

SOUTH AFRICA / JUDGMENT

Mbola obo M v Member Of The Executive Council For Health, Eastern Cape (4521/18) [2018] ZAECMHC 67 (6 December 2018)

[2018] ZAECMHC 67**COURT**

Eastern Cape High Court, Mthatha

BEFORE

S Mbenenge

CASE / FILE NUMBER

4521/18

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN CAPE****LOCAL DIVISION, MTHATHA)****Case No.: 4521/18****In**

the matter between:

NELISWA

MBOLA obo A

M

Plaintiff

and

MEMBER

OF THE EXECUTIVE COUNCIL

FOR

HEALTH, EASTERN CAPE

Respondent

JUDGMENT

MBENENGE JP

Introduction

- [1] The plaintiff, in her representative capacity as the natural mother and guardian of A M, a boy born on 31 January 2010 (A), seeks to recover damages allegedly suffered as a consequence of A suffering from kernicterus/ neurological dysfunction and resultant cerebral palsy due to the untreated presentation of chronic bilirubin encephalopathy (the injury).
- [2] The defendant has been sued on a vicarious liability basis, it being alleged that the Department[1] of which the defendant is the political head is responsible for any and all delictual liability incurred by “the staff working at hospitals and medical facilities under the authority, administration and control of the Department.” The cause of action is located in delict, the allegation being that after A had been born, substandard medical care resulting in the injury was meted out to him (A) by medical practitioners and nursing staff employed at the St Lucy’s Hospital (otherwise referred to as the hospital).

The Pleadings

- [3] Until the commencement of the hearing of the action, the plaintiff’s case had been that the conduct complained of was meted out by nursing and medical staff who examined A upon his birth, “from 31 January 2010”, and who failed to take remedial steps to avert jaundice that A had contracted on “3 February 2010.”
- [4] The defendant disputes being liable to the plaintiff in the damages claimed, or at all and has contended that “St Lucy’s Hospital had nothing to do with the birth of the child in issue” and that “the [p]laintiff was never seen or given medicine at St Lucy’s Hospital...”
- [5] At the commencement of the hearing the plaintiff’s particulars of claim was amended to found the case principally on the allegation that the substandard care complained of against the medical and nursing staff consisted in, inter alia, one or more or all of the following:

“7.5 he/she/they, upon the attendance of the Plaintiff and her child on 3 February 2010 and/or one week later and/or 16 February 2010, unreasonably failed to examine the child either properly or at all, and unreasonably failed to diagnose the presence of jaundice, when he/she/they could and should have done so;

7.6 he/she/they, following the return attendances of the Plaintiff and her child on 3 February 2010 and/or one week later and/or 16 February 2010, failed to implement immediate and appropriate treatment in modalities in respect of jaundice, when he/she/they could and should

have done so, and instead unreasonably discharged the plaintiff and her child;

7.7 he/she/they failed to prevent the development in the child of excessively high levels of jaundice and/or the development of kernicterus and/or bilirubin induced neurological dysfunction when he/she/they could and should have done so; and

7.8 he/she/they failed on 3 February 2010 and/or one week later as well and/or on 16 February 2010, or either, to subject the child to appropriate blood investigations and appropriate light (phototherapy) treatment or examination, when he/she/they could and should have done so.”

[6] The amendment attracted an adjustment of the defendant’s plea so as to read as follows:

“10.5 Plaintiff never visited St Lucy’s Hospital on 16 February 2010, however, defendant alleges that the plaintiff had visited St Lucy’s Clinic for the first time on 16 February 2010. After her child was attended to and examined by the clinic staff she was referred to a hospital capacitated to deal with her condition in the form of Doctor Malizo Mpehle Hospital. The balance is denied.

...

11.4 Defendant’s employees did not meet or treat the plaintiff or her child during February 2010. In the alternative, even if it is found that on 16 February 2010 (although remains denied) the plaintiff was seen by the employees of the Defendant, the brain damage complained of in this action would have occurred in any event due to plaintiff’s failure to present her child to a health institution on time.”

The

issues

- [7] The parties’ experts reached agreement that (a) in the event of the plaintiff’s version that had she been to the hospital on 03 February and/or a week later prevailing, failure by the medical staff to properly manage A’s jaundice constituted gross negligence;
- (b) if one has regard to A’s subsequent neurological condition and MRI brain findings, the diagnosis on 16 February 2010 that “physiological jaundice ([was] improving)” is incorrect; and (c) kernicterus (bilirubin induced neurological dysfunction) can be prevented with timely diagnosis of

“hyperbilirubinemia and treatment with phototherapy/ exchange transfusion.”

- [8] It does not appear that the parties ever attended any meaningful pre-trial conference to agree on issues that would be determined at trial. Instead, there is a purported “MINUTE OF A PRE-TRIAL CONFERENCE” embodying questions posed ostensibly in terms of rule 37(4) of the Uniform Rules and answers thereto. The relevant portion of the “minute” reads:

“3 The defendant is requested:

3.1 ...

3.2 to state what (on Defendant's version) caused the condition of hypoxic cerebral palsy and infantile epilepsy;

Defendants reply: The Plaintiff is referred to the Defendant's Plea about the defendant's version as to the cause of Asavela's Cerebral Palsy."

[9] During the plaintiff's opening address the precise ambit of the lis between the parties was the subject of some controversy. According to Mr Uys who, together with Mr Schouten, appeared for the plaintiff, agreement had been reached that if it were to be proven on a balance of probabilities that the plaintiff

attended St Lucy's Hospital on 03 February 2010 and/or approximately a week later, the treatment received by the plaintiff

during these attendances was substandard and resulted in causal negligence. Were it to be proven on a balance of probabilities that the plaintiff attended St Lucy's Hospital on 16 February 2010, said Mr Uys, the defendant bears the onus to show that irreversible neurological dysfunction had already intervened by then.

[10] The following excerpt from the transcript demonstrates how tentative and vacillating the defendant's stance was regarding the issue for determination in these proceedings:

"MR KUNJU: ... we accept from the ... Road Health Card there is an indication that she had attended on the 16th, in other words we will deal with that, but we are not necessarily saying she was at the hospital, but we will then deal with the matter broadly, on the basis that even if she was at the hospital, but there are certain areas that we need to discuss..."

COURT: All redounding to whether on the 16th she was there and proper treatment was meted out.

MR KUNJU: From what we, from where we are seated, she was not at the hospital.

COURT: On the 16th."

[11] The transcript is also quite revealing in so far as it goes on to say:

"MR KUNJU: M'Lord, the case was premised on 3 February the issue has always been whether she was attended on 3 February, they seem not to be strong on their own what they have pleaded, now they want to latch on much on 16 February."

COURT: If it turns out that they will be pursuing or championing their cause also on the basis that something happened on the 16th, what is going to happen?

MR KUNJU: M'Lord, His Lordship.

COURT: Will you require... expert testimony?

MR KUNJU: My expert witnesses are available I think today and tomorrow, beyond tomorrow they are not.”

COURT: And you may be disadvantaged if the case is pursued on the basis that something happened on the 16th, you would need an expert coming here to controvert, whatever is said, or whatever becomes a consequence upon what the plaintiff says.

MR KUNJU: The major, problem, M’Lord, is that my expert who will talk on that will only be available tomorrow. Depending on how, I mean how long does their case take. Then I am not sure I cannot assure, His Lordship, that my witness will be available tomorrow.”

[12] The issue is a pure factual one; shorn of verbiage, it is whether the plaintiff (and A) attended and interacted with medical and/or nursing staff at St Lucy’s Hospital on 03 February and/or a week later and/or on 16 February 2010.

[13] Against this background it is convenient to narrate the facts as testified to in court by the parties.

The plaintiff’s case

[14] Whilst in labour and being conveyed to hospital on a private vehicle, and in the presence of her sister, Mbokazi, the plaintiff gave birth to A on 31 January 2010. She and her new born baby (A) were thereupon admitted to Dr Malizo Mpehle Hospital. The admission and the stay overnight was uneventful, hence the plaintiff (and A) was discharged and returned home on 01 February 2010.

[15] The plaintiff testified that on the following day, 02 February, she noticed that A’s eyes and cheeks had become yellowish; he was crying and did not suck when being fed. The baby was also lethargic. She became concerned. On 03 February she took A to the St Lucy’s Hospital complex. Her first point of call was the clinic section of the complex where she was referred to the hospital. She registered her presence at the Outpatient Department and thereafter proceeded to the history room, where she explained A’s condition to the nurses. From there she went to see the attending doctor who she referred to as Dr Obakah.[2] She reported to the doctor that A had developed yellowish eyes and cheeks. The doctor examined A by opening his eyes with his fingers

and prescribed a syrup for use three times a day, with instructions to return to the hospital when the course was complete.

[16] Approximately a week later, the plaintiff returned to St Lucy’s Hospital. She said she was, even on this occasion, attended to by the same doctor, who assured her that A’s condition was improving and prescribed the same syrup.

- [17] After the second syrup course had been completed, and there being no end in sight to A's condition, the plaintiff returned to the hospital a week later- on 16 February. On this occasion, too, said the plaintiff, A was seen by Dr Obakah. The plaintiff was, once again, assured that A's condition was improving and they were sent home. No blood was drawn from A for testing. He was also not "kept under bright lights" at any stage during her visits to the hospital.
- [18] The plaintiff was subjected to cross-examination by Mr Kunju. She stated that St Lucy's Hospital (Ngcolosi Hospital in isiXhosa) was also referred to as St Cuthberts Hospital, and is an institution that is different from Dr Malizo Mpehle Hospital. She was pointed to the particulars of claim wherein it is alleged that A had jaundice after his birth, and challenged regarding her testimony that A had been healthy after birth. Moment was also made of the fact that the particulars of claim is silent regarding the name of the doctor who attended to her, and attributed blameworthiness to the hospital she was initially admitted to on 31 January 2010 (Dr Malizo Mpehle Hospital). She was hard put to explain all this.
- [19] Upon being cross-examined about the absence of records supportive of her attendances at St Lucy's Hospital before 16 February 2010, the plaintiff was adamant that she had been to that hospital on two previous occasions.
- [20] It further emerged, during the cross examination, that the Gateway Clinic referral book does contain a single entry that A had been referred to St Lucy's Hospital for "jaundice" on 16 February 2010. The St Lucy's Hospital OPD register for the period spanning 02 to 24 February 2010 contains no entry that is relevant to the plaintiff or A.
- [21] Ms Mbokazi Mbola, the plaintiff's sister, confirmed having been in the company of the plaintiff on the day she gave birth to A. The plaintiff and A were discharged from Dr Malizo Mpehle Hospital on the following day. She observed nothing wrong with A, until a couple of days thereafter, when A's eyes and cheeks turned yellowish. She however did not accompany the plaintiff to hospital when A was being taken thereto on this occasion. After the plaintiff and A had returned the plaintiff showed her (Mbokazi) and their mother the syrup that had been prescribed.

The defendant's case

- [22] The testimony of the defendant's witnesses focused on the identification of hospital records and was tendered with a view to demonstrating that neither A nor the plaintiff attended upon St Lucy's Hospital on the dates in question.
- [23] Ms Nomathamsanqa Greta Khalimashe who is in charge of the St Lucy's Gateway clinic was the first witness for the defendant. She explained that upon arrival at the clinic children are issued with a Road to Health Card on which it is recorded the particulars of the person attending the clinic. The history of the child and monitoring thereof is recorded on the card. Every time the child attends the clinic an entry is made. The Road to Health Card relevant to this case indicates the first entry of attendance by A and his mother as having been 16

February 2010. According to Ms Khalimashe the absence of an entry for 03 February signified that A never attended the clinic on that day. None of the relevant registers that could still be traced lend support to A's alleged attendance other than on 16 February 2010, on which day he is recorded as having been with yellow eyes, referred to and attended by a doctor for jaundice.

- [24] Under cross examination, Ms Khalimashe conceded that her view that A had been to St Lucy's Hospital on 16 February was based purely on the entries on the books that could still be retrieved; she had no independent recollection of the facts relevant to this case. She was initially adamant that the recording on the registers is accurate and that they never omit to record the relevant information. She mentioned that at times entries to the relevant registers are made retrospectively by the nurse involved, which left scope for human error and an election to depart from the alleged protocol especially in instances of emergency referrals. She also conceded that the Gateway Clinic referral book contains no entries for the year 2015. It further emerged whilst she was being cross examined that the entries on the referral book and the Road to Health Card did not match. According to her it did often happen, in an emergency situation such as the observation of jaundice symptoms, to forthwith make a referral without insisting on the production of the Road to Health Card or the noting of a clinic attendance.
- [25] Next to be called as the defendant's witness was Ms Noluthando Ngoma. She is the current nursing senior manager at St Lucy's Hospital and had previously been employed at the OPD section for 16 years. According to Ms Ngoma protocol prescribes that all medical attendances be recorded on the Road to Health Card. Absence of such recording implies non-attendance. She also testified that protocol also requires that hospital attendances be recorded in the OPD tick register, and absent that there would have been no referral.
- [26] Ms Ngoma was cross examined regarding whether the entries on the tick register referred to all patients or children under the age of five years. She gave contradicting evidence in that regard. She, too, conceded that there were times when the recording of the relevant details was done retrospectively by the particular nurse, which rendered the whole process prone to human error and made it possible for one to depart from the alleged protocol.
- [27] The last of the defendant's witnesses was Dr Shadrack Abakah Gyenin (Dr Abakah). He has been a medical officer employed at St Lucy's Hospital for the past "15 to 18 years." He was called to refute that he had any dealings with the plaintiff and/or her son, A, during the time in question, he having applied for and granted leave of absence for the period 08 February 2010 up to 16 February 2010. He said he recalled that his brother had died on "27 March 2010." He had gone to Johannesburg to sort out traffic ticket fines attracted by his father driving in a car that his wife had bought his father. He said he resumed work on 17 February 2010.

- [28] Dr Abakah could not remember whether he was at work or not on 03 February 2010. He had tried but could not find hospital records establishing the position. According to him the plaintiff would have to point to a Road to Health Card as proof that he had interacted with the plaintiff on 03 February 2010. This, according to Dr Abakah, was the only document to prove interaction with a baby, including any prescription made by a doctor. A pharmacist would only be able to issue medicines prescribed on the card. He denied that he had prescribed medicine for the plaintiff as alleged by her. According to the relevant Road to Health Card the first contact with A was 16 February 2010. He disputed that the handwriting on the card is his. He also said he could not have seen the plaintiff and/or A on or about 10 February as he had still been on leave.
- [29] During cross examination Dr Abakah's tenure at St Lucy's Hospital was shown to have been 12 years, and not "15 to 18 years." It was suggested to him that the law required the keeping of contemporaneous notes in out patient's files by medical officers. Initially, he seemed oblivious to "contemporaneous notes" but as this concept was unpacked it became clear that he was aware of the concept and knew the significance of contemporaneous note keeping. He proffered no response when it was pointed out to him that this case was beset by absence of contemporaneous notes to support his evidence. He conceded that contemporaneous notes compiled on a particular day would have shown whether he had seen A, or not. He said he has not been keeping any contemporaneous notes.
- [30] Unlike Ms Ngoma, he did not concede that the existence of yellow eyes and cheeks called for emergency treatment which could result in medicine being prescribed without an entry of such prescription being made on the Road to Health Card.
- [31] Asked about A's Road to Health Card on which it is inscribed "diagnosis (#) of physiological jaundice (improving)" he said he did not know who had made these inscriptions. He could not dispute that "improving" signified that there had been a prior diagnosis and that, therefore, A might have been seen by some doctor as St Lucy's Hospital on a previous occasion. In this regard, his response was:

"WITNESS: Well it is so, but the thing is, according to, I mean, what I know, this is the Road to Health Chart, the first contacts of a baby, if you are in contact of a baby, if you write your notes, it should appear in the Road to Health Chart, you know, and then the first contact of this baby is on the 16 February 2010 and then there is a doctor here who saw the patient on 16 February 2010 at 12:44 and wrote here physiological jaundice improving, that is what I see here. So if maybe this patient was seen earlier before, I don't know."

The law

- [32] It is trite law that the plaintiff bears the duty of convincing the court, through credible evidence, that her version is more probable than that of the defendant.

- [33] In its analysis and evaluation of the disputed issues the court ought to select a conclusion which it deems the more rational or plausible conclusion from amongst several ones, even though that conclusion may not be the only reasonable one.[3]
- [34] In the event that the probabilities do not indicate where the truth lies, the court should have recourse to an evaluation of the credibility of the plaintiff's and defendant's witnesses.[4]
- [35] In this matter, to the extent that the defendant's case, by and large, hinges on circumstantial evidence, it becomes necessary to consider the law relative to circumstantial evidence, which is that the inference sought to be drawn must be consistent with all proved facts. If it is not, then the inference cannot be drawn. The inference must also be the more natural or plausible conclusion from among several conceivable ones when measured against the probabilities.[5]
- [36] In terms of section 16 of the Civil Proceedings Evidence Act[6] judgment may be given in any civil proceedings on the evidence of any single competent and credible witness. In *Daniels v General Accident Insurance Co Ltd*[7] it was held:
- "... although there is apparently no 'cautionary rule' in civil cases as in criminal matters where proof beyond reasonable doubt is required, the single witness, more particularly where he is one of the parties, must be credible to the extent that his uncorroborated evidence must satisfy the court that on the probabilities it is the truth".*[8]
- [37] It is also incumbent on the trial court to weigh the evidence of the single witness and consider its merits and demerits, and, having done so, decide whether the court is satisfied that the truth has been told despite shortcomings or defects or contradictions in the evidence.[9] Although the incidence of the onus and the standard of proof in criminal proceedings is different from that in civil proceedings this principle finds application in civil proceedings.[10]

Analysis

- [38] The central issue here is whether the plaintiff was seen by a doctor and/or the nursing staff at St Lucy's Hospital on 03 February 2010 and/or a week thereafter, and even on 16 February 2010. The testimony in relation to her attendance at the hospital is that of a single witness, but her sister corroborated her at least in one material respect namely, that after A's cheeks and eyes had turned yellowish she went away and returned with a bottle containing syrup. In all probability, this must have been on 3 February 2010.
- [39] The entry (# physiological jaundice- improving) on the Road to Health Card made on 16 February 2010 is not without significance; at the very least, in all probability, A was, on an occasion prior to 16 February, seen by a doctor at St Lucy's Hospital who noted a previous similar diagnosis from other sources at the hospital.[11]

- [40] No evidence was adduced by the doctor who ostensibly made an entry on 16 February 2010. The doctor could and should have been identified through the entry and would have been able to explain why he made the diagnosis and the entry appearing on the card.
- [41] It is, as argued by Mr Uys and not denied by Ms Ngoma under cross examination, indeed highly probable that the nurse at the clinic saw it expedient for A to be referred to hospital for immediate attention without making a note on the Road to Health Card. It is further probable that contemporaneous notes were contained in the OPD patient file. Otherwise where did the entry of 16 February come from? The files were not discovered or produced. A negative inference must be drawn from such failure.
- [42] The plaintiff was an impressive witness whose evidence has stood the test of the law. Her being questioned about lack of records to support her assertions did not detract from her consistency in her testimony. In her view the doctor she saw was “Dr Obakah” (sic), adding that “If I did not see Dr Obakah (sic), who did I then see?” Her sincerity in this regard is telling. If her memory failed her she expected and invited the defendant to identify the doctor.
- [43] Much was made of the lack of detail in the particulars of claim specifying who the doctor that attended to the plaintiff was. The particulars of claim, as the name suggests, does not contain every detail of the plaintiff’s case to be led at trial. It is a pleading whose purpose is to enable the adversary to plead. It is available to a party seeking further particularity to deliver a request for particulars for trial purposes. Even at that stage, matters that are for evidence at trial stage do not feature in the reply to such request. The particulars of claim may have been excipiable as having been vague and embarrassing,[12] but it was not excepted to until amended and more clarity shed regarding the case that the defendant was called upon to meet in
- answer. Also, when levelling criticism against her testimony one must not lose sight of the fact that the particulars of claim was not drawn by the plaintiff, but by her legal representatives, whose call it was to decide on how that pleading should be structured.
- [44] The evidence of the defendant’s witnesses was, through the trial, circumstantial in nature and focused on identifying records and documents[13] that disprove A’s attendances at the St Lucy’s Hospital complex. The witnesses sought to explain and interpret the records and documents. Yet none of them had independent recollection of the facts of this case, having based their testimony on available records which, on their own showing, do not contain accurate information. The records were lacking in many other respects. For instance, followed to its logical conclusion, the concession made by Ms Khalimashe that the St Lucy’s Gateway Clinic contains no entries for the year 2015, suggests that there were no referrals in that year, which is highly improbable.

[45] Section 13 of the National Health Act 61 of 2003 renders it obligatory for a person in charge of a health establishment to ensure that health records are maintained, and section 17 of that Act makes it incumbent on the person in charge of a health establishment in possession of a user's health records to set up control measures to prevent unauthorised access to those records.

[46] In *M obo M v Member of the executive Council for Health of the Gauteng Government*[14] it was held that records in health institutions are crucial and completely indispensable in the adjudication of cases involving

medical negligence[15] and that the absence of the records invariably makes the adjudication of ensuing litigation extremely difficult.[16]

[47] This case is plagued by incomplete or absence of relevant records to aid the adjudication process. That can only be laid on the door step of the defendant, especially in so far as it bears an evidentiary burden. There are more reasonable inferences to be drawn from the proved facts than that the plaintiff did not attend hospital on the relevant day/s; there is a strong probability that A's case was treated as an emergency case, hence no notes were made on the Road to Health Card. Also, the concession made by the doctor who examined A on 16 February 2010 and pronounced him as having improved (albeit erroneously) could only have based his view through comparison with previous attendances.

Conclusion

[48] In all these circumstances the plaintiff has shown, on a balance of probabilities, that A was seen by the Medical and/or Nursing Staff at St Lucy's Hospital on, at the very least, 3 February 2010. It is also probable (than not) that the plaintiff visited the hospital on 10 February 2010. No evidence was adduced to controvert the plaintiff's version, which finds support from the Road to Health Card, that the plaintiff (and A) attended and was seen by a Doctor at St Lucy's Hospital on 16 February 2010. Despite the pledge made at the commencement of the trial, no evidence was adduced from the defendant's camp that the injuries had already occurred by 16 February 2010. These findings establish causal negligence on the part of the medical and/or nursing staff of St Lucy's hospital and thus the liability of the defendant to the plaintiff.

Costs

[49] The plaintiff must succeed, and costs should follow the result. The amount involved in this case is huge. The determination of liability also hinged on expert reports, which added to the voluminousness of the records in this case. Mr Kunju, quite correctly in my view, made no mention of this. In the exercise of my discretion I am of the view that this case did warrant the involvement of two counsel.

Order

[50] The following order is made:

[50.1] The defendant shall pay 100% of proven or agreed damages to the plaintiff, in her representative capacity, for and on behalf of her minor child, A M, as a result of the negligence of the staff of the St Lucy's Hospital and/or Clinic, resulting in the minor child suffering from cerebral palsy.

[50.2] The defendant shall pay the plaintiff's taxed or agreed party and party costs of suit, incurred to date, on the High Court scale, such costs to include:

- (a) the costs attendant upon obtaining expert reports and/or addendum reports by the following experts:
 - (i) Prof. Savvas Andronikou (Specialist Radiologist);
 - (ii) Dr Kali (Neonatologist);
 - (iii) Prof Van Toorn (Paediatric Neurologist);
- (b) the costs of the qualifying and preparation fees of Prof. Savvas Andronikou (Specialist Radiologist) in respect of the joint minute discussions and preparation of the joint minute with Dr Zinhle Zulu (Specialist Radiologist);
- (c) the costs of the qualifying and preparation fees of Dr Kali (Neonatologist) in respect of the joint minute discussions and preparation of the joint minute with Prof. Cooper (Paediatrician);
- (d) the costs of the qualifying and preparation fees of Prof Van Toorn (Paediatric Neurologist) in respect of the joint minute and/or addendum joint minute discussions and preparation of 3 (three) joint minutes with Dr Mogashoa (Paediatric Neurologist); and
- (e) the costs of two counsel.

[50.3] No interest shall be payable, except in the event of default of payment of such costs, in which case interest shall be payable at the applicable legal rate from a date 14 days after allocatur.

S M MBENENGE

JUDGE PRESIDENT OF THE HIGH COURT

Counsel for the plaintiff : P Uys (with him H Schouten)

Instructed by :

Nonxuba Inc. Attorneys

Johannesburg

c/o Potelwa & CO

Mthatha

Counsel for the defendant : V Kunju

Instructed by

: The State Attorney

Date heard

: 20 to 22 August 2018; 05 and 25 September 2018

Date Judgment delivered : 06 December 2018

[1] The Department of Health, Eastern Cape Provincial Government.

[2] This is how the witness pronounced the surname of the doctor who attended to her.

[3] AA Orderlinge Assuransie Assosiasie BPK v De Beer 1982

(2) SA 603 (A)

[4] National Employer's General Insurance Co Ltd v Jager 1984

(4) SA 437 (A), at 440 E-441 A

[5] South African Post Office v De Lacy & Another 2009

(5) SA 255 (SCA) at [35]

[6] Act 25 of 1965

[7] 1992 (1) SA 757 (C)

[8] Cited with approval in MEC for Police, Road and Transport v Bornman, Christian Hieronymus (unreported decision of the Free State Division by Musi AJP concurred in by Daffue et Hefer JJ, delivered on 17 August 2017 under case no. A51/2016

[9] S v Webber 1971 (3) SA 754 (A) and S v Jackson 1998 (1) SACR 470 (SCA) at 476 to 477; cited with approval in M. A obo L M v The MEC for Health, Gauteng Provincial Government (unreported judgment by Moshidi J delivered on 20 April 2018 under case no. 2014/32504

[11] Contemporaneous notes being a possibility

[12] In so far as it also postulated the scenario that Asavela suffered the injury at birth

[13] The Road to Health Card, Gateway Clinic referral book and St Lucy's Hospital OPD register

[14] 2014/32504 [2018] ZAGPGJHC 77 (20 April 2018)

[15] Para [37]

[16] Para [40]

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