



Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case number: 2720/2017
Date Heard: 13 / 06 / 2022
Date delivered: 02 / 09 / 2022

In the matter between:-

**THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF HEALTH, NORTHERN CAPE PROVINCE**

APPLICANT

And

**ADVOCATE LINDY LOU NORMAN N.O. obo
MERCIA LOTT obo GENOVIA ELZAAN SHIRLEY LOTT**

RESPONDENT

IN RE:-

*ADVOCATE LINDY LOU NORMAN N.O. obo MERCIA LOTT obo
GENOVIA ELZAAN SHIRLEY LOTT*

PLAINTIFF

and

*THE MEMBER OF THE EXECUTIVE COUNCIL
DEPARTMENT OF HEALTH, NORTHERN CAPE PROVINCE*

DEFENDANT

JUDGMENT:
APPLICATION FOR LEAVE TO APPEAL

INTRODUCTION:-

- [1] For ease of reference, I will refer to the parties as they are cited in the action issued under case number 2720/2017.
- [2] The defendant seeks leave to appeal against the whole of my judgment and order, handed down on 22 September 2021, in terms of which I dismissed the defendant's application in terms of Uniform Rule 35(7).

AD FACTUAL MATRIX:-

- [3] On 05 January 2021, the plaintiff filed a third report by Professor Jan Lotz, her expert radiologist, to which was attached an article titled *"Difference between Basal Ganglia-Thalamic Pattern and Acute Profound Hypoxic-Ischemic Brain Injury ("the Lotz report")*.
- [4] Subsequent to the filing of the Lotz report, the defendant filed a notice in terms of Uniform Rule 35(3) of the Uniform Rules for the plaintiff to discover the literature and raw data referred to in the article; the literature referred to in a PowerPoint presentation of Professor Lotz; the clinical and medico-legal reports of patient Ndlovu and Dr L Murray's screening report. The plaintiff refused compliance, stating that she either does not have the documents in her possession or that it is protected by copyright or attorney and client privilege.
- [5] The defendant proceeded to file an application in terms of Rule 35(7) to compel discovery.
- [6] After the application was issued, the plaintiff provided certain of the requested documents, save for the raw data that underscores the Lotz article and the MRI scan of patient Ndlovu ("the Ndlovu records").

- [7] The raw data comprises the documents as set out in detail in my judgment. I therefore do not deem it necessary to specify them herein. In essence, they consists of the recent human studies pertaining to medico-legal actions arising from the development of neonatal encephalopathy-cerebral palsy in term gestations, including the detail of 195 medico-legal actions and the copies of clinical and / or medical records and all medico-legal reports relevant to the actions.

GROUND FOR APPEAL:-

- [8] The grounds of appeal may be distilled as follows, namely, that I erred:-

- 8.1 In finding that the raw data and the Ndlovu records were not legally relevant to the grounds of wrongfulness/negligence as pleaded by the plaintiff and the witness summaries of Professor Lotz and Professor Smith's opinions, and the reasons therefor, filed in terms of Rule 39(9)(b);
- 8.2 In finding that Professors Lotz and Smith were not parties to the action and as such the discovery by them in terms of Rule 35 should be disallowed;
- 8.3 In confusing the copyright law in respect of the published article with the status of the raw data contained therein, which raw data had already been the subject of medico-legal cases before courts of law; and
- 8.4 In finding that copyright has been assigned to Thieme Medical Publishing in terms of Section 22 of the Copyright Act 98 of 1978, but failed to find that Section 12 of the Copyright Act specifies that the use of copyrighted material during judicial proceedings does not infringe such copyright.

- [9] The plaintiff opposed the application for leave to appeal and persisted that the raw data and the Ndlovu records are:-

9.1 Not subject to Rule 35(3);

9.2 Not in her possession or control, but in the control of third parties who are not parties to the action or that they are subject to copyright held by Thieme Medical Publishers; and

9.3 Subject to collateral evidence.

- [10] In addition to the listed grounds of appeal, Mr M Salie SC, on behalf of the defendant, during argument, vigorously contended that compelling reasons exist why the application for leave to appeal should be granted. The gist of his argument is that Professors Lotz and Smith are contending that a Basal Ganglia-Thalamic Pattern injury ("BGT injury") may not be synonymous with an acute hypoxic brain injury, and in reaching such an opinion, heavy reliance is placed on the Lotz article, which was based on the raw data and the Ndlovu records. According to the defendant, Professor Lotz drastically changed his opinion in the Lotz report from the report he originally provided in July 2018. In the July 2018 report, he initially stated that the MRI scan clearly shows an "*acute hypoxic ischemic encephalopathy*" and in the Lotz report, he now opines that the BGT injury may not be synonymous with an acute hypoxic brain injury.

- [11] Mr Salie SC supported his argument by stating that the raw data and the Ndlovu records are relevant by virtue of the fact that the plaintiff bears the onus of proving that the defendant's actions were wrongful and negligent and that such wrongfulness and negligence gave rise to the injuries sustained by the minor child. He submitted that the defendant is entitled to the raw data and the Ndlovu records for the purposes of conducting their own investigations; to possibly procure their own experts to comment and to prepare properly for the cross-examination of the expert witnesses.

APPLICABLE LAW:-

- [12] The test of what needs to be established in order to be granted the necessary leave to appeal is set out in section 17(1) of the Superior Courts Act, Act 10 of 2013, the relevant provisions of which read as follows:-

"17(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

(b) The decision sought on appeal does not fall within the ambit of s 16(2)(a); and ..."

- [13] Mr Salie SC, with reference to the judgments in matters of ***AN v MEC for Health, Eastern Cape***¹ and ***The MEC for Health, Eastern Cape v DL obo AL***,² submitted that an ultimate judgment on the issue of liability, premised on the Lotz article, will have a far-reaching impact on the *jurisprudence* already laid down by the Supreme Court of Appeal.

- [14] The Supreme Court Appeal, in the matter of ***Qoboshiyane NO and others v Avusa Publishing Eastern Cape (Pty) Ltd and others***³ when dealing with section 17(a)(11) of the Superior Courts Act where a matter had become moot, confirmed that where a discrete legal issue of public importance arose that would affect matters in the future, compelling circumstances were present.

- [15] Having regard to the high volume of medical negligence claims arising from brain damage to children during labour, I am persuaded that compelling

¹ (585/2018) [2019] ZASCA 102 (15 August 2019)

² (117/2020) [2021] ZASCA 68 (03 June 2021).

³ 2013 (3) SA 315 (SCA) para [5]. See also *City of Tshwane Metropolitan Municipality and others v Nambiti Technologies (Pty) Ltd* ([2016] 1 All SA 332 (SCA) para [6].

circumstances exist that the Supreme Court of Appeal may be inclined to provide guidance for future similar cases; and that leave to appeal should accordingly be granted in terms of section 17(1)(a)(ii) of the Superior Courts Act.

- [16] What remains is whether the appeal should be heard by the Full Bench of this Division or the Supreme Court of Appeal. This question is governed by the provisions of section 17(6)(a) of Superior Courts Act, which require that I weigh-up two broad considerations. Firstly, whether the issues involve important questions of law. Secondly, whether the interests of justice, either generally or in the particular case, require that the matter be heard by the Supreme Court of Appeal.
- [17] Both Mr Salie SC and Mr P Uys, who appeared on behalf of the plaintiff, agreed that, should leave to appeal be granted, it be to the Supreme Court of Appeal. After considering the issues, I am of the view that it is in the interests of justice that the appeal be disposed of by the Supreme Court of Appeal.
- [18] On the issue of the costs, I am of the view that it will be equitable that they be costs in the appeal.

ACCORDINGLY, THE FOLLOWING ORDER IS MADE:-

1. The defendant is granted leave to appeal to the Supreme Court of Appeal;
2. The costs of the application for leave to appeal are to be costs in the appeal.



STANTON, A
ACTING JUDGE

On behalf of the applicant: Mr. M Salie SC; Mrs. S Mahomed
(obo Robert Charles Inc.)

On behalf of the respondent: Mr P Uys
(obo Duncan & Rothman)