

SOUTH AFRICA / JUDGMENT

B.G.M obo Baby A v Member of the Executive Council for the Department of Health North West Province (431/2021) [2025] ZANWHC 124 (18 July 2025)

[2025] ZANWHC 124**COURT**

North West High Court, Mafikeng

BEFORE

T Djaje

CASE / FILE NUMBER

431/2021

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Policy

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

Case**Number: 431/2021****Reportable:**

YES / NO

Circulate

to Judges: YES / NO

Circulate

to Magistrates: YES / NO

Circulate

to Regional Magistrates: YES / NO

In

the matter between: M[...]
B[...] G[...]
Obo
BABY
A[...]
Plaintiff
And
MEMBER
OF THE EXECUTIVE COUNCIL
FOR

THE DEPARTMENT OF NORTH
HEALTH: WEST
PROVINCE
Defendant

Heard: 19
March 2025

Reserved: 22 April 2025

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses.
The date for the hand-down is deemed to be on 18 July 2025.
ORDER
The

following order is made: 1.
The Defendant is liable for payment of 100% (one hundred percent) of the proven or agreed damages to the Plaintiff's minor son, Baby A[...] .

2.
The Defendant shall pay the Plaintiff's taxed or agreed party-and-party costs of suit on the High Court scale up to finalisation of the issue of liability, which costs shall include (but not necessarily be limited to):

2.1
the costs occasioned by the employment of counsel by the Plaintiff, including the trial costs for the appearances on the 21st, 22nd and 23rd of October 2024, and the 19th of March 2025, such costs to be paid on Scale B;

2.2
the Plaintiff's costs of obtaining the medico-legal reports of the following experts and joint minutes

relating to the issue
of liability, including the cost of counsel on
Scale B of drafting the Plaintiff's expert summaries in respect
of the issue
of liability;

2.2.1
Dr Alheit;

2.2.2
Professor Smith; and

2.2.3
Dr Pearce.

2.3
the cost of preparation, qualifying and
reservation fees, and fees for testifying, in respect of the
liability trial of Professor
Smith and Dr Pearce, including their
reasonable traveling and accommodation expenses, and including the
cost of consultations by
the Plaintiff's legal representatives
with these experts, and the costs of these experts in preparing for
and holding joint
meetings with their respective counterparts, and
preparing joint minutes;

2.4
the costs of the MRI investigation of A[...]s
brain performed by Burger Radiologists for purposes of the report of
Dr Alheit,
expert radiologist;

2.5
the costs consequent upon the drafting of heads of argument;

2.6
the costs and expenses of accommodation and of transporting the
Plaintiff and
the minor child in attending all medico-legal
examinations and consultations by the Plaintiff's and the
Defendant's
experts, (where applicable), for purposes of
preparing their reports for the trial relating to the issue of
liability, subject
to the discretion of the Taxing Master; and

2.7
for purposes of taxation, the Plaintiff, B[...] G[...] M[...], is
declared a
necessary witness.

3.
The costs stipulated above shall be paid into the trust account of
the Plaintiff's

attorney, the details
which are:

WIM
KRYNAUW ATTORNEYS TRUST ACCOUNT ABSA – TRUST
ACCOUNT
ACC. NR: 4[...] REF: K NTHODI / MEC1245

JUDGMENT

DJAJE DJP

- [1] The plaintiff acting on behalf of her minor child instituted an action for damages for medical negligence on the minor child (“baby A[...]”) who was diagnosed with jaundice. The matter proceeded on merits only.

Plaintiff’s case

- [2] The plaintiff who is the mother of baby A[...], testified that after giving birth on 14 January 2017, they were both discharged on 15 January 2017. At that time the plaintiff was 34 years old. When they were discharged, she was not advised of what to observe on baby A[...] except being given a card to go back to a nearby clinic after three days. On 17 January 2017 she went to Steve Tshwete clinic and informed nurse Masike that baby A[...]’s eyes were yellow, and her skin was not looking good. According to the plaintiff, nurse Masike advised her to put the baby in the sun at home, and he will be fine. The plaintiff complied but the baby’s condition worsened and on 19 January she took baby A[...] to the doctor. At that time the baby’s eyes were yellow with white substance and rolling. His skin was more yellow. The doctor advised that they take the baby to the hospital as it was an emergency.
- [3] When they arrived at the hospital, the nurse on duty informed them to wait in the queue with other patients and they were only attended to at 14h20. At that time the doctor extracted blood from the baby, and they waited for the results. Baby A[...] was only placed in a machine with a light by the night shift nurses. Around midnight the plaintiff

was asked by the doctor to sign some documents for blood exchange transfusion. In the morning at 6h00 she was informed by the doctor

that they were still waiting for the blood to do the transfusion. The blood arrived at 7h00 and the doctor began the transfusion process. The baby was admitted for two weeks.

- [4] Dr Juan Smith who is a neonatologist was called to testify and explained that baby A[...] has sustained brain damage induced by jaundice. According to him, the advice by the nurse to place the baby in the sun was misplaced as it is not taught at medical school. He testified that because bilirubin floats freely in the blood stream, it was important that when the baby was discharged after birth, the mother should have been informed of jaundice. At the time when the

mother visited the clinic with the baby's eyes being yellow, the nurses should have done a blood test to check the bilirubin

levels in the blood. He opined that the delays in attending to the baby made the condition worse and if the nurses had acted appropriately on 17 January, the outcome could have been avoided. The doctor went on to state that on 19 January the baby was seen at 14h25 and blood should have been done at 15h15 instead of at 19h30 when the baby already had worsening signs. He concluded that there was no continuous assessment of the baby and the time when the blood transfusion, was done on 20 January, the horse had bolted.

- [5] During cross examination Dr Smith explained that the first domino fell when the plaintiff was not advised to look out for jaundice on her discharge. The second one fell on 17 January when she was advised to place the baby in the sun and then on 19 January with all the delays to perform a blood transfusion. He explained that jaundice is reversable if treated in the beginning but if left untreated, the level of bilirubin increases which is what happened in this case. On the use of phototherapy, his opinion is that it is a priority once jaundice is diagnosed. However, in this case, there was a delay in administering phototherapy by five hours.
- [6] The Paediatric Neurologist, Dr Debra Pearce confirmed the issue of delay at various stages of monitoring the baby. According to her, phototherapy and IV fluids were delayed which caused the condition of the baby to worsen. The IV fluids would have caused the baby to pass urine and stools to reduce the bilirubin in the blood system.

Defendant's case

- [7] The first witness for the defendant was Nurse Sibongile Masike from the Tlokwe sub-district. She confirmed that on 17 January 2017 the plaintiff came to the clinic with baby A[...] for the three-day post-natal care. She conducted an assessment on both the plaintiff

and the baby and found everything to be normal. She did not see any symptoms of jaundice. The only advice she gave to the plaintiff was that she must continue to breastfeed the baby. She denied that she gave the plaintiff advice of sunning the baby. If she had noticed any signs of jaundice, she would have referred the plaintiff and the baby to a doctor.

- [8] It came out during cross examination that she did not remember the plaintiff and her testimony relied on the documents from the clinic records. She insisted that she never gave advice of sunning a child and that maybe the jaundice only started after baby A[...] had been to the clinic for the check up on 17 January.
- [9] Dr Cooper who is a paediatrician and a neonatologist at the department of paediatrics at Wits University testified for the defendant. He compiled a report on baby A[...] based on the particulars of claim, maternity records, neonatal records, hospital admission records, road to health records and the MRI scan results. According to him on day three of life, baby A[...] had no abnormalities, and the bilirubin would have been at 400umol/l but jaundice could have been missed in dark skinned babies. At the time of discharge, it could have been at

120umol/l and jaundice could not have been picked up. He conceded that he had no idea what the skin tone of baby A[...] was at the time of birth or on the third day of life.

- [10] Dr Cooper admitted that there was a delay with phototherapy and blood transfusion but that it had a marginal effect. There should not have been a delay at all if jaundice was visible on day three of life and the outcome could have been prevented. He could not dispute that on day three of life, baby A[...] had jaundice and that the possibility is that the nurse did not do a thorough examination.

Joint minutes

- [11] Drs B. Alheit and S. Misser, the radiologists for the plaintiff and defendant compiled and signed joint minutes. They agreed as follows:

“BA agrees with SM that the sum of the findings are considered as diagnostic of kernicterus/chronic bilirubin encephalopathy.

BA and SM agree that the findings of the MRL study suggest that a hypoxic-ischemic aetiology as the cause of the child’s brain damage is unlikely.

BA and SM agree that the findings of the MRI study suggest that genetic disorders as the sole cause of the child’s brain damage are unlikely.

BA and SM agree that there is no evidence of current or previous infective or inflammatory disease on the various MRI sequence and agree that inflammatory or infective conditions are unlikely as the sole cause of the child’s brain damage.

BA and SM agree that a review of the clinical and obstetrical records by appropriate specialists in the field of Neonatology and Obstetrics to be essential in confirming the cause and probable timing of this injury.”

- [12] The paediatricians, Drs Smith and Cooper also compiled a joint minute. They agree that baby A[...]’s brain was injured due to prolonged exposure to, and hazardous high levels of total serum bilirubin (unconjugated). They agree that if clinical jaundice was evident on day three of life during the clinic visit, then the serum bilirubin level should have been obtained to evaluate whether ongoing management was indicated, and appropriate management would have prevented the development of kernicterus. Both DRs agree on the issue of delay in the commencement of phototherapy as well as blood transfusion on 19 January. However, according to Dr Cooper, the extremely high level of SBR on admission and the manifestation of signs of kernicterus before the blood transfusion makes it probable that the delays had only a marginal additional effect on the extent of the brain injury.
- [13] Dr Cooper went on to explain that the first SBR level taken on 19 January was 716umol/l. He referred to a paper by Johnson L et al (J Perinatol 2009;29:S25-45) that no infant with an SBR level more than 600umol/l escaped permanent brain injury. This meant that baby A[...] would have been exposed to levels of more than 600umol/l for

about 30 hours prior to the earliest time an exchange transfusion could have been done. Hence the conclusion that the delay played only a marginal additional role.

[14] Dr Cooper stated that the delay in obtaining blood from Johannesburg to Potchefstroom was out of the hands of the attending doctors due to the *modus operandi* of the South African Blood Transfusion Services. However, Dr Smith opined that the decision to perform the blood transfusion was taken approximately 9 hours after baby A[...] was diagnosed with jaundice in casualty at 14:30. This was a significant delay in managing a baby who already had signs of subtle acute bilirubin encephalopathy. This resulted in substandard neonatal practice. The request for blood from SABTS was received at 03:28 on 20 January and delivery taken at 05:15 same day.

Issues

to be determined

[15] It is for the court to determine whether there was any failure on the defendant to timeously administer treatment for jaundice on baby A[...] at the clinic and the hospital. Further that the delay in administering the treatment was the direct and sole cause of the outcome of the condition of baby A[...].

Submissions

[16] The plaintiff's argument is that based on the evidence of the Drs, the jaundice on baby A[...] was visible on 17 January when the plaintiff took the baby to the clinic. At that time, nurse Masike could have picked it up if she did a thorough examination. It was argued that she could have referred the baby to the hospital.

[17] The defendant contends that nurse Masike as a trained professional nurse could not have missed jaundice on baby A[...] when brought in on day three of life. Further that despite knowing of sunning, she has never advised any mother to place a baby in the sun to treat jaundice. The defendant argued that the plaintiff is to be blamed for the delay in taking the baby to the clinic or hospital after noticing on 16 January that the eyes were yellow. Further that her excuse of the clinic being closed should not be accepted as she could have easily taken the baby to the doctor or hospital.

Applicable law and analysis

[18] In *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) at paragraph 21 the court reiterated the benchmark for negligence as follows:

"[21] A formula for determining negligence which has been quoted with approval and applied by this Court time without measure is that enunciated by Holmes JA in Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E – F. It reads:

"For the purpose 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 person or 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.”

However, in *Mukheiber v Raath and Another* 1999 (3) SA 1065 (SCA) the following said at 1077 E-F:

“The test for culpa can, in the light of the development of our law since Kruger v Koetzee 1966 (2) SA 428 (A) be stated as follows: (see Boberg The Law of Delict at 390):

For the purposes of liability culpa arises if-

- (a) a reasonable person in the position of liability culpa arises if-
- (i) would have foreseen harm of the general kind that actually occurred;
- (ii) would have foreseen the general kind of causal sequence by which that harm occurred;
- (iii) would have taken steps to guard against it, and
- (b) the defendant failed to take those steps.”

The formula is that of Boberg. A reading of the reference cited reveals, however, that the learned author’s formulation of the test is in the context of the so-called relative theory of negligence which he advances as being more logical and convenient than what has sometimes been called the absolute or abstract theory. Broadly speaking, the former involves a narrower test for foreseeability, relating it to the consequences which the conduct in question produces, and serves in effect to conflate the test for negligence and what has been called “legal causation” (cf *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984

- (2) SA 888 (A) at 914 F - H) so as, it is contended, to eliminate the problems associated with remoteness. I do not read the judgment in the *Mukheiber* case to have unequivocally embraced the relative theory of negligence. Indeed, elsewhere in the judgment and when dealing with the issue of causation the court appears to have applied the test of “legal causation” which the strict application of the relative theory would have rendered unnecessary. (See par 36 -par 52.) Having said this, it should not be overlooked that in the ultimate analysis the true criterion for determining negligence is whether in the particular circumstances the conduct complained of falls short of the standard of the reasonable person. Dividing the inquiry into various stages, however useful, is no more than an aid or guideline for resolving this issue.”

[19] As far as medical negligence is concerned the following was stated by Corbett JA in the case of *Blyth v Van der Heever* 1980 (1) SA 191 (A) at 196E:

“(i) what factually was the cause of the ultimate condition of the child;

(ii) did negligence on the part of Defendant cause or materially contribute to this condition in the sense that the Defendant by the exercise of reasonable professional care and skill could have prevented it from developing.”

The two questions raised are central in this case to determine if there was any negligence on the part of the defendant’s medical staff.

[20] In the case of *Cecilia Goliath v Member of the Executive Council for Health, Eastern Cape* 2015 (2) SA 97 (SCA) at par 8 the following was stated:

“The general rule is that she who asserts must prove. Thus, in a case such as this a plaintiff must prove that the damage that she has sustained has been caused by the defendant’s negligence. The failure of a professional person to adhere to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which he or she belongs would normally constitute negligence (Van Wyk v Lewis 1924 AD 438 at 444).”

[21] We have a baby in this matter who suffered brain damage because of high levels of bilirubin in the blood system simply known as jaundice. The case for the plaintiff is that the condition was worsened by the substandard treatment at the clinic and the hospital. The experts herein, Drs Smith and Cooper agree that there was indeed a delay and that had the baby received immediate treatment, the condition would have been reversed, and we would not have the current outcome. This is a matter of relying on the factual evidence by the plaintiff and nurse Masike who attended to the baby at the clinic on 17 January. The doctors agree in the main about the delay and the treatment required in circumstances where a baby presents with high levels of bilirubin.

[22] The plaintiff testified that when she attended at the clinic on 17 January, the baby had yellow eyes, and she was advised to sun the baby by nurse Masike. This is denied by the nurse despite not being able to remember the plaintiff and her baby. The version of the nurse is that she examined the baby and the mother, and they were both

normal. If she had observed any signs of jaundice, she would have referred baby A[...] to a doctor or hospital. She however only relies on the clinic record that shows that on 17 January she is the nurse that examined both the plaintiff and baby A[...]. She is unable to specifically remember them as she sees many patients daily.

[23] On the other hand, there is expert evidence that looking at the blood results from baby A[...] on 20 January where the levels of bilirubin were more than 600umol/l, the inference which both the doctors agree on, is that on 17 January, the bilirubin level could have been at 400umol/l. This means that on 17 January jaundice was visible on baby A[...] and could have been picked up at the clinic. Dr Cooper however, testified that it might have been difficult to observe in a dark-skinned baby. However, neither Dr Cooper nor nurse Masike are unable to confirm if baby A[...] on 17 January was dark skinned. The evidence from the mother is that the baby’s eyes were yellow, and that would not require the nurse to look at the skin at all.

[24] On 19 January when the plaintiff took the baby to the hospital, the condition had worsened. This lends credence to her evidence that the baby started showing signs of jaundice on 17 January already. The question is whether nurse Masike did notice the signs of jaundice and gave sunning advice. During her testimony she testified about jaundice that can heal on its own and by the mother breastfeeding the baby. She then changed her evidence in that

regard. This was an indication that nurse Masike could have thought that jaundice does heal on its own or by placing the baby in the sun and breastfeeding.

[25] When the plaintiff arrived at the hospital, there was a further delay. Despite her worsened condition, phototherapy was not administered immediately. It was only in the evening when it was administered. There was again a delay in doing a blood transfusion as well. Dr Cooper argued that the delay at the hospital played a marginal role as the levels of bilirubin were already very high at the time phototherapy and blood transfusion were administered. The fact that there was a delay in the treatment of baby A[...] leads to the conclusion that there was substandard treatment by the staff at the hospital.

[26] It is not denied that there was a delay in the treatment of baby A[...] and that resulted in the outcome of the brain damage. The experts further agreed that on 17 January there were visible signs of jaundice on baby A[...] and treatment should have commenced immediately. The factual evidence is that on 17 January the plaintiff was at the clinic with the baby. Nurse Masike does not dispute that the plaintiff attended the clinic with baby A[...]. She however testified that the jaundice might have developed after the baby was from the clinic. According to the Drs Smith and Cooper the bilirubin levels could have been at 400umol/l on 17 January which means that there were visible signs. The version of nurse Masike is found to be improbable. The delay to treat baby A[...] on 17 January was substandard treatment which resulted in the outcome of the brain damage suffered by baby A[...]. The plaintiff has succeeded to prove and discharge the onus on a balance of probabilities that there was negligence on the medical staff of the defendant.

[27] The plaintiff has succeeded with her claim against the defendant and I see no reason why costs should not follow the result.

Order

[28] Consequently, the following order is made:

1. The Defendant is liable for payment of 100% (one hundred percent) of the proven or agreed damages to the Plaintiff's minor son, Baby A[...].

2.1 the costs occasioned by the employment of counsel by the Plaintiff, including the trial costs for the appearances on the 21st, 22nd and 23rd of October 2024, and the 19th of March 2025, such costs to be paid on Scale B;

2.3 the cost of preparation, qualifying and reservation fees, and fees for testifying, in respect of the liability trial of Professor Smith and Dr Pearce, including their reasonable traveling and accommodation expenses, and including the cost of consultations by the Plaintiff's legal representatives with these experts, and the costs of these

experts in preparing for and holding joint meetings with their respective counterparts, and preparing joint minutes;

2.4 the costs of the MRI investigation of A[...]’s brain performed by Burger Radiologists for purposes of the report of Dr Alheit, expert radiologist;

WIM KRYNAUW ATTORNEYS TRUST ACCOUNT ABSA – TRUST ACCOUNT ACC. NR: 4[...] REF: K NTHODI / MEC1245

J T DJAJE

DEPUTY JUDGE PRESIDENT

NORTH WEST HIGH COURT

APPEARANCES

DATE OF HEARING

: 19 MARCH 2025

DATE RESERVED

: 22 APRIL 2025

DATE OF JUDGMENT

: 18 JULY 2025

COUNSEL FOR THE PLAINTIFF : ADV COETZE

COUNSEL FOR THE DEFENDANT : ADV MONGALE

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