REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14/26684

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

19/10/2017 .... DATE

.... SIGNATURE

In the matter between:

MODIANANG, N V obo MODIANANG, V K	Plaintiff
and	
TEMBISA HOSPITAL	First Defendant
MEC FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG PROVINCE	Second Defendant

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JUDGMENT

KEIGHTLEY J:

[1] This is an application for leave to appeal against a judgment and order I handed down on the 24th of March 2017. The plaintiff in this matter sued on behalf of her minor child, V, and in her personal capacity. The claim was one

for damages arising out of the care and treatment rendered to the plaintiff and V at Tembisa Hospital ("the hospital") before and during the birth of V, on 4 April 2009. It is common cause that V suffered an acute profound hypoxic ischemic injury to his brain in the latter stages of the plaintiff's labour. V was born with what is commonly referred to as cerebral palsy.

[2] The plaintiff's case is that the nursing and/or medical personnel at the hospital were negligent in a number of respects. In particular, her case is that the hospital staff failed to adequately and objectively assess and manage the progress of her labour and the delivery of V. Further, they failed to monitor, observe and act swiftly upon signs of foetal distress, in particular the draining of meconium-stained amniotic fluid. They also failed to expedite delivery of the foetus, and to timeously take steps and precautions to prevent foetal hypoxia. They failed further in not following and applying the standard guidelines for maternal care in South Africa. There are various additional grounds of negligence cited in the particulars of claim.

[3] The parties agreed to, and I ordered, a separation between merits and damages ~~quantum~~ in terms of Rule 33. The hearing before me dealt only with the issue of merits. I found that the plaintiff had proven her case, and ordered:

[3.1] The second defendant is liable to the plaintiff, both in her personal and representative capacities, for her damages consequent upon the negligence of the first defendant's medical and nursing personnel on 3rd and 4th of April 2009, resulting in the minor child, Victor Kwena Modianang's cerebral palsy and accompanied deficits.

[3.2] The second defendant is ordered to pay the plaintiff's costs on the ordinary scale.

The grounds of appeal

[4] It is apparent from my order that I granted judgment in favour of the Plaintiff in respect of both of her claims. It must be borne in mind that I was faced with two claims: the first, by the plaintiff on behalf of V, as her minor child in respect of his damages; and the second, being by the plaintiff herself in her personal capacity for her damages.

[5] The applicants present 12 points on which they base this application for leave to appeal. The first 7 points, or grounds, relate to the application for leave to appeal in respect of V's claim. The remaining 5 points or grounds relate to the application for leave to appeal in respect of the plaintiff's personal claim. Briefly they are:

1 *"The learned Judge erred in finding that the diagnosis of CPD, and the recording of moulding +++ and caput+++ together with the direction that a caesarean be performed are indications of some foetal distress.*

2 *The learned judge erred in placing reliance on what had been stated by Dr Pistorius in a report he had compiled before he and Dr Koll had compiled their joint minute to the extent that what was said in the earlier report is inconsistent with what is contained in the later joint minute the contents of which Dr Pistorius confirmed when he gave evidence.*

3 *The learned judged erred in not taking into account, alternatively not taking sufficient account, Prof Kirsten's evidence that the CPD could have been the sentinel event that caused the hypoxia*

4 *In light of the fact that the negligent conduct consisted of an omission, the learned Jude erred in not applying the but-for test, alternatively in not applying the but-for test as laid down in the relevant authorities.*

5 *In addition, in dealing with causation, he learned Judge erred in not considering whether, even if there had been proper monitoring and care, the harm to the baby would not have ensued, that is, reasonable*

measures would timeously and successfully have been implemented to avert the harm

6 *In this regard, the learned Judge erred in not considering, alternatively in not placing sufficient weight on, the assessment of the obstetricians that, even if there had been foetal monitoring after 03:15, it is doubtful whether it would have been possible to perform a caesarian section quickly enough to prevent the neurological sequelae of an acute profound event in the time between 03:25 and 04:45.*

7 *The learned Judge accordingly erred in finding that the Plaintiff had established the necessary causation to found her claim for damages against the Defendants.*

8 *The learned Judge erred in accepting the evidence of the Plaintiff that there had been pressure on her abdomen to force the baby through the pelvis*

9 *The learned erred in accepting the Plaintiff's evidence on this issue, despite the following: such allegation had not been made in her Particulars of Claim, in the questionnaire or in her statement to her attorney; the version she gave in Court differed fundamentally from the version given to Dr Pearce, who checked the version three times; the Plaintiff could hardly be considered a reliable witness; and the accepting of her version is inconsistent with the approach that it has been laid down should be followed to resolve disputes of fact*

10 *The learned Judge erred in accepting that the Plaintiff had suffered damages in respect of the pressure on her abdomen when in fact she had not claimed such damages in her particulars of claim*

11 *The learned Judge erred in holding that the Plaintiff had established that she had suffered damages in her personal capacity, particularly in light of the fact that the Plaintiff's claim in her personal capacity was for psychiatric and psychological therapy and no evidence had been led in respect of such damages.*

12 *He leaned Judge erred in holding that the Plaintiff was entitled to damages in her personal capacity when the issue had not even been argued."*

From these points, the Applicants then conclude:

13 *The Judgment of the learned Judge has far-reaching consequences for the Applicant*

14 *There is a reasonable prospect that another Court might come to a different conclusion on the issues canvassed above. Leave to appeal accordingly ought to be granted to the Full Bench, alternatively to the Supreme Court of Appeal.*

[6] As regards the current application in respect of V's claim, at the hearing of the application for leave to appeal, Mr Soni, for the Applicant, emphasized point 2 and point 6. With regard to the mother's claim Mr Soni focused specifically on point 11. None of the grounds were abandoned. However, the conclusions in respect of point 2 and point 11 are dispositive of many of the other points raised, and I too focus on these.

<u>The application for leave to appeal in respect of the minor, V's, claim</u>

[7] The crux of the argument with regard to point 2 (above) was the meaning of the final sentence of the Joint Minute of Drs Pistorius and Koll (bullet point 7 of the Joint Minute, "JM-7"). In this recordal, it is noted that

> "*It is doubtful whether it would be possible to perform a Caesarean section quickly enough to prevent the neurological sequelae of an acute profound hypoxic event in this time interval.*"

[8] Mr Soni submitted that this must be taken to mean that nothing could have been done to prevent to the tragic outcome which ensued. It is the same argument that is raised in point number 4, where it is stated that the "but-for" test was not, or was not correctly, applied. That is, the question the court should have asked was "but for the omission(s) of the Applicant's, would the outcome have been the same?" Mr Soni submits that JM-7 means that the outcome was inevitable.

[9] In order for that argument to succeed I must be persuaded that there are reasonable prospects that another court will find that both the earlier report of Dr Pistorius and the testimony given in court are somehow overridden by the Joint Minute. In addition, I would need to be persuaded that another court will

find that JM-7 bears the interpretation that the Applicants wish to place on it. I am not so persuaded.

[10] Mr Soni stressed that the evidence of Dr Pistorius must be viewed as a whole, but that in the event of inconsistency the Joint Minute must be decisive, as Dr Pistorius himself confirmed the Joint Minute under oath. I find that that cannot help the Applicants' case for leave to appeal. Indeed, I believe that Dr Pistorius's prior report, the Joint Minute, the evidence in chief and the testimony during cross examination are entirely reconcilable and consistent. It was on the basis of all of that evidence as a whole that I made my finding as regards the applicants' liability in respect of V. Mr Soni's argument rests on JM-7 being taken to mean that *even with* appropriate monitoring there would not have been time to avoid the medical consequences. If, on the other hand, it is taken to mean *given that there was no monitoring* there would not have been time *once monitoring resumed*, the implication is entirely the opposite of that submitted by Mr Soni. Dr Pistorius's expert opinion was clear, and it does not support the conclusion Mr Soni seeks to draw. According to Dr Pistorius:

> "*There was clearly insufficient monitoring during the latent and active phase of labour. No "sentinel event" was recorded, but a sentinel event would have easily escaped notice, given the insufficient monitoring. The available evidence indicates that there was suboptimal care during labour, resulting in foetal asphyxia and subsequent hypoxic ischemic encephalopathy, which would have been avoided by appropriate monitoring and action.*" (my emphasis)

Mr Soni submitted that Dr Pistorius was cross examined on the Joint Minute and confirmed the contents thereof. While this is correct, Dr Pistorius was not questioned as to the meaning of JM-7. He was only asked to confirm that it

was what had been agreed with Dr Koll. In light of the surrounding context, I find that the only reasonable interpretation of JM-7 is the one I have given above, and that Dr Pistorious' affirmation does not constitute a contradiction.

[11] With regard to Point 2, the final point I wish to make is this: simply as a matter of logic, if it is the case that nothing can be done *even with* monitoring why have standard guidelines for maternal care (which require monitoring) at all? It must be the case that monitoring enables preventative measures to be adopted at some stage during labour. Failure to monitor appropriately removed this possibility. I understand that each labour is potentially unique, and may proceed faster (or slower) than expected. But that is precisely the information which appropriate monitoring provides. The Applicants' cannot escape liability for a failure to monitor on the basis that precisely that failure prevents the plaintiff from pin-pointing the exact time when action should have been taken. Evidence was led that the international standard for performing a caesarean is 30 minutes. Given the monitoring gap of an hour and a half, and the undisputed testimony of the neonatal expert (Prof Kirsten), that V was delivered very close to the time that he would have died (at 05h10) I find it probable that emergency measures would have been feasible.

[12] As regards the other grounds pertaining to V's claim, these were not pressed. I am unpersuaded that there is any reasonable prospect that another court would find differently. The evidence of the plaintiff on all of these aspects of the case was clear, consistent and entirely convincing. The plaintiff's witnesses were not troubled under cross-examination, and the defendants did not seek to call any witnesses to support a different view, relying only on their cross-examination of the plaintiff's witnesses. This was a clear case, in

my view, where the defendants' employees failed to meet the standards required of them in assisting V's birth.

[13] Accordingly, I am not satisfied that another court would find differently with regard to the findings in respect of V's claim.

The application for leave to appeal in respect of the plaintiff's personal claim against the defendants

[14] The grounds for leave to appeal in respect of the plaintiff's personal claim are directed at those aspects of my judgment dealing with the pressure applied to plaintiff's abdomen forcing her to give birth to V. As far as grounds 8 & 9 are concerned, in my view there is no reasonable prospects of another court finding that I ought properly to have rejected plaintiff's version in this regard. I dealt with the relevant evidence in my judgment and do not repeat my reasons for reaching that conclusion here. I point out, too, that the defendants offered no witnesses to provide an alternative version of events. Plaintiff's recorded physical condition at the time, and the position of V in the birth canal, render it highly improbable that the plaintiff would have given birth without extensive pressure being applied to her abdomen as she averred.

[15] In their application for leave to appeal the defendants also take issue with my finding that the plaintiff had established that she was entitled to an order declaring that the defendants were liable for her personal damages. They submit that the plaintiff did not ever claim damages as a result of pressure being applied to her abdomen; that she led no evidence of her need for

psychiatric or psychological therapy; and that it was never argued that she as entitled to damages in her personal capacity.

[16] In terms of the particulars of claim, plaintiff claimed damages in her personal capacity arising out of the negligence of the defendants' officers. Included in her grounds of negligence were the following: the failure to timeously recognise the fact that the plaintiff was a possible candidate for a caesarean section; the failure by the midwives and/or nurses to adequately assess and manage the progress of the labour and the delivery of the child; the failure to perform a caesarean section in circumstances where it was necessary; the failure to follow and apply the standard guidelines for maternal care in South Africa; the failure to ensure that a doctor assist with the delivery of the child.

[17] In my view, all of these instances of negligence have a direct bearing on the conduct of the nurse who applied extreme pressure to the plaintiff's abdomen to force the birth of the child. In the circumstances, it was not necessary for the plaintiff to specifically plead that there was negligence in effecting extreme pressure on her abdomen as a separate ground of negligence. It stands to reason that such conduct was indicative of all of the acts of negligence cited earlier. There is thus no merit in this argument.

[18] The final two grounds (11 and 12) deal with my alleged error in accepting that the plaintiff had in fact suffered the damages she claims in her personal capacity. In her particulars of claim, the plaintiff claimed the following damages in her personal capacity: past medical, hospital and related expenses; future medical, hospital and related expenses; accrued loss of earnings of the plaintiff; plaintiff's future loss of earnings; general damages

including damages for pain, suffering and discomfort, loss of amenities of life and psychological shock and trauma.

[19] The defendants took issue in particular with the plaintiff's failure to lead any evidence to establish that she had suffered any psychological shock and trauma. Accordingly, so they argued, I erred in finding that the plaintiff had established the defendants' liability in this regard. I was referred to the case of *Road Accident Fund v Sauls* 2001 (2) SA 55 (SCA) in this regard. That case involved the liability of the Fund for damages for the trauma allegedly experienced by the plaintiff who witnessed her fiancé being struck by a vehicle while he was outside the parked vehicle in which he and the plaintiff had been travelling. Although the fiancé had been lightly injured the plaintiff claimed that she had suffered extensive emotional shock and trauma as a result of, among other things, believing that he would die of his injuries. The court held that in order to be successful, a plaintiff must prove, not mere nervous shock or trauma, but that she or he had sustained a detectable psychiatric injury (at para 13).

[20] In my view, this judgment does not establish a precedent for purposes of the present case. If one reads the judgment, it is clear that the parties had agreed that the plaintiff had suffered shock and trauma amounting to chronic post-traumatic stress disorder. There was no necessity for any evidence in this regard. What the court was concerned with was the question of whether it was reasonable to expect the negligent driver in that position to have foreseen that the plaintiff might witness her fiancé being injured as a result of the negligent driving and that she might suffer emotional shock as a result.

This was the primary issue considered by the court, along with other issues arising in the very particular circumstances of that case.

[21] In the present case the circumstances are entirely different. The negligence of the medical staff attending the plaintiff during V's birth as a matter of course involved both her and V. Until he was separated from V after birth, V was part and parcel of her body. *Ipso facto*, the negligent conduct was directly experienced by the plaintiff herself. This includes (but is not limited to) her painful (as she testified) experience of having a nurse applying force to her abdomen to force the birth of V despite the fact that it had already been ordered that she be prepared for a cesarean section. Of course, after birth, she also had to deal with the fact that her child has been severely compromised as a result of his cerebral palsy.

[22] Once the defendants' liability for V's cerebral palsy was established, and once I had accepted that the plaintiff's version regard the pressure to the abdomen, it followed that in principle the plaintiff would be entitled to any damages that she might be able to prove.

[23] Critically, my order goes no further than this. It does <u>not</u> make any finding that the plaintiff has in fact suffered emotional stress (as defined in our law of delict), or loss of income in her own right, or that she suffered medical expenses or will have future medical expenses in her own right. The effect of my order is that in principle the defendant is liable to the plaintiff for whatever damages she is subsequently able to establish.

[24] The simple reason for this is that the parties agreed to separate damages from the merits of the matter, and a separation was ordered. On my

understanding of what the parties had agreed to, and as I applied it in reaching my conclusion in the judgment, all issues of damages (and not just the issue of quantum) were held over for later determination by agreement between the parties. For this reason, in the same way that the plaintiff did not lead evidence about V's past and further medical expenses, prospective loss of earnings or general damages, she also did not lead any evidence of her own in these regards.

[25] It stands to reason that when nursing staff fail to adhere to the standards of care required of them during the course of a labour and birth in the manner that they did in this case, there is inherent potential for psychological or emotional shock and trauma for a mother in the position of a plaintiff. She has claimed damages in this regard. However, in order to succeed in being awarded damages in her own right, she will have to lead evidence to establish that she has, as a matter of fact, suffered emotional shock and trauma. If she is unable to do so, she will obviously not be entitled to an award of damages under that head. The same will hold true of her claim for damages under the other heads set out in the particulars of claim.

[26] Counsel for the plaintiff accepted that this was the effect of my order, and that it still fell to the plaintiff to prove her actual damages in the second round of the litigation.

[27] For these reasons, I find that there are no reasonable prospects of another court finding differently in respect of the plaintiff's claim in her personal capacity.

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

"The application for leave to appeal is dismissed with costs."

R M KEIGHTLEY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date Heard:	26 June 2017
Date of Judgment:	19 October 2017
Counsel for the Appellants:	Adv. V. Soni SC
Instructed by:	The State Attorney
Counsel for the Respondent:	Adv. G.J. Strydom SC
Instructed by:	Edeling van Niekerk Inc