

SOUTH AFRICA / JUDGMENT

N.A.M obo T.M v Member of Executive Council, North West Department of Health (CIVAPPF01/2019) [2019] ZANWHC 45 (12 September 2019) [2019] ZANWHC 45

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, Samkelo Gura, Charlotte SP
Oosthuizen-Senekal

CASE / FILE NUMBER

CIVAPPF01/2019

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Policy

IN

THE NORTH WEST HIGH COURT, MAHIKENG

CASE

NO: CIV APP FB 01/2019

In

the matter between:

N[...]
A[...] M[...]
Appellant
obo T[...] M[...]
and
MEMBER OF EXECUTIVE
COUNCIL,
NORTH
WEST DEPARTMENT OF HEALTH Respondent
DATE
OF HEARING
:
31 MAY 2019

DATE
OF JUDGMENT
:
12 SEPTEMBER 2019
COUNSEL
FOR APPELLANT
: ADV.
JHF PISTOR SC
COUNSEL
FOR THE RESPONDENT : ADV.
TR MASEVHE

JUDGMENT

ORDER

- (i) The appeal succeeds with costs.
- (ii) The order of the court a quo is set aside and is substituted with the following order:

“1. The Plaintiff succeeds on the merits of her claim.

- 2. Defendant is ordered to pay to the Plaintiff in her representative capacity as the mother and natural guardian of her minor child T[...] M[...], born on 17 December 2003, all such damages as Plaintiff might be able to prove or that the parties might agree on.
- 3. Defendant shall pay the Plaintiff's taxed or agreed party and party costs of this action up to the moment of this order on the High Court scale which shall include the following:

3.1 The fees of senior counsel on the High Court scale;

3.2 The reasonable taxable costs of obtaining all experts'

Medico legal reports from the Plaintiff's experts which were served on the Defendant in terms of Rule 36 (9) (a) & (b);

3.3 The reasonable taxable preparation and reservation fees of the following experts of whom notice has been given and who testified, on behalf of Plaintiff being:

- (a) Dr. TKP Moja
- (b) Dr. HH Lewis.

3.4 The reasonable taxable transportation and accommodation costs incurred by the Plaintiff in attending medico legal consultations with the Plaintiff's and Defendant's experts inclusive of the reasonable travelling and accommodation costs in attending the trial proceedings, subject to the discretion of the Taxing Master;

3.5 The above costs will be paid into the following trust Account:

SEMAUSHU ATTORNEYS TRUST ACCOUNT

Account number 620[...] FNB

BATHOPELE BRANCH

Branch CODE: 260 849

4. The following provisions will apply with regards to the determination of the aforementioned taxed or agreed costs:
 - (a) The Plaintiff shall serve the Notice of Taxation on the Defendant's Attorneys of record;
 - (b) The Plaintiff shall allow the Defendant 7(SEVEN) court days to make payment of the taxed or agreed costs from date of the settlement or taxation (whichever might be applicable);
 - (c) Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.5% on taxed or agreed costs from date of allocator or the date of the agreement (whichever might be applicable) to date of final payment.
5. The Plaintiff is declared to have been a necessary witness.”

HENDRCIKS ADJP

Introduction

- [1] Ms. N[...] A[..] M[...] (the appellant) was pregnant during 2003 with her second child. She was expected to give birth during December of that year. In the early morning hours of the 17th December 2003, she experienced contractions and labour pains. The nearby clinic is the Makgobistadt Clinic (the clinic). She was transported to the clinic in a light delivery motor vehicle (van) by Mr. Lebone at approximately 08:00 am. Upon arrival at the clinic, she gave birth to her baby girl T[...], inside the van. She and T[...] were taken inside the clinic where they received treatment. They were both discharged around noon [±four (4) hours later] on the very same day. She took Tshepiso back to the clinic on scheduled visits for a period of about six (6) months. As she suspected that something is wrong with T[...], she then decided to take her to another clinic, the Motlhabeng Clinic. T[...] was diagnosed with cerebral palsy as a result of a hypoxic ischemic injury she sustained. This led to the appellant, as natural guardian of T[...] and acting on her behalf, to institute a claim for delictual damages against the Member of the Executive Council (MEC) of the North West Province, Department of Health (the respondent).
- [2] It was agreed amongst the parties that the merits and quantum be separated. The trial on merits proceeded before Gutta J in order to determine liability, if any, on the part of the respondent. Gutta J in the court a quo found that the appellant, as the plaintiff, did not succeed in proving that the staff of the clinic was negligent or that their

negligence caused or failed to reverse a hypoxic ischemic injury to the brain of T[...]. Leave to appeal against this judgment and order was subsequently granted by the court a quo to the Full Court of this division; hence the present appeal.

- [3] It is common cause that the Makgobistadt Clinic is a Government institution which is open to the public on a 24-hour basis and that the medical staff at the clinic involved in the treatment of the appellant and T[...], were acting within the cause and scope of their employment with the respondent. Furthermore, the respondent is vicariously liable for their actions.
- [4] It was alleged during the trial that the medical staff at the clinic was negligent in that although the clinic building was open, they were not on duty and at hand to attend to the appellant when she gave birth. Furthermore, that they failed to properly attend to T[...], after she was born and that their negligence in not properly attending to T[...], is the cause of the cerebral palsy. Evidence was adduced during the trial by witnesses for and on behalf of the appellant (plaintiff) and the respondent (defendant) respectively. In order to fully understand and appreciate the extent of the alleged negligence, it is necessary to give a synopsis of the evidence tendered during the trial.

The Appellant's evidence

- [5] The appellant, Ms N[...] A[.] M[...] (Ms M[...]), testified as the plaintiff. She said she visited the clinic and her pregnancy was confirmed. She returned after four (4) to five (5) months and thereafter visited the clinic on a monthly basis.
- [6] On the 17th December 2003 at around 3:00 am, she experienced labour pains. Her sister called for an ambulance but was unsuccessful. Her father asked Mr Lebone to drive her to the clinic. At around 7:35 am to 7:40 am they left her home in Mr Lebone's van en route to the clinic. She was seated in the middle and her sister was next to her on the left. They arrived at the clinic between 7:50 am to 7:55 am. Upon arrival, they found a security officer at the gate. He informed them that there were no nurse(s) at the clinic. She waited in the van. At about 8:00 am her membrane ruptured. A lady called Maria Tlhabanyane came to check on her. She gave birth whilst seated in the van. She said she wore a T-shirt, a long black skirt and a panty which she pushed to her knees when she gave birth. She was alone in the van when she gave birth. After giving birth, a cleaner from the clinic came with a blanket and wrapped it around her. They stayed there for about ten (10) minutes. The baby did not move, breath or cry.
- [7] Between 8:25 am and 8:30 am Ms Motaung, a nursing sister, arrived and cut the umbilical cord and took her and the baby. Ms Motaung put her on a bed in the clinic. Sister Moletsane examined her and cleaned her. She also admonished her and said that when she arrived and found no one at the clinic, she should have gone to the Disaneng clinic instead and that she want to put them in trouble. They brought Tshepiso to her in an incubator. She was discharged around 12:00. Tshepiso did not cry at the clinic and cried for the first time later during the day. She could not remember whether she breastfed Tshepiso

at the clinic. She said the first night T[...] slept throughout the night. Thereafter she observed that T[...] slept too much.

- [8] She said she was given the Road To Health Card (RTHC) on the day she left the clinic. She went back to the clinic for T[...]’s immunisation in January 2004 and returned after five months. Thereafter, she went to the Motlhabeng Clinic because she was concerned that T[...] was always sleeping and not behaving like a normal baby of that age. She was referred to Bophelong Hospital where they diagnosed Tshepiso with microencephalopathy cerebral palsy (CP).
- [9] Mr Poloko Lazarus Lebone (Mr. Lebone) testified on behalf of the appellant (plaintiff). He said that on arrival at the clinic, the gate used by motor vehicles was closed. The security officer told them that the nurses had not yet arrived. He said there is another gate that is used by pedestrians. He told the appellant to alight but she could not. Upon realizing that the appellant was unable to alight, he called Ms Maria Tlhabanyane. The latter entered the clinic using the pedestrian gate and returned with a cleaner who was carrying a blanket. He then saw Ms Motaung coming for work and she then assisted the appellant. He was instructed to take the vehicle inside the clinic yard.

The Respondent’s evidence

- [10] Ms Sophie Lebone Moletsane (Sister Moletsane) a professional registered nurse testified that on 17th December 2003, she reported for work at the clinic at 7:00 am. There was a handover report from the night nurse. She was on duty with Ms Motaung, the assistant nurse. She was in the emergency room and Ms Motaung was in the maternity room. Ms Motaung called her saying there is a maternity emergency in that the patient has already delivered and requesting a pair of scissors. She entered the maternity room, took a pair of scissors, a clean sheet and a cord clamp and went to the van. Ms Motaung was already at the van. She found the appellant and saw something that looked like a ball between her thighs at the vaginal area. The appellant was wearing a jean trouser. In the motor vehicle there was not sufficient space for the appellant to open her legs. She requested Ms Motaung to assist her to pick the appellant up and put her in a wheelchair so that they could wheel her inside the clinic building and have privacy.
- [11] In the passage, she requested Ms Motaung to help her to lift the appellants’ legs. She then cut the jean trouser from the bottom end upwards and seeing that the panty was holding the baby, she also cut the panty. She took the baby and put the baby on the appellants’ thigh, clamped the cord and cut it. She supported the baby’s neck and wrapped the baby with a sheet. On the way to the maternity room, she removed secretions from the nose and the mouth with gauze.

She then went with the baby inside the maternity room. She was holding the baby in her left hand. She turned the baby’s head

with the right hand so that any remaining secretions could flow out. When she entered the labour room, the baby cried. She put the baby on the table and then took a suction machine and suctioned the secretions that were left. She wiped off the blood on the baby's body and wrapped the baby in another clean sheet and put the baby inside an incubator. At that time, Ms Motaung had put the appellant in a bed inside the maternity room. She then examined the appellant and cleaned her.

[12] She returned to the incubator and attended to the baby. She measured her head circumference, the length and performed the genital examination. She requested the maternity record from the appellant as she was attending antenatal classes, but she did not have it. They opened a new maternity register. After recording the information, she handed the baby to the appellant to see if the baby sucks. The baby was able to breastfeed. Thereafter, she put the baby back inside the incubator. Every two (2) hours, she checked the baby and the appellant. The baby was fine, she was pink, breathing normally and was crying. They checked the appellant's blood pressure and bleeding. After four (4) hours, at 12:00, they discharged the appellant and the baby.

[13] According to sister Moletsane, the baby breastfed several times from the appellant and was discharged being in good condition. She also considered the crying and reflexes of the baby. She said that because the baby was in a good condition, she did not need oxygen as her skin was pink, she was crying and the reflexes were present. She completed the maternity register. In this register she recorded normal vaginal delivery (NVD), 'head on perineum'. She said this means the baby's head was already out and they did not deliver the baby. She said this was a complicated case because she could have

written birth before arrival (BBA), but this is when the mother arrives with the baby in her arms. However, in this case the baby was between her legs in her panty. Under complication she wrote 'none'. The appellant was examined and there were no tears in her vagina, hence she wrote that the condition of the appellant was 'satisfactory'. Under the column condition of child, she wrote satisfactory because she checked whether the child was crying, her skin colour and sucking reflexes. She wrote the weight as 2.8kg. She said she gave the appellant a maternity record which has all the information about the mother and the baby. The appellant was supposed to return after seven (7) days with the baby. She issued the Road to Health Card (RTHC) to the appellant.

[14] Ms Keorapetse Sylvia Motaung (Ms Motaung) testified. She is employed at the clinic as an assistant nurse. On 17th December 2003, she was on duty from 7:00 am. She was busy in the maternity ward preparing the equipment for the morning. Through the window, she saw a van. The people from the van appeared to be in a hurry. She directed through the window that they should go to the back. This was around 8:00 am, but she could not recall the exact time. She went out and met them at the main door. Present in the van were the appellant, her sister and the driver. The driver switched off the engine of the van and left.

- [15] Somebody mentioned that the appellant had already delivered her baby. She then ran back to collect a wheelchair and screamed, calling sister Moletsane. Sister Moletsane came and said the appellant had delivered and was wearing a pair of jean trouser. She assisted sister Moletsane to cut the trouser. They could not manage to assist further because it was on the front seat of the van and the space was too small. They put her on a wheelchair and wheeled her into the corridor of the clinic building where they further assisted her. Sister Moletsane cut the trouser and the baby was placed on the left thigh of the appellant. Sister Moletsane cut the baby's umbilical cord and entered the maternity ward with the baby. She did not see if the baby was lifeless. She ran into the ward to fetch a gown for the appellant to cover her privacy. Thereafter, she wheeled her into the maternity ward whilst sister Moletsane was attending to the baby. Moletsane checked the appellants' vitals, namely her blood pressure, temperature and pulse. She then left to check on other patients. Later on she saw the appellant breastfed her baby. She did not see the appellant when she was discharged.
- [16] She denied that the clinic was closed when the appellant arrived. She said when she arrived at work on that day, there wasn't a car (van) parked in front of the clinic. She also denied that a cleaner assisted the appellant in the van when it arrived at the clinic. She did not see Maria Tlhabanyane inside the clinic yard. She denied that she was not at work and said she was present and saw them entering through the gate. She denied that she cut the umbilical cord and took the baby. She said with her scope of practice and training, she would never cut an umbilical cord. This is done by the sister or midwife.

She said she went to collect a gown to cover the appellant and on her return from collecting the gown, she heard the baby crying. She said she also used to give antenatal classes but has never seen the appellant there.

- [17] Ms. Kedimetseng Alice Jaula (Ms Jaula) testified and said that she is employed as an administration officer at the clinic. She registers patients and do the filing. On 17th December 2003 she arrived at work at 8:00 am. While dusting, she heard sister Moletsane requesting a pair of scissors. Sister Moletsane exited the examination room and went in the direction of the labour ward. Ms Motaung followed Moletsane with the appellant in a wheelchair. She knows the appellant from the village. They met at the labour ward door. Sister Moletsane cut off the appellant's

pants, removed and wrapped the baby. She then took the baby inside the ward. Thereafter she heard the baby crying. She continued with her work and didn't see the appellant again on that day.

- [18] She said prior to 17th December 2003, she did not see the appellant at the clinic. She registers the people who come to the clinic on a daily basis in a book called "Head Count". She said the fill port is the maternity case record. Information such as the weight, length, and head circumference of the baby is recorded in the maternity case record by the midwife, who was sister Moletsane on 17th December 2003. She said in 2016, her supervisor asked her to look for the records relating to the appellant. She checked in the old clinic

building where files are stored, but could not locate the file. She only found the maternity register.

Findings by the court a quo

- [19] The court a quo found that neither the appellant nor Mr Lebone testified that the clinic was closed. They testified that they heard that the nurses had not arrived. There is no evidence that the clinic, which is a 24 hour clinic, was indeed closed. On probabilities the clinic was open as Mr Lebone said that Ms Tlhabanyane entered the clinic using the pedestrian entrance and returned with a cleaner. There is no evidence to gainsay the respondent's evidence that the clinic was open and that sister Moletsane and Ms Motaung were there at 7:00 am and were taking over from the night staff. It is improbable that the clinic would be closed and that there would be no staff to assist the appellant if there had to be a handover from the night staff to the day staff. It is further improbable that all the staff would have arrived late. This conclusion by the court a quo loses sight of the fact that the appellant's case was not that the clinic was physically closed or locked but that the nursing staff was unavailable to assist the appellant.
- [20] The court a quo concluded that there are differences in the testimonies of the appellant and Mr. Lebone with regard to the time of their arrival at the clinic. The appellant testified that it was around 8:00 am whilst Mr. Lebone said it was at 7:00 am. Much have also been made about the fact that the appellant contradicted herself in giving different times to the different experts she consulted. The difference in time is fifteen (15) minutes, which is between 7:45 am and 8:00 am. In my view this is insignificant, especially if regard is had to the version of the respondent's witnesses with regard to the time of the appellant's arrival at the clinic. Ms Jaula, testified that the appellant arrived after 8:00 am but she was not specific about time. Sister Moletsane, testified that it was between 7:00 am and 8:00 am, when the appellant arrived. Once again, even she was also not specific about the exact time of arrival. The court a quo found that because of the differences with regard to the time of arrival in her evidence, the appellant cannot be believed. If time was of the essence, especially the time of arrival of the appellant at the clinic, then surely it is almost common cause that the time of arrival was approximately 8:00 am.

Evaluation

- [21] It is quite apparent that the versions of the appellant and Mr. Lebone vis-a-vis that of Moletsane, Motaung and Jaula (the staff of the clinic) are different and irreconcilable. These versions are incompatible to the extent that one version can be true whereas the other one is false.

See: *Allie v Foodworld Stores Distribution Centre (Pty) Ltd and Others* 2004

- (2) SA 433 (SCA)

With regard to the conflicting versions which are mutually destructive, see also: Stellenbosch Farmers Winery Group Ltd and Another v Martell ET CIE and Others 2003 (1) SA 11 (SCA).

A court of appeal's interference with credibility findings of a trial court is very limited and can only do so if it is satisfied

that the trial court failed to correctly evaluate the evidence.

- [22] It should be borne in mind that all the witnesses testified after the passage of approximately fourteen (14) to fifteen (15) years. It can hardly be expected of any of them to remember with minute particularity and in every detail what the time was on the day of the incident, when the appellant arrived at the clinic. Especially because no one actually recorded the time of her arrival at the clinic and no documentary proof was presented in this regard in the court a quo.
- [23] On appellant's evidence, as corroborated by the evidence of Mr. Lebone, the nurses were not present at the clinic when they arrived as was conveyed to them by the security officer. That is why Mr. Lebone had to illicit the assistance of Ms Tlhabanyane, who called the cleaner to bring a blanket. Had the nursing staff been available at the clinic and on duty at the time of arrival of the appellant, they would have assisted her earlier and she would have given birth to T[...] under more conducive circumstances. On the version of the appellant, as supported by her witness, the staff at the clinic was negligent in not being present at the clinic to attend to the appellant when she arrived.
- [24] On an analysis of the evidence tendered on behalf of the respondent, it is quite apparent that the nursing staff at the clinic were negligent. At first, according to their evidence, the appellant gave birth to Tshepiso inside the van. Sister Moletsane and Ms Motaung contradicted each other as to where exactly inside the van did the appellant give birth. Whether inside the cab on the seat or at the back inside the canopy on the loading bin. It is common cause that the appellant gave birth in an uncomfortable place (inside the van) and space. This in itself must have raised certain concerns with especially sister Moletsane, the nursing sister.
- [25] On the evidence of sister Moletsane, she had to cut the jean trouser of the appellant in order to assist in getting T[...] to be delivered. This too is something that should have raised an alarm. She found the baby inside the panty of the appellant protruding like a ball between her thighs and the appellant being in an uncomfortable position. She did not secure the delivery of T[...] at that stage. Instead, she sent for a wheelchair and wheeled the appellant, with T[...] trapped in that position, into the clinic building. According to her, the delivery happened whilst the appellant was still in the wheelchair.

[26] A careful analysis of sister Moletsane's evidence indicates that T[...] did not cry immediately when she arrived at the van, nor whilst the appellant was being wheeled into the clinic. She had to cut the jean trouser and panty to free T[...]. On the way to the maternity room, she removed secretions from the nose and mouth of T[...]. Thereafter, according to her, T[...] did cry. This happened within the first five (5) minutes of the birth of T[...].

The first five minutes after birth is of vital importance. Sister Moletsane placed T[...] inside an incubator wherein oxygen was administered. If there was nothing untoward the birth of T[...] and also her condition at birth, there was no need to administer oxygen. This is an aspect to which I will return in more detail later on in this judgment when dealing with the medical evidence.

[27] It seems that sister Moletsane, as the highest qualified medical professional on duty at the clinic on the day of the incident, was in charge of the clinic. She completed the RTHC incorrectly in terms of her own evidence. If the baby was born before admission then she should have written "BBA" on the RTHC and not "head on perineum" as she wrote. This in itself is a vital contradiction. It underscores the fact that the appellant was in the process of delivering T[...] in the presence of the nurses at the clinic, both sister Moletsane and Ms Motaung. That being the case, the nurses should have exercised diligent care of Tshepiso and the appellant, failing which, this amounts to negligence on their part.

[28] A disturbing factor to me is that for almost six (6) months after the birth of T[...], the appellant regularly took her back to the clinic for follow-up consultations. On the occasions that she went back to the clinic, no abnormalities were detected. It is only when the appellant took T[...] to a different clinic that she was diagnosed and referred to the hospital. This is something which should have been or must have been detected by the staff of the Makgobistadt Clinic. This in itself smacks of negligence on the part of the nursing staff at the clinic. If this wasn't the case, then the question that begs an answer is why did the nursing staff at the clinic not detect any abnormalities in the behaviour of T[...]

for a considerable period of time (approximately six (6) months), whilst the nursing staff at the Motlhabeng clinic could detect it so quickly?

[29] There are numerous material contradictions in the evidence of sister Moletsane, Motaung and Jaula (the staff of the clinic), which the court a quo ignored in arriving at its decision. These relate to where in the van the appellant was seated– was she in the cabin in front or under the canopy at the back in the loading–bin; whether Moletsane held T[...] at her ankle(s) with her head facing downwards to allow the secretions to fall from her nose and mouth or whether she held her on her arm with the head tilted; whether Moletsane administered oxygen on T[...] in the incubator or not; what Moletsane wrote on the RTHC about T[...] which is not true namely, 'head in perineum' instead of "BBA" (born before arrival), ect.; whether a file was opened and what happened to it; whether T[...] was resuscitated or not; at what stage did T[...] cry; whether Motaung dressed T[...] on her discharge or not; ect. Had these contradictions of the staff at the clinic been taken into consideration, a different decision would have been arrived at by the court a quo.

- [30] This brings me to the medical evidence that was presented during the trial in the court a quo. Dr Moja a neurosurgeon, testified in appellant's (plaintiff's) case and said that he examined T[...] on 8th July 2016 and compiled a report. He had sight of the RTHC. The Apgar score was not filled in and there were no measurements of T[...]’s weight, length and head circumference. He explained that the purpose of the Apgar score is to give a numerical value to a baby’s ability to breath, take oxygen and respond neurologically after birth. It is done at one minute, five minutes and in some cases ten minutes intervals. He said T[...] was diagnosed with cerebral palsy (CP) when she was six (6) months old.
- [31] Dr Moja accepted the radiologist’s finding of a “hypoxic ischemic injury of a term brain at a chronic stage of evolution”. He explained that hypoxia means that there was oxygen starvation of the brain and ischemic implies that in addition to the lack of oxygen, there was also poor flow of blood to the brain, and these two led to the brain injury. Dr Moja said when looking at the MRI reports there was an acute profound event, that is total oxygen deprivation for a very short period which lasted for less than five minutes. There is also the second element which means that at that point there was lack of oxygen but it was not total lack of oxygen, it was prolonged hypoxia. Where you have an acute profound hypoxia and subsequently also have a prolonged period of hypoxia, you have ongoing damage that may not be immediately evident and may manifest later as the baby starts to develop normal milestones.
- [32] He said the impact on the brain occurred and did not stop instantaneously but developed over a period of time. Investigation and monitoring of a baby after suffering such an insult is of utmost importance not only in evaluating the severity of the condition but also to potentially reverse some of the subsequent events that would have occurred in the brain and improve the long term outcome of the baby. He said the degree of neurological deficit will depend on the treatment that was given. T[...] would have fallen in the mild to moderate category and with the correct treatment, T[...] was potentially salvageable to be either completely normal or with far less severe neurological outcome.
- [33] Dr Moja stated that upon consultation with the appellant, she said she noticed that her baby was initially not crying, breathing and not moving. In such a case there would have been a period of birth asphyxia and subsequent hypoxic anoxic and hypoxic ischaemic brain injury. The nurses attended to the baby when they arrived at the clinic. Nonetheless, in light of T[...]’s breathing problems at delivery, it would have been prudent to resuscitate the baby and immediately arrange for transfer of T[...] to the hospital for further medical attention. The child should have been referred to a pediatrician for further investigations and treatment. On this basis there is a plausible case of medical negligence. Dr Moja said it was unreasonable to discharge T[...] and his mother and send them home at 12:00, on the very same day.

[34] He explained that it is logical and more probable that the acute profound episode which is limited to a few minutes was at the point of delivery because the baby was lifeless but then started breathing. This could have been up to five minutes but not more than five minutes. If the acute profound event was in utero (in the womb), T[...] would have died at birth. He stated that it was not necessary to resuscitate T[...] in circumstances where the nurse placed her in the incubator, she started crying, she was pink in colour and breathing. However, he said that there was definitely still a need to

monitor her and to do further investigations. He said if a patient is pink but suffered an event, you still have to give oxygen. It is called supplemental oxygen until you have done further test to evaluate that there is indeed adequate oxygenation. He said even if T[...] was breastfed at the clinic, the nursing staff should still have monitored and referred T[...] because of the extraordinary situation in which she was delivered. He said the fact that the nurse performed a resuscitative manoeuvre by initiating breathing means that T[...] should have been monitored for at least 24 hours, as there may be initial recovery and subsequent deterioration.

[35] Dr Lewis, a pediatrician, testified in appellant's (plaintiff's) case and said that when he examined T [...], she was 12 years old. He said T[...] suffers from spastic quadriplegia with the left side being more affected than the right. Due to her injuries, she is unable to care for herself. She requires a wheelchair and would require 24 hour care later in her life. He said it's a type of cerebral palsy that follows an intrapartum or peripartum insult and it causes spasticity of her limbs and her body. Delays in assisting the non-breathing new-born to establish ventilation may exacerbate hypoxia, increase the need for assisted ventilation and contribute to neonatal morbidity and mortality.

[36] Dr Malebane testified on behalf of the respondent and said that he consulted with T[...] and the appellant on 11th May 2017 and compiled a report. In a revised report prepared after receiving the radiologist's joint minutes and the maternity

register, he states that the labour occurred prior to her admission for delivery and for this reason no monitoring of the labour

preceding the time of her admission could have occurred at the clinic. So if there were abnormalities in the foetal condition (foetal distress), this would have not been detected and managed accordingly. In his report he said that due to the fact that the

patient had virtually her entire labour outside of the health care, the resultant brain injury cannot be attributed to any action or omissions by the health care workers.

[37] He explained that for a foetus to suffer acute profound injury there must have been at some stage, a total shut off of blood flow. With partial prolonged there is some flow of blood just not an adequate flow. He said the acute profound ischemic injury occurred in the second stage of labour when the cervix was fully dilated, ten minutes from the time of the insult to the delivery, to a maximum of an hour before the delivery. If the blood and oxygen flow is cut off and exceeds ten minutes, one will suffer brain damage of an acute profound nature.

Ten minutes is the threshold to sustain brain injury. Beyond 40 – 60 minutes, the foetus dies. Dr Malebane said a qualitative assessment of the general status of the neonatal is done within the first ten (10) minutes. There are different parameters, namely the colour of the skin, the tone, respiration, etc. Depending on what the assessment is, a decision would then be made whether or not the foetus requires resuscitation and what type of resuscitation. If the neonatal was breathing and was pink in colour there was no indication of respiratory distress.

- [38] He agreed that the Apgar score was important to establish the condition of the baby. Assessments can be done, one with an Apgar score, and also by looking at the respiratory effort, whether the baby is crying, the colour of the skin and the presence of reflexes. On appellant's version she gave birth at 8:15 am in the van and stayed there for ten
- (10) minutes. The baby was not moving, not breathing and not crying. Dr Malebane agreed that this was an abnormal position for a woman to give birth. He agreed that on probabilities the injury occurred during the period that the appellant was waiting to give birth in the van or immediately thereafter. Around the time the appellant went into labour, the delivery and probably the immediate post delivery period.
- [39] Dr Kganane, a qualified pediatrician testified on behalf of the respondent and said that on examining T[...], she found the weight, height and head circumference to be appropriate for her age. This was unusual for someone who had neuro developmental delay, whose cognitive

function was diminished. Her motor functions showed decreased power, increased reflexes and increased tone on the left upper and lower. Dr Kganane said Tshepiso has mixed cerebral palsy, normal growth parameters and no epilepsy which is uncommon in hypoxic ischemic encephalopathy cases. There is spasticity in the muscles but the brain function is not so bad. There was no objective evidence to confirm the hypoxic ischemic encephalopathy on history or on examination. The neurological findings confirmed by the MRI scan was in keeping with congenital brain malformation.

- [40] Dr Kganane did not change his opinion even after the radiologists changed their opinion. She said for a baby born outside a health care facility (BBA), a health care worker should look at whether the baby was breastfeeding, was breathing, was pink, and looked normal. Dr Kganane said the appellant told her that T[...] was discharged because she was breastfeeding and there were no problems. After conducting an examination on the appellant, they handed the baby to her to see if she could suck and the baby sucked from the breast. The appellant was discharged at 12:00 and no concerns were noted. At home the appellant observed that T[...] slept a lot. There were no abnormal movements, no fits and the baby was vaccinated.
- [41] Dr Kganane said the steps taken by Sister Moletsane, namely to suction and remove excessive secretions and wrap the baby is normal. As part of trying to stimulate, you wipe off the excessive fluids and wrap their bodies to re-establish normal body temperature and you

put them in an incubator to establish the temperature. You would give oxygen if the colour and the appearance of the baby was blue or purple and there is inactivity. You can also give oxygen via the incubator. Oxygen is a drug, it is a therapy. If there are no signs or symptoms that you need oxygen, then you would not give the oxygen. In response to Dr Moja's opinion that the baby should have been taken for further monitoring at a hospital for a period of 24 hours, Dr Kganane said, the fact that the baby was sucking was appropriate and further that the baby was monitored for another four (4) hours was impressive. The baby was conscious and did not need oxygen in the four (4) hours. In the four (4) hours you monitor if the baby is sucking and does not have seizures or abnormal movements. The RTHC showed that the baby was normal, well and gaining weight. Tshepiso did not have any other issues and was not readmitted to the hospital with an infection or seizures.

- [42] Under cross examination, Dr Kganane admitted the she had the first radiologist's report and not the second revised report. After seeing the revised report, she said there wasn't much of a change. She admitted that she did not really rely on the reports and joint minutes of the radiologists. Under cross examination she also admitted that according to the RTHC, Tshepiso's weight gain from one month up to six months was subnormal. This, she explained, is relative as it depends on circumstances such as whether the baby is sick or whether there is enough nutrition at home, etc. She said that from the age of six (6) months Tshepiso did not develop properly, so by the age of 13, she was not developed. She was questioned why then did she state in her report that the baby's weight, length and head circumference were normal for her age when she saw T[...] at age 13. She said the measurements were appropriate for her age but that T[...] was not developing neurologically after six (6) months.
- [43] She was asked to explain the difference between spastic quadriplegic type of cerebral palsy and mixed cerebral palsy. She said spastic refers to increased tone so the arms and legs are stiff. Quadriplegic is someone who cannot walk and cannot use his limbs. They are usually bed bound. That differs substantially from mixed cerebral palsy. She said T[...] does not fit in with the findings of the radiologists, whose findings were a typical spastic quadriplegic. She was referred to the joint minutes wherein she agreed that T[...] suffers from cerebral palsy of the spastic quadriplegic type. She said she missed this one when she signed the joint minutes.
- [44] In cross examination, Dr Kganane was asked whether she is in a position to say when the brain injury occurred. She said if we say it is an acute insult then it probably happened during the time that T[...] was delivered. Growth relates to when the insult occurred. In this case, the brain is still preserved and T[...] did not stop growing. She said she was not in a position to conclude when the incident happened but was more inclined to believe that it happened at some time after birth.
- [45] Dr Mogashoa is a pediatrician neurologist, who qualified in pediatrics and subspecialize in neurology of the child. She testified on behalf of the respondent and said that she consulted with the appellant and T[...] on 12th May 2017 and compiled a report. She also prepared an

addendum report on 19th November 2017, after receiving additional information. She had the RTHC and the radiologists report when she prepared her report. The appellant arrived at the clinic at 7:45 am and there were no nurses. She delivered in the van at 8:18 am. The nurses arrived ten (10) minutes after the delivery. In her report she said for a thirteen

[13] year old, T[...]’s milestones are grossly delayed. She is still in nappies and her speech is not normal. T[...]’s thumbs were fisted, she was spastic (stiff), and cannot be moved with ease. All four limbs were affected which is called quadric, but the one side was more affected than the other. She has mixed cerebral palsy because she has both spasticity and she has abnormal posturing (dystonia). It’s a mixture of spastic quadriplegia plus dystonia.

[46] Dr Mogashoa said according to the appellant, she was well during the pregnancy and attended antenatal classes. There is no antenatal card, so one does not know how the baby grew. The appellant arrived at the clinic well after she had gone through most of her labour. Dr Mogashoa did not think the problem occurred in the postpartum (after birth) period. According to the appellant, T[...] was depressed at birth and started crying after ten (10) minutes. T[...]’s neonatal course does not support an ideological diagnosis of hypoxic ischemic encephalopathy, as T[...] was well in the neonatal period according to the appellant.

[47] There are 2 types of hypoxic events. The first is gradual prolonged hypoxia for example if someone has been in labour for a long time and that typically would give you spastic quadriplegic cerebral palsy. You also get a situation where there was sudden loss of blood supply to the brain and the brain does not have enough oxygen to compensate and spare its most critical or its most metabolically active parts of the brain. Depending on the type of hypoxia that the baby has, you can get dystonic cerebral palsy or quadriplegic cerebral palsy. Dr Mogashoa says T[...] has got features of both partial prolonged

hypoxia and acute profound. This fits the clinical picture because T[...] has got both features of spastic quadriparesis from a partial prolonged injury and dyskinetic or abnormal movements from an acute profound injury. She has mixed cerebral palsy.

[48] In cross examination she was questioned about her handwritten notes where she wrote “Baby did not cry at birth, was just still for ten minutes after nurse arrived”. She said this should be interpreted that the baby was still when it was born and it was approximately ten minutes thereafter that the nurses arrived. In her first report she said “baby did not cry at birth. She was quiet for about ten minutes”. She said she took this from her notes. She said the two are the same, as the baby was quiet for about ten minutes. She said if there is a difference between the two, the Court can rely on the written notes. She reiterated that the appellant told her that the baby was still for ten minutes and the nurses arrived

about ten minutes after the baby was born. The appellant did not tell her what happened during the period after the nurses took the baby.

[49] Dr Mogashoa said she prepared the addendum report after receiving the revised radiology report and the maternity register. The only useful information from the maternity register was T[...]’s condition on discharge, where the sister wrote “Satisfactory” and the weight was 2.8kg which is a normal weight. She agrees with the radiologist that the pattern that they see is hypoxia to the term brain. She said the hypoxia could have occurred anywhere from 37 weeks of pregnancy to the first month of life. She said it is difficult for the radiologist to interpret the MRI because it was done when T[...] was 12 – 13 years old and there has been many changes to the brain. When looking at the MRI at 13 years of age

one cannot say that this occurred at birth. For one to say the injury occurred in the intra partum period, the MRI had to be done within the first 12 days of life.

[50] She said further that there is a pattern of injury of acute profound. An acute profound injury takes about six (6) to ten (10) minutes. There is also partial prolonged injury and this injury takes much longer to occur. That is why she concluded by stating that “I am of the opinion that at this point we cannot conclude when the brain insult occurred”.

[51] Dr. Moja’s evidence is supported by the evidence of Dr. Lewis. Dr. Malebane, who testified on behalf of the respondent (defendant), also supports the evidence of Dr. Moja with regard to when the injury occurred. His evidence that T[...] suffered an hypoxic event – being lack of oxygen to the brain – which happened shortly before or during the time of birth, lends credence to the testimonies of Dr. Moja and Dr. Lewis. This is a clear indication that there was negligence on the part of the nursing staff at the clinic to properly assist the appellant during the birth of T[...] and to take proper care of T[...] after birth. If the appellant was timeously and properly assisted at the clinic, the nursing staff (Moletsane and Motaung) would have either prevented the occurrence of the hypoxic event or detected it early enough to either minimize or reverse the occurrence. On the probabilities, the court a quo should have concluded that there was negligence on the part of the nursing staff at the clinic.

[52] Instead, reliance was placed on the evidence of Dr. Kganare and Dr. Mogashoa by the court a quo. Dr. Kganare agreed with Dr. Lewis in the joint minutes they compiled, but deviated from it in the testimony presented. This is a contradiction which cast serious doubt on the acceptance of the evidence of this witness, especially if it is uncorroborated. She also did not pay attention to the joint minutes of the radiologists, something which was not the case with the other experts. She conceded that if the court were to accept the joint minutes of the radiologists, then her opinion should not be accepted. This also cast a serious doubt on her expert opinion. This too, the court a quo overlooked. Important though is that she conceded also that if a baby is well, there is no need to administer oxygen, as Moletsane did with T[...]. The fact that oxygen was administered is a clear indication that there was cause for concern. This much was also conceded to by Dr. Moduma who also testified on behalf of the respondent (defendant).

[53] Not much reliance should also have been placed on the evidence of Dr. Magashoa because of the inconsistencies in her evidence. She filed two reports. In the first report she aligned herself with the initial findings of Dr. Kamolane and excluded a hypoxic brain injury. Dr. Kamolane subsequently changed his view after the joint minutes of the radiologists were supplied and found that T[...] suffered a hypoxic ischemic injury. Dr. Mogashoa filed an addendum to her report and although conceding that T[...] suffered a hypoxic injury, she said it must have occurred during pregnancy (in utero) or in the first month of life, but not during labour. This is totally different from the other expert opinions. If the period is from in utero until the first month of life, then surely it includes the delivery of the child. Why this period is excluded does not make sense. There is no logical explanation or basis to exclude this period.

Conclusion

- [54] On the probabilities, the court a quo should have found that the appellant succeeded in proving its case. The evaluation of the evidence indicates that the nursing staff at the Makgobistadt Clinic was negligent in their treatment of the appellant and T[...]. I am of the view that on both the version of the appellant and the respondent, the nursing staff at the Makgobistadt Clinic was negligent in assisting the appellant to give birth to T[...] and the exercise of due diligent care of T[...] upon birth. With regard to the medical evidence too, the court a quo should have found in favour of the appellant. On the probabilities, the hypoxic ischemic injury occurred during the birth of T[...].
- [55] Based on the evidence presented and taking into account the probabilities, it is clear that the court a quo erred in not finding that the nursing staff at the clinic was not on duty and at hand to assist at the clinic. That the appellant gave birth in a very restricted area in the front of the van under less conducive circumstances. That the nursing staff failed to properly and timeously attend to the appellant and Tshepiso. That they failed to properly observe T[...] at least for a 24 hour period. That they were negligent in early discharging the appellant and T[...]. That they were negligent in not referring T[...] to a specialist or hospital seeing that the birth happened under unusual circumstances. That had they properly monitored T[...] or referred her to a specialist, her condition would have been detected earlier and steps could have been taken to minimize or reverse the condition.

Costs

- [56] As far as costs are concerned, costs should follow the event and be awarded in favour of the successful litigant, namely the appellant. Furthermore, this case is meritorious of the employment of senior counsel because of its complexity.

Order

- [57] Consequently, the following order is made:

(i) The appeal succeeds with costs.

“1. The Plaintiff succeeds on the merits of her claim.

2. Defendant is ordered to pay to the Plaintiff in her representative capacity as the mother and natural guardian of her minor child T[...] M[...], born on 17 December 2003, all such damages as Plaintiff might be able to prove or that the parties might agree on.

3.6 The fees of senior counsel on the High Court scale;

3.7 The reasonable taxable costs of obtaining all experts'

Medico legal reports from the Plaintiff's experts which were served on the Defendant in terms of Rule 36 (9) (a) & (b);

3.8 The reasonable taxable preparation and reservation fees of the following experts of whom notice has been given and who testified, on behalf of Plaintiff being:

(c) Dr. TKP Moja

(d) Dr. HH Lewis.

3.9 The reasonable taxable transportation and accommodation costs incurred by the Plaintiff in attending medico legal consultations with the Plaintiff's and Defendant's experts inclusive of the reasonable travelling and accommodation costs in attending the trial proceedings, subject to the discretion of the Taxing Master;

3.10 The above costs will be paid into the following trust Account:

SEMAUSHU ATTORNEYS TRUST ACCOUNT

Account number 620[.] FNB

BATHOPELE BRANCH

Branch CODE: 260 849

(iii) The Plaintiff shall serve the Notice of Taxation on the Defendant's Attorneys of record;

(iv) The Plaintiff shall allow the Defendant 7(SEVEN) court days to make payment of the taxed or agreed costs from date of the settlement or taxation (whichever might be applicable);

(v) Should payment not be effected timeously, the Plaintiff will be entitled to recover interest at the rate of 10.5% on taxed or agreed costs from date of allocator or the date of the agreement (whichever might be applicable) to date of final payment.

6. The Plaintiff is declared to have been a necessary witness.”

R D HENDRICKS

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG.

I agree

SAMKELO GURA

JUDGE OF THE HIGH COURT,

CHARLOTTE SP OOSTHUIZEN-SENEKAL

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG.

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Prepared on 10 October 2026 · Esheria