IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH

Case no: 1037/2007
Date heard: 23-26 March 2010 and
2-3 March 2011
Date delivered: 9 September 2011

IN THE MATTER BETWEEN:

OLENE HOFFMANN	**PLAINTIFF**
vs	
MEMBER OF THE EXECUTIVE COUNCIL DEPARMENT OF HEALTH, EASTERN CAPE	**FIRST DEFENDANT**
MEDICAL SUPERINDENT, DORA NGINZA HOSPITAL, PORT ELIZABETH	**SECOND DEFENDANT**

JUDGMENT

TSHIKI J:

A) INTRODUCTION

[1] In this case the plaintiff herein is suing the defendants for medical negligence which is alleged to have resulted in plaintiff suffering from emotional shock and trauma coupled with psychological dysfunction in the form of post traumatic stress and depression. As a consequence of suffering from emotional psychological dysfunction aforesaid plaintiff alleges that she has suffered both special and general damages all amounting to a sum of R333 080,00 for which the defendants are held liable by the plaintiff jointly and severally together with costs of suit.

[2] Defendants have denied liability to plaintiff as well as all the material

allegations by the plaintiff but have admitted that there is a legal duty on the medical personnel and medical practitioners employed by the defendants at Dora Nginza hospital to take reasonable care to:

[2.1] attempt to, where possible, keep babies born at the hospital alive; and

[2.2] to give medical assistance and care to mothers admitted to the hospital whilst giving birth to their children.

B) EVIDENCE

[3] At the inception of the trial of this case and at the request of both parties, I made an order that in terms of rule 33 (4) the issues of negligence and quantum were separated and that the case should proceed on the negligence issue only.

[4] During his address in terms of rule 39 (5) Mr Mouton for the plaintiff handed up by consent a bundle of documents marked as exhibit A as well as another which was marked as exhibit B. Exhibit A contains, *inter alia*, a record of the plaintiff while she attended the West End clinic, as well as a letter dated 15th July 2004 addressed to Dora Nginza hospital which is marked exhibit A2. This letter was handed to Dora Nginza hospital on 16th July 2004 when the plaintiff was being observed at that hospital from the 16th July to 23rd July 2004 a period of seven days. It is, therefore, no longer disputed that for this period reflected in exhibit A the plaintiff was admitted at Dora Nginza hospital as a patient. The other portion of exhibit A contains the record of admission of the plaintiff at Dora Nginza from the 11th September 2004 and it shows that she was admitted at 21h30.

[5] In his comment in response to the plaintiff's address by Mr Mouton, Mr

Pretorius for the defendants put in issue and therefore denied that the plaintiff was diabetic and, if she was diabetic this was not to the knowledge of the defendants or their employees at the time plaintiff was admitted at Dora Nginza hospital on 16th July 2004. Mr Pretorius further submitted as exhibit C a document from Dora Nginza laboratory containing information about the plaintiff. Mr Mouton consented to the receipt by the Court of exhibit C.

B) EVIDENCE FOR PLAINTIFF

[6] The plaintiff then called *viva voce* evidence of Nova Veronica Monteith. She is employed by Nelson Mandela Metropolitan Municipality at the primary health care unit as an assistant director. She testified that she has access to clinic records in Bundle A and that the West End clinic is under her management. She then explained and interpreted the recordings and contents of exhibit A2.

[7] From the evidence of this witness, it appears from the contents of exhibit A2 that there is no recording which shows that the plaintiff is a diabetic or that she was a diabetic when she was examined at West End clinic. It is only recorded that she comes from a family with history of diabetics in particular the plaintiff's mother. There is no record of illness on the part of the plaintiff. It is, however, recorded that plaintiff's last birth was by way of caesarean section. The witness testified further that she is a qualified registered professional nurse with midwifery.

[8] The evidence of this witness was mainly to read the contents of exhibit A

pertaining to the plaintiff's visits at West End clinic on 15th July 2004. There is nothing further to comment on her evidence which honestly was not even disputed during cross-examination.

[9] The next witness called was Elizabeth Magdalene van Brises. She knows the plaintiff with whom they attend the same church. She was in company of the plaintiff when the latter was admitted at Dora Nginza hospital on 11th September 2004 and the plaintiff's husband and her husband were also in their company when plaintiff was taken to hospital on 11th September 2004. They arrived at about 18h00-18h45. On arrival they proceeded to the labour section. However, their husbands preferred to take seats on the hospital benches and did not enter the labour unit. On arrival at the reception section plaintiff handed in her hospital card after which they were advised to take seats on the bench. She describes the hospital card as a small blue card which was submitted to a receptionist who is a nurse. Apparently even at that stage, the plaintiff was experiencing what the witness refer to as "terrible pain" to the extent that one of the nurses who apparently had attended to her had to return to plaintiff and informed her to go lie on the bed. In fact the nurse took her to the bed which was at the labour ward just at the back of the receptionist. According to the witness there are beds at the back of the receptionist area which are meant for women in labour to lie on so as to be observed until they are ready to deliver. A nurse attended to her in privacy as it was the only two of them the curtain had been pulled so that no other person could see what was happening. She could not see what was happening behind the curtain but was able to see the nurse going away and came back with a "heart machine" for the baby.

[10] She testified further that plaintiff was instructed by the nurse to monitor the

heart beat of the foetus and if it is slow she would have to pat herself on her side and then lie on her other side (turn around). At that stage I ruled her evidence inadmissible because she could not give evidence on the interpretation of how the heart machine functions. The witness further explained how the movements of the lines of the machine were progressing and that she would also hear a “peep peep sound”. She says all the time she was always with the plaintiff. When plaintiff would pat or hit herself on her side the witness would then proceed to call the nurse. She continued doing this but the last time she went to call the nurse was about 23h00. According to her the machine would make a “toet toet” sound and would show a horizontal line. She testified that at some stage she swore at the nurse and scolded her telling her that plaintiff should not have to undergo the labour process because she had to give birth by caesarean section procedure. When she mentioned this the nurse reacted immediately and came to examine the plaintiff and also checked on the heart monitor machine. She confirmed that it was not the first time for the nurse to come and observe the plaintiff. The nurse told them she would phone and call the doctor. The doctor came about an hour later.

[11] After the doctor had examined the plaintiff he instructed the nurse to prepare the theatre for the plaintiff’s caesarean operation. The time then was about 01h00 on 12th September 2004. The recordings in exhibit A show that the plaintiff was operated at about 01h12 on the 12th September 2004. The record shows that the infant was stillborn when it was delivered.

[12] When cross-examined by Mr Pretorius the witness conceded that she could

not be precise as to the nature of the sound that was made by the machine, whether it was “peep peep” or “boem boem” in view of the time lapse since 2004. She insisted, however, that there was a sound made by the machine.

[13] It also transpired during cross-examination that the witness was making a mere guess when she testified that it was about 17h30-18h00 when they went to the hospital with the plaintiff. It also became clear during cross-examination that the plaintiff was not instructed by the nurse to beat herself but to simply tap herself on the side of her body. The witness insisted that they did not arrive at the hospital at about 21h30 as it is recorded in exhibit A, but earlier than 21h30. She insisted though that the plaintiff was taken to the theatre at about 01h00 on 12th September 2004. She conceded further that she does not have medical training or knowledge.

[14] The witness further conceded that it was at about 21h30 when the foetus was in distress a condition commonly referred to as foetal distress.

[15] The plaintiff then testified. She told the Court she is 32 years old and has three children, the eldest of which is a girl 14 years old. All her children were born by caesarean section. On 15th July 2004 she attended to West End clinic in Port Elizabeth. Her sugar was tested and the finding was that her sugar level was high as well as her blood pressure. She was advised she would be referred to Dora Nginza hospital because of her diabetes sickness. On Friday the 16th July 2004, she was referred to Dora Nginza hospital by West End clinic. After the doctor had examined her she was admitted for observation for one week. On the doctor’s request she revealed that her first child was born by caesarean operation. At that

stage she was pregnant for +/- 7 months. On the date of her discharge she was advised that when the child was due to be born she would have to go to the hospital as she is a risk patient. On discharge she was also given insulin to manage her sugar diabetes. She was to inject herself twice daily.

[16] On 11th September 2004, she was taken to Dora Nginza hospital for the delivery of the child in question. She experienced pains for the first time at about 16h00. By pains she refers to stomach cramps. A phone call to the last witness Mrs Van Brises was made at about 18h00. She recalls the time because her husband was watching the television news at that time. She was then taken to Dora Nginza hospital in Port Elizabeth. Mrs van Brises told the person at reception that the plaintiff was experiencing labour pains and that she should be given a bed on which to lie. She was then checked by a nurse as to her condition and how far she was towards birth.

[17] I must say that this conduct of enquiring how far the plaintiff was from giving birth is inconsistent with the procedure followed when a pregnant woman is to give birth by way of caesarean section. This is so because caesarean birth does not depend on stomach cramps but at least on the readiness of the child to be born. Her evidence goes on to say she was examined and informed by the nursing sister that she was not advanced enough to give birth and would have to wait a little while. It is at that stage that she told the sister that she would have to give birth by caesarean birth. The evidence quoted verbatim reads:

> "Then she said to me I shall have to wait a little while because I am still far from giving birth, they are under staffed, but I shall have to wait."

[18] At that stage she was still on the bed. The nursing sister then brought a monitor to test the heart of the child. The sister nurse explained to her how she would have to check the monitor that was connected to and placed on her body. She was informed that once the graph of the monitor was below a certain level she would have to tap herself on her left side of the body or call the nurse. According to the witness she was informed that the reason for doing so is that when the graph falls below the line it would be an indication that the baby was getting tired and was struggling to get oxygen. The graph did eventually drop and many a times it went below the line and it was on those occasions that she had to pat herself. According to her the graph went below the line for the first time an hour after it was connected to her. This was about more or less 21h00. The graph did fall below the line again after half an hour since it had been put back to normality. Time and again the graph went below the line at intervals of between 15-20 minutes. She again called the nursing sister who came and informed her to endure because the theatre was full and that there is a doctor who would come to attend to her. She was very much concerned and worried about the line that had dropped below the normal level.

[19] The witness then drew a line on a plain paper to show how the graph looked like as it was shown by the machine. This drawing was received by consent as exhibit D. The doctor did not come within the reasonably expected time and the nurse had to call the doctor again. There was another period of waiting. The doctor came after another hour or more. The doctor examined her and prepared her for the theatre. She was then taken to the theatre not long after she had been prepared. The doctor told her that they had to conduct an emergency caesarean operation because the baby in *utero* was undergoing a foetal heart distress and had to be

removed from the hostile environment.

[20] She was then operated and gave birth to a big still born baby.

[21] During cross-examination the plaintiff revealed that she has a machine she uses to check or test her sugar diabetes which she received in 2003. The plaintiff informed the Court that her medical doctor is Dr April and that her specialist is Dr Behari and has been so since 2003. The plaintiff disputed the information contained in the notes from West End clinic. She insisted that she informed the medical staff and nurses at the clinic that she was diabetic. She also informed them that she comes from a diabetic family. The plaintiff further testified that she uses and injects herself with insulin on a daily basis and also has a machine she uses to test her sugar levels. She was given that machine for the first time in 2003 and has been using it for testing since then and on a daily basis. The machine reading after testing would always be between 4 and 6 and had not been higher than 6. She conceded however, that on about two occasions it exceeded 6 and on rare occasions it would read less than 4. Plaintiff refuted the allegation by Mr Pretorius that when she was at West End clinic her blood pressure was not too high. She testified that the nursing sister who attended to her specifically told her that her “blood pressure was too high”. She was adamant that she had told the nursing sister of the hospital that she also suffers from diabetes. She, however, could not explain why in the referral letter as well as in exhibit A there is no record to show abnormality in her diabetes and high blood pressure. Mr Pretorius intimated to the witness that her evidence does not confirm the contents of the recording in exhibit A. The first witness had in fact indicated that she was not responsible for the recording of the contents and

therefore cannot comment about them. She could only read the recordings for the record. The contents of exhibit A having been disputed by the plaintiff who gave *viva voce* evidence the documents become less valuable in weight compared to the evidence of the plaintiff. This is so because the person who made the recordings was never called to confirm what she recorded or to confirm that what she recorded is what she was told by the plaintiff. The denial of the contents of the documents opens the document's contents to speculation as to what the plaintiff told the staff and/or nurses at West End clinic. Her evidence on what she told the nurses should be preferred because it has been tested as against the contents of the document which have not been confirmed.

[22] The next witness called by the plaintiff was Mr Daniel J Van Brises. His evidence is basically to confirm the evidence of his wife the second witness Elizabeth van Brises. He testified that they arrived at Dora Nginza hospital before 19h00. He and the plaintiff's husband left their wives in the labour ward and they both proceeded to rest in the waiting room. He could not recall how much time they spent waiting but became bored of waiting at about 20h45. He then went to the labour ward to establish what progress had been made so far. He could not be able to see the plaintiff and his wife and decided to go back to the waiting room. Later his wife came to report that plaintiff had been taken to the theatre for an operation. On hearing these news he and plaintiff's husband went home. During cross-examination he was referred to the recordings in exhibit A but said he could not answer on behalf of the person who made the recording. He reiterated that when they arrived in the hospital it was beginning to be dark and according to him in terms of time it was just before 19h00.

[23] Dr Pierre F.M. Du Toit was then called by the plaintiff. He is a gynaecologist. He testified that he was present in court when evidence was led by previous witnesses who testified before him. He has also studied the available medical records. He confirmed that according to the recording in exhibit A on page 16 plaintiff's first visit at West End clinic was on 15th July 2004. He confirmed that the records show a family history of diabetes and hypertension on the plaintiff's mother's side and that plaintiff has had previous caesarean section birth. According to the witness the previous caesarean section is an additional risk in the plaintiff's pregnancy. This is in addition to the hypertension and diabetes which are also additional risks to both the mother and the foetus. He confirmed that given those considerations it would be fair to regard the plaintiff as a high risk patient. According to him her sugar level of 9.2 millimetres on the plaintiff in an indication of diabetes mellitus. He confirmed that the normal sugar levels on the part of plaintiff on 30th August 2004 could have resulted from plaintiff's treatment with insulin because insulin causes a drop in high blood sugar levels. He also regarded as elevated the blood pressure reading of 138 over 107 and that it was high blood pressure which was abnormal for a pregnant woman.

[24] Dr Du Toit further testified that in the case of history of previous caesarean birth it would be a prudent thing to have any subsequent birth by way of an elective caesarean section. An elective caesarean birth should take place a week or two before the expected date of delivery ie before the woman goes into labour. He opined that the reason why the plaintiff was instructed by Dora Nginza hospital to go straight to the hospital if she goes to labour and not to the clinic is based on the risk

with a possible caesarean birth which the clinic could not do. The instruction was in fact a realization by the hospital that this is a risk which has to be attended to by the hospital. The witness went on to suggest that if such a person goes into labour with a previous caesarean section, there is a risk of spontaneous rupture of the uterus in labour and an ordinary clinic could not deal with such complication.

[25] According to Dr Du Toit, in the case of a baby (in *utero*) whose mother is suffering from diabetes there is a possibility of foetal distress occurring and it is for those reasons that pregnancy must be terminated and that caesarean birth be performed on the mother. The witness testified that the fact that plaintiff who was discharged from Dora Nginza hospital on 23rd July 2004 was given insulin for treatment of her diabetes indicates that plaintiff was treated with insulin while she was in the hospital. In any event plaintiff has already confirmed that at Dora Nginza hospital she was treated with insulin and therefore the hospital was aware or at least could have been reasonably been expected to be aware of her diabetic condition.

[26] It should therefore be expected that when the plaintiff arrived at the same hospital on 11th September 2004 for delivery of the baby she would have to be sent to the labour ward and be instructed not to eat or drink due to her pending caesarean section birth. Given the history we have of the plaintiff Dr Du Toit emphasised that in the circumstances, plaintiff was 40 weeks pregnant, with a history of a previous caesarean section birth, with a raised blood pressure and with a history of diabetes. Therefore, plaintiff was a high risk and the correct procedure in the circumstances would have to remove the baby from the hostile environment as soon as possible by caesarean birth. This would also have been compounded by the drop in the heart

rate of the baby in *utero* which made the plaintiff's case very serious and urgent. According to Dr Du Toit this would be so, irrespective of the cause or causes of the foetal distress. He added that the foetal distress was a totally new emergency which could cause the unborn child to suffer irreparable brain damage or that it may even die in *utero*.

[27] During cross-examination by Mr Pretorius, Dr Du Toit conceded that it would be unreasonable for the nurse to record something incorrect or not to record at all when that person would have recorded what the patient tells him or her. He was referred to the records contained in exhibit A wherein none of what the plaintiff told the nurse at West End clinic was recorded. In fact what was recorded is the direct opposite of what she had told the nurses at the clinic. It is recorded that her diabetes and her blood pressure was normal instead of being abnormal as she told the officials that she was suffering from diabetes and high blood pressure.

[28] During cross-examination by Mr Pretorius Dr Du Toit conceded , *inter alia*, that it would be dangerous and unreasonable to get a lay person who is a patient to read the graph on something they do not really understand. I agree this is correct and that the evidence of both Mrs Van Brises and that of the plaintiff cannot be relied upon by the Court when they testified about how the heart machines worked. I refer to the machines which were given to the plaintiff by the nurse to monitor the heart of the unborn child. To place reliance on the lay patient and her friend would amount to relying on the evidence of a lay person on a matter which requires the opinion of a professional and qualified specialist. The evidence of Mrs Van Brises and that of the plaintiff about how the heart machine functions will be disregarded as irrelevant. Dr

Du Toit conceded that if one has regard to the West End clinic notes there would have been no indication that the plaintiff was diabetic, and that the medical personnel at Dora Nginza hospital would not have been aware either. The doctor conceded further that on all visits by the plaintiff at the clinic the notes show that her blood pressure levels were also at acceptable levels. This also holds true even in respect of blood sugar and blood pressure which were at acceptable levels on the plaintiff's third visit at the clinic. The doctor further conceded that the plaintiff had been under observation at the hospital and in all probabilities it was found that there was nothing materially wrong with her and she was discharged. He conceded further that in respect of the diagnosis of blood pressure being alarmingly high on 6th September 2004 they should then have referred the plaintiff immediately to the doctor at Dora Nginza hospital and that their failure to do so amounts to negligence as she should have been referred on the same day. He conceded further that after the time of confinement the procedure is not over as the doctor would also have to close up the uterus and abdomen and that takes some time about fifteen to twenty minutes. Thereafter a theatre will also have to be prepared for the next patient a procedure which takes some time unless there is more than one theatre. In this regard on this day there was only one theatre for delivery at this hospital. Dr Du Toit conceded that this day there was only one theatre available at the maternity section at that time though on other occasions there would be three theatres in that unit. The doctor further conceded that at night time Dora Nginza hospital is a very busy time with babies being delivered normally and through caesarean section. That the hospital was busy was confirmed by the plaintiff herself.

[29] It is Dr Du Toit's evidence that Dora Nginza maternity unit is a very busy place

and frequently they are under staffed. According to the doctor the mere fact that the heart beat drops to 120 or below does not necessarily indicate foetal distress. This is so because it could have been merely due to a contraction and it could have returned back to normal very quickly. He testified that foetal distress does not just happen. It gradually builds up and it must have been going for some time and that if the baby in issue had been removed from that environment it does not matter what the cause of foetal distress was, the baby would have had a chance of survival.

[30] On this note plaintiff closed its case a step which was followed by an application for absolution from the instance. I refused the application per my judgment delivered on 3rd June 2010.

C) EVIDENCE FOR DEFENDANTS

[31] Defendants called two witnesses in their defence. They are Dr Aydin Vebhi and Dr Irvin Burger Berkowitz.

[32] Dr Aydin Vebhi testified that during 2009 he made a thorough search to locate the records of the plaintiff in this case but in vain. He was unable to find the official records of the plaintiff. Although a folder was subsequently found it did not have the relevant documents.

[33] He testified further that according to what he could see the plaintiff was discharged by Dora Nginza hospital on the 23rd July 2004 and was instructed to go back to the clinic. He testified that if the patient is diagnosed as diabetic for her treatment as well as the management of the diabetes he or she would have to be

referred to Dora Nginza hospital.

[34] What the witness is testifying on this point is not what happened to the plaintiff but what should have been done if the patient was diagnosed with diabetes. It also seems to me that no one knows where the actual records of the plaintiff are and those responsible would speculate as to what treatment was received by plaintiff. In my view, to say the plaintiff would have been referred to the hospital, if diabetic, cannot assist the defendant's case especially in view of the careless manner in which they have dealt with the plaintiff's records. Judging by their conduct they could also have failed to refer a diabetic case to hospital. Indeed their conduct aforesaid makes one to conclude that they are capable of doing so.

[35] According to Dr Vebhi, when a patient reports at the hospital, after he or she has been observed at West End clinic, she will not necessarily carry or bring all the records from the clinic. All his or her visits and some test results, if any, would be recorded on his or her card, and if necessary in the additional referral letter.

[36] The witness further commented on the ability of the lay patient to interpret the signs displayed by the machine that was placed on the plaintiff's stomach after she was admitted for labour. He mentioned that there are two types of machines the ECG whose purpose is to produce and trace a patient's heart in terms of the functionality of its rate etc. The CTG machine is specifically designed to monitor the foetal heart. The latter works different from the former and deals with ultra sound effects. Accordingly, the machine that was described by Mrs Van Brises is an ECG machine not for the monitoring of the foetal heart and was not the CTG which was

specifically for monitoring the foetal heart beat. The ECG machine would have been used to test the patient's (plaintiff's) heart beat. He added that at the stage when plaintiff was admitted for labour at the hospital the ECG machine was not used in the labour ward and that even at the time he testified it is not standard practice to use it in the labour ward.

[37] When questioned by Mr Mouton the witness confirmed that a patient would receive a green card in which all the information, the family history, the illness eg diabetes and high blood pressure and tests results about that patient would be reflected. If the information on the green card indicates high risk, Dora Nginza hospital would be aware of that information. He conceded that any information reflected in the green card about some illness would be confirmed by the hospital and that would then give the hospital a clue which would cause them to do confirming tests. He conceded that the information would then raise alarm bells so as the hospital staff and doctors to be on their toes. He conceded further that in respect of exhibit B they would have the same document which is a second entry that refers to the plaintiff's visit and observation at the hospital on 16th July 2004.

[38] Dr Irvan Burger Berkowitz testified that he is a specialist gynaecologist having qualified as such in 1971. He is employed at Dora Nginza hospital in the Department of gynaecology as a senior specialist.

[39] He compiled a report about the tragic incident involving the plaintiff. He used the theatre register which has information compiled in exhibit A. Exhibit A, which is a copy of the theatre register is the only document available about the plaintiff. According to him 80% of the diagnosis is made from the history of the patient and

the doctor will rely on that history to make the diagnosis.

[40] In his experience in the medical profession, nursing sisters make notes accordingly. He then confirmed the information reflected in exhibit A and its annexures which has been referred to earlier in these proceedings.

[41] His evidence was substantially similar to that of Dr Vebhi. However, during cross-examination by Mr Mouton, he made concessions which are damaging to the defendant's case. He conceded that where a patient has brought to the hospital a report with information from a clinic that her family has a history of diabetics and that she had a previous caesarean birth due to a pregnancy induced hypertension, that information will alert a reasonable hospital that such a patient is a high risk. He conceded further that it is reasonably correct that the plaintiff could have reported to the nurses at West End clinic about her history of suffering from diabetics. And that the results which showed that she was normal in so far as sugar levels are concerned could have been as a result of her treatment with insulin which she was using at the time. He agreed that with the report of a previous caesarean birth a reasonable doctor or nurse should be alerted so as to take any preventative measures for a safe delivery. He conceded further that foetal distress is an emergency especially in a person who has previously given birth by caesarean section and that such a situation should alert the hospital staff and doctors to proceed with the caesarean birth as soon as possible. In addition to the above information, the witness conceded that Dora Nginza hospital having been aware of the diabetic illness of the patient or that it should have been aware of that illness, and that she suffers from hypertension, as well as history of previous caesarean

birth, the nurses and/or doctors should have recommended an elective caesarean birth one or two weeks before he normal birth date. He conceded further that having regard to the time when the operation was made to the plaintiff and the time when the doctor was called for a caesarean operation on the patient, as well as the time when the operation was done it was unacceptably and unreasonably late for the hospital to take such an action at that very late stage. He conceded further that in the case of the plaintiff with the signs of a foetal distress the latest at about 21h30, at the time when the theatre was ready and not functioning, it was unreasonable for the doctor to be called only at about 23h30. A further concession was that there is no evidence that the foetal distress of the plaintiff's unborn baby was sudden.

[42] Mr Pretorius, in his questions on re-examination, dealt with the two witnesses' (Van Brises and the plaintiff) inability to interpret the signs which were reflected in or by the machine which was on plaintiff's body. I have already emphasised that the Court cannot rely on the two witnesses interpretation of the signs made by the machine. However, I cannot ignore their evidence or the evidence of a witness who testifies that she responded to an instruction by the nursing sister as to what to do when the machine's level went below a certain line indicated by the nurse. This, in my view, does not amount to the interpretation of the machine but simply compliance with the instruction given to her by the nurse. It is clear that when the nurse gave her such instructions she was aware of the dangers if the situation is not attended to immediately once the machine levels go below that line. This is so especially in this case where the plaintiff was told to either pat herself or call the nurse. She had on many, if not all occasions, resorted to calling the nurse. The witness conceded though that even a contraction would cause the heart

beat to move below the line.

[43] On this note the defendants' case was closed.

E) ISSUES

[44] The issue herein is whether the defendant's employees failed to observe the legal duty they owed to the plaintiff in that they failed to ensure that:

[44.1] The plaintiff's baby was born alive.

[44.2] The plaintiff's baby remained alive after birth.

[44.3] That sufficient medical personnel and medical facilities were placed at the disposal of the plaintiff and her baby for purposes of the delivery process as well as any subsequent aftercare in order to ensure that the baby was born alive and thereafter remained alive.

[44.4] In the event of complication arising during the delivery process or subsequent aftercare, that such medical officials including the staff assisting thereto, possessed the necessary training and skill to attend thereto in a proper, professional and satisfactory manner in order to ensure that the plaintiff's baby was born alive and thereafter remained alive.

[44.5] The necessary steps were taken or tests done in order to monitor the condition or health of the plaintiff's baby before and after birth so as to ensure that the baby was born alive and thereafter remained alive.

[44.6] The generally accepted procedures were timeously and/or properly taken during the delivery and or any emergency arising therefrom so as to ensure that the baby was born alive and thereafter remained alive.

[45] The critical questions for decision herein in assessing whether the defendants acted negligently in treating or failing to treat the plaintiff should be decided based on the following issues:

[45.1] Whether the plaintiff was a high risk patient, and if so:

[45.1.1] At what stage did defendants become aware of such eventuality;

[45.1.2] At what stage did the foetal distress develop; and

[45.1.3] Whether the proper care was administered to the plaintiff in the light of the foetal distress and her high risk status and if so;

[45.3.1] Whether the defendants acted within a reasonable time to prevent the death of the child. And in doing so:

[45.3.1.1] Whether the defendants employed the adequate measures in their attempt to prevent the death of the child thus ensuring that the plaintiff's child was born alive and/or remained alive after birth.

F) EVALUATION OF THE EVIDENCE

[46] The evidence of the plaintiff's witnesses including that of the plaintiff cannot be faulted. I have no reason not to accept their evidence. Although Mrs Van Brises was so confident in her evidence to the extent that she was even prepared to convince the Court, mistaken though, that she knew a lot about how the two heart machines worked, her evidence was not shown to be false. This is more so that her evidence was, to a large extent, confirmed by the evidence of the plaintiff and her husband. This holds true with the evidence of Dr Du Toit whose analysis of the issues of expertise has assisted the Court to a great extent.

[47] The defendant's evidence of the two doctors was also clear and straight

forward. None of them was discredited in any manner whatsoever.

[48] I will, therefore, decide the case on the basis that the evidence of the witnesses is acceptable. This, however, is different from the weight to be attached to such evidence for the purposes of finding for either party.

[49] I must, however, make a comment on one issue about the evidence or lack thereof on why was the plaintiff's explanation and notes in West End clinic not recorded in accordance with what the plaintiff explained to the nurses and other clinic staff. It is also puzzling to note that some of the records which contain the history of the plaintiff were found to be missing in that clinic. In any event i have no reason to believe that plaintiff did not inform the staff, doctors and/or nurses in the clinic about her history in the manner she has explained to this Court. She had no reason to tell a different story when, as early as 2003, she was already treated with insulin and that she has had a previous caesarean section. It could be that the notes recorded in exhibit A were taken out of the blue because the plaintiff's file could not be found or that they were deliberately falsified. There is no other conclusion one can make in the circumstances.

G) WAS DEFENDANT NEGLIGENT?

[50] Mr Pretorius for the defendants seems to put more emphasis on the fact that there are no records available which show that the plaintiff was suffering from diabetes at the time she was at West End clinic. And, therefore, the hospital staff at

Dora Nginza hospital could never have been aware of her diabetic condition when she went to give birth on the 11th September 2004. In my view this is not the consideration in this case.

[51] In view of the admission by the defendants in paragraph 5 of the plea that a legal duty exists on their medical personnel and medical practitioners employed by defendants at Dora Nginza hospital to take reasonable care to:

[51.1] attempt to, where possible, keep babies from at the hospital alive;

[51.2] to give medical assistance and care to mothers admitted to the hospital whilst giving birth to their children;

I need not deal, specifically as a separate heading, with the issue of wrongfulness. I will deal with it when determining the issue of negligence.

[52] Proof of defendant's negligence herein does not necessarily depend on what took place at West End clinic. The conduct of the staff and/or medical personnel at Dora Nginza hospital should be judged on its own without having regard to what happened at West End clinic on the 15th July 2004.

[53] West End clinic subsequently referred plaintiff to Dora Nginza hospital for observation and was admitted from 16th July 2004 and was discharged on 23rd July 2004. While undergoing observation at Dora Nginza hospital she was informed by a doctor who attended to her that she would have to be detained in hospital for the purpose of observing her diabetes as well as her blood pressure. She was then observed in that hospital for a week. Whilst in hospital they would take her blood pressure and diabetes tests twice daily. She would receive insulin for sugar and

some tablets for blood pressure. The doctor further told plaintiff that she would not be able to give birth in the natural way and would have to give birth through caesarean operation. She was further informed by the nurse that for the purposes of giving birth she would have to come straight to hospital as she was a high risk.

[54] Again on admission at the hospital on the 11th September 2004, plaintiff informed the hospital staff and the nurses who attended to her that she was a diabetic case and that she would have to give birth by caesarean section and not naturally. When she said so the nursing sister advised plaintiff that she would have to wait a little while because she was still far from giving birth and that they were under-staffed and therefore she would have to wait. This evidence was left unchallenged by the defendants. In the absence of anything to the contrary, I have to accept the uncontested evidence.

[55] There is undisputed evidence that at about 21h00 when the graph of the machine in her chest fell below the line plaintiff called the nursing sister who informed her to just endure because the theatre was full but there was a doctor who would come to attend to her. The doctor only came very late and prepared her for the theatre. When the doctor eventually arrived he informed the plaintiff that she was to be operated. There is also undisputed evidence that at about 21h30 the theatre was free and not occupied. The doctor informed her that they would have to conduct an emergency caesarean operation because the baby was undergoing foetal distress. The records show that the operation was conducted at about 01h12 on the 12th September 2004. The doctor tried to resuscitate the baby but without success. It is clear that when the doctor attempted the resuscitation of the child the

latter was still alive and had proper action been taken earlier the life of the baby could have been saved. The logical conclusion is that the baby was still alive until about the time its mother was operated at about 01h12. Therefore, from about 21h30 when the plaintiff's condition became serious, in my view, up to until the birth of the child nothing was done by the hospital employees including the nurses and doctors. Bear in mind that at that time the theatre room was not in use. In any event, the doctor who attended to the plaintiff was only called by the nurse at about 23h30 but only took in excess of an hour to come to plaintiff's assistance. Were the actions of the defendants' employees reasonable in the circumstances?

[56] It follows, therefore, that in view of the defendant's admission of the legal duty it has towards plaintiff once that legal duty is breached and the plaintiff consequently suffers damages the actions of the defendants are in law regarded as wrongful. However, the enquiry does not end there the plaintiff has to also prove negligence on the part of the defendants.

[57] It is now well established that wrongfulness is a requirement for liability under the modern Aquilian action. Negligent conduct giving rise to loss, unless also wrongful, is therefore not actionable[1].

[58] Where the element of wrongfulness gains importance is in relation to liability for omissions, as in this case, and pure economic loss[2]. In ***Boerdery BK v Transnet*** [3] and at 498-499 para 12 H-I and 499 A Scott JA held as follows:

"...The inquiry as to wrongfulness will then involve a determination of the

1 Gouda Boerdery BK v Transnet 2005 (5) SA 490 at 498 para 12G-H

2 Minister of Police V Ewels 1975 (3) SA 590 (A). Gouda Boerdery BK v Transnet *supra*

3 See footnote no 1 *supra*

existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the plaintiff harm. This will be a matter for judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms. If a legal duty is found to have existed, the next enquiry will be whether the defendant was negligent. The test to be applied will be that formulated in ***Kruger v Coetzee***, involving as it does, first, a determination of the issue of forseeability and, second, a comparison between what steps a reasonable person would have taken and what steps if any, the defendant actually took[4]."

[59] While conceptually the inquiry as to wrongfulness might be anterior to the enquiry of negligence[5], it is equally so that without negligence the issue of wrongfulness does not arise, for conduct will not be wrongful if there is no negligence[6].

[60] During cross-examination by Mr Mouton, Dr Vebhi made the following concessions:

[60.1] That the green card received by the plaintiff would have contained, *inter alia*, information regarding her family history of hypertension and diabetes, and that she had undergone previous caesarean section. Should this information suggest that the plaintiff is a high risk patient, Dora Nginza hospital would have been made aware of this fact by means of such card.

[60.2] That based on the plaintiff's family history of hypertension and diabetes as well as the fact that she had had a previous caesarean section, alarm bells should have gone off.

4 Gouda Boerdery BK v Transnet *supra*

5 Cape Town Municipality v Bakkerud 2000 (3) SA 1049 (SCA) also at [2000] 3 All SA 171 in para [9] at 1054 H-I (SA)

6 Cape Metropolitan Council v Graham 2001 (1) SA 1197 SCA also at [2001] 1 ALL SA 215 Para 6 at 1203E-G (SA)

[60.3] And that the plaintiff's pressure readings obtained on 6th September 2004, were, on their own, sufficient to classify the plaintiff as a high risk patient.

[61] Dr Du Toit's evidence is that it was on its own negligence on the part of the Dora Nginza hospital not to terminate the plaintiff's pregnancy at 38-39 weeks. Plaintiff was specifically asked how she gave birth to her other children and when she indicated that it was by caesarean section she was informed that her birth for the child in *utero* would be by caesar hence she was even advised to proceed straight to the hospital instead of the clinic once she feels she is due to deliver. There is no evidence from the defendants to gainsay this evidence and it was not even disputed during cross-examination of the plaintiff's evidence and during the evidence of the other witnesses for the plaintiff.

[62] Furthermore, there is uncontested evidence that plaintiff was admitted at Dora Nginza hospital for observation and to ascertain the reason for her diabetes and to monitor the high blood pressure. This evidence flies in the face of the notes made or recorded on behalf of the plaintiff (exhibit A) that there was no record that she has diabetes. Even if there was no such evidence, on arrival at the hospital on 11th September 2004, she apprised the nurses of her diabetic and hypertension status. As I indicated above i have no reason to reject the evidence of the plaintiff in this regard and if she had not informed the staff at West End clinic about her diabetes they would never have referred her to Dora Nginza hospital for the observation concerning, *inter alia*, her diabetes.

[63] Not very long after the plaintiff was admitted at the hospital on 11th September

2004, she reported her problem concerning the foetal distress. This problem became serious at about 21h30 and, given her history, her diabetic illness and previous caesarean birth as well as her hypertension, all of which should have been known by the hospital, the hospital staff should have attended to her as soon as possible, and in my view, even before 22h30. There is no valid reason why she was not attended to with a view to remove the baby from the hostile environment in which it was. Mrs Van Brises, testified that apart from the readings of the CTG machine, it was evident from her and from any other person that there were serious problems with the mother and the baby, a condition which the nurses should have noticed and acted accordingly with a view to have the baby removed from the hostile environment. This was never done. Reasons which had been given by other people other than the hospital personnel for not doing so are mere speculation. None of the persons who were directly involved in attending to the plaintiff were called to refute her evidence and that of her witnesses. I accept Dr Dut Toit's evidence that foetal distress takes a couple of hours to start showing clinical signs and does not come suddenly. This is confirmed by the signs displayed by the plaintiff herein. In the present case plaintiff's condition became alarmingly serious at about 21h00 but nothing was done by the hospital staff despite the reports made by the plaintiff to the nursing sister. This evidence was also not disputed.

[64] In the present case we are dealing here with a public hospital whose duty is, *inter alia*, to admit hundreds of people who come to the hospital to give birth naturally and by caesarean section. From the accepted evidence led during the trial, I can take judicial notice that Dora Nginza hospital is a busy hospital which admits patients with all kinds of illnesses without exception.

[65] The hospital has employed professional nurses and qualified doctors who have to deal with the patients who come to hospital for delivery of babies and other illnesses. Both nurses and doctors in their own right possess or at least should reasonably be expected to possess proficiency or or expertise in regard to their areas of proficiency and/or expertise.

[66] Thus in the case of an expert such as a surgeon or gynaecologist, the test for negligence in regard to the exercise of the expert's area of activity is the test of the so called reasonable surgeon, reasonable gynaecologist etcetera and the negligence of an expert is sometimes referred to as professional negligence[7]. This applies equally to professional nurses whose conduct is also judged according to their rank and experience. A nurse who has progressed to the rank of a sister, in certain circumstances, will be judged according to the reasonableness of a nursing sister and not that of a student nurse. The same holds true in the case of a general practitioner who should exercise the same degree of skill and care as that of a reasonable medical practitioner and not that of a reasonable specialist. He or she is in fact not a specialist but a medical practitioner. In ***Lourens v Oldwage***[8] Mthiyane JA approved the following statement[9]:

> "A specialist is required to employ a higher degree of care and skill concerning matters within the field of his speciality than a general practitioner. The objective 'reasonable physician test' is subjectified to the particular branch of medicine to which the specialist belongs. This means that it is expected from a specialist in the treatment of his patients to act as a reasonable specialist would have done under the circumstances."

7 Van Wyk v Lewis 1924 AD 438 at 444F.

8 2006 (2) SA 161 (SCA) at 171C

9 Classen and Verchoor – Medical Negligence in South Africa (1992) at 15

[67] The question of reasonableness and negligence is one for the Court to determine on the basis of 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 reaching its own conclusion on the issue raised[10].

[68] In this case the nursing sister who attended to the plaintiff does not appear to me to have applied her mind to what the plaintiff told her relating to her previous caesarean birth. If she did she would never have told the plaintiff to wait until she is ripe for giving birth. Given her rank and, therefore, her experience, she was reasonably expected to have checked the history of the plaintiff's illness as contained in their records. Her records would appear from her file because she had been to the same hospital a few months before she came on the 11th September 2004.

[69] Assuming that she was busy then and did not apply her mind to what plaintiff told her, at the time plaintiff was complaining of pain especially when it was clear that the unborn child was suffering from foetal distress the alarm bells should have rung in the mind of the sister nurse more so that the plaintiff had already informed her of her illness in the form of diabetes and hypertension. She did nothing about that until at about 23h30 when, for the first time, she phoned the doctor. In my view, the information about the plaintiff, which she had already been told, was sufficient to cause her to prevent the harm that was obviously looming. The same would apply to any other nurse in the circumstances. At least about 21h30 or a little thereafter, the nurse would have called the doctor, informed him of the plight of the plaintiff and

10 Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA) at 1200 D-E

then prepare he theatre for the operation of the plaintiff. Her failure to do so or to take any preventive action amounts to negligence.

[70] The doctor who was called by the nurse at about 23h30 whether a specialist or not should have become aware of the seriousness of the illness. She only responded when called for the second time. I will assume that she had no reason not to come and attend to the plaintiff, and in fairness to the plaintiff, I must say so because there is no evidence from the doctor to dispel that assumption. Her failure to act at that stage amounts to negligence.

[71] The last opportunity for the hospital staff in defendants' hospital, to operate the plaintiff presented itself at about 23h30. Defendant's employees failed to do so as a result of which the plaintiff's baby died in *utero*. No reasonable explanation has been proffered for such omission. The general nature of the looming harm and the general manner on how the harm would occur were both reasonably foreseeable[11]. The situation as explained by Dr Du Toit makes it clear in my mind that the defendants' employees should have taken preventive measures to help the plaintiff by performing caesarean birth on her to save her baby. Their failure to do so amounts to negligence. It is clear, in my view, that the occurrences of death of the plaintiff's child, when it was apparent that it was suffering from foetal distress, was clearly and reasonably foreseeable to all the defendants' professional staff including the nurses and the doctors[12].

11 Minsiter of Police v Van Aswegen 1974 (2) SA 101 (A)

12 Van Der Spuy v Minsiter of Correctional Services 2004 (20 SA 463 (SECLD) at 472. See also Munkeiber v Raath and Another 1999 (3) SA 1065 (SCA) at 1077

[72] In his argument Mr Pretorius referred me to decided cases particularly the judgment of ***Yanga Kosana vs The MEC for Health, Western Cape*** case no 9230/2005 delivered on 23rd January 2008. The facts of the above case are clearly distinguishable from those of the case *in casu*. I cannot, therefore, rely on it when deciding the present case though I agree with the principles formulated therein.

[73] It is trite law that in a trial, evidence that is not challenged and is subsequently accepted by the Court, can be used by the Court in proving or disproving either parties case provided that it is relevant to the issues involved in the case. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged evidence is accepted as correct[13].

[74] I have already indicated that the plaintiff's evidence and that of her witnesses has been accepted as true and that includes their evidence which has not been challenged during cross-examination.

[75] In the circumstances I find that the plaintiff has established on a balance of probabilities that the defendants acted negligently in failing to treat plaintiff and her unborn child with the required level of care and skill required of them during the preparation for the plaintiff's delivery on 12th September 2004. This negligence resulted in the death of the plaintiff's baby.

[76] In the premises I declare as follows:

[76.1] The defendants are liable to compensate the plaintiff in respect of any such damages as the plaintiff is able to prove in due course.

13 President of the RSA v South African Rugby Football Union 2000 (1) SA 1 (CC) at 37 B-E

[76.2] The defendants are ordered to pay the plaintiff's costs of suit, as taxed or agreed on a party and party High Court scale, such costs to include costs occasioned by the employment of two counsel, if any, and to include the costs of Dr Du Toit and the interpreter, where applicable.

[76.3] The defendants are ordered to pay interest on the plaintiff's costs at the rate of 15.5% per annum as from a date 14 days after the date of taxation or agreement until the date of payment.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

Representatives of parties:

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