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

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

Case number: 4014/2014

In the matter between:

C P Plaintiff

and

MEC FOR HEALTH PROVINCIAL GOVERNMENT OF THE FREE STATE Defendant

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CORAM: PHALATSI, AJ

JUDGMENT BY: PHALATSI, AJ

HEARD ON: 15 JUNE 2018

DELIVERED ON: 12 OCTOBER 2018

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[1] The plaintiff issued summons against the defendant, arising out of an incident wherein the plaintiff was admitted at Universitas Hospital on the 10th of February 2013, to deliver her unborn baby. The foetus sustained an intra-uterine death and was stillborn at birth. The plaintiff alleges in her particulars of claim that at all material times hereto and more particularly when delivering the baby on or about 12 February 2013 at the hospital, the Defendant wrongly and negligently breached its duty of care to the Plaintiff, in one or more or all of the following respects:

Defendant (through its nurses and/or doctors and/or the medical staff) failed to recognise that Cytotec® is a potent uterine stimulant which can lead to over stimulation of uterine contractions during the induction of labour; The nurses and/or doctors and/or the medical staff failed to recognise, after the first administration of Cytotec®, that the post CTG had already demonstrated that Cytotec® was capable of producing a sustained hypertonicity in the Plaintiff; The nurses and/or doctors and/or the medical staff failed to ensure that the Cytotec® did not lead to over stimulation of uterine contractions; The nurse and/or doctors and/or the medical staff failed to further monitor the plaintiff after the initial standard protocol was followed in respect of the administration of Cytotec®;

The nurses and/or doctors and/or the medical staff failed to pay proper attention to adequate monitoring of the plaintiff after the administration of Cytotec® and to the possibility of foetal distress.

The nurses and/or doctors and/or the medical staff failed to timeously diagnose foetal distress and to perform an emergency caesarean section when this occurred; the nurses and/or doctors

and/or the medical staff failed to take all reasonable and necessary precautions to ensure that the birth resulted in a live baby. *Alternatively* to the paragraph above, the Defendant and/or its servants (nurses and/or doctors and/or the medical staff) at the hospital, acting within the course and scope of their employment with the Defendant, failed to exercise due skill, diligence, competence and care in that he/she/they breached the abovementioned agreement in one or more or all of the respects referred to in above paragraph. As a result of the Defendant's breach of its duty of care as aforesaid, the foetus sustained an intra-uterine death and was stillborn at birth.

[2] The defendant in its plea denies that the foetus died of *hypoxia* as a result of the administration of Cytotec. The defendant further denies that there was over stimulation of the uterine contractions, or that this caused the death of the foetus.

[3] In support of her case, the plaintiff testified personally and called a further witness, namely, Doctor Duminy. The defendant called two witnesses in its defence, being Doctors Malebane and Du Toit.

[4] At the inception of the trial, both parties, through their respective Counsel, indicated that the trial is only in respect of the merits and that quantum would be adjudicated later, should the need arise.

[5] The first witness who testified was the plaintiff herself, who testified briefly as follows:

That she is the assistant teacher at Jim Fouche School in Bloemfontein. That she was admitted at Universitas Hospital, Bloemfontein, on 10 February 2013, after she felt terrible pain in her stomach. She went to the said hospital because she was being treated at the same hospital for her tracheal stenosis and her ENT specialist wanted to be present when she went to labour. During the evening of the 11th of February 2013, whilst she was lying on her bed, she asked that the sister be called because she was wet. The sister came and told her that it was just a discharge but according to her it was amniotic fluid, meaning that her membrane had ruptured. On the 12th of February 2013, the doctor told her that he was going to give her an induction to accelerate the labour process. She was given Cytotec, the induction medicine, at about 14H00 on the 12 of February 2013. After the administration of the induction medicine, she felt severe pain and she thereafter told her family that she does not feel the movement of the baby anymore. Eventually when the sister came, they could not get the pulse of the baby. She was thereafter taken to the labour ward where she delivered a baby boy, but the child was stillborn.

[6] The next witness to testify on behalf of the plaintiff was Doctor Paul Charl Duminy, who testified briefly as follows:

That he has a bachelor's degree in medicine and surgery and a Master's degree in obstetrics and Gynaecology. He is a member and fellow of the Royal College of Obstetrics and Gynaecology. He has practiced for 40 years, specialising in obstetrics and gynaecology. That there is a standardised protocol for induction of labour, which is used in the Western Cape. He assumes that

the Universitas hospital is also using the same protocol. I must state at this stage already that this contention or assumption was never disputed by the defendant, nor any evidence tendered to the contrary. The Protocol states that once it has been decided that the patient must be induced, both the patient and the foetus must be properly evaluated. The foetal heart rate is evaluated by a cardio-tachogram, a CTG. If the condition of both the foetus and the mother is good, then Cytotec can be administered. The evaluation of the foetal heart rate with CTG must be done before each administration of Cytotec. The protocol also prescribes the form and amount of Cytotec which must be administered. In the case at hand, the CTG was not reassuring, indicating a foetus in distress, and it should therefore not have been proceeded with the administration of Cytotec. The strict adherence to the protocol is of utmost importance because Cytotec contains a very potent substance which causes the contractions of the uterus and has the potential to cause tonic contractions. Again, in the case at hand, Cytotec was administered although the CTG tracings were not reassuring and showed the foetus in distress, because the foetal heart rate was too high. There was no proper monitoring of the plaintiff and the foetus at the most crucial time of her induction. He postulates that the administration of Cytotec, which was administered about three times on the 12th of February 2013, caused strong and sustained contractions. This led to hyper stimulation of the uterus, which cut the supply of oxygen to the foetus. The foetus ultimately died as a result of Hypoxia, which is lack of oxygen. The pains felt by the plaintiff was as a result of the administration of Cytotec. The prudent cause of action that should have been undertaken, after CTG tracings which were not

reassuring, should have been to try and resuscitate the foetus, and if the foetal condition was not improving, then delivery by caesarean section should have been considered. The conclusion noted in the hospital file that indicated that the pre-Cytotec CTG was reassuring, was not correct as the said CTG tracing was not reassuring. Whoever came to the said conclusion, was negligent. The post mortem report revealed that the foetus had been infected with chorioamnionitis. Chorioamnionitis is a recognised complication in pregnancy. There is overt chorioamnionitis, which means that there are signs which are present for it to be recognised, on the one hand, and silent chorioamnionitis, on the other hand, where there are no signs present for it to be recognised. In the present case, it was silent chorioamnionitis. No amount of monitoring of the patient and the foetus could establish this silent chorioamnionitis. On the basis of his evidence that Cytotec was administered contrary to the protocol, there was no proper monitoring of the plaintiff and the foetus during induction, failure to try and resuscitate the condition of the foetus and consider delivery by caesarean section, he came to the conclusion that the defendant was negligent. I must again state that the view that the defendant's employees were negligent in that they failed to recognise that the pre-Cytotec CTG was not assuring, and that there was no proper monitoring of the plaintiff and the foetus during induction, is shared and conceded by the defendant's expert in the joint minute of the experts.

The plaintiff thereafter closed her case.

[7] The first witness called by the defendant was Doctor MATLHOGONOLO KEOREEDITSE MALEBANE, who testified as follows:

He holds the BSC degree and MBCHB. He qualified through the college of medicines for South Africa as obstetrician and gynaecologist in 2006. He worked at Baragwanath and Sebokeng hospitals and he was in private practice until 2017. He now does work as a medical expert in medical malpractice cases. His testimony is based on the notes that were provided to him by the defendant's attorney and he did not consult with the patient herself. The patient was firstly admitted to Universitas hospital between 22 and 24 January 2013 and again on 10 February 2013. The reason for the first admission was the suspicion that she was in preterm labour, meaning in labour prior to the expected time. She was given medication to prolong the pregnancy to increase the chance of the foetus surviving outside the uterus. The only point of concern was that the patient had had tracheotomy, an operation on the air pipe. The importance of this information is that, should the patient require any surgical intervention, for example, caesarean section, there may be complications. He testified that the foetus had chorioamnionitis with funisitis. Funisitis is the infection of the umbilical cord of the foetus. The infection was therefore spread through the blood, which is why it disseminated in every organ, ultimately causing the foetal death. Hypoxia in this case was caused by the fact that the foetus had an infection that depleted the oxygen and food of the foetus. He could not find any evidence to suggest that there was uterine hyper stimulation which resulted in Hypoxia and foetal death. Hyper stimulation is a distinct, definable condition,

and, as stated above, there was no evidence of the characteristics of hyper stimulation in this case. In his opinion, no timeous intervention of any kind, including caesarean section, would have stopped the effects of chorioamnionitis, and saved the child's life.

[8] The next witness to be called by the defendant was Doctor LEE-ANN DU TOIT, who testified as follows:

She has MBCHB and she is a fellow of the college of South African anatomical pathology, a master of medicine and anatomical pathology, all at Free State University. She is employed at the National Health Laboratory Services at Universitas Hospital, Bloemfontein, as an anatomical pathologist, also known as Histo Pathologist. She compiled the report in 2013 under the direction of Professor Beukus, who passed away in 2013. She performed a post mortem on the baby. The microscopic findings included funisitis, which is an infection of the vessels in the umbilical cord. They also found bronchial pneumonia, which is an infection in the lungs. They saw evidence of haemorrhage in the lungs, soft tissue of the neck, both adrenals and both kidneys. They also received a third trimester placenta which had Grade 3 chorioamnionitis. They explain the cause of death and call it the mechanism of death. They surmised that the findings and post mortem were explicable as a result of preterm rupture of the membranes with chorioamnionitis and resultant bronchial pneumonia, with funisitis. Bronchial pneumonia is an accepted cause of death in infancy. Grade 3

chorioamnionitis is the most severe. It does not progress from 1, 2 and 3 and it can start as grade 3.

The defendant then closed its case.

[9] Counsel for the defendant, Mr Motloung, spent a lot of time in cross-examination of Doctor Duminy, trying to show that the plaintiff was properly monitored during her stay at Universitas Hospital, from 10 to 12 February 2013, and more specifically during the period of her induction, that the protocol was complied with in the administration of Cytotec and that generally the defendant was not in any way negligent in this matter. However, as I have alluded to earlier, the expert who testified on behalf of the defendant, Doctor Malebane, not only conceded in the joint minutes that the defendant was negligent, but he also testified to that effect in court. The defendant did not tender any evidence to gainsay the evidence of both Doctor Duminy and Doctor Malebane on this aspect. On the other hand, counsel for the plaintiff, Ms. Auret, in cross-examination of Doctor Malebane, concentrated on the concessions in respect of the issue of negligence of the defendant. On the pleadings and at the start of the trial, it is apparent that the defendant denies that the conduct of the defendant, either by way of commission or omission, was the cause of the death of the foetus. The version of the defendant as to what the cause of death was, was neither challenged nor disputed by counsel for the plaintiff during cross-examination of both Doctor Malebane and Doctor Du Toit. This may not be surprising considering the fact that, in the opinion of Doctor Duminy, his theory is that the pre-Cytotec CTG reading showed a

foetus in distress. The administration of Cytotec caused uterine hyper stimulation, which cut the supply of oxygen to the foetus, and the foetus died of Hypoxia, which means the lack of oxygen. Doctor Duminy, however, conceded that there is no evidence proving the presence of uterine hyper stimulation, at least from 15h00 on 12 February 2013 and his postulation is therefore conjecture. Doctor Malebane testified that hyper stimulation is a distinct and definable condition and there was no evidence of hyper stimulation in this case. It is further the evidence of Doctor Du Toit that the cause of foetal death in this case is Bronchial Pneumonia, which is a common cause of death in infancy. It is the evidence of Doctor Malebane that chorioamnionitis depleted the oxygen and food for the foetus and also compromised the capacity of the organs like the lungs and the adrenal glands to function properly. Doctor Du Toit also testified that chorioamnionitis played a pivotal role in the causing of Bronchial Pneumonia. This clearly illustrates that the postulation of Doctor Duminy is not sustainable and is therefore improbable.

[10] The further contention on behalf of the plaintiff is that, if the foetus had been delivered earlier, either on the 10th or 11th February 2013, it would have been less exposed to chorioamnionitis and would have been born alive. Firstly, this was never the case of the plaintiff neither in the pleadings, nor in the evidence of the plaintiff's expert witness, Doctor Duminy. However, in any case, it is the evidence of Doctor Malebane that there was nothing that necessitated the urgent delivery of the foetus prior to the 12th of February 2013. The CTG readings of both the 10th and the 11th were normal. It was only the pre-Cytotec CTG of the 12th which

was not assuring and showed foetal distress, necessitating action to be taken. The spontaneous rupture of the membranes occurred in the evening of the 11th. There was no knowledge of the presence of chorioamnionitis at that time and that could not have been a consideration to deliver the baby expeditiously. It is further not known when did chorioamnionitis begin and what Grade it was at what stage. There is therefore no factual basis for this contention and it therefore stands to be rejected.

[11] The last contention that I need to deal with is the one that the foetus should have been delivered by caesarean section and the baby would have been born alive. The evidence of all the experts who testified herein is that chorioamnionitis is an infection which occurs in the uterine. The inherent risk in the delivery by caesarean section is that when one opens the uterine, the infection might spread to the mother as well. Doctor Duminy further stated that it is preferable to deliver the baby vaginally if the mother is a *primigravida*, meaning a girl who is pregnant for the first time, which was the case with the plaintiff herein. Doctor Malebane testified that one of the first things that is essential when the baby is born is that the baby must breathe. Both he and Doctor Du Toit testified that the Bronchial Pneumonia and the haemorrhage in the lungs so compromised the capacity of the lungs that respiration would have been very difficult. I therefore find this contention difficult to sustain as to how a baby who is unable to breathe could have been born alive. It is also the evidence of Doctor Malebane that because this infection was blood born, it had permeated and compromised all the organs of the foetus and even if it was born alive, it would not have lived for

long. I am of the view that there is absolutely no evidence on which I can make a finding whether the baby would have lived or died if it was born alive and I therefore decline to make a finding on this issue.

[12] On the basis of these findings, although I find that the defendant was negligent in administering Cytotec to the plaintiff, I further find that such conduct of the defendant, or any other commission or omission, did not cause the death of the foetus.

[13] I therefore make the following order:

1. The plaintiff's claim against the defendant is dismissed with costs.

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N.W. PHALATSI, AJ

On behalf of plaintiffs: Adv. AURET
Instructed by:
LC DE SWARDT
P/A LOVIUS BLOCK
BLOEMFONTEIN

On behalf of defendant: Adv, MOTLOUNG WITH ADV. MOPEDI
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