IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION : BHISHO

CASE NO. : 401/2021

In the matter between:

ASAVELA MCINGANA **Plaintiff**

and

MEC FOR HEALTH **Respondent**

JUDGMENT

SUMMARY

This case involves a claim for damages due to alleged medical negligence by the staff of the Member of the Executive Council for Health, Eastern Cape. The plaintiff, Asavela Mcingana, acting on behalf of herself and her minor child, L[...], claimed that the negligence of the medical staff during her labour and the birth of L[...] at Nelson Mandela Academic Hospital (NMAH) on August 24, 2017, led to L[...]'s cerebral palsy.

At trial, the issues of liability and quantum of damages were separated, with the court focusing solely on liability. It was conceded that the actions of the defendant's employees were substandard and negligent. The primary issues were whether the cerebral palsy was caused by a pre-partum or intrapartum event, and whether the negligence was causally connected to the cerebral palsy.

The plaintiff presented evidence from four witnesses, including medical experts, who supported the claim that the injury to L[...]'s brain occurred intrapartum due to prolonged labour and delayed caesarean section, leading to hypoxic ischemic encephalopathy (HIE). The defence presented four witnesses but relied heavily on Dr. Keshave, whose theories about possible pre-existing conditions causing the HIE were not sufficiently substantiated.

The court found in favour of the plaintiff, concluding that the negligent monitoring and delayed intervention by the defendant's medical staff were the probable causes of L[...]'s HIE and subsequent cerebral palsy. The court ordered the defendant to pay any damages which may be agreed or proved and costs, including the costs of two counsel, due to the complexity of the case.

GRIFFITHS, J.:

[1] This is an action for damages arising from the alleged medical negligence of employees of the defendant, the Member of the Executive Council for Health, Eastern Cape. The plaintiff has sued both in her personal and in her representative capacities as mother and natural guardian of L[...] M[…], a minor child.

[2] At the outset of the trial and pursuant to an agreement between the parties, I ruled that the issues of liability and quantum of damages were to be separated and that only the question of liability would be determined at the hearing.

[3] It is common cause that the plaintiff gave birth to L[...] at Nelson Mandela Academic Hospital ("NMAH"), Mthatha, by way of a caesarean section at 23:29 on 24 August, 2017, and that he suffers from cerebral palsy. It was also apparently agreed that the remaining issues which fell to be determined by this court were, firstly, the question as to whether the medical staff of the defendant (admittedly acting within the course and scope of their employment with the defendant) acted with negligence during the course of their medical supervision of the plaintiff whilst she was in labour and during the course of the birth of L[...] and, secondly, whether such negligence, if proved, was causally connected to the cerebral palsy.

[4] During argument it seemed that the issues were narrowed down further in that, as I understood the defence, it was conceded that the actions of the defendant's employees were substandard, amounting to negligence. Accordingly, the only remaining issues as expressed during argument are two interrelated issues, these being, firstly, whether the insult which caused the cerebral palsy occurred pre-partum or intrapartum and, secondly, whether such negligent acts on the part of the defendant's staff were causally connected with the cerebral palsy.

[5] Four witnesses testified on behalf of the plaintiff. These were, the plaintiff herself, Dr Murray (an obstetrician and gyneacologist) Dr Kara (a

pediatrician) and Prof. Andronikou (a radiologist). The defendant also led the evidence of four witnesses, these being Mr. Maholwana (an ambulance driver), Dr Keshave (a pediatric neurologist), Prof. Cooper (a pediatrician/neonatologist) and Dr Swan (an obstetrician and gyneacologist).

[6] Because the issues have narrowed considerably, I do not intend to summarize the evidence of each and every witness. The facts leading up to the birth of the child were testified to by the plaintiff herself as read with the admitted hospital records. It behoves me to mention at this stage that the hospital records as kept by the defendant's servants were, generally, very cryptic with the use of medical shorthand and, in many instances, unintelligible. The defendant did not lead the medical witnesses who authored these notes and accordingly the experts who testified, and ultimately the court, were left to interpret and interpolate these notes as best possible and, in many instances, this resulted in speculation.

[7] It is however common cause that the plaintiff was referred from Canzibe Hospital to NMAH for a cesarean section. It is further common cause that Canzibe is a district hospital.

[8] According to the plaintiff's evidence, as read with the maternity case records, she was a primigravida with no medical risks. Her expected delivery date was 16 August 2017, and she commenced her clinic visits on 24 January, 2017. There was good foetal growth up to 38 weeks and she was treated for a vaginal discharge during May 2017, and 27 July 2017. On the latter date, she was admitted to hospital for a urinary tract infection ("UTI") and was discharged on 31 July 2017. During this, there were no concerns relating to

foetal wellbeing. Once again, on 22 August 2017 she attended at the clinic without complaint.

[9] On 24 August 2017, she experienced abdominal pains and arrived at Canzibe at 13:40. Foetal movement was felt, and she was assessed as being 36 weeks. There was a yellow vaginal discharge. Oxygen was administered and the plaintiff was not informed that anything was wrong with the baby.

[10] At 16:34 the CTG was recorded as being "*non-reassuring*". She was assessed by a doctor who recorded a tender abdomen, a one cm dilated cervix, and a greenish discharge. There were no contractions. Foetal distress was recorded. She was informed that as there were no doctors in attendance, the nurse would phone for an ambulance so that she could be transferred to NMAH. The following was further recorded: "*? Foetal distress and ?Chorioamnionitis. For cesarean section*".

[11] According to the ambulance records, the call centre received the request for an ambulance at 17:36 and the ambulance arrived at Canzibe, at 19:20. Plaintiff testified that the ambulance arrived at NMAH at 21:00 and that she was taken to theatre for the caesarean section at 23:00.

[12] The NMAH records reflect that at 21:40: "*the plaintiff's blood pressure (BP) was 149/93, and she had been referred from Canzibe with foetal distress. The plaintiff had labour pain from 08:00. The plaintiff reported good foetal movement. The foetal heart rate was 140 on CTG, cervix admitted one finger, meconium liquor grade 4, no foul smelling liquor or discharge. The concern on*

referral was foetal distress and chorioamnionitis. Last felt foetal movement in the morning. Ultrasound recorded a live singleton with bradycardia, 35+ week of gestation. CTG – variable decelerations. For intrapartum resuscitation and for emergency CS. Currently there is another emergency in the theatre. Still has to wait for blood results."

[13] Apgar scores were two, five and five. Thick meconium was suctioned, and mask oxygen was administered. The baby was sent to neonates. According to the caesarean section record, the procedure was for foetal distress and tachysystole. The decision to operate was made at 21:45. There were late decelerations and variable decelerations. The baby had low Apgars, and a spinal anaesthetic was administered.

[14] The summary of labour reflects that the baby was born at 23:29 and no comment was made regarding resuscitation. The placenta was normal and there was an abnormal cord with three vessels. The baby had a weak cry.

[15] Plaintiff further testified that she had been told that the baby did not cry at birth and had experienced seizures. When she saw him the next morning, he had tubes inserted and she was obliged to express milk to tube feed him.

[16] As an aside, it ought to be mentioned that it was argued by the defence that the plaintiff had said in this regard that "*the baby had some seizures while inside…*" Whilst it is correct that this is reflected on the record, it was clarified immediately thereafter that the interpretation was not correct. Upon such

clarification, as confirmed by doctors Kara and Keshave who had discussed this with the plaintiff, it became clear that the baby suffered such seizures post birth.

[17] The plaintiff further testified that L[...] remained in hospital for about two weeks after which he was transferred back to Canzibe, from where he was discharged. Finally, the plaintiff testified that caesarean sections had in the past been performed at Canzibe as her sister had undergone such a procedure during May, 2017.

[18] Prof. Andronikou, a radiologist who testified on behalf of the plaintiff, confirmed on examination of the MRI scan of L[...]'s brain that the features represented a prior hypoxic ischemic brain injury ("HIE") with a watershed pattern most likely in keeping with a prolonged insult occurring in the perinatal period. Of importance, he excluded chromosomal abnormalities and highlighted that the cause of the injury was hypoxia, and not infection. He stated clearly that the brain pattern was not representative of a growth restriction pattern as growth restricted brains shrink globally causing the entire brain to shrink, not a portion thereof.

[19] There is no dispute that the plaintiff bears the onus regarding the disputed issues. Regarding the question of negligence, the onus would be discharged were the plaintiff to establish, on a balance of probability, that a reasonable medical practitioner in the circumstances in which the nurses and/or doctors at the hospital found themselves would have foreseen the likelihood of harm occurring (in this matter the likelihood of harm occurring to L[...]) and would have taken steps to guard against its occurrence, and the practitioners concerned

failed to take such steps[1]. In the case of an expert, such as a surgeon, the standard is higher than that of the ordinary layperson and the court must consider the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs[2].

[20] Furthermore, where the plaintiff has presented evidence which of itself raises, at the very least, a *prima facie* case, an obligation in the form an evidential onus passes to the defendant to rebut such *prima facie* case and to explain how the injury came about.

[21] It is clear, on the evidence and as conceded by the defence and particularly Dr. Swan, that there existed substandard care amounting to negligence in that there was poor monitoring of the foetal heart rate ("FHR") and that, as Canzibe Hospital was a district hospital, it should have been able to perform a caesarean section, but it did not. It seems that Dr. Swan further conceded that in the circumstances prevailing, that is where Canzibe could not perform such a caesarean section, more should have been done by the medical staff, including regular monitoring, to prevent foetal stress over the many ensuing hours until 23:29 when L[...] was born at NMAH. The question which this court has therefore to answer, is whether the plaintiff has established, on a preponderance of probabilities, that these actions were the cause of the HIE.

[22] On the evidence of the plaintiff, and in particular the expert evidence of Drs Murray and Kara, the plaintiff made out a strong *prima facie* case that the

[1] ***Kruger v Coetzee*** 1966 (2) SA 428 (A) at 430; ***Mukheiber v Raath & Ano.*** 1999 (3) SA 1065
[2] ***Mukheiber*** at paragraph 32; See generally as to the approach to evidence of expert witnesses: ***JBA obo DA MEC for Health*** 2022 (3) SA 475 (ECB).

injury to L[...]'s brain occurred intrapartum as a consequence of the extended labour due to the delay in getting the plaintiff on to the theatre table at NMAH. During this period, whilst the foetus was in distress, the continued contractions would have resulted in a cumulative decrease in both the blood flow and consequent oxygen provision to the brain. As emphasized by all the practitioners, this would have occurred over period, consistent with the MRI brain pattern as described by Prof. Andronikou.

[23] Furthermore, Drs Murray and Kara in careful and logical analyses concluded that no other possible pre-existing condition (such as chorioamnionitis for example) would have been the cause of the HIE. At most, even if such conditions had existed, these would have resulted in a vulnerable foetus, that is a foetus which ought to have been managed far more carefully in the circumstances as such features might have made the foetus more susceptible to the stresses which occur during labour, and particularly extended labour. Had this been done, the medical practitioners concerned would have been more alive to the necessity of ensuring that full and proper monitoring of the foetus was undertaken and that an early intervention, such as a caesarean section, was called for.

[24] Did the defendant rebut this *prima facie* case? As stressed earlier in this judgment, the defendant called none of the medical staff, or indeed any staff, who were involved in the treatment of the plaintiff during her confinement at both Canzibe and NMAH. It is this lack of evidence which, in my view, has resulted in a fair degree of speculation on the part of the defence[3].

[3]Lord Justice Brooke stated in this regard in the case of ***Ratcliff v Plymouth and Torbay Health Authority*** paragraph 48 (as quoted in ***Goliath v MEC for Health, Eastern Cape*** 2015 (2) SA 97 SCA at paragraph 17):

> "It is likely to be a very rare medical negligence case in which the defendants take the risk of calling no factual evidence, when such evidence is available to them, of the circumstances

[25] The major player in the defence case appears to have been Dr Keshave. Before dealing with his evidence, it should be said that I regard Dr Keshave as a highly competent and well-respected practitioner in his field, as particularly testified to by his accepted curriculum vitae and, indeed, in the manner he testified.

[26] Having said this, the impression I gained from Dr Keshave during his evidence was that he had become wedded to the possibility that L[...] may have suffered an insult causing the HIE before the plaintiff went into labour. In this regard, he referred to various possibilities such as infection, chorioamnionitis, growth restriction and an abnormal umbilical cord.

[27] However, under cross examination he conceded that these possible events fell more within the area of expertise of the obstetricians. Despite this, it appeared that he was not prepared to concede the evidence of Dr Murray in this regard because he believed that a possibility existed that some pre-existing condition may have caused the insult.

[28] For example, Dr Murray explained carefully and logically as to why she believed that chorioamnionitis did not exist. Not only did she point to the fact that the limited recordals of the clinic examinations did not necessarily indicate that the plaintiff suffered from vaginal infections, but rather from natural

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surrounding a procedure which led to an unexpected outcome for a patient. If such a case should arise, the judge should not be diverted away from the inference of negligence dictated by the plaintiff's evidence by mere theoretical possibilities of how that outcome might have occurred without negligence: the defendant's hypothesis must have the ring of plausibility about it…"

discharges which occur in every pregnancy, but she explained how the evidence available demonstrated that it was most unlikely that the plaintiff suffered from chorioamnionitis at any stage. Apart from anything else, there was no diagnosis thereof, it was merely mentioned in the final notes at Canzibe with a question mark next to it indicating that the staff at Canzibe were requesting the staff at NMAH to look into this. At NMAH it was clearly not diagnosed. And, added to this, was Prof. Andronikou's evidence to the effect that the MRI scan revealed no evidence of infection.

[29] She further testified that even if there existed latent or hidden chorioamnionitis which could not be detected, all the literature indicated that it was highly unlikely that this would have any effect on the foetus.

[30] Finally in this regard, she testified, as conceded by Dr Swan, that chorioamnionitis was unlikely to have been a cause of HIE in the circumstances but, at the most, might have made the foetus more susceptible to it. The proximate or main cause of the HIE in her view was clearly the insult which occurred over a period of time during labour as I have described earlier.

[31] Once again, Dr Keshave became somewhat wedded to the statement in the medical records that the foetus had an abnormal umbilical cord. Again, he deferred to the obstetrician and the defendant's own obstetrician, Dr Swan, laid this to rest by stating that it had no effect whatsoever.

[32] As regards the growth restriction as a possible cause, Prof. Andronikou laid this to rest in his evidence to the effect that the MRI showed no features of growth restriction to the brain.

[33] Dr. Keshave also mentioned that in his view there was insufficient evidence to establish the existence of cerebral palsy during the first 24 hours or so of the child's life span. This, likewise, was laid to rest by the evidence of the plaintiff as to seizures which occurred during this period and certain other factors such as the baby not crying, it requiring to be fed by tube and the low Apgar scores.

[34] All in all, it seemed to me that Dr Keshave regarded this more as an inquiry into *possible* causes but was unable to say that any one of these conditions, pre-existing or not, were the *probable* cause of the HIE suffered by L[...]. This, as against the strong evidence tendered on behalf of the plaintiff to the effect that the probable cause was the negligent conduct of the defendant's staff as I have described.

[35] This evidence caused the defendant, in the final analysis, to argue that the court ought to find that, "*cumulatively*", these various factors mentioned by Dr Keshave must have been the cause of the cerebral palsy. This argument does not take into account that most, if not all, of these possible causes were discounted on the evidence of the plaintiff on strong grounds and, even if one or more of these possible causes did exist, an accumulation of two or more possibilities without more cannot equal a probability.

[36] I accordingly find that the plaintiff has established on a preponderance of probabilities that L[...]'s HIE and consequent cerebral palsy was caused by the negligent conduct of the defendant's employees.

[37] The only remaining issue is the question of costs of two counsel, as the plaintiff is clearly entitled to her costs being the substantially successful party. I did not understand the defence to argue that the plaintiff was not entitled to the costs of two counsel and, in my view, the complexity of this matter clearly warrants such an order.

[38] In the circumstances, I make the following order:

1. **The defendant is ordered to pay the plaintiff's agreed or proven damages both in her personal and in her representative capacities for and on behalf of her minor child, L[...], which damages flow from the neurological injuries sustained by L[...] during labour and/or delivery at Nelson Mandela Academic Hospital on or about 24 August, 2017, and the resultant cerebral palsy (and its sequelae) from which he suffers.**

2. **The defendant is ordered to pay the plaintiff's taxed or agreed costs of suit, such costs to include the costs consequent upon the employment of two counsel.**

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R E GRIFFITHS

JUDGE OF THE HIGH COURT

COUNSEL FOR PLAINTIFF	**:**	**Ms Da Silva SC**
	:	**with Ms Mashiyi**
INSTRUCTED BY	**:**	**Msitshana Incorporated**

COUNSEL FOR DEFENDANT	**:**	**Mr Mpakane**
INSTRUCTED BY	**:**	**The State Attorney**

HEARD ON	**:**	**22 JULY 2024**
DELIVERED ON	**:**	**06 AUGUST 2024**