REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION. PRETORIA

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

CASE NO: 2014/69026

In the matter between:

M[….]: T[….] V[….]	**Plaintiff**
and	
THE; MEC FOR HEALTH: GAUTENG PROVINCE	**1st Defendant**
THE HEAD OF DEPARTMENT: KALAFONG HOSPITAL	**2nd Defendant**
DR ASSAN	**3rd Defendant**
DR D A SIHLABELA	**4th Defendant**

JUDGMENT

MOKOSE J

Introduction

[1] The plaintiff instituted a claim against the first to fourth defendants for negligence in respect of her management during her stay at the Kalafong Hospital when she was admitted.

[2] It is common cause that the plaintiff was admitted to Kalafong Hospital on 19 October 2013 being 38 weeks pregnant, with abdominal pains. Following a period of

natural labour, the plaintiff gave birth to a daughter by emergency caesarean section. The plaintiff was discharged from hospital on 24 October 2013 and readmitted on 27 October 2013.

[3] Early on 28 October 2013 the plaintiff underwent an evacuation which was converted to a full laparotomy and hysterectomy, during which her uterus and one of her ovaries was removed. The results showed that the plaintiff had suffered from severe sepsis which necessitated the performance of the hysterectomy, which it is accepted, was necessary in order to save her life.

[4] At the commencement of the matter the plaintiff applied for a separation in terms of the provisions of Rule 33(4) of the Uniform Rules of Court. The defendant specifically indicated that the harm, as alleged in the particulais of claim as amended, should form part of the determination in respect of the quantum. The separation was duly granted and the issue of quantum was postponed *sine di9.*

Factual context

[5] It is common cause that the plaintiff was admitted at Kalafong Hospital on 19 October 2013 at 17H20 complaining of pain on the left side of her abdomen. The plaintiff was immediately seen by a doctor who found that she was in active labour whose cervix was 4cm dilated and began plotting her progress on the patogram. In the early hours of the next morning, a senior doctor reviewed her progress and found that the plaintiff was in fact at a latent phase of labour and was only 2cm dilated. She was removed from the labour ward for this reason.

[6] At 8H45 the plaintiff was noted as being stable with a dilated cervix of 4cm. It is also noted that the membranes were ruptured. When the plaintiff was again reviewed at 10H20 it was found that she had dilated to 4cm which was noted on the patogram. The plaintiff progressed until 15H10 when it was ascertained that she had dilated to 9cm and that molding and caput were diagnosed. The doctor then decided to perform a caesarean birth.

[7] The plaintiff alleges in the particulars of claim that she was operated on due to the negligence of the second and third defendants who were negligent in one or more of the following:

(i) that they failed to check the plaintiff for type 2 diabetes mellitus or proper

screenings as per the national guidelines;

(ii) they failed to also monitor the plaintiff s labour progress, and that rendering her to undergo a caesarean section 21 hours later, when they could have detected that she had a 'big baby;'

(iii) they did not pay attention to the plaintiff's complaints;

(iv) they did not pay attention to the tachycardia and high CRP on the first day post- caesarean section (both indicators of infection);

(v) they failed to pay attention to the more than expected drop of haemaglobin levels from 14 pre-operatively to 9.7 post-operatively (indicating possible internal bleeding); and

(vi) they failed to not immediately get a more specialized opinion on day 4 post-caesarean section when congenital infection, diabetes and low haemaglobin levels were found and documented in a patient complaining of feeling very unwell.

[8] The defendants deny having acted in breach of the duty of care they owed to the deceased.

Issue

[9] The plaintiff indicated that the negligence relied upon is the failure to timeously identify and diagnose the infection and/or sepsis and the failure to not treat it timeously.

Legal Principles

[10] It is trite that the conduct of the defendant must have caused the loss suffered by the plaintiff and the resulting harm must not be too remote.[1] The approach to causation was outlined by the Constitutional Court in the matter of **Lee v Minister of Correctional Services**[2] where the following was stated:

"The point of departure is to *have clarity on whet causation is. This element of liability gives rise to two distinction enquiries.* The *first is a factual enquiry into whether the*

[1] Coertze v RAF 2016 ZAGPPHC 558 at para [37]

negligent act or omission cause the harm giving rise *to the claim. If ff did not, then that* is *the end of the matter. If ff did, the second enquiry, a Juridical problem* arises. *The question is then whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue* or *whether the harm is* too *remote. This is termed legal causation."*

[11] If a reasonable person would have foreseen the harm and would have taken reasonable steps to prevent it, and the person in question did not do so. negligence is established.[3]

[12] The party who bears the onus of proof can only discharge it if he has adduced enough credible evidence to support the case of the party on whom the onus rests. In the matter of **National Employer's General Insurance v Jagers**[4] the court considered the matter and said-

"In deciding whether the evidence is true or not the court will weigh up and test the plaintiffs allegations against the general probabilities. The estimate of the credibility of a *witness will therefore be inextricably bound up with* a *consideration of the probabilities of the* case *and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true.'*

[13] The test to be applied in order to weigh the defendant's conduct is enunciated in the matter of **Kruger *v* Coetzee**[5] in which the Supreme court of Appeal articulated the proper approach for establishing the existence of negligence as follows:

"For the purposes of liability culpa arises if-

(a) A diligens paterfamilias in the position of the defendant-

(i) Would foresee the reasonable possibility of his 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*

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[2] 2013 (2) SA 144 (CC) at para 38
[3] Kruger v Coetzee 1966 (2) SA 428 (A) at 430E·H
[4] 1984 (4) SA 437 (E) at 440 D - G
[5] 996 (2) SA 428 (A) at 430 E - G

(b) The defendant failed to take such steps."

[14] It is trite that an expert witness Is employed to assist the court in deciding issues in which the court does not have the ordinary and requisite expertise. Furthermore, the . opinion of an expert witness must be well grounded and reasoned. The determination of the probable value and weight of an expert witness's evidence is not always about credibility; and that judicial officers should be careful not to allow the opinion of an expert witness to take the place of their own finding of fact.

[15] In the matter of **Lord Arblnger v Ashton (1873) LR Eq 358** at 374, the court held as follows:

"Undoubtedly there ls a *natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural and ff is effectual that we constantly see persons, instead of considering themselves witness***,** *rather consider themselves as the paid agents* of *the person who employ them."*

[16] Davis J in the matter of **Schneider NO and Others v AA and Another**[6] said:

"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 an opinion, based on *his* or *her expertise, as possible. 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 an advocate, nor gives evidence which* goes *beyond the logic which is dictated by the scientific knowledge which that expert claims to possess."*

[17] I will not delve into all the evidence presented by the parties but will highlight the common cause facts, corroborated evidence and discrepancies.

[18] The plaintiff's first witness, Dr Burchell, an expert gynaecologist and obstetrician gave evidence that he uses a book named 'Clinical Obstetrics - A South African Perspective' as a guideline. He testified that the plaintiff had endured a prolonged labour as was seen from the content of the clinical records which indicated

that the plaintiff's dilation on the afternoon of 19 October 2013 was 4cm. He further testified that the ··, prolonged labour creates an increased risk of infection. He brought it to the court's attention that the plaintiff had endured six vaginal examinations In the period after the membranes had ruptured until the performance of the caesarean section. He was of the view that this was excessive and unnecessary. Accordingly, the examinations heightened the risk of infection.

[19] Dr Burchell also testified about the haemaglobin count of 14 on admission to the hospital and that of 9.7 after the performance of the caesarean section. He acknowledged that this test was not a routine one after a caesarean birth in South Africa but held the view that the drop in the haemaglobin level was a 'red flag' and as such, should have been investigated.

[20] Dr Burchell also referred to the plaintiff's C-reactive protein level count of 227mg/l which was recorded on 21 October 2013. The normal level is between 0 - 4.9mg/l. He testified that he uses the Ampath Laboratory Guidelines for the interpretation of blood results which indicated that an upper limit of 75mg/l would be acceptable as anything over that level would indicate a bacterial infection.

[21] Dr Burchell further confirmed the presence of tachycardia, dizziness and constant pain notwithstanding pain medication having been administered as well as nausea which should have been a cause for concern. The clinical records apart from the laboratory tests which were requested on 21 October 2013 did not indicate any further investigations. He further testified that had the care been reasonable and on standard, the plaintiff would not have had to undergo an emergency laparotomy and hysterectomy on 28 October 2013.

[22] In cross-examination, Dr Burchell conceded that the only way of measuring the progress of labour was to do a vaginal examination but insisted that six vaginal examinations over a period of six hours was excessive.

[23] The second witness was the plaintiff herself who testified about the signs and symptoms she experienced after the performance of the caesarean section as well as the complaints to the nursing staff. She confirmed that she experienced dizziness, nausea and pain. Furthermore, she testified that she was unable to walk unassisted throughout her period in hospital and on her discharge. She testified further that when she complained to the nursing staff she was told to stop being childish.

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[6] 2010 (5) SA 203 (WCC) at 211

[24] The defendants called Dr Marishane whose expertise and ability to express an opinion was not disputed. Dr Marishane testified that he had prepared a medico-legal report on the instructions of the State Attorneys' office. He admitted that he wrote the report without having interviewed the plaintiff but conceded that it is pertinent to obtain a factual version.

[25] Dr Marishane advocated for the defendant without proper consideration of the content of the clinical records and without having done proper research himself. He made various assumptions relating to the alleged correction of mistakes in the clinical records without having a proper factual basis to do so. Dr Marishane further expressed an opinion on the C-reactive protein count and contended that it was not high. He conceded eventually that he did not research it and did not know what a high count would be.

[26] A reading of the joint minute by Dr Burchell and Dr Marishane indicates that the occurrence of sepsis Is excusable In the public sector because it relates to many factors such as overcrowding and patient profile. Dr Marishane was of the view that public healthcare should not be held to the same standard as private healthcare and that users of public healthcare should be satisfied with that.

[27] Dr Marishane furthermore expressed an opinion on the plaintiff's psychological state without considering all the facts and without being qualified to do so. He was of the view that the plaintiff had psychological problems due to her refusal to do a medical test. He did not properly consider the clinical records made available to him. He was not sure how many vaginal examinations the plaintiff had after her membranes had been ruptured, information which was available from the clinical records. Despite indications that something was wrong, he persisted in his opinion that there were no Indications of bacterial infection prior to the plaintiffs discharge from the hospital.

[28] The approach to negligence in matters of this nature Is no more than a context specific application of the generally expressed test for negligence.[7] A medical practitioner diagnosing and treating a patient is expected to exercise a level of skill, care and diligence exercised at the time by the members of the branch of the

[7] Mand Another v MEC for Health, Western cape (4621/2014) [2018] ZAWCHC 113 (10 September 2018) para 60

profession to which he or she belongs.[8]

[29] The plaintiff testified about the symptoms experienced after she had the caesarean section as well as the complaints to the nursing staff. She confirmed the pain, dizziness and nausea she experienced and also that she was unable to walk unassisted, even when she was discharged. She confirmed that when she complained to the nursing staff of the symptoms she experienced, she was told to stop being childish. This evidence was not disputed during cross-examination nor did a factual witness contradict her evidence. As such, her evidence remains undisputed.

[30] Dr Burchell was called as an expert witness. He was of the view that had a test been conducted to do investigations other than those conducted in the laboratory tests as requested on 21 October 2013, it would have been ascertained that the plaintiff was developing sepsis which could have been treated through an evacuation and a course of antibiotics. He confirmed that other than pain medication, there was a total lack of treatment. He was of the opinion that the plaintiff was provided with care that was substandard and unreasonable in the circumstances. He testified that had the plaintiff been provided with care that was standard and reasonable, she would not have undergone a laparotomy and hysterectomy.

[31] Dr Marishane, on behalf of the defendant was patently influenced by the litigation and its exigencies. In the joint minute compiled with Dr Burchell he stated that reference to the use of the word 'substandard' was used to sway the judges from a perception of the case without any tangible medical evidence. He went to so far as to state that in the event of a finding of liability in this matter, this would create a further risk that doctors would be held unfairly responsible.

[32] The role of an expert witness is to provide independent assistance to the court by way of objective, unbiased opinion in relation to matter within his expertise. Dr Marishane failed to consider material facts which could detract from his concluded opinion. He made various assumptions relating to the alleged correction of mistakes in the clinical records without having any proper factual basis to do so. It is clear that his opinion was not founded on logical reasoning as alluded in his evidence in chief and cross-examination. His ··evidence was poor, biased and unreasonably inflexible

[8] Topham v Member of the Executive Committee for the Dept of Health, Mpumalanga (2013) ZASCA 65

in his views. A number of his findings were in respect of matters wholly outside of his area of expertise, having entered the expertise in neuropsychology. I gained a distinct impression that he was partisan in giving evidence, which affects his credibility. He was a 'typical hired gun' that was called to give evidence for the defendants when the facts speak for themselves.

[33] In cross-ex mination, counsel for the plaintiff brought to the court's attention the matter of Ntsele v MEC for Health, Gauteng Provincial Govemment[9] in which Dr Marishane was criticised by the judge of having been a 'hired gun' and requested the court to make a similar finding. Looking at the evidence and joint minutes between Dr Burchell and Dr Marishane, I am of the view that Dr Marishane is a 'hired gun' and as such, will disregard his evidence in Its totality as it is of no assistance to the court.

[34] I am satisfied with the evidence of Dr. Burchell who was thorough and clear in his evidence in chief and conceded where he was required to do so. I am of the view that he was a credible witness whose evidence as an expert witness, came to the court's assistance. The court takes counsel from his evidence in the absence of evidence to the contrary, having disregarded that of Dr. Marishane.

[35] Accordingly, I am of the view that the plaintiff has proven that she received substandard care In the period 21 October 2013 to 24 October 2013. Furthermore, the discharge from the hospital on 24 October was unreasonable in the circumstances.

[36] As such, the following order ls granted:

(i) The first defendant is ordered to pay 100% of the plaintiffs agreed or proven damages suffered as a result of the failure to diagnose the bacterial infection and/or sepsis timeously and the laparotomy and hysterectomy performed on the plaintiff on 28 October 2013 and its sequelae:

(ii) the defendant shall pay the plaintiffs taxed or agreed party and party costs of suit, to date, on the High Court scale, such costs to include (but not necessarily be limited to) the following:

(a) The costs attendant upon the obtaining of the medico-legal report and/or addendum reports and/or joint minutes, if any, as well as qualifying and/or reservation fees, travelling costs as well as reasonable disbursements of Dr. Burchell.

MOKOSE J

Judge of the High Court of South Africa
Gauteng Division, Pretoria

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Date of Hearing: 9, 19, 11 and 12 March 2020

Date of Judgement: 28 April 2020

[9] [2013] 2 All SA 356 (GSJ) at para 87 - 92