IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH DIVISION, PRETORIA

Case No: 44761/2013

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

8/9/2015 _____

DATE SIGNATURE

In the matter between:

D. N. **Plaintiff**

and

THE MEC FOR HEALTH, GAUTENG **Defendant**

JUDGMENT

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1. On the 30th March 2013 a baby girl was born to the plaintiff, Ms D. N., residing at [....], by caesarean section in the George Mukhari Hospital, a provincial hospital situated in Ga-Rankuwa, Pretoria. What should have been a joyful occasion for the mother and a safe entry into the world for the baby turned into a nightmare experience for both mother and child. The claim for damages is based upon the alleged negligence of the hospital staff, both doctors and nurses, on behalf of the plaintiff acting for herself and for her child
2. The George Mukhari Hospital is a public hospital under the control and administration of the Gauteng Provincial Department of Health, for which the

defendant, the Member of the Executive Council for Health ("the MEC'), bears the political responsibility. The MEC has clearly been cited in his official capacity (indeed, the holder of the office was not identified by name), although the plaintiff's particulars of claim do not describe him as such. According to its internet website the George Mukhati hospital is also a teaching hospital for the Medical University of South Africa.

3. The plaintiff's claims arise from the manner and fashion in which the medical and nursing staff attended to her baby's birth and to herself during and after the birth. It should be underlined at this early junction already that the defendant and the George Mukhari hospital, duly represented by the office of the State Attorney, Pretoria, failed to participate at all in the proceedings other than to oppose the claims. No witnesses were called in support of the defendant's denial of liability in the pleadings and no doctor or nurse was called to dispute the factual assertions made by the plaintiff under oath. Given the gravity of the charges levelled against the medical specialists and nursing staff involved the failure to engage the plaintiff is remarkable.
4. The plaintiff was admitted to the hospital upon the advice of her family physician when she went into labour. He suspected that a normal birth might present complications because of the position of the foetus. The diagnosis of a breach birth was confirmed by the hospital's gynaecologist and a caesarean section was arranged to be performed later that evening.
5. The plaintiff was to be anaesthetised by a spinal block which was duly administered but was found to be ineffective when the operation commenced and plaintiff had to be given a second dose which made her very drowsy. After the performance of the operation the plaintiff was told that the baby had been cut on the left arm during the procedure by one dr Mabena.
6. The plaintiff's new-born was removed to a neonatal ward without the plaintiff having been afforded the opportunity to see or hold the baby. She could not

ascertain the nature of the injury her little daughter had suffered, nor could she comfort or suckle the child. In spite of repeated requests to be allowed to see her baby plaintiff was only taken to her daughter on the morning of the third day of the new-born's life after she had been informed that the child was screaming with hunger. She found the child in an incubator that had either not been switched on or was dysfunctional. The little baby had not been attended to at all, she had not been fed and her wounds – the mother found two cuts on her left arm – had not been treated or dressed. In spite of not having been fed at all since birth the baby had not been put on a drip. She had simply been neglected.

7. The plaintiff was understandably dismayed and protested against the way her child was dealt with. She fed the little one and demanded medical attention for her. The cuts were some four centimetres long and had penetrated the skin into the muscle. The wounds were dressed and plaintiff was later informed that an operation would have to be performed to suture the wounds. The operation was eventually performed only on the eighth day of the baby girl's life. It was supposed to have been performed two days earlier. The baby was taken off her feeding routine and put on an intravenous drip for two days because other operations had to take precedence, according to the hospital's staff.
8. The wounds became infected and it took three months for the condition to heal. The baby suffered pain and discomfort as a result of the protracted healing process.
9. At the same time the plaintiff also developed complications. Three days after the caesarean section was performed her wound began to bleed. In spite of being informed that she would require a further operation to attend to the wound she had to wait another nine days before her wound was eventually cleaned and closed in another operation. During this long wait her stomach

expanded and grew hard, she suffered fever and discomfort and anguish at the constant postponement of the operation she required. Eventually she was attended to and discharged on 17 April 2013. Although she was told to return five days later to remove the stitches with which her wound had been sutured she refused to do so, consulting a private practitioner.

10. She was not informed of the reason for the long wait she had to endure before she was attended to other than that other operations were more urgent. Her further treatment by the private practitioner was uneventful but slow. She still experiences pain from the operation.

11. The plaintiff was dissatisfied with the treatment she and her baby received but lacked the financial means to engage a lawyer. She did tell the magazine "Drum" about her ordeal, however and the publication of her story prompted her attorney of record to offer his services on a contingency basis. Summons was issued claiming R 7 million in damages. The defendant raised a point *in limine* of non-compliance with the provisions of section 3 of the Institution of Legal Proceedings against certain Organs of State Act 40 of 2002, which was abandoned. The plea on the merits asserted that the baby girl was attended to as soon as was reasonably possible but at the same time simply denied every single other allegation relating to the plaintiff's cause of action. The plaintiff did not except to the bare denial but filed a replication to which the hospital records were annexed to prove the correctness of the facts upon which her case rests.

12. After the close of pleadings a pre-trial conference was held which paid lip service to the purpose for which it is intended, namely a genuine effort to minimise the issues the court will be called upon to decide Nothing was achieved at this conference, and nothing could be achieved, because the defendant's legal representatives had no instructions other than to oppose the claim.

13. The plaintiff filed notices informing the defendant that she intended to call two expert witnesses, Ms Talita da Costa, a clinical psychologist, and Dr Leslie Berkowitz, a plastic surgeon. Summaries of the evidence they would give were filed and served by annexing their respective reports to the notice. The defendant did not give notice of any expert witness he intended to call. When the matter was called the court was informed that the evidence of the plaintiff's two experts was admitted.

14. The plaintiff in her evidence confirmed the facts as set out above. She was an excellent witness, honest, articulate and prepared to make concessions when such were called for. She was cross-examined in respect of the alleged negligent conduct of the doctors and nurses employed at the George Mukhari hospital, but no factual disputes emerged in respect of the merits of the case as the defendant informed the court from the outset that he had no witnesses to call from the hospital and no experts to dispute the assertions of the plaintiff's professional witnesses.

15. The evidence of the two experts having become common cause the conclusions drawn by Ms Da Costa and dr Berkowitz can safely be taken into account regarding the effect the experience in the hospital had upon the plaintiff regarding her psychological condition prior to and after the birth of her child; and the nature and cause of the injury the baby suffered. In this connection dr Berkowitz observed in his report, after having examined the baby girl and having consulted the plaintiff:

    '*This little girl had her forearm lacerated during the caesarean section by which she was born.*

    This unfortunate incident was undoubtedly due to negligence on the part of the surgeon.

    *I am at a lost (*sic*) to explain the management of the laceration as described by the child's mother.*

Why the wound was not sutured primarily and dressed appropriately which should have resulted in prompt healing of the wound and a very short post traumatic process I am not able to understand.

As it turned out the child suffered pain and discomfort for up to three months until the infected wound had healed by secondary intention.

There appears to be no evidence available to the writer to contradict a finding of gross medical negligence in the management of the injury in the first place and subsequent treatment of the child.'

16. While dr Berkowitz is not necessarily qualified to express an opinion on the question whether negligence on the part of the gynaecologist is the only possible cause of the fact that the child suffered two cuts to her arm he is certainly qualified, being a surgeon himself, to express an opinion upon the manner and fashion in which the child's wounds were treated after she had suffered the injury. In this respect the plaintiff mother's factual evidence is not contradicted. It should be pointed out that there is an annotation in the medical records attached to the plaintiff's reply that the wounds the baby suffered at birth were sutured and dressed immediately. This inscription is contradicted by the plaintiff's evidence, which was not challenged. The clinical notes were neither admitted nor proven during the trial and the plaintiff's evidence must therefore prevail.

17. This leaves the question whether, apart from the causation of the injury to the child and the subsequent mismanagement of her injuries, the plaintiff has been able to establish negligence on the part of the hospital's staff and doctors in respect of her own claim. In this respect the plaintiff failed to engage the services of an expert such as a gynaecologist or a professional nurse. During her evidence the court enquired whether she had consulted a gynaecologist. She answered in the negative. Plaintiff's counsel closed her

case without heeding the court's question in this respect and without presenting any expert evidence at all other then the admitted reports.

18. The court *mero motu* separated the issues of liability and quantum and, after counsel for the defendant had closed the latter's case without calling any witness, heard argument on the issue of the merits. The plaintiff submitted that negligence had been established in respect of both claims by mother and child through the plaintiff's own evidence. The court raised the absence of expert evidence to establish that the doctors and nurses had indeed been negligent. Counsel realised that the absence of such evidence might present an obstacle but persisted in his submission that plaintiff's evidence was sufficient to establish her case against both doctors and nurses. The court then enquired whether the principle of *res ipsa loquitur* could be applied to the present set of facts. Counsel was unable to address the question immediately but, after having considered the matter, submitted that the principle should apply. The *res ipsa* rule can seldom, if ever, be applied to establish alleged medical negligence, as Brand JA said in *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA)

> *'To me that seems reminiscent of an application of the res ipsa loquitur maxim, which the court a quo quite rightly found inappropriate in this case. I say quite rightly because, as was pointed out in the locus classicus on medical malpractice, ie Van Wyk v Lewis* ***1924 AD 438*** *at 462, that maxim could rarely, if ever, find application in cases based on alleged medical negligence. The human body and its reaction to surgical intervention is far too complex for it to be said that because there was a complication, the surgeon must have been negligent in some respect.'* [par16].

19. While the maxim might not find general application, especially in matters in which conflicting expert evidence is called by all the parties to the suit, it may

well have to be considered in unusual situations such as the present. Serious allegations are made by the plaintiff against professional persons in the defendant's employ. The factual allegations made in respect of the operation performed upon the plaintiff herself do not necessarily establish a *prima facie* case of negligence against the doctors who performed the caesarean section. The mere fact that the plaintiff's wound began to bleed may not in itself be ascribed to negligence and there is no expert evidence to suggest that this complication arose as a result of a failure to perform the caesarean section according to accepted medical standards. But the subsequent failure to perform the operation that was necessary to repair the bleeding wound with due expedition, and to subject the plaintiff to days of pain, suffering, worry and disability while being parted from her child does not require expert evidence to establish a strong *prima facie* case of grave negligence by doctors and nurses alike. The defendant is an organ of State. The sole purpose of its existence is service to the public by providing health care (and possible also education). Such health care should normally be rendered in an efficient manner unless the State's resources do not permit such service: *Soobramoney v Minister of Health, Kwazulu Natal* 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC); pars [11], [31] and [36]. There is no suggestion in the pleadings or the evidence that the defendant did not have the resources available to render effective health care that would seem to have been nothing more than routine. The services of the George Mukhari hospital are intended primarily for those members of our society who cannot afford private medical services. The plaintiff clearly falls into this category. Given the serious allegations against professional individuals, doctors and nurses, it is surprising that the defendant decided to play possum. There is no suggestion that the doctors involved – who are mentioned by name in the pleadings and were identified in plaintiff's evidence – were not available to give evidence and to explain what must at

first blush appear to have been a dereliction of their professional duty. The same consideration applies to the individual nurses identified in like fashion. It is a matter for comment that the defendant opposed the merits of the plaintiff's action in the light of its decision not to call available witnesses to dispel the allegation that its services were sub-standard. Against this factual backdrop the defendant has only itself to blame that the application of the maxim *res ipsa loquitur* is justified. The strong *prima facie* case becomes proof on a balance of probabilities once it remains unanswered.

20. The court therefore decided the merits in favour of the plaintiff and ruled that the defendant was indeed liable to plaintiff in respect of both claims. Counsel for the plaintiff proceeded to commence his address on quantum without further evidence. The court then raised the question why the plaintiff had not consulted a gynaecologist and commented that the plaintiff's case could not proceed to establish quantum if no expert evidence was called to establish the nature and extent of any potential consequences the negligence of defendant's employees might have caused. The court was of the view that it should not allow a situation to arise where an unfortunate decision by well-intentioned legal representatives acting on contingency or *pro bono* for a client in need to derail a claim by failing to present any expert evidence that appeared to be necessary and readily available. Mindful of the principles enunciated in *City of Johannesburg Metropolitan Council v Ngobeni* Case No 314/11 [2012] ZASCA 55, and the dangers associated with the judge intervening in the calling of witnesses, the court informed the parties that it was of the view that plaintiff should be requested or advised to consult a gynaecological expert before proceeding. The court underlined that its actions might be regarded as untoward but that it felt compelled to act in the interests of justice. Both parties, and in particular the defendant, were pertinently invited to raise any concerns about the course the court proposed to follow.

The defendant's counsel and attorney informed the court that they had no objection to a proposed adjournment to allow the plaintiff to be assessed by a gynaecologist. Such an examination was arranged.

21. Dr C P Davis, a gynaecologist/obstetrician, prepared a report dated 27 May 2015, that was accepted by both parties as correct when the hearing resumed. Dr Davis expressed an opinion on the merits of the claim which had already been decided. He conducted an examination of the plaintiff and concluded that her uterus and ovaries are normal. The unfortunate occurrences at the George Mukhari hospital should not affect her fertility.

22. The position is, however, different when her present psychological profile is considered. From Ms Da Costa's report it is clear that she was severely traumatised by the events described above. She was diagnosed as suffering from symptoms of a mild post traumatic stress disorder. She is terrified of falling pregnant again because of the emotional distress caused by her experience in the George Mukhari Hospital. She especially mentioned under cross-examination that people in her community as well as the nurses at the clinic to which she takes her child tend to blame her for the child's injury, assuming that she failed to protect the baby adequately and neglected her. She is deeply embarrassed and distressed as a result thereof. She will furthermore suffer anguish because she will have to observe her child's discomfort at her disfigurement.

23. Prior to the baby's birth she socialised easily and regularly, but has since tended to avoid social contacts. She still experiences dismay, fear, anxiety and flashbacks of the event. In addition, the area of the operation wound was still found to be painful when she consulted Ms Da Costa. As a result of the trauma she has experienced she is also suffering from depression. She will require psychological treatment for at least 40 sessions that should cost about R 1000, 00 per session, taking into account the present inflationary climate.

24. The consequences for the child are of a permanent nature. She has two scars on her left arm that will require further treatment by a reconstructive surgeon once she has ceased growing. She experienced pain for several months after the wound became infected. She will require surgery once she has reached the age of sixteen or seventeen to remove the scars. She will have to treat the restored area with scar maturation and sun block on a daily basis for at least twenty-four months, at the present cost of R 400, 00 per month. The cost of the restorative operation will amount to some R 28 000, 00 in total, including the doctors' fees and the hospital costs.

25. It is clear that the child is also entitled to general damages for pain, suffering, disfigurement and the embarrassment caused thereby for a teenage girl and young woman.

26. The quantification of any claim for general damages is always difficult. In the present case the plaintiff claimed a completely unrealistic sum of R 7 million, the calculation of which was similarly lacking in foundation. The defendant suggested a sum of R 300 000, 00 as general damages for the child and R 150 000, 00 in respect of the plaintiff's claim for general damages. These amounts appear to be realistic, although somewhat low in respect of the plaintiff's claim.

27. As far as the costs of the action are concerned, the plaintiff and her child were left in the lurch by an organ of state. They were treated without empathy and without compassion. In this Court the defendant decided to play a role that was essentially obstructive. None of the essential features of the plaintiff's case were disputed or could be disputed, yet the defendant persisted in resisting both merits and quantum on the basis of a bare denial. Under these circumstances it would be iniquitous to expect the plaintiff to bear any portion of her own costs. As a mark of its disapproval of the defendant's approach to the matter the Court will therefore award the plaintiff attorney and client costs.

28. Taking all the above factors into account the following order is made:

The defendant is ordered to pay to the plaintiff in her personal as well as her representative capacity:

1. The sum of R 40 000, 00 in respect of future psychological treatment of the plaintiff;
2. The sum of R 36 000, 00 in respect of future medical expenses for the child;
3. The sum of R 200 000, 00 in respect of the plaintiff's general damages for pain and suffering;
4. The sum of R 300 000, 00 in respect of the child's pain and suffering;
5. The plaintiff''s attorney and client costs, including the qualifying fees of the three expert witnesses and the costs of all appearances.

Signed at Pretoria on this day of September 2015.

E BERTELSMANN

Judge of the High Court