

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION: MTHATHA**

CASE NO. 1182/2017

In the matter between:

MILLICENT MOLOSE obo AVILE MOLOSE

Plaintiff

And

**MEMBER OF THE EXECUTIVE COUNCIL FOR
HEALTH: EASTERN CAPE PROVINCE**

Defendant

JUDGMENT

JOLWANA J

[1] According to the amended particulars of claim, Avile was born on 14 July 2013 with foetal distress, hypoxic ischaemic encephalopathy, meconium and superadded hypoglycaemia giving rise to spastic quadriplegic cerebral palsy and cortical blindness. These birth defects were allegedly caused by the defendant's employees who acted in breach of the agreement with the plaintiff relating to the provision of medical services to the plaintiff about the delivery of Avile at Willovale

Clinic where the plaintiff attended antenatal clinic and at Butterworth Hospital where plaintiff was admitted as an inpatient until she gave birth to Avile.

[2] The matter went through all the normal stages of the filing of pleadings, the discovery processes as provided for in the Uniform Rules and the filing of expert reports by a number of medical experts who saw both the plaintiff and Avile in their consulting rooms in different parts of the country.

[3] On 17 June 2018 Dr Redfern, a paediatrician for the plaintiff and Dr Kara, a paediatrician for the defendant signed a joint minute which reads as follows:

“JOINT MINUTES

IN THE MATTER OF MILLICENT MOLOSE obo AVILE MOLOSE vs MEC FOR HEALTH

PREPARED BY DR A REDFERN (Paediatrician for the plaintiff) & DR Y KARA (Paediatrician for the defendant)

16 June 2018

Plaintiff attorney ref: ZMM/SK/MAT335

Case number: 888/2017

This report has been compiled by Dr A Redfern, acting on behalf of NONXUBA INC Attorneys for the plaintiff Millicent Molose obo Avile and Dr Y Kara, instructed by Simi Health Care on behalf of the State Attorney who represents the Defendant, MEC for Health in the province of the Eastern Cape.

This report is based on the following documents/sources:

1. Copy of limited medical records, namely Road to Health booklet pages only. No maternity case record or neonatal records available
2. Medicolegal report by Dr A Redfern (submitted 30 May 2018)
3. Medicolegal report by Dr Y Kara (submitted 23 Sept 2017)
4. MRI scan performed on 4 May 2017, and accompanying medicolegal report by Prof S Andronikou.

JOINT STATEMENT

With regards to the basis of our opinions

We agree that the absence of medical records, particularly the maternity case record and neonatal records, means that important information is not available, that would assist with determining the cause and timing of brain injury.

With regards to the condition of the child

We agree that Avile has severe spastic quadriplegic cerebral palsy, has visual impairment, is intellectually and functionally severely disabled (GMFCS classification scale 5) and has an abnormally large head.

With regards to determining the cause of brain injury

We agree that Millicent's positive HIV status did not cause brain injury to Avile, as she was on antiretroviral therapy and was virally suppressed.

We agree that, based on the maternal history and anthropometric measurements of the baby at birth, no antenatal (distal) risk factors can be identified for intrapartum asphyxia. We note that there was a maternal history of hypertension in labour, this may or may not be of significance.

We agree that we do not know for certain whether foetal distress or an acute sentinel event were present during labour, or other intrapartum risk factors for neonatal encephalopathy, due to the lack of records.

We agree that the reason for the emergency caesarean section, and the timing of events around the time of delivery are unclear due to lack of records and clear maternal history.

We agree that the MRI scan performed on Avile shows extensive brain damage consistent with hypoxic ischaemic brain injury occurring in a term infant. Specifically, there is no genetic or developmental brain abnormality, and apparent hydrocephalus is due to ex vacuo dilatation of the ventricles due to extensive brain damage.

We agree that, in spite of Avile's large head, this appears to be an incidental finding and other potential causes of hydrocephalus, as described by Dr Kara in his report, are not apparent.

With regards to determining the timing of brain injury

We agree that there is limited and conflicting information upon which to decide whether there was depression of the baby at birth or not.

We agree that, based on the limited information available, a neonatal encephalopathy lasting at least several days was present after birth. We agree that there are various causes of neonatal encephalopathy and information is lacking with which to exclude some potential causes. We agree that the presence of a neonatal encephalopathy is compatible with and suggestive of intrapartum asphyxia, in the absence of other known causes of the neonatal encephalopathy.

We agree that hypoglycaemia may have contributed to brain injury, but that due to an absence of neonatal records, we cannot confirm or refute the presence of hypoglycaemia.

We note that the MRI scan, as reported by Prof Andronikou, shows brain injury consistent with a mixed pattern of injury, namely prolonged-partial and acute profound hypoxic ischaemic brain injury occurring in a term brain.

The authors conclude that, based on the MRI findings and available information, the most likely cause of Avile's brain injury is intrapartum asphyxia causing a hypoxic ischaemic encephalopathy after birth.

The authors stress that this opinion is based on information available to them and reserve the right to review their opinions should the medical records become available.”

[4] On 15 June 2018 Dr Wright, a specialist obstetrician and gynaecologist and Dr Hulley also a specialist obstetrician and gynaecologist signed a joint minute in which, among other things, they recorded that “*the most probable causation of the cerebral palsy was intra-partum hypoxic ischaemia which was missed due to poor intrapartum foetal monitoring.*”

[5] Based on the pleadings, the expert reports filed and the joint minutes referred to above and other documents filed and hearing counsel this court granted an order in which, inter alia, the defendant was held liable for the plaintiff’s agreed or proven damages arising from cerebral palsy suffered by Avile. The defendant was also ordered to pay R2000 000.00 being interim payment of the plaintiff’s damages within 30 (thirty) days from the date of the order. That court order is dated 20 June 2018. The plaintiff was represented by Du Plessis SC and the defendant was represented by Gqamana SC and advocate Melane.

[6] The matter was later set down to determine quantum from the 12 February 2019 in terms of the Notice of Set Down served on the state attorney on 04 December 2018 and filed with the Registrar of this court on the same date.

[7] On 13 February 2019 the defendant filed a substantive application for the postponement of the matter sine die. In the affidavit deposed to by Mr Andrew Conroy of Smith Tabata Inc, correspondent attorneys of Norton Rose Fulbright South Africa, attorneys of the defendant it appears that the matter was referred to them on the date of the trial by Mr Johan van Schalkwyk the Acting Head of the office of the State Attorney in Mthatha, who until then were attorneys for the defendant. The application for postponement was opposed.

[8] Among other things Mr Andrew Conroy stated as follows in his affidavit:

- “23. At approximately 10:30 on Tuesday, 12 February 2018, (sic) our office received a telephone call from Acting Head of the State Attorney’s office in Mthatha Johan Van Schalkwyk, indicating that there was an additional matter that had not been handed over to the consortium which was before Court.
24. We were instructed that the matter was before Court and would be heard at 11:00. Van Schalkwyk indicated that his office was not aware of this matter, but that he would investigate same. In addition, we took immediate steps to peruse the court trial roll for the first term. The matter was not enrolled according to the said trial roll.
25. We instructed Adv Mfeya to attend court and explain the position described aforesaid and indicate that our instructions were to bring an application for postponement.”

[9] The answering affidavit filed on behalf of the plaintiff in opposition to the application for the postponement of the matter was deposed to by Mr Nonxuba who is the attorney of the plaintiff. He, inter alia, had this to say in his answering affidavit:

- “9. The version of Andrew Conroy is in direct contrast with the submission that was made by Mr Nqiwa in Court on 12 February 2019, who specifically advised the Judge President in roll call court that the matter is no longer handled by the State Attorney it is handled by certain Melisa of Mr Conroy’s office. Whereafter he later requested that the matter should stand down in order to enable him to enquire from Melisa as to why she was not in court to attend to this matter and the court acceded to his request.”

[10] It became clear to me that either Mr van Schalkwyk lied to Mr Conroy in saying that his office was not aware of the matter or Mr Nqiwa lied to the Judge President in saying that the matter was handled by Melisa of Mr Conroy’s office. Alternatively Mr Nonxuba lied in what he said about Mr Nqiwa. I became concerned that no less than three officers of this court, van Schalkwyk, Nqiwa and Nonxuba could all be lying or at least one of them could be lying. I issued an order that both van Schalkwyk and Nqiwa must come to court to give oral evidence under oath.

[11] Van Schalkwyk gave a background about the state of affairs in his office in general and how the Special Investigating Unit (SIU) got involved as well as what his office is doing to resolve their challenges. It also became clear from his oral testimony that as at the time that he decided to refer the matter to Norton Rose he

had already made up his mind that there was fraud on the part of Mr Nonxuba. He made gratuitous statements accusing Mr Nonxuba of being well known for what he called “*shenanigans*”. He referred to what he called “fraudulent claims” that were being lodged by Mr Nonxuba. He was asked to elaborate on the basis of these gratuitous statements. It turned out that his opinion was based on media reports and his discussions with the SIU and the fact that Mr Nonxuba had been arrested on fraud allegations the day before.

[12] His evidence was not helpful at all in the application for postponement. All it did was to show his own failures to manage basic processes like notices of set down of trials which, if not attended to as was the case in this matter could have very serious implications for his clients. He did not appear like somebody who had a good grip of what is going on in his office. He also alluded to problems that are not of his own making like the lack of capacity largely due to the volume of work that his office handles and staff shortages.

[13] It did not help that he seemed to see fraud everywhere and did not seem to have created good working relations with the professionals that report to him like Mr Nqiwa. I was taken aback that he referred this matter to Norton Rose without getting a status report from Mr Nqiwa, the attorney who handled the file and who was readily available in his office. His reticence when he gave evidence painted a picture of a man who placed too much reliance on other institutions like the SIU and Norton Rose without informing himself about the way they are supposed to assist him and properly identify cases where fraud may be involved so that the SIU may investigate fraud and corruption in those cases.

[14] His assumptions about fraud on the part of Mr Nonxuba based on nothing more than media reports, on-going investigations or even the fact that Mr Nonxuba was arrested were not helpful. He seemed to forget that whatever he thinks of Mr Nonxuba the reality is that his name has not been struck off the roll of attorneys and he has not been suspended or interdicted from practice. This has major legal

consequences including his clients' rights to be represented by him as well as his constitutional rights not only to choose the legal profession but also to practice it until he is stopped through the due process of the law. Mr van Schalkwyk seems to believe that Mr Nonxuba should be treated as a convicted fraudster when the reality is that this court has no legal basis for treating Mr Nonxuba as if he is a convicted criminal or any differently from how it treats other practitioners.

[15] It became clear from Mr Nqiwa's evidence that both Mr van Schalkwyk's office, which is the office of the State Attorney which represented the defendant at the time, Norton Rose through Melisa and the defendant received the notice of set down as far back as the 11 December 2018 in the case of the defendant, the 4 December 2018 in the case of State Attorney's office. It is important to mention that Mr van Schalkwyk and some of the officials of the defendant were recipients of an email dated 21 June 2018 sent by Mr Nqiwa in which he furnished them with the court order dated 20 June 2018 in terms of which the merits were awarded to the plaintiff. On 10 August 2018 the defendant made a payment to plaintiff's attorneys in the sum of R2 008 054.76 which was in terms of that court order. How could this payment have been made if nobody was aware of this matter? Clearly, for Mr van Schalkwyk to say that he did not know about this matter is disingenuous in the extreme.

[16] Mr Andrew Conroy conveniently leaves out of his affidavit the email sent to Melisa of his office by Advocate Gqamana SC on the 4 February 2019. If one accepts in his favour that he might not have known about that email which was sent to Melisa, that raises further questions about how his office or Norton Rose for that matter as defendant's attorneys are managing these very important and time bound matters. In that email Mr Gqamana enclosed a notice of set down in terms of which the matter was set down for hearing on the 12 February 2019. It is bewildering that both Mr Andrew Conroy and Mr van Schalkwyk claim ignorance about this matter when objective evidence suggests that their respective offices and that of the defendant were in fact furnished with a notice of set down earlier than the 12 February 2019.

[17] All of this information came from Mr Nqiwa whose detailed evidence assisted the court in getting a clear picture of what the correct facts are. It was precisely because of Mr Nqiwa's candidness that it became clear to me that the matter must be postponed as those representing the defendant including some of the officials of the defendant had failed to act on the notice of set down to the prejudice of the defendant. I still find it difficult to understand how Mr Conroy's office through Melisa received the Notice of Set Down from Gqamane SC and did nothing. They did not even send an urgent email to Mr van Schalkwyk when they received the Notice of Set Down to establish what he intended to do about it as at that stage he had not yet instructed them.

[18] For Mr van Schalkwyk to go on and on about Mr Nonxuba's alleged corruption is just obfuscation and mischievous and was designed to mislead the court about the real reason why the matter could not proceed and why they were not in court or had not briefed counsel to represent the defendant. It is most disheartening that he and Mr Andrew Conroy came to this court with half-truths and feigned ignorance about this matter.

[19] The suspicions that Mr van Schalkwyk had at the time he gave evidence were at that stage nothing more than suspicions. He seemed to elevate his suspicions to objective evidence and the arrest of Mr Nonxuba on charges of fraud to a finding of guilty of fraud. All of this is worrisome, to put it mildly. This court cannot be expected to treat Mr Nonxuba differently from how it treats other practitioners - certainly not on the basis of media reports about him or even the fact that he was recently arrested. In the exercise of my discretion I decided to postpone this matter *sine die* to give Mr van Schalkwyk time to confirm if indeed there is real evidence of fraud in respect of this matter because if indeed there is evidence of fraud, that would be a very serious matter for all the parties and this court. I thereupon issued the following orders:

1. The trial is postponed to a preferential date to be arranged with the Registrar for the determination of quantum.
2. Mr van Schalkwyk (Deputy State Attorney) is to provide written reasons on or before 15 March 2019, as to why this case is to be regarded as a fraudulent claim.
3. The plaintiff's attorney is to file his response to Mr van Schalkwyk's affidavit by not later than 31 March 2019.
4. The defendant is ordered to pay the costs of the application and the postponement on an attorney and client scale.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant: J.J WESSELS

Instructed by: Nonxuba Inc. c/o POTELWA & CO.

Mthatha

Counsel for the Respondent: S. MFEYA

Instructed by: Norton Rose c/o Smith Tabata

Mthatha

Heard on: 14 February 2019

Delivered on: 12 March 2019