of, or even during cross-examination of Dr.

Mohosho. It appeared to me distinctly unnecessary to allow a postponement for that purpose whilst the witness was still busy presenting his evidence-in-chief.

[97] There was no sense in using what little of what was left of the Wednesday afternoon session. The matter of necessity had to be postponed to the next date as arranged, namely the Friday. I ruled that the examination-in-chief of Dr. Mohosho was then to be completed whereafter the case would be postponed prior to the cross-examination of the witness. I indicated that judgment on the issue of costs was reserved.

[98] The testimony of Dr. Mohosho continued on the Friday morning and was concluded before shortly lunch.[77] After Dr. Mohosho completed his evidence-in-chief, the Defendant's counsel insisted that the cross-examination will not commence before he has not further consulted with the Defendant's expert witnesses.[78] As no further days were left in the week arranged for the trial, the matter was postponed for dates later in the year, allowing for five more additional court dates. Thus, the postponement effectively was not due to the Defendant's request for a postponement, but was necessary due to the lack of available court time.

[99] Generally speaking, the party requesting a postponement should bear the costs occasioned thereby. In this instance, the Defendant requested the postponement due to documentation filed by the Plaintiff but not properly served on the Defendant's attorney of record. Considering the matter only from such an angle, fault appears to lie at the door of the Plaintiff's attorney. However, this is too simplistic an approach in the light of the matter as a whole. After the "missing" documentation was made available to the Defendant's counsel, he could follow the evidence presented by Dr. Mohosho. There was no need for the case to be postponed whilst the witness was still busy with his examination-in-chief. Most of the court time available on the Wednesday was in

[77] At 12h20 to be precise (according to my watch).
[78] Surprisingly, when the trial resumed later, the Defendant's had new counsel, this time round senior counsel.

fact utilized, albeit partly to deal with the incomplete set of documentation and the application for postponement. Considering the inevitable time lapse between the Wednesday and Friday of any regular trial week in this Division, there was time for the Defendant's experts to peruse the articles and give their input to counsel for purposes of cross-examination. It would also have been possible for counsel to start with the cross-examination and then request a postponement when it became necessary to get further instructions on the documentation which was received late.

[100] But still this was not the end of the matter. The further testimony from Dr. Mohosho in chief took several hours. Less than half of the available court time for the Friday remained for cross-examination. Evaluating the situation further still from the vantagepoint of the further court days spent on the cross-examination of Dr. Mohosho when the trial recommenced, even if the Defendant's counsel had commenced his cross-examination on the Friday, it would have been impossible for him to conclude it. A postponement of the trial and the arrangement of further court days became inevitable. And practically speaking it was fortuitous that the postponement was granted prior to cross-examination commencing, otherwise Dr. Mohosho would have been unable ethically to have any discussions with the Plaintiff and the attorney during the delay before the next arranged dates.

[101] Court time was utilized on both the Wednesday and the Friday, despite the postponement. It can thus not be argued that a huge portion of court time was lost. In as far as time may have been wasted through the request for a postponement and the reasons therefor, it cannot be said that it led to any significant costs being wasted. Calculating which portion of the court time was lost due to the postponement and the circumstances leading up to the postponement will be difficult. It is furthermore not something that should in the circumstances simply be left for the taxing master to contend with.

[102] In the premises, I exercise my discretion relating to costs by ordering that costs occasioned by the postponement are considered to be costs in the cause. This seems to me to be fair to both parties.

ORDER

[103] In the premises, I make the following orders:

1. Absolution from the instance is granted;

2. Each party is to pay his own costs of suit;

3. The costs occasioned by the postponement of the trial on 20 August 2021 are considered to be costs in the cause.

G.J.M. WRIGHT, AJ

For the Plaintiff: Mr. MJ Ponoane
Bloemfontein

For the Defendant: Adv. R Williams SC
Instructed by: State Attorney
Bloemfontein