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

REPORTABLE

CASE NO: 8734/2017

In the matter between:

N[...] Z[...]

Plaintiff

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH - WESTERN CAPE**

Defendant

ORDER

PARKER AJ

1. The application for leave to appeal is dismissed.
2. The defendant shall bear the costs of the application on a party and

party scale including the costs of counsel where so employed on Scale C for Senior Counsel and Scale B for Junior Counsel, where so employed.

JUDGMENT – LEAVE TO APPEAL

[1] This leave to appeal surrounding a difficult childbirth is to grant leave to the full bench of this honorable court alternatively the Supreme Court of Appeal against the whole judgment handed down on 1 November 2024 granted in favour of the plaintiff. The parties are cited as they were in the *court a quo*.

[2] The application for leave to appeal requires the determination whether section 17(1)(a)(i), section 17(1)(a)(ii) and section 17(1)(b) of the Superior Courts Act 10 of 2013 have been met, hence the raising of the following two questions by the defendant;

2.1 does the intended appeal have reasonable prospects of success and or

2.2 are there some other compelling reasons why the appeal should be heard?

[3] The application for leave to appeal is broadened across several grounds which includes errors of fact relating to the gestation, the objective indicator the cesarean section, the critical 8 minutes, the MacRoberts maneuver and suprapubic pressure. In the assessment of evidence, the defendant examines the evidence of plaintiff, nurse Fletcher, Sister Faro and the medical records. The plaintiff opposed the application for leave to appeal.

[4] The defendant argued that the comparable case law the court relied on shoulder dystocia cases of which the facts were starkly distinguishable from this matter and or in conflict with the authorities relied upon by the defendant in establishing causation,¹

¹ NVM obo VKM v Tembisa Hospital and Another [2022] ZACC 11

instead of noting the facts as in *Sibisi NO v Maitlin*.² In the latter case, the SCA did not find Dr Maitlin's conduct wrongful and hence because the doctor was not negligent, liability was not established.³ The circumstances surrounding the *Sibisi* matter is distinguishable from this matter in that from a reading of the case, suprapubic pressure was applied, the MacRoberts procedure was applied to "*save the baby's life...in an emergency when the shoulder dystocia is preventing the delivery*".⁴ Mrs Sibisi did not discharge the onus of proving Dr Maitlin negligent. In the present matter, we simply do not know what happened - within the critical eight minutes. In my view it is in the latter which makes all the difference.

[5] The defendant once again took the court through very much the same arguments it heard before, including that the court erred in paragraph {57} of the judgment, in finding that the defendant failed to generate a comprehensive and detailed report, with a disregard for the evidence given by Sister Faro in her own handwriting.⁵ The defendant cannot escape that it failed to produce a comprehensive report, emphasis being on "comprehensive" as to what happened in the critical eight minutes.

[6] In so far as the experts are concerned, it is defendant's view that both obstetricians agreed that the MacRoberts maneuver was attempted, whilst the plaintiff herself described the maneuver or rather, what she experienced. She said, the bed was lifted up from the back,⁶ her "*legs bent, and feet were not flat on the bed*",⁷ that fundal pressure was applied "*under my ribs*",⁸ instead of suprapubic pressure.

[7] In terms of Section 17(1), the threshold required for granting leave to appeal has become more stringent. In *Caratco (Pty) Limited v Independent Advisory (Pty) Ltd*,⁹ an applicant for leave, the court considering the appeal, whether the applicant would have

² (311/2013)2014 ZASCA 156 1October 2014

³ Supra para [52]

⁴ Supra para [42]

⁵ Pages 17 and 37 of the medical records

⁶ Record page 17

⁷ Record page 18

⁸ Record page 19

⁹ (982) [2020] ZASCA 17; 2020 (5) SA 35 (SCA) (25 March 2020) para [2]. Also, para [10]

a reasonable prospect of success or that there are some other compelling reasons why the appeal should be heard;

“If the court is unpersuaded of the prospects of success, it must still inquire whether there is a compelling reason to entertain the appeal. A compelling reason includes any important question of law or a discrete issue of public importance that will influence future disputes. But here too, the merits remain vitally important and are often decisive”

[8] An applicant must convince the court that there truly is a reasonable prospect of success *“a mere possibility of success, an arguable case or one that is hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.”*¹⁰

[9] The authorities relied upon by the defendant¹¹ in advancing there are other compelling reasons, and that, the Superior Courts Act did not bring about with it a new test for leave to appeal does not assist it. In traversing the grounds set forth for the leave to appeal, nothing different has been placed before the court, other than which was argued at the hearing.

[10] After carefully considering the grounds for leave to appeal, I am not persuaded that defendant has not established a reasonable possibility of a reasonable prospect of success – it “must exist (it must not be hopeless) and must be reasonable (based on logic.”¹² As in *Smartpurse*, find no such basis. In carefully considering whether there are compelling reasons to entertain the appeal,¹³ the defendant has not advanced compelling reasons to pass the test.

[11] I see no reason to depart from the usual costs order that costs follow the result.

¹⁰ MEC for Health, Eastern Cape v Mkitha and Another [2016] ZASCA 176 (25 November 2016) paragraphs [16]- [18]

¹¹ Ramakatsa and Others v African National Congress and Another (Case Number 724/2019)[2021] ZASCA 31 (31 March 2021) para [29] , Smartpurse Solutions (Pty) Ltd v Firstrand Bank Ltd (35882/2022)[2024 ZAGPJHC 961 [2026] 1 All SA 552 (GJ) 26 September 2024 pars 64-65

¹² Supra Smartpurse para [67]- [67] as to the grounds the applicant must demonstrate

¹³ Supra Caratco para [10]

[12] Accordingly it is ordered:

1. The application for leave to appeal is dismissed.
2. The defendant shall bear the costs of the application on a party and party scale, including the costs of counsel where so employed on Scale C for Senior Counsel and Scale B for Junior Counsel, where so employed.

R K PARKER
ACTING JUDGE OF THE HIGH COURT

Appearances:

<u>Counsel for Applicant:</u>	Adv Peter Corbett SC Adv Eugene Benade
Instructing Attorney:	Rob Menzies Attorneys
<u>Counsel for Respondent:</u>	Adv Ellen Fitz-Patrick
Instructing State Attorney:	Ms N Hendricks