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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 9019/2017P

In the matter between:

ZODWA SHANGE **PLAINTIFF**

(obo MLONDLI RASSY SHANGE)

and

MEC FOR HEALTH FOR THE PROVINCE OF KZN **DEFENDANT**

JUDGMENT

(Delivered on 5 December 2019)

KRUGER J

[1] The Plaintiff seeks damages from the Defendant, on behalf of her minor son, Mondli Rassy Shange. The Plaintiff's cause of action arises out of the alleged negligence of the medical staff at the Edendale Hospital, Pietermaritzburg. It is alleged that as a result of their negligence in attending to the birth of Mondli, he has cerebal palsy.

[2] The matter proceeds on the issue of liability only. I could not find any recordal in the file that the issues were separated in terms of Rule 33(4) and that such an order was granted. To the extent necessary, I hereby make such an order. It appears from the Rule 37 Minutes that the special plea of non-compliance with the provisions of Section 3(2)(a) and (4)(i) of the Institution of Legal Proceedings against certain organs of State Act No. 40 of 2002 has been resolved in that the Defendant has condoned such non-compliance.

[3] The following is common cause or has not been disputed:

(a) Mondli was born, via caesarean section, at the Edendale Hospital, on the 9th April 2008, at approximately 02h05.

(b) On the 8th April 2008, the Plaintiff was admitted to the said hospital.

(c) The Plaintiff was assessed by way of a cardiotocograph (CTG) during her initial examination and assessment at the hospital, whereafter she was asked to walk in the passage.

(d) A doctor later assessed the Plaintiff and determined that she ought to be transferred to the labour ward.

(e) On arrival at the labour ward, the Plaintiff was assessed by a nurse and monitored via CTG.

(f) At some stage a decision was taken, by the attending doctor, to perform a caesarean section.

(g) The Plaintiff was taken to the theatre but returned to the labour ward as an emergency caesarean section for foetal distress was given preference over her.

(h) On her return to the labour ward she was assessed by a nurse and a doctor.

(i) The injuries suffered by Mondli was "hypoxic ischemic in nature and that it exhibits a pattern of acute profound (central) hypoxic ischemic injury".

(j) Mondli was diagnosed as suffering from hypoxic encephalopathy Grade 2.

[4] Applying the well-established test set out in **Kruger v Coetzee 1966 (2) SA 428 (A) at 430 E-G** and **Blyth v van den Heever 1980 (1) SA 191 (AD) at 196 E**, the two questions requiring answers are:

(a) What factually was the cause of the ultimate condition of Mondli; and

(b) Did negligence on the part of the Defendant's servants cause or materially contribute to this condition in the sense that the said servants, by the exercise of reasonable care and skill could have prevented it from occurring.

[5] Mr Pillemer SC, on behalf of the Plaintiff, called four witnesses. The first was Doctor Berthold Alheit, a Specialist Radiologist. At the outset, it is not known why Mr Pillemer sought to lead the evidence of this witness. The import of his testimony was that Mondli suffered an acute profound hypoxic ischemic injury. This was never in dispute. It has been recorded earlier in this judgment that the nature of Mondli's injury is common cause. Dr Alheit resorted to the use of a power-point presentation to demonstrate the cause of Mondli's injury. It however became apparent, towards the end of his lengthy testimony, that most of his presentation was a "cut and paste" exercise. Apart from incurring unnecessary costs, I initially failed to see why Dr Alheit was called. It later became apparent that Dr Alheit was attempting to introduce a third type of hypoxic ischemic injury that is neither partially prolonged or acute – viz a sub-threshold hypoxia. This, as I understand his testimony, was because he "realised that misconception has been generated that acute profound can only happen in a case of an obstetric emergency". Dr Alheit could not offer any peer review articles to support his theory and conceded that it was only recently that he propagated this theory of sub-threshold hypoxia. Most alarmingly he conceded that unlike the partial prolonged or acute profound injuries, the sub-threshold injury cannot be seen on an MRI scan. This latter concession is concerning as I am of the view that Dr Alheit was attempting to use the courts to give credence to his theories, notwithstanding his lack of expertise in that particular field. In this regard it is noted that Dr Alheit is a Specialist Radiologist whose expertise revolves around the examination of MRI scans and to indicate what those scans reveal.

[6] The next witness to testify was the Plaintiff. The important aspects of her evidence is common cause and have been identified earlier in this judgment. The Plaintiff was not a good witness. Mr Pillemer has submitted that as a lay person she was confused, particularly with regard to the times of day when certain events occurred. In her evidence in chief she failed to testify about these specific times nor did she attempt to estimate same. Under cross-examination she suddenly remembered everything. Her evidence coincided with that which was pleaded on her behalf – an indication of the instructions given to her attorneys. She testified that she looked at the clock during her labour and noted the times when the events occurred. She could also clearly recall the times and events notwithstanding the fact that she instructed her attorneys approximately nine years later. It however soon became apparent that her evidence relating to the various times and treatment received (or lack thereof) were incorrect. It came as no surprise that the Particulars of Claim were hastily amended by, *inter alia*, removing all references to times therein. The main thrust of her evidence was that she was examined by a doctor who informed her that her baby was "tired" and that she needed to deliver via caesarean section.

[7] The next witness to testify was Dr Sevenster, an Obstetrician and Gynaecologist. He testified that the fact that the doctor informed the Plaintiff that "the baby is tired", is indicative of foetal distress. In this regard it is recalled that the Plaintiff testified that when she was first examined by a doctor in the labour ward (at 16h00 according to the Plaintiff and 19h00 according to the Defendant), she was informed that "her baby was tired". According to Dr Sevenster, as this indicated foetal distress, a caesarean section ought to have been performed within an hour. If not performed within this time period, the foetal distress would lead to permanent brain damage – cerebal palsy.

[8] Under cross-examination he testified on the reports of Drs Kara and Denysschen and on the Plaintiff's testimony in Court. He conceded that the different time lines meant that his report may be flawed in so far as the conclusions reached. Of importance is that he agreed or conceded the following:

(a) That given the new/correct time lines, that the Plaintiff would probably have reached full dilation between 23h00 and 24h00.

(b) That having reached full dilation (and the second stage of labour) if there was no further progress of labour, the Plaintiff ought to be taken to theatre.

(c) That at 24h00 the theatre was occupied as a patient was having a caesarean section for "foetal distress".

(d) That the operation in (c) above was completed at 01h10 and that fifteen minutes later, the Plaintiff was on the operating table.

(e) That on the probabilities, the foetal distress occurred when the doctor, in theatre, pushed the baby's head up in order to facilitate delivery.

(f) The cause of the hypoxia could not be independently determined and that it was more probable that it was the incident, reflected in (e) *supra* that occurred in the theatre; and

(g) Finally, he agreed that based on the recordals in the theatre register, there is no indication that the Plaintiff had a caesarean section for foetal distress.

[9] These concessions, in my view, were correctly made. Had the onset of foetal distress occurred at the time when "the baby was tired", the MRI scan would have revealed a partial prolonged hypoxic ischemic injury as opposed to an acute profound hypoxic ischemic injury. I am of the view that in order to overcome this difficulty and to assist the Plaintiff or to advance the Plaintiff's case, that Dr Alheit attempted to introduce his third category of a sub-threshold hypoxia.

[10] The final witness who testified on behalf of the Plaintiff was Dr Yatish Kara, a paediatrician. He immediately qualified his field of expertise being "from the time of the baby's birth up to eighteen to twenty years old". As with Dr Alheit, it was not immediately clear why Dr Kara was called to testify. As stated earlier in this judgment, it is common cause that the disabilities experienced by Mondli were caused by the brain injury referred to. During his evidence in chief, Dr Kara was repeatedly requested to deal with the question of causation. In attempting to answer, Dr Kara ventured into areas of expertise which were not of his calling. Under cross-examination he was constrained to concede that he was not a

paediatric neurologist; he was not a geneticist and he was not a neonatologist. He confirmed that in order to qualify in these fields would require further study and the necessary examination. Notwithstanding this, he surprisingly and insistently averred that as he was interested in the various fields of expertise and had read extensively and could quote from leading experts in the said various fields, he felt qualified to testify in these fields of expertise. In this regard he did not see the necessity to restrict himself to the period "from the time of the baby's birth up to eighteen to twenty years old".

[11] Dr Kara also attempted to introduce the third category of sub-threshold hypoxia. He also admitted, under cross-examination, that he was aware of the recent judgments of the Supreme Court of Appeal relating to acute profound injuries and more particularly the acceptance by the said court of the theory that an acute hypoxic ischemic injury would have occurred in the last few minutes of labour. He however refused to concede that the theory of sub-threshold hypoxia was introduced to circumvent the Supreme Court of Appeal's judgment.

[12] The Defendant's main witness was Dr Koll, a Specialist Obstetrician and Gynaecologist. He testified that if foetal distress was suspected on a CTG (as alleged by the Plaintiff – "baby is tired") and it was causing hypoxic episodes, the brain damage would have been of a partial prolonged type and not an acute profound type. As the injury was an acute profound injury, this resulted from "a sudden complete occlusion of blood or oxygen to the baby". In terms of the literature, it would occur "somewhere between ten and forty five minutes before delivery". He was accordingly of the view that "the episode of hypoxia was thus unpredictable and under the circumstances, appears to have been unavoidable".

[13] He agreed with the testimony of Dr Sevenster that the injury presumably occurred during delivery. Finally he testified that if there is an acute profound injury, then a sentinel event occurred. The classic list of sentinel events are not exhaustive and a sentinel event may, in some cases, not leave a footprint.

[14] It is clear from the brief summary of the evidence that the injury most likely occurred in theatre and whilst the difficult anaesthetic constrained the surgeon to push the foetal head back up. This is the evidence of both Dr Sevenster (on behalf of the Plaintiff) and Dr Koll (on behalf of the Defendant). The Plaintiff has conceded

that she has not shown that the injury occurred earlier and that on the probabilities it occurred in the last ten to forty five minutes prior to delivery. This concession, made during argument and in the heads of argument, is correctly made as it is common cause that the nature of the injury is an acute profound one. The evidence of both Dr Alheit and Dr Kara, that the injury may be a sub-threshold hypoxic ischemic injury is therefore rejected. It is noted that both these witnesses are not experts in the particular field to which they testified and attempted to introduce the sub-threshold theory. As stated earlier in this judgment it appears that their evidence was led in order to advance the Plaintiff's case. This, in my view, clearly demonstrates partiality towards a particular party at the expense of their duty to the Court.

[15] The functions and duties of experts has been set out in the case of **Menday v Protea Assurance Company Ltd 1976 (1) SA 565 (ECD)**. At page 569 B to E Addleson, J held:

> "In essence the function of an expert is to assist the Court to reach a conclusion on matters on which the Court itself does not have the necessary knowledge to decide. It is not the mere opinion of the witness which is decisive but his ability to satisfy the court that, because of his special skill, training or experience, the reasons for the opinion which he expresses are acceptable. ..... Phipson and Hoffmann both point out the dangers inherent in expert testimony. For example, the inability of the court to verify the experts conclusions and the tendency of experts to be partisan and over ready to find and multiply confirmation of their theories from harmless facts. Nevertheless the court, while exercising due caution must be guided by the views of an expert when it is satisfied of his qualifications to speak with authority and with the reasons given for his opinion.
>
> However eminent an expert may be in a general field, he does not constitute an expert in a particular sphere unless by special study or experience he is qualified to express an opinion on that topic. ..... Where therefore an expert relies on passages in a text book, it must be shown, firstly, that he can, by reason of his own training, affirm (at least in principle) the correctness of the statements in that book; and secondly, that the work to which he refers is reliable in the sense that it has been written by a person of established repute or proved experience in that field. In other words, an expert with purely theoretical knowledge cannot in my view support his opinion in a special field (of which he has no personal experience or knowledge) by referring to passages in a work which has itself not been shown to be authoritative."

[16] This judgment has been consistently followed by our Courts – **Commissioner, South African Revenue Service v Stepney Investments (Pty)**

Ltd 2016 (2) SA 608 (SCA), at paragraph 16; SS v Road Accident Fund [2016] 3 All SA 637 (GP) at paragraph 52.

[17] In considering the aforesaid dicta both the evidence of Dr Alheit and Dr Kara cannot be accepted.

[18] The Plaintiff's claim is essentially based on two aspects – (a) that had the caesarean section been performed an hour earlier, the brain injury would probably have been avoided; and (b) given the fact that the theatre was occupied with an emergency caesarean section for foetal distress, the hospital administration could have opened another theatre to deal with the Plaintiff. In this regard the Plaintiff has accepted that this would have necessitated summoning a surgeon and hospital team who were not on call, to attend to the Plaintiff.

[19] The scenario envisaged in (b) *supra* is based on the submission that the Plaintiff required emergency treatment. There is however no evidence before me to substantiate this submission. From the evidence adduced, the Plaintiff's procedure was the last on the list of priorities. There is also no evidence to support the submission that an entire theatre team and surgeon could have arrived in a short space of time to open an additional theatre to deal with the Plaintiff. It came as no surprise therefore that Mr Pillemer SC did not pursue this any further.

[20] The Plaintiff's caesarean section commenced at 01h25. The caesarean section for foetal distress (before the Plaintiff) commenced at approximately midnight. The Plaintiff testified that it was at about this time (midnight) that she was taken into theatre. This ties in with the evidence of Dr Sevenster that she would have been fully dilated at this time. The Plaintiff confirmed that she could not be operated on as there was an emergency procedure being performed. An hour later she was taken back to the theatre and operated upon. Clearly there was no theatre available to commence the Plaintiff's caesarean section at or about midnight which is the one hour earlier period relied upon by the Plaintiff. The medical staff did not record that there was foetal distress and her procedure was not rated as an emergency. I fail to see how the Defendant can be said to be negligent in these circumstances, which negligence can give rise to a claim in favour of the Plaintiff.

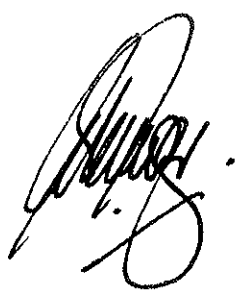
[21] Given the absence of an emergency in respect of the Plaintiff and the fact that the acute profound injury probably occurred in the last ten to forty five minutes prior to delivery, I fail to see how the servants of the Defendants could have foreseen or anticipated the onset of the said injury. In this regard it must also be remembered that the Plaintiff's caesarean section was for a failed VBAC (vaginal birth after caesarean section) and not for foetal distress.

[22] In the result I am of the view that the Plaintiff has failed to prove that there was any negligence on the part of the servants of the Defendants which negligence caused the damage/injury suffered by Mondli. The Defendant's counsel has indicated that the Defendant, in the circumstances, will not be seeking a costs order against the Plaintiff.

[23] In the result, the following order is made:

1. The Plaintiff's claim is dismissed.

2. Each party is to pay their own costs.



DATE OF HEARING:	26,27 & 28/8/19 & 19/9/19 (PMB)
DATE OF CAV:	19 September 2019
DATE DELIVERED:	5 December 2019
FOR THE PLAINTIFF:	M PILLEMER SC
	R PILLEMER
INSTRUCTED BY:	FRIEDMAN & ASSOCIATES
FOR THE DEFENDANT:	V M NAIDOO SC
	S TAKCHUND
INSTRUCTED BY:	STATE ATTORNEY