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REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/52394
REPORTABLE

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

……………………… DATE ………………………… SIGNATURE

In the matter between:

LUNGILE NTSELE **Plaintiff**

and

MEC FOR HEALTH, GAUTENG PROVINCIAL GOVERNMENT **Defendant**

J U D G M E N T

MOKGOATLHENG J:

INTRODUCTION

(1) The plaintiff has instituted action on behalf of her minor child A against the defendant for damages arising from the alleged negligent medical treatment accorded them by the defendant's employees during 1996 at Zola Clinic ("*the clinic*") and Baragwanath Hospital ("*the hospital*").

(2) The plaintiff alleges that the nursing staff at the clinic in the negligent breach of their duty of care, during the period of her ante-natal pregnancy care at the clinic failed to:

(a) properly monitor her foetal growth;

(b) monitor the foetal heart beat rate;

(c) measure and assess the size of her pelvis;

(d) refer her to a hospital for ante-natal sonar tests; and

(e) on experiencing labour on 7 September 1996, she attended the clinic and whilst there, the nursing staff in the negligent breach of their duty of care failed to:

(i) monitor her and the foetus condition properly;

(ii) administer the Cato Togo Graph (CTG) on her and the foetus;

(iii) ruptured her membranes under septic conditions; and

(f) on 7 September 1996 the doctor and the nursing staff at the hospital in the negligent breach of their duty of care failed to:

(i) examine and accord her treatment without unnecessary delay;

(ii) monitor her and the foetus condition without unnecessary delay;

(iii) monitor her labour contractions and the foetal heart beat rate; and

(iv) perform a caesarean section when it was expeditiously necessary in the birth of A.

(3) Further the plaintiff alleges that the defendant's employees did not execute their statutory duty as obliged pursuant to ***section 27 of the Constitution of the Republic of South Africa Act 108 of 1996*** in that, they failed to provide reproductive health care to her and A with the reasonable skill and diligence prevailing in the medical profession, and as a result A sustained peri-natal asphyxia which rendered him a dystonic spastic cerebral palsy quadraplegic.

(4) At the commencement of the trial, the parties requested the court to separate the issues of liability and quantum. An order in terms of ***Rule 33(4)*** was made, consequently, the

court was only seized with the issue of causation and negligence.

THE NATURE OF THE EVIDENCE

(5) Because of the exceptional nature of the circumstances extant in this matter, for the plaintiff to succeed in her claim;

(a) the plaintiff has to establish a *prima facie* case of negligence against the defendant's employees, which in turn casts an evidential rebuttal burden on the defendant to destroy the probability of negligence by giving a reasonable explanation that occurred without negligence being attributable to the defendant's employees;

(b) alternatively, the plaintiff has to: "*show that the factual injurious eventuality happened in a manner which when explained by implication carries a high probability of negligence regarding the defendant's employees' conduct; and*

(c) if the evidence shows*: "the defendant did, and the plaintiff subjectively did not completely have within her grasp the means of knowing how the clinic and hospital staff administered treatment to her and her child, as all the crucial specific treatment facts are exclusively within the defendant's employees' knowledge, the court is permitted to draw an inference of negligence by applying the doctrine of res ipsa loquitur." See* ***Res Ipsa Loquitur and Medical Negligence by P Van Den Heever and P Casters***

THE PLAINTIFF'S EVIDENCE

(6) Because of the nature of the claim and the view I take of this matter, it is imperative to fully set out the evidence tendered. The plaintiff's first child A was born on 7 September 1996 by vertex, her second child N by caesarean section. Before and during the course of her pregnancy she was in good health. Her pregnancy was uneventful. For her pre-natal pregnancy care she attended the clinic where all prescribed pre-natal pregnancy tests were conducted with positive outcomes.

(7) On 7 September 1996 she experienced labour. She arrived at the clinic at 05h00. She was attended by two nurses. The foetal heart beat rate and labour contractions were not monitored. Her membranes were ruptured to accelerate birth. In spite thereof, no birth ensued.

(8) She was transferred to the hospital. No explanation was proffered for such transfer. She arrived at the hospital at 08h00. No doctor was available to examine and treat her. The nurses did not examine or treat her.

(9) She was given her clinic file and instructed to register her admission. The registration took 2 hours. She was thereafter placed in a ward. She informed the nurses her membranes were ruptured. A CTG was applied on her abdomen for 20 to 30 minutes.

(10) Ultimately a doctor arrived. He engaged the nurses in a discussion. The doctor examined her, palpitated her

abdomen and conducted a vaginal examination. The doctor asked if she felt like bearing down to give birth. She agreed. The nurses assisted her. She "*pushed*" for a long time but failed to give birth to her child.

(11) The doctor again engaged the nurses in a discussion. He thereafter requested her to "*push*" but still no birth eventuated. Thereafter she "*pushed*" four times without success. The doctor then performed an epiostomy. After what seemed an eternity she gave birth to A.

(12) She immediately noticed that A was not crying nor breathing. The nurses took A for resuscitation to the theatre. On 8 September 1996, It was confirmed A had suffered cerebral palsy. A was discharged on 27 September 1996.

(13) She believes because she was an emergency patient transferred after her membranes were ruptured, she should have been accorded prompt treatment on arrival at the hospital. In her view A should have been delivered by caesarean section.

DR HEYNS' EVIDENCE

(14) The size of the baby differs with every pregnancy but the size of the pelvic passage remains constant. The plaintiff as first time mother should have been continuously monitored. A pelvic assessment and measurement should have been conducted in order to determine if her pelvis and cervix were sufficiently adequate to enable her to give birth by vertex.

(15) The plaintiff was not referred to a hospital for an ante-natal sonar scan, which is vital to establish the position and condition of the foetus. There was no continuous CTG monitoring of the foetal heart beat rate or the plaintiff's labour contractions at the clinic and hospital.

(16) During labour it is important to monitor the foetal heart beat rate to establish if there is any irregular heart beat rate. The monitoring of the heart beat rate establishes the condition of the foetus and assists the attending doctor to make the correct decision regarding the delivery method to be employed.

(17) The continuous monitoring of the foetal heart beat rate by CTG is very critical in assessing whether the foetus is not in distress as a result of insufficient oxygenated blood supply to the foetal brain. The failure to continuous monitor the foetal heart beat rate resulted in the foetal heart completely stopping due to the lack of oxygenated blood supply to the foetal brain. A's failure to breath and cry was a consequence of him having suffered brain damage.

(18) The delay in not promptly treating the plaintiff at the hospital, the delayed and prolonged delivery of A by vertex resulted in him suffering hypoxia (the lack of oxygen to his brain) which caused peri-natal asphyxia rendering him a dystonic spastic quadraplegic.

(19) The rupturing of the plaintiff's membranes under septic conditions and the failure to induce her to give birth, caused the nurses to transfer her to the hospital, as such, the plaintiff became a red flag patient requiring prompt treatment on arrival at the hospital.

(20) Dr Heyns confirmed the critical observations in his medico-legal-report namely that:

> *"The long hours in labour caused pressure on the umbilical cord and placenta. The oxygen supply to the foetus and very importantly to the brain was reduced and or off completely, and this caused hypoxia.*
>
> *In his opinion there is no question about negligence, because the labour process was poorly handled. A lot of time was wasted and critical warning signs were missed. The end result was a brain damaged child with cerebral palsy and epileptic fits."*

<u>DR LEFAKANE'S EVIDENCE</u>

(21) No ante-natal foetal heart beat rate monitoring was conducted regarding the status of the foetus at the clinic. It was incumbent on the nurses to know the foetal heart beat rate at the time the plaintiff was experiencing labour because there is relationship between the foetal heart beat rate and labour contractions.

(22) If at the peak of the labour contraction the foetal heart beat rate decelerates, that points to the possibility of umbilical cord compression with the consequential shortage of blood and oxygen supply to the foetus, resulting in hypoxia and peri-natal asphyxia.

(23) The CTG must be continuously applied before and during delivery because it is the most critical period when the labour contractions are at their highest intensity. With every incidence of labour contraction, there is pressure on the sufficient flow of oxygen which can possibly result in an incidence of hypoxia.

(24) The plaintiff's cephalo-pelvic size was not assessed with sonar measurements during her ante-natal pregnancy care. The septicaemia recorded in the neo-natal summary resulted from the premature septic rupture of membranes at the clinic. The infection occurred between 2 and 6 hours after such rupture.

(25) Pre-natal asphyxia is not as prevalent in South Africa as peri-natal asphyxia. Deprivation of oxygen (hypoxia) to the brain during labour is the most common cause of peri-natal asphyxia and consequent cerebral palsy.

(26) Pre-natal asphyxia is commonly caused by placental factors, infections, diabetes, foetal cardiovascular abnomalies, respiratory congenital abnomalies, severe viral and bacterial infections. A's birth circumstances are not consistent with the aforementioned factors because he suffered peri-natal asphyxia.

(27) The only available hospital record relating to some aspects of A's peri-natal asphyxia is the neo-natal admission summary report compiled on 27 February 1997. Characteristics of peri-natal asphyxia forming part of A's obstetric history extracted from the now non-existent obstetric records of A's delivery included:

(i) an Apgar score of 5 in 1 minute and 7 in 5 minutes; and

(ii) the seizures noted within 12-48 hours of birth.

(28) The Apgar score of 6 to 7 in 5 minutes represents a critical score which confirms peri-natal asphyxia. The seizures occurring on 8 September 1996 confirm peri-natal asphyxia. The neo-natal summary report also recorded peri-natal asphyxia, encephalopathy (brain cell pathology) and hypoxia (the lack of oxygen to the brain which results in peri-natal asphyxia).

(29) The presence of hypoxia is established by the CTG as a manifestation of an irregular foetal heart beat rate. In that exigency because the foetus is in distress and in imminent danger due to lack of sufficient oxygenated blood supply to

its brain, the attending doctor is obliged to expeditiously deal with the situation within five minutes to effect delivery by caesarean section.

(30) In his opinion the most efficient and quickest way of delivering A should have been by caesarean section. Peri-natal cerebral palsy can occur when the foetal head gets compressed whilst travelling through the pelvic canal during birth. If the pelvic canal is small and the foetal head is forced through, umbilical cord compression occurs.

(31) The cause of the A's traumatic birth resulting in him being a cerebral spastic quadraplegic is attributable to the fact that during the long labour process from the rupture of the membranes to the time he was delivered at noon, there were stages when his brain had insufficient amounts of oxygenated blood, and as a consequence, hypoxia and peri-natal asphyxia occurred.

(32) The delivery of at the hospital was negligently handled because the defendant's employees were dealing with a first time pregnant plaintiff in a situation where her membranes were ruptured at the clinic to accelerate birth, as a result, the plaintiff was a red flag emergency patient who needed prompt medical treatment.

(33) He had recourse to and perused Dr Moshesh's medico-legal-report. Dr Moshesh concurs with his conclusion that A suffered spastic cerebral palsy quadraplegia commonly associated with peri-natal asphyxia.

THE APPLICATION FOR ABSOLUTION

(34) After the close of the plaintiff's case the defendant's counsel Mr Lengene argued that negligence had not been proved, consequently, the court was obliged to grant absolution. He cautioned the court to guard against being seduced by understandable sympathy for A's traumatic birth which resulted in his cerebral palsy. In support of the submission counsel referred to the case of ***Broude v McIntosh and Others 1998 (3) SA 60 SCA.***

(35) The defendant's counsel submitted that the plaintiff had not shown that the defendant's employees had failed to take reasonable measures to prevent A's cerebral palsy, further the plaintiff had not shown that A's cerebral palsy was foreseeable and due to the defendant's employees' negligence.

(36) I am aware of the injunction in ***Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001 (3) SA 1188 (SCA) at par 40*** where it was stated: "*This essential difference between the scientific and the judicial measure of proof was aptly highlighted by the House of Lords in the Scottish case* **of Dingley v The Chief Constable, Strathclyde Police 200 SC (HL) 77** *and the warning given at* ***89D-E*** *that*

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

THE INCIDENCE OF ONUS

(37) Given the nature of this action, the defendant's counsel misconceives the nature of the incidence of the onus reposing on the plaintiff, once the plaintiff has established a

prima facie case of negligence, the defendant bears an evidential burden to disprove the probability of negligence by adducing cogent credible evidence showing that the defendant's employees accorded the plaintiff and A adequate treatment with the skill and diligence prevailing in the medical profession, further, that A's cerebral palsy could not possibly have been reasonably foreseeable as a consequence arising from such treatment.

(38) Further, the defendant bears the rebuttal burden of disproving causation by showing that A's brain damage was not attributable to the defendant's employees' negligence, that if it was caused by hypoxia and peri-natal asphyxia, the treatment accorded to the plaintiff by the defendant's employees' was certainly not the cause of such hypoxia and peri-natal asphyxia.

CAUSATION

(39) Regarding causation, the plaintiff has to show that the defendant's employees breached their duty of care, that on a balance of probabilities, such breach caused A's cerebral palsy.

(40) The plaintiff's case is based on the essential proposition that A's peri-natal asphyxia was a consequence of the defendant's employees' breach of the duty of care, in having failed to monitor the foetal heart beat rate to prevent the hypoxia which resulted in peri-natal asphyxia and cerebral palsy.

(41) Although the onus of proving negligence is on the plaintiff, *"the plaintiff does not have to adduce positive evidence to disprove every theoretical explanation which is exclusively within the knowledge of the defendant, however unlikely, that might be devised to explain (A's cerebral palsy) in a way which would absolve the defendant and his employees of negligence."* ***Naude NO v Transvaal Boot and Shoe Manufacturing Co 1938 AD 379.***

(42) In ***Monteoli v Woolworths (Pty) Ltd 2000 (4) SA 735 (W)*** it was held:

"[25] It is absolutely trite that the onus of proving negligence on a balance of probabilities rests with the plaintiff.

[27] Sometimes, however, a plaintiff is not in position to produce evidence on a particular aspect. Less evidence will suffice to establish a prima facie case where the matter is peculiarly in the knowledge of the defendant.

[29]In such situations, the law places an evidentiary burden upon the defendant to show what steps were taken to comply with the standards to be expected. The onus nevertheless remains with the plaintiff."

THE DUTY OF CARE

(43) The defendant's employees had a duty of care to accord the plaintiff and A obstetric and paediatric care with the reasonable skill and diligence prevailing in the medical profession in order to ensure the safe delivery of A.

THE PLAINTIFF'S *PRIMA FACIE* CASE OF NEGLIGENCE

(44) I turn to consider whether the plaintiff has established a *prima facie* case of negligence against the defendant's employees. The plaintiff's evidence stands uncontroverted. There is no evidence adduced by the defendant to gainsay it.

(45) The plaintiff tendered evidence 15 years 5 months after the traumatic incident. She was unable to give the exact duration of her labour or the exact time she gave birth to A. She could only give relative time estimates regarding these exigencies, but is certain that her labour endured for a considerable time and she gave birth in the afternoon.

(46) Logic and common sense dictates that the plaintiff's labour and A's subsequent birth endured for a longer period of time than the few minutes suggested by the plaintiff under cross-examination. It is unfair and unjust for the defendant's counsel without any cogent evidence from the defendant's employees regarding the treatment accorded to the plaintiff or any reasonable explanation tendered by the defendant's employees regarding the disappearance of the plaintiff's clinic and hospital records, to expect the plaintiff to be precise and specific about the treatment accorded her at the clinic and hospital whilst under anesthesia.

(47) The plaintiff made concessions regarding the adequate treatment accorded her and the time frames suggested by defendant's counsel, in respect of the duration of her labour

and the time she gave birth. In my view these concessions are not decisive having regard to the objective proven facts. "

(48) *A concession, like any other evidence, may either be conclusive or count for nothing; Witnesses make concessions for any number of reasons, sometimes because the concession is in fact warranted, sometimes because for example, they are confused or tired or because they do not understand the effect of a concession, sometimes in circumstances where they are asked, impermissibly, to put their interpretation on certain events; the concession, like other viva voce evidence, must be weighed by the Court in the light of the totality of evidence before it and the probabilities revealed thereby."*

Harlech-Jones Treasure Architects CC and Others v University of Fort Hare 2002 (5) SA 32 (6) (E) at para 88

(49) Counsel argued that Dr Heyns conclusions should be rejected because his process of reasoning cannot sustain his conclusions due to the lack of empirical evidence suggesting that there was prolonged birth, and how long the prolonged birth endured.

(50) With respect, counsel conflates the concept of prolonged birth with the concept of delayed birth. There is a distinction as testified by Dr Heyns. The plaintiff's membranes were ruptured at 5.30 hours but she only gave birth to A at 12 noon. In Dr Heyn's opinion that is delayed birth as opposed to prolonged birth which by definition is the prolonged period during which the delivery endured.

(51) Mr Lengene assailed Dr Heyn's expertise based on the premise that he based his opinion on unproven facts and relied for his conclusions on the plaintiff's evidence, yet the plaintiff contradicted the material conclusions of his medico-legal-report. Dr Heyns motivated the reasons for his conclusions. His essential conclusions are corroborated by Dr Lefakane and Dr Moshesh's medico-legal-report.

(52) The statements in Dr Heyn's medico-legal-report that the CTG was not administered on the plaintiff at the hospital or that the plaintiff gave unassisted birth, should be seen and understood in the context of the communication between the plaintiff and Dr Hyens in the consultation which occurred 15 years after the traumatic incident.

(53) Mr Lengene questioned Dr Lefakane's competence to express an opinion regarding hypoxia and peri-natal asphyxia as the causes of A's dystonic spastic cerebral palsy quadraplegia.

(54) Although Dr Lefakane is not an obstetrician, it cannot be persuasively argued that as a paediatrician he was testifying on matters outside the scope of his expertise, if regard is had to the logical scientific exposition he tendered regarding hypoxia and peri-natal asphyxia as causes of A's dystonic spastic cerebral palsy quadraplegia. Dr Lefakane's expert opinion in this regard was not challenged.

(55) Dr Lefakane stated that he is variously consulted by obstetricians, he advices obstetricians on peri-natal obstetrical complications and diagnosis of foetal diseases. In my view, Dr Lefakane is eminently qualified to express an opinion regarding hypoxia and peri-natal asphyxia as causes of A's spastic cerebral palsy quadraplegia.

(56) Drs Lefakane and Heyns opinion and conclusions regarding the cause of A’s cerebral palsy, coincide with those expressed by Dr Moshesh (the defendant’s expert who consulted the plaintiff and examined A) in her medico-legal-report lodged in court in terms of ***Rule 36(9).***

(57) Dr Heyns and Dr Lefakane expressed their views firmly with confidence. They were impressive witnesses who gave logical rational explanations for their conclusions. Their unqualified opinion is, the cause of A’s cerebral palsy is attributable to peri-natal asphyxia, and not to pre-natal or post natal asphyxia.

(58) In my view, the plaintiff has through circumstantial evidence established a *prima facie* case that the treatment accorded to her and her foetal child A on 7 September 1996, was not in accordance with the skill and diligence prevailing in the medical profession, as a consequence of such negligent treatment, A suffered hypoxia and peri-natal asphyxia which resulted in cerebral palsy.

THE DEFENDANT’S REBUTTAL BURDEN

(59) I turn to consider whether the defendant has succeeded in explaining that the cause of A's cerebral palsy is not attributable to the defendant's employees' negligence. The defendant adduced the evidence of Dr Marishane in rebuttal to disprove the probability of negligence.

(60) At this juncture it is apposite to cite the applicable legal principles predicating the cogency of the evidence the defendant is obliged to adduce in rebuttal to disprove the probability of negligence. In ***Naude NO v Transvaal Boot and Shoe Manufacturing Co 1938 AD*** *[15] Tindall JA at* ***392-3*** *said:*

"Though the inference suggested by the nature of the accident does not shift the burden of disproving negligence on to the defendant, still it does call for some degree of proof in rebuttal of that inference…Where a plaintiff establishes a prima facie case which, unless rebutted, justifies a decisive inference, the nature of the answer which is called for from the defendant to enable him to escape such inference depends upon "the nature of the case and the relative ability of the parties to contribute evidence on the issue"…The mere suggestion of a reasonable theory according to which

the accident may have happened without negligence cannot be a sufficient answer. It seems to me clear that where admittedly, as in the present case, the nature of the occurrence itself creates a probability of negligence, it would be a negation of that premise if it were held that the defendant displaced the prima facie evidence by merely proving a reasonable possibility that the accident could have happened without negligence".

(61) Stratford CJ at ***398-9*** in the same context remarked:

"…(P)roof in some degree is required from the defendant to rebut the presumption arising from the fact that the occurrence speaks for itself…the burden of proof incumbent on a defendant…is simple and clear, he must produce evidence sufficient to destroy the probability of negligence presumed to be present prior to the testimony adduced by him. If he does that then – bearing in mind that the burden of proving his allegation is always on the plaintiff and never shifts – on the conclusion of the case the inference of negligence cannot properly be drawn. Put differently, his evidence must go to show a likelihood in some degree of the accident resulting from a cause other than his negligence."

(62) Because of the view I take of the evidence of Dr Marishane it is necessary reproduce his medico-legal-report verbatim in its totality, and thereafter compare and contrast his opinion and evidence based thereon, with the evidence of Drs Heyns and Lefakane, when the totality of the evidence is evaluated.

DR TM MARISHANE'S RESPONSE TO THE MEDICO-LEGAL-REPORT PREPARED BY DR AM HEYNS REGARDING THE PATIENT

"(a)…Electronic fetal heart monitoring (CTG) was introduced in the 1970s with the hope that it will reduce the prevalence of cerebral palsy (CP). It has been used extensively in the first world, but the prevalence of cerebral palsy even in the first world has remained the same. It is obvious that an assumption was made in the medical fraternity that the major cause of cerebral palsy was hypoxia at birth or birth trauma;

(b) *We know today that fewer than 10% of cases of cerebral palsy begin during birth. Current thinking is that 70-80% of cerebral palsy (cases) start before birth;*

(c) *CTG was investigated and compared to intermittent auscullation in monitoring low risk pregnancies and was not found to be superior;*

(d) *Ultrasound (sonar) is also not done for every pregnant patient in the public sector, especially if the patient has no identifiable risk factors;*

(e) There is apparently an assumption that there was cord compression;

(f) The cause for cerebral palsy in many cases is never found and with the information at hand one cannot agree with the opinion of Dr Heyns."

DR MARISHANE'S EVIDENCE

(63) Dr Marishane admitted that he was pertinently instructed to prepare a medico-legal-report in response to Dr Heyn's medico-legal-report to discredit his conclusions. He testified that he was not able to glean any information on which Dr Heyns based his conclusions regarding A's cerebral palsy.

(64) Dr Heyns's undisputed evidence was that due to lack of oxygenated blood to his foetal brain A suffered hypoxia which caused peri-natal asphyxia which resulted in cerebral palsy.

(65) It was put to Dr Marishane that the statement in the "*Reuters Information Document*" on which he based his medico-legal-report it is stated that spastic cerebral palsy was the only type of cerebral palsy associated with the acute interruption of oxygenated blood supply to the brain.

(66) He responded that peri-natal asphyxia did not necessarily prove that it was not the only type of cerebral palsy acquired as a result of hypoxia, nor did the statement suggest that the only cause of spastic cerebral palsy was birth trauma.

(67) The universally accepted scientific fact is that there are pre-natal, peri-natal and post-natal causes of cerebral palsy, but the "*Reuters Information Document*" pertinently stated that peri-natal cerebral palsy is the only type of cerebral palsy caused by hypoxia.

(68) Dr Marishane conceded that there was no suggestion in the "*Reuters Information Document*" that indicated that A did not fall into the category of the less than 10 percent of the cases alluded to who suffered peri-natal asphyxia cerebral palsy as a consequence of hypoxia.

(69) Dr Marishane testified that vertex delivery is indicated where there is pelvic deformity, or if the baby is too big for the pelvic canal and cervix. When this situation obtains, vertex delivery causes trauma on the motor and sensory cortex which results in cerebral palsy. In the present case the evidence

indicates that A was small, consequently, there was no suggestion that the plaintiff's pelvis and cervix were not adequate to enable vertex delivery.

(70) Dr Heyn's evidence that the pelvic passage remains constant in size was not disputed nor was the evidence that the plaintiff's pelvis was not measured to determine whether same would facilitate the efficacy of delivering A by vertex.

(71) The plaintiff's undisputed evidence is that her second child N was delivered by caesarean section at Sebokeng Hospital after she was informed that her pelvis and cervix were too small to deliver N by vertex.

(72) In his medico-legal-report Dr Marishane stated*: "The medical staff monitored the plaintiff's condition and that of the baby properly and without unnecessary delay. A CTG was applied to the plaintiff,…her membranes were not ruptured under septic conditions. Septicaemia did not cause the cerebral palsy*. *From what I have heard, there is nothing that one can regard as having been untoward or of poor standard from the information that is at hand that proves that*

there was negligence. What was done by the Baragwanath Hospital medical staff is exactly what I would have done."

(73) Despite this assertion Dr Marishane conceded that the plaintiff was a red flag patient after the rupture of her membranes at the clinic and transfer to the hospital. It is not disputed that on arrival at the hospital the plaintiff was not immediately accorded treatment.

(74) Dr Marishane testified that the APGAR score 5 at 7 minutes did not indicate hypoxia, that usually the APGAR score should be less than 6 at 5 minutes for one to suspect hypoxia.

(75) Dr Lefakane's evidence that the APGAR score recorded in the neo-natal summary confirmed A's peri-natal asphyxia was not disputed. The neo-natal summary indicated that A sustained hypoxia and peri-natal asphyxia which resulted in cerebral palsy.

(76) The sonar scan conducted on A's brain on 23 March 2001 indicated that he had suffered hypoxia and encephalopathy

(pathology of the brain) and the dilation of the lateral 3 ventricles, (injury to the brain neurons). Dr Lefakane testified that the sonar scan confirmed A's peri- natal asphyxia. His evidence was not disputed.

(77) Further Dr Marishane stated: "*The medical staff monitored the plaintiff's condition and that of the baby properly and without unnecessary delay. They applied CTG to the plaintiff, her membranes were not ruptured under septic conditions. Septicaemia did not cause the cerebral palsy."*

(78) Drs Lefakane and Heyns opinion is that the septicaemia infection occurred as result of the rupture of the plaintiff's membranes under septic conditions. Dr Marishane has not proffered any explanation as to how the plaintiff acquired the septicaemia infection. He conceded that the streptococcus, recorded in the neo-natal summary, can be transmitted to the foetus in the vaginal canal and cervix during birth and causes cerebral palsy.

(79) It was put to Dr Marishane that the expert evidence shows that A suffered hypoxia which caused peri-natal asphyxia because of his delayed birth, that this indicated that A's birth should have been effected by caesarean section.

(80) He replied that caesarean section was not indicated because there was no evidence that the plaintiff had suffered from uncontrollable high blood pressure nor was there any evidence that the foetus was in distress, which would have necessitated A's birth by caesarean section.

(81) On being asked whether he could deny that A had suffered hypoxia and birth asphyxia during the peri-natal phase, his response despite the universally accepted scientific fact that spastic cerebral quadraplegia is associated with hypoxia which results in peri-natal asphyxia, was there were no factors in the present case to support this assertion.

(82) Dr Marishane, however, conceded that his medico-legal-report dealt only with the explanation as to how cerebral palsy occurred in the pre-natal phase but did not deal with how cerebral palsy occurred in the peri-natal phase, which was the phase which predicated and defined A's cerebral palsy.

(83) It was put to him that it was incorrect for him to make the assertion in his medico-legal-report that the percentage prevalence of peri-natal cerebral palsy in cases where a CTG was used remained the same, because research studies clearly showed that the percentage figures of peri-natal cerebral palsy had decreased when a CTG was used.

(84) He responded that it was not the import the article in the "*Reuters Information Document*" conveyed, Dr Marishane contend that counsel did not understand the import of the article because the article, was written for doctors who could because of their training and qualifications understand what the import conveyed.

(85) I agree with counsel's reading and understanding of the "*Reuters Information Document*" that research conclusively showed that in cases where a CTG was used to monitor the foetal heart beat rate, there was a definite decrease in cases of peri-natal cerebral palsy as compared to cases where CTG monitoring was not conducted.

(86) The overwhelming expert evidence shows that hypoxia curtails the efficient supply of oxygenated blood to the foetal brain, which in turn causes hypoxia (brain damage) which manifests itself as peri-natal asphyxia which results in spastic cerebral palsy.

(87) It is clear from his evidence that Dr Marishane was "*a hired gun*" specifically engaged to undermine Dr Heyns evidence at all costs. Dr Marishane did not attempt to place an impartial gloss on his critical evidence. He was reluctant to concede the obvious when faced with uncontrovertable scientifically proven objective facts.

(88) In ***Schneider NO and Others v AA Another 2010 (5) SA 203 (WCC)*** Davis J quoting: ***Zeffertt, Paizes & Skeen The South African Law of Evidence at 330***, citing the English judgment of ***National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer') [1993] 2 Lloyd's Rep 68 at 81***, set out duties of an expert witness thus:

"(1) Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation.

(2) An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise...An

expert witness should never assume the role of an advocate.

(3) An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinions.

(4) An expert witness should make it clear when a particular question or issue falls outside his expertise.

(5) If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional ones."

(89) Judge Davis in adumbration of the duties of an expert witness stated:

"*In short, an expert comes to court to give the court the benefit of his or her expertise. Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the*

court with as objective and unbiased opinion, based on his or her expertise, as possible or a particular case. An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of the advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."

(90) Regrettably Dr Marishane has contravened every single one of these strictures. He was dismissive and irreverent of the evidence of Dr Heyns without any scientific basis. Dr Marishane was a dogmatic witness who did not concede even universal scientifically accepted dogma that spastic cerebral quadraplegia is associated with hypoxia which results in peri-natal asphyxia.

(91) What is revealing, Dr Marishane did not consult the plaintiff. He did not examine A. He did not engage Dr Heyns concerning his medico-legal-report. He did not peruse the patient neo-natal summary generated. He did not consult the

clinic and hospital staff who treated the plaintiff on 7 September 1996.

(92) In my view Dr Marishane's evidence raises significant problems regarding its impartiality and credibility. Consequently, his expertise cannot be relied upon because it is unashamedly without any cogent scientific basis biased in favour of the defendant's case.

IS THE CIRCUMSTANTIAL EVIDENCE CONCLUSIVE?

(93) I agree with the plaintiff's counsel Mr Grobler that the occurrence of A's cerebral palsy evidences circumstantial evidence which shows the existence of negligence on the defendant's employees' conduct justifying the court to draw an inference of negligence from the proven facts, if the inference of negligence is consistent with the proven facts and the proven facts exclude all other reasonable inferences that can be drawn.

(94) In ***Caswell & Powell Duffryn Associated Collieries [1940] AC 152 at 169-170*** Lord Wright remarked: "*Inference must be carefully distinguished from conjecture or speculation.*

There can be no inference unless there are objective facts from which to infer the other facts from which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

(95) Regarding the inference to be drawn it was held in ***AA Onderlinge Assosiasie Bpk v De Beer 1982 (2) 603 (A) at 614G***

"It is not necessary for a plaintiff invoking circumstantial evidence in a civil case to prove that the inference which he asks the Court to make is the only reasonable inference. He will discharge the onus which rests on him if he can convince the Court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible inferences."

(96) In ***Kruger v Coetzee 1966 (2) SA 428 (A) at 430E*** it was held:

"'For the purposes of liability culpa arises if –

(a) a diligens paterfamilias in the position of the defendant (or his employees) –

(i) would foresee the reasonable possibility of his (their) conduct injuring another in his person or property and causing him patrimonial loss; and

(ii) would take reasonable steps to guard against such occurrence; and

(b) the defendant(or his employees) failed to take such steps."

(97) Whether a *diligens pater-familias* in the position of the defendant or his employees would take any preventative measures at all and, if so, what steps would be reasonable, depends upon the particular circumstances of each case.

(98) In applying the ***Kruger v Coetzee supra*** test all the experts concur that the plaintiff was a high-risk patient because she was a first time pregnant patient, whose membranes were ruptured at about 5.30am at the clinic and was thereafter

transferred and arrived at the hospital at 8.00 hours as an emergency patient in need of prompt treatment.

(99) After the rupture of the plaintiffs membranes, the risk of the foetal A being afflicted by hypoxia was ever present and such risk was exacerbated by the unreasonable delay which occurred in not treating the plaintiff expeditiously and delivering A expeditiously by caesarean section. **Premier of KZN and Another v Sonny and Another 2011 (3) SA 424 (SCA)** ***page 1200, paragraph C-H.***

(100) If on arrival at the hospital the foetal heart rate beat was continuously monitored, the doctor and nursing staff would have established that the foetus was in distress due to hypoxia (the lack of oxygenated blood supply to its brain). This discovery would have enabled the doctor to realize that time was of the essence in relieving the foetals distress by delivering A in the quickest possible method by caesarean section to prevent the occurrence of hypoxia which eventually resulted in peri-natal asphyxia.

(101) No exculpatory evidence was led by the defendant to show that the vertex delivery of A was the most expeditiously indicated delivery under the circumstances, that same was carried out promptly and efficiently with the skill and diligence prevailing in the medical profession.

(102) In the absence of exculpatory rebuttal explanatory evidence, the inference is inescapable that despite the fact that there was an emergency, an inordinately long period time elapsed before the plaintiff was attended, consequently, there was a failure of provide skilled and diligent treatment during this critical period, because there was no doctor to treat the plaintiff, at this critical period, as a result, vital time to diagnose the onset of hypoxia was lost, so too was the onset of peri-natal asphyxia.

(103) The delay in delivering A expeditiously by caesarean section created a further risk of the existing foetal distress hypoxia exercebated by the 2 hours delay before the plaintiff was attended, coupled with the delayed and prolonged birth of A resulted in peri-natal asphyxia.

(104) In my view the circumstantial evidence regarding the nature of A's cerebral palsy justifies an inference on the probabilities that same occurred because of the defendant's employees negligence. In the absence of countervailing evidence to the contrary disproving the probability of negligence, the only logical and reasonable inference to be drawn from the defendant's employees failure to proffer an exculpatory explanation is, the defendant's employees were negligent in their failure to accord the plaintiff the treatment she was lawfully entitled to in conformity with the skill and diligence prevailing in the medical profession.

THE APPLICATION OF THE DOCTRINE OF *RES IPSA LOQUITUR*

(105) In the alternative, the circumstantial matrix encapsulates the occurrence of an eventuality which carries a high probability of negligence regarding the defendant's employees' conduct which justifies the invocation of the doctrine of res *ipsa loquitur*.

(106) Since the seminal case of ***Van Wyk v Lewis 1924 AD 438*** it has been generally assumed that the maxim *res ipsa loquitur*

is generally not applicable in medical negligence cases, because *"A doctor is not held negligent simply because something goes wrong. It is not right to invoke against him the maxim of res ipsa loquitur save in extreme cases."* (my emphasis) per Lord Denning in ***Huck v Cole 1993 4 MED LR 393.***

(107) However, a careful consideration of the *ratio* enunciated in the abovementioned judgment shows that the Appellate Division (as it then was) did not totally prohibit the application of the maxim in cases like the present where there are exceptional circumstances justifying such application.

(108) In ***Van Wyk v Lewis (supra) at p445*** Inne CJ held: *"No doubt it is sometimes said that in cases where the maxim applies the happening of the occurrence is in itself prima facie evidence of negligence…there has been no shifting of onus."*

(109) Kotze JA at *page 452* in a dissenting judgment also aligned himself with the same notion when he remarked: *"not infrequently a plaintiff may produce evidence of certain facts*

which, unless rebutted, reasonably if not necessarily indicate negligence, and in such cases the maxim res ipsa loquitur is often held to apply."

(110) Wessels JA at *page 464* echoed the same sentiment in when he remarked *"...it seems to me that the maxim res ipsa loquitur has no application in cases of this kind...The onus therefore of proving negligence in a case of this kind is on the plaintiff from the beginning of the trial to the very end.*"

(111) *"The doctrine must be invoked with caution and only where the defendant's employees were in absolute control over the patient, the treatment and all the instruments used, and where the injury results in a complete discord with the recognized therapeutic, objective treatment and technique involved, and suggests no other explanation possible… The doctrine, constitutes nothing more than a particular species of circumstantial evidence. What is sought to be proved is negligence and the evidence of the occurrence itself because it carries a high degree of probability of negligence, it provides its own circumstantial evidence as to the exigency of the negligence in question and the facts*

upon which the inference is to be drawn and derived from." See ***Res Ipsa Loquitur and Medical Negligence by P Van Den Heever and P Casters.***

(112) The application of the doctrine does not shift the plaintiff's a *prima facie* factual inference that does not shift the burden of disproving negligence, but may call for some degree of proof in rebuttal of that inference.

THE DEFENDANT'S REBUTTAL OBLIGATION

(113) There is an obligation on the defendant to explain how A's cerebral palsy occurred if the plaintiff and A were accorded the requisite treatment, because quite clearly the evidence raises a *prima facie* case of negligence against the defendant's employees. The defendant has not explained how the cerebral palsy attributable to peri-natal asphyxia could have occurred without his employees negligence.

(114) To paraphrase Lord Denning in ***Cassidy v Ministry of Health [1951] 2 KB 343 [1951] 1 ALL ER 574 CA***. *"The defendant has busiest himself that he and his employees were not* negligent. *But the defendant has called not a single*

person to say that the injuries (A's cerebral palsy) were (was) not consistent with due care on the part of all members of his staff and that there was no discomformity between what should have happened. They have not therefore displaced the prima facie against them and are liable in damages to the plaintiff."

(115) There is a legal duty on the nurses at the clinic, the doctor and nurses at the hospital to record the treatment accorded to the plaintiff and A. The defendant's employees were obliged to and must have made and kept punctilious clinic and hospital notes pertaining to the plaintiff's treatment.

(116) The clinic and hospital notes are missing from the plaintiff's and A's files. There is a duty on the clinic and hospital record custodian staff in terms of ***sections 13 and 17 of the National Health Act No. 61 of 2003*** to safeguard the plaintiff's and A's clinic and hospital records.

(117) The custodians of the clinic and hospital records were not called to explain the reason why these records are missing or lost. No explanation or reason was proffered regarding the

attempts made if any, of finding or recovering the missing or lost records.

(118)The defendant has not called the clinic nurses, the hospital doctor and nurses to explain the reason pertinently why the critical records of the 7 September 1996 are missing.

(119) No explanation was proffered for these flagrant omissions whatsoever to explain the reason why these vital witnesses who had a rebuttal obligation to show that they were not:

(a) negligent or incompetent;

(b) did not act improperly;

(c) did not lack reasonable skill diligence or foresight;

(d) took all reasonable measures to prevent A sustaining hypoxia and peri-natal asphyxia, were not called to testify.

(120) The defendant's failure to take the court into its confidence and explain the reason why the nurses and doctor were not called to give contemporaneous evidence regarding the treatment accorded to the plaintiff and A, on 7 September

1996 inescapably justifies an adverse inference of negligence to be made against the defendant.

(121) In any event, there are no clinic or hospital notes evidencing that recognized objective treatment and therapeutic techniques were accorded to the plaintiff and A on 7 September 1996. In the absence of such exculpatory evidence to circumstances justifiably call for the invocation of the maxim *res ipsa loquitur,* to have recourse to the evidential inference because the defendant's employees had within their grasp, the knowledge how the incidence occurred.

THE CONSTITUTIONAL IMPERATIVE

(122) The invocation of the constitutional imperative is underpinned by the plaintiff's right to the highest attainable standard of reproductive health foreshadowed in ***Section 27 of the Constitution.*** The plaintiff has a constitutional right to access adequate reproductive health care administered with the skill and diligence prevailing in the medical profession.

(123) The state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realization of each of these constitutional rights. In this sense the invocation of the *res ipsa loquitur* maxim is applicable where the plaintiff has established probable a *prima facie* case of negligence and the defendant has failed to proffer a reasonable exculpatory explanation in negation of the *prima facie* of the infringement of the plaintiff's ***Section 27***constitutional right to access adequate reproductive health care.

(124)Consequently, because the knowledge of the treatment accorded to the plaintiff on the 7 September 1996 is peculiarly within the knowledge of the defendant's employees, and the defendant has not adduced any direct cogent evidence to discharge the evidential rebuttal burden of probable negligence, the invocation of the maxim *res ipsa loquitur* in this kind of exceptional case given the critical missing clinic and hospital records pertaining to the plaintiff's treatment on 7 September 1996, is legally justifiable having regard to the ***Section 27 of the Constitutional.***

(125) In ***Naude NO v Transvaal Boot and Shoes (supra)*** in the head note it is stated: "*Whether a case is one to which the expression res ipsa loquitur applies or not the burden of proving negligence is on the plaintiff who alleges it; there is no burden of proof on the defendant to disprove negligence. Where, however, the case is one where the occurrence speaks for itself proof is required from the defendant to rebut the presumption arising from the fact that the occurrence speaks for itself: he must produce evidence sufficient to destroy the probability of negligence presumed to be present prior to the testimony adduced by him. If he does so, then on the conclusion of the case the inference of negligence cannot properly be drawn.*"

(126)Because the defendant has failed to discharge the evidential burden disproving a causal connection between the negligence of his employees and A's cerebral palsy, the summation that the eventuality speaks for itself is unanswered.

THE ORDER

(a) The defendant is liable to compensate 100% of the plaintiff's proven damages;

(b) the defendant is ordered to pay the plaintiff's costs together with the qualifying costs of Dr Heyns and Dr Lefakane.

Dated the 24 day of October 2012 at Johannesburg

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MOKGOATLHENG J

JUDGE OF THE SOUTH GAUTENG HIGH COURT

DATE OF HEARING:

DATE OF JUDGMENT: 24TH OCTOBER 2012

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