

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



Case number: 57373/2017

Date of hearing: 5 August 2025

Date delivered: 6 August 2025

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO 1

(3) REVISED

6/8/25

DATE

SIGNATURE

In the matter between:

THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, GAUTENG

Applicant

and

YB OBO RP

Respondent

JUDGMENT

SWANEPOEL J:

[1] The applicant seeks leave to appeal against my judgment dated 12 May 2025. The applicant also seeks condonation for the late filing of the application for leave to appeal. The respondent does not oppose the application for condonation, but seeks a costs order in that application.

[2] Briefly, the background to the filing of the application for leave to appeal is the following:

[2.1] Following on the delivery of my judgment on 12 May 2025, the Director of Litigation in the Department of Health (“the Department”) received a memorandum from the Senior Legal Administrator requesting payment authorization of the judgment debt. The Director refused to approve payment, on the basis of “*dissatisfaction with our representative, Counsel at that time.*” (sic)

[2.2] On 29 May 2025 the Director instructed the State Attorney to launch the appeal. The State Attorney was evidently of the view that there were minimal prospects of success on appeal, and it conveyed that view to the Department. Nonetheless, the Department was determined to appeal, and on 25 June 2025 its Senior Legal Administration officer: Legal Services addressed a memorandum to the Head of the Department in motivation of a request to terminate the services of the State Attorney, and to appoint private attorneys.

[2.3] The memorandum records the following:

"Following our instructions, the State Attorney's Office briefed the same counsel, who subsequently prepared a memo indicating that the defendant's chances of success were minimal."

[2.4] The legal officer's recommendation to appoint private attorneys was approved, and on 1 July 2025 the applicant's current attorneys were instructed. On 7 July 2025 the attorneys sought access to CaseLines from the State Attorney, which was facilitated on 8 July 2025.

[2.5] The application for leave to appeal was delivered on 23 July 2025.

[3] It is somewhat ironic that condonation is sought in an application for leave to appeal, on the basis that the applicant had initially been advised that the chances of success on appeal were minimal, and that it had to terminate its attorneys and find attorneys who were of a different view. After all, one of the aspects relevant to condonation is the prospect of success on appeal. Nonetheless, I accept that the applicant did not agree with its erstwhile attorneys, and that it is entitled to pursue its case as it deems fit. Also, the respondent does not oppose the application for condonation, and in fact has agreed to condonation being granted, on condition that it is granted costs. I shall, therefore, grant condonation for the late filing of the application.

[4] As far as the merits of the application are concerned, I am of the view that there is no prospect that another court would come to a different finding. I shall briefly deal with the grounds of appeal hereunder:

[4.1] The applicant first ground of appeal is that I should have found that the *“public healthcare defence” had been established “on the identified services (assistive devices, medical interventions and therapies available for free from the Chris Hani Baragwanath Hospital CP Clinic) premised on all the evidence, including evidence adduced in support of an alternative and cheaper source of medical services.”* The applicant also submitted that Ms. Haarhof (the applicant’s only witness) had testified that the plaintiff was entitled to receive certain services for free.

[4.2] The difficulty with this submission is that Ms. Haarhof could only testify regarding certain services and devices that fell under her purview as Deputy Director for Therapeutic Services, and there were a number of other services and devices that she could not testify on. Furthermore, Ms. Haarhof testified that there were a number of services and devices that the applicant could not provide. Ms. Haarhof specifically testified that public healthcare was not necessarily free, and that she could not opine on whether the plaintiff would have to pay for these services. The submission that Ms. Haarhof testified that the plaintiff could provide certain services and devices for free is not correct.

[4.3] The applicant also suggests that I should have found that the fact that the plaintiff's son had been treated at the hospital for 12 years was indicative of the public healthcare system's ability to provide services at the same or higher standard as that in private healthcare. The problem with this submission is that there was absolutely no evidence on the treatment that the child had received (if any), what services were provided and when, nor what standard of care was provided. There was no evidence comparing the standard and cost of care in the public healthcare system with that in private healthcare.

[4.4] A further submission is that higher than normal contingencies should have been applied to the monetary award for the services that the plaintiff is able to access for free at the Chris Hani Baragwanath hospital ("the hospital"). This argument had not been canvassed in the trial, and it is based upon the false averment that evidence was presented that there are services available free of charge.

[4.5] Furthermore, the applicant contends that I erred in finding that there was no evidence regarding the standard of services available at the hospital. There was, in fact, no such evidence. When the applicant's counsel sought to extract an opinion from Ms. Haarhof regarding the standard of services at the hospital, the respondent objected, and I upheld the objection. Ms. Haarhof had

not been qualified as an expert and could not, in my view, raise any opinion on the standard of care at the hospital.

[4.6] The applicant also contends that evidence was led that the Defendant would incur a saving if the order proposed by it were to be granted. That averment is false. There was no such evidence.

[4.7] The applicant contends that the healthcare defence is capable of being established without expert evidence on the standard of care available in the public health sector, as opposed to the care available in the private healthcare sector. Mr. Nhlapo, acting for the applicant, conceded that it was necessary to make a comparison of the level of care that is available in the respective sectors. How one is able to compare the two, without having the benefit of expert witnesses who are able to opine on the subject, is difficult to understand. It may be of assistance in a case if factual evidence were available that the patient had been treated successfully for a period of time, but such evidence is by its very nature anecdotal, and is not on its own sufficient to establish the public healthcare defence.

[4.8] The same is applicable to the contention that there does not have to be a comparison between the cost of care in the public as opposed to the private sector. The whole premise of the public healthcare defence is that healthcare can be provided more economically by the State, as opposed to the costs in the private

sector. How this comparison can be made without comparing the costs in the respective sectors is beyond me.

[4.9] The final ground of appeal is that I should have granted the applicant an indulgence to stand the matter down from Thursday 17 April 2025 to 22 April 2025 for the evidence of the CEO of the hospital. Two factors motivated my decision to refuse the request: Firstly, the applicant had been largely responsible for the case standing down on 14 April due to an alleged difference between the actuaries (an issue that ultimately was not in placed dispute by the applicant, nor did it call its actuary to testify); for a substantial part of 15 April, the entire 16 April, and when the matter resumed on 17 April, the applicant's witnesses were still not available. The applicant's counsel was unable to say where the witnesses were, nor why they were not at court. I was not told what arrangements had been made to secure their attendance at court. The applicant's counsel could only say was that the witness would be available on 22 April. I could see no reason to provide the applicant with any further indulgences. Secondly, given my view on the expert evidence required to establish the public healthcare defence, and given the fact that the CEO had not been qualified as an expert witness, the evidence that she was to give seemed to me not capable of taking the matter further.

[5] From the above it should be clear that I do not believe that the appeal has any prospect of success, and the application must, consequently, be dismissed.

[6] The respondent has sought costs on the attorney-client scale. Although I am perturbed by the false averments made by the applicant, regarding evidence allegedly on record (when it is not), I understand that the applicant's counsel had not read the record of evidence. As I said in my judgment previously, counsel has a responsibility not to make factual statements to the court that are incorrect. However, I accept that in this instance counsel was in the unfortunate position that he had not participated in the trial, and that the incorrect submissions were not intentionally made. The fact that the application itself seems bereft of all merit is also not sufficient to order punitive costs. However, the application for condonation was not of the respondent's making, and although the application was not opposed, the respondent is, in my view, entitled to whatever party/party costs it has incurred in respect thereof.

[7] I therefore make the following order:

[7.1] Condonation is granted for the late filing of the application for leave to appeal.

[7.2] The applicant shall pay the respondent's costs of the application for condonation.

[7.3] The application for leave to appeal is dismissed with costs of two counsel where so employed.


SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION PRETORIA

Counsel for the applicant:	Adv. S.B. Nhlapo
Instructed by:	Mncedisi Ndlovu Sedumedi Attorneys
Counsel for the respondent:	Adv. S. J. Myburgh SC Adv. C. Jacobs
Instructed by:	Vorster & Brand Inc.
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