

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, GQEBERHA)**

Case no: 132/2015

In the matter between:

VN on behalf of PN

APPLICANT/PLAINTIFF

and

MEMBER OF THE EXECUTIVE

RESPONDENT/DEFENDANT

COUNCIL FOR HEALTH & SOCIAL

DEVELOPMENT OF THE EASTERN CAPE PROVINCE

JUDGMENT IN AN APPLICATION FOR LEAVE TO APPEAL

D VAN ZYL DJP

[1] This is an application for leave to appeal the judgment of this court dismissing the plaintiff's claims. The parties, to whom I shall continue to refer to as "**plaintiff**" and "**defendant**" respectively, agreed that with the leave of this court, oral argument may be dispensed with, and that the application be determined by making written submissions. Both parties made extensive written submissions, and I am satisfied that the matter can be dealt with in the manner proposed.

[2] The plaintiff's claim was for damages arising from the birth of PN at the Dora Nginza Hospital during October 2009. PN sustained a permanent brain injury during birth diagnosed as a severe hypoxic-ischaemic injury which led to her developing cerebral palsy. The plaintiff's case was that the injury was the result of the causal negligence of the midwives who attended to the plaintiff's labour and the delivery of PN. The issues for determination were that of negligence and causality.

[3] Before I deal with the grounds of appeal, it may be convenient to say something about the test to be applied in an application for leave to appeal, and the nature of the issues raised in the grounds of appeal. As correctly pointed out by counsel for the defendant, the test is not whether another court “**may come to a different conclusion**” to that of the trial court, as suggested by the plaintiff. Whereas the test previously applied for deciding whether or not to grant leave to appeal was whether another court “**could**” or “**may**” come to a different conclusion, section 17(1)(a)(i) of the Superior Courts Act provides that leave may “**only**” be granted where the court is of the opinion that the “**appeal would have a reasonable prospect of success.**” This has been interpreted as having raised the bar for the test that now has to be applied to the merits of the proposed appeal before leave shall be granted. (Erasmus **Superior Court Practice** 2nd ed vol 1 at page A2-55 and the authorities referred to.)

[4] The second aspect is that the issues raised by the grounds of appeal are factual in nature. That being the position, a court of appeal will not lightly interfere with the factual findings of a trial court unless there is a demonstrable and material misdirection/or and a finding that is clearly wrong. (Mashongwa v PRASA 2016 (3) SA 528 (CC) at para [45].) The principles to be applied to guide an appeal court in dealing with an appeal purely on the facts, have been set out extensively in R v Dhlumayo and Another 1948 (2) SA 677 (A) at 705 – 706.

[5] Against this background, I will proceed to separately deal with the individual grounds of appeal in so far as it may be necessary, and with reference to the reasons in the judgment for the findings made.

[6] Ad paragraph 2 thereof:

The issue raised herein is factual. It concerns mainly the reliability of the plaintiff's evidence against that of Sister Minnaar, that fundal pressure was applied during labour. As counsel for the defendant correctly points out, the issue of fundal pressure became the touchstone of the plaintiff's case after her expert witnesses effectively had to

concede that the monitoring of the first stage of her labour was in order, and that nothing outward had been noticed which could have been indicative of foetal distress. The credibility and the reliability of this evidence was fully dealt with in paragraphs [54] to [64] of the judgment. The evidence of the relevant witnesses on this aspect was evaluated against the contents thereof, the other evidence, its consistency with the evidence, and the probabilities as it arose from the evidence.

[7] The submissions made on behalf of the plaintiff with regard to the presence of a caput on the head of PN were extensively dealt with in paragraph [45] of the judgment. That the presence of a caput was evidence of an obstructive labour and thereby raising as a probability that fundal pressure was applied, must be assessed on all the evidence, which evidence includes the fact that the presence of a caput on its own is not, without further evidence, indicative of an obstructed labour; the determination of the size of a caput is a subjective exercise; the opinion given on this aspect was based on an incorrect assumption of the extent of the caput as recorded by the midwives; reasons other than an obstructed labour for the presence of a caput; and the concessions made in evidence that PN was a small baby, and that there was no evidence of an obstructed labour.

[8] I agree with the defendant's submission that the nurses' notes recording "poor maternal effort" is not indicative of the probability that fundal pressure was applied. As stated, there was no evidence of an obstructed labour and no physical evidence that may support a conclusion of the likelihood of an obstructed labour. The plaintiff's expert witness, Dr Hofmeyer dealt with the reasons for a poor maternal effort, other than obstructed labour which evidence *inter alia* pointed to the fact that it was the plaintiff's first pregnancy and delivery; the factor of **"anxiety of not knowing what is going on and being uniformed about the process and being quite distressed, there is the factor of being tired physically, I would use the word exhausted after being subjected to repetitive contractions. Often not eating or drinking in that time and then pain is another factor that could contribute to the situation and then as I said**

the poor, poor understanding of, or the inexperience of the birthing process is also potentiated.” (Page 214 to 215 of the record).

[9] The aspect relating to the performing of an episiotomy has been dealt with in paragraph [59] of the judgment. There was no evidence that it is generally nothing more than a routine procedure to facilitate the birth process, and that it must justify an inference that fundal pressure must have been applied as suggested. On a careful consideration of the aspects raised in this ground of appeal, I am unconvinced that, on an assessment of all the evidence, there exists any reason to conclude that the factual finding with regard to the application of fundal pressure was incorrect, or that it should be interfered with on appeal.

[10] Ad paragraphs 3 and 4.

The grounds of appeal raised in these two paragraphs once again deal with whether this court was correct on the facts to prefer the evidence of the defendant's witness Sister Minnaar to that of the plaintiff with regard to what transpired during the plaintiff's labour. I have extensively dealt with the reliability and the credibility of the witnesses and the reasons why the defendant's evidence was preferred on this aspect. I refer to paragraphs [56] and [60] of the judgment.

[11] The matters raised by the plaintiff in paragraphs 4.1 to 4.7 of the grounds of appeal do not raise a reasonable prospect of another court coming to a different factual finding with regard to the probability of fundal pressure having been applied. The aspect of the caput has been dealt with above. Further, the fact that no identifiable sentinel event could be identified does not render the probabilities in favour of the plaintiff's version. It was common cause that deep central brain injuries do occur without there being any identifiable sentinel event. Dr Kirsten, the plaintiff's expert testified that **“you can get an acute profound insult that can develop without a visible sentinel event when the foetus suddenly in the second stage of labour, there's a foetal bradycardia and they deliver the foetus and there is nothing you can do about**

that.” (Page 61 of the record) This aspect was dealt with in paragraph [52] of the judgment.

[12] Further, the speculative nature of the proposition that excessive fundal pressure may have placed pressure on the umbilical cord and placenta, and thus affected cerebral blood flow, was dealt with in paragraph [64] of the judgment. It was found to have been based on an insufficient factual basis and is the subject of conflicting opinions. The contention that the fact of an adverse outcome placed the probabilities in the plaintiff’s favour is without merit. As stated in paragraph [38] of the judgment, the fact of a poor outcome in itself does not establish negligence.

“Negligence is not presumed and the burden of proof remains throughout on the plaintiff. The fact of a poor outcome in itself does not establish negligence. As stated by Lord Denning in Hucks v Cole, “... with the best will in the world things sometimes went amiss in surgical operations or medical treatment. A doctor was not to be held negligent simply because something went wrong.” In the present context, reasoning of this nature would simply be because the plaintiff had a normal pregnancy, yet she gave birth to an injured child, therefore, there was negligence. This reasoning is based on the drawing of an inference simply from the temporal sequence of events, which is an unreliable method of inferential reasoning. Inferential reasoning is an accepted technique that is utilised in judicial fact-finding. However, the inference sought to be drawn must be capable of being drawn from the objective facts established by evidence. If tenuous, or far-fetched, it cannot form the foundation for the court to make any finding of fact. Further, the inference must be based on, and be consistent with all the admitted or proved facts, and not be matters of speculation.”

[13] Ad paragraph 5.

Whether or not the issue of resuscitation was pleaded, is immaterial, as it was accepted for purposes of the case and the judgment that the issue was properly raised on the evidence. It was consequently fully addressed and dealt with in the judgment. I refer to paragraphs [65] to [67] of the judgment.

[14] In paragraph [70] of the judgment I have dealt with the objective considerations which militate against the probability that PN's injury was aggravated, and the absence of a factual basis to draw the necessary inference(s) with regard to causation. Causation was dealt with on the basis of having assumed in favour of the plaintiff that there was negligence in the resuscitation of PN after birth.

[15] The pertinent issue with regard to resuscitation remains that PN suffered an extremely severe and profound brain injury intrapartum and was born flat and cold and apnoeic. The extent, if any, to which the alleged sub-standard resuscitation had aggravated an already existing brain injury, cannot be proved with any degree of certainty, leaving it in the realm of speculation.

[16] Ad paragraph 6.

The evidence with regard to the condition of the foetus when the second stage of delivery commenced, and the conduct of the midwives, was dealt with in paragraphs [41] to [50] of the judgment. The evidence of Dr Kirsten was premised on the assumption that the foetus arrived at that stage of labour in a weakened state. The reason for it being an assumption is that there was no evidence to conclude as a fact that the foetus was in a weakened state. The evidence of the plaintiff's expert witness, Dr Hofmeyer, was that the first stage of labour, judging from the nurses clinical notes, was on the probabilities normal. What the said witness described as a **“text book first stage,”** contained no indication of foetal distress or anything that could have caused or contributed to a weakened state.

[17] Ad paragraphs 7 to 9.

The issues raised in these paragraphs also deal with the resuscitation of PN following her birth, and the argument that the plaintiff must be found to have proved that cumulatively with fundal pressure and a failure to effectively resuscitate PN, the hypoxia and ischemia was not interrupted, alternatively, that the failure to resuscitate PN caused the injury to be exacerbated. The issues raised in this regard at the trial have been dealt with fully in the judgment in paragraphs [65] onwards. These are factual matters which were decided on the evidence, and I am not persuaded that another court would come to another conclusion on the facts. As stated in paragraph [69] of the judgment, even if it is to be assumed in favour of the plaintiff that the midwives were negligent in the manner contended, no expert witness was able to say what the extent of any aggravation was of what was clearly an already existing severe brain injury. It remains a matter of speculation on the evidence presented, and militates against the probabilities raised by the objective evidence referred to in paragraphs [70] of the judgment.

[18] Ad paragraph [10].

This paragraph of the plaintiff's grounds of appeal presents a summary of conclusions and there is no need to deal therewith.

[19] The supplementary submissions.

In the supplementary submissions filed by the plaintiff, reliance was placed on certain medical writings (articles) and a judgment of another court where the author of one of the articles gave evidence. What the plaintiff seeks to do, is to introduce into this matter the proposition that what is termed an **“Intrapartum BGT HI pattern injury,”** may not only be incurred during a single sentinel event, that is, a sudden or acute onset, but **“across serial events,”** that is, repetitive episodes of less severe ischemia and hypoxia. The raising of this proposition at this stage presents with a number of difficulties, as it seeks to provide an explanation for the probable cause of the injury sustained by PN in this case. This of course begs the question whether the plaintiff had

proved that there were repetitive episodes or serial events, and following thereon, whether there was negligent conduct on the part of the midwives which is the factual cause of such episodes of ischemia and hypoxia. These are factual issues which require evidence. The difficulty is that the theory propounded was not a trial issue and is sought to be superimposed onto an existing factual matrix, the focus of which was issues that were pertinently raised at the trial. It is evident from the articles referred to that the views expressed therein are of necessity premised on the existence of certain facts. In the portion quoted in the plaintiff's supplementary submissions, reference is made to **"a non-reassuring foetal status"** that develops during labour, which **"is prolonged"** and, according to the article of Smith *et al*, exhibits as **"abnormal tracing."** The burden of proof is on a plaintiff to prove the facts upon which his expert's opinion is based or the opinion will be given no weight.

[20] Also, as correctly submitted by the defendant, it is impermissible to seek to rely on publications and its acceptance in another court in this manner. Factual findings of one court are not binding on another. A judgment in a case constitutes findings made on the factual evidence and the expert evidence placed before that court, and cannot without more be introduced into the factual matrix of another case. Evidence is assessed, evaluated and given weight to in the context of the issues raised in a particular matter, and its evidential value is the end result after the evidence presented had been tested by cross examination, against other the evidence placed before the court, and against the probabilities as they arose therefrom.

[21] I agree with the submission of counsel for the defendant that when an expert witness refers to journals or articles or text books in support of his expressed opinion, it only becomes evidence insofar as the witness has adopted them, with or without comment, as part of his evidence and opinion in the case in which he was called as a witness. Further, the author of the article or the book cannot be treated as another witness and use be made of passages to which the expert witness has not referred to, or which were not put to him in cross examination. Joubert, **The Law of South Africa** explains it as follows:

“An expert may refer to data garnered from the experience of others, provided that he or she has the necessary qualifications to evaluate the data and to know where to find reliable sources of information. It follows that an expert may refer to the writings of others (either to refresh his or her memory or to support the opinion) if he or she has sufficient personal knowledge of the subject to be able to express a relevant opinion. It is only that part of the writing to which the witness refers that is in evidence and the court cannot have regard to other passages that have not been canvassed by the witness. Expert evidence should be presented in such a way that the court itself is in position to make the observations on which the expert has relied for his or her conclusion.

Opinion evidence that is not linked to the facts is mere abstract theory. An expert cannot base his or her opinion, for instance, on documents that are not before the court. Although a witness may refer to experiments that have become part of the generally accepted body of scientific knowledge, the hearsay rule would prevent the witness from relying on assertions made by others in individual cases.” (Vol 18, 3rd ed at para [138] on page 127.)

[22] I accordingly conclude that the plaintiff has not shown reasonable prospects of success or some other compelling reason why the appeal should be heard as envisaged in section 17(1)(a)(1) of the Superior Courts Act.

[23] In the result, the application for leave to appeal is dismissed. There will be no order as to costs.

D VAN ZYL

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Counsel for the Plaintiff:

Adv. W L Munro

Adv. T Rossi

Instructed by:

W. Langson & Associates

23 Ralston Road

Fern Glen

PORT ELIZABETH

Tel: 041 - 3642997

Counsel for the Defendant:

Adv. C J Mouton SC

Adv. A Rawjee

Instructed by:

The State Attorney

29 Western Road

Central

PORT ELIZABETH

Tel: 041 – 5852687

Date heard:

18 April 2022

Date delivered:

17 June 2022