IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: 1531/22

In the matter between: -

A[...] M[...] M[...] **APPELLANT/APPLICANT**

and

MEMBER OF THE EXECUTIVE COUNCIL FOR DEPARTMENT OF HEALTH, NORTH WEST PROVINCE **RESPONDENT/DEFENDANT**

JUDGMENT FOR APPLICATION FOR LEAVE TO APPEAL

MOREI AJ

INTRODUCTION

[1] This is an opposed leave to appeal application. The Applicant (cited as the Plaintiff in the trial) applies for leave to appeal to the Supreme Court of Appeal, alternatively, the Full Bench of the North West Division High Court, against the whole judgment and order handed down on 13 June 2025, which found that:

[1.1] The claim by the Plaintiff is dismissed, and

[1.2] The costs follow the suit.

[2] The parties are referred to in this judgment as they were cited and/or referred at trial (i.e. the Applicant as Plaintiff and the Respondent as Defendant).

GROUNDS UPON WHICH LEAVE TO APPEAL IS SOUGHT

[3] The grounds for the application for leave to appeal are as follows that:

This Honourable Court erred in:

[3.1] Finding that it was a dispute between the parties, whether the Plaintiff's HIV status caused a spontaneous fistula or whether it was caused by the negligent conduct of the medical practitioners employed by the Defendant in the absence of any plea in that regard by the Defendant. The Court should have had cognizance to the fact that the plea is a plea in bare denial, quoting the words "the Defendant has no knowledge" and the plea was never amended to reflect any version of the Defendant before Court.

[3.2] In finding despite no expert evidence was presented by the Defendant who has the necessary expertise to comment on the probabilities that the fistula was caused by the HIV status of the Plaintiff.

[3.3] In finding that it was common cause that the Plaintiff's pre-existing factors contributed to the injuries as alleged by her in her Particulars of Claim. The pre-existing factors caused the Plaintiff a high-risk patient which needed extra special care.

[3.4] In not finding that the evidence of an admission of Dr. Chimosoro with regards to the pre-existing factors causing the Plaintiff a high risk patient as relevant.

[3.5] In finding that the operation was a success, despite all the admissions, that Dr. Chimosoro admitted in regard to the negligence of the clinical staff, specifically mentioned the conserve doctor, Dr. Van Zyl, was probably overwhelmed and inexperienced.

[3.6] In finding that the operation was a success, despite the fact that the Plaintiff's left ovary and tube had to be removed, which has the effect that she can no longer bear children and which operation also ended in the rectovaginal fistula and still persisted.

[3.7] In finding that there is no causal link between the injuries sustained by the Plaintiff and the conduct of the Defendant. And further in the absence of any evidence to the contrary by the Defendant, further erred in not drawing a negative inference from the fact that neither of the clinicians were ever called to give

evidence, nor were they ever presented to the Plaintiff as possible witnesses.

[3.8] By ignoring the opinion of Prof Cronje, who testified that Dr. Van Zyl, the conserve doctor, probably should have had more experience before operating on such a high-risk patient and further by failing to give reasons why the opinion of Prof Cronje was completely disregarded by the Court.

[3.9] By further ignoring Prof Cronje's opinion that the tear was probably caused by the conserve doctor, Dr. Van Zyl, by inexperiencedly proceeding with a C-section on a high-risk patient. This despite the fact that Dr. Chimosoro agreed during his testimony that Dr. Van Zyl was inexperienced.

[3.10] Furthermore, the Court erred by ignoring Dr. Pienaar's evidence without providing reasons, despite the fact that Dr. Pienaar testified that the colostomy was an absolute must to conduct. The staff should have been aware of the Plaintiff's high-risk factors and that it was inappropriate to leave a junior doctor without senior supervision.

[3.11] Erred in not accepting Dr. Pienaar's opinion that such a patient needs more care as a high-risk patient.

[3.12] Erred in ignoring Prof Cronje's evidence that the case management of the Plaintiff's operation was substandard and that more experienced supervision was required.

[3.13] Misunderstanding the patient's high-risk status as being attributed to her HIV status when Dr. Chimosoro testified that the HIV was

dormant and under control and presented a possibility rather than a probability.

[3.14] Although the Court quotes the evidence of Dr. Pienaar failed to point out why the Court would not accept his opinion as proper and probable despite the fact that he opined that the fistula was not caused by the Plaintiff's HIV status.

[3.15] Erred in not taking into consideration that Dr. Chimosoro's report was never handed in as evidence.

[3.16] In not considering any of the admissions made by Dr. Chimosoro during his cross-examination supporting the evidence of the Plaintiff.

[3.17] In finding that an emergency situation excuses a doctor from negligence despite trite law that inexperience cannot be considered as a valid defence.

[3.18] Erred in the interpretation and evaluation of the case law, in regard to expert opinions. More specifically, in this matter where the evaluation of the expert evidence of the plaintiff's witnesses (Prof Cronje and Dr. Pienaar) was not comparable to the expert evidence provided by the Defendant's expert Dr. Chimosoro. Dr. Chimosoro agreed with this and admitted that the Defendant's staff were likely negligent in as much as Dr. Van Zyl probably waited too long before calling the Registrar for assistance during a high-risk serious situation.

[3.19] Erred in applying a test of beyond reasonable doubt when only a balance of probabilities should be considered. In not having

regard to the two expert's opinions (Prof Cronje and Dr. Pienaar) which were not disputed, and the admissions made by Dr. Chimosoro which, if considered in combination shows on a balance of probabilities that the Plaintiff has proved her claim.

[3.20] By failing to consider the evidence as a whole firstly and secondly by failing to list the isolated statements made by the Plaintiff's experts, which the Court did not agree with taking into account the evidence available to the Court.

[3.21] In quoting general statement but erred in drawing a negative implication in regard to the failure of the Defendant not calling any of the clinicians to shed light on their professional skill at the relevant time.

[3.22] In finding that the clinicians acted reasonably despite not having the benefit of their evidence. The Court erred further by not considering the fact that at least three expert's opinions (Prof Cronje, Dr. Pienaar and Dr. Chimosoro) stated that the comserve Dr. Van Zyl, was probably negligent because of his or her inexperience.

[3.23] In not finding that the Plaintiff did prove the possibility that reasonable steps should have been taken and should have been foreseen, seeing it is common cause that the Plaintiff was a high-risk patient.

[3.24] Erred in referring to case law specifically the matter of *Goliath v The MEC for HEALTH* 2014 (ZASCA) 182; 2015 (2) SA 97 (SCA) and then not applying the principle established in the mentioned case regarding the negative inference the Court has to draw

when essential witnesses are not called to come and give evidence before it.

[3.25] In misconstruing factual evidence that there was no chronic fistula prior to the operation, a fact that the Plaintiff herself testified to which could not be disputed and therefore erred on finding on assumption rather than fact.

[3.26] In finding that the Plaintiff's HIV status had any bearing on the result, namely the post operative fistula in the absence of any evidence in support thereof, and the fact it was never pleaded as the Defendant's case.

[3.27] In finding that the Plaintiff failed to demonstrate the Defendant's negligence when the evidence before the Court established to the contrary, namely that Dr. Van Zyl was probably overwhelmed and inexperienced.

[3.28] In not awarding the wasted costs on 22 November 2024 to the Plaintiff, which was caused by the Defendant's failure to call the expert witness because he was not available to testify on that day.

[3.29] It is submitted by virtue of the aforementioned grounds that the appeal would have a reasonable prospect of success implicating that another Court might come to a different conclusion.

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

[4] 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:

[4.1] The appeal would have reasonable prospects of success; or

[4.2] There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[5] The prospectus 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* 2014 JDR 2325 (LCC) the Court held that:

> " I*t 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. ..."* .[2]

[6] 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.

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

[2] At para 6.

There must be a sound, rational basis for the conclusion that there are prospects of success. [3]

[7] 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. [4]

[8] In the matter of *Tecmed Africa v Minister of Health*[5] 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 SA 353 (A) at 354)".

[9] Meritless appeals may not be allowed. The test in an application for leave to appeal is simply whether there are any reasonable prospects of success in an appeal, not whether a litigant has an arguable case or a mere possibility of success. The Supreme Court of Appeal (SCA) has in the past criticized the regularity with which leave to appeal is granted in matters not deserving its attention. Marais AJ stated that:

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[3] Ramakatsa v African National Congress [2021] ZASCA 31 (31 March 2021).

[4] Goodwin Stable Trust v Duohex (Pty) Ltd (2) [1996] 3 All SA 119 (C)

[5] [2012] 4 All SA 149 (SCA).

" ... The inappropriate granting of leave to appeal to this court increases the litigants' costs and results in cases involving greater difficulty and which are truly deserving of the attention of this court having to compete for a place on the court's roll with a case which is not.[6] *[footnote 1 on the case on the internet]".*

[10] The right to appeal is, among others, managed by the application for leave to appeal. It may not be abused but the hurdle of an application for leave to appeal may never become an obstacle to justice in the post-constitutional era, as outlined in Section 17 of the Superior Courts Act above.

[11] Adv. De Meyer and Adv. M Van Aswegen on behalf of the Plaintiff argued that the probabilities favour the Plaintiff's case, as another Court might reach a different conclusion due to the complexities of expert testimony and differing expert opinions. They contended that a different Court would take into consideration that there are issues in dispute; conflicting experts opinions exists and that this Court, applied a test of beyond a reasonable doubt when only a balance of probabilities test should have been applied, in deciding whether the Defendant was negligent or not; and that the Plaintiff had proven her claim.

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[6] Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others (231/2002) [2003] ZASCA 57; [2003] 3 All SA 123 (SCA); 2003 (5) SA 354 (SCA) (30 May 2003) para 6.

[12] Adv. MM Maphuta on behalf of the Defendant opposed the appeal on the basis that there are no other compelling reasons why the appeal should be heard. There is no question of law that needs to be considered, and there are no conflicting judgments on the matter under consideration. This Court correctly held that the presence of a fistula to a patient who are infected with HIV is not foreign or unheard of, and to tie its presence to unlawful and negligent conduct of the Defendant would not be entirely correct except where the Plaintiff is able to demonstrate that indeed the Defendant failed to apply the standard of care unto the Plaintiff which culminated into medical malpractice. Moreover, this Court's approach in considering whether the Defendants' conduct failed to meet the accepted standard of care, causing harm to the patient, is consistent with how this principle is applied in all medical negligence cases.

[13] Furthermore, contended that the Defendant has succeeded in proving that the Applicant's leave to appeal has no prospects of success and that any other court faced with the facts of the Plaintiff's case will not come to a different conclusion to the one the trial court came to.

THE TEST FOR MEDICAL NEGLIGENCE

[14] In *Topham v MEC for the Department of Health, Mpumalanga* (351/2012)

[2013] ZASCA 65 (27 May 20213) it was held that:

> *"[6] Professional negligence is determined by reference to the standard of conduct of the reasonably skilled and careful*

practitioner in the particular field and in similar circumstances. A medical practitioner diagnosing and treating a patient is expected to adhere to the general level of skill, care and diligence possessed and exercised at that time by the members of the branch of the profession to which he or she belongs. It follows that a wrong diagnosis does not per se amount to negligence on the part of the medical practitioner concerned. It will only be negligence if the practitioner's conduct does not comply with the general standard of care to which I have referred." (My own emphasis added)

[15] The test for medical negligence was aptly captured in November 2023 by

Joubert[7] when he discussed the cases of *Chapeikin and Another v Minister* (103/2015) [2016] ZASCA 105 (14 July 2016) and *Oppelt v Head*: *Health, Department of Health Provincial Administration: Western Cape* (CCT185/14) [2015] ZACC 33; 2016 (1) SA 325 (CC); 2015 (12) BCLR 1471 (CC) (14 October 2015). He concluded that:

(a) The existence of negligence for the purpose of liability is that fault arises if a reasonable person in the position of the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence; and the defendant failed to take such steps;

(b) There are two steps, the first is foreseeability – would a reasonable person in the position of the defendant foresee the reasonable possibility of injuring another and causing loss. The second is

[7] https://www.millers.co.za/OurInsights/ArticleDetail.aspx?ArticleID=3121 accessed on 23 December 2025.

preventability – would that person take reasonable steps to guard against the injury happening;

(c) Negligence must be evaluated in light of all the circumstances;

(d) Because the test is defendant-specific the standards are upgraded for medical professionals. The question for them is whether a reasonable medical professional would have foreseen the damage and taken steps to avoid it;

(e) The appellate division noted that this standard does not expect the impossible of medical personnel.

(f) A medical practitioner is not expected to bring to bear upon the case entrusted to him the highest possible degree of professional skill, but he is bound to employ reasonable skill and care and he is liable for the consequences if he does not;

(g) A practitioner can only be held liable if his diagnosis is so palpably wrong as to prove negligence, that is to say, if his mistake is of such a nature as to imply absence of reasonable skill and care on his part, regard being had to the ordinary skill in the profession.

(h) The test is always whether the practitioner exercised reasonable skill and care or put differently, whether his or her conduct fell below the standard of a reasonably competent practitioner in the field;

(i) If the error is one that a reasonably competent practitioner might have made, it will not constitute negligence.

CONCLUSION AND ORDER

[16] I have carefully considered both parties submissions and whether there are any reasonable prospects of success on appeal.

[17] I am not persuaded that there are any reasonable prospects of success, as the Plaintiff did not meet the threshold required for this Court to grant leave to appeal.

[18] Moreover, in making a ruling, I correctly applied the balance of probabilities test considering all the evidence, including evidence of all expert witnesses that was provided.

[19] In the premises, the application for leave to appeal is dismissed with costs.

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ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

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