

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 1365/2013

MSAWENKOSI MENE

Applicant

And

MEMBER OF THE EXECUTIVE CONCIL FOR

HEALTH IN THE PROVINCE OF THE

EASTERN CAPE

Respondent

JUDGMENT

BROOKS J

[1] The plaintiff is an adult male who is resident at M L in T, Eastern Cape. On 11 June 2013 he issued summons against the defendant on the basis that the defendant is nominally liable for all wrongful acts committed by persons acting

in the course and scope of their employment by the Department of Health, including those employed at St Lucy's Hospital, Tsolo.

[2] Plaintiff's claim is for damages. It is based upon allegations that employees of the defendant stationed at St Lucy's Hospital, Tsolo, breached the terms of an oral agreement concluded by them with the plaintiff, represented by his mother, to provide diligent and adequate medical, surgical, nursing and midwifery treatment, alternatively that the defendant's employees stationed at St Lucy's Hospital, Tsolo, acted negligently whilst under a legal duty of care to render such services to the plaintiff and his mother.

[3] Both causes of action relied upon by the plaintiff arise from the circumstances which arose subsequent to his mother's presentation on 24 July 1994, at approximately 05h00, at St Lucy's Hospital, Tsolo. The allegations common to both causes of action are that at the material time the plaintiff's mother was in labour prior to the birth of the plaintiff, that the defendant's employees failed to assess properly and monitor the pre-natal plaintiff and his mother so as to establish whether the plaintiff should be delivered naturally or by caesarean section, that they were negligent in not doing so, in delivering the plaintiff by vacuum extraction instead of caesarean section thus causing injuries to the plaintiff's right arm and/or shoulder resulting in Erb's palsy and the lameness of the limb, in not detecting promptly the injury to the plaintiff and in not referring the plaintiff promptly for remedial surgery so as to obviate or mitigate the effects of the injury.

[4] The plaintiff alleges that due to the negligence of the defendant's employees the plaintiff suffers with an atrophied and useless right arm and that this is a permanent condition.

[5] In due course, the plaintiff's action was defended and the defendant filed a plea which denied liability on the basis that the plaintiff and his mother were given optimal care, examination, treatment and advice with such skill, care and diligence as was reasonable in the circumstances that presented. Significantly, in the plea the defendant merely "notes" that the plaintiff sustained injuries to the right arm and/or shoulder resulting in Erb's palsy and that he suffers permanently from an atrophied and useless right arm, but denies that the defendant's employees were negligent in performing the vacuum extraction procedure and the delivery of the plaintiff.

[6] Accordingly, excluding the elements of the dispute between the parties pertaining to the *quantum* of the plaintiff's damages, the ambit of the dispute between the parties relating to the issue of casual negligence is limited. At the commencement of the proceedings the parties sought an order by agreement in terms of the provisions of Rule 33(4) of the Uniform Rules of Court which had the effect of separating the issues pertaining to the liability of the defendant from the issues pertaining to the *quantum* of the plaintiff's damages and postponing the latter *sine die*. Such an order was granted.

[7] Subsequent to the close of pleadings, expert notices and reports in support of the plaintiff's claim were provided by Dr M. D. du Trevou, a neurosurgeon and Dr C. B. Hulley, an obstetrician and gynaecologist.

[8] Expert notices and reports provided by Dr L. Z. Gqiba, an obstetrician and gynaecologist and Dr J. Retter, an orthopaedic surgeon were filed on behalf

of the defendant. The latter report does not enter into the debate about the introduction of the vacuum assistance into the delivery of the plaintiff. The former report expresses the view that the vacuum extraction should not have been performed during the delivery of the plaintiff. The plaintiff's mother, suggests the report, should have been offered a caesarean section.

[9] It is apposite to record at this point that none of the defendant's expert witnesses were called to testify. After the closure of the plaintiff's case the defendant's case was closed without any evidence being led.

[10] It follows that the issue of casual negligence falls to be determined upon the evidence presented on behalf of the plaintiff.

[11] The first witness for the plaintiff was his mother. She testified that her pregnancy with the plaintiff was without problems and that she had attended an ante-natal clinic regularly. It seems that towards the end of her pregnancy there was a suspicion that she may be carrying twins and some concern was expressed about her diminutive stature in coping with the delivery. This was her first pregnancy and her usual body weight was fifty two kilograms. She was advised to ensure that she presented herself at hospital so that her delivery could be monitored. This she duly did at the onset of labour pains, presenting at St Lucy's Hospital, Tsolo, at approximately 05h00 on 24 July 1994. She eventually gave birth at approximately 05h00 on 26 July 1994. During the forty-eight hour labour she experienced regular labour pains which increased in severity. On each occasion that she approached the labour ward the sister-in-charge told that her dilation was insufficient to give birth and that she should

walk up and down the hospital corridors until full dilation was achieved. This she did, notwithstanding little sleep, increasing levels of pain and exhaustion. Eventually at about 15h00 on 25 July 1994 she asked the sister-in-charge to arrange for surgery because the pains were unbearable. She was told that she would see the doctor but in the meantime must continue moving up and down the corridors. She complied with these instructions. At 18h00 she reported to the sister-in-charge that her labour pains were very strong, that she experienced difficulty in walking as one leg had become stiff and that she felt weak. The sister-in-charge told her that she would call a doctor but then went off duty.

[12] Close to 21h00 the plaintiff's mother realised that her "waters had broken". She reported to the nurse on duty in the labour ward that this had occurred and was told that the nurse would look for a doctor. Eventually at approximately 03h00 on 26 July 1994 the pains were unbearable and the plaintiff's mother felt that she "was giving in". This appears to have galvanised the nurses on duty to call the doctor and the plaintiff's mother was taken to the labour ward. She was told to "push" because she was ready to give birth but it was difficult. Once the doctor arrived she asked again for an operation but the doctor said that she was about to give birth and must "try by all means". At approximately 04h20 the plaintiff's mother was still trying to "push" but said that she could not continue to do so. She was losing power and becoming weak. At that stage the baby's head was visible but not completely out of the cervix. It is then that the plaintiff's mother lost consciousness. She regained consciousness only after the delivery.

[13] Sometime during the morning of 27 July 1994 the plaintiff's mother noticed that the plaintiff's right arm was lame and just rotating. She tried to ask

the sister on duty who was handling the plaintiff why this was but she was reprimanded and told not to ask questions. She was undeterred and when she was told to go back to the ward she started screaming. The plaintiff's mother was then taken to another room and was told that she and the plaintiff would be taken to Bedford Orthopaedic Hospital in Mthatha as the plaintiff "had a dislocation".

[14] Before the plaintiff and his mother were discharged from St Lucy's Hospital, Tsolo, a nursing sister employed there advised her to look for Dr Hulley. She was not taken to Bedford Orthopaedic Hospital in Mthatha and sometime after her discharge she took the plaintiff there herself. At Bedford Orthopaedic Hospital the plaintiff's arm was bandaged and his mother was told that he would be attended to. However, before any further treatment was administered to the plaintiff, his mother made her own way with him to Groote Schuur Hospital in Cape Town. There she saw two doctors. By then the plaintiff was approximately eight months old. Two surgical procedures were conducted on the plaintiff without success. The plaintiff's mother was told that she has brought the plaintiff in too late; she should have come to Groote Schuur earlier on when she was still at St Lucy's hospital, Tsolo.

[15] It was the evidence of the plaintiff's mother that she had not been scanned or subjected to an X-ray. Only mechanical tools of some sort were used for the ante-natal examination of the plaintiff's mother. Notwithstanding the suspicion that she was carrying twins, only the plaintiff was *in utero*. To use the words of his mother, he was "a very big boy".

[16] The plaintiff's second witness was Dr. C.B Hulley. He confirmed that he had examined the plaintiff and was confident in his diagnosis that he presented with a right arm exhibiting all the symptoms of Erb's palsy. He stated that the palsy results from damage to the brachial plexus of nerves just under the clavicle that run down the arm and into the hand. The injury arises during the delivery by women with small pelvises or in whom the baby presents in a breach position. It can be encountered in babies born to diabetic mothers or mothers in pre-diabetic condition; in such circumstances the babies were usually large but with a normal head size. During delivery the shoulder of the baby can become stuck behind the pubis.

[17] Dr Hulley opined that the plaintiff's recorded birth weight (variously recorded as 4,7 kg or 4,9 kg) indicated that he was a very large baby "not made for a vaginal delivery". The height of the plaintiff's mother was only 1,7 m and the plaintiff was far too large to pass through his mother's pelvis. In these circumstances, Dr Hulley was of the opinion that the plaintiff's right shoulder had become stuck behind the pubis; although his head had passed through the pelvis it was not possible for his body to do so uninjured.

[18] No documentary evidence was available of any monitoring of the labour. Due to the lapse of time since 1994, one cannot simply assume that no records were completed relating to the development of the labour process encountered by the plaintiff's mother. However, whether records were kept or not, the evidence is clear that the plaintiff's mother was in labour for at least forty eight hours. Given suspicion that the plaintiff was one of a set of twins, informed most probably by the evident size of the foetus, the diminutive size of his mother, the fact that this was her first pregnancy and the alarming length of her

unproductive labour, Dr Hulley was of the firm opinion that vacuum assistance should never have been used in the delivery. After twelve hours of labour at the most the plaintiff's mother should have been assessed by a doctor. Had she been, the doctor would have come to the conclusion that a caesarean section delivery was called for. If that had been the case, the plaintiff would have been born almost certainly without injury. It was Dr Hulley's concluding opinion that such a lengthy labour in a hospital environment demonstrated an unacceptably low standard of medical care.

[19] In my view, the evidence tendered on behalf of the plaintiff demonstrates both that a factual link exists between the conduct of the defendant's employees at St Lucy's Hospital, Tsolo, and the harm sustained by the plaintiff and, indeed, that the defendant should be held legally responsible for the consequences of that conduct.¹

[20] It follows that I am of the view that the plaintiff has succeeded in discharging the *onus* of establishing casual negligence on the part of the defendant's employees who saw to the delivery of the plaintiff at St Lucy's Hospital, Tsolo. The harm directly caused was the Erb's palsy with the resultant permanently lame right arm and hand about which there is no apparent dispute. The plaintiff is entitled to such damages as may be proven or agreed between the parties in due course.

[21] In the result, the following order is made:

¹ HLOMZA v MINISTER OF SAFETY AND SECURITY AND SECURITY 2013(1) SACR 591 (ECM) para [35].

- “1. The defendant is directed to make payment to the plaintiff of such damages as may be proven by the plaintiff on trial or as may be agreed upon between the parties as having been suffered by the plaintiff arising out of the Erb’s palsy caused by the delivery of the plaintiff on 26 July 1994 at St Lucy’s Hospital, Tsolo;
2. The defendant is further directed to pay the plaintiff’s costs of suit, such costs to include the travelling expenses, reservation and appearance fees, if any, together with the costs of the preparation of the report and qualifying fees, if any, of Dr. C. G. Hulley, and the travelling and accommodation expenses incurred by the plaintiff’s mother, Nosiseko Mene, in attending court.
3. The defendant is directed to pay interest on the aforesaid costs, such interest to be calculated at the prescribed rate of interest from a date fourteen (14) days after date of allocatur, or after date of agreement, to date of payment.”

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

For the plaintiff: ADV J.L. HOBBS

**Instructed by: J. S. Sikhungo & Associates,
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For the defendant: ADV I. J. SMUTS S.C. and

ADV L. SAMBUDLA

Instructed by: State Attorney

MTHATHA

Date heard: 19 September 2016

Date delivered: 22 September 2016