IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION – MAHIKENG

Case No: 83 / 2021B

Reportable: YES / **NO**

Circulate to Judges: YES / **NO**

Circulate to Magistrates: YES / **NO**

Circulate to Regional Magistrates: YES **/ NO**

In the matter between:

G[...] K[...] M[...] **PLAINTIFF**

And

LEHURUTSHE HOSPITAL **1st DEFENDANT**

THE MEC FOR HEALTH,

NORTH WEST PROVINCE **2nd DEFENDANT**

CORAM: MAODI AJ

Date judgment reserved: 17 November 2025

Judgment is handed down electronically by distribution to the parties' legal representatives by e-mail. The date that the judgment is deemed to be handed down is ***27 February 2026*** *at* ***10h00****.*

ORDER

1. The plaintiff's claim is dismissed with costs.

JUDGMENT

MAODI AJ

Introduction

[1] This is a claim for damages and compensation to the plaintiff as a result of negligence and breach of duty of care by members of the defendants acting within the course and scope of their employment with the defendants. The matter was defended.

The particulars of claim

[2] The plaintiff pleads that on or about 26 September 2020 she was admitted to first defendant for maternity purposes. The plaintiff gave birth to a still born baby on 27 September 2020, whom she named K[...] M[...]. The

death of the said baby was a result of natural causes. The first defendant acted negligently by failing to verify that the remains handed over to plaintiff were those of baby K[...] M[...]. Plaintiff was discharged on 28 September 2020 and was informed that a registered funeral undertaker had been sourced to remove the remains of K[...] M[...]. The first defendant once again failed and/or neglected to afford plaintiff a right to see the body of the deceased baby when it was put into a coffin from the hospital mortuary and into a hearse.

[3] On 29 September 2020 plaintiff received a call from the first defendant informing her that she buried a baby belonging to one M[...] M[...]2 named R[...] M[...]2 instead of hers. The remains of baby R[...] M[...]2 had to be exhumed on an urgent basis. Plaintiff, as a result thereof, has been denied the right to bury her still born baby, K[...] M[...]. At all material times the first defendant was acting within the course and scope of its employment with the second defendant. As a result thereof the plaintiff has suffered trauma, discomfort, emotional shock, as well as pain and suffering due to burying someone else's child and not granted the right to bury her own baby. Consequently the plaintiff demands compensation from the first and second defendants, jointly and severally the one paying the other to be absolved, in the sum of R 500 000, 00 for general damages.

The plea

[4] The defendants deny that the plaintiff suffered compensable psychiatric injury considering the merits of the case and that she was provided with the remains of her still born baby. The conduct of the health professionals who interacted with the plaintiff at first respondent did not contribute to the plaintiff's alleged damages.

The evidence

[5] The plaintiff was the only witness in her own case. She testified that she gave birth to a child on 27 September 2020 at the first defendant. She went to hospital and stayed there. In the early hours she gave birth. After giving birth the nurse told her that the child was born tired and had passed on. She was taken out of the labour ward to another ward. Then later on the corridor. One nurse came and asked other nurses why she was put in the corridor. She called her mother but the hospital had already called her mother and informed her of the status of her birth.

[6] On 28 September 2020 paternal and maternal aunts of the deceased child, (that is the families of the child's father and mother respectively), came to hospital. The family members were told by hospital staff that the child was tied by an umbilical cord, but that is not what was told to her. The hospital staff told her to get services of a mortuary. Family members went with mortuary to fetch the baby and found the baby in a coffin. They followed the hearse to go home. When they got home, she proceeded straight to her bedroom and not into her mother's bedroom as it is where the child was. Later that day the baby was buried inside her mother's bedroom. After the process, they had to look for someone to come do cleansing, who promised to come early the following day.

[7] She received a call from hospital personnel who enquired about her mother. She informed them that her mother had gone away to visit her siblings. The hospital personnel came to her house and informed them that the child they had buried was not theirs. She enquired as to whose child she was grieving but they could not tell her the names of the parents of the child. After three weeks the hospital and government personnel came to

exhume the remains. She was told that the remains of the child who was exhumed was older as the child had come to the hospital due to illness while hers was still born. She did not see the corpse which was brought for burial. The hospital personnel left without fixing the mess they had created in the house. Her family had to find someone to fix the floor and house.

[8] After some time the hospital personnel came to take them to the clinic. That is when she met the other child's parents for the first time. When she enquired from the said parents where they had been, they informed her that the hospital did not want to disclose to them the whereabouts of the remains of their child. The hospital said they will keep in contact with them to track progress but they never contacted them again. She does not know if the remains provided to them is those of her child because in her culture she is not allowed to enter where the child is. She is not certain if the child she re-buried is hers or not. This has affected her family greatly, especially her as she has constant headaches. She has taken her sister's daughter who was born on 28 September 2025 to comfort herself. If one enters her mother's bedroom, one will notice and see that there are two graves.

[9] Under cross-examination she testified that she does not know if the child was still born or not as she was not shown the child. This has affected her emotionally. She confirmed that miscarriages happen in pregnancy but what has hurt and affected her is the swapping of the child at hospital. When the child was taken at mortuary she was not there as she was in the maternity ward. She does not know what happened at mortuary. She accepted the child that was given to her as she does not know the procedure at hospital after a child passes away. She does not know if she has to put the child in the coffin herself. In her culture she is not allowed to

enter a bedroom where the child is buried. At home she is not allowed to see the corpse. At hospital, after giving birth, she was only told that her child had passed on but was never shown the child.

[10] She had accepted that the child she gave birth to had passed on, but what hurt her is that she was later given another baby to bury. She cannot dispute that the child she re-buried is hers. Her child was not buried in the same grave that was used for the exhumed child. There are two graves in her mother's bedroom.

Plaintiff's case.

[11] The first witness for defendants was Samuel Itumeleng Mosimane (Mosiane) who testified that he is a medical doctor employed by the defendants. He is aware of the plaintiff's matter. During the year 2020 he was Acting Clinical Manager for Lehurutshe Medical Complex. One Tuesday he was called by a member of the hospital who told him about an incident which occurred the previous day in the mortuary where two babies were swapped. He asked the executive who called him to tell him which funeral parlour took the child so that they can stop them from burying the child. He found that they had already buried on 29 September 2020 whereas he got the information on 30 September 2020 which is a day after the incident.

[12] He organised his executive to go meet the family of the deceased to inform them that the baby they buried was not theirs. They called the family and told them that they were on their way. They went to the family's house and found that the family had already gathered waiting for them. They met the family in the sitting room, explained what happened and returned to the hospital to reconvene for further processes. The process was to inform the

Regional Manager so that he can inform the MEC. The buried child remained buried while the other one remained in mortuary while they embarked on exhumation processes. They informed the District Manager who informed the MEC. They also informed COGTA, the Municipality and arranged psychological support for grieving person.

[13] They arranged the social worker of the hospital to assist with the grieving process. According to the social worker report, she went to the family and made group assessments. She was still open for individuals to get assistance if individual assistance was required. It took nine (9) days to get all signatures and approval. They went to the family house with the members of the South African Police Services. The exhumation was done by Avbob. The M[...]2 family and M[...] family were present. He was there with two police officers, people from the funeral parlour, elders from M[...] family and M[...]2 family. The body was buried in one room. They dug the room, removed baby M[...]2 and re-buried the baby M[...] in the same grave. They made sure they don't leave anything out of order as they plastered the room. They proceeded to another village to bury the one who was exhumed. The expenses were covered by the Department of Health via Avbob Funeral Parlour according to his knowledge.

[14] They did not deny anyone an opportunity to see the baby. Their goal was to bury the baby. Sometimes the family does not allow the mother to see the baby. The family did not allow the mother to see the baby. In identifying deceased bodies at the hospital they use body shrouds. For babies they use linen saver as they are small. They write their names on green four corner tags. One on the head, one on the chest and one on the leg. That is how they identify a corpse before they put them in the fridge. On Monday (day of incident) he was not there but on Tuesday when he

arrived baby M[...] had tags. Baby M[...]2 still had tags when he was exhumed.

[15] Under cross examination he confirmed that the baby given to the M[...] family was the wrong child. In mortuary setting they have mortuary attendant, they also have the family that will come with mortuary to take the corpse to private mortuary. The hospital mortuary attendant is the one guiding the process. It is the duty of the hospital mortuary attendant to ensure the correct baby is given to the correct family. He could not tell what caused a wrong baby to be given to the family on Monday as he was not there, but that on Tuesday he was there and the baby had tags. There was no need to do DNA tests because on that week they only had two babies that had died. It was a 6 months old and a still born.

[16] He conceded that the fact that the hospital mortuary attendant had to attend to other duties she had neglected her duties in respect of baby M[...] and was thus negligent. Because the procedure was not followed to the core, there was a bit of negligence. He was not present on the day baby M[...] was put in the coffin and the day of the incident.

[17] The second witness for the defendants was Itumeleng Josephine Kanye (Kanye) who testified that she was employed by the first defendant as a mortuary attendant at the time of the incident. Her job description was to issue and receive. To issue means when people come into the mortuary, her job is to assist them get their corpse or body. At the time of the incident it was during Covid pandemic and it was very busy. While she was helping the M[...] family there was a long queue and she was working alone. From the M[...] family she can’t remember their names but the father and aunt were there.

[18] The one who signed the form is the aunt by the name of N[…] K[…] T[…]. She assisted the M[...] family and while waiting for the hearse to come, she assisted another family. She assisted the M[...] family with a form called BI-1663 and they went outside. Another family came in to be assisted. The other family complained that their corpse had covid but was not wrapped whereas corpses with covid had to be wrapped. There was a conflict or quarrel between her and the said family. As she was working alone and phones were not working, she had to leave to go call management due to noise. As she was about to leave, it was the time the hearse for the M[...] family came in. She informed the M[...] family about the conflict with the other family and that she had to go call management.

[19] She also informed the hearse personnel of the situation and requested them to go inside and look for a certain fridge as the two bodies were in the same fridge. The corpses were in one line of the fridge. She informed the hearse personnel that they differentiate the babies by tags on the head, chest and legs. Further that they will find a still born and a 6 months old baby. She left the M[...] family with the hearse personnel. She allowed the M[...] family to enter the room so that they could identify the baby via tags which were on the head and wrist. Management came and took the family which was quarrelling with her away. When she came back, she asked the M[...] family if they identified the child as the hearse had already left by that time.

[20] At that time she had not noticed that the hearse had taken a wrong baby. She only noticed the following day that a wrong body was taken by the hearse for the M[...] family. That is when the M[...]2 family came for their own child and she had to give them a BI form to complete. The M[...]2

family confirmed that the body was not that of their baby and started to cry. She called management who came and took the family to their offices and left her behind. What caused the children to be swapped is because it was covid times, it was unusual and life was not normal. She was in distress and had a quarrel or conflict with another family. It has never happened in her career that a child is swapped. She has been working for the defendants for eighteen (18) years, but it was thirteen (13) years at the time of incident.

[21] Under cross examination she testified that the process of identification of the body involves assisting the family to complete a BI-1663 form. Then an undertaker comes. They open the shelf where the body is kept and ask the family to identify the body. Once done, the undertaker removes the body to a private mortuary. It is her duty to ensure that the undertaker removes the correct body. She conceded that she was negligent but testified that there was a quarrel with another family and she had to call management. Her employer is negligent for making her work alone for 18 years in a situation which traumatises her.

The authorities and reasons for judgment

[22] At the outset, for the plaintiff to succeed in a claim of this nature, she must prove that there was negligence on the part of the defendants, which led to a breach of the duty of care, and as a result thereof she has suffered a detectable psychiatric injury. Mere nervous shock or trauma is not sufficient. The fact that the defendants were negligent, which resulted in a breach of duty of care, is not sufficient on its own to warrant success or compensation in matters of this nature. The plaintiff has to do more or go further and establish a detectable psychiatric injury.

[23] This issue was discussed and confirmed in the case of ***Road Accident Fund v Sauls 2002 (2) SA 55 (SCA)*** at par 13 where Olivier JA held as follows:

> "In my view, the so-called flexible approach or test of legal causation does not require in the present case either a denial of or limitation to the plaintiff's claim, apart from questions of proof of the quantum of damages. It must be accepted that in order to be successful a plaintiff in the respondent's position must prove, not mere nervous shock or trauma, but that she or he had sustained a detectable psychiatric injury. That this must be so, is, in my view, a necessary and reasonable limitation to a plaintiff's claim."

[24] What then is a detectable psychiatric injury? A Detectable psychiatric injury is a recognised mental illness or psychological condition (such as PTSD, Major Depression or anxiety disorder) that is diagnosed by a professional and proven through evidence rather than a simple, temporary emotional distress of grief. In his paper, ***Ahmed R – The influence and reasonableness in determining delictual or tort liability for psychological or psychiatric harm in South African and English Law [2023], Potchefstroom Electronic Law Journal***, states as follows:

> "In English and South African law there is no precise definition of psychiatric or psychological harm but some form of medically recognised psychiatric or psychological harm is required, which is that the harm must be reasonably serious; that is, it must not be trivial or minor. In English law the primary victim must sustain psychiatric harm from a reasonable fear of harm to himself or herself. With regard to secondary victims, the psychiatric harm must be induced by some form of shock. The influence of reasonableness on harm is implicit in the sense that it is unreasonable to hold the defendant liable if the harm was not medically recognised or minor."

[25] In casu, the evidence of Mosiane and Kanye clearly established negligence and breach of duty of care on behalf of the defendants. Mosiane was not

present on the day of the incident when the babies were swapped. There is no evidence that the hospital staff asked the plaintiff to see the baby and she refused. Mosiane only testified on re-burial, which the plaintiff cannot dispute as correct. On all issues relating to swapping of the child, he cannot assist as he was not there. The plaintiff testified that the nurses did not show her the child. They only informed her that her child had passed on. Her family was not shown the child or taken through the process of handing over of the child.

[26] With regard to Kanye, she testified that she left the plaintiff's family to go into the room where the child was on their own. She was busy with other people as it was covid and too busy. She informed the hearse personnel what to do but did not ensure that it is done. She informed the family to enter but did not state what she told them to look for. She left them there to fend for themselves. People who had never seen the baby before and who do not know how the process of identifying children in such situations works. No evidence has been placed that the hearse people also understood what they were looking for or knew how to identify the M[...] child. She came back from attending to the other family with management, asked the M[...] family if they identified their child to which there is no evidence of their response. She did not go inside the room where the fridge is to check and ensure that the correct baby was taken. She knocked off, went home and waited until the following day when another family complained, to realise that a wrong body of a baby was taken.

[27] Clearly no proper hand over or identification of the baby was done. Nothing was said about how the family was assisted in identifying the child. The plaintiff's family was not present when the child was born. The plaintiff herself was not shown the child. How then is it expected that the

family would know how their sister's newly still born child looks like. They were left on their own in a room where corpses are placed. On the version of both defendants' witnesses, (Mosiane and Kanye), it is the duty of the mortuary attendant and ultimately that of the hospital to ensure that the correct baby is given to the correct family. However, is this sufficient for the plaintiff to succeed in her claim?

[28] The incident occurred in 2020. The plaintiff claims to have recurring headaches but no professionally diagnosed medical condition or evidence was tendered in respect of that. The plaintiff cannot simply allege shock. It must be substantiated by expert psychiatric evidence. I do not know if the plaintiff has or is suffering Post Traumatic Stress Disorder (PTSD), Depression, medically diagnosed migraines or anxiety. I do not know how often the headaches occur, severity of the headaches, in the morning or when it is cold or otherwise. I do not know if the plaintiff has reached maximum medical improvement in that she will remain in this mental state (with headaches) for the rest of her life or the symptoms will resolve over time and if so how long. I do not know whether the prognosis is good or poor and if this is permanent or temporary. No evidence to such effect has been tendered.

[29] At the commencement of the case, Counsel for the plaintiff indicated that they have a report by a medical expert, however elected not to utilise it or call the medical expert who authored same. The defendants' Counsel also indicated that they had medical experts but none of them were called. The plaintiff, at the time of the incident (swapping of the child), was already suffering grief due to the still born child. As to what extent and how manifest in her mental or psychiatric health had the swapping of the child

affected her, remains a mystery as no expert evidence has been led in this matter.

[30] As I have stated earlier, the authorities are clear that for the plaintiff to succeed in a claim of this nature, she must prove, in addition to negligence and breach of duty of care, that she has suffered a detectable psychiatric injury. In the case of ***R K and Others v Minister of Basic Education and Others 2020 (2) SA 347 (SCA)(18 December 20290*** Leach JA held as follows:

> "[24] In common law countries, claims for so-called nervous or emotional shock have historically been treated with a good measure of suspicion and wariness. Underlying considerations appear to have been, inter alia, that the shock experienced by witnesses to gruesome events is one of the many vicissitudes of life which people have to face and live up to, and should therefore not be regarded as actionable, and that to recognise shock as actionable might open the floodgates of litigation. Thus in *Bourhill v Young* Lord Porter said 'the driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including . . . the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm'.
>
> [25] However, for many years now, such a claim has been recognised in this country where the claimant shows that the nervous shock is associated with a detectable psychiatric injury. Thus, in *Bester v Commercial Union* this court, seemingly influenced to an extent by developments in England, held a psychological or psychiatric injury to constitute a 'bodily injury' for the purposes of delictual liability, and that there was no reason in our law why a claimant who suffered such an injury as the result of the negligent act of another should not be entitled to receive compensation.
>
> [29] Since then, claims for what has commonly, albeit incorrectly, come to be called nervous or emotional shock have been allowed in England, where it can be said that the shock gave rise to a psychiatric injury. Thus, in *Alcock v Chief*

Constable although a claim for nervous shock was disallowed, essentially on the basis that the damages were too remote, Lord Oliver stated:

'There is . . . nothing unusual or peculiar in a recognition by the law that compensatable injury may be caused just as much by direct assault upon the mind or the nervous system as by direct physical contact with the body. This is no more than the natural and inevitable result of the growing appreciation by modern medical science of recognisable causable connections between shock to the nervous system and physical or psychiatric illness. Cases in which damages are claimed for directly inflicted injuries of this nature . . . are not, in their essential elements, any different from cases where the damages claimed arise from direct physical injury . . . .'

As appears from these cases as well as the decisions, inter alia, in *White & others v Chief Constable of Yorkshire & others* and *Vernon v Bosley (1)* in English law damages are now recoverable for nervous shock or pathological grief disorder (ie grief which became so severe as to be regarded as abnormal and giving rise to psychiatric illness), if certain preconditions for recovery are satisfied.

[30] The development of the law on this issue in England was, to a large extent, mirrored in Australia, New Zealand and Canada. In all three of those jurisdictions, damages for 'nervous shock' are now recoverable where the claimant suffers either a physical consequence or some medically identifiable psychiatric illness or injury. In *Tame's* case in Australia, however, the court the court stressed that many of the concerns relating to the recovery of psychiatric injury receded if full force was given to the distinction between emotional distress, on the one hand, and recognisable psychiatric illness, on the other. Doing so reduced the scope for indeterminate liability or increased litigation, and restricted recovery to disorders capable of objective determination. As the learned authors of *Fleming's Law of Torts* put it, the court 'repudiated' the earlier policy limitations 'and held that liability was based on reasonable foreseeability unfettered by other restrictions'.

[31] It is clear from this that our law is closely aligned to that which prevails in Australia, and is more flexible than that of England which is bound by certain policy limitations. However, in all three of these jurisdictions, as well as those of Canada and New Zealand, a plaintiff can only claim damages for so-called

nervous or emotional shock where it is suffered as a consequence or cause of a detectable psychiatric injury. Gleeson CJ summarised the position succinctly in the following terms:

'. . . save in exceptional circumstances, a person is not liable in negligence, for being a cause of distress, alarm, fear, anxiety, annoyance or despondency, without any resulting recognised psychiatric illness.' (*Tame v New South Wales* para 7.)

To similar effect in *Van Soest v Residual Health Management Unit* para 28 it was said:

'The common law gives no damages for the emotional distress which any normal person experiences when someone he loves is killed or injured. Anxiety and depression are normal human emotions. Yet an anxiety neurosis or a reactive depression may be recognisable psychiatric illnesses, with or without psychosomatic symptoms. So, the first hurdle which a plaintiff claiming damages of the kind in question must surmount is to establish that he is suffering, not merely grief, distress or any other normal emotion, but a positive psychiatric illness.'

[32] Accordingly, there is no difficulty in recognising in principle the legal basis of the appellant's Claim A, which as I understand the pleading, is a claim for emotional shock attributable to a psychiatric lesion caused by the circumstances of S's death. It is a claim long recognised in this country and supported by the other common law jurisdictions I have mentioned. I shall return to whether given the facts of this case, liability in respect of that claim was established.

[38] It was argued on behalf of the appellants, however, that our law had relaxed even further and that this latter requirement was no longer valid. The argument in this regard was based upon the judgement of this court in *Mbhele v MEC for Health for the Gauteng Province*. In that matter, due to negligence on the part of certain hospital authorities, the appellant's child was stillborn. She instituted action for damages in the high court. The matter was decided on a stated case under Uniform rule 33. The court of first instance held that the appellant had abandoned her claim for emotional shock and her claim was dismissed. This court, on appeal, found that the high court had erred in finding that the appellant's claim for emotional shock had been abandoned and proceeded to consider whether it had been proved. It held that it had, and

awarded the appellant R100 000 as damages, saying that there could be no doubt 'that the appellant experienced severe shock, grief and depression'. It did so without specific agreement as to the existence of a psychiatric lesion having been set out in the stated case.

[39] On the strength of this, it was argued that this court had been prepared to allow damages for grief without proof of there having been a psychiatric injury to the appellant. It was unfortunate that the trial court had attempted to decide the matter on a stated case without all the necessary facts being fully and clearly set out, as was indeed observed by this court in its judgment. However, the stated case did record that the appellant had suffered from depression, in itself a mental illness, and it was further held that the appellant had suffered from emotional shock justifying damages which, too, by its very nature, implies a psychiatric lesion. At first blush, then, there was sufficient factual material to show that this was a case in which psychiatric harm had been suffered. But even more importantly, no reference was made to any of the authorities which have previously prescribed that grief, without an underlying psychiatric lesion associated therewith, cannot be the subject of a damages claim. Without those cases and the ratio of their decisions having been debated and adjudicated, it cannot be said that they have been overruled by a simple passing comment relating to grief. The decision in *Mhbele* is therefore no authority for the proposition that our law has changed and that this court has recognised a claim for grief where there is no psychiatric lesion.

[50] It would be extremely unfair to disregard the symptoms of grief and bereavement which the appellants have suffered because of the manner in which their claim was pleaded. This counsel for the respondents conceded. He also conceded that in assessing liability for damages under Claim A, regard should be had to the appellants' extended period of grief; and that what was allowable in respect that claim should not be limited in financial terms to the amounts claimed in the particulars of claim. This was consistent with his statement at the outset of the trial that the claim for grief was intertwined with Claim A, and would seem to be a practical and sensible solution. The result is that the appeal against the dismissal of claim A must succeed; and to the extent that the appellants are entitled to damages for grief and bereavement, account must be taken of this in assessing the proper quantum of damages under that head. The

appeal against the dismissal of claim B fails because the recoverable damages described therein are to be compensated under Claim A."

[31] In all authorities cited, expert diagnosis of psychiatric injury was proven and necessary. Without expert evidence on detectable psychiatric injury, and given the issues I have raised above, I find that the plaintiff has not acquitted herself in the threshold required to succeed in her claim. To find in favour of a claimant or plaintiff who subjectively and without expert medical diagnosis, in cases of this nature, claims headaches or psychiatric injury will lead to chaos and open floodgates for undeserving matters. The need for medical psychiatric intervention and evidence will assist the court as both plaintiff and defendant can have experts to prepare joint minutes which will assist in the evaluation of the psychiatric injury.

Costs

[32] Costs are a discretion of the court. The defendants' case as contained in their plea, and submissions by Counsel, has always been that the plaintiff did not suffer compensable psychiatric injury. I therefore see no reason why costs should not follow the suit.

Order

[33] I therefore make an order as follows:

1. The plaintiff's claim is dismissed with costs.

J. T. MAODI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

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Date judgment reserved:	17 November 2025
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