

**IN THE HIGH COURT OF ESWATINI**

**HELD AT MBABANE**

**CASE NO. 96/2022**

In the matter between:

**BABHEKILE MATSEBULA**

**PLAINTIFF**

**And**

**GOOD SHERPERD MISSION HOSPITAL**

**DEFENDANT**

**NEUTRAL CITATION:      BABHEKILE   MATSEBULA   V   GOOD  
SHERPERD MISSION HOSPITAL (96/2022)  
SZHC – 360 (07/12/2023)**

**CORAM:                      BW MAGAGULA J**

**HEARD:                      13/10/2023**

**DELIVERED:                07/12/2023**

**SUMMARY:** *Civil Law Exception premised on Rule 23 (1) – the contention being that, the negligence alleged can only come through negligence claims, the delict is against the institution through the negligent conduct of it's staff.*

**HELD:** *Considering the particulars of claim as a whole, the necessary averments to sustain a claim of medical negligence have been made. The exception fails with costs.*

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### **RULING ON EXCEPTION**

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**BW MAGAGULA J**

#### **BACKGROUND FACTS**

- [1] Serving before court is Rule 23 (1) Notice. The Defendant has taken an exception on the Plaintiff's particulars of claim on the basis that the pleading does not sustain a cause of action.
- [2] The court finds it underserving to belabor this ruling with a detailed background pertaining to the facts of this matter. Having said so, it is apposite just to mention that the Plaintiff before court is an adult female Liswati who is currently a resident of Tincatfwini.

- [3] The Defendant is Good Shepherd Mission Hospital a non-profit faith based organization, supported by the Ministry of Health Eswatini and duly registered as a medical institution based at Siteki, Lubombo<sup>1</sup>.
- [4] The basis of the Plaintiff's claim as against the Defendant, is a claim for payment of damages in respect of future medical expenses, pain and suffering, suffered by her minor child allegedly at the hands of the Defendant's staff subsequent to an incorrect retrieval of a catheter. The total claim is for the sum of E2 000 000-00 (**Two Million Emalangeni**).
- [6] The Defendant has taken issue in the manner in which the Plaintiff has pleaded its case in the particulars of claim. The Defendant submits that from the reading of the summons and the citation of the parties, the damages that are claimed are only against the Defendant. To buttress its point, the Defendant has reproduced the manner in which the Defendant has been cited which is as follows;

*"The Defendant is Good Shepherd Mission Hospital, a non-profit making organization supported by the Ministry of Health, Eswatini and duly registered as a medical institution based at Siteki in the District of Lubombo."*

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<sup>1</sup> At least how the Defendant has been cited by the Plaintiff in the summons.

[11] The Defendant therefore argues that reading from the citation, the Defendant is an artificial person, which enjoys a separate legal personality from its owners and its employees.

[12] The Defendant further continues to argue that the Plaintiff's claim in its nature, is a damages claim for delictual liability under the *action iniuriarum*. The Defendant also takes issue in the manner in which the Plaintiff has pleaded its particulars of claim. In as much as on one hand, the Defendant accepts that the negligence is attributable to the Defendant's medical staff, who are parties separate from the Defendant in terms of legal personalities. However, these third parties who are the doctors and nurses (the medical staff) have not been cited in the legal proceedings pending before court.

[13] The Defendant therefore argues that in a delictual claim for damages based on culpa, the Plaintiff must allege and prove that the Defendant was negligent. In support of that argument, the Defendant has cited the case of **EVERSMEYER (PTY) LTD v WALKER 1963 SA 384 (T)**.

[14] The Defendant therefore argues that the Plaintiff's summons and particulars of claim, falls short of satisfying Rule 23 (1) because the Plaintiff has only imputed the negligence to third parties who have not been cited in the pleadings. Ultimately, the argument is that there is no causal has established between the damages allegedly suffered by the child and the Defendant's negligent conduct.

- [15] The Defendant also argues that in as much as the Plaintiff seeks to hold the Defendant liable under that strict liability Rule, there is no averment in the Plaintiff's claim that is predicated on vicarious liability.

**Plaintiff's arguments contra**

- [16] The Plaintiff argues that the issue of a purported lack information connecting the alleged third parties to the Defendant is not an issue that is competent for exception, but could have been properly addressed through a request for further particulars in terms of Rule 21 (1).
- [17] The Plaintiff also further argues that even if those particulars would have been requested it would have been difficult for the Plaintiff to provide the names of the Defendant's staff who facilitated the retrieval of the catheter or who committed the alleged negligent act. Such information is in the possession of the Defendant.
- [18] The Plaintiff argues that the key issue is that the Plaintiff was admitted to the Defendant's hospital to deliver a baby and a negligent act occurred. The Defendant's nurse in an attempt to remove the catheter from the Plaintiff's child injured her.
- [19] It is argued further that Plaintiff has been able to successfully establish the nexus between the Defendant's conduct and the resultant harm that occurred to her child. The harm is allegedly to be the suffering that resulted on the

Plaintiff's child during the incorrect retrieval of the catheter and the scarring of the child's abdomen. The Plaintiff therefore argues that resultant harm itself demonstrates the connection between the Defendant's negligent conduct and resultant injury and those facts have been pleaded adequately. It is the leading of evidence on the merits that will exonerate the Defendant.

## **THE LAW**

- [20] In her particulars of claim the Plaintiff alleges that on or about 10<sup>th</sup> June 2022, the Plaintiff was admitted to the Defendant's hospital and was attended to by Defendant's resident doctor known to her as Dr. Makhosi whose further particulars are not known to the Plaintiff.
- [21] As at the date of her admission, Plaintiff presented with risk factors which increased her risk and that of the child in relation to their management and care during the course of her pregnancy and in preparation for the delivery of her baby. The risk factors included the following, namely, that Plaintiff was diabetic on treatment, was morbidly or grossly obese and exhibited high blood pressure.
- [22] Plaintiff was advised that the aforementioned risk factors are indicators of a potentially macrosomic baby; she was advised about the option of an elective caesarean section; she was also advised about the risks associated with a

[22] Plaintiff was advised that the aforementioned risk factors are indicators of a potentially macrosomic baby; she was advised about the option of an elective caesarean section; she was also advised about the risks associated with a caesarean section and she was given an opportunity to make an informed decision as to the option of birth delivery.

[23] The Legal Authors **J. NEETHLING & OTHERS** in their book *Law of Delict 2<sup>nd</sup> Edition* at page 160 also provide that; there can be no question of delictual liability if it is not proven that the conduct of the Defendant caused the damage of the person suffering harm. As the cited legal authority succinctly states the legal position, it is the negligent conduct of the Defendant that must be proved. The operative word there being proved. It is common cause that the process of proving unfolds during the trial stage. At this stage we are still concerned about the necessary averment to sustain an action. In so far as the issue at hand is concerned, the above cited legal authority by the Defendant does not support the legal exception taken.

### **ADJUDICATION**

[24] In light of the fact that the exception taken is premised on Rule 23(1), it is proper that the exact wording of the Rule be revisited. It states as follows:-

23.1 (1) Where any pleading is vague and embarrassing or lacks averments which are necessary to sustain an action or defence, as the case may be, the opposing party may, within the period provided for filing any subsequent

pleading, deliver an exception thereto and may set it down for hearing in terms of Rule 6 (14):

[25] The Defendant has used the language that the Plaintiff's particulars of claim are deficient due to a lack of averments connecting the alleged negligent act and the Defendant. In particular, the issue that is subsequently expounded on during the arguments is that the employees of the Defendant through which the negligent act can only be a conduct have not been cited. The crucial issue here is whether in pleadings where medical negligence is claimed is it necessary to particularize the name of the employees of the hospital that committed the negligent act or the citation of the hospital or entity suffices. Further, even if the specific names of the employees were not immediately ascertainable by the Plaintiff, was it a necessary averment that the Plaintiff should have alleged that the negligent act occurred during and with the scope of employment with the Defendant.

[26] The Rule per se only speaks of the lack of averments necessary to sustain an action or defence.

[27] The Plaintiff at paragraph 4 of her particulars, pleaded as follows;

*"4. On or about the 10<sup>th</sup> June 2020, Plaintiff was admitted to Defendant's institution and was attended to by Defendant's resident*



*doctor known to her as Dr. Makhosi, whose further particulars are not known to Plaintiff”.*

*“8. On or about the 19<sup>th</sup> June 2019, the date of the client’s contemplated release from hospital. The doctor assisted by a nurse encountered problems while removing the catheter in the lateral position, then breakage was noted along it’s length as was the absence of the catheter tip.....”*

*“9. The doctor conceded that the breakage of the catheter was occasioned by poor operating technique invoked by the nurse”.*

*“17. Plaintiff pleads that due to the negligence of the Defendant’s medical staff, the child’s injuries and scarring would require the intervention of a plastic and reconstructive surgeon for treatment”.*

*“On being admitted into Defendant’s institution, Plaintiff and her child were owed a duty of care by expecting the members of Defendant’s staff to apply their expert skill, knowledge and diligence in their practice”.*

*“As a direct proximate result of failure to practice reasonable and acceptable standards by Defendant’s institution it is in breach of its duty of care resulting in the injuries and scarring of Plaintiff’s child”.*

[28] Upon reading of the Plaintiff's particulars of claim, I observe that they would have benefitted more through better drafting. They have been in eloquently drafted. It is not common to refer to any of the parties as "client" in particulars of claim<sup>2</sup>. Having said so, drafting styles differ variably. What is key, is that the particulars must contain all the necessary averments to sustain an action<sup>3</sup>.

[29] In the matter of **Messina Associated Carries v Kleinhans 2001 (3) SA 868 (SCA) at 872 F – 873B, especially at 872F – 1**, where **Scott JA** said the following:

*"[10] It is trite law that an employer is liable for delicts of an employee committed in the course and scope of the latter's employment...But even in the absence of an actual employer – employee relationship, the law will prevent the recovery of damages from one person for a delict committed by another where the relationship between them and the interest of the one in the conduct of the other is such as to render the situation analogous to that of an employee acting in the course and scope of his or her employment or...wherein the eye of the law, the one is in the position of the others servant. In such a situation one is really dealing with an analogous extensions based on considerations of the employer's liability for the wrongful conduct of an employee".*

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<sup>2</sup> See paragraph 8, where the Plaintiff is referred to as "client". This is unheard of in pleadings.

<sup>3</sup> See Rule 23 (1) of the Rules of court.

[30] In the matter at hand there are particulars that link the alleged negligent act to the Defendant's medical staff<sup>4</sup>. The culpa is also pleaded at paragraph 9, being the alleged concession by the Doctor that the breakage of the catheter was occasioned by poor operating technique invoked by the nurse. Hence, the necessary averments of culpa and negligence have been sufficiently connected to the Defendant in the particulars of claim.

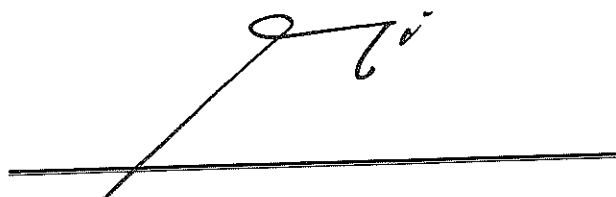
[31] In cases of medical negligence, the duty of care is owed by the health institution through its doctors and nurses to a patient. This preposition was alluded to in the matter of **Minister of Safety Security vs Van-Duivenboden 2002 (b) SA 431 (SCA)** at paragraph 12.

[32] It is therefore my considered view that when the particulars of claim are considered as a whole not in isolation, the pleading does sustain a cause of action.

[33] Due to the foregoing reasons, the exception cannot succeed. It is accordingly dismissed. Costs to follow the event.

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<sup>4</sup> See paragraph 17 of the Plaintiff's particulars.

A handwritten signature in black ink, appearing to be 'BW Magagula J', is written above a horizontal line. The signature is stylized with a large 'B' and a 'W' that are connected, and a 'J' at the end.

**BW MAGAGULA J**  
**HIGH COURT OF ESWATINI**

**FOR THE PLAINTIFF:**

**T.V. HLANZE ATTORNEYS**

**FOR THE DEFENDANT:**

**L. MANYATSI (MANYATSI &  
ASSOCIATES)**