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**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

Case no: 289/2019

In the matter between:

N[...] G[...] obo CG

Plaintiff

and

**THE MEMBER OF EXECUTIVE COUNCIL responsible for
HEALTH: EASTERN CAPE PROVINCE**

Defendant

JUDGMENT

GQAMANA J

[1] The plaintiff instituted an action for damages in the sum of **R28 675 443.02** in her personal and representative capacity as the biological mother and natural guardian of her minor child, C.G. Plaintiff seeks to hold the defendant vicariously liable for an alleged negligence in the management of her labour and sub-standard care by the nursing staff at Holy Cross Hospital, a government hospital. The defendant in her plea denied liability.

[2] At the commencement of the trial, merits and quantum were separated in terms of Rule 33(4) of the Uniform Rules of Court and proceeded only in respect of the

determination of negligence and whether such negligence caused C.G's brain injury and consequential loss.

[3] The plaintiff's case as pleaded in the amended particulars of claim is the following:

"7. On 16 February 2002, the plaintiff felt labour pains and proceeded to hospital. Upon arrival at hospital, the plaintiff:

7.1 was assessed by a nurse;

7.2 had not had a rupture of membranes;

7.3 did not have an (sic) admission cardio topography (CTG);

7.4 had a vaginal examination done;

7.5 had the fetal heart rate of the fetus determined by means of a fetoscope;

7.6 felt normal fetal movements, as had been the case during her antenatal course (sic);

7.7 was a high risk patient because of her advanced maternal age and the fact that she was multigravida but was not treated as such;

7.8 whilst in labour and as labour progressed:

7.8.1 was made to lie on the floor;

7.8.2 bled profusely but the cause of the bleeding and its effect on the fetus was not checked. Instead, the plaintiff was made to mop her blood;

7.8.3 complained to the nurse, several times, about the intensity of the pains. She was instructed to push even though she had no urge to do so;

7.8.4 probably sustained a minor abruption placenta the effects of which were ignored;

7.8.5 the fetal heart rate, the fetal condition was not checked;

7.8.6 was made to push the bay (sic) at a time when she had no urge to do so and later gave birth to [C...]; and

7.8.7 passed meconium stained liquor."

[4] Based on the above allegations, plaintiff pleaded that she was accorded substandard services by the medical and nursing staff, and they were negligent, and as a result of such negligence, her baby [C.G] suffered brain injury.

[5] The defendant denied that the plaintiff was accorded substandard care and that her employees were negligent. The defendant however admitted that [C.G] “*was born with intrapartum fetal distress and hypoxia which gave rise to cerebral palsy with severe intellectual disability*” but it denied that such was caused by the negligence of the medical and nursing staff at the hospital.

[6] Prior to the commencement of oral evidence, parties handed in by agreement joint minutes signed by their respective radiologists¹ and pediatricians and neurologists². The radiologists in their joint minutes are in agreement of the nature of [C.G]’s brain injury, namely that, it is a global prolonged partial hypoxic ischemic injury in a stable and chronic stage of evolution.

[7] Further, the pediatricians are in agreement that, the hypoxic ischemic injury sustained before or during labour seems more probable as a cause of [C.G]’s neonatal encephalopathy and the brain injury. In addition, they agreed that, the presence of neonatal encephalopathy points towards the perinatal period as the most likely period when such brain injury occurred. However due to the absence of the maternity case records, they could not agree with certainty on the timing of such brain injury. However, the Dr Redfern opined that the features are possible indicators of fetal distress and depression at birth indicative of *intrapartum* asphyxia.

[8] Plaintiff was the only factual witness who testified. Her evidence vastly differed from most of the allegations pleaded in the amended particulars of claim. However, the gist of her cause of action remained the same, that is, the nursing staff at Holy Cross

¹ Prof Kamolane and Prof Lotz.

² Drs Redfern and Van Rensburg.

hospital were negligent and that such negligence caused [C.G.]’s brain injury. In brief, the plaintiff’s uncontested evidence is that, she has five children and [C.G] is her lastborn. Plaintiff is a retired educator.³ At the time [C.G] was conceived, plaintiff was 41 years of age. Upon confirmation of her pregnancy, plaintiff religiously attended the antenatal clinic, and her antenatal visits were uneventful.

[9] On 16 February 2002, at approximately 08h30 in the morning, plaintiff was admitted at Holy Cross Hospital complaining of labour pains. Upon arrival at hospital, and within a period of approximately twenty minutes, plaintiff was attended to by a nurse (whose name is unknown to her). She informed the nurse that she was in labour. Without delay, the nurse instructed her to lie on the bed, and she was examined. The nurse checked the fetal condition using a fetoscope. She was informed that her baby was normal and that she was still far from delivery in terms of dilatation in centimeters. The plaintiff’s blood pressure was checked, and her urine was also tested and all were found to be normal. After that she was instructed to wait in the waiting room.

[10] As she was in the waiting room, she felt strong labour pains, and noticed that she was severely bleeding vaginally. She reported that to the nurse. However, the cause of the bleeding was not investigated but, she was told that she would not be given sanitary pads because the nurses were waiting for her baby to be delivered. Bleeding would occur after each contraction which happened on several occasions and she reported it on each occasion. Despite her reporting it to the nurses, no action was taken nor was the doctor called to assess and examine her. Save for the first examination upon admission, the fetal condition was not checked again.

[11] Shortly after the night shift started, plaintiff experienced bleeding again and reported same to the night shift nurse. She was given the same response: that she would not be given sanitary pads because they were waiting for her to deliver. When she experienced bleeding on the third occasion, the nurse instructed her to lie on the

³ Plaintiff’s date of birth is 17 July 1960.

bed. Before any examination was conducted, there was a power outage, and the nurse instructed her to remain on the bed while looking for a candlelight. The nurse left her in the dark unattended for approximately fifteen to twenty minutes. The nurse returned with a candlelight and instructed her to push. After having pushed for some time, she felt the baby coming and she eventually delivered around 22h00. Her baby was in a compromised state, he did not cry and had to be stimulated. As the nurse was stimulating her baby, the latter cried once. While lying on the bed, she felt dizzy and tired and she fell off from the bed. Plaintiff and her baby were taken to the ward by the nurse.

[12] In the early hours on 17 February 2002, the plaintiff's baby was examined by a medical doctor, who then advised her that the baby was sick. Her baby was also placed in an incubator and was fed with nasogastric tube. She was also informed that her baby had seizures. The baby was also taken to the Intensive Care Unit (ICU) and remained there for two days. The plaintiff and her baby were discharged from the hospital four or five days after her delivery.

[13] As time progressed, the plaintiff noticed that her baby had delayed milestones, because he only started crawling after a year. At present [C.G] is epileptic and fully dependent on the plaintiff for his self-care needs.

[14] It is against this factual evidence that I must consider the plaintiff's claim, taking into account the applicable legal principles as well as the uncontested expert evidence of Dr Ashraff Ebrahim, a qualified specialist obstetrician and gynecologist. Dr Ebrahim compiled an expert report about the plaintiff's *intrapartum* care, her care in labour and the birth of [C.G] and his conclusions are based primarily on the information conveyed to him by the plaintiff about the events in labour.

[15] As a point of departure, the defendant's legal duty of care arose from the moment plaintiff was admitted at Holy Cross hospital at about 08h30 in the morning on 16 February 2022. The plaintiff's case is that of negligent mismanagement of her labour

by the defendant's nursing staff at the aforementioned hospital. The defendant has admitted that, the nursing staff were acting within the course and scope of their employment, and that it owes the plaintiff a duty of care. But it is disputed that the nursing staff were negligent and that such negligence caused [C.G]'s brain injury.

[16] The test for negligence is set out in *Kruger v Coetzee*⁴ :

"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 personal 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."

[17] It was submitted on behalf of the plaintiff that, the nursing staff were aware that she was a high risk patient and as such it was reasonably expected of the nurses to monitor her closely using either a CTG or a fetoscope.

[18] Dr Ebrahim testified that plaintiff was a high risk patient because she was of an advanced maternal age and a multigravida. Because of that, plaintiff was highly likely of developing complications in labour and as such the nurses had to monitor her continuously.

[19] According to the plaintiff's uncontested evidence, the fetal condition was monitored once, that is, only at the time of her admission. Due to the absence of the medical records, this Court is in no better position to know at what stage of labour the plaintiff was at the time of admission. However, based on her evidence, she was informed by the nurse on the first examination that, the baby was still high, and as such, she was far from delivery.

⁴ 1966 (2) SA428 (A) at 430E.

[20] Normal progress of labour requires dilatation at a rate of 1 centimeter per hour in a primigravidae and 1.5 centimeters per hour in multigravidae⁵. During the first stage of labour (in the latent phase) i.e. when the cervix is less than three centimeters dilated, the fetal heart rate has to be checked 2 hourly. But once a patient reaches the active phase of labour the fetal heart rate has to be monitored ½ hourly - before, during and after contractions.

[21] Dr Ebrahim testified that contractions are stressful to a fetus; hence, the monitoring of the progress of labour is crucial, because it informs the nurses whether the fetus is coping with each contraction. In the absence of monitoring, the opportunity to identify the fetal condition and whether the fetus is in distress would be missed.

[22] From the information contained in [C.G.]’s road to health chart, it was mentioned that the fetus had fetal distress and had aspirated meconium. Meconium aspiration occurs when a newborn breathes a mixture of meconium and amniotic fluid into the lungs around the time of delivery.

[23] Dr Ebrahim testified that the meconium aspiration was associated with fetal distress. Counsel for the plaintiff argued that because there was no proper monitoring, the inception, evolution and progression of fetal distress were missed. No contrary evidence was led on behalf of the defendant.

[24] From the evidence at my disposal, it appears that had the defendant’s nursing staff properly monitored the plaintiff during her labour, they would have identified the fetal condition timeously and would have been able to take reasonable and necessary steps in terms of the maternity guidelines to avert the outcome. But because there was neither monitoring of the fetal condition nor an examination of plaintiff, for a considerable period in excess of 8 hours, the nurses missed the opportunity to pick up that the fetus was in distress and to act thereon.

⁵ Clinical Obstetrics, a South African perspective (4th edition): by H S Cronje; et al.

[25] In addition, despite numerous reports from the plaintiff that she was severely bleeding vaginally, the cause of such bleeding was not checked.

[26] In light of this overwhelming evidence, I'm satisfied that negligence has been established.

[27] The plaintiff having established negligence, but for her to succeed in her claim, she needs to prove causal link between the defendant's omissions, on the one hand, and the harm suffered⁶. Causation has two elements, the factual issue and the legal causation. The factual issue entails a hypothetical enquiry as to what probability would have happened "but for" the wrongful conduct of the defendant. With legal causation the question is whether the wrongful act is linked sufficiently closely to the harm suffered, if the harm is too remote, the defendant would not be liable.

[28] The vital question in this matter is whether on probabilities, [C.G.]'s brain injury would in any event have ensued even if the defendant's nursing staff's negligent intrapartum care had not occurred ⁷.

[29] The nature of such injury has been agreed upon by both radiologists that, it was partial prolonged hypoxic ischemic injury. The pediatricians also agreed that a partial prolonged injury as was seen on [C.G.]'s MRI is typically seen in cases of intrapartum asphyxia where the insult is less severe, but occurs over a prolonged period of time. However, they did not agree on the timing of injury. Dr Redfern held the view that if one has regard to the plaintiff's factual evidence and the information contained in the road to health chart, it is unlikely that the injury occurred before labour. On the other hand, Dr

⁶ Lee v Minister of Correctional Services 2013 (2) SA 144 (CC) para [37] - [58] and Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape 2016 (1) SA 325 (CC) para [35].

⁷ Mashongwa v PRASA 2016 3 SA 528 (CC) para [65].

Van Rensburg opined that due to limited maternal records available, she is unable to state with “*any certainty*” whether the brain injury happened before or during labour.

[30] As a matter of law, all that is required of the plaintiff is to prove the causal link on a balance of probabilities, and not with certainty. From the plaintiff’s evidence, the fetal condition was not monitored, save for that one examination upon admission, until delivery at approximately 22h00. Signs of fetal distress during that period were missed and that on the balance of probability caused the fetus to sustain the brain injury of the partial prolonged nature.

[31] In the circumstances, the plaintiff has succeeded to prove that her child’s brain injury was on probability caused by the negligence of the defendant’s nursing staff and that such injury occurred intrapartum.

[32] In the result, the following order is issued:

1. The defendant shall pay 100% (one hundred percent) of the plaintiff’s agreed or proven damages in her personal and representative capacity for and on behalf of her child, [CG], which damages flow from the neurological injury sustained by [CG] during labour at Holy Cross Hospital on 16 February 2002 and the resultant cerebral palsy (and is *sequelae*) which he suffers from.
2. The defendant shall pay the plaintiff’s taxed or agreed party and party costs of suit on the High Court scale, such costs to include (but not necessarily be limited to) the following:
 - 2.1 the costs attendant upon the obtaining of the medico-legal reports and/or addendum reports and/or joint minutes, if any, of the expert witnesses in respect of whom notices in terms of Uniform Rule 36(9) were filed;
 - 2.2 the qualifying and appearance fees of the expert witnesses in respect of whom notices in terms of Uniform Rule 36(9) were filed, where such fees were incurred;

2.3 the reasonable and necessary air transport and accommodation costs and expenses in respect of expert witnesses in respect of whom notices in terms of Uniform Rule 36(9) were filed, where such fees were incurred; and

2.4 the reasonable fees of two counsel where such services were engaged, including in respect of the preparation of heads of argument, accommodation costs and expenses in respect of consultation when preparing for trial with expert witnesses in respect of whom notices in terms of Uniform Rule 36(9) were filed.

3. The defendant shall pay interest on the plaintiff's taxed or agreed costs of suit at the prescribed statutory rate calculated from a date fourteen days after agreement in respect thereof, or a date fourteen days after affixing of the taxing master's *allocatur*, to date of payment.

N GQAMANA
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicants: *Adv A Bodlani SC (together with Adv Zito)*

Instructed by: Sakhela Inc, East London.

Counsel for the Respondent: *Adv N Msizi*

Instructed by: State Attorney, East London.

Date heard on: 18 March 2024

Delivered on: 11 June 2024