

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 13493/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
08/06/2026	
DATE	SIGNATURE

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, GAUTENG**

Applicant

and

RSL obo TM

Respondent

Delivered: The matter was heard via Microsoft Teams and the judgment was prepared and authored by the judge whose name is reflected herein and handed down electronically by circulation to the parties' legal representatives by email and uploading it to the electronic file of this matter on Caselines. The date and time of handing down is deemed to be 11:00 on 8 June 2026.

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

SKIBI, AJ

[1] This is an application for leave to appeal against the whole judgment of this Court delivered on 26 January 2026, where the applicant was ordered to pay the respondent, in her representative capacity, damages claim for future hospital medical and related expenditure; loss of earnings and damages and protection of the funds in the total amount of R 30 775 286. The said figure is calculated as follows:

- a. future medical and related expenditure: R 22 125 163;
- b. loss of earnings: R 3 903 010;
- c. general; damages: R 2 600 000; and
- d. protection of the award: R 2 147 113.

[2] The application for leave to appeal is accompanied by an application for condonation for late filing of same. The applicant's leave to appeal is either to the Supreme Court of Appeal or to the Full bench of this Division.

[3] Both application for leave to appeal as well as the application for condonation are opposed by the respondent. In addition, the respondent raised a point in *limine* regarding the defective notice of the application for leave to appeal served and filed. I propose to start with the application for condonation and point in *limine*, before I deal with the grounds for the application for leave to appeal.

Condonation

[4] The applicant, in its supporting affidavit for the application for condonation, states as follows:

"31. The judgment uploaded on Caselines on the 29th of January 2026 and after studying the judgment sent to the client for consideration and advise.

31.1 The client instructed to proceed to appeal the judgment.

31.2 After receiving instructions to proceed with the appeal, the SCA handed down the decision, *TN obo BN V MEC HEALTH (EC) CASE NO. 383/23 (2026) ZASCA 14* on the 11th February 2026.

31.3 The Applicant is the fourth Amicus Curiae in the matter.

31.4 Counsel then advised that we need to seek further instructions from client in the light of the decision.

31.5 We had been advised that decision has now been taken of an appeal to the CC and accordingly we should proceed with our appeal, hence, there was delay in bringing this application".¹

[5] It is important to mention that the respondent's answering affidavit at paragraph 7 states:

"7. This application is, therefore, as far as leave to appeal is concerned, fatally defective and stands to be dismissed on this ground alone. However, seeing that there is a minor child in dire need of medical care and that finality is important, we have decided to file this answer, which should not be seen as us condoning the fatal defects, but rather just an attempt to expedite finality in the best interest of the minor."²

[6] It is common cause that the applicant was two months late in filing the application for leave to appeal. However, the application for leave to appeal is accompanied by an application for condonation. The argument by the respondent does not end on the applicant's lateness in filing the application for leave to appeal, but also that the explanation provided is inadequate. The respondent also argues that the applicant was late in filing its heads as it should have filed heads of argument on 18 May 2026, in terms of the court directive, but the applicant's heads were only filed on 19 May 2026 with no explanation whatsoever. In reply, the applicant insists that its heads were filed on the due date, being 18 May 2026, *albeit* after court hours, hence an apology has been tendered.

[7] Rule 49 (1(b) of the Uniform Rules of Court prescribes the period of 15 days from the date of the judgment or order within which an aggrieved applicant may serve and file an application for leave to appeal. However, Rule 49(1)(b)(ii) provides for indulgence, i.e. extension of the time period upon 'good cause' shown. The respondent's contention that the applicant has failed to provide an adequate explanation for the delay relies on the judgment by the Constitutional Court in *Van*

¹ Caselines page 01-17.

² Caselines page 01-26.

Wyk v Unitas Hospital and Another,³ where the Constitutional Court, when dismissing an application for condonation for, amongst other reasons, lack of full explanation held: “An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable”. The respondent also relies on the case of *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others*⁴ where the court, in a unanimous judgment, dismissed an application for condonation for the late filing of the heads of argument and held that: “factors which usually weigh with this Court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent’s interest in the finality of the judgment of the court below, the convenience of this Court and the avoiding of unnecessary delay in the administration of justice.”

[8] I have considered written and oral submissions and papers filed on record on the application for condonation for late filing of the application for to appeal together with authorities referred to by the parties and have reflected on same. I am not convinced with the reasons given for the delay in filing the application for leave to appeal. The judgment was forwarded to the parties on 27 January 2026. The applicant’s application for leave to appeal was uploaded on Caselines on 13 April 2026, two months out of time from the date of judgment. The *TN*⁵ judgment was delivered by the SCA on 11 February 2026, a period which was within the stipulated time for filing leave to appeal in this case. After *TN judgment* was delivered it took not less than two months for the applicant to lodge this application. It is not indicated the date when the instructions were sought and obtained from the applicant by the applicant’s legal representatives. Despite the respondent’s argument that there was no need for the applicant to wait for this judgment as the facts on these matters are distinguishable, it is common cause that the issue of the development of public healthcare defence was dealt with in the *TN judgment* and in this present matter. In my view, there was hope on the applicant that perhaps the *TN* judgment was to provide

³ 2008 (2) SA 472 (CC) at para 22.

⁴ [2013] 2 All SA 251 (SCA) at para 11.

⁵ *T N obo B N v Member of the Executive Council for Health of the Eastern Cape Government and Others* [2026] 1 All SA 500 (SCA).

clarity and help the applicant in decision making as to whether to appeal this judgment or not.

[9] The provision of good cause for the delay is not the end of the enquiry. Case law provides in depth analysis on the minimum requirements for condonation to be granted. Amongst the factors considered by the court as to whether to grant condonation, are the following: the degree of lateness, the explanation thereof, the prospects of success on the merits of the appeal, and the importance of the case.⁶ I have highlighted above that the respondent is also in agreement that reaching finality will be in the best interest of the minor child involved, although it has been stated clearly that it does not mean that the respondent abandons the argument that no adequate explanation is provided by the applicant for the delay in filing this application for leave to appeal.

[10] Having said that, I am inclined to grant condonation for the late filing of the application for leave to appeal. This is due to the importance of the matter and to see to it that it reaches finality. It is important for litigants to comply with the time period prescribed by the Rules of Court and court directives. The lateness by the applicant in launching the application for leave to appeal and filing of the heads of argument are not inordinately long. The applicant was a few hours late in filing its heads. There is no reason to reject the apology for such lateness in filing heads of argument as it was late by few hours. The respondent was not prejudiced, although they deemed it appropriate to make time and prepare supplementary heads, which was not planned. The decision reached in this condonation application is adopted to protect the best interests of the minor child, which are of paramount importance as enshrined in section 28 of the Constitution of the Republic to avoid any unnecessary delay in finalising the matter.

Point in limine: Defective application for leave to appeal

[11] The respondent has raised a point in *limine* in the answering affidavit, in that the application for leave to appeal has not been properly instituted in terms of Rule 49

⁶ *Melane v Santam Insurance Company Ltd* 1962 (4) SA 531 (A) at 532. See also *Dengentenge supra*

of the Uniform Rules, which requires that leave to appeal be brought on notice, clearly and succinctly, stating the grounds upon which the judgment is disputed. Instead, the application has been instituted on notice of motion, supported by an affidavit. The respondent places reliance on the judgment of *Songono v Minister of Law and Order*,⁷ which was followed with approval by the full court of the High Court, Eastern Cape Division in *Xayimpi and Others v Chairman, Judge White Commission (formerly known as Browde Commission) and Others*.⁸ The respondent also referred this Court to the judgment of *Doorewaard and Another v S*⁹ where Hendricks J (as he then was) said:

"The law governing a notice of appeal (and also notice of application for leave to appeal) is trite. The grounds of appeal in a notice of application for leave to appeal must be clearly and succinctly set out in unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which respondent is to meet in opposing the application for leave to appeal. The notice should not contain arguments. Therefore heads of argument must also be filed and served in which the points to be argued will be set out in much more detail."

[12] During oral arguments, the applicant argued that the grounds of appeal are clearly set out in the application without ambiguity. It was contended that this point is no longer pursued by the respondent as it has been indicated in the answering affidavit that in the interest of justice, the respondent decided to file an answering affidavit to avoid unnecessary delays so that the matter can proceed until it reaches finality. The applicant was referred to paragraph 26 of the founding affidavit where a wide range of allegations of court misdirections are highlighted to give an opportunity to address this point *in limine* in that it leaves the respondent and the court guessing as to what it is alleged that the grounds of appeal not clearly stated as required by the Rules of Court. It was submitted on behalf of the applicant that the said paragraph is a summation of the issues raised by the applicant. Furthermore, the applicant's contention is that the grounds of appeal clearly and succinctly stated in the notice of application for leave to appeal.

⁷ *Songono v Minister of Law and Order* 1996 (4) SA 384 (E) at 386A-B.

⁸ [2006] JOL 16596 (E) at para 8c-d.

⁹ [2019] ZANWHC 25 at para 3.

[13] I agree with the respondent, the application is defective. However, be as it may I am going to deal with the enlisted grounds of appeal or rather what has been described as purported grounds of appeal. The *Songono*¹⁰ & *Doorewaard*¹¹ judgments cited above clearly state what is required in an application for leave to appeal. The notice of motion with supporting affidavit is used when leave is sought from the President of the Supreme Court of Appeal and/or the Constitutional Court. Paragraphs 26 and 27 of the applicant's affidavit listed general allegations of misdirection. In the answering affidavit, the respondent has responded to what it has described as purported grounds of appeal. It is only in the applicant's heads of argument where it highlights what it states are grounds of appeal, something which should have been articulated in the notice of application for leave to appeal. There are additional points of attack on the judgment and new issues raised i.e. the argument on Rule 27(3). However, since the decision on condonation has been made, there is no need of addressing the issue raised on Rule 27. As indicated on the issue of condonation, the interests of minor child require that the matter reaches finality.

The legal principles on application for leave to appeal

[14] The legal principles for leave to appeal are situated in section 17(1) of the Superior Courts Act.¹² The section reads as follows:

- “(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;”

[15] There are several judgments dealing with the test for leave to appeal encapsulated in Section 17(1) of the Superior Courts Act:

¹⁰ Above n 8.

¹¹ Above n 10.

¹² Act 10 of 2013.

15.1. *Democratic Alliance v President of the Republic of South Africa and Others*,¹³ a judgment by a full court of this Division regarding the test for leave to appeal is authoritative:

"[4] The test as now set out in section 17 constitutes a more formidable threshold over which an applicant must engage than was the case. Previously the test was whether there was a reasonable prospect that another court might come to a different conclusion... The fact that the Superior Courts Act now employs the word "would" as opposed to "might" serves to emphasise this point. As the Supreme Court of Appeal said in *Smith v S* 2012 (1) SACR 567 (SCA) at para 7:

'More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must in other words be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[5] ...

[6] The second basis upon which leave should be granted is that there is a compelling reason, that is apart from the existence of conflicting judgments on the matter under consideration which require clarification from a higher court. In essence the compelling reason is whether the case raises issues of significant public importance..."

15.2. The Supreme Court of Appeal in *MEC for Health, Eastern Cape v Mkhitha and Another*¹⁴ remarked as follows:

"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal *would* have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

¹³ [2020] ZAGPPHC 326, *coram*: Mlambo JP, Davis JP and Molefe J.

¹⁴ [2016] ZASCA 176.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.¹⁵ ”

15.3 In *Rex v Baloi*,¹⁶ the Appellate Division (now SCA) held that “. . . leave to appeal should not be granted unless the applicant will have a reasonable prospect of success on appeal,”

[16] From the above mentioned cases it is clear that the threshold for granting leave to appeal has become more stringent, in that the test to be applied is not “may” but “would”. The issue now is whether another court, sitting as a court of appeal, would come to a different conclusion/decision.¹⁷ The applicant referred to the judgment of *Van Heerden v Cronwright & Others*,¹⁸ where it was held that 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. However, I could not locate the quoted passage at page 343 on the cited case on anywhere in the judgment referred to.

The applicant's grounds of appeal

[17] The applicant contends that the Court erred in law and/ or fact in respect of the ruling against upholding the development of common law public healthcare defence; further, that the Court erred on the ruling on the repudiated joint expert minutes and, further, erred by granting an order of an award which is unreasonably excessive. There

¹⁵ *S v Smith* 2012 (1) SACR 567 (SCA) at para 7. See also *Mont Chevaux Trust (IT 2012/28) v Tina Goosen and 18 Others* Unreported, LCC Case No LCC14R/2014 dated 3 November 2014 and *Notshokovu v S* [2016] ZASCA 112.

¹⁶ 1949 (1) SA 523 (A) at 524. See also *Fusion Properties 233 CC v Stellenbosch Municipality* [2021] ZASCA 10 at para 18; *Nwafor v The Minister of Home Affairs and Others* [2021] ZASCA 58 at para 25 and *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) at para 34.

¹⁷ *Mont Chevaux Trust (IT2012/28) v Tina Goosen & 18 Others* above n 15 at para 6 where Bertelsmann J held as follows: “It is clear that the threshold for granting leave to appeal against a judgment of the 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 . . .”

¹⁸ 1985 (2) SA 342 (T) at 343C-D.

is also criticism of the Court's findings on the credibility of witnesses. The submissions on the grounds of appeal are dealt with below:

17.1. The applicant's first ground of appeal is that the Court erred on its findings to decline to develop the common law public healthcare defence (PHD) based on the impact this judgment has on the resources of the applicant in fulfilling its constitutional obligations to its public healthcare facilities. It is submitted further that that the appellate court would find that the Court erred in the awarding of damages to the respondent in the amount of R 30 775 286 as it is expected, in terms of Section 3(3)(a) of the State Liability Act,¹⁹ to make payment within 30 days of the order becoming final, or within a period agreed upon by the judgment creditor and accounting officer of the department concerned. The applicant contends that it had a different expectation regarding the manner of payment based on its amended plea in which public healthcare defence was pleaded (in terms of which claims for future medical expenses against public healthcare authorities, may be satisfied through the provision of medical services in the public healthcare sector), alternatively, the respondent would be permitted, where the provincial department of health cannot itself provide the required services or items that the respondent will reasonably require, to procure such services or items in the private healthcare sector as and when needed or reimburse the respondent in the circumstances where he is obliged to first incur these expenses himself.

17.1.2. The applicant further argues that the Court erred as a matter of law when it incorrectly applied the law to the facts in that it erred to have regard to the fact the applicant planned to call witnesses from Chris Hani Baragwanath Hospital (CHBH) to discharge its evidential burden of proof through factual witnesses that the services at that public hospital are of similar standard as those provided in the private healthcare sector or reasonable, had it not been concession by senior counsel for respondent that CHBH provides healthcare services on Occupational therapy, Neuro development therapy, Speech therapy and an Orthotist. It further submits that calling the said witnesses would have amounted to wasting of the

¹⁹ Act 20 of 1957.

Court's time. Based on such concession, the applicant argues it was not required to go further than that, i.e. to lead evidence and Court erred in finding that the applicant presented no evidence as required by the judgments of *Ngubane v South African Transport Services*²⁰(*Ngubane*), *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ*²¹ (*DZ*) and *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government*²² (*MSM*). Furthermore, the applicant contends that since the respondent gave birth to all her children at CHBH, that is an indication that the said facility renders services of good standard or reasonably acceptable standard. The applicant further argues that this matter presents novel legal issues and leave to appeal should be granted. The applicant concludes that the court ought to have upheld the public healthcare defence.

17.1.3. During oral arguments, I engaged the respondent's counsel during oral submissions as to whether the concession by the respondent's senior counsel would not be a compelling reason for granting leave to appeal so that there could be certainty in future similar cases where such concession is made. The respondent argued as reflected in the main judgment that there was no concession was made regarding the required reasonable standard of healthcare services which are available at CHBH. The respondent submits or suggests that the reason for the applicant not calling those factual witnesses even after listening to the recording of what was conceded is that it knew that those witnesses were not going to assist it in discharging the evidential burden that those services are of similar to those provided in the private health care sector.

17.2. The second ground of appeal is that the Court misdirected itself in the manner the expert's evidence was dealt with.

²⁰ *Ngubane v South African Transport Services* 1991 (1) SA 756 (A)

²¹ *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC).

²² *MSM obo KBM v Member of the Executive Council for Health, Gauteng Provincial Government* [2020] 2 All SA 177 (GJ).

17.2.1. The applicant's further criticism is that the Court erred in dismissing the application for the repudiation of the expert joint minutes at the conception of the trial. It is contended that the Court's ruling on the admissibility of the repudiated expert joint minutes was prejudicial. The applicant argues that it repudiated the joint minute to which its own expert is a party, did so clearly at the very latest, at the outset of the trial. The main argument here was that the decision by this Court to dismiss the application for the repudiation at the conception of the trial was incorrect and erroneously granted, as the ruling had final effect and will therefore result in a miscarriage of justice, in that the applicant will not be allowed to lead evidence contrary to the agreements that have been made by experts on these joint minutes. It was further argued that the Court should have found that there was timeous repudiation, and the applicant was restricted in the evidence that was highly prejudicial in the conduct of the trial. This argument is made on the basis that the applicant brought this at the earliest time as is required in terms of the law.

17.2.2. The respondent's counter-argument is that the applicant cannot complain of having been deprived an opportunity when the ruling was on the admissibility of non-contested joint minutes and on repudiated expert joint minutes. The Court ruled that each party would be entitled to call witnesses where it deems necessary. The Court ruling admitted uncontested joint minutes to avoid unnecessary formal proof and allowed evidence to be led where expert witnesses disagree. This approach that was adopted is in line with the legal prescripts enunciated in *Van der Merwe obo MH v Member of the Executive Council for Health & Social Development, Gauteng Provincial Government*²³ and *Glenn Marc Bee v The Road Accident Fund*.²⁴ The respondent concluded that the applicant was not barred from calling the operational witnesses at CHBH it intended to call.

²³ [2024] ZAGPJHC 437.

²⁴ 2018 (4) SA 366 (SCA).

17.3. The third ground is the criticism regarding the conclusion on the award quantum of damages claim, in that the Court erred in awarding quantum of damages which is excessive, placing more emphasis or reliance on the respondent's expert witnesses' recommendations. The applicant submitted that the Court failed to consider the comparative judgments referred to during argument. The Court failed to have regard to the fact that the cerebral palsy was not severe; the child attended school at the mainstream and never repeated a grade from grade 1 to grade 7 etc. On the other hand, the respondent argued that the court did consider comparison of previous judgments and concluded to award R 2 600 000 for general damages.

17.3.1. The respondent's submission to this ground of appeal was that the applicant's criticism on quantum of damages is levelled in general and broad terms. This appears at paragraph 26 of the applicant's affidavit where there are general allegations of misdirection, such as scoliosis diagnosis; which expert evidence should not have been accepted; inadmissible or changed evidence; overlaps; inflated relief and inadequate regard to the public budgetary impact.

17.3.2. The respondent's further argument is that on future hospital medical and related expenditure, the applicant does not identify a single item where the Court misunderstood the law and reached a conclusion that no reasonable court could reach. The respondent further contended that there were around 500 itemised medical and related items presented in Court, and the Court dealt extensively with them and considered contingencies where applicable, as well as overlaps to eliminate duplications.

The Court's evaluation and conclusion

[18] With regard to the contention of misdirection on public healthcare defence, reliance is found mainly on the concession by the respondent's senior counsel that certain healthcare services are available at CHBH is misplaced as it does not meet

the *Mashinini*²⁵ standard requirement. In other words, a concession that CHBH provides certain public healthcare services (Occupational therapy, Neuro development therapy, Speech therapy and an Orthotist) does not meet the standard of healthcare set out in *Mashinini*, which requires proof of services similar to those provided at private healthcare sector or healthcare services which are at an acceptable standard at no or lesser cost²⁶. For completeness in *Mashinini* the SCA quoting with approval a passage in Ngubane judgment at para [12] says 'This Court went on to further state that ' Thus in the instant case the respondent was required to adduce evidence- a "voldoende getuienisbasis" in the words of Jansen JA- in support of its contention, that it is to say, that for the next 35 years, or for some shorter period, medical services of the same, or an acceptably high, standard will be available to the appellant at no cost or for less than that claimed by him'²⁷.

[19] A lot has been said that the Court erred in failing to consider the implications of granting an order without making a proper analysis as per the *DZ*²⁸ judgment in that instead of making an order that the respondent be compensated in monetary terms, the Court should have instead granted an order directing the applicant to provide healthcare services, and where it is unable to provide same, direct that the applicant procure such. This criticism is found on the basis that an order for payment of lump sum could hamper the applicant's constitutional ability to fulfill its constitutional obligation in providing healthcare services to other people. In as much as this may be viewed as a valid argument, this point has been dealt with in more detail in the main judgment.²⁹ After considering the arguments by both parties and applicable case law,³⁰ the Court reached a conclusion that the public healthcare defence could not be sustained.

[20] The law has been consistently followed by the higher courts, the *Mashinini* SCA judgment, and was also followed with approval in the latest *TN* judgment. As much as periodic payment rather than a once-off payment was pleaded in the applicant's amended plea, the applicant chose not to lead evidence that it may not be in a position

²⁵ *Mashinini v Member of Executive Council for Health and Social Development Gauteng Provincial Government* 2023 (5) SA 137 (SCA).

²⁶ *Mashinini* SCA Judgment at para [11] to [13]

²⁷ Quote in *Mashinini*, from Ngubane judgment, at 785C-D

²⁸ Above n 21.

²⁹ Judgment page 27 at paragraphs 48.1 - 48.7 & 49.

³⁰ Judgment page 5 at paragraphs 8 - 46.

to make a once off payment or requesting the court to direct that such payment be paid in kind or instalments. It has not been pointed out that the Court overlooked or ignored such evidence as there is none (regarding non affordability to pay compensation in a lump or budgetary constraints) which was led by the applicant during the trial. It is surprising that the applicant is pursuing leave to appeal on the public healthcare defence as one of its grounds of appeal as it stated that, amongst the reasons for the delay in launching the leave to appeal, it awaited the SCA Judgment on the *TN* matter as the judgment had a direct bearing on the legal principle on lump sum damages in medical negligence cases, before it could decide whether or not to appeal this judgment. However, this should not be construed to mean that it was prohibited to pursue this ground of appeal in its application as it has every right to pursue any ground including this one on PHD.

[21] The applicant's contention that the Court erred by failing to measure the damages reasonably and placed more weight on the respondent's expert evidence as opposed to the applicant's expert evidence, who, in fact, led evidence that of healthcare is just as good (or at least good enough) to cater for the needs of the respondent is inaccurate. The applicant's reliance on this submission is based on the concession made by the respondent's senior counsel and the concession by the respondent (under cross-examination) that she gave birth to all the victim's siblings at CHBH. This statement (respondent's senior counsel concession) is inaccurate, senior counsel didn't concede that the services provided at CHBH are as good as those at the private healthcare sector, he only conceded that such services are available at CHBH. The record of the proceedings reveals that no evidence was led by the applicant regarding the provision of reasonable healthcare services CHBH.

[22] It has not been demonstrated where the Court erred on the quantum of the future hospital, medical and related expenditure. I agree with the respondent's submission that the applicant's criticism of the 'court's not challenging' the applicant's election not to call factual witnesses has no legal basis. This has been confirmed in a few cases, amongst others is the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*,³¹. As stated in the main judgment, the record shows that the proceedings were halted and counsel for the

³¹ 1999 (4) SA 147 (CC).

applicant was given an opportunity to listen to what was conceded by the respondent's senior counsel. After listening to the recording of the proceedings, the applicant's legal team elected to close their client's case. There was no need for the court to seek clarity on the applicant's election to close its case.

[23] The *TN* judgment is a classical case where the high court was provided with evidential material and asked to develop common public healthcare defence. In that case (*TN*), the trial court heard voluminous record from departmental and treasury witnesses', economics and rehabilitation evidence, nonetheless, the SCA set aside the public healthcare defence remedies and held that fundamental reform, in once-and-for all rule and damages law, is for the legislature and not the Courts.

[24] With regard to the alleged misdirection on the repudiated joint minute, the Court ruling was that each party may call its expert witnesses if it deems necessary as the parties were far apart in reaching an agreement on the above-mentioned areas of specialisations. The applicant chose not to call its witnesses. It was not stopped to do so, contrary to what is contended. The Court admitted the undisputed joint minutes and held that each party may call its respective witnesses deemed necessary. Although at the time the ruling was made, the contents of the joint minutes had yet to be handed in, once they were handed and other evidence led, the parties' expert recommendations and conclusions, any differences of experts' conclusions and recommendations have been addressed in the application of contingency deductions in order to deal with any the issue of unfairness and/or any injustice would have been caused.

[25] With regard to the finding on the quantum of damages, (general damages claim and loss of future earnings) no misdirection is pointed out that the Court misunderstood and erred in law. The argument that the Court was generous in the award of general damages and future loss of earnings has no merit. The court had regard to the judgments³² it was referred to by both parties, analysed the facts and applied the law.³³ Furthermore, the court had regard to the comparable decided cases on cerebral palsy, and based on experts' evidence, contingencies were applied where

³² MEC for Health, Gauteng Provincial Government v AAS obo CMMS (2025 (6) 152 (SCA), delivered on 20 June 2024 at para 51 to 59

³³ Judgment page 98 at paragraph 184 to page 100 at paragraph 185.4 & page 102 at paragraph 193 to page 102 & pages 106 at paragraph 198.4 to page 109 at paragraph 207.1.

applicable and a conclusion was reached that the award of damages was fair and reasonable. It has not been pointed where the appellate court may find that there is misdirection in the Court's exercise of its discretion save to state that the court erred to award excessive damages claim.

[26] On the question of excessive award of damages, the legal position is that a court of appeal may only step in or interfere in the findings of the court *a quo* if there is a material misdirection or a clear problem with the award. This includes a situation where the trial court acted on a wrong principle of law, the court misdirected itself on facts, the award is so inordinately high or low that it induces a sense of shock or the court failed to properly consider relevant factors, for example comparable awards. If none of these are present, a court of appeal will not interfere, even if it might have awarded a different amount itself.³⁴ In this particular case, the court even took into account the already awarded special damages³⁵ when considering the general damages, considered comparative case law and revisited expert reports before fixing general damages at R 2,6 million. In the cases referred to above on general principles for leave to appeal, case law³⁶ states that a mere possibility another court may reach a different conclusion is not enough as the test for leave to appeal became more stringent.

[27] The applicant's other additional ground takes an issue with various factual and credibility findings in relation to the oral evidence presented in court, namely; credibility finding concerning Ms Radzuma;³⁷ Ms Mokgata;³⁸ Dr Mteshana;³⁹ Dr Close and Dr Ramokgopa (preferred the evidence of Dr Close as there was corroboration by Dr Botha and other clinicians on the issue of mild scoliosis diagnosis);⁴⁰ Ms Greef and Ms Radzuma on the issue of caregiver and case management; the issue of educational needs, mobility, orthotics, and neurology/Botox. In each objection raised by the applicant, the issues are dealt with. For example, on the challenge with regards

³⁴ See *Protea Assurance Co Ltd v Lamb* 1971 (1) SA 530 (A); *Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA) and *Southern Insurance Association Ltd v Bailey* NO 1984 (1) SA 98 (A).

³⁵ Judgment page 110 at paragraph 207.2.

³⁶ Cases referred to in this judgment at para 15.1 to 15.3

³⁷ Judgment at paragraph 36.1: witness tailored her evidence, paragraph 139.3: recommendations lacked consistency, no plausible explanation for rechanged recommendations, short-period postulations contrast to Ms Greef lifelong approach.

³⁸ Judgment at paragraph 36.2.

³⁹ Judgment at paragraphs 36.3 and 39.

⁴⁰ Judgment at paragraphs 135, 136 and 137.

to schooling costs, no evidence was presented to show that costs were lower or that bursary-related assumptions displaced the agreed expert need;⁴¹ the claimed overlap figure was not explained, and the court was not persuaded to deduct it in the absence of evidence to the contrary.⁴² The Court engaged the argument that Botox services existed at CHBH, but weighed that against the respondent's evidence of failed referral and failed access.⁴³ The court held that even if orthotic services are provided at CHBH, the applicant had still not proved comparable private-sector standard or acceptable reasonable standard. These are factual findings, none of which have been shown to be contaminated by an error of law or failure to consider relevant evidence, or a conclusion no reasonable court could reach. It is trite law that the court of appeal does not interfere lightly with credibility findings of the trial court unless they are of material nature.

[28] The respondent raises an issue regarding the conduct of the applicant, namely; bringing new issues or grounds of appeal on its heads of argument, which are not in the applicant's notice of application for leave to appeal. The respondent argues that this is against the spirit of fairness - giving an opportunity to the opponent to prepare for the case to meet. The respondent has asked the Court to reject the new issues raised for the first time in the applicant's heads of argument. Amongst the new issues raised in the applicant's heads of argument which are not contained in the notice of application for leave to appeal are in broad terms about excessive damages and evidentiary misdirection. The new detailed complaints relate to the criticism on the admissibility of the respondent's experts' witnesses' evidence regarding scoliosis diagnosis, life expectancy, experts allegedly changing evidence in the witness box, experts testifying beyond expertise, overlaps and duplication, inflated relief, insufficient reasoning and unreasonable awards.⁴⁴

[29] It is contended that in the notice, the applicant does not plead alternative amounts for loss of earnings, general damages or contingencies, whereas in the heads of argument, it does exactly that.⁴⁵ In the heads of argument, the applicant also alleges that the respondent made an admission necessary for the development of the

⁴¹ Judgment at paragraphs 122.5 to 123.

⁴² Judgment at paragraphs 125 -126.

⁴³ Judgment at paragraphs 129 -130.

⁴⁴ Applicant's heads at paragraphs 3.6 - 3.7.

⁴⁵ Applicant's heads at paragraphs 22 - 24.

common law.⁴⁶ The applicant also brings the issue that the Court should have used wide discretion to obtain clarity, this is not in the notice as well. The respondent contends that the addition of the new or fresh criticism on the judgment is not merely to elaborate the issues in the notice of application for leave to appeal but materially enlarges and reformulates the case by doing that effectively supplement the grounds of appeal in the original application for leave to appeal and is asking the court to reject the new arguments. The respondent referred the court to the case of *Songono v Minister of Law and Order*,⁴⁷ Leach J stated the following profound remarks:

"It seems to me that, by a party of reasoning, the grounds of appeal required under Rule 49(1)(b) must similarly be clearly and succinctly set out in clear and unambiguous terms so as to enable the Court and the respondent to be fully and properly informed of the case which the applicant seeks to make out and which the respondent is to meet in opposing the application for leave to appeal. Just as Rule 49(3) is peremptory in that regard, Rule 49(1)(b) must also be regarded as being peremptory. In my view the lengthy and rambling notice of appeal filed *in casu* falls woefully short of what was required. Mr Bursey suggested that grounds of appeal could be gleaned from the notice but that is not the point - the point is that the notice must clearly set out the grounds and it is not for the Court to have to analyse a lengthy document in an attempt to establish what grounds the applicant intended to rely upon but did not clearly set out. On this basis alone the application seems to me to be fatally defective and must be dismissed."

[30] I am in agreement with the respondent's argument that the fresh criticisms or new issues ought to have been included in the original application. It should be noted that paragraph 26 of the applicant's affidavit includes some of the so called new grounds but not as specific but in broad terms. However, the said issues have been dealt with in the main judgment and the argument against same has have been addressed at the end of paragraph 27 above.

[31] I am not persuaded by the argument that the judgment raises a number of novel legal issues which are of significant public importance. The *DZ*,⁴⁸ *Mashinin*⁴⁹ and, lately, *TN*⁵⁰ judgments have provided extensive jurisprudence and guidance when it

⁴⁶ Applicant's heads at paragraphs 63 - 64.

⁴⁷ Above n 8 at 385H - 386B.

⁴⁸ Above n 21.

⁴⁹ Above n 25.

⁵⁰ Above n 5.

comes to public healthcare defence, and the issue of the repudiation of expert joint minutes has been dealt with in our jurisprudence. The only thing new in this matter is the concession by the respondent's senior counsel which is still less than the required standard as required by law in negligent damages claim. Moreover, the SCA in *Mashinini* refers to the very same DZ judgment (in terms of which the applicant contends the court failed to have regard with) says: "[13] The Constitutional Court in *MEC for Health v DZ* endorsed the approach that was adopted by this Court in *Ngubane* when faced with 'public healthcare defence'. It expressed that medical services of the same or higher standard, at no or lesser cost than private medical care, will be available to a plaintiff in future. It stated: 'if that evidence is of a sufficiently cogent to disturb the presumption that private future healthcare is reasonable, the plaintiff will not succeed in the claim for higher future medical expenses'.⁵¹" (own underlining)

[32] The applicant has not shown that there was a material misdirection on the award of damages which would warrant the appellate court interference, save to allege that the quantum of damages is generously excessive without pointing out how the Court's discretion was not exercised judiciously or was exercised improperly.

[33] Having considered comprehensive written submissions and case law referred thereto by applicant's legal team and counter argument by the respondent in respect of all the grounds of appeal based on the reasons highlighted on each ground above, I am not persuaded that there is either a reasonable prospect of success or any compelling reason why the appeal should be heard.

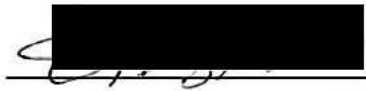
Order

[34] Consequently, the following order is made:

1. The application for condonation for the late filing of the application for leave to appeal is granted.

⁵¹ *MEC for Health v DZ* at para [21]

2. Leave to appeal is dismissed with costs, including the costs consequent upon the employment of two counsel on scale C.


N L SKIBI
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date heard: 22 May 2026

Date of Judgment: 8 June 2026

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