IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 5710/2019

(1) REPORTABLE: **NO**/YES

(2) OF INTEREST TO OTHER JUDGES: **NO**/YES

(3) REVISED.

DATE: 27/01/2025

In the matter between:

K[...] N[...] **PLAINTIFF**

and

MEMBER OF THE EXECUTIVE COUNCIL LIMPOPO PROVINCIAL GOVERNMENT: DEPARTMENT OF HEALTH **DEFENDANT**

JUDGMENT

NAUDE-ODENDAAL J:

[1] The Plaintiff instituted a claim against the Defendant for payment of delictual damages, which the Plaintiff alleges she suffered as a result of the negligence of the employees, nurses and doctors, at the Elim District Hospital.

[2] The background facts are briefly that the Plaintiff, was a 21 year old female with a history of a previous cesarean section ("C/section") in 2014 for delivery of a macrosomic baby ("big baby").

[3] The Plaintiff in the present matter went to Tembisa hospital/clinic for her check- ups. Her check-ups were uneventful except for that she was diagnosed with anemia for which she was given Venofer as a supplement. The Plaintiff's estimated date of delivery was end of October, early November 2018. The Plaintiff decided to relocate back home and deliver her baby at Elim Hospital, Limpopo. She attended the Elim Health Care Centre once and was told that her estimated date of delivery was still estimated to be end of October, early November 2018.

[4] On the 18th of October 2018, on the day of her regular check-up, she experienced lower abdominal pain. On arrival at the clinic, she was checked by the nurses and diagnosed with anemia. She was a high risk given her anemia and previous caesarean section and was referred to Elim Hospital. The Plaintiff was admitted in hospital until 25 October 2018. She was monitored on a daily basis at least twice, or thrice a day, including her vital signs.

[5] On the 25th of October 2018 at around 21h00, she started to experience labour pains and was transferred and admitted in the labour ward. From there she was not monitored until the following day.

[6] On the 26th of October 2018 at around 06h00am, the Plaintiff felt a sudden severe abdominal pain like something had burst and ripped inside her. She screamed and called for help, but nobody from the hospital's staff members came to assist her. The Plaintiff asked one of the patients to assist her by taking her to the nursing station in order to seek help.

[7] At the nursing station she was not assisted or examined, instead, the nurses asked her to return to sleep. She could not carry herself back to her bed and opted to sit on a bench next to the nursing station. She fell asleep there on the bench. Later, whilst still on the bench, a doctor passed by and asked her why she was still there. The Plaintiff informed the doctor that she was in pain. The doctor told her to join the queue of the patients who needed his attention. She went back and slept on the bench.

[8] Around 10h00am to 11h00am the same day, the nurses' noticed that she was shivering and having shortness of breath. The doctors were immediately called to attend to her and an emergency caesarean procedure was scheduled for the delivery of the baby. The baby was delivered a fresh stillborn as a result of the raptured uterus on the 26th of October 2018 at around 12h09pm on the 26th of October 2018.

[9] The Plaintiff testified in support of her claim. Further, both the Plaintiff and Defendant appointed one expert witness each. Dr. Songabau an obstetrician and gynecologist appointed for the Plaintiff, and Dr. Mbokota an obstetrician and gynecologist appointed for the Defendant, compiled a joint minutes.

[10] In conclusions the respective doctors remarked as follows:-

> *"In my conclusion, the management of this patient was substandard: The patient was previous CIS and anaemia and admitted for 8 days in hospital setting for correction of anaemia. She was term at 38 weeks gestation and was not counselled to the mode of delivery including VBAC. With a better monitoring as per guidelines NDoH 2015 and having insight about danger signs of impending uterine rupture from the 22/10/201[8] such as abdominal pains and fetal tachycardia, an emergency CIS would have been indicated on the 2211012018. Thus, both severe maternal morbidity (ruptured uterus, anaemia and near miss) and fetal mortatility (FSB) were preventable.*
>
> *Dr. Songabau: Agree*

Dr. Mbokota: Disagree

i. Based on available records in my possession, Ms K[...] was a 21-year-old lady who was pregnant for the 2nd time in 2018 and she was a previous c/section X1.

ii. She had mild iron deficiency anaemia of pregnancy which did not respond well to oral supplements and was admitted at 37 weeks for intravenous iron.

iii. She was diagnosed with vaginal discharge syndrome while she was on intravenous iron therapy and was started on oral antibiotics.

iv. She then developed an episode of fetal tachycardia on 22nd October 2018 after completion of her intravenous iron therapy and her oral antibiotics were changed to intravenous and she was monitored closely for any labour signs.

v. There was no indication for c/section on 22nd October 2018 as discussed in detail in paragraph 26 above.

vi. She went into labour on the 26th of October at exactly 37 completed weeks of gestation and she developed fetal bradycardia.

vii. An emergency c/section was done and at c/section a ruptured uterus was discovered, and the baby was a fresh stillbirth.

viii. A raptured uterus is a sentinel event and a known complication that can occur to any person who goes into labour with a previous c/section.

ix. Since it is a sentinel event, it cannot be predicted and prevented by the hospital staff.

x. *Ms. Kubuayi's baby died in utero as a result of the ruptured uterus and there was nothing the staff could have done to prevent it.*

xi. *The staff at Elim Hospital, a district hospital without specialists acted promptly in response to a fetal bradycardia, and courageously to repair the uterus after the diagnosis of the ruptured uterus.*

xii. *This tragedy was not preventable, the Ors and the staff at Elim hospital must be commended for saving Ms K[...]'s life and also saving her uterus as these type complications often end up with severe morbidity and sometimes mortality." (Own emphasis added)*

Legal Principles and the Law:

[11] The legal relationship between a medical practitioner and a patient is usually created by contract. The practitioner undertakes to render professional services and the patient undertakes (normally) to pay for services rendered.

[12] The Defendant had an obligation by contract and by delict. The Defendant had a duty of care towards the Plaintiff, being indigent, to provide proper care, and not to harm or to injure her or her baby.

[13] In order for the Plaintiff to succeed with her claim for damages, she must allege and prove:-

a) the contract or agreement;

b) negligent breach of the contract;

c) causation; and

d) damages.

[14] It is an implied term of the contract between medical practitioner and patient that the medical practitioner will exercise the reasonable skill and care of a practitioner in the particular field. In deciding what is reasonable, the evidence of qualified physicians is of the greatest assistance, however, what is reasonable under the circumstances is a matter for the court to decide**. (See Van Wyk v Lewis 1924 AD 438).**

[15] Expert evidence must be evaluated in accordance with the principles enunciated by the Supreme Court in **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another (1) (361/98) [2001] ZASCA 12; [2002] 1 All SA 384 (A) (13 March 2001) at paragraph 34**:-

> *"However, it is perhaps as well to re-emphasise that the question of reasonableness and negligence is one for the court itself to determine on the basis of the various, and often conflicting, expert opinions presented. As a rule that determination will not involve considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the court are reaching its own conclusion on the issues raised."*

[16] The Supreme Court of Appeal in **Michael and Another v Linksfield Park Clinic supra at paragraphs 36 to 37** held as follows:-

> *"**[36]** ... what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority **[1997] UKHL 46; [1998] AC 232** (H.L.(E.)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.*
>
> ***[37]** The court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such*

opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached "a defensible conclusion"

[17] It was further held in paragraph 40 of **Michael and Another v Linksfield Park Clinic *supra*** that:-

*"Finally, it must be borne in mind that expert scientific witnesses do tend to assess likelihood in terms of scientific certainty. Some of the witnesses in this case had to be diverted from doing so and were invited to express the prospects of an event's occurrence, as far as they possibly could, in terms of more practical assistance to the forensic assessment of probability, for example, as a greater or lesser than fifty per cent chance and so on. This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case of Dingley v The Chief Constable, Strathclyde Police, **200 SC (HL) 77** and the warning given at 89 D-E that:*

"(o)ne cannot entirely discount the risk that by immersing himself in every detail and by looking deeply into the minds of the experts, a judge may be seduced into a position where he applies to the expert evidence the standards which the expert himself will apply to the question whether a particular thesis has been proved or disproved - instead of assessing, as a judge must do, where the balance of probabilities lies on a review of the whole of the evidence.

[18] From the documentary, as well as *viva voce* evidence before me, it is clear that there was an agreement between the Plaintiff and the medical practitioners and/or the medical staff members and nurses at Elim Hospital. They had a duty of care towards the Plaintiff and her unborn baby.

[19] The inquiry therefore is whether there was fault, in this case, negligence. In **Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC) at para 64**, it was stated as follows:-

"*The wrongful conduct must cause the wronged person to suffer loss. The first step in proving this is to prove that the wrongful conduct of the staff caused the baby to suffer brain damage. The appellant accordingly bore an onus to prove this. Wrongfulness should not be conflated with factual causation."*

[20] The inquiry whether there was negligence involves a twofold inquiry. In the much quoted dictum of **Holmes JA in Kruger v Coetzee 1966 (2) SA 428 (A)** it was stated that the inquiry rests on two bases, first, whether the harm was reasonably foreseeable and secondly, would the *diligens paterfamilias* take reasonable steps to guard against such occurrence and did the Defendant fail to take those steps.

[21] The failure of the professional persons, doctors, nurses and staff members at Elim Hospital to adhere to the general level of skill and diligence possessed and exercised at the same time by the members of the branch of the profession to which he or she belongs would normally constituted negligence.

[22] The Supreme Court of Appeal restated the test as in **Mukheiber v Raath and Another 1999 (3) SA 1065 (SCA) at 1077 E F** by adopting the following test as proposed by **Prof. Boberg in the Law of Delict at 390**:

"For the purposes of liability culpa arises if-

(a) a reasonable person in the position of the defendant-

(i) would have foreseen harm of the general kind that actually occurred;

(ii) would have foreseen the general kind of causal sequence by which that harm occurred;

(iii) would have taken steps to guard against it, and

(a) the defendant failed to take those steps".

[23] This latter formulation involves a narrower test for foreseeability than that propounded in **Kruger v Coetzee**, *supra* by relating it to the consequences produced by the conduct in question and effectively conflating negligence and so-called "*legal causation*" in order to eliminate the problems associated with remoteness. See the judgment of **Scott JA in Sea Harvest Corporation v Duncan Dock Cold Storage 2000 (1) SA 827 (SCA) at 839**.)

[24] Essentially, the test in the **Mukheiber-case**, *supra* involves a consideration both of factual causation and of remoteness in order for *culpa* to be established. But **Scott JA** stated in the **Sea Harvest case**, *supra* at **839 E - F** that he had not understood the judgment in the **Mukheiber-case** to have unequivocally embraced the relative theory of negligence and went on to observe that there probably can be no universally applicable formula appropriate to every case.

[25] In **Van Wyk v Lewis 1924 AD 438 at page 444, Innes CJ** said the following about the applicable test for determining whether a medical practitioner was negligent in the performance of his or her duties:-

> *"it was pointed out by this court, in **Mitchell v Dixon (1914 AD p525)** that "a medical practitioner is not expected to bring to bear upon a case entrusted to him the highest possible degree of professional skill but he is bound to employ reasonable skill and care. In deciding what is reasonable, the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs. The evidence of qualified surgeons or physicians is of the greatest assistance in estimating that general level."*

[26] It cannot be determined in the abstract whether a surgeon has or has not exhibited reasonable care and skill. The question to be answered is whether the Defendant's doctors and medical staff members acted as average surgeons and medical staff members, placed in similar circumstances, would have acted, or did they manifestly fall short of the skill, care and judgment of the average surgeon and or medical staff members in similar circumstances.

[27] In the present matter, the simple answer to the above question is "**NO**". The Plaintiff was classified as a high risk patient, she had complications and was a previous C-Section patient. She was admitted in Elim Hospital to be monitored because she was a high risk patient from the 18th of October 2018. On the 25th of October 2018, she was transferred and admitted in the labor ward. The Defendant therefore knew that she was a high risk patient, with complications and was in labour - they knew she had to be monitored closely. They never even discussed the mode of delivery with the Plaintiff.

[28] Although Dr. Mbokota stated that the Plaintiffs ruptured uterus was a sentinel event and a known complication that can occur to any person who goes into labour and since it is a sentinel event it cannot be predicted and prevented, with which I agree, I do not agree that the tragedy was not preventable. The ruptured uterus might not have been preventable, but certainly the outcome could have been prevented had the medical staff and doctors acted promptly in the circumstances as was required from the reasonable doctor, nurse, medical staff in the same situation.

[29] Considering the fact that the Plaintiff was a previous caesarean patient, there was persistent foetal tachycardia recorded, anaemia and she complained of lower abdominal pains and in particularly that she felt a rupture like pain around 06h00 am in the morning and called for help, but nobody came whereafter she had to ask one of the patients to assist her to get to the nursing station where she was simply told to go back to sleep without giving her any attention or even just checking her, speaks volumes of the care the Plaintiff **did not** receive. Had the nurses heeded to the Plaintiffs cry for help, attended and monitored her or even called a doctor, this tragedy would not have happened.

[30] In my view, the Plaintiff succeeded in alleging and proving that the treatment and monitoring given to her at Elim Hospital was grossly sub-standard and negligent in the circumstances.

[31] In my view, had the Hospital staff acted with reasonable care on the morning of 26 October 2018 and attended to the Plaintiff, a c-section could have been done earlier and the tragic outcome could have been prevented.

[32] The Defendant's members failed to give the right amount of care at the right time. The Defendant further failed to examine, monitor and operate the Plaintiff at the opportune moment when, the Plaintiff started to complain of her lower abdominal pain and especially on the morning of 26 October 2018 when she cried for help but was only assisted once the nurses, several hours later, saw that she is shivering and sweating. The Plaintiff was simply left several hours unattended and unmonitored on a bench despite being an admitted high risk patient in the labour ward at the Elim Hospital and with tell-tale-signs of a uterine rapture present.

[33] The death of the Plaintiff's unborn child was caused by the negligence of the staff of the Defendant in failing to properly and timeously care for the Plaintiff. The Defendant did too little too late, which I find to be shockingly unacceptable, and amounting to gross negligence, especially because the Plaintiff was all along admitted in hospital.

[34] I am under the circumstances, having considered the evidence and reports presented, satisfied that the Plaintiff succeeded in alleging and proving that there was a contract or agreement, there was negligent breach of the contract, causation and that she suffered damages in the consequence. The Defendant and its medical personnel did not exercise and act with the reasonable skill and care expected of a practitioner in the circumstances and therefore the Defendant was in negligent breach of the contract between patient and medical staff members of the Elim Hospital.

[35] By virtue of all the evidence and facts placed before me, only one conclusion can be drawn and that is that the Defendant is 100% liable for the Plaintiffs proven and/or agreed damages.

[36] I therefore make the following order:-

1. The Merits are awarded 100% in favour of the Plaintiff.

2. Cost of suit on a party and party scale - Scale B, which costs shall include, but not be limited to the costs of two counsels, one senior and one junior, where so employed and all expert costs, including consultations, drafting of reports and joint minutes, and reservation costs, where applicable.

M. NAUDE-ODENDAAL
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE.

APPEARANCES:

HEARD ON:	**26 & 27 August, as well as 11 September 2024**
HEADS OF ARGUMENT SUBMITTED IN CLOSING ARGUMENT:	**4 NOVEMBER 2024**
JUDGMENT DELIVERED ON:	**27 JANUARY 2025**
For the Plaintiff:	Adv. H. Mphe SC appearing with Adv. L. Makgopa
Instructed by:	TT Kgomokaboya Inc. Attorneys Polokwane, tumelo@ttkgomoinc.co.za
For the Defendant:	Adv. C Mokhare SC Appearing with Adv. B. Mashego
Instructed by:	The State Attorney

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