THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 529/17

In the matter between:

LIFE HEALTHCARE GROUP (PTY) LTD **APPELLANT**

and

DR ABDOOL SAMAD SULIMAN **RESPONDENT**

Neutral citation: *Life Healthcare Group (Pty) Ltd v Dr Suliman* (529/17)

[2018] ZASCA 118 (20 September 2018)

Coram: Shongwe ADP and Majiedt, Seriti, Wallis and Saldulker JJA

Heard: 20 August 2018

Delivered: 20 September 2018

Summary: Medical negligence – factual causation – 'but for' test – correct question to be asked whether it is more probable than not that the outcome would have followed – elements of liability – wrongfulness – breach of legal duty and negligence – expert evidence – evaluation of medical expert opinion – to what extent opinion founded on logical reasoning and not scientific validity thereof.

ORDER

On appeal from: KwaZulu-Natal Local Division, Durban (Ploos van Amstel J sitting as court of first instance): judgment reported *sub nom TS & another v Life Healthcare Group (Pty) Ltd & another* 2017 (4) SA 580 (KZD).

1 The appeal is upheld with costs including the cost of two counsel where employed.

2 The order of the court a quo is set aside and substituted with the following:

'(a) The damages agreed as payable to the plaintiff is apportioned in terms of s 2 of the Apportionment of Damages Act, 34 of 1956 as between the first defendant and the second defendant as follows:

(i) the first defendant: 40 per cent and

(ii) the second defendant: 60 per cent

(b) It is declared, in terms of s 2(7) of the Apportionment of Damages Act, 34 of 1956, the first defendant is entitled to recover from the second defendant 60 per cent of the R20 million and of the recoverable costs of the plaintiff paid by the first defendant to the plaintiff.

(c) The second defendant is directed to pay the first defendant's costs of the third party proceeding, such costs to include the costs consequent upon the employment of senior counsel.'

JUDGMENT

Shongwe ADP (Majiedt, Seriti, Wallis and Saldulker JJA concurring)

[1] Medical negligence claims have escalated substantially in our country in recent times. This has caused insurance premiums for medical doctors to sky

rocket and has proved to be a disincentive for the specialisation in certain medical fields, of which obstetrics and gynaecology appears to be one. This appeal is against the order and judgment of the court a quo (Ploos van Amstel J) dismissing with costs the claim of the appellant against the respondent. Initially this case started when the plaintiffs, Mr and Mrs Sibaya, the parents of Nasi, their son, who was delivered on 12 July 2008 and shortly thereafter diagnosed with cerebral palsy, sued Life Healthcare Group (Pty) Ltd, as the first defendant and Dr Abdool Samad Suliman, a specialist obstetrician and gynaecologist, as the second defendant, jointly and severally, for the damages resulting from the birth injuries sustained by their child. The appellant issued, simultaneously with its plea, a third party notice against the respondent (in terms of rule 13 of the Uniform Rules of Court) in which it alleged in terms of s 2(1) of the Apportionment of Damages Act 34 of 1956 (the Act) that the respondent (third party) negligently contributed to, or was the cause of any damages which either of the plaintiffs might prove they had suffered. It sought a contribution in the event the court a quo found that the appellant was negligent.

[2] Subsequently the parties settled the dispute with Mr and Mrs Sibiya on the basis that the appellant and the respondent would pay to the plaintiff a sum of R20 million without admission of negligence or breach of contract or liability on their part. Thus the hearing in the court a quo proceeded without the participation of the plaintiffs. The lis was between the appellant and the respondent. (I shall henceforth refer to the parties as the hospital and Dr Suliman for ease of reference.)

[3] The hospital admitted, during the hearing, that their nursing staff were negligent. However Dr Suliman denied negligence and averred that, in the event

he was found to have been negligent, such negligence was not causally linked with the resultant injury. The court a quo found that Dr Suliman was also negligent but was unable to find that his negligence was causally linked with the harm suffered by the plaintiffs and the child. It accordingly dismissed the hospital's claim against Dr Suliman. This appeal is with the leave of the court a quo.

[4] The facts of this case are largely common cause. Mrs Sibaya (the patient), fell pregnant sometime in 2007. On 12 July 2008 at about 10h00 she was admitted at the Crompton Hospital, which is a part of the Life Healthcare Group. Prior to her admission date she had contracted with Dr Maise, an obstetrician and gynaecologist, to attend to her during her labour and subsequent delivery of the baby. On the day of her admission, however, Dr Maise was unavailable, but had made arrangements with Dr Suliman to 'cover' for him. The understanding was that Dr Suliman would attend to Mrs Sibaya in the absence of Dr Maise. The hospital staff was made aware of this arrangement. Apparently it is a well-known practice in the medical fraternity. At about 10h30 Dr Suliman was telephoned by Sister Savage informing him of Mrs Sibaya's admission. Dr Suliman instructed her to allow labour to proceed and to sedate the patient, if necessary. He also prescribed Pethidine and Aterax, for managing pain and nausea respectively.

[5] The nursing staff's duties, inter alia, were to monitor, observe and record the developments, progress or lack thereof of the patient. A cardiotocography (CTG) was used to record the foetal heart rate. Sister Savage telephoned Dr Suliman again at 18h35 and advised him that the patient was 4 cm dilated with the head of the baby 3/5 above the pelvic brim. She reported a deceleration of

the foetal heart rate, but added that it recovered quickly. Dr Suliman instructed her to transfer the patient to the labour ward, that her membranes be ruptured and that an epidural be arranged. (This is a form of anaesthesia administered by an anaesthetist.)

[6] Up to this point Dr Suliman had not been to see nor visit the patient. The records at 18h40 showed that the heart rate decreased to 90 beats per minute, but this record was not brought to the attention of Dr Suliman, as the nursing staff should have done (the normal foetal heart rate is in between 110 – 160 beats per minute). The recording showed that the contractions became strong at three per minute, Dr Suliman was informed about this development at approximately 19h30. Another deceleration occurred at around 19h40, but was not reported to Dr Suliman. At 21h00 Dr Suliman was informed that the patient was fully dilated. He arrived at the hospital at 21h20 for the first time since the patient was admitted at 10h00.

[7] On his arrival, Dr Suliman looked at the CTG and realised that the foetus had been in distress for some time and that delivery was a matter of urgency. Time was now of the essence. He needed a vacuum extractor which is used to assist in the delivery. Sister Khumalo, who was on duty then, could not find it, and when she did eventually find it, it became clear that she could not use it. Dr Suliman, asked for forceps but, once again the nurse was unable to find them. The birth of the baby was delayed by another 20 to 25 minutes. The baby was born at 22h10 after an episiotomy was performed. On delivery the baby was born ‘flat’, in the language of the medical community, meaning that he was not breathing and barely had a heartbeat. Clearly he had suffered birth hypoxia, the

deprivation of oxygen. He was resuscitated and oxygen was administered, but a little later it was discovered that he had developed cerebral palsy.

[8] The hospital contended that in the event Dr Suliman was found to be liable to compensate either of the plaintiffs in damages, then there should be an apportionment of such damages as between itself and Dr Suliman in such proportions as the court might deem just and equitable, having regard to the degree in which each was at fault. The basis of the hospital's claim was that Dr Suliman owed a legal duty to the patient and because he was negligent he was liable for a contribution in terms of s 2(1) read with s (6) of the Act.

[9] Dr Suliman, on the other hand contended that Mrs Sibaya was not his patient, but that she was Dr Maise's patient. He contended further that he was simply covering for Dr Maise and did so at Dr Maise's request, conveyed to him between 09h00 to 10h00 on 12 July 2008. He contended that it was common practice in the medical profession for one doctor to cover for another when the latter was unavailable. Therefore, he was merely on standby for any emergency that could arise during the absence of Dr Maise and he (Dr Suliman) therefore did not assume normal responsibility for the patient. Thus, so he contended there was never a doctor-patient relationship between him and Mrs Sibaya until he arrived at the hospital at 21h20. The only reasonable and logical inference from Dr Suliman's contention was that during Dr Maise's temporary period of absence, the patient was practically without a doctor or specialist taking care of her. For the reasons that follow I disagree with these contentions.

[10] It is settled law that the hospital bore the onus to prove on a balance of probabilities that Dr Suliman owed a legal duty to the patient, that the duty was breached, and that as a direct result of the breach the patient suffered harm. In dealing with the question whether Dr Suliman owed a legal duty to the patient, it is clear that the legal duty arose immediately when Dr Suliman acceded to the request to cover for Dr Maise and when he positively responded to a call from Sister Savage that the patient had been admitted to hospital. Dr Suliman manifested his responsibility by giving instructions to the nurse to allow the labour to proceed and to sedate the patient, if necessary, and prescribed medication as mentioned earlier. His conduct of getting involved in the treatment of the patient placed him in a position of being responsible for her and the baby. In our law a negligent omission is only unlawful if it occurs in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm (*Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 25, cited with approval in *Oppelt v Head: Health, Department of Health, Provincial Administration: Western Cape* [2015] ZACC 33; 2015 (12) BCLR 1471 (CC).) I therefore agree with the finding of the court a quo that the legal duty arose at 10h30 at the latest when he was informed of the patient's admission and provided telephonic instructions to the nursing staff with regard to her care. This was confirmed at 18h35 when Sister Savage telephoned him and he again without demur, gave further instructions for Mrs Sibiya's care.

[11] I now turn to deal with whether the legal duty was breached, in other words whether Dr Suliman did or did not do something which the law expected of him. Did he act like a reasonable obstetrician in the circumstances? Dr van Helsdingen an expert obstetrician, who testified for the hospital, confirmed that his conduct in not visiting the patient 'would be contrary to anything that one

expects of the average obstetrician standing in for somebody else'. Dr Suliman himself testified that if the patient were his, he would normally have gone to see her within three or four hours of her admission. However, he explained that he did not visit her because he did not want to interfere with the personal relationship which she had with her doctor (Dr Maise), as it could cause anxiety on her part. On the contrary a reasonable obstetrician would have visited the patient shortly after her admission to create that doctor-patient relationship and to assure her that, in the absence of her own doctor, he was standing-in and would take good care of her. Dr Suliman was, at all material times aware that Dr Maise had not returned to see the patient. He did not even phone Dr Maise to establish whether he was available in the late afternoon of 12 July 2008. The sum effect was that the patient had been admitted at 10h00, but the first and only time she was seen by a doctor was after more than 11 hours at 21h20. The explanation given by Dr Suliman was that he did not regard her as his patient, but Dr Maise's. If this is not gross negligence, then it is difficult to imagine what would be.

[12] I now turn to deal with the causal link between the negligent action of Dr Suliman and the resultant harm. Establishing factual causation can be a difficult exercise as it must be demonstrated that 'but for' the doctor's action or inaction harm would not have occurred. (See *Lee v Minister of Correctional Services* [2012] ZACC 30; 2013 (2) SA 144 (CC) para 38 and *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC) para 65 as authority.) In view of the findings and the order of the court a quo, the main thrust of this appeal was that the court a quo was unable to find that 'had he acted as it is said he should have, the tragic outcome would have been avoided'. It appears that when considering the question of factual causation the court a quo relied on Dr van Helsdingen's evidence when he said that 'he could not say

that the baby would have been saved [if the baby was] delivered by caesarean section at some time between 17h30 and 20h00'. In response to a question from the bench he also said 'I cannot even begin to answer the question whether that would have salvaged the baby and I don't think anybody can tell you that, M'Lord'.

[13] These passages in Dr van Helsdingen's evidence were contradicted by the following very clear statement of his views:

'Ploos van Amstel J: Well let's assume for the moment at 7.50 a decision is made to do a caesarean section and let us say 40 minutes later the baby is delivered at about 8:20, 8:30 thereabouts, is there reason to believe that, that would probably have prevented or avoided the cerebral palsy? --- Yes, I think there is a strong reason to believe that, that would have, because cerebral palsy or brain damage does not occur to that extent that rapidly. If you left it you're talking about more than an hour and a half, so I think there is every probability that had it been done then this very unfortunately outcome would have been prevented.'

Dr Suliman himself confirmed Dr van Helsdingen's view. Counsel for Dr Suliman asked his client at the beginning of his evidence:

'Now, everyone, well, whoever was giving evidence said that if you got there earlier you would have picked up the distress and the baby would have been saved, do you have any dispute with that, as a matter of fact, had you got there earlier, is there any doubt there would have [intervention] --- No, dispute, M'Lord.

So the question is whether you should have got there, that's the question? Yes.'

[14] The joint report by Dr van Helsdingen and Professor H S Cronje, confirmed that:

'In general, it means the covering doctor has to see the patient personally during labour in order to establish a doctor-patient relationship and to verify him/herself of the patient's condition, including that of the baby (foetus).'

In the joint report it was also said:

'Based on a high degree of probability, the tragedy of cerebral palsy could have been prevented. If Dr Suliman saw the patient at 19:00, he would have noticed an abnormal foetal heart pattern, which gradually became worse. Between 20:00 and 21:00, he would have made the diagnosis of possible foetal distress and he would have performed a caesarean section. In our view, the brain damage probably occurred after 20:00, especially after 21:00.'

[15] Judges must be careful not to accept too readily isolated statements by experts, especially when dealing with a field where medical certainty is virtually impossible. Their evidence must be weighed as a whole and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion. In *Michael & another v Linksfield Park Clinic (Pty) Ltd & another* [2002] 1 All SA 384 (A); 2001 (3) SA 1188 (SCA) paras 36-37, the court said:

'That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advanced are founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of *Bolitho v City and Hackney Health Authority* [1998] AC 232 (HL(E)). With the relevant dicta in the speech of Lord Browne-Wilkinson we respectfully agree. Summarised, they are to the following effect.

The court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion, albeit genuinely held, is that the treatment or diagnosis in issue accorded with sound medical practice. The court must be satisfied that such opinion has a logical basis, in other words that the expert has considered comparative risks and benefits and has reached "a defensible conclusion" (at 241G–242B).'

[16] In my considered view the court a quo, with due respect, asked the wrong question in respect of factual causation. The correct question should have been: Was it more probable than not that the birth injuries suffered by the baby could have been avoided, if Dr Suliman had attended the hospital earlier, after the 18h35 phone call? Had he done so after 18h35 or after 19h00, for that matter, he would have noticed the non-reassuring tracings on the CTG

personally, even those readings not reported to him by the nursing staff. The nursing staff is there to observe, but the doctor is responsible for the diagnosis and for ordering the appropriate treatment. Had he done that then, he would have seen the early signs of foetal distress and, according to his own evidence, would have performed an emergency caesarean section, that would have avoided the birth injury to baby Nasi. This view accorded with that of the other medical experts.

[17] The real issue between Dr Suliman and the hospital was not whether his earlier attendance upon Mrs Sibaya would have prevented the harm to Nasi, but whether he was under an obligation to attend earlier. That was the dispute as elicited from him by his own counsel in his evidence-in-chief. In my view he was clearly obliged to attend upon Mrs Sibaya at least after the telephone call from Sister Savage at 18h35. All the evidence shows that it is more probable than not that had Dr Suliman attended the hospital earlier the injuries would have been avoided. For that reason the hospital succeeded in proving factual causation on a balance of probabilities. In my view the attitude of Dr Suliman that he had no doctor-patient relationship with the patient was too lackadaisical and, as indicated earlier, legally and morally indefensible.

[18] The next question to consider is the degree of contributory negligence. Because of the conclusion of the court a quo, this question was not considered, hence it is difficult, on appeal, to determine it without sufficient evidence. This court would have referred the matter back to the court a quo, but this exercise would not have been the best solution, as the court a quo would also not be in possession of the evidence. Both parties had closed their case. It is clear that the damages are not divisible. In my view, it remains in the discretion of the court,

based on the evidence before it to assess the relative degree of fault of the hospital and Dr Suliman and to apportion the damages accordingly. Section 2(1) of the Act provides that 'where it is alleged that two or more persons are jointly or severally liable in delict to a third person (hereinafter referred to as plaintiff) for the same damage, such persons (hereinafter referred to as joint wrongdoers) may be sued in the same action.' Therefore in this case the hospital and Dr Suliman are joint wrongdoers as their negligence caused the injury to the child. (See *Minister of Safety and Security & another v Rudman* 2005 (2) SA 16 (SCA) para 79). There is a paucity of evidence before this court to indicate when the baby suffered the injuries. The evidence of the experts is of limited assistance, but on the probabilities it could have been after 20h00 or likely after 21h00. In his own evidence Dr Suliman said that had Mrs Sibaya been his patient he would have attended her upon being informed of the deceleration in the foetal heart rate identified on the CTG tracing – but because he was covering for Dr Maise he found it unnecessary to visit her.

[19] It is clear that Sister Khumalo was negligent in failing to identify possible foetal distress from about 19h50 to 20h20 and in her subsequent failure to inform Dr Suliman of the non-assuring tracing. On the probabilities had Sister Khumalo called Dr Suliman around 20h00 after the evidence of deceleration, clearly Dr Suliman would have responded and an emergency caesarean section could have been performed to save the child. The hospital readily admitted negligence by its nursing staff. I am in agreement with the hospital's contention that Dr Suliman's negligence is greater than that of the nursing staff and that this should be reflected in the apportionment. He was the specialist who abdicated his duties especially after receiving the call at 18h35. The nursing staff only makes observations. Dr Suliman adopted a hands-off approach.

[20] In the circumstances, an apportionment of 60 per cent – 40 per cent in favour of the hospital is reasonable and appropriate.

[21] In the result the following order is made:

1 The appeal is upheld with costs including the costs of two counsel where employed.

2 The order of the court a quo is set aside and substituted with the following:

'(a) The damages agreed as payable to the plaintiff is apportioned in terms of s 2 of the Apportionment of Damages Act 34 of 1956 as between the first defendant and the second defendant as follows:

(i) the first defendant: 40 per cent and

(ii) the second defendant: 60 per cent

(b) It is declared, in terms of s 2(7) of the Apportionment of Damages Act 34 of 1956, the first defendant is entitled to recover from the second defendant 60 per cent of the R20 million and of the recoverable costs of the plaintiff paid by the first defendant to the plaintiff.

(c) The second defendant is directed to pay the first defendant's costs of the third party proceeding, such costs to include the costs consequent upon the employment of senior counsel.'

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J B Z Shongwe

Acting Deputy President

Supreme Court of Appeal

Appearances

For the Appellant:	S R Mullins SC Instructed by: Norton Rose Fulbright Incorporated, Durban; Webbers Attorneys, Bloemfontein
For the Respondent:	O A Moosa SC Instructed by: Pather & Pather Attorneys, Durban; Claude Reid Incorporated, Bloemfontein