IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 4872/2013

In the matter between:

C[…] J[…] H[…] **Plaintiff**
(Respondent)

And

The Kingsbury Foetal Assessment Centre (Pty) Ltd **Defendant**
(Excipient)

JUDGMENT DELIVERED ON 24 APRIL 2014

BAARTMAN, J

[1] On 4 […], M[…] P[…] H[…] (M[…]) was born with Down's syndrome. This is an exception taken to M[…]'s claim for damages resulting from medical negligence, a failure to have assessed the high risk of abnormality in the foetus and to have informed his pregnant mother, C[…] J[…] H[…] **(H[…]),** of the risks associated with her pregnancy, which caused him to be born rather than aborted.

[2] The purpose of an exception is to dispose of the case or a portion thereof in an expeditious manner, or "to *protect oneself against an embarrassment which is so serious as to merit the costs even of an exception."* (See **Lobo Properties (Pty) Ltd v Express Lift Co. (SA) (Pty) Ltd** 1961(1) SA 704 [CPD] at 711 G) In the notice of exception, the excipient must state in "*clear and concise*" terms the particulars on which the exception is based and is bound by them. The clear particulars on which this exception is based are set out below.

BACKGROUND

[3] H[…] issued summons in *"her representative capacity as the mother and natural guardian*"...of M[…] and alleged that:

(a) on 8 October 2007, H[…], at the time pregnant with M[…], attended the Kingsbury Foetal Assessment Centre (Pty) Ltd (the excipient) to have a foetal assessment done;

(b) the excipient's staff, acting in the course and scope of their employment, carried out an NT scan on H[…];

(c) the video of the NT scan clearly showed, "a *very large abnormal nuchal translucency present in that although the Defendant measured the nuchal translucency at 1.9mm, it actually measured between 4mm - 5.3mm, such a measurement indicating a very high risk of DS in the foetus."*

(d) the excipient's employees failed to correctly interpret the NT scan and, as a consequence, did not warn H[…] of "a *very high risk of foetal abnormality, particularly chromosomal and cardiac defects."*

(e) properly informed of the risk, H[…] would immediately have aborted the foetus;

(f) The *sequelae of the defendant's breach of its duty of care, and therefore negligence ...are:*

(i) M[…] was *bom with severe DS;*

(ii) M[…] has serious and permanent cardiac defects;

(iii) M[…] has IGA deficiency...

(iv) At the time of the assessment it was reasonably foreseeable that should DS present in the foetus at the time of the assessment not be detected, as it should have been, M[…] would probably be born with DS and that the Plaintiff (H[…]) would consequently suffer damages and incur additional expenses in caring for and providing for care for M[…] for the rest of his natural life "

[4] The excipient took exception to the particulars of claim in the following terms:

"8. Accordingly, the particulars are expiable in one or more or all of the following respects –

8.1 The present action (and the claim so instituted on behalf of M[…]) is bad in law; and/or

8.2 The present action (and the claim so instituted on behalf of M[…]) is contra bonos mores and/or contrary to the public policy; and/or

8.3 Actions and /or a claim such as the present one of M[…] are not recognised or permissible in terms of South African law; and /or

8.4 Based, as the action is, on the alleged breach of a legal duty (duty of care), particulars contain no allegation to the effect that defendant assumed, undertook or, indeed, had, any legal duty towards M[…] whilst still a foetus in utero and, more in particular, on 8 October 2007; and/or

8.5 Defendant could not, in law, have undertaken or assumed a legal duty towards M[…] (whilst a foetus in utero and/or prior to his birth and/or on 8 October 2007) that would have obliged it to take such action as might be required or necessary to cause M[…]'s life (as a foetus in utero) to be terminated; and/or

8.6 Defendant did not owe M[…] a legal duty (a duty of care) that could lead to the termination of his existence in the circumstances pleaded in the particulars; and/or

8.7 M[…] does not have a delictual claim against defendant for "allowing" him to be born with Down Syndrome and the related pathology instead of giving plaintiff such advice as would have caused her to terminate her pregnancy,

thereby causing M[…] never to have existed in the legal sense; and/or

8.8 Defendant could not have, and did not, act unlawfully towards M[…]; and, further, it is not alleged in the particulars that he did so act; and /or

8.9 Defendant could not have, and did not, act unlawfully towards M[…]; and further, it is not alleged in the particulars that he did so act; and/or

8.10 No legal viable cause or right of action exists in South African law for the damages that plaintiff purports to claim on behalf of M[…]; and/or

8.11 The legal effect and implications of the relief claimed by plaintiff in casu on behalf of M[…] is that of requiring the above Honourable Court to have hold and/or to make a finding to the effect that it would be better for M[…] not to have the 'unquantifiable blessing of life' rather than to have such life, albeit in a marred way; and it would be contrary to public policy for the above Honourable Court to do so; and/or

8.12 Regard being had to the contents of the particulars and the true nature of the claim presently instituted on behalf of M[…], it is not possible or competent for the above Honourable Court to determine and/or award damages by means of a process of comparing, on the one hand, the value of non-existence (in the event of a termination of the relevant pregnancy) with, on the other hand, the value of existence (albeit in an abnormal, disabled or malformed state); and/or

8.13 In so far as the contents of paragraph 13.2 and 13.3 of the particulars are concerned, the claims contained therein -

8.13.1 would (ordinarily) properly and appropriately be designated as those of one or other or both of M[…]'s parents and natural guardians, in his/her/their personal capacities (as the case may be) or losses and/or expenditure that has/have been, or will in the future be, incurred in respect of M[…]; and/or

8.13.2 would (ordinarily) properly and appropriately be designated as those of such person or persons, in his/her/their capacities (as the case may be) as might

legally be responsible for losses and/ or expenditure that have been, or will in the future be, incurred in respect of M[…]; and/or

8.13.3 do not properly constitute claims for those losses suffered, or to be suffered in the future of M[…].”

[5] Mr Van der Spuy, who appeared for the excipient, submitted that the decisions in **Friedman v Glicksman** 1996 (1) SA 1134 (WLD), **Stewart and Another v Botha and Another** 2007 (6) 247 (C) and the Supreme Court of Appeal (SCA) decision at 2008(6) SA 310 (SCA) in the Stewart matter, were authority for the proposition that South African Law does not recognise or permit “wrongful life actions”. It is necessary to deal with these decisions in some detail.

The Friedman matter

[6] Succinctly, the facts of the Friedman matter in the exception were:

(a) The plaintiff (respondent), who was pregnant at the time, consulted the defendant (excipient) - a specialist gynaecologist - who advised her that there was no greater risk than normal of her unborn child being born with abnormalities or in a disabled condition.

(b) Acting on the advice, the plaintiff carried to term and on 5 March 1991 gave birth to Alexandra (Alexandra). However, Alexandra suffered the very abnormalities the excipient had a duty to warn about and had been contracted to warn about.

(c) The excipient was negligent in not alerting the plaintiff of the higher than normal risk of abnormalities in the foetus. At the time of consulting, it was understood that the plaintiff would have aborted the foetus if there had

been a higher than normal risk of the unborn child being born with abnormalities.

(d) Therefore, the plaintiff sued in her personal capacity for the expenses of maintaining and rearing Alexandra as well for future medical and other special expenses.

(e) In her representative capacity on behalf of Alexandra, the plaintiff sued for general damages as well as a claim for future loss of earnings.

[7] In the Friedman matter, Goldblatt J, remarked that counsel had with "considerable diligence" made available to him many of the judgments and articles written on the issue in both foreign and local jurisdictions. In this matter, counsel displayed the same diligence. Goldblatt J said the following about the common terminology at page 1138:

> "... *'Wrongful pregnancy' refers to those cases where the parents of a healthy child bring a claim on their own behalf for damages they themselves have suffered as a result of giving birth to an unwanted child.*
>
> *'Wrongful birth' are those claims brought by parents who claim they would have avoided conception or terminated the pregnancy had they been properly advised of the risk of birth defects to the potential child.*
>
> *'Wrongful life' actions are those brought by the child on the basis that the doctor's negligence - his failure to adequately inform the parents of the risk - has caused the birth of the disabled child. The child argues that, but for the inadequate advice, it would not have been bom to experience the pain and suffering attributable to the*

*disability."(*my underlining)

[8] In respect of the contract between the plaintiff and the excipient, Goldblatt J said:

> *"In my view the contract entered into between the plaintiff and the defendant* was *sensible, moral and in accordance with modem medical practice. The plaintiff was seeking to enforce a right, which she had, to terminate her pregnancy if there* was *a serious risk that her child might be seriously disabled.*
> *...a 'wrongful birth' claim is not contra bonos mores.* "

[9] In upholding the exception in respect of Alexandra's claim, the court said at 1142-1143:

> *"In my view, it would be contrary to public policy for Courts to have to hold that it would be better for a party not to have the unquantified blessing of life rather than to have such life albeit in a marred way.*
>
> *...The defendant was in no way responsible for the child's disabilities and yet he is being asked to compensate the child for such disabilities. This proposition is, in my view, illogical and contrary to our legal system. The only measure of damages can be the difference in value between non-existence and existence in a disabled state. No criteria, in law, can exist in establishing such difference or even in establishing whether any damage has been sustained*

[10] That finding accorded with English and other foreign decisions at the time.

The Stewart matter in the High Court

[11] Brian Stewart (Brian) was born with severe disability after the defendants (excipients), a general medical practitioner and a gynaecologist, failed to detect deformities and

abnormalities in the foetus during pregnancy.

[12] In their particulars of claim, the first plaintiff, Brian's mother, claimed that the excipients had breached a contractual alternatively a legal duty owed to her. In her personal capacity she claimed for past and future medical expenses occasioned by Brian's special schooling and maintenance for the rest of his life.

[13] Brian's father, the second plaintiff, sued in his representative capacity as Brian's father and natural guardian for future medical treatment necessitated by his disability, the costs of his special schooling and his maintenance.

[14] It was common cause that Brian's abnormalities were "congenital in nature."

[15] No exception was taken to the "Wrongful birth" claim. Therefore, Louw J dealt only with an exception in respect of the "Wrongful Life" claim. At the time, the Friedman judgment was the only decided South African case.

[16] Louw J found that the Friedman matter was distinguishable from the Stewart matter. Friedman's claim was for general damages for pain and suffering, loss of amenities of life and cost of special schooling and maintenance; whereas, Brian's claim was for medical expenses, cost of special schooling and for maintenance. Nevertheless, Louw J held that the same principles applied.

[17] After a critical analysis of the Friedman matter and considering a number of foreign judgments, Louw J concluded:

> *"[18] The sanctity of life argument has been eroded in South Africa in a number of respects. First there is the Choice of Termination Act 92 of 1996...*
>
> *[23] The second ground on which the claim for wrongful*

life was *disallowed in Friedman is that it would open the door for disabled children to sue their parents because they may, for a variety of reasons, have allowed the child to be born knowing of the risks inherent in such a decision. In my view this does not follow. ...The couple who decides, with knowledge of the risks involved, to conceive, and the expecting mother, who decides not to procure an abortion in the face of the known or foreseeable risks, act in the exercise of their constitutional right to make decisions concerning reproduction.... Whether or not it should be held to be unlawful vis-á-vis the child for the parents to conceive...will depend on the circumstances and the views of the community incorporating the constitutional values and norms set out in the Constitution. ...*

[30] The answer to B's (Brian's) claim is therefore that, in view of the current state of medical science, the only life ever possible to him was a life in the handicapped state to which he was born...The negligent conduct of the defendants is therefore legally irrelevant to the state in which B (Brian) was born.

[31] it follows that the second plaintiff's claim as formulated in the particulars of claim does not disclose a cause of action in our law."

The Stewart matter in the SCA

[18] In dismissing the appeal against Louw J's upholding of the exception, Snyders AJA said:

"[5] ...As there has been a *considerable amount of recent debate*[1] *on the subject and to provide focus in the current enquiry, it is necessary to revert back to the starting point in our law of delict when wrongfulness is to be decided. In Telematrix (Pty) Ltd v Advertising Standards Authority* S/\ *2006 (1) SA 461 (SCA) at 468 the following is stated:*

'[12] The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author *Asser* points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law tort of negligence into our law, thereby distorting it.

[1] Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ* 90; J Neethling The conflation of wrongfulness and negligence; Is it always such a bad thing for the law of delict?' (2006) 123 *SALJ* 204; R W Nugent 'Yes, it is always a bad thing for the law. A reply to Professor Neethling' (2006) 123 *SALJ* 557.

[13] When dealing with the negligent causation of pure economic loss it is well to remember that the act or omission is not *prima facie* wrongful ("unlawful" is the synonym and is less of a euphemism) and that more is needed. Policy considerations must dictate that the plaintiff should be entitled to be recompensed by the defendant for the loss suffered (and not the converse as Goldstone J once implied unless it is a case of *prima facie* wrongfulness, such as where the loss was due to damage caused to the person or property of the plaintiff.) In other words, conduct is wrongful if public policy considerations demand that in the circumstances the plaintiff has to be compensated for the loss caused by the negligent act or omission of the defendant.'

[6] The enquiry as to negligence and wrongfulness is separate and distinct and should not be confused as to terminology or substance.[2]"

[19] Snyders AJA considered the trend in other jurisdictions and found the majority worldwide disallowed "Wrongful Life" claims, eg England, Canada, Australia, and France - where the courts initially found liability in "Wrongful life" claims. However, on 4 March 2002, legislation was enacted after pressure from groups representing disabled people and those representing gynaecologists, obstetricians and ultra-sonographers. The court further considered contrary trends in Holland, the US where *"the Appellate Division of the New York Supreme Court in* ***Park v*** *Chessin 400 NYS 2d 110 (1977) allowed a claim of this nature for special damages while at the same time refusing a claim for general damages. Thereafter the supreme court of California, Washington and New Jersey followed suit."*

[20] The court found that it was impossible to assess the harm caused "...not merely difficult, because it is essential to such a decision that the court finds that non-existence is preferable to life." After considering the debate as it has for some time been raging in

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[2] *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Ply) Ltd* 2006 (3) SA 138 *(SCA) at 144 para 11;* Telematrix *at 469B-E; R W Nugent at 558.*

publications and judgments, the Constitution and the need to develop the common law, the court concluded:

> *"[28] The essential question that is asked when enquiring into wrongfulness for purposes of delictual liability is whether the law should recognise an action for damages* caused *by negligent conduct*[3] *and that is the question that falls to be answered in this case. I have pointed out that from whatever perspective one views the matter the essential question that a court will be called upon to answer if it is called upon to adjudicate a claim of this kind is whether the particular child should have been born at all. That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law. For that reason in my view this court should not recognise an action of this kind."*

[21] Against the above background, M[…]'s case is brought as a test case. Mr Hoffman SC, who appeared for the plaintiff, submitted that Friedman and Stewart were decided *"in a previous legal order and the courts seized with the matters were not able to examine the parameters of the duty of care owed to children within the context of their rights afforded to them in the Bill of Rights."*

[22] The Stewart judgments were delivered on 7 April 2007 by Louw J and 3 June 2008 by Snyders AJA. The Constitution came into operation in 1996. As indicated above, the SCA rejected the invitation to develop the common law after a consideration of the relevant Constitutional provisions. In 2008, Snyders AJA said *"...The debate illustrates that for every argument there has been a counterargument and vice versa and there are hardly novel contentions being raised*." That was also the position in this matter.

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[3] *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12 E-F.

[23] However, on 20 March 2014, in the matter of Loureiro and Others v iMvula Quality Protection (Pty) Ltd [2014] ZACC 4, the Constitutional Court imposed liability on a private security company in the following circumstances:

The Loureiro facts

[24] In November 2008, the Loureiro family moved into a new house in Melrose, Johannesburg. Since the family had been robbed at gun point in their previous home, Mr Loureiro implemented extensive security measures at their new home - electrified fencing, perimeter beams, multiple alarm systems and a guard house as well an intercom system with closed-circuit television.

[25] An oral agreement between Mr Loureiro and iMvula security provided for 24-hour armed guard services at the house and further:

> *"6.5.1 [iMvula] would take all reasonable steps to prevent persons gaining unauthorised access and/or entry to the premises;*
>
> *6.5.2 [iMvula] would take all reasonable steps to protect the persons and property of [the Loureiro family];*
>
> *6.5.2 [iMvula] would take all reasonable steps to ensure that no persons gained unlawful access to the premises."*

[26] A few days after the guard services commenced, Mr Loureiro's brother was allowed onto the premises without the guard first obtaining Mr Loureiro's permission. In December 2008, Mr Loureiro, concerned about guards granting access to the premises without first obtaining permission, caused to have the intercom partially disabled so that the guards would be unable to open and close the main driveway gate, without contacting the main house.

[27] That arrangement affected the ability of the guards to change shift, so Mr Loureiro provided a key to the pedestrian gate but expressly prohibited the use of the key for any other purpose.

[28] On 22 January 2009, the guard used the key to let robbers posing as police officers onto

the premises. Van der Westhuizen J who wrote for a unanimous court found iMvuia liable as follows:

> *"[56] There are ample public-policy reasons in favour of imposing liability. The constitutional rights to personal safety and protection from theft of or damage to one's property are compelling normative considerations. There is a great public interest in making sure that private security companies and their guards, in assuming the role of crime prevention for remuneration, succeed in thwarting avoidable harm. If they are too easily insulated from claims for these harms because of mistakes on their side, they would have little incentive to conduct themselves in a way that avoids causing harm. And policy objectives (such as the deterrent effect of liability) underpin one of the purposes of imposing delictual liability. The convictions of the community as to policy and law clearly motivate for liability to be imposed. "*

[29] I am not persuaded that there has been a change in "the convictions of the community" since the SCA judgment in the Stewart matter. On the contrary, public opinion continues to be influenced by the remarkable resilience in overcoming enormous odds displayed by many disabled persons in all walks of life, refuting those who "treat their lives as inferior to non-existence." (see para 13 of the SCA Stewart judgment)

CONCLUSION

[30] I, for the reasons stated above, make the following order.

(a) The excipient's exception to the plaintiffs claim in her representative capacity on behalf of her minor son M[…] is upheld.

(b) The plaintiffs claim is dismissed with costs.

Baartman J