

**REPUBLIC OF NAMIBIA**



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**JUDGMENT**

**CASE NO: HC-MD-CIV-ACT-DEL-**

**2017/03939**

In the matter between:

**MARTHA SHIKONGO  
DENNY MWANYEKANGE  
PLAINTIFF**

**FIRST PLAINTIFF  
SECOND**

and

**MINISTER OF HEALTH AND SOCIAL SERVICES  
DEFENDANT  
GOVERNMENT OF THE REPUBLIC OF NAMIBIA  
DEFENDANT**

**FIRST  
SECOND**

**Neutral citation:** *Shikongo v Minister of Health and Social Services* (HC-MD-CIV-ACT-DEL-2017/03939) [2021] NAHCMD 231 (12 May 2021)

**CORAM:** PRINSLOO J

**Heard:** 5-8 October 2020, 16-18 November 2020, 22 February 2021 and 26 February 2021

**Delivered:** 12 May 2021

**Reasons:** 14 May 2021

**Flynote:** **Law of delict** – All five elements of delict must be present before the conduct complained of may be classified as a delict – Damages suffered by the plaintiff as a result their minor child passing away after being vaccinated – Plaintiffs alleging vaccination administered by defednants is cause of death – Plainitffs alleging defendants failed to provide first plaintiff with information on the risks and benefits of the vaccinations as such no informed consent was given by first plaintiff – elements of informed consent and causation discussed – Court finding no link between minor childs death and vacination – Plaintiffs failing to prove case on a balance of probabilities – Accordingly plaintiffs claim is dismissed.

**Summary:** The plaintiffs' caused summons to be issued against the defendants as a result of their six week old baby passing away a few hours after he had been vaccinated by a nurse in the employment of the defendants, whose identity is unknown. The plaintiffs alleged that the death of their baby was caused by the vaccination. The plaintiffs further claimed that the first plaintiff was not provided with informed consent to enable her to know the benefits, risks and consequences that accompanied the vaccination administered to the minor child. The post- mortem indicated that the cause of death was "vaccination related death."

The defendants denied liability and plead that the plaintiffs have failed to establish a causal link between the vaccination administered and the death of the baby. The plaintiffs called five expert witnesses who testified that the vaccination was not the cause of the baby's death. Court finding expert witness's evidence to be more probable than the plaintiffs on a balance of probability. Consequently, plaintiff's claim is dismissed.

*Held that* the case presented by the plaintiffs to court does not support their contentions. *Held that* the experts found themselves to be at a disadvantage in this matter and in order for them to make an actual diagnosis as to the cause of death all the expert reports should have been correlated and considered together with the clinical history of the baby but this was not done.

*Held that* court cannot fault the expertise of the experts in their respective fields of specialty and court believing that if the experts were presented with the 'big picture' all of them would have been able to present this court with a diagnosis as to the cause of death.

*Held further that* informed consent forms the basis of the doctrine of *volenti non fit injuria* that justifies conduct that would otherwise have constituted a delict or crime if it took place without the victim's informed consent. In order for consent to be valid the patient must have the capacity to consent. Accordingly, "capacity to consent" refers to the intellectual and emotional ability of the patient to comprehend and understand the nature of any proposed treatment and the consequences thereof.

*Held further that* to assess whether the patient has given informed consent to the procedure, it must be established whether they have been provided with adequate information to make an informed choice. This is not an absolute right, and in some circumstances the doctor is not required to disclose specific details if, for example, the patient is already aware of the information.

*Held that* evidence has been led by the experts that testified on behalf of the plaintiffs clearly indicated that the vaccination was not the cause of the demise of the baby and that his death must have been caused by an underlying condition.

*Held accordingly that* having considered all the evidence, medical and otherwise, presented before this court, court must find that the demise of Baby Paulus was not as

a result of the vaccination administered on 23 January 2015. The claim of the plaintiffs must thus fail.

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### ORDER

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1. The first and second plaintiffs claim is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalized.

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### JUDGMENT

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PRINSLOO J

#### Introduction

[1] It is generally accepted that immunization is one of society's most valuable weapons for combatting communicable diseases. Health authorities exhort the public to participate in immunization programs. Namibia is no different and there is little doubt in my mind that the Ministry of Health and Social Services, Namibia is firmly committed to immunization.

[2] The matter before me stems from the immunization of little Paulus Jona Mwanyekange (baby Paulus), who was born on 3 December 2014 and passed away on 23 January 2015.

[3] On 23 January 2015 baby Paulus, approximately 6 weeks old at the time, received his six week immunization at the Okuryangava Clinic, Katutura, Windhoek.

[4] On the said date baby Paulus received a combination immunization of Polio (OPV1) oral drops; intramuscular Pentavalent 1 vaccination (consisting of Diphtheria, Pertussis, Tetanus, Hepatitis B (Hep B) and Haemophilus (Hib)), oral Rotavirus drops and Pneumococcal vaccination<sup>1</sup>. This vaccination was done according to standard protocol.

### The parties

[5] The first and second plaintiffs are Martha Shikongo and Denny Mwanyekange, who are the parents of baby Paulus, residing at Okahandja Park, Katutura, Republic of Namibia.

[6] The first defendant is the Minister of Health and Social Services, a Minister of State duly appointed as such in terms of the applicable provisions of the Namibian Constitution with his principal offices located at Ministerial Building, Harvey Street, Windhoek cited herein in his aforementioned capacity and in his capacity as a representative of the Namibia Government.

[7] The second defendant is the Namibian Government, represented herein by the aforementioned first defendant and served in the care of the offices of the Government Attorney, 2<sup>nd</sup> floor, Independence Avenue, Sanlam Centre, Windhoek.

[8] For purposes of this judgment the first and second plaintiffs are jointly referred to as the plaintiffs and the first and second defendants as defendants.

### The pleadings

[9] The plaintiffs seeks damages against the first and second defendants arising from the death of baby Paulus.

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<sup>1</sup> Exhibit D.

[10] The plaintiffs caused summons to be issued against the defendants on 19 October 2017 and pleaded that the defendants are liable to them (also on the basis of vicarious liability) in the sum of NAD 718 500, which is calculated as follows:

10.1 emotional and psychological shock and trauma, inconvenience and discomfort, for which plaintiff's claim NAD 500 000 jointly;

10.2 patrimonial damages, totaling NAD 18 500 computed and arrived at as follows: funeral expenses, coffin and transportation in respect to the funeral costs and arrangements;

10.3 past and future medical expenses in relation to psychological assessment and counselling required by the plaintiff in light of the afore-pleaded, totaling NAD 200 000.

[11] In addition thereto the plaintiffs claimed interest on the amount of NAD 718 500 at the rate of 20% per annum *a tempore morae* and costs of suit, including the cost of one instructed and one instructing counsel.

[12] The plaintiffs pleaded that the defendants were negligent in one of the following ways, which lead to the death of baby Paulus:

'10. The death of the deceased minor child was caused as a result of the breach of one or more of the afore-pleaded duties and as a result of the wrongful and negligent conduct of the defendants and the nursing staff afore-pleaded, alternatively breaches of terms of the oral agreements (there also not having been prior informed consent by the first plaintiff in respect of the administration of the vaccines), in that-

10.1 in respect of the defendant and the nursing staff employed at the clinic-

(a) they failed to ensure that the vaccines and other medication administered at the clinic were properly stored in suitable conditions (also at times prior to the delivery of the vaccines to the defendants by the third party suppliers), and fit for the purposes intended;

- (b) they failed to ensure that the vaccines and other medication administered at the clinic were suitable for administration to humans;
- (c) they failed to ensure that the vaccines and other medication administered at the clinic were safe and would not adversely impact on persons to whom same is administered;
- (d) they failed to ensure that the vaccines and other medication administered at the clinic would not cause the death of persons to whom same was administered;
- (e) they failed to obtain proper informed consent from the parents of the deceased minor child prior to administration of the vaccines;
- (f) they acted negligently, resulting in the ultimate death of the deceased minor child;
- (g) they failed to exercise due care and skill in the administration of vaccines and medicines, and failed to ensure the health and well-being of the deceased minor child.'

[13] The defendants in response to the plaintiffs' claim pleaded (in summary):

13.1 That the vaccines and other medication administered at the clinic were suitable for administration to humans and are safe and that in terms of the World Health Organization (hereinafter referred to as "WHO") any licensed vaccination is rigorously tested across multiple phases of trials before it is approved for use on humans and regularly reassessed once it is on the market.

13.2 That the defendants' normal procedure is to inform the plaintiffs or any other patient of the nature of the treatment, i.e. that the child is getting a vaccine, whether it's injected or oral; the risks and benefits of the treatment, the benefits of the vaccine, in other words, the risks from the disease they vaccinate against; the risks of the vaccine, potential side effects; alternatives, which do not really exist for vaccines.

13.3. That the employees are required not to act negligently and to apply their knowledge, skills and experience in administering the vaccinations. The defendants further plead that the employees exercised due care and skill in administering the vaccinations which is required of them.

13.4 That the defendants admit that the deceased minor child was presented for administration of vaccination as per state required schedule vaccinations at the Okuryangava Clinic.

13.5 That the patients who come for vaccinations are provided with health education in groups, as well as individually during the administration of the vaccine and are informed to bring back their children should there be any adverse effects post the administration of such vaccinations.

13.6 That the plaintiff<sup>s</sup> failed to inform the defendants of such alleged adverse effects after the administration of the vaccine.

13.7 That the employees are required not to act negligently and to apply their knowledge, skills and experience in administering the vaccinations. The defendants further plead that the defendants' employees did not fail to ensure the health and well-being of the deceased minor child.

13.8 That the vaccines are properly stored, as they are kept in a fridge, where the temperature is checked on a daily basis over a monthly period. Which temperature is monitored to ensure that it is suitable to fit the required conditions the vaccines should be kept.

13.9 That the vaccines and other medication are suitable for the purposes intended.

13.10 That the defendant denies that the vaccination was the cause of the deceased minor child's death and when it comes to vaccination that no one can determine how vigorous an individual's immune's response would be.



13.11 That vaccines are some of the safest medical products which are administered to millions of healthy people, including infants, to prevent serious diseases.

13.12 The defendants further denies that the employees acted negligently, resulting in the ultimate death of the deceased minor child.

[14] The following are common cause between the parties or have not been disputed:

a) Baby Paulus was born on 3 December 2014 with a birth weight of 3.4 kg and a normal APGAR score of 9 and 10 after 1 and 5 minutes of life respectively.

b) Baby Paulus was born with an abnormal thumb with an attached extra digit for which x-rays were done while in hospital<sup>2</sup>.

c) Although the entry dated 11 December 2014 on the medical card of baby Paulus refers to 'possible referral to physiotherapy' baby Paulus did not receive physiotherapy or management for the thumb as the extra digit fell off by its own<sup>3</sup>.

d) The first plaintiff (Martha) presented baby Paulus for his six week routine vaccination at Okuryangava Clinic on 23 January 2015.

e) A nurse, whose identity is unknown, administered the said vaccines to baby Paulus at between 12h00 and 12h25.

f) Upon having returned home after the administration of the vaccines baby Paulus was crying uncontrollably and refused to feed. Baby Paulus developed a breathing difficulty and passed away approximately three hours later.

g) The nurse who administered the vaccines was employed by the defendants and was a staff member at the Okuryangava Clinic.

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<sup>2</sup> Exhibit B.

<sup>3</sup> Exhibit C.

- h) The Okuryangava Clinic was staffed by nursing staff and medical practitioners that were employed by the defendants.
- i) The clinic was stocked with vaccines and medicine supplies, procured and/or sourced by the defendants for the purpose of distribution and administration to persons presenting themselves or others at the clinic for purposes of being vaccinated.
- j) The defendants had a duty to ensure that these vaccines and other medication stored by them and/or administered at the clinic were fit for the purposes intended; were suitable for administration to humans, were safe and would not adversely impact on persons to whom it was administered; to ensure proper treatment is in place in the unlikely event that an adverse reaction should occur and to exercise due care and skill in the administration of vaccines and medicines, and in ensuring the health and well-being of patients who present themselves or who are presented at the clinic.
- k) A Causality Assessment Committee, constituted from representatives from the Ministry of Health and Social Services, the World Health Organization (WHO), United Nations' Children's Fund, Medi-Clinic, Namibia Instituted of Pathology, were tasked to investigate the cause of death of baby Paulus.
- l) According to the research of the Causality Assessment Committee there was no evidence that the death of baby Paulus was caused by the vaccines or errors originated from the Ministry's Immunization Programme.
- m) A postmortem was conducted on 27 January 2015 by the late Dr. Yury Vasin on baby Paulus and the cause of death is indicated as 'vaccination related death'.

## Evidence adduced

### Plaintiff's case

[15] The plaintiffs testified and further called seven witnesses who testified in support of their case. I will deal with their evidence in the sequence they testified.

#### *Martha Shikongo*

[16] Martha Shikongo (hereinafter "Martha") testified that she is the biological mother of baby Paulus, born on 3 December 2014, a healthy baby who fed well and had no health issues, apart from the fact that the little one was born with an extra digit. However, when she took baby Paulus for his follow up consultation at the clinic on 11 December 2014 the extra digit had fallen off on its own.

[17] Martha testified that on 23 January 2015 at around 09:00 a.m. she took the baby to Okuryangava State Clinic for his six week immunization. She arrived at around 09:30 at the Clinic where she waited in the queue until around 12:00 noon when her turn came to see the nurse (she and five other ladies with their babies saw the nurse together). Martha testified that one nurse weighed baby Paulus and another nurse gave him the polio drops. Hereafter, the baby was injected on both his legs, one after the other. Martha testified that the nurse never explained anything to her apart from informing her that they were done and that she can go home.

[18] Martha further testified that after the immunization was administered she left for home and baby Paulus started crying whilst in the taxi. She tried to breastfeed the baby but he was crying non-stop until they reached their house at around 13:30. She testified that in between the crying she observed that the baby was gasping as though he was out of breath and would stop crying for a while to catch his breath. She gave the baby to Denny, the second plaintiff, who held the baby and soothed him. Baby Paulus would be quiet for a while and would appear to be sleeping, however, after a few minutes he

would wake up and start crying again. She tried to breastfeed him again but he still refused to feed.

[19] According to Martha she repeatedly tried to feed baby Paulus but he refused to feed and her and Denny would take turns to comfort the little one. Again baby Paulus went quiet and she put him to bed and that is when she noticed blood coming out of the baby's mouth and nose. Martha further testified that she noticed white foam stained with blood coming out of the corners of the baby's mouth and that there was a strong medicinal smell emanating from the baby. When she touched baby Paulus she realised that he was no longer breathing or moving.

[20] A neighbor called the police who came at around 17:00 where after baby Paulus was removed and taken to the Mortuary. The couple was informed to attend to the mortuary the following Monday to get the results of the post mortem examination. The post mortem report was however only concluded on Tuesday and provided to second plaintiff.

[21] Martha testified that baby Paulus was buried on 28 January 2015 and that they contracted Tommy Jarman Funeral Services to conduct the funeral service. Martha testified that as a family they incurred a number of expenses as a result of the funeral i.e.:

- a) N\$ 1 643 for the funeral services which she provided the court with the proof of payment;
- b) N\$ 6 000 for food, drinks and transport she however did not have receipts for those as these expenses were attended to by different individuals;
- c) N\$ 10 000 as yet to incur a further expense for the tombstone.

[22] Martha testified that she suffered emotionally since the baby's death and she could not sleep, she had nightmares as a result of the baby's traumatic death and that she was assessed by Dr. Shaun Whittaker, who prepared a report on her assessment.

She testified that to the fact that the government's refusal to take responsibility for what happened to her baby makes it worse.

[23] On 26 February 2015 a letter was addressed to her and the second plaintiff by the Permanent Secretary of Ministry of Health and Social Services, wherein they were informed that the investigations into the death of baby Paulus were completed and they were invited to attend a meeting scheduled for 2 March 2015 where they would be informed of the outcome of the investigations. Martha testified that she was not present at the meeting and cannot testify as to what transpired at the meeting.

[24] Pursuant to the said meeting they received a further letter from the Ministry of Health and Social Services, wherein the Permanent Secretary suggested that there might have been five possible causes of baby Paulus' death. One such possible causes of death was listed as Thrombocytopenia-absent radius (TAR) syndrome, because of the baby's abnormal thumb and extra digit. Martha testified that she does not understand the medical terminology but the mere suggestion that the condition relating to the extra digit was the cause of death is upsetting because the afore-mentioned condition has been in the second plaintiff's family for years and no one has died from it to her knowledge.

[25] Martha testified that she has three older children (aged 11, 8 and 3 years respectively) and most of them as well as her husband Denny have an extra digit and all of them are healthy. Martha testified that to her knowledge the postmortem report identified the cause of death as vaccination and that is what she believes to be the cause of death.

[26] Ms Zenda invited Martha to comment on the evidence of Nurse Irja Thomas, who stated that there was health education done in groups with the parents prior to the immunization, whereafter the names of the children were called out and the nurse explained the type of antigen the child will receive as well as the possible side effects

and to return to the clinic upon experiencing the side effects. Martha was however adamant that they were not told anything about side-effects, or that there was any health education done.

[27] During cross-examination Mr. Chibwana confronted Martha with the expert report of Dr. Bau, whose finding was that baby Paulus' passing away was due to underlying conditions however Martha was insistent that the cause of death was due to the vaccination received. Martha was not willing to accept Dr. Bau's report or that the Ministry of Health and Social Services might not to blame for the death of baby Paulus.

[28] When confronted with the plaintiffs' calculations in respect of the patrimonial damages the witness testified that there is no receipts available in respect of the funeral expenses apart from the Funeral Home amounting to N\$ 1 643. There is also no quotation in respect of the tombstone incorporated in the amount of N\$ 18 500.

[29] In respect of the claim for past and future medical expenses, Martha testified that both she and Denny attended to Dr. Whittaker only once in 2018 and neither one of them received psychological treatment prior to the issuing of the summons. Martha testified on questions by Mr. Chibwana regarding the difference between the costs of the actual treatment of N\$ 7 068 and the N\$ 200 000 claimed that the lesser amount is Dr. Whittaker's estimation but she claims N\$ 200 000 for past and future medical expenses.

[30] When Mr. Chibwana questioned Martha as to why she did not take the baby to hospital to be treated when he cried continuously after the vaccination, she testified that even if she considered taking the baby to hospital, this was a first for her but she thought that the baby would eventually stop crying. Martha confirmed that she did not call the ambulance until such time that the baby passed away, however for approximately one and a half hour prior to death baby Paulus was gasping for air.

*Denny Mwanyekange*

[31] The second witness to testify in support of the plaintiffs' case was the second plaintiff, Denny Mwanyekange (Denny), who is the biological father of baby Paulus.

[32] Denny testified that baby Paulus was born healthy despite the extra digit at his right thumb. Denny testified that in his family they have a history of being born with extra digits, his first born son was born the same way and he did not have a problem with his health and he is over six (6) years old now. Denny testified that the extra digit usually falls off on its own just like his did when he was younger.

[33] Denny testified that from birth baby Paulus was breastfeeding properly and had no medical problems.

[34] Denny further testified that he did not accompany Martha to the clinic on the day of baby Paulus' immunization. He confirmed that upon Martha's return from the clinic baby Paulus cried continuously and was inconsolable. He attempted to soothe the little one and it would only work for a little while and then the baby would start crying again.

[35] This continued for a while and when baby Paulus fell silent they thought he was asleep and Denny handed the baby to Martha to put to bed. That is when he noticed blood coming out of the baby's mouth and nose as well as white foam stained with blood coming out of the corners of baby Paulus' mouth. There was also a strong medicinal smell coming out of the baby's body. Martha touched his face and she started screaming. He realised that something was wrong with the baby. A neighbor immediately came and took the baby and put him inside the house. The police were also called to come.

[36] Denny testified that during February 2015 outreach people from the Ministry of Health and Social Services gave him a letter dated 26 February 2015 addressed to him and the first plaintiff. He testified that the letter informed them that the investigations were completed and that a report had been compiled and they were invited for a

meeting scheduled for 2 March 2015 where they would be informed of the outcome of the investigations.

[37] Denny testified that he attended to the meeting as requested and he was informed that the death of baby Paulus was not caused by the vaccination but rather either malnutrition, Sudden Infant Death Syndrome (SIDS) amongst other causes. He was not told what specifically happened to their baby but rather an outcome that was given as a general assumption based on Ministry's own statistics, not on evidence based results emanating from the results of the tests and further analysis which he thought were being conducted.

[38] On the 19th of March 2015 the plaintiffs received another letter in which the Permanent Secretary: Health and Social Services suggested that baby Paulus' death could have been caused by Thrombocytopenia-absent radius (TAR) syndrome because of his abnormal thumb and extra digit.

[39] Denny testified that this letter made him very upset because that condition has been in his family for years and no one has died from this condition to his knowledge. He further testified that he is not prepared to accept any findings other than that his child died because of the vaccination.

[40] During cross-examination Denny testified that baby Paulus cried continuously but they thought it was because of the pain of the vaccination and thought he would settle and when the little one started gasping for breath he thought that it is as a result of the baby crying so much. Neither he nor Martha thought of calling the ambulance or to take the baby to the hospital.

[41] In respect of his claim for past and future medical expenses Denny confirmed that he only saw Dr. Whittaker once and the consultation was paid for by the Legal Assistance Center. He however testified that they need treatment as neither he nor Martha can sleep properly.



*Dr. Shaun Whittaker*

[42] The third witness to testify was Dr. Shaun Whittaker, who testified as an expert witness. Dr. Whittaker is a duly qualified and practicing clinical psychologist and registered as such with the relevant qualifying bodies in Namibia.

[43] Dr. Whittaker testified that he did a psycho-diagnostic evaluation of the first and second plaintiff on different days, with a session of 60 minutes each, which was adequate to determine a diagnosis and a treatment plan. Dr. Whittaker further testified that he did his diagnosis in terms of the Diagnostic and Statistical Manual (DSM-IV-TR) of the American Psychiatric Association (2000) criteria.

[44] Dr. Whittaker testified that based on the information provided to him by the first plaintiff he came to the conclusion that the first plaintiff suffered from major depression as she manifested the following symptoms: depressed mood, insomnia, decreased concentration, low appetite, inertia and diminished interest in activities as result of the sudden and horrific passing away of her son, Paulus in January 2015 a few hours after he had been vaccinated. Dr. Whittaker further testified that the first plaintiff witnessed blood from the nose and mouth of her son at the time of his death.

[45] With respect to the second plaintiff, Dr. Whittaker testified that based on the information provided to him, the second plaintiff is suffering from major depression as manifested by the following symptoms: dejected mood, sleeplessness, reduced appetite, loss of vigor and significant lessened interest in activities as a result of the sudden and horrific passing away of his son, Paulus in January 2015 a few hours after he had been vaccinated. Dr. Whittaker further testified that the second plaintiff also witnessed blood flowing the nose and mouth of his son at the time of his death. He further testified that the second plaintiff's condition is worsened by the fact that the deceased son died in his hands and he also had to comfort the first plaintiff while mourning his son too.

[46] With respect to first and second plaintiff's, Dr. Whittaker testified that he had worked a treatment plan for the plaintiffs and that he recommended the plaintiffs undergo long term psychotherapy of at least six (6) session or more depending on the progress.

[47] During cross-examination, Dr. Whittaker indicated that he consulted with the plaintiffs once each as result of them being referred to him by the Legal Assistance Centre<sup>4</sup> for an evaluation and not for treatment.<sup>5</sup>

*Dr. Brona Nawa Mundia*

[48] The fourth witness for the plaintiffs was Dr. Brona Nawa Mundia, who testified on subpoena. Dr. Mundia testified that she holds a Master for Science degree in Chemistry as well as a Bachelor's Degree in Chemistry and Biology, both obtained from the University of Namibia. Dr. Mundia testified that she is employed at the National Forensic Science Institute as a Forensic Scientist and that she worked on the blood samples that was submitted to the laboratory and as result thereof produced a report under serial number 243/2015/R1<sup>6</sup> handed up as Exhibit L, which indicated that no organic compound of toxicological significant was detected.

[49] Dr. Mundia testified that she carried out an examination or test on organic compound substance that might be of toxicological significance and this was done using a method of gas chromatography mass spectrometry or a GCMS.<sup>7</sup> She further testified that the sample was received by her office on 3 February 2015 but was only tested around September/October 2017 because she was the only scientist at the time doing toxicological analysis for the whole country and that she was overworked. Dr. Mundia indicated that there is no effect on blood samples being tested two years eight months later after it been collected as long as it is properly stored and preserved.

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<sup>4</sup> Transcribed record p 23 line 20.

<sup>5</sup> Ibid, p 27 line 10.

<sup>6</sup> Exhibit L.

<sup>7</sup> Ibid, p 33 line 30.

[50] Dr. Mundia further testified that in this case it was not specified as to which compound to look at, in such instances they do a general screening, meaning they just look for anything they can find in that sample using the general screening protocol.<sup>8</sup>

*Dr. Albertina Mpingana Ithana*

[51] The fifth witness to testify on behalf of the plaintiffs was Dr. Albertina Mpingana Ithana who testified on subpoena that she is a pathologist with a Master's degree in Anatomical Pathology from the University of Stellenbosch.<sup>9</sup> Dr. Ithana testified that she was employed at Namibia Institute of Pathology (NIP) from 2010 until 2016.

[52] Dr. Ithana testified that on 29 January 2015 she received tissue samples from the brain, the lungs, the liver, the kidney, the heart and from the spleen from the Windhoek Mortuary under PM 15/2015 Windhoek for examination and analyses.

[53] The clinical history of the deceased was given as 'a six weeks born male' and 'sudden unexpected death at home after being vaccinated'.

[54] Dr. Ithana testified that following the microscopic examination of the tissue samples she found that all the samples were within normal limits but the lung sections showed aerated lung tissue with congestion and hemorrhage.

[55] On 4 March 2015 Dr. Ithana produced a report<sup>10</sup> with her finding, which was: 'lung: acute respiratory distress due to pulmonary hemorrhage'.

[56] Dr. Ithana simplified her diagnosis of 'acute respiratory distress due to pulmonary hemorrhage', as follows:

- acute: acute refers to something which has happened recently most likely from one hour to twenty four prior to death;

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<sup>8</sup> Ibid, p 42 line 20 to 30.

<sup>9</sup> Ibid, p 48 line 30.

<sup>10</sup> Exhibit K.

- and respiratory distress is when a person is having difficulty breathing; and
- pulmonary haemorrhage refers to bleeding inside the lungs.<sup>11</sup>

[57] Dr. Ithana testified that when the blood vessels in the lung are dilated it causes the alveoli (air sacs) to fill up with blood instead of oxygen. The result is that once the air spaces are filled with blood the child would have difficulty in breathing and if not assisted medically with a breathing apparatus the child will die.

[58] Dr. Ithana testified that she only received two lung tissue samples which she analyzed, instead of the five samples she would normally require (one sample from each lobe of the lungs). From her analyses she could see no signs of infection, and no sign of previous inflammation or of chest trauma that could result in the rupture of the blood vessels.

[59] Dr. Ithana explained that bleeding in the lungs comes from blood vessels which have ruptured and these blood vessels are part of the normal architecture of the lung.<sup>12</sup> She further explained that there are various causes that can result in the rupturing of blood vessels, i.e. if the person is not getting enough oxygen then the tissue will become swollen (hypoxia). Such rupture of the blood vessels can also be caused by chest trauma that is sustained as a result of a motor vehicle accident.

[60] Ms Zenda questioned Dr. Ithana on what would cause blood coming from the nose and eyes of baby Paulus as well as the white foam specked with blood coming from his mouth. Dr. Ithana testified that the small blood vessels in the nasal passage and the conjunctiva can rupture as well depending on what the cause is. Regarding the white foam Dr. Ithana testified that the white foam would be as a result of the mixture of salivation and air but reiterated that the secretion would depend on where it comes from.

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<sup>11</sup> Transcribed record of proceedings p 59 line 30.

<sup>12</sup> Ibid p 55 line 30.

[61] Dr. Ithana testified that normal causes for the rupturing of the small blood vessels can be attributed to an increase in pressure for example when the baby is crying, defecating or vomiting.

[62] Dr. Ithana testified that it therefore is of critical importance to have clinical pathological correlation with the clinical setting of death of the child, i.e., the what, where, when, was assistance rendered and if so by whom and what assistance etc. and also findings during the postmortem. Dr. Ithana testified that her duty was to determine what was wrong with the tissue samples received and then there had to be correlation with the finding of the other role players like the pathologist and clinical information that would be forthcoming from the family members only then can a final diagnoses be reached.

[63] During cross-examination, Dr. Ithana testified that none of the previous clinical history was at her disposal and she would therefore not be able to make a diagnosis as to the cause of death and will not be in the position to say whether the vaccine was the cause of death or any other possible cause for that matter.<sup>13</sup>

*Dr Mamadi Gotartine Guriras*

[64] The sixth witness to testify on behalf of the plaintiffs was Dr. Mamadi Gotartine Guriras, who testified that she holds a Bachelor's of Science Degree from the University of Namibia and a Bachelor of Medicine and Bachelor of Surgery (MBChB) from the University of Stellenbosch. She testified that she is a Forensic Medical Officer by profession and is stationed at the Windhoek Mortuary.

[65] The witness further testified that the postmortem of baby Paulus was conducted by her late colleague, Dr. Yury Vasin, but by virtue of her training she is duly qualified to express a view and form an expert opinion in the action before this court.

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<sup>13</sup> Ibid p 62 line 20.

[64] Dr. Guriras testified that she read the medical records of the deceased baby and proceeded to draft a report thereon.<sup>14</sup>

[65] Dr. Guriras testified that when conducting autopsies they get a general history of the circumstances surrounding the death whereafter the general, external and internal examinations of the body and organs take place.

[66] Dr. Guriras testified that she considered the autopsy findings by Dr. Vasin in his report and is of the opinion that it is quite non-specific and therefore the cause of death should rather have been certified as 'undetermined' until such time that the investigations into the cause of death was completed. Dr. Guriras submitted that only upon receipt of the results of the analyses of histological, biochemical and toxicological samples taken during the postmortem could a final determination be made as to the cause of death.<sup>15</sup>

[67] She further testified that since non-specific pathological cause of death was determined during the autopsy the provisional diagnosis made by Dr. Vasin fell back onto the history obtained and a diagnosis of 'vaccination related death' was made, as per the postmortem report. Dr. Guriras testified that the finding of pulmonary hemorrhage by NIP, in her view, is also very non-specific as it only means that the child went into respiratory distress. The issue that needed to be determined was the underlying cause of death.

[68] During cross- examination, Dr. Guriras testified the there was no clear indication that the vaccine was the actual cause of death.<sup>16</sup>

*Dr. Steffen Bau*

[69] The seventh and final witness was Dr. Steffen Bau, who also testified as an expert witness. He testified that he is a duly qualified and practicing medical practitioner

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<sup>14</sup> Exhibit M.

<sup>15</sup> Transcribed record of proceedings p 86-87 lines 20-30.

<sup>16</sup> Ibid p 30 lines 89-90.

specializing in pediatrics since 2012. He testified that he prepared a report in respect of the case involving baby Paulus, who passed away in close proximity to vaccination.

[70] Dr. Bau testified that immunization should be undertaken under direct supervision with resuscitation equipment available. He further testified that it is common for infants to cry after being immunized for a short period and it is for that reason that he found that it was abnormal for an infant to cry for a period exceeding ninety minutes.

[71] During his testimony Dr. Bau referred this court to quite a number of literature pieces relating to immunization, for consideration by this court. Dr. Bau testified that vaccination of children with underlying medical conditions should be done under the guidelines in module 5 of the World Health Organization Standards titled “Immunization in Practice – A practical guide for health staff”. Dr. Bau testified that examination of children before vaccination will determine the acute health status of the child and uncover diseases such as pneumonia, diarrhea, malaria, measles and malnutrition.

[72] According to Dr. Bau, precautionary measures that personnel in public health facilities ought to take to determine underlying medical conditions include asking the parents for any known diseases of the child. Dr. Bau testified that the deceased’s minor child health passport contains a note that Hepatitis B immunization was given on 4 December 2014, however, there is no indication that the BCG vaccine<sup>17</sup> or the Polio infant drops were given nor is there an indication that the vitamin K was given at birth. Dr. Bau testified that the cause of death as per the diagnosis on the histopathological review is “acute respiratory distress due to pulmonary hemorrhage” whereas the death certificate states “vaccination related death” on 23 January 2015.

[73] Dr. Bau testified and reiterated that it is very unusual for an infant to cry for more than 90 minutes due to a vaccination. He testified that what is very unnerving in this case is the rapid demise of what was reportedly an otherwise well infant after receiving the six weeks immunization. Dr. Bau testified that due to the close proximity to the

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<sup>17</sup> Bacille Calmette-Guerin, is a vaccine for tuberculosis (TB).

vaccination the deceased minor child's death is correctly assessed as "vaccine related death". The witness qualified this statement during the course of his evidence and I will return to it.

[74] Dr. Bau testified that he also considered the histopathological report which diagnosed an acute respiratory distress due to pulmonary hemorrhage but was of the opinion that this diagnosis is in disagreement with the findings of the pathologist, who made no findings of pulmonary hemorrhage.

[75] Dr. Bau however testified that the finding of the causality assessment report found the reliability of the forensic pathological results as questionable and Dr. Bau agreed with this assessment. This appears to be so because the pathologist failed to observe the obvious like the congenital abnormalities of baby Paulus' thumb.

[76] Dr. Bau strongly disagreed with the possible causes of death as proposed by the said committee, especially in respect of Thrombocytopenia-absent radius (TAR) syndrome as TAR syndrome relates to low platelet count absent radial structure. This means the possible absence of the thumb and not hyperplasia or duplication of a digit.

[77] Dr. Bau further discussed the remaining possible causes of death as proposed by the causality report (which he also disagreed with), which I will not discuss for purposes of this judgment. The witness is however in agreement with the view of the committee that the vaccination was not the cause of death of baby Paulus but rather that his demise was caused by an underlying condition.

[78] In the conclusion of his report Dr. Bau stated as follows:

'The infant was immunized and demised within 24 hours after immunization, which rightfully is labeled as an 'immunization related death'. However, after review of the evidence it is my professional opinion most likely that the infant demised of an underlying condition. The most likely diagnosis would be VKDB, followed by diffuse alveolar hemorrhage most likely due to idiopathic pulmonary hemorrhage. Still further information on vitamin K application at birth is



required to get a more complete picture. Other conditions such as severe hemophilia cannot be ruled out without further information on bleeding tendencies in the extended family. There is however a small possibility that this infant demised of an extremely rare immune mediated reaction to the Hepatitis B vaccination. If this indeed would be the case, this severe reaction would in my personal opinion not be the fault of the defendant as all immunization steps were documented as having been in place according to the causality assessment report. It would have been unfortunate and extremely rare idiosyncratic event that led to the demise of the baby. Regarding the opinion of the pathologist, he should have indicated the possible differentials for this "vaccination related death" and not solely blamed the vaccination itself for the infant's demise.<sup>18</sup>

[79] In amplification of the statement of the extremely rare immune mediated reaction to the Hepatitis B vaccination Dr. Bau explained it as follows:

'The conclusion is that I do not think the vaccine is to blame for the bleeding of the child because the chance of this is exceedingly rare. There is a small chance of it but it is very, very rare. Even if the vaccination would be the cause in this particular infant it is what I have already pointed out an idiosyncratic reaction. So that meaning I can give the vaccine to everyone in this room, obviously as a child because it is a child vaccination, and none of you will react. But there is going to be one in, I do not know, I cannot quantify but one in very many people that will react with thrombocytopenia<sup>19</sup>. That we know from the research that has been done. There were cases prescribed. So there are cases that very rarely can cause, that can cause, that vaccine causes thrombocytopenia and it can be if it is bad enough to cause bleeding into the lungs. That said I am not convinced that we are actually even dealing with thrombocytopenia....

Okay. --- And the point of that is because you would find petechial in the whole body and not just in the lung, and that is what was described. So that does not make sense for thrombocytopenia. So which also then points to, even if this vaccine can give you thrombocytopenia that is not really what we are dealing with. So therefore my conclusion is that is it exceedingly unlikely that this baby died of it. Even if so it was no preventable, it was not something that anybody could have foreseen to then say oh this baby does not need, does not get the vaccine. Okay, because it is a reaction that you cannot predict.<sup>20</sup>

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<sup>18</sup> Dr Bau's report at p 11 to 12.

<sup>19</sup> Meaning a low platelet count which results in problems with blood clotting.

<sup>20</sup> Transcribed record p 40 line 1 - 30.

[80] Dr. Bau confirmed that if one considers the health passport of baby Paulus he was a healthy baby and there would have been no reason for him not be immunized in terms of the WHO guidelines.

[81] On the Vitamin K deficiency bleeding (VKDB) Dr. Bau testified that all babies in Namibia receive Vitamin K intramuscularly at birth as Vitamin K is an essential vitamin that the liver needs to make clotting factors. The witness testified that Vitamin K is poorly transmitted via the placenta and if the baby does not get enough Vitamin K there would not be enough clotting factors and so the baby can bleed.

[82] Dr. Bau testified that there are three different presentation types of Vitamin K deficiency bleeding, i.e. early, intermediate and delayed. The early stage is the day of birth of the baby, the intermediate is between one day and two weeks after birth and then delayed reaction would be after two weeks. The latter is not a common occurrence.

[83] On a question of how such a Vitamin K deficiency bleeding can be diagnosed Dr. Bau testified that in the early stage there might be some bleeding from the mouth or one would see bleeding into the skin, however the delayed bleeding tends to bleed in the brain and other organs, in which instance the baby would just start bleeding because his or her clotting system is not functioning properly and depending on the degree of bleeding it may kill the child. This would result in suffocation as the lungs fill up with blood.

[84] Dr. Bau explained that the bleeding can start in the womb already if the baby does not get sufficient Vitamin K and for whatever reason the liver cannot produce the enzymes needed for blood clotting and the infant would be born with a clotting deficiency and at some point and out of nowhere the baby can start bleeding. This is not something that can be predicted.

[85] When asked by the court to explain the term 'vaccination related death' further Dr. Bau stated that the sentence in his view is a shortcut taken by the pathologist, instead of mentioning the differentials that are present. The witness explained that the death is recorded as a 'vaccine related death' as the immunization took place within 24 hours prior to death and not because the vaccination was the cause of death.

### Joint Expert Report

[86] I requested the expert for the plaintiffs and for the defendants to provide the court with a joint expert report to assist the court in narrowing down the issues in dispute. I will therefore briefly deal with the joint expert report.

[87] The joint expert report was prepared by Dr. Steffen Bau (whose expertise I have already dealt with in the preceding paragraphs) and Professor Clarissa Hildegard Pieper (hereinafter "Professor Pieper"), who is an expert witness on behalf of the defendants.

[88] Prof. Pieper is a duly qualified, registered pediatrician with a subspecialty in the field of neonatology and epidemiology and practicing as medical practitioner.

[89] Dr. Bau and Prof. Pieper both agree that baby Paulus had congenital abnormalities, which the post mortem report omitted and therefore cast a doubt on the thoroughness of the post mortem examinations.

[90] The purpose of the joint expert report was in essence for the doctors to provide this court with their expertise in deciding as to what might have caused baby Paulus' death. However, the doctors provided divergent opinions on what might have caused the death of Baby Paulus.

[91] Prof. Pieper concluded that baby Paulus died because of a congenital abnormality whereas Dr. Bau concluded that the cause of death was an underlying condition, the most likely diagnosis being Vitamin K deficiency bleeding (VKDB)

followed by diffuse alveolar hemorrhage<sup>21</sup> likely due to idiopathic pulmonary hemorrhage in infancy<sup>22</sup>.

[92] Dr. Bau further stated that there is a slight possibility that baby Paulus passed away as a result of an extremely rare immune mediated reaction to the Hepatitis B vaccination. Despite the diverging opinions on the underlying causes of death, both experts agreed that the vaccination is not what caused baby Paulus' death.

#### Plaintiff's case

[93] The plaintiffs called no further witnesses and closed their case. Mr. Chibwana, acting on behalf of the defendants elected not to call any witnesses in reply to the plaintiffs' case and as a result closed the defendants' case.

#### Issue for determination

[94] Having dealt with the evidence presented to this court the crisp question to determine is whether the vaccination administered to baby Paulus is what caused his death.

#### Arguments on behalf of the parties

[95] I will refer to the words 'submit' and 'argue' and their derivatives during my judgment and must be understood to encompass both the heads of arguments and the oral submissions made in court.

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<sup>21</sup> Diffuse alveolar hemorrhage results from widespread damage to the pulmonary small vessels, leading to blood collecting within the alveoli (tiny air sacs in the lungs).

<sup>22</sup> Acute idiopathic pulmonary hemorrhage of infancy is characterized by the sudden onset of pulmonary hemorrhage in a previously healthy infant less than 1 year of age, in whom medical problems that might cause pulmonary hemorrhage, including physical abuse, have been ruled out.

*On behalf of the plaintiffs*

[96] Ms. Zenda on behalf of the plaintiffs based her submissions on informed consent. Ms. Zenda referred this court to the Supreme Court case of *Government of the Republic of Namibia v LM and Others*<sup>23</sup> wherein the doctrine of informed consent was discussed with reference to the South African case of *Christian Lawyers Association v Minister of Health*<sup>24</sup>, which held that the basis of the doctrine of *volenti non fit injuria* justifies conduct that would otherwise have constituted a delict or crime if it took place without the victim's informed consent.

[97] Ms. Zenda submitted that when the three legs consisting of knowledge, appreciation and consent, as discussed in the *Christian Lawyers Association*<sup>25</sup> as the requirements for informed consent, are applied to the facts of the current matter, the question the court should ask is whether the first plaintiff as the legal guardian of the deceased minor child, had knowledge of the risks that came with the vaccination administered on 23 January 2015 and whether the first plaintiff appreciated the risks in order for her to give her informed consent.

[98] Ms. Zenda during her submissions referred this court to international laws in relation to informed consent. She argued that according to international law all medical treatments can only be carried out with the informed consent, except under extraordinary circumstances. Ms. Zenda submitted that the court should consider the persuasiveness of the UNESCO Declaration more specifically article 6 which reads as follows: "any preventative, diagnostic, and therapeutic medical intervention is only to be carried out with the prior, free and informed consent of the person concerned based on adequate information", in developing the delictual understanding of the nurses duty to have obtained the informed consent of the first plaintiff before administering the vaccinations on the deceased minor child.

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<sup>23</sup> *Government of the Republic v LM and Others* 2015 (1) NR 175 (SC).

<sup>24</sup> *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (T) (2004 (10) BCLR 1086.

<sup>25</sup> See footnote 16 above.

[99] Ms. Zenda argued that as per the indication of the medical expert, Dr. Steffan Bau, baby Paulus' constant crying was not normal and was a cause of concern and therefore appropriate information about the risks and consequences of the vaccines would probably have alerted the plaintiffs to take immediate action and there may have been a different outcome.

[100] Ms. Zenda submitted that the WHO is of the view that it is commonly accepted that vaccines are not without risks, regardless of proper design, manufacture and delivery, adverse events can occur. Ms. Zenda further submitted that the duty of the nurse in this matter was to inform and educate the first plaintiff of this fact and the defendants cannot argue that baby Paulus had an underlying health condition or that his death was not caused by the vaccine as the WHO has admitted that there are adverse effects that can occur from vaccines.

[101] Ms. Zenda submitted that although the post-mortem was done sloppily and cannot conclusively say what the cause of death was, the court has the authority to use its discretion as stated in the *Ministry of Health and Social Services NO v Kasingo*<sup>26</sup> wherein the court held that the judge should not be seduced by applying the standards of an expert, which requires absolute certainty on whether a thesis has been proved or disproved. Ms. Zenda added on that logical reasoning and the courts standard of a balance of probabilities should guide the court in deciding what caused the death of baby Paulus. Ms Zenda submitted that the first plaintiff's testimony is first hand and more credible than experts who are assessing the facts from sloppy records and blood samples that are years old. Ms. Zenda argued that the court should instead question how credible the plaintiff's testimony is and from there the court can infer from the evidence before it as to what caused the death of baby Paulus.

[102] Ms. Zenda argued that from logical progression the court can assess that the nurse was indeed negligent because there is no proof that the first plaintiff received education or warning to alert her to the signs of an adverse reaction to the vaccine. Ms.

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<sup>26</sup> *Ministry of Health and Social Services NO v Kasingo* 2018 (3) NR 714 (SC).

Zenda added that the nurse was negligent in failing to receive the first plaintiff's informed consent and thus is liable as there is no shield given to her for the adverse events that followed.

[103] In conclusion, Ms. Zenda submitted that in the *Kasingo*<sup>27</sup> matter, the Supreme Court held that expert scientific witnesses tend to assess a likelihood in terms of scientific certainty instead of the balance of probabilities. Therefore Dr. Bau, Guriras and Mundia saying there is no certainty about what caused the deceased minor child's death is not according to standards of proof applied in judicial reasoning, which should be what guides the court. Further, Ms. Zenda submitted that the rapid demise of the deceased minor child and the plaintiff's corroborating evidence should be weighed against the strict requirements of scientists who want higher standards of proof to determine the cause of death.

[104] It is Ms. Zenda's submission that on a balance of probabilities baby Paulus died within hours of the being vaccinated when he was perfectly healthy and the nurse failed in her duty to warn the first plaintiff, which makes the defendants liable for negligence.

*On behalf of the defendants*

[105] Mr. Chibwana, on behalf of the defendants, submitted that the plaintiff's failed to lead evidence on the following aspects:

- '(a) Whether the vaccines were properly stored in suitable conditions;
- (b) Whether the vaccines were suitable for administration to humans;
- (c) Whether the vaccines were safe and would not adversely impact persons to whom they were administered, and
- (e) Whether the defendants exercised due care and skill in the administration of the vaccines.'<sup>28</sup>

[106] Mr. Chibwana submitted that the very first hurdle that the plaintiffs must cross is to establish wrongfulness and additionally thereafter negligence by the defendants. The wrongfulness and negligence that the plaintiffs must establish is the fact that the

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<sup>27</sup> See footnote 28 above.

<sup>28</sup> Defendant's heads of argument par 7.

defendants administered a vaccine on a baby in circumstances where medically they ought not to have administered the vaccine. Mr. Chibwana argued that the question of negligence and wrongfulness is answered by the evidence of Dr. Bau during his cross-examination, who accepted that the deceased baby was a clinically well child with appropriate weight, who should in the circumstances have received a six-week vaccine. Mr. Chibwana submitted that once the evidence of the medical expert is accepted, which evidence was led by the plaintiffs during their case, there can be no question of negligence in the administration of the vaccine by the defendants employees on the deceased minor child.

[107] Mr. Chibwana also referred this court to the matter of *Kasingo*<sup>29</sup> wherein the test for medical negligence was set out as formulated in the *Kruger v Coetzee 1966 (2) SA 428 (A) at 430G* by Holmes JA as follows:

‘For the purpose of liability *culpa* arises if –

- (a) a diligens pater familias in the position of the defendant –
- (b) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
- (c) would take reasonable steps to guard against such occurrence; and
- (d) the defendant failed to take such steps.’

[108] Mr. Chibwana submitted that the onus rests squarely on the plaintiffs to establish both negligence and wrongfulness. Mr. Chibwana’s argument is that the plaintiffs’ action must fail if they fail to establish both wrongfulness and negligence and that the plaintiff’s failed at trial to meet the essentials of the negligence test as set out by the Supreme Court. Mr. Chibwana submitted that this Court is only obligated to apply the law and not equity and that hard, painful and heart-breaking cases such as the present case must not lead to the making of bad law courts,

[109] According to Mr. Chibwana, the second hurdle that the plaintiffs had to cross by way of leading evidence, is whether or not the vaccine caused the death of their baby.

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<sup>29</sup> *Ministry of Health and Social Services NO v Kasingo* 2018 (3) NR 714 (SC).



[110] Mr. Chibwana referred to the evidence led by Dr. Bau and submitted that that evidence establishes that the vaccination was not the cause of the baby's death. It is Mr. Chibwana's argument that had the plaintiffs been informed of the contents of their expert witness report the matter would not have proceeded to trial.

[111] Mr. Chibwana dealt with the evidence of the plaintiffs' expert witnesses in sequence starting with Dr. Mundia who testified that the test she carried out could not detect vaccines as the cause of death. Therefore, on Dr. Mundia's testimony there was no scientific evidence that could prove that the vaccine caused the death of baby Paulus.

[112] Hereafter Mr. Chibwana referred to the evidence of Dr. Ithana, who testified that she was unable to make a diagnosis that the vaccination caused the death of baby Paulus.

[113] With respect of the evidence of Dr. Guriras, Mr Chibwana pointed out that when asked during cross-examination as to whether the vaccine was the cause of death, her response was that there is no evidence to that effect. Mr. Chibwana submitted that this expert witnesses of the plaintiffs led no evidence to the effect that the vaccines caused the death of Baby Paulus.

[114] Mr. Chibwana, in his submissions referred the court to *International Shipping Company (Pty) Ltd v Bentley*<sup>30</sup> wherein the requirements for causation was formulated and on that score submitted that the plaintiffs failed to establish both factual and legal causal link between the alleged act, the vaccination and the death of the baby and as such the claim must fall on this basis alone.

[115] On the issue of informed consent raised by the plaintiffs, Mr. Chibwana argued that there is a fundamental difference between the current matter and the claim in the *LM*<sup>31</sup> matter, which was premised on the actual harm emanating directly from the procedure, whereas with the current matter there is no such claim. Mr. Chibwana

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<sup>30</sup> *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680 (A), at 700 E to J and 701 A to G.

<sup>31</sup> See footnote 15 above.

argued that there is no case pleaded that the injection caused an injury on its own, further that there is no evidence that the injection, the syringe breaking the skin, caused any form of harm.

[116] Mr. Chibwana argued further that the plaintiffs may at law only claim compensation for the pain they endured because of the death of their baby, however the death was not caused by the injection and therefor the plaintiffs' reliance on lack of consent has no claim in fact and in law.

### Evaluation of the evidence

#### *The plaintiffs*

[117] The evidence before me consist of the evidence of the plaintiffs and their expert witnesses. I appreciate how difficult it must have been for the plaintiffs to testify regarding the trauma of losing a child and no one would know what they have experienced until one has walked a mile in their shoes.

[118] The plaintiffs are so set in getting justice for their little boy that they are not willing accept any other single finding than a finding that the vaccination is the sole cause of death of baby Paulus and they testified as much.

[119] The problem is that the case that they presented to court does not support their contentions.

[120] If one considers the evidence of Martha there appears to be a number of inconsistencies. Given the fact that baby Paulus was the last born of four children, I find it rather strange that in spite of the fact that the little one cried continuously in the taxi on the way home Martha did not go back to the clinic nor did she go to the hospital. Even after she got home and baby Paulus cried to the point of gasping for air neither she nor Denny called the ambulance or returned to the clinic.

[121] Baby Paulus was not Martha's first baby to be vaccinated and yet when the little one cried for hours according to the plaintiffs. The plaintiffs are not in agreement as to how long the little one cried but it was well beyond an hour and a half and this is over and above period of more than an hour that Martha spend in the taxi on her way home with the baby and it is also not clear when the baby passed away.

[122] Martha was the only one who testified as to what happened at the clinic. When confronted by Mr. Chibwana regarding the health education prior to the immunization Martha's version was a bare denial. She went as far as testifying that nobody said anything to her. Baby Paulus was immunized and weighed and she was told to go home. I find this hard to belief. From her evidence one must then also infer that Martha also asked no questions.

[123] No witnesses were called in support of Martha's denial in spite of the fact that there must have been a number of other women at the clinic and despite the fact the plaintiffs' alleged negligence on the part of defendants' nurses no further witnesses were called in this regard.

#### *The experts*

[124] The plaintiffs called five experts in this matter but having listened to their evidence I must say I am not sure why Dr Mundia was called. Her evidence did not contribute anything to the plaintiffs' case.

[125] There is also the issue of the contradiction between the findings of the respective experts as there are no less than four different findings, i.e. 1) 'vaccination related death' by Dr. Vasin; 2) 'acute respiratory distress due to pulmonary hemorrhage' by Dr. Ithana and yet Dr Vasin did not observe any pulmonary hemorrhage; 3) A finding that should have been 'undetermined' by Dr. Guriras and 4) Vitamin K deficiency bleeding by Dr. Bau.

[126] I understand that the experts found themselves to be at a disadvantage in this matter and in order to make an actual diagnosis as to the cause of death all the expert reports should have been correlated and considered together with the clinical history of the baby but this was not done.

[127] I cannot fault the expertise of the experts in their respective fields of specialty and I do believe if they were presented with the 'big picture' all of them would have been able to present this court with a diagnosis as to the cause of death.

[128] The fact however remains that not one of the plaintiffs' experts could confirm that the vaccination was the cause of death of baby Paulus.

[129] The main expert report that the plaintiffs relied upon is that of Dr. Bau who is clearly a pediatric specialist and his report and evidence is of great assistance to this court.

[130] What is disturbing to me is the fact that I got the distinct impression that the plaintiffs were never advised as to the contents and findings in Dr. Bau's report and if they were then the question is, why did this matter progress to trial?

[131] Dr Bau's evidence is clear that the vaccination is not the cause of death of baby Paulus and if it was it would be such an extremely rare reaction to the Hepatitis B vaccination that nobody could predict and he said in as many words the defendants could not be held liable under the circumstances.

[132] I suspect it is because of these expert findings that went directly against the plaintiffs' case that Ms Zenda called upon this court, during her closing address, to rather rely on the evidence of the first plaintiff instead of the plaintiffs' own experts regarding the cause of death of baby Paulus. Ms. Zenda went as far as asking the court to only draw inferences from the first plaintiff's evidence as to the cause of death of the

minor child as opposed to an expert like Dr. Bau, for example. This flies in the face of the purpose of calling the expert witnesses.

[133] Surely the court cannot be expected to disregard the evidence of the plaintiffs own expert witnesses just because it contradicts the believes of the plaintiffs.

#### The applicable legal principles and application thereof on the present matter

[134] The present matter before me is a delictual claim wherein the plaintiffs are suing the defendants for damages. It is trite that all five elements of delict, namely an act (or omission), wrongfulness, fault (intent or negligence), harm and causation must be present before the conduct complained of may be classified as a delict<sup>32</sup>.

[135] As argued by Mr. Chibwana the plaintiffs failed to proof any of the averments pleaded regarding the storage, suitability, safety of the vaccines and further failed to proof that the defendants failed to exercise due care and skill in the administration of the vaccines and requires no further discussion.

[136] The remaining issue that Ms. Zenda focused all of her attention on during closing submissions was the issue of informed consent and it is on this basis that counsel argued the plaintiffs must succeed with their claim.

#### Informed consent

[137] The general doctrine of informed consent is well established in South Africa and in Namibia but the law is unclear regarding the degree of detail required in the immunization context.

[138] In the matter of *Christian Lawyers Association v Minister of Health*<sup>33</sup> it was confirmed that informed consent forms the basis of the doctrine of *volenti non fit*

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<sup>32</sup> See Neethling, Potgieter & Visser Law of Delict 5 ed (LexisNexis 2006) at 3 (Law of Delict.)

<sup>33</sup> See footnote 24 above.

*injuria* that justifies conduct that would otherwise have constituted a delict or crime if it took place without the victim's informed consent. It was further held that "In the context of medical treatment, treatment will constitute a violation of a patient's right to privacy and personal integrity if it is provided without the patient's informed consent." Adding to this, informed consent was found to rest on three pillars: knowledge, appreciation and consent. "Knowledge" concerns full knowledge of the nature and extent of risk associated with the treatment. "Appreciation" means that the patient should comprehend and understand the nature and extent of the harm or risk. "Consent" requires that the patient should subjectively provide comprehensive consent, meaning that consent must be in relation to the entire course of treatment, including its consequences."

[139] It was further held in the Supreme Court case of *Christian Lawyers Association*<sup>34</sup> that "in order for consent to be valid the patient must have the capacity to consent". Accordingly, "capacity to consent" refers to the intellectual and emotional ability of the patient to comprehend and understand the nature of any proposed treatment and the consequences thereof."

[140] In the *LM*<sup>35</sup> case on which the plaintiffs rely heavily on, on the issue of informed consent it was held that:

'To assess whether the patient has given informed consent to the procedure, it must be established whether they have been provided with adequate information to make an informed choice. This is not an absolute right, and in some circumstances the doctor is not required to disclose specific details if, for example, the patient is already aware of the information.'

[141] Having considered the evidence led by Martha and the submissions and/or arguments on behalf of the plaintiffs, I am not convinced that she lacked informed consent. Martha indicated to this court that baby Paulus was not her first child. In fact she has three older children, whom I am convinced had to receive the same six weeks vaccination as baby Paulus. The court is not here to make assumptions, however, the

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<sup>34</sup>Ibid.

<sup>35</sup> See footnote 23 above.

fact that Martha on her own version took baby Paulus for his six weeks vaccination on her own, I am not convinced that she did not have full knowledge of the nature and extent of risk associated with the vaccination as this was after all her fourth child.

[142] I am further convinced that Martha appreciated and understood the necessity, risks and benefits of the vaccination for her minor child. I agree that consent should be given freely and voluntarily, however nowhere in the evidence before me does it appear that the first plaintiff was coerced into taking the deceased minor child to the Clinic for vaccination. On her own version confirmed by the second plaintiff she indicated that she took the deceased minor child for his six weeks vaccination, she sat in the queue for quite some time before she and five other ladies got the opportunity to have the children vaccinated.

[143] It is the easiest thing to say that there was no informed consent however the first plaintiff failed to lead evidence on what she understood to be informed consent in the current context and no evidence was presented in support of her denial.

[144] According to Dr. Bau a possible reaction to the Hepatitis B vaccination was so idiosyncratic that no health care provider could have foreseen it or could be guilty of negligence if he or she failed to inform a parent of the extremely rare risks.

[145] Ms Zenda hammered on informed consent however the lack of informed consent, which I already found not to be the case, did not cause baby Paulus' death. Dr. Bau's evidence was that in his opinion the baby passed away because of VKDB, which in my understanding could have presented itself at any time and again it had nothing to do with the vaccination or informed consent.

### Causation

[146] In order for this court to determine whether the vaccination was the cause of the deceased minor child death, I must look at the issue of causation. In other words, whether there is a link between the vaccination and the death of baby Paulus.

[147] It is trite that to establish causation it is not only necessary to establish factual causation, but also legal or juridical causation. In *International Shipping (Pty) Ltd v Bentley*<sup>36</sup> the then Appellate Division held as follows:<sup>37</sup>

‘As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. The enquiry as to factual causation is generally conducted by applying the so-called "but-for" test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question ... .The second enquiry then arises, whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".’

[148] In terms of the usual test, namely the *conditio sine qua non* test, one would think away the conduct and should the harmful consequence fall away, there would be factual causation.<sup>38</sup> Evidence that has been led by the experts that testified on behalf of the plaintiffs clearly indicated that the vaccination was not the cause of the demise of the baby and that his death must have been caused by an underlying condition.

[149] Therefore having considered all the evidence, medical and otherwise, presented before this court I must find that the demise of baby Paulus was not as a result of the vaccination administered to him on 23 January 2015. The claim of the plaintiffs must thus fail.

[150] My order is as follows:

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<sup>36</sup> *International Shipping (Pty) Ltd v Bentley* 1990 1 SA 680 (A).

<sup>37</sup> At 700E.

<sup>38</sup> See footnote 28 above.



1. The first and second plaintiff's claim is dismissed.
2. There is no order as to costs.
3. The matter is removed from the roll and regarded as finalized.

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J S PRINSLOO

Judge

APPEARANCES:

On behalf of Plaintiffs:

Ms Zenda  
Of Legal Assistance Centre

On behalf of Defendants:

Adv Chibwana  
On instructions of Government  
Attorneys