IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 57373/2017

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED

21 November 2022

Closing arguments heard on:

16 August 2022

Judgment delivered on:

21 November 2022

In the matter between:

R[....] P[....] **PLAINTIFF**

Assisted herein by his mother and natural

guardian Y[....] B[....]

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG **DEFENDANT**

JUDGMENT

VUMA AJ

BACKGROUND

[1]. On 8 and 10 August 2022 this special civil trial served before me. Evidence was led and on 16 August 2022 I heard closing arguments from both parties.

[2]. Having considered the evidence and the arguments placed before me on behalf of the parties, I reserved judgment but made following order (on 16 August 2022):

> *" **ORDER***
>
> *1. The issue of liability is separated from the issue of quantum, in terms of the provisions of Rule 33(4), and the issue of quantum is postponed sine die.*
>
> *2. The Defendant shall pay 100% (ONE HUNDRED PERCENT) of the Plaintiff's agreed or proven damages incurred as a result of the irreversible hypoxic brain damage suffered by the Plaintiff during birth, which resulted in dyskinetic spastic cerebral palsy and as a result of the Defendant's negligence.*
>
> *3. The Defendant shall pay the Plaintiffs' taxed or agreed costs of suit, to date, on the High Court scale, such cost to include (but not necessarily be limited to the following:*
>
> *3.1 The cost attended upon the obtaining of the medico-legal reports and/or addendum reports and/or joint minutes and/or addendum joint minutes, if any, as well as the qualifying, reservation and preparation*

fees, if any, of the following expert witnesses of whom notice have been given in terms of Rule 36(9)(a) &(b):

3.1.1 Prof V Davies;

3.1.2 Dr C Sevenster;

3.1.3 Dr A Keshave;

3.1.4 Dr J Reid;

3.1.5 Dr B Alheit;

3.1.6 The costs of any radiological or other special medical investigation used by any of the aforementioned experts, if applicable.

4. The cost attendant upon the appointment of senior counsel. "

INTRODUCTION

[3]. The plaintiff is R[....] P[....], (hereinafter "P[....]"), a minor male born in the defendant's hospital, the Chris Hani-Baragwanath Hospital, on 19 May 2013. P[....] is assisted herein by his mother and natural guardian Y[....] B[....] (hereinafter "B[....]").

[4]. P[....]'s claim is for damages caused due to the personal injuries he suffered during his birth which was attended to by the defendant's employees in the aforementioned hospital. (The trial would however, by agreement, proceed only on the question of liability, the parties having required the court to make an order in terms of Rule 33(4) to this effect).

[5]. P[....] suffers from dyskinetic spastic cerebral palsy and he will never be able to look after himself or experience the normal amenities of life due to his condition. His condition was caused as a result of a so-called Hypoxic Ischaemic Event, (hereinafter “HIE”). Simply put, he experienced oxygen starvation which resulted in the damage of his brain.

[6]. In P[....]’s particulars of claim 17 grounds of negligence on the part of the defendant are pleaded. In its plea the defendant denies each of these grounds of negligence.

[7]. The following are some of the alleged grounds of negligence by the defendant which resulted in P[....]’s insult and damages:

7.1. The defendant decided to induce B[....]’ labour by administering Misoprostol to B[....] every two hours. (It is common cause that Misoprostol accelerates the onset of contractions necessary to cause the birth process to progress to the birth of a baby).

7.2. Under these circumstances it is necessary to regularly monitor the foetal heart rate to detect possible signs of foetal distress. The defendant failed to regularly monitor the foetal heart rate.

7.3. When the foetal heart rate was monitored at approximately 15h33, deep decelerations in the foetal heart rate were detected and the necessity of an emergency caesarean section arose and a decision was made that such an emergency caesarean section should be undertaken.

7.4. Despite the severe foetal distress evinced by the deep decelerations in the foetal heart rate, the emergency caesarean section only commence approximately two hours later.

7.5. Furthermore, despite the severe foetal distress, only one of four possible

intrauterine measures that could be adopted to alleviate the foetal distress was adopted by the defendant.

7.6. All of the aforegoing conduct fell short of the universally accepted practices. The defendant's conduct was substandard and it is what caused P[....]'s condition, more particularly the following:

7.6.1. A failure to detect foetal distress at the earliest possible moment.

7.6.2. A failure to alleviate the foetal distress at the earliest possible moment.

7.6..3. A failure to conduct an emergency caesarean section within an hour after the necessity for same arose, which is the universally accepted practice.

COMMON CAUSE FACTS

[8]. The following are the common cause facts:

8.1 The names of the plaintiff and the fact that R[....] P[....] is assisted by Y[....] B[....].

8.2. The citation of the defendant as set out in paragraph 2 of the particulars of claim;

8.3. The fact that the mother of the minor attended the Lenasia South Clinic at regular intervals during her ante-natal period and that same was uneventful.

8.4. That the plaintiff attended the defendant's hospital during the morning of 18 May 2013 as instructed and did so without experiencing any labour pain at the time.

8.5. That at approximately 17h00 on 19 May 2013 there had been no progress with the Plaintiff's labour and a doctor employed by the defendant informed her that an emergency caesarean section had to be performed on her;

8.6. That a caesarean section was only performed on the plaintiff at approximately 19h00 on 19 May 2013;

8.7. That the minor was born at approximately 19h20 on 19 May 2013 with Apgar Scores of 3/10, 6/10 and 6/10;

8.8. That the minor was admitted to the Neonatal Intensive Care Unit of the Defendant's hospital for a period of approximately two weeks;

8.9. That during his admission to the Neonatal Intensive Care Unit the minor developed, *inter alia*, hypoglycaemia;

8.10. That there was a legal duty upon the defendant acting through its employees;

8.11. That at all relevant times the employees of the defendant were acting within the course of the defendant's business and within the course and scope of their employment as such; and

8.12. Facts recorded in the hospital records pertaining to the plaintiffs, correctly record what the authors of the recordals wanted to record contemporaneously and are accurate.

8.13. In its defence the defendant pleaded general denials without pleading any specific alternative cause of P[....]'s brain injury.

THE EVIDENCE

[9]. The evidence before court consisted of the following:

9.1 Factual evidence, which was provided mainly by Ms B[....] but which also consisted of the common cause hospital records of the defendant.

9.2 Expert evidence consisting of:

9.2.1. The plaintiff's gynaecologist/obstetrician, Dr Sevenster.

9.2.2. The plaintiff's paediatrician with sub-speciality neonatology, Prof Davies.

[10]. **Ms B[....]' evidence** can be summarized as follows:

10.1 She regularly visited the Lenasia South Clinic during her pregnancy and at all times everything was found to be normal with her pregnancy.

10.2 During her last visit to the said Clinic she was advised that if she had not given birth by 17 May 2013 she should attend the Chris Hani Baragwanath Hospital.

10.3 She had not given birth by 17 May 2013 and consequently, at approximately 06h30 on 18 May 2013 she presented at the Chris Hani-Baragwanath Hospital.

10.4 She waited at the reception area until eventually she was attended to and a file for her was opened by the defendant.

10.5 At approximately 16h00 she commenced using Misoprostol, consisting of a tablet dissolved in a bottle of water, which dilution she drank every two hours, as instructed, by using a measuring cup which had also been provided to her by the defendant to ensure that the correct measurements were consumed by her.

10.6 At approximately 17h00 she was moved to a labour ward but not accommodated in a bed.

10.7. There were approximately 10 other expectant women also waiting.

10.8. She was eventually provided with a bed.

10.9. At approximately 17h00 on 19 May 2013 a doctor advised her:

10.9.1. That her foetus was experiencing distress; and

10.9.2. That she would have to undergo an emergency caesarean section.

10.10. At the same time the doctor ruptured her membranes.

10.11. She signed two documents presented to her, the one consisting of an “informed consent” form and the other consisting of an explanation as to what was going to occur and why same would occur.

10.12. She was eventually taken to the operating theatre where she was given an epidural.

10.13. Eventually her child was born but did not cry.

10.14. The first time she saw her child was the following day at approximately 12h00 whilst the child was in the Neonatal Intensive Care Unit.

10.15. She perceived that her child had been packed with ice.

10.16. Upon enquiries from the nurses she was informed that her child was not normal and that they were conducting tests to ascertain what was wrong but she was never informed of the precise condition of her child until his discharge some weeks later. At that time she was informed that her child suffered from cerebral palsy.

10.17. She was never informed as to what had caused her child's condition.

10.18. Upon discharge she was informed to take her child for physiotherapy treatment and she did so and still continues to do so to this day.

[11]. **Dr Sevenster's evidence** can be summarized as follows:

11.1 He wrote two medico-legal reports but relies upon the addendum report he wrote after receipt of certain records received from the defendant.

11.2 He confirmed the correctness of the contents of his addendum report.

11.3 He studied all of the records provided by the defendant pertaining to the treatment of the plaintiff and P[....] and bases his opinion upon what is recorded in same.

11.4. In his expert opinion the condition of P[....] was due to sub-standard treatment of B[....] by the defendant's employees which, if such sub-standard treatment had not occurred, would probably have resulted in P[....] not suffering from his present condition. The substandard treatment consisted of the following:

11.4.1. A failure to regularly monitor the foetal heart rate, preferably by means of a CTG, which is something which is universally accepted as required, especially when labour is induced as was the case *in casu*. This failure, on the probabilities, resulted in a failure to detect foetal distress at an earlier time than 17h00, more particularly given that the amniotic fluid discharged by B[....] at 15h33 was clear and subsequently progressively became contaminated by foetal discharge, (i.e. meconium was present in the amniotic fluid).

11.4.2. When foetal distress is detected, intra-uterine steps must be taken to alleviate the foetal distress but only one of the steps was taken, *viz*, turning Ms B[....] onto her left side.

11.4.3. Once the necessity for an emergency caesarean section was ascertained (due to foetal distress), universally accepted guidelines require same to be performed within one hour after a decision is taken to conduct an emergency caesarean section. *In casu* it took almost two hours up to the commencement of the caesarean section.

11.4.4 The injurious event which caused P[....]'s condition occurs over a long period of time.

[12]. **The evidence of Prof Davies** can conveniently be summarized as follows:

12.1. He too, (just like Dr Sevenster), relies upon the records generated by the defendant pertaining to the treatment of B[....] and P[....].

12.2. He confirmed the correctness of the contents of his report.

12.3. He is *au fait* with the practices in Chris Hani-Baragwanath Hospital, having undergone training there and also having worked there extensively.

12.4. Despite the inexplicable lack of various records from the defendant pertaining to the treatment of B[....] and P[....], (which records the Chris Hani-Baragwanath Hospital should have and would normally have kept according to his experience), he was nevertheless able to make conclusions from the records provided, (especially the so-called "follow-up records" pertaining to the treatment of P[....] after his birth), and to opine on the various matters in respect of which he voiced opinions.

12.5. Given the absence of a so-called "sentinel event" having been recorded, (which is something which would have been recorded had it occurred), and bearing in mind international research which is universally accepted about the timing of and the causes of HIE, such as that experienced by P[....] *in casu*, P[....]'s condition was most probably due to hypoxic events which occurred over a prolonged period of time, (i.e. when contractions occurred), which was not detected by the defendant due to a lack of proper and regular monitoring of the foetal heart rate.

12.6. Had reasonable and proper intrapartum obstetric care been given and delivery expedited, the hypoxic ischaemic (asphyxial) injury visible on the MRI of P[....]'s brain, birth asphyxia, neonatal encephalopathy and subsequent brain injury would probably have been prevented.

[13]. In addition to the aforegoing there are various joint minutes where agreements between experts in the same fields were achieved and recorded. The defendant mounted no challenge to the joint minutes when the plaintiff's counsel requested the defendant's counsel, before the close of the plaintiff's case, to indicate what the defendant's stance to the joint minutes was. As a matter of fact the defendant's counsel agreed that the agreements between experts were binding upon the parties.

[14]. The joint minutes between experts in other fields can best be summarized as follows:

14.1. The radiologists agree that:

14.1.1. The MRI is diagnostic of a peripartum hypoxic ischaemic injury of the brain of P[....].

14.1.2. The findings of the MRI suggest that other genetic disorders as a cause of P[....]'s brain damage are unlikely.

14.1.3. The MRI sequences reveal no evidence of current or previous infective or inflammatory disease and same are unlikely as a cause of P[....]'s brain damage.

14.1.4. A review of the clinical and obstetrical records by appropriate specialists in the field of neonatology and obstetrics is essential in determining the cause and probable timing of this hypoxic ischaemic injury.

14.2. The gynaecologists/obstetricians agree that:

14.2.1. There is no antenatal factor that could be reviewed as a factor for causation of the cerebral palsy of P[....].

14.2.2. Upon admission to Chris Hani-Baragwanath Hospital B[....] and P[....] were found to be in a reassuring condition.

14.2.3. Upon his birth P[....] did not cry, was very floppy, had the Apgar scores as recorded in the records and had to be bagged and transferred to the nursery for respiratory stress.

14.3. The paediatric neurologists agree that:

14.3.1. The type of cerebral palsy which P[....] suffers from is one of the two forms of cerebral palsy that is associated with intrapartum birth asphyxia.

14.3.2. The most probable timing of P[....]'s injury resulting in his current physical disabilities of cerebral palsy is the perinatal period.

14.3.3. The MRI features indicate features that are compatible with acute profound hypoxic ischaemic injury in a term infant. This further highlights the fact that the injury most likely occurred as a result of birth asphyxia.

14.3.4. Further indications that P[....]'s insult is most probably due to perinatal birth asphyxia consist of:

14.3.4.1. Low Apgar scores.

14.3.4.2. The diagnosis of hypoxic ischaemic encephalopathy, grade 2, as the admitting diagnosis.

14.3.4.3. The need for therapeutic hypothermia, for which the only indication for use is in the setting of perinatal birth asphyxia.

14.3.4.4. The presence of meconium at the time of birth, which is a marker for foetal distress.

14.3.4.5. Blood gas results in keeping with ACOG criteria for birth asphyxia.

LEGAL PRINCIPLES

[15]. In ***HAL obo MML v MEC for Health, Free State 2022 (3) SA 571 (SCA) p.644 par 231*** it was stated that:

> *"My final point is that the joint minute does not render the whole of the expert's report admissible in evidence. Unless the expert gives evidence, or it is agreed that the report will be admissible, it remains inadmissible."*

SUBMISSIONS BY THE PLAINTIFF

[16]. In regard to the defendant's experts reports and relying on ***HAL obo MML v MEC for Health, Free State 2022 (3) SA 571 (SCA) par 231***, the plaintiff submits that given that the defendant filed various medico-legal reports by experts yet failed to call a single one to testify it is, it is therefore necessary to emphasize that such reports are inadmissible if the authors thereof are not called to testify and there is no agreement that such reports will be admissible. The plaintiff thus argues that the contents of the defendant's expert medico-legal reports, (i.e. the Rule 36(9)(b) notices), are inadmissible as there is no agreement that same will be admissible.

[17]. The plaintiff submits that all of the its evidence is uncontested because the defendant adduced no evidence whatsoever. In addition no attempt was made during cross-examination of the two witnesses who were cross-examined *viz* the Plaintiff and

Prof Davies, to gainsay their evidence. Dr Sevenster was not even cross-examined. Neither were statements made implying that anything to which they testified was incorrect or could not be relied upon.

[18]. The plaintiff submits that in light of the uncontested evidence of the plaintiff, the court should find that the plaintiff f has succeeded in proving the liability of the defendant on a balance of probabilities and that an order be made that the defendant is liable to pay the plaintiff's proven or agreed damages and costs.

[19]. As far as costs are concerned the plaintiff submits that this case justifies the employment of senior counsel given that both parties saw fit to employ senior counsel and consequently there can hardly be a plausible debate about same, contrary to defendant's counsel's submissions. The plaintiff further submits that the nature of the disputes and the importance of the case for the plaintiff justify the employment of senior counsel.

SUBMISSIONS BY THE DEFENDANT

[20]. The defendant's submissions rest on two pillars; namely:

20.1. Ms B[....] being a single witness; and

20.2. The issue of costs.

[21]. In regard to Ms B[....] the defendant argues that the court needs to factor in the fact that she is a single witness. Pertaining to the issue of costs, the defendant argues that there is no justification as to why the plaintiff appointed senior counsel in this matter and that the court's costs order counsel's fees-wise should not be consequent upon the employment of a senior counsel.

ANALYSIS

[22]. It is common cause that what the plaintiff is required to be prove is not the causal link with certainty but only that wrongful conduct of a defendant was the probable cause of the plaintiff's loss. It is further common cause that no challenge whatsoever was mounted against the evidence adduced by the plaintiff. Neither did the defendant make any statement that anything testified to by any of the plaintiff's witnesses would be contested.

[23]. Whilst it is trite that the fact that evidence which is uncontradicted and unchallenged does not result in such evidence automatically being accepted by a court, it is also trite that evidence of a single witness, where there is nothing that discredits it, cannot be disregarded by a court. *In casu* there is nothing discrediting the plaintiff's evidence. Further to that, the defendant's own clinical/medical records agree with the plaintiff's evidence and further support the conclusions and opinions of the plaintiff's experts.

[24]. Taking into account the conspectus of the facts before me, I find that the plaintiff has, on a balance of probabilities, succeeded in proving the liability of the defendant. In the premises I am satisfied that an order which is appropriate be that the defendant is liable to pay the plaintiff's proven or agreed damages, including costs consequent upon the appointment of senior counsel.

COSTS

[25]. It is trite that costs should follow the result and there is nothing that served before me that would justify otherwise. It is further considered view that the complex issues arising in this matter justify the appointment of senior counsel.

[26]. In the premises I make the following order.

ORDER

1. The issue of liability is separated from the issue of quantum, in terms of the provisions of Rule 33(4), and the issue of quantum is postponed *sine die.*

2. The Defendant shall pay 100% (ONE HUNDRED PERCENT) of the Plaintiff's agreed or proven damages incurred as a result of the irreversible hypoxic brain damage suffered by the Plaintiff during birth, which resulted in dyskinetic spastic cerebral palsy and as a result of the Defendant's negligence.

3. The Defendant shall pay the Plaintiffs' taxed or agreed costs of suit, to date, on the High Court scale, such cost to include (but not necessarily be limited to the following:

3.1. The cost attended upon the obtaining of the medico-legal reports and/or addendum reports and/or joint minutes and/or addendum joint minutes, if any, as well as the qualifying, reservation and preparation fees, if any, of the following expert witnesses of whom notice have been given in terms of Rule 36(9)(a) &(b):

3.1.1 Prof V Davies;

3.1.2 Dr C Sevenster;

3.1.3 Dr A Keshave;

3.1.4 Dr J Reid;

3.1.5 Dr B Alheit;

3.1.6 The costs of any radiological or other special medical investigation used by any of the aforementioned experts, if applicable.

4. The cost attendant upon the appointment of senior counsel.

Livhuwani Vuma
Acting Judge
Gauteng Division, Pretoria

Heard on:	8; 10 & 16 August 2022
Judgment delivered on:	21 November 2022

Appearances:

For Plaintiff:	Adv. TALL Potgieter SC
Instructed by:	Vorster & Brandt Inc.
For Defendant:	Adv. MS Mangolele SC
Instructed by:	State Attorney