



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN**

CASE NO: 11661/2021

In the matter between

MEC FOR HEALTH, WESTERN CAPE

APPLICANT/DEFENDANT

And

L A SAMPSON

RESPONDENT/PLAINTIFF

DATE OF HEARING (Application for leave to appeal): 2 APRIL 2025

DATE OF JUDGMENT: Judgment was handed down electronically by circulation to the parties and their representatives by email and released to SAFLII. The date for hand down is deemed to be 11 April 2025.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

- [1] The applicant (cited as the defendant in the trial) applies for leave to appeal to the Full Court of the Western Cape High Court, alternatively the Supreme Court of Appeal, against the whole judgment and order handed down on 6 February 2025, which found that:

- [1.1] The applicant/defendant is liable for such damages as the respondent/plaintiff may prove to have arisen as a result of the treatment administered to him at Mitchell's Plein District Hospital ("**MPDH**") in and during January 2020, resulting in the performance of a nephrectomy on 21 January 2020; and
- [1.2] The applicant is to pay the costs of suit on a party-and-party scale with costs of senior counsel at Scale C and the reasonable and necessary expenses of Dr F Plani.
- [2] The parties will be referred to in this judgment as they were cited at trial (i.e. the applicant as defendant and the respondent as plaintiff).

THE LEGAL POSITION IN DECIDING IF LEAVE TO APPEAL SHOULD BE GRANTED

- [3] Section 17(1) of the Superior Courts Act provides that leave to appeal may only be given where the Judge is of the opinion that:
- [3.1] The appeal would have reasonable prospects of success; or
- [3.2] There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.
- [4] The prospect of success required in terms of Section 17(1)(a)(i) is to be decided without reference to the parties' wishes.¹ *Inn Mont Chevaux Trust v Goosen*² the Court held that:

¹ Rail Commuter Action Group v Transnet Limited trading as Metrorail (Number 2) 2003 (5) SA 593 (C)

² 2014 JDR 2325 (LCC)

*“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, ...The use of the word “would” in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against. ...”*³

- [5] The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law, that a Court of Appeal could reasonably arrive at a conclusion different to that of the trial Court. In order to succeed, the applicant must convince the Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. There must be a sound, rational basis for the conclusion that there are prospects of success.⁴
- [6] Leave to appeal is further granted not in respect of the reasons for the judgment but in respect of the order itself. Therefore, the success of the application for leave to appeal must be related to the outcome of the case and not an argument that fails to dispose of the case in the Appellant's favour.⁵
- [7] In the matter of *Tecmed Africa v Minister of Health*⁶ the Supreme Court of Appeal held:

“[17] First, appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a court of appeal agrees with a lower court’s reasoning would be of no consequence if the result would remain the same (Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd 1948 (3) SA 353 (A) at 354).”

³ At para 6

⁴ *S v Smith* 2012 (1) SACR 567 at 570, para 7

⁵ *Goodwin Stable Trust v Duohehex (Pty) Ltd* (2) [1996] 3 All SA 119 (C)

⁶ [2012] 4 All SA 149 (SCA)

GROUND'S UPON WHICH TO LEAVE TO APPEAL IS SOUGHT

[8] The application for leave to appeal is fundamentally based on the following grounds:

[8.1] That the Court erred in deciding that the factual cause of a nephrectomy was an act or omission on the part of the medical practitioners at Mitchells Plein District Hospital (MPDH).

[8.2] That the Court erred in holding that the applicant was negligent in not offering the appropriate or timeous treatment reasonably required to diagnose and treat the pelvic renal injury.

[8.3] That the Court failed to distinguish between a gunshot wound injury to the renal pelvis and a gunshot wound injury to other parts of the kidney and incorrectly concluded that even if there had been a different treatment plan, given that it turned out to be an injury to the renal pelvis, that it would have resulted in a different outcome.

[8.4] By not accepting or attributing sufficient value to the evidence of Dr Kaestner that Groote Schuur Hospital (GSH) had not repaired an injury of this nature in her years of experience, and in doing so accepted Dr Plani's speculative evidence as to what GSH could and would have done.

[8.5] The Court incorrectly ruled on causation by determining that any act or omission by the medical personnel at MPDH was likely the cause of the respondent's loss.

[8.6] That the Court failed to apply a sensible retrospective analysis of what would probably have occurred based on the evidence and what can be expected to have occurred in the ordinary course of human experience if all had gone according to measures taken by reasonable medical personnel in the circumstances.

[8.7] That the Court erred in not finding that the gunshot would have caused irreparable damage to the renal pelvis and that irrespective of when the imaging was performed, or the date when the operation took place, the renal pelvis would not have been repairable.

[9] Ms. Bawa SC, on behalf of the defendant, argued that the probabilities favour the defendant's case, as another court might reach a different conclusion due to the complexities of expert testimony and differing expert opinions. She contended that a different court would acknowledge the difference between damage from blunt force and gunshot injuries. There is also no evidence that Dr. Moodley checked the bullet's trajectory, but that was irrelevant, as she suspected a non-significant kidney injury, based on the plaintiff's symptoms and the clinical picture he presented, which was resolving. The extent of the renal pelvic injury was determined during surgery on 21 January 2020 and could not be seen earlier through imaging. The court, further, did not explain its preference for Dr. Pani's opinion over Prof. Borman's.

[10] Mr. Corbett SC, who appears for the plaintiff, argued against the application for leave to appeal, citing, among other things, that the surgical team consulted with Dr. Kreasner during surgery on 21 January 2020 due to the presence of sepsis and friable tissues. He submitted further that the plaintiff need not prove causation with certainty; a reasonable, retrospective approach suffices. Dr. Pani, with extensive experience in kidney reconstructive surgery, stands in contrast to Prof. Borman, who last operated in the 1980s. Another court would likely accept Dr. Pani's testimony regarding the high success rate of kidney reconstruction, which is supported by the standard of care that recommends imaging once a patient is stable. Mr. Corbett emphasised that Prof. Borman failed to justify his claim that the renal pelvis was irreparably damaged by the gunshot, relying solely on what he was told by Dr. Salukazana, the surgeon who performed the nephrectomy. Dr. Salukazana did not testify, and Prof. Borman's opinion lacked a factual basis and supporting reasons. The experts concurred that the plaintiff needed earlier imaging, confirming negligence.

CONCLUSION

- [11] How severe was the pelvic renal injury? The short answer is that none of the parties can tell. No direct evidence is available regarding the extent of the damage as of 1 January 2020, when Dr. Moodley performed the emergency surgery. However, what remains unchallenged is that the hematoma Dr. Moodley viewed during the emergency surgery was non-pulsating. GSH continued treating the injured kidney on the basis that it was capable of being reconstructed and saved.
- [12] Suppose the defendant's claim that the bullet damaged the kidney beyond repair is correct. In that case, it does not make sense why GSH inserted the double stent on 16 January 2020 (more than two weeks after the gunshot) and why the treatment plan, when the nephrectomy was performed on 21 January 2020, was a so-called ureteric proximal pelvic repair, meaning that only if the kidney was not repairable, a nephrectomy would be performed. Dr. Kaestner agreed during her testimony that the surgical team intended to repair the injury; however, this was found to be infeasible during the procedure. This supports Dr. Pani's opinion that if the plaintiff had undergone an imaging contract test two weeks earlier, it would have been possible to detect the injury. The procedure is performed by inserting a catheter and scope in the urethra. Contrast is inserted under pressure to identify and leakage. A double-jointed stent could have been inserted to stop the leakage. The double-jointed stent allows for drainage without leakage. Because the leakage was not detected early, the whole area around the kidney became infected, making it impossible to perform reconstructive surgery.
- [13] Having considered the totality of evidence and the arguments submitted on behalf of the parties, I find that there is no reasonable prospect of success that a Court of Appeal could reasonably arrive at a conclusion different to that of the Court. The grounds of appeal and legal issues raised are not of substantial importance or public interest.

[14] The outcome of any appeal would largely depend on the application of well-established legal principles to the facts of this particular case. Regardless of any criticisms directed at the reasoning of the judgment, the result will remain the same based on the undisputed facts concerning the treatment plan implemented by GSH and the attempts to preserve the kidney.

[15] In the premises, the following order is granted:

- (1) The application for leave to appeal is dismissed with costs, including the costs of counsel on scale C.

BY ORDER

VAN DEN BERG AJ

FOR APPLICANT/DEFENDANT

ADV N. BAWA SC
ADV T. M. STEYN (HEADS OF ARGUMENT)
STATE ATTORNEY
CAPE TOWN

FOR RESPONDENT/PLAINTIFF

P. A. CORBETT SC
MALCOLM LYONS & BRIVIK INC
REF: MR T. BRIVIK