IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 26129/2001

DATE: 27/5/2002

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

27/5/2002 .....
DATE SIGNATURE

IN THE MATTER BETWEEN:

VRM APPLICANT

AND

THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA 1ST RESPONDENT

CHAIRMAN OF THE COMMITTEE OF PRELIMINARY ENQUIRY OF THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA 2ND RESPONDENT

DR E LABUSCHAGNE 3RD RESPONDENT

JUDGMENT

DANIELS, J

This is a review application involving a decision taken by the first respondent upon a recommendation by the second respondent regarding a complaint of improper or disgraceful conduct on the part of the third respondent. The applicant lodged the complaint and the first and second respondent resolved, upon consideration of the facts, that "there has

not been conduct on behalf of the third respondent which can be said to have been improper or disgraceful, and to resolve that no further action be taken".

It is this decision that is being reviewed, and the adoption of this decision by the first respondent that is sought to be set aside.

The applicant's complaint is contained in a letter dated 9 July 1999. It is to be found at pp33-35 of the papers and reads as follows:

"DR LABUSCHAGNE/LOUISTRICHARDT MEMORIAL HOSPITAL: MRS VRM

We act on behalf of Mrs VRM who instructs us as follows:

1. On 29 January 1999 our client consulted Dr Labuschagne at his surgery in LouisTrichardt.

2. Our client was six months pregnant at the time and wanted Dr Labuschagne to deliver her baby.

3. At this consultation our client was examined by Dr Labuschagne to see if the baby and she were healthy. A blood sample was also taken.

4. Dr Labuschagne advised our client that her baby would be due on 23 March 1999.

5. During February our client saw Dr Labuschagne once and during March she had two consultations. During these consultations the normal examinations were done.

6. Dr Labuschagne advised our client that if she experienced labour pains that she should go to LouisTrichardt Memorial Hospital where the baby would be delivered.

7. 0ur client further informs us that during March she received an account from Drs Buisson and Partners in the amount of R160.00.

8. At the second consultation in March our client's husband accompanied her to her consultation with Dr Labuschagne. At the consultation our client's husband, Mr VRM asked Dr Labuschagne to explain to him the account he had received from Drs Buisson and Partners as well as the contents thereof.

9. Our client and her husband wanted to know from Dr Labuschagne what an HIV Elisa was and if it had anything to do with AIDS as this appeared on the account.

10. Dr Labuschagne told both our client and her husband that the account and the contents thereof had nothing to do with AIDS and that Dr Labuschagne would follow it up with Drs Buisson and Partners.

11. Dr Labuschagne told Mr VRM that he performed a simple blood test on our client at our client's first consultation and it had nothing to do with HIV or AIDS.

12. On 1 April 1999 our client was admitted to LouisTrichardt Memorial Hospital with labour pains.

13. Our client was under the care of Dr Labuschagne at the hospital.

14. On 2 April 1999 our client's waters broke and she was informed by Dr Labuschagne that he would schedule a Caesarian Section for 3 April 1999.

15. On 3 April 1999 our client had the Caesarian Section.

16. When our client woke up after the operation our client requested one of the nurses to bring her baby to her. The nurse said that she would do so.

17. The nurse came back with another nurse who was in the theatre at the time of the delivery and told our client that she wanted our client to see the baby, but that the baby was stillborn.

18. On 4 April 1999 Dr Labuschagne came to our client and informed her that she is HIV positive.

19. Our client further informs us that Dr Labuschagne told her that her baby was also HIV positive and that was the cause for her baby's stillbirth.

20. Dr Labuschagne told our client that he wanted to see our client's husband.

21. Both Mr and Mrs VRM were devastated at the news and asked Dr Labuschagne why he did not inform them earlier about the HIV status of our client.

22. Dr Labuschagne said that he did not want to inform them earlier because our client was going to have problems.

23. Our client also informs us that Dr Labuschagne issued a death certificate where the cause of death is stated as stillborn/HIV positive.

24. Our client requests that an investigation be initiated into the conduct of Dr Labuschagne and that Dr Labuschagne provides clarity on the following issues

- Why Dr Labuschagne conducted an HIV test without the consent of our client and without providing pre or post test counselling;
- Why Dr Labuschagne did not disclose client's HIV status at the consultation during March when both our client and her husband raised the concern of the statement received from Drs Buisson and Partners;
- Why Dr Labuschagne did not advise our client on measures to take to reduce the risk of mother to child HIV transmission during birth after he had knowledge of her HIV status;
- Why Dr Labuschagne did not perform the Caesarian Section immediately after our client's waters broke to further reduce the risk of mother to child HIV transmission;
- At the time of registering the death of the still birth, Dr Labuschagne listed in section G of the Notification / Register of Death / Still Birth Form that the HIV status of the baby was an underlying cause of death;

- When did Dr Labuschagne perform an HIV test on her baby and what type of test;
- And if Dr Labuschagne performed an HIV test on her baby he did so without her consent;
- That Dr Labuschagne informed her husband of her HIV status without her consent and did this without advising our client and her husband to go for counselling;
- Our client seeks further clarity as to whether Dr Labuschagne had any intentions of informing our client of her HIV status if the baby had lived;
- Why Dr Labuschagne abused her medical aid by doing a test and not informing our client of the type of test being performed, yet our client's medical aid is liable for treatment to which our client did not consent to nor had any knowledge of.

25. Our client submits that Dr Labuschagne acted unethically and illegally and requests that your offices start investigations into his conduct immediately.

We await your urgent response in this regard."

It subsequently transpired that the allegation on p35 that Dr Labuschagne "informed her husband of her HIV status without her consent" was incorrect. It is now common cause that Dr Labuschagne in fact had the applicant's consent to inform her husband.

I should point out also that the applicant was discharged from the hospital on 6 April 1999. I could find no explanation as to what transpired between 6 April 1999 and 9 July 1999 when the complaint was forwarded to the respondents. It is also of some concern that the applicant upon receipt of the second respondent's letter dated 7 0ctober 1999 enclosing Dr Labuschagne's explanation, and having been invited to comment thereon, failed to comment, and failed to provide proof of *inter alia* the counselling facilities available at the Louis Trichardt hospital. As will be shown there is a dispute about the existence of such facilities at the time. Apart from requesting reasons for the decision reached (and this some seven months after having been advised thereof) and having been furnished with the reasons on 21 February 2001, the application was brought in 0ctober 2001, again some seven/eight months later. I mention this to illustrate the point that the applicant, although represented by an attorney at that stage, did nothing to dispel the disputes which had arisen in regard to some of the allegations made. I shall refer to the applicant's immediate response (the letter dated 29 0ctober 1999) at a later stage. The third respondent answered to the allegations made. The following emerges from his reply:

Cause of the delay?

(1) consent was obtained from the applicant to have her blood sample taken, for *inter alia* HIV testing, although this would probably not have constituted "informed consent" in the strict sense of the expression, and not entirely in line with the "guideline" issued by the first respondent;

(2) that the applicant's husband was informed of the results at the request of the applicant and with her consent;

(3) that she was told about her positive testing on 6 April 1999, and that Dr Labuschagne was at that stage unaware of counselling facilities at the Louis Trichardt Provincial Hospital. Whether such facilities were available is still not certain. As stated earlier nothing was produced to support the applicant's contention that such facilities were available. Dr Labuschagne explained that such facilities were not in place. The second respondent accepted as a fact that such facilities were not available. The probabilities suggest that he is correct. Firstly, the applicant failed to produce evidence to the contrary, when invited to comment. Secondly she did not of her own sought counselling. If the facility was available one must ask oneself why she did not approach the authorities. The impression is that she knew about its existence. A letter to this effect from the hospital would have sufficed.

(4) No tests were carried out on the still-born child. The applicant assumes that tests were carried out. It is inferred from the death certificate. Dr Labuschagne's explanation in this regard is both feasible and uncontradicted and is to be preferred to the assumptions made and inferences drawn by the applicant.

(5) There is the allegation that the applicant's "waters broke" and that Labuschagne failed to carry out a caesarean section. The hospital records support a finding that it was not so. Dr Labuschagne admits to the fact that he knew in March 1999 that the applicant had tested HIV positive. He explains why he did not then inform her of that fact. His explanation is to the following effect-

"4. Ad Paragraph 9

I admit that I knew that the patient was HIV positive at this stage. The patient was, however, one month away from delivery and as stated as above I thought it in her best interest from a psychological point of view not to inform her of her status at this point in time. I explained in medical terms that HIV Elisa indicates an infection and that Aids might be a result thereof which is a terminal decease. I did not advise the patient nor her husband that she did in fact have Aids and

attempted to sidestep the question given the fact that she was one month away from delivery and not to complicate matters at this late stage of pregnancy. I had prior knowledge of the outcome of the blood tests but for the reason stated above decided not to reveal it to the patient nor her husband at that point in time."

In the applicant's commentary on Dr Labuschagne's explanation which is dated 29 0ctober 1999, the attorney draws attention to the admissions made by Dr Labuschagne. These include-

(i) the question of a lack of informed consent, dealt with in paragraph (1) above;

(ii) the question of counselling, dealt with in paragraph (2) above;

(iii) the failure to disclose the applicant's HIV status at the earliest opportunity, dealt with in paragraph (5) above.

Nothing further was added to the list of complaints, but the following three submissions were made in this letter-

"(a) The doctor tacitly admits that he is not conversant with the current medical knowledge concerning the reduction of mother-to-child transmission, by claiming in paragraph 16.4 of his letter, that there was no 'risk of mother-to-child transmission' and that 'medical science has no outright answer'. As any reasonable obstetrician practising in South Africa should know, the UNAIDS PETRA studies, the ACTG 076 Protocol results and the CDC-Thai regimen have conclusively shown that mother-to-child transmission of HIV in pregnant women not only exists, but can be reduced by taking antiretrovirals during pregnancy.

(b) Our client instructs that, in not being told by Dr Labuschagne of the existence of antiretroviral therapy to reduce mother-to-child transmission of HIV, she was not given the right to exercise her reproductive choices in terms of section 12.(2)(a) of the Constitution of South Africa.

(c) Our client instructs that her constitutional right to security in and control over her body as is set out in section 12.(2)(b) of the said Constitution was violated by her not being informed of her HIV positive status as soon as the results were available."

I fail to understand when and where the attorney was instructed as stated in paragraphs (b) and (c), since Dr Labuschagne's comments were forwarded to her for her instructions. However this may be, no particulars were furnished as to the "reproductive choices" she intended to exercise. The discussion took place in March 1999. She gave birth on 4 April 1999. If one has regard to the applicant's founding affidavit and VRM2 it is safe to assume that this took place on 12 March 1999. Very few choices if any were available to the applicant at that stage. If one assumes that the tests became available early in March as Dr Labuschagne appears to suggest it remains difficult to understand in what respect her constitutional rights were violated. I say that it is difficult to understand exactly what it is that the applicant's attorney attempted to convey since these points were not again argued before me, and apparently do not form part of the applicant's case.

The remarks about the use of anti-retrovirals raised in paragraph (a) above is possibly correct, although I am uncertain about the availability of such drugs at the time (March 1999). We know that Nevirapene was formally registered in 2000 or 2001 and that it is even now not necessarily available at State hospitals. It was suggested that the applicant should have been informed earlier because she could then have taken measures to ensure safer sex. That would not have assisted her, since she was HIV positive in any event. Whether transmission to the child could have been prevented at that stage is a moot point. There is no proof that the child was HIV infected. It was also mentioned that she could have

prepared herself sufficiently to break the news to her family and friends. The fact that she was informed later instead of sooner was really of no moment at that stage.

The complaint now raised is that it is stated by the second respondent that the decision was based upon three grounds and other factors, and that it is impossible to discern what facts were accepted or rejected.

The Council unequivocally stated that the committee accepted the third respondent's explanation, based on the following facts:

1. the acceptance that the patient was informed of the HIV testing, and that she consented to it;

2. that there is a lack of facilities for proper pre- and post HIV testing in the hospital;

3. noted that the patient's husband was only informed at the request of his wife.

The Council clearly understood the complaint to be directed at the taking of a blood sample without any consent, that no counselling was provided, and that her husband was informed of the results without the complainant's consent. These issues were resolved. The

issue of "informed" consent was subsequently raised, the implication being that consent was in fact obtained and given, but not "informed" consent. This is in fact the only real issue remaining, apart from the fact that Dr Labuschagne failed to convey the results at the earliest possible time. He explained his dilemma, and his approach at the time.

Can it be said that the decision not to proceed was so unreasonable as to warrant interference by this court? The difference between informed consent and consent is marginal. In the context of the circumstances then prevailing it has very little import. The applicant was told that it was a routine blood test involving also an HIV test. Once this was known to her and she consented, or at least did not object, what else must be done? I have explained earlier that the fact that the applicant was informed about the outcome of the tests at a later stage was equally of no real moment. The approach adopted by the third respondent is not without merit. It shows a degree of compassion, and concern. Things would not have changed had he informed the applicant earlier. He exercised his discretion, although not strictly according to the book, but in what he believed to have been the best interests of his patient. It can hardly be suggested that this was disgraceful or negligent conduct on his part. The guidelines are exactly that. As was pointed out by Mr Nthai who appeared for the respondent, the guidelines are not 'cast in stone'. The facilities at the hospital are *prima facie* at least, inadequate. Can it be said that the second respondent failed to apply its mind to the facts before it. The third respondent was asked to comment on the report received. His response was put to the complainant. No further or new evidence was

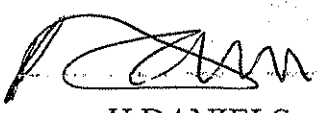
produced by the complainant. I can find no room for the contention that it arrived at a decision in a paternalistic and capricious manner. I have attempted to show that objectively viewed, the decision makes sense. It might have been the wrong decision, but that is not the test. This is not an appeal. In any event I am not at all inclined to consider the decision as wrong. The test at the preliminary enquiry was said to be:

> "If the preliminary investigation shows that the evidence furnished in support of the complaint discloses *prima facie* evidence of improper or disgraceful conduct in respect of the practitioner's profession, then there is a complaint to be inquired into by the council or the disciplinary committee. It should be noted here that the very concept of *prima facie* evidence involves an opportunity of controverting it. If the investigation, however, shows that the complaint, even if substantiated, would not constitute improper or disgraceful conduct, or for any other reason should be withheld from inquiry, the inquiry committee must take such action as it may think fit" [See *Veriava v President, SA Medical Council and Dental Council* 1985 2 SA 293 (T) 309 and see also *Tucker v SA Medical and Dental Council* 1980 2 SA 207 (T).]

The allegation of 'irregular and unreasonable' conduct remains a mere allegation, and is not substantiated. I should point out that the matter was not brought in terms of the Promotion of Administrative Justice Act 3 of 2000, nor was it argued on that basis.

I am satisfied that a proper case had not been made out for the relief sought.

The application is accordingly dismissed with costs.



H DANIELS
JUDGE OF THE HIGH COURT

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