



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2017/02346

In the matter between:

MILKA LOPEZ

PLAINTIFF

and

MINISTER OF HEALTH AND SOCIAL SERVICES

DEFENDANT

Neutral citation: *Lopez v Minister of Health and Social Services* (HC-MD-CIV-ACT-DEL-2017/02346) [2019] NAHCMD 367(24 September 2019)

Coram: PARKER AJ

Heard: 31 October, 1 & 8 November 2018; 18,19,20,21,22 February, 13 March, 20 June, 6 & 9 August 2019

Delivered: 24 September 2019

Flynote: Delict – Legal duty – What constitutes – Patient dying after delivery of still born baby – Doctor on call and Nurses failing to act reasonably in order not to cause harm – Doctor on call failing in his duty to properly and timeously assess condition of patient mother when the opportunity to do so presented itself – Nursing Sister failing to appraise Doctor on call true records-based condition of patient - Court held that the modern concept of legal duty for determining wrongfulness differs from the concept of a ‘duty of care’ as used in earlier South African cases, influenced by English Law – Using the concept of duty of care with its central basis of foreseeability of harm which is central to negligence and the duty of care concept in English law to determine wrongfulness tends to blur the distinction between the two elements of negligence and legal duty in delict – Court held, accordingly, that there was a legal duty on the medical personnel to act reasonably – In determining award of damages court should guard against duplicated and overlapping damages.

Summary: Delict – Legal duty – What constitutes – Plaintiff is the mother of the patient – Patient dying after delivery of still born baby – Patient left unattended after delivery and patient bleeding profusely – Doctor on call called to assist Supervising Sister to resuscitate baby – Doctor certifying death of baby but failing to assess situation of the mother, although patient and Doctor separated by only a curtain – Patient’s condition deteriorating dangerously and Doctor then after five hours making attempt to stabilize patient after stopping bleeding from after-birth laceration – Patient not regaining consciousness after leaving theatre – Patient carried by ambulance to Windhoek where she died – Patient’s mother, plaintiff, suing defendant Minister (in his official capacity) for breach of legal duty, in the first alternative negligence, and in the second alternative breach of constitutional right to found a family – Court finding medical personnel liable on the basis of their breach of legal duty – Court awarding fair and reasonable damages to non-patient plaintiff on the basis of plaintiff’s close familial relationship with patient.

ORDER

- (a) Judgment for plaintiff in the amount of N\$651.042, plus interest at the rate of 20 per cent per annum *tempore morae* from the date of this judgment to the date of full and final payment.
- (b) Costs of suit.

JUDGMENT

PARKER AJ:

[1] In the Gospel according to St John (KJV) 16:21 it is written:

‘A woman when she is in travail hath sorrow, because her hour is come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man (or woman) is born into the world.’

[2] In the instant matter, the woman is Margaritha Sophia Paula Nghinamwaami (the daughter of plaintiff). Margaritha’s hour came on 12 February 2015. She was delivered of a child, that is, a baby girl, at around 16H00 the same day. Margaritha’s joy was short-lived. Dr Obey Nhiwatiwa, the doctor on call at the relevant time at the hospital (a defence witness), certified the death of the baby at around 17H00 the same day. Margaritha passed on at the Windhoek Central Hospital (Intensive Care Unit) on 19 February 2015, that is, some four days after the death of her baby. How the events in the Walvis Bay State Hospital came to a triste end in the Windhoek Central Hospital (Intensive Care Unit) will become apparent in due course.

[3] Plaintiff holds defendant (in his official capacity) responsible for the death of Margaritha (‘the patient’) on the basis set out in the plaintiff’s particulars of claim. After adumbrating certain named actions in subparas 10.1 to 10.5 of the particulars

of claim in respect of which, according to plaintiff, 'the defendant had a duty of care', plaintiff deduces from the above-mentioned subparas 10.1 to 10.5 thus:

'11. In the premises, the defendant and its employees failed to fulfil the duty of care towards the deceased, and in so doing acted wrongfully and unlawfully towards the deceased.

'12. Alternatively, the defendant and its employees acted negligently, falling short of the reasonably required standard of conduct by hospital staff in the same or similar circumstances.'

And, plaintiff concludes:

'13. As a direct result of the breach of the duty of care, and in the alternative, negligence of the defendant and its employees, which caused the plaintiff's daughter's death, the plaintiff has suffered the following:

- 13.1 emotional shock and trauma;
- 13.2 inconvenience and discomfort;
- 13.3 loss of Amenities;
- 13.4 future medical expenses in relation to psychological counselling to deal with deceased's death; and
- 13.5 funeral expenses.'

[4] Plaintiff goes on to plead as follows:

'14. Alternatively to paragraph 13 *supra*, as a consequence of the wrongful and unlawful conduct of the defendant's employees as set out in paragraph 11 and alternatively paragraph 12, the plaintiff has suffered an infringement on her constitutional rights namely;

- 14.1 Her right to found a family in terms of Article 14 of the Namibian Constitution.'

[5] Going by the pleadings, as I should, it is crystal clear that plaintiff's claim is principally this: 'the defendant and its (his) employees failed to fulfil the duty of care towards the deceased, and in so doing acted wrongfully and unlawfully towards the

deceased'. I shall refer to this claim in the rest of the judgment as 'the principal claim'. It follows irrefragably that plaintiff's averment that 'the defendant and its (his) employees acted negligently' is – as the plaintiff herself indicates in the particulars of claim – a claim alternative to the claim that 'defendant and its (his) employees failed to fulfil the duty of care towards the deceased', ie the principal claim. I shall hereinafter refer to the negligent claim as 'the first alternative claim'.

[6] There is a second alternative claim in the particulars of claim. It is this, namely, that the alleged 'wrongful and unlawful conduct' breached plaintiff's constitutional right 'to found a family in terms of Article 14 of the Namibian Constitution'.

[7] Plaintiff's pleadings appear to be confusing and complicated. I have, above, made them clearer and easier to understand. After illuminating plaintiff's pleadings, what we have is simply this:

- (a) a principal claim; *or*
- (b) a first alternative claim; *or*
- (c) a second alternative claim.

The disjunctive word 'or' is italicized to emphasize the point that it links alternatives.

[8] Doubtless, plaintiff has not come to court with a total of three distinct and separate claims, even if they overlap somehow. It follows clearly that – as a matter of law, common sense and logic – I shall go on to consider the first alternative claim only if I rejected the principal claim; for, after all, there is a distinction between these two elements of delict, that is, legal duty and negligence (M Loubser (Ed) and R Midgley (Ed) *The Law of Delict in South Africa* (2015) at 149; and I shall go on to consider the second alternative claim only if I rejected the first alternative claim: in that fashion. It is, therefore, to the principal claim that I now direct the enquiry.

The principal claim

[9] The courts' approach to the notion of 'legal duty' has developed over the years. Today the notion of 'legal duty' for determining wrongfulness in delict differs from the concept of a 'duty of care' applied in earlier South African cases, influenced – no doubt – by English Law. See, for example, *Union Government v Ocean Accident & Guarantee Corporation Ltd* 1956 (1) SA 577 (A) at 585B-D. The line taken by the court in *Union Government* is based on the test of the ubiquitous reasonable person. This enquiry into 'duty' is very similar to the test for negligence'; and 'uses the flexible concept of foreseeability'. Furthermore, this approach combines wrongfulness and negligence. But foreseeability of harm is a concept that is central to negligence and central to the English Law notion of the 'duty of care', which instructs: 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour.' (*Donoghue v Stevenson* [1932] AC 562 at 580, per Lord Atkin). The 'test of duty (of care) depends, without doubt', said Lord Denning LJ in the English case of *Roe v Minster of Health* [1954] 2 WLR 915 (CA) at 924, 'on what you should foresee. There is no duty of care owed to a person when you could not reasonably foresee that he might be injured by your conduct.' That is English Law on the concept of 'duty of care'.

[10] Of course, courts still at times consider reasonable foreseeability as an indicator of a legal duty, and, thus, of wrongfulness. Thus, while foreseeability of harm is a requirement of negligence it might not be a decisive factor in determining wrongfulness (see *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) SCA at para 12). Granted, the courts have not applied the concept of legal duty uniformly, and its content vary in that there is a duty not to cause harm, a duty to prevent harm and a duty to act reasonably. Be that as it may, it has been said that legal duty is an indicator of wrongfulness in its amplitude and is not confined to negligence (M Loubser (Ed) and R Midgley (Ed) *The Law of Delict in South Africa* (2015) at 151); so that the legal duty required for wrongfulness in our law is 'the legal duty not to cause harm negligently or intentionally'. (M Loubser (Ed) and R Midgley (Ed) *The Law of Delict in South Africa* (2015) at 151) That is the manner in which I approach the determination of the principal claim ((a)).

[11] I do not think any person can be unmoved by the aforementioned deaths: of a very young mother and her baby. These deaths call for an explanation in the face of

plaintiff's allegation that the medical personnel, ie Dr Nhiwatiwa and the nurses who attended to Magaritha at the Walvis Bay Hospital, were responsible in ways set out in plaintiff's particulars of claim.

[12] On the pleadings, as intimated previously, it seems to me clear that plaintiff seeks no explanation from the medical personnel in the Windhoek State Hospital (Intensive Care Unit); and so, the enquiry will centre on the acts and omissions of the medical personnel at the Walvis Bay State Hospital. It seems to be clear also that in the pleadings and on the evidence the alleged delict concerns chiefly the death of Margaritha, ie the patient.

[13] Ms Van Wyk represents plaintiff, and Mr Kandovazu defendant. I am grateful to both counsel for their commendable industry. The only fly in the ointment is that in Ms Van Wyk's submission, counsel appears to conflate 'negligence' and 'legal duty', and also 'legal duty' in our law with the English law concept of 'duty to take care'. Indeed, the greater part of counsel's submission rests on negligence, which, as I have said previously, is the subject of the first alternative claim which I shall, as I have said previously, consider only if I rejected the principal claim. Mr Kandovazu's submission does not, with respect, fare any better: he also falls in the pitfall, as it were.

[14] Under this head ((a)), I shall consider whether any of the Walvis Bay State Hospital personnel did, by their conduct – act or omission – breach their duty not to cause harm negligently or intentionally. That the medical personnel had a legal duty not to cause harm, a duty to prevent harm and a duty to act reasonably was not challenged by defendant. What should be considered, therefore, is whether the medical personnel acted wrongfully by causing any harm negligently or intentionally. (See para 10 of this judgment): in the converse, whether the medical personnel owed a legal duty to take reasonable steps to ensure that they did not cause harm to Margaritha. (See *Gawanas v Government of the Republic of Namibia* 2012 (2) NR401 (SC).)

[15] I should say that both Ms Van Wyk and Mr Kandovazu adduced properly for either side of the suit the examination-in-chief-evidence, cross-examination-evidence

and re-examination-evidence to the extent that in the final analysis, there were no wide differences in the bare versions of the different witnesses. There were, however, divergent opinions expressed by the expert witnesses. I will deal with them as I go along.

[16] I have carefully considered all the evidence placed before the court, leaving nothing out. Having done that I arrive at the following relevant factual findings and inferences thereanent.

[17] At the relevant time there was only one medical doctor on call, that is, Dr Obey Nhiwatiwa, as aforesaid. His hands may have been full, so to say, but there was no medical emergency comparable to the situation regarding Margaritha. Dr Nhiwatiwa was called by Sister Blom (a defence witness) who was the shift supervisor. Enrolled nurse midwife Garases was admitting Margaritha. In the presence of Sister Blom the baby was delivered. After she had cut the umbilical cord, Sister Blom saw that the baby was pale and not responsive. Sister Blom commenced emergency procedure to resuscitate the baby and then requested Enrolled nurse midwife Garases to go and fetch Dr Nhiwatiwa for him to assist in her effort to resuscitate the baby. Dr Nhiwatiwa was called around 17H00 (the same day) and he found Sister Blom resuscitating the baby. The Doctor checked the baby for any sign of life and to see if she had a pulse. It became clear to the Doctor that there was no form of life and she did not have a pulse. The Doctor asked Sister Blom to cease with the resuscitating effort, and he certified the death of the baby.

[18] Up to this point in time, I do not find any breach of legal duty on the part of Sister Blom. What she did was not wrong and was reasonable – as far as the baby is concerned. And no cogent evidence was led tending to establish the cause of death of the baby. It is important to make this important point. *Pace* both counsel, particularly Mr Kandovazu, I find that the experts assisted the court. We do not praise expert witnesses when we like their evidence because it supports our cause. We should not condemn them when their evidence does not support our cause.

[19] Now, back to Margaritha. During delivery of the baby, Margaritha suffered a laceration which caused her to lose a lot of blood. Margaritha was left unattended

for some four hours, without reasonable monitoring or at all, during those hours. Sister Blom did what she could at her level to stitch the laceration. The laceration appeared to her to be beyond her professional depths; and so, she wanted to call Dr Nhiwatiwa but she was persuaded by Margaritha to carry out the stitching herself. Ms Van Wyk submitted that Sister Blom ought to have informed Margaritha that the seriousness of the laceration called for the Doctor's attention. While I do not accept Mr Van Wyk's submission that Ms Blom's omission was intentional, I find that it was unreasonable for her to have acceded to the entreaty of a patient who had very little training at the nursing school and who was in that serious condition. And at that moment, I do not think the patient could judge her situation properly. One would have thought that it is precisely for such serious cases that there are doctors on call at hospitals.

[20] Now we know that Ms Blom's effort was not adequate. The patient continued to lose a great deal of blood, causing further complications. In her cross-examination-evidence, Sister Blom said she did her best. I agree: as respects the professional effort she exerted, at her level, to cut the umbilical cord of the baby, her attempt to resuscitate the baby, and her stitching of the patient's laceration, but not when she told Dr Nhiwatiwa that all was fine. As a nurse of considerable experience, it was her duty to place recorded facts before Dr Nhiwatiwa in order for the Doctor to make a proper assessment of the patient's condition. The situation at the relevant time was anything but 'fine'. In any case, there is a good reason why there was a Doctor call; not to leave nurses on their own – it is of no moment whether they are Enrolled or Registered Nurses.

[21] Be that as it may, in my opinion, in all this, the clincher is this. Dr Nhiwatiwa was called to see if he could assist Sister Blom in resuscitating the baby. After certifying the death of the baby, as I have mentioned previously, Dr Nhiwatiwa did not as much as ask of the nurses what had become of the mother of the dead baby. I accept Dr Agnew's evidence that Dr Nhiwatiwa's failure to assess the condition of the mother (at that critical time, I should add), who had given birth to a still born baby was unlawful because it fell short of the skill and experience that should be shown by medical practitioners who are under oath to save and preserve life. It should be emphasized that the mother and the baby were in the same room as Dr Nhiwatiwa,

separated by only a curtain. As I have said, the Doctor did not as much as ask the nurses as to what had become of the mother of the baby. That failure is not natural – by any standard of the community. See the following paragraph, para 25 and para 31, below.

[22] I accept Mrs Van Wyk's submission that a fresh still born situation indicates strongly that a serious thing went wrong during delivery. Indeed, the *boni mores* and convictions of the community would be one in their expectation that the Doctor Nhiwatiwa should have enquired about the situation of the mother. I cannot accept Dr Nhiwatiwa's testimony that he did not ask to see the patient because Sister Blom had told him that all was fine with the patient.

[23] If oral reporting by nurses about patients to Doctors is adequate, there will be no need to keep accurate and meticulous records of patients. Furthermore, I accept Ms Van Wyk's submission that Dr Nhiwatiwa should have taken some time to ask Sister Blom to make available to him the medical records of the patient in order for him to make an informed decision about the true situation of the patient. In fact, Sister Blom herself had not acquainted herself with the records, containing the vitals of the patient; and the utterance to Dr Nhiwatiwa that the mother was 'fine' was, therefore, not based on any relevant facts. In fact, Sister Blom's failure to present the patient's records to Dr Nhiwatiwa for him to do a proper assessment is wrongful and unreasonable and, therefore, blameworthy.

[24] I heard Dr Kimera, Specialist Obstetrician Gynaecologist (defence witness), at present a Lecture at the University of Namibia, with an immense experience, to testify that it is not always necessary for a Doctor to assess a patient in a ward. The good Doctor misses the point. The relevant situation was not one of an ordinary walk-about-rounds through a dormitory-like ward by a doctor. Dr Kimera testifies further that the patient ought to have complained to Dr Nhiwatiwa. How could the patient complain when there was Sister Blom and Dr Nhiwatiwa present with only a curtain separating them from the patient, and Dr Nhiwatiwa had been called to an emergency involving a dying baby of the patient? With the greatest deference to Dr Kimera, I am constrained to say the Doctor's evidence on the point is at best not founded on logical reasoning (see *Minister of Health and Social Services N.O. v Ivan*

Kasingo Case No.: SA 46/2014 at para 47, and at worst insensitive. On both grounds, the Doctor's evidence on the point is of no real assistance on the point under consideration.

[25] In my opinion, Dr Nhiwatiwa had no good reason to only certify that the baby was dead without properly assessing for himself the true situation about the patient. Lo and behold, barely three hours after certifying that the baby was dead, Dr Nhiwatiwa was called by registered nurse Shijabuluka to return in order to attend to an emergency. And the emergency happened to be about no other person than the mother whose baby the Doctor had some three hours earlier certified as dead but had failed, without any good reason, to assess the mother. Common sense and human experience tell me that if the efforts that Dr Nhiwatiwa took in the theatre to stop the patient's bleeding at around 22H45 and the administering of *Ketamin* had been pursued at around 17H00, the complications that set in after around 22H45 would have been successfully managed. Indeed, from the theatre the patient did not gain full consciousness, albeit she was breathing on her own, and Dr Nhiwatiwa gave her blood transfusion at around 23H00.

[26] After Dr Nhiwatiwa had left the theatre to attend to other patients, Registered nurse Shijabuluka reported to Dr Nhiwatiwa that the patient was not breathing well and there was secretion on her mouth. After examining the patient, and seeing that the patient was in critical condition Dr Nhiwatiwa decided to refer her to Windhoek for further medical care. At that time the bleeding from the laceration had stopped but she was unconscious and her blood pressure was 60/50.

[27] Dr Agnew's evidence is that when the patient was taken to the theatre at around 22H05 (mentioned in paras 25 and 26) the patient was already in cardiac arrest. Dr Agnew came to that conclusion from studying the patient's records, I think it is unsafe and unsatisfactory to accept Dr Agnew's evidence on the point. It may be an informed conclusion, but she was not there. I would rather accept Dr Nhiwatiwa's evidence that, as I have said, he took the patient to the theatre and succeeded in stopping the bleeding and gave her blood transfusion. The patient could breathe on her own; and that she did not suffer cardiac arrest while in the theatre.

[28] In this enquiry, I state that I am aware that the law does not expect a general medical practitioner to exhibit the same level of skill as possessed by a specialist (see *Minster of Health and Social Services N.O v Ivan Kasingo* 2018 (2) NR 714 (SC) at para 45). I have also taken into account that the hospital is Walvis Bay State Hospital and also the fact that it is quite a busy hospital, especially the maternity ward. This observation is offset by the evidence, which I have referred to previously, that at the relevant time there was no medical emergency – involving a birth with complications or other suchlike medical emergencies. I have also not weighed the legal duty of Dr Nhiwatiwa on the same scale as I would of a specialist medical practitioner and of a practitioner practising in a private hospital in, say Windhoek, and, *a fortiori*, I keep in my mental spectale that in gauging Dr Nhiwatiwa's legal duty, I have also taken into account 'the particular circumstances prevailing at the time', which I have mentioned previously (see *Ivan Kasingo* at para 43).

[29] Having taken all these factors and circumstances into consideration and on the evidence, I come to conclusion that by his omission described previously, Dr Nhiwatiwa breached the legal duty he owed to Margaritha and thereby to the plaintiff, the mother of patient and who personally experienced the traumatic incident, in ways mentioned previously. But that is not the end of the matter. The question to look at at this juncture is this: Is the consequence, that is the death of Margaritha to be regarded as within the risk created by Dr Nhiwatiwa's breach of duty? If so, Dr Nhiwatiwa (and through him the defendant) is liable. (See *Roe v Minister of Health*, per Lord Denning at 928.) The question 'can only be determined by applying common sense to the facts of each particular case' (*Roe, loc cit*). The common sense approach is in line with the approach that when evaluating expert evidence, what is required is to determine whether and to what extent the expert opinions put forth are founded on logical reasoning. (*Minister of Health and Social Services N.O. v Ivan Kasingo* at para 47)

[30] The question should be asked. What was the risk involved in Dr Nhiwatiwa not assessing the situation of Margaritha when he had ample opportunity to do so? (See *Roe loc cit*.) *Roe* concerns negligence, but I see no good reason why the learned Lord Denning's cogent analysis and conclusions should not apply to breach of a legal duty.

[31] I have set out in paras 19-26 above the risk that was involved in Dr Nhiwatiwa's failure to assess the true condition of Margaritha when, as I have said more than once, the Doctor had ample opportunity to do so, and Sister Blom's failure to make it a point to present to the Doctor the patient's vital records. It would seem Sister Blom did not closely monitor the stitching she had done in attempt to stop the bleeding from the severe tear Margaritha had suffered. All was not 'fine'; in my opinion. The defendant's medical personnel's conduct ran afoul of the *boni mores* and convictions and ordinary expectations of the community, applying common sense to the facts of the case, as I have done. The consequence of the aforementioned personnel's conduct cannot be put down as 'a misadventure', as spoken of by Lord Denning in *Roe v Minister of Health* at 926.

[32] On the facts and in the circumstances considered previously, I conclude that the consequence, that is the death of Margaritha, fairly considered, should be regarded as within the risk created by Dr Nhiwatiwa's omission; and so, the defendant is liable.

[33] Mr Kandovazu submits that the court should find that 'where a medical practitioner prescribes after-care but the patient does not cooperate or refuses, contributory negligence is present'. To start with, contributory negligence as a defence should be pleaded to enable plaintiff to meet it. Contributory negligence is not the case that plaintiff is called upon to answer. It is too late in the day to raise it in counsel's submission. In any case, the evidence placed before the court is not sufficient and cogent to establish plaintiff's contributory negligence, as explained in para 35.

[34] The defendant relies on the evidence of Dr Charles Kimera (a defence witness) that the patient appeared to have attended only one session of ante-natal care when a minimum of four sessions are recommended; and that the severe anaemia that the patient presented during labour could have been treated during the ante-natal care sessions. The second ground is that on 13 January 2015 the patient went to the Walvis Bay State Hospital complaining of spitting blood, epigastric pain, watery stool (diarrhoea), vomiting and painful lower limbs. She was advised by the medical personnel to be admitted, but she refused to be admitted. The last ground is

that the patient smoked '*hubbly bubbly*', which is known to contain tar and nicotine. The evidence from the expert witnesses is that smoking by pregnant mothers is not prudent or recommended. They did not say it is fatal, by the way.

[35] I fail to see how these series of conduct on the part of Margaritha could have contributed in any way to the unlawful omission of Dr Nhiwatiwa and Sister Blom, as described above. No evidence was led to establish the causal link between the patient's act of smoking and her refusal to agree to be admitted and to attend at least four ante-natal care sessions on the one hand and the unlawful omission of Dr Nhiwatiwa and Sister Blom, as examined above, on the other.

[36] Consequently, I respectfully reject the defendant's defence of contributory negligence, which was also testified to by Dr Kimera on the same grounds. With the greatest deference to Mr Kandovazu, there is no merit in that defence, apart from the fact that it was not pleaded. There is, in my opinion, on the evidence ample justification for finding that Dr Nhiwatiwa and the aforementioned nurse breached the legal duty they owed to Margaritha and plaintiff, as aforesaid. Therefore, I respectfully reject Mr Kandivazu's submission that 'what caused the harm was an unrelated event and not the conduct of the medical personnel'. The evidence does not, with respect, account for such ill-considered submission.

[37] Based on the foregoing reasons, I hold that plaintiff has succeeded on the principal claim. That being the case, I shall not, as intimated previously, consider the first alternative claim, which is plaintiff's second choice, and the second alternative claim, which is plaintiff's third choice.

[38] As respects plaintiff's principal claim, plaintiff claims damages 'under general law of damages' amounting to N\$ 2 300 000, made up as follows:

- 13.1 Emotional shock and trauma -N\$900 000;
- 13.2 Inconvenience and discomfort -N\$300 000;
- 13.3 Loss of Amenities -N\$500 000;
- 13.4 Future medical expenses in relation to psychological counselling to deal with deceased's death -N\$500 000; and

13.5 Funeral expenses -N\$100 000.

[39] Thus, under the principal claim, plaintiff claims both patrimonial and non-patrimonial damages. In considering what plaintiff claims under this heard, the following significant principles and approaches are relevant and apropos. First, there is no general right to recover damages for patrimonial harm suffered as a result of the injury or death of another person. There are exceptions, though, to these general principles, namely, in cases where the harm derives from a recognized duty of support, eg based on family relationships. (See Max Loubser (Ed) and Rob Midgley (Ed) *The Law of Delict in South Africa* at 286.)

[40] Second, the general principle is that a successful plaintiff, as is the case in the instant proceedings, is entitled to be compensated for the loss suffered but is not entitled to profit from the loss.

[41] Third, when determining the quantum of damages in such claims, the courts seek in aid awards granted in comparable cases, although – and this is important – the instant court must always take into account the circumstances of each individual case (*Getachew v Government of the Republic of Namibia* 2006 (2) NR 720 (HC)). Ms Van Wyk did well to refer the court to a number of cases, albeit they are South African cases. They are, no doubt, persuasive. I have, therefore, distilled from those cases the well-reasoned justification and factors taken into account by the courts there. Be that as it may, the court is alive to the fact that the strength and level of South Africa's economy are incomparable to Namibia's.

[42] Fourth I should, based on the *Getachew* approach (see *Getachew v Government of the Republic of Namibia*), look at the circumstances of the present matter – through the prism of the circumstances surrounding the unlawful omission of the medial personnel and also the prism of the circumstances of the unspeakable and enduring loss suffered by a grandmother who at one go loses her daughter and her baby grand-daughter. But, as plaintiff accepted in her cross-examination-evidence, no amount of money can heal such grave loss. Nevertheless, the law must attempt to compensate plaintiff for her loss in a manner open to the law, the purpose of which is to draw the attention of medical personnel to their legal duty not to harm

patients they treat through their wrongful conduct, and that if they did, there would be consequences. But it is never the aim of such award to stifle initiative of medical personnel and shake their confidence (see *Roe v Minister of Health*). It is to insist on the medical personnel's legal duty and to condemn them in damages if they failed in that duty. The aim is also not to enrich successful plaintiffs and punish defendant hospitals and their personnel by ruining the hospitals financially.

[43] Fifth, in that regard, the Supreme Court of Appeal South Africa have cautioned that in making an award for general damages, courts should guard against duplication of awards and awards overlapping, and plaintiff being overcompensated. (*Ngubane v South Africa Transport Service* 1991 (1) SA 756 (A))

[44] I have also kept in my mental spectacle that no evidence was led to establish that Margaritha bore a duty of support towards the plaintiff. (See Max Loubser (Ed) and Rob Midgley (Ed) *The Law of Delict in South Africa* at 386.) The evidence is only that in the eyes of plaintiff Margaritha was a star among her siblings and she expected her daughter to attain great heights after graduating as a nurse. Not meaning to be disrespectful to the feelings of plaintiff, I will say, that is the hope every parent has in one or more of his or her children. But such hope has not always come to pass in concrete terms – and not always through the agency of another person. In any case, such hope is naturally too tenuous and ephemeral to put a monetary value on it.

[45] I now proceed to consider the damages that plaintiff claims under the principal claim. And in doing so, I shall take into account the principles and approaches discussed in paras 39 to 44, and, of course, the evidence.

[46] As respects damages for emotional shock and trauma (para 13.1 of the particulars of claim), it has been said that in virtue of various policy considerations, courts approach claims based on nervous or emotional shock with caution. (M Loubser (Ed) and R Midgley (Ed) *The Law of Delict in South Africa* (2015) at 305) In *Road Accident Fund v Sauls* 2002 (2) SA 202 (SCA) at 215, the court said that the issue is one of reasonableness and awarded damages to a fiancée who had a live – in relationship with a person injured in an accident, which she had witnessed. The

closer the relation, the more likely it will be that the emotional harm will be regarded as foreseeable. Successful plaintiffs are mostly persons who personally experienced the traumatic incident. In *Bester v Commercial Union Versekeringsmaatskappyy van Suid-Afrika Bpk* 1973 (1) SA 769 (A) (Headnote), the Appellate Division held that liability for psychological harm must be determined on the basis of reasonable foreseeability.

[47] According to the modern approach to legal causation, the critical question is whether there was sufficiently close relationship between the tortfeasor's wrongful conduct and the psychological harm, for courts to impute such harm to the tortfeasor, taking into account policy considerations based on reasonableness, fairness and justice. Of course, it must be noted, as I have said previously, that the foreseeability of harm is not a decisive factor when dealing with legal duty, though an important factor. In my judgment, taking into considerations the aforementioned principles and approaches and on the facts, I think an award of N\$300 000 is fair and reasonable.

[48] No evidence of any substance was led to support damages for inconvenience and discomfort (para 13.2, of the particulars of claim). In my opinion, 'inconvenience and discomfort' are subsumed in 'loss of amenities' (para 13.3 of the particular of claim). In any case, no cogent evidence was led to establish damages for 'loss of amenities'. I have taken into account the aforementioned caution of South Africa's Supreme Court of Appeal's caution in *Ngubane v South Africa Transport Service* that in making award for general damages, the court should guard against duplication of awards and overlapping awards. Thus, for the damages under paras 13.2 and 13.3 of the particulars of claim, it would be fair and reasonable to award a total amount of N\$200 000.

[49] I now consider damages for future medical expenses in relation to psychological counselling to deal with deceased's death, that is death of Margaritha and her baby. I accept, in the main, the evidence of Dr Shawn Whittaker, a dully qualified psychologist with vast experience. The only shortcoming in his evidence is that it is based on the 'alleged gross negligence' of the medical personnel. But the evidence, even as respects the first alternative claim, does not characterize the alleged negligence as 'gross'. In any case, the principal claim, which is now under consideration concerns the concept of legal duty.

[50] The principal claim, which is now under consideration, concerns the concept of legal duty as mentioned previously. Dr Whittaker consulted plaintiff on 18 September 2018. Dr Whittaker's witness statement was filed with the court on 31 October 2018. As I see it, the sixth period within which plaintiff was to undergo a long-term psychotherapy and to take the relevant psychotropic medication passed in March 2019; and so, Dr Whittaker, who testified at the beginning of November 2018, should have done well to place before the court specific and exact amounts of charges and fees for the sessions and the cost of the medication. The Doctor's evidence is short in that department. Neither does plaintiff's own evidence cure this deficiency. Indeed, the 'failure' referred to in par 13.4, read with para 17.4, of the particulars of claim has passed with the passing of March 2019. For these reasons and in the circumstances, the court is entitled to fix an amount that is fair and reasonable. And I think an amount of N\$100 000 is fair and reasonable on the facts and in the circumstances of the case.

[51] I now come to the damages claimed for funeral expenses. Here, too, there are no specific and exact amounts supported by credible receipts; and so, it is not established how plaintiff arrived at the round figure of N\$ 100 000. Of course, I take it that it is not reasonable to expect a grieving parent and her relatives and friends to insist on receipts for every expense imaginable during the funerals and burials. What is relevant is that in those circumstances and on the facts, it cannot be discounted that plaintiff incurred funeral expenses. In that regard, I find that the fact that the receipts concerning funeral expenses do not bear the name of plaintiff answers to the principle *de minimis non curat lex*. The court does not expect a grieving parent to go around himself or herself doing all the things, including buying things and paying for services, necessary and required for a funeral. The AVBOB receipts are for N \$18 222, N\$16 600 and N\$16 222; and the total is N\$51 042. In my opinion, those charges are reasonable; and so, I accept the amount of N\$51 042 as the cost to plaintiff of the two funerals.

[52] Based on the foregoing reasoning and conclusions, I order as follows:

- (c) Judgment for plaintiff in the amount of N\$651 042, plus interest at the rate of 20 per cent per annum *tempore morae* from the date of this judgment to the date of full and final payment.
- (d) Costs of suit.

C PARKER
Acting Judge

APPEARANCES:

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FIRST DEFENDANT: N KANDOVAZU
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