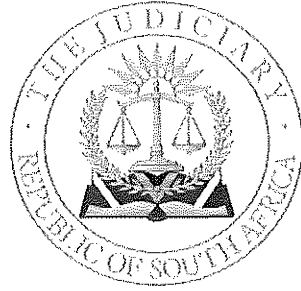


Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST PROVINCIAL DIVISION, MAHIKENG

Case No.: 365/2021

In the matter between:

LLM

Plaintiff

and

MINISTER OF HEALTH

Defendant

JUDGMENT

DIBETSO-BODIBE AJ

INTRODUCTION

[1] The Plaintiff, Ms LLM, instituted a claim for damages against the Defendant, the MEC for Health, arising from an incident of an alleged medical negligence which occurred during her admission from 05 to 07 April 2018 at Zeerust Hospital.

MERITS AND QUANTUM SEPARATED

- [2] At the commencement of the trial as agreed between the Parties, and by order of this Court in terms of Rule 33(4) of the Uniform Rules of Court, the merits (liability) were separated from quantum. The matter proceeded on the issue of liability, which the Court is called upon to adjudicate.

THE PLEADINGS

- [3] In terms of the Plaintiff's Particulars of Claim:
- [3.1] "On or about the 4th April 2018 and 7th May 2018 the Plaintiff was admitted at Zeerust Hospital, and at that time the Plaintiff was pregnant and close and or ready to deliver.
- [3.2] At the same time the Plaintiff was experiencing lower abdominal pain and nausea wherein the Plaintiff checked in at Gopane Clinic for check-up and then transferred to Zeerust Hospital...
- [3.3] The nursing staff at both Gopane Clinic and Zeerust Hospital were at all material times working for Defendant and as part of their duties they diagnosed Plaintiff after checking her and consequent to their checkings and diagnosis Plaintiff suffered a miscarriage before being discharged from the hospital.
- [3.4] It was expected that Defendant's nursing staff and doctors would apply diligent skill and care upon Plaintiff when examining her and before they could allow the Plaintiff to check out of hospital on the 6th April 2018 as she had suffered miscarriage.

[3.5] Defendant's nursing staff and doctors failed to apply the skill and care in that they were negligent in performing their duties to the extend that they failed to observe that another dead foetus was still kept inside of Plaintiff as the 1st foetus was removed and/or delivered.

[3.6] On the 07th May 2018 Plaintiff was again admitted at Zeerust Hospital after again experiencing severe abdominal pains and acute foul smelling vaginal discharge and it was discovered that Plaintiff had another foetus left inside of her upon her miscarriage of 04 April 2018.

[3.7] At all material times Plaintiff was treated and examined by the doctors and nursing staff of Zeerust Hospital staff who were expected to treat Plaintiff with diligent skill and care upon attending to Plaintiff diagnosis and medical assistance.

[3.8] The doctors and nursing staff failed in their duty to care of Plaintiff as a result of which Plaintiff suffered miscarriage and further that a deceased foetus was left inside of Plaintiff for a period of over 30 days.

[3.9] The negligent conduct of the said doctors and nursing staff of Zeerust Hospital caused Plaintiff to suffer severe harm in the form of partrimonial damages as follows:-

(a) Emotional discomfort / harm or distress.

(b) Pain and suffering.

(c) Loss of amenities of life.

[3.10] At all material times the doctors and nursing staff of Zeerust Hospital were working within the scope of their employment with the Department of Health...

[3.11] The Defendant as the employer of the doctors and nursing staff ... is vicariously liable for damages caused to Plaintiff as a result of the negligent conduct of the said doctors and nursing staff in their failure to properly diagnosing Plaintiff thereby causing her to suffer miscarriage and to carry a deceased foetus for over a period of 30 days.”

[4] The Defendant denies that:-

[4.1] the Plaintiff was admitted on 7 May 2028 and was close and/or ready to delivering a baby,

[4.2] the Plaintiff suffered a miscarriage consequent to the examination and diagnosis by the nursing staff,

[4.3] the doctors and nursing staff failed in their duty of care for the Plaintiff,

[4.4] a deceased foetus was left in the Plaintiff's uterus for a period of over 30 days,

[4.5] the conduct of the medical staff at Zeerust hospital caused her to suffer the alleged partrimonial loss,

[4.6] the alleged negligent conduct cause the Plaintiff to incur general damages in the amount of R1,8 million.

PLAINTIFF'S EVIDENCE

- [5] On 04 April 2018 the Plaintiff was at home when she started experiencing vaginal bleeding and abdominal pains. She then went to Gopane clinic where she was referred to Lehurutshe hospital. Following medical examination by the nursing staff at Lehurutshe hospital, the Plaintiff was transferred to Zeerust hospital by ambulance.
- [6] Upon her arrival at Zeerust hospital around 02h00 on 05 April 2018, the Plaintiff was examined by the medical staff. In the morning the doctors and nurses came to see her and she explained to them that she was bleeding and experiencing pains and also that she was pregnant.
- [7] The next morning of 05 April 2018 the doctor came to see her and informed her that she would be taken to theatre. According to the Plaintiff, she does not know what happened to her as she was administered general anaesthesia upon arrival at the theatre and regained consciousness later in the afternoon.
- [8] When she woke up in the general ward, the doctor and the nurse came and explained to her that they "took out the clots". This was translated to her in Setswana. The Plaintiff told the doctor that she was in pains and the doctor instructed the nurse to give her pain killers. The Plaintiff further explained "the doctor said he removed clots in me and did not explain anything about the pregnancy. I did not ask the doctor about the pregnancy."
- [9] According to the Plaintiff, she remained in pains until the 07 April 2018. When the doctor came again she told him that she was still

experiencing pains and she was given pain killers. The Plaintiff was discharged from hospital later that day of 07 April 2018.

[10] On 05 May 2018, during the day, the Plaintiff felt sever pains in her abdomen. She went to Gopane Clinic which was closed at that time. She then went to Lehurutshe hospital which was also closed. According to the Plaintiff she proceeded to Dinokana Clinic and “that is where I got help. They removed the baby. They examined my private parts and saw that the baby was visible.” Asked whether she saw what was removed from her body, the Plaintiff said “Yes, the baby was removed from the body and when I arrived home clots came out.”

[11] According to the Plaintiff, she was given medication and told to come for scan. During re-examination it became clear that the Plaintiff was in fact told to come for sonar as per proof of the sonogram which forms part of the Plaintiff’s medical records.

[12] It was the Plaintiff’s evidence that she is still experiencing pains mostly when she works with heavyload stuff.

MEDICAL RECORDS (HOSPITAL NOTES)

[13] The medical record of the Plaintiff was handed in as bundle “B” and in accordance with Rule 35(9) of the Uniform Rules of Court. The eight (08) page document which consisted of the Plaintiff’s discharge report from Zeerust / Lehurutshe hospital, referral form from Gopane Clinic to Dinokana Clinic and the hospital notes from Dinokana Community Health Centre (CHC) was placed before the Court as proof of what transpired in support of the Plaintiff’s evidence.

[14] The content of the medical record, mainly hand written notes states:

[14.1] "Lehurutshe / Zeerust hospital Complex: Patient Discharge Report – Date of admission: 04/04/2018, Date of discharge 06/04/2018 (11h39), Diagnosis on discharge: Incomplete miscarriage, condition on discharge: Stable. Signed by the doctor with Reg no. MP0828661 and the Plaintiff."

[14.2] "General Referral from Clinic to Hospital and Feed-Back: Dinokana CHC on 05/05/2018

Patient's name: L [REDACTED] M [REDACTED], Address: Gopane, Age 29

Please take note over the above-mentioned patient for assessment/treatment

Short history of illness: Client seen at Gopane clinic with history of lower abdominal pain and nausea and still presenting with the same problem. Miscarriage a month ago

Findings on examination: bleeding noted, foetus delivered, clots and membranes expelled.

Nursing diagnosis: palpable mass & excessive bleeding."

[14.3] "Case History Sheet (Hospital O.P.D and Clinics)

04/05/18 (10h00) –

C/o nausea reports, had miscarriage a month ago now reports feeling some movement on some lower abdomen. Talked to Dr Moalou over the phone. Advised to refer client to Dinokana Health Centre on Monday for sonar.

05/05/2018 –

Client seen at Gopane clinic with the same problem, returned from Lehurutshe hospital as it is not operating, pain experienced on palpation, bleeding ++, previous miscarriage and evacuation done @ Zeerust hospital a month ago.

12h15

Delivered a foetus spontaneously (6cm). All clots expelled and membranes apparent completely. Uterus contracted. Clinically looks well. To be reviewed by M.O Monday. To collect blood grouping.

Medication: Flaggyl, Amoxyl, Syntocinin

07/05/2018

Dr E O Moalusi (MP0712221) Patient referred by Gopane clinic? Missed miscarriage and twin, she had an incomplete miscarriage in April – was evacuated in Zeerust hospital and discharged. Subsequently carried the remaining unevaluated twin.

C/o moderate PV bleeding, mild abdominal discomfort, no fever, no dizziness.”

DEFENDANT'S EVIDENCE

[15] No evidence was adduced on behalf of the Defendant. Senior Counsel for the Defendant contended that the Court refused to grant the Parties postponement because "on the date of trial, the Parties agreed that the matter would not proceed because of the Defendant's failure to file his expert's report on time". The Court refused to grant the Parties postponement after they failed to comply with the order of Dewrence AJ of 26 July 2023 that experts reports by Defendant's expert witnesses be filed by 15 December 2023, like experts to meet on or before 15 January 2024 and joint minutes of like experts to be filed by 29 January 2024.

EXPERT REPORT OF DR DONALD AMOKO (SPECIALIST OBSTETRICIAN AND GYNAECOLOGIST) ON BEHALF OF THE PLAINTIFF

[16] The Court accepted Dr Amoko's expert report as Bundle "C" on behalf of the Plaintiff, however, the Senior Counsel on behalf of the Defendant contended that this was done despite the signed pre-trial minutes expressly recording that the Plaintiff's two expert witnesses would be called to give oral evidence and that no document, whether affidavit would be tendered. The pre-trial minutes did not form part of the Court Bundle and this accord with what the Senior Counsel for the Defendant observed that Bundle "A" consisted of the pleadings, Plaintiff's discovery affidavit, two expert notices, reports and summaries and the pre-trial agenda. In the premises, this issue cannot be taken any further.

[17] I do not intend to belabour on the quality of this report for it does not assist the court nor does it advance the Plaintiff's case. It is alleged at the foot note of a two and half page report that the source

of information which informed the expert's opinion is derived from Mogau Attorneys, AMA Guides and information from clinical history, physical examination and ultrasound assessment of the Plaintiff.

[18] The opinion is basically what the Plaintiff had told Dr Amoko and based on the Plaintiff's say-so Dr Amoko opined as follows:

"Comment

- 1. In a district hospital under normal conditions, when a patient is referred with a nursing diagnosis of incomplete miscarriage, the doctor at the hospital must conduct a thorough examination including ultrasound before instituting a definitive treatment.*
- 2. There is no evidence in the initial notes available to the writer that thorough evaluation of L [REDACTED] was done. If this was done, a twin pregnancy would not have been missed. It is also strange that during an evacuation a twin pregnancy was missed.*
- 3. Furthermore it is mandatory that a patient that has been to theatre for evacuation must have post-evacuation ultrasound before discharge.*

Opinion

- 1. The management of L [REDACTED] is not only Substandard but also Negligent*
- 2. L [REDACTED] qualifies for compensation for pain, suffering and stress caused by this gross negligence under general compensation under AMA Guidelines of 2%"*

- [19] This opinion is based on the “say-so” of the Plaintiff, no research had been done to assist the Court on the medico-legal understanding of the concepts “twin pregnancy, miscarriage vis-à-vis stillbirth given the period of gestation, missed miscarriage, incomplete miscarriage, retained products of conception (clots, membranes and placenta) etc. The Expert also referred to some sources of information that he received without including same in the report.
- [20] Strikingly odd is that the expert report says nothing about the personal qualifications and experience expert’s and in particular, the specialized experience concerning the matter before this Court. An expert is an expert based on the years of specialized experience, research work done, text books written etc. In my view, the report has failed to pass the muster of an expert report/opinion.
- [21] The Senior Counsel for the Plaintiff contended that “the comment and opinion expressed by Dr Amoko in his medico-legal report, to the extent that it remains uncontradicted, constitutes valid expert evidence which is admissible, without him having to adduce evidence”. This cannot be correct. On the contrary his absence from giving oral evidence means that all the grey areas in his report remains unanswered living the court with an onerous burden of evaluating the factual evidence of a single witness unassisted with the relevant medical scientific knowledge.

THE VALUE OF EXPERT WITNESSES AND THEIR EVIDENCE

- [22] *“... The functions of an expert witness are threefold. First where they have themselves observed relevant facts that will be evidence of fact and admissible as such. Second, they provide the court with*

abstract or general knowledge concerning their discipline that is necessary to enable the court to understand the issues arising in the litigation. This includes evidence of the current state of knowledge and generally accepted practice in the field in question. Although such evidence can only be given by an expert qualified in the relevant field, it remains, at the end of the day, essentially evidence of fact on which the court will have to make factual findings. It is necessary to enable the court to assess the validity of opinions that they express. Third, the evidence give concerning their own inferences and opinions on the issues in the case and the grounds for drawing those inferences and expressing those conclusions.”¹

- [23] Before an expert witness may be called it is necessary to deliver a summary of the witness's opinions and the reasons therefor in terms of Uniform Rule 36(9)(b). The summary must at least include:

“... the facts or data on which the opinion is based. The facts or data would include those personally or directly known to or ascertained by the expert witness, e.g., from general scientific knowledge, experiments, or investigations conducted by him, or known to or ascertained by others of which he has been informed in order to formulate his opinions, e.g., experiments or investigations by others, or information from text books, which are to be duly proved at the trial.”²

¹ AM and Another v MEC for Health, Western Cape (252/2018) [2020] ZASCA 89 (31 July 2020) (AM) at para [17]

² AM cross referencing from *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft for Schadlingbekapfung MBH 1976 (3) SA 352 (Coopers)* at 37A-H

[24] *“... an expert opinion represents his reasoned conclusion, based on certain facts or data, which are common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted an expert's bald statement of his own opinion is not of real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.”*³

[25] *“Opinion evidence is admissible ‘when the court can receive “appreciable help” from that witness on the particular issue’. That will be when:*

*‘... by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact. There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion, but the help of an expert would be useful.’*⁴

[26] *“... An expert witness in the High Court should never assume the role of an Advocate”*⁵

[27] *“Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.”*⁶

³ AM cross referencing from Coopers at 371F-H

⁴ Price Waterhouse Coopers Inc and Others v National Potato Co-operative Ltd and Another (451/12)[2015] ZASCA 2 (4 March 2015) (PWC) at para [97]

⁵ PWC at para [98]

⁶ PWC at para [99]

[28] In the premises, the Court is inclined to reject the unsubstantiated opinion of Dr Amoko moreso that he also failed to give oral evidence of his opinion technically leaving the Court with no opinion at all.

EVALUATION OF PLEADINGS AND PLAINTIFF'S EVIDENCE

[29] According to the Plaintiff's Particulars of Claim, firstly, the medical staff at Zeerust hospital failed in their duty of care in that the Plaintiff suffered miscarriage when she was not supposed to have suffered such miscarriage and secondly, that when the medical staff removed a dead foetus from the Plaintiff's uterus, they failed to conduct the necessary medical examination as a result of which another deceased foetus was left unnoticed inside the Plaintiff's uterus for over a period of 30 days.

[30] During her evidence the Plaintiff told the Court that the doctor and the nurse came to see her in the ward after theatre and explained to her that they took out the clots and that this was translated to her in Setswana. During cross-examination the Plaintiff confirmed that the doctor said that he removed clots from her. In his summary report, Dr Amoko stated that the Plaintiff 'aborted a fetus and was done womb cleaning'. No evidence was led by the Plaintiff that the medical staff caused her to suffer miscarriage as averred in the Particulars of Claim. This issue was also not dealt with during argument on behalf of the Plaintiff.

[31] Concerning the Plaintiff's gestational age, it was averred in the Particulars of Claim that 'the Plaintiff was pregnant and close and or ready to deliver'. During cross-examination the Plaintiff told the Court that she is the one who informed the medical staff at Zeerust

hospital that she was pregnant and that she was two months and three weeks. According to Dr Amoko, the Plaintiff's gestation was of three months.

[32] The only information before the Court concerning the medical treatment of the Plaintiff at Zeerust hospital is what is termed "Patient Discharge Report" which states that the Plaintiff was admitted at hospital on 04/04/2018 and discharged on 06/04/2018 and was diagnosed on discharge of incomplete miscarriage. The Plaintiff's cause of action is dependent on what transpired at Zeerust hospital yet no attempts were made on both sides of the litigants to assist the Court with the medical records from Zeerust hospital and/or witnesses who offered the Plaintiff the medical treatment during the said period.

[33] The medical notes (case history) from the Dinokana Clinic state that the Plaintiff experienced a miscarriage a month ago and that on 05/05/2018 at 12h15 the Plaintiff delivered a foetus spontaneously worth 6cm and that all clots were expelled. On 07/05/2018, Dr Moalusi places a question mark on the information apparently received on referral from Gopane Clinic as follows:-

"? Missed miscarriage and twin, she had a incomplete miscarriage in April – was evacuated in Zeerust hospital and discharged. Subsequently carried the remaining unevaluated twin"

This information is dated 07/05/2018, two days after the Plaintiff spontaneously delivered a foetus. What caused Dr Moalusi to put a question mark on the said notes is not before the Court and the Court cannot make any attempts to delve into it safe to state that

in the absence of the medical records from Zeerust hospital, any analyses of the “medical notes” will come to zero.

APPLICABLE PRINCIPLES

[34] “... *In order to be liable for the loss of someone else, the act or omission must have been wrongful and negligent and have caused the loss.*”⁷

[35] The jurisdictional requirements for delictual claims are trite. The proof is on a balance of probabilities of these elements – wrongfulness, negligence, causation and that the loss suffered was as a result of the defendant’s conduct or omission. This means that the Plaintiff needs to prove that the act or omission by the employees of the Defendant must have been wrongful and negligent and caused the harm.

[36] The evidence before the Court is insufficient to attract delictual liability in general. The lack of medical records and a well reasoned expert opinion left the Court with general assumptions as to the cause of negligence and this militate against the Plaintiff’s case.

CONCLUSION

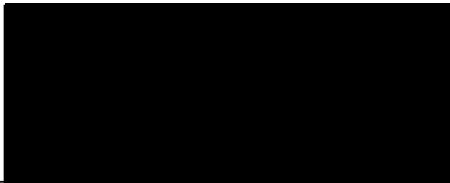
[37] Regarding the issue of costs, I am disinclined to grant an order for the costs to the follow the event as is the norm. The Plaintiff is currently unemployed making it unjustifiable for her to pay costs incurred by the Defendant in this matter.

⁷ AN v MEC for Health, Eastern Cape 9585/2018) [2019} ZASCA 102 (15 August 2019) (AN) at para [3]

ORDER

[38] In the circumstances, the following order is made:

The Plaintiff's case is dismissed with no order as to costs.



**O.Y DIBETSO-BODIBE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG**

Delivered: This judgment is prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

DATE OF HEARING: 13 February 2024

DATE OF JUDGMENT: 26 September 2024

APPEARANCES

**FOR THE PLAINTIFF: Adv L Montsho-Moloisane SC
Adv G K Seleka**

INSTRUCTED BY: Mogau Attorneys

**FOR THE DEFENDANT: Adv K D Ramolefe SC
Adv T Kwape**

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Ms G Selowa