

**IN THE HIGH COURT OF SOUTH AFRICA  
NORTHWEST DIVISION, MAHIKENG**

**Case No.: 16/2018**

Reportable: YES/ **NO**

Circulate to Judges: YES/ **NO**

Circulate to Magistrates: YES/ **NO**

Circulate to Regional Magistrates: YES/ **NO**

In the matter between:

**TSHEGOFATSO MOOKETSI**

Applicant/ Plaintiff

and

**MEC FOR HEALTH FOR HEALTH  
AND SOCIAL DEVELOPMENT**

Respondent/Defendant

This judgement was handed down electronically by circulation to the parties' representatives *via* email. The date of hand-down is deemed to be **11 July 2023**.

**ORDER**

In the result, I make the following order:

- 1. The medical records contained in the core bundles marked as exhibits "A", "B" and "C", as admitted by the parties in the pretrial conference, are admitted into evidence in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988, read with section 34(1)(ii) of the Civil Proceedings Evidence Act 25 of 1965.**

**2. The respondent shall pay the costs of the application.**

## **JUDGEMENT**

**Mfenyana J**

### **Introduction**

[1] In this application, the applicant seeks to introduce certain medical records into evidence in terms of section 3(1) of the Law of Evidence Amendment Act, 45 of 1988 read with section 34 of the Civil Proceedings Evidence Act 25 of 1965. These medical records form part of a bundle of documents which was discovered by the respondent.

[2] During a pretrial conference held on **29 June 2020**, the parties agreed as follows:

**“16 PROOF OF DOCUMENTS: RULE 37(6)(k)**

...

**16.1.1** *all documents contained in the core bundle are what they purport to be and shall be admissible in evidence without formal proof or production of the original;*

- 16.1.2 *where a document in the core bundle purports to have been created by any person or sent and received by that person such document will be regarded as having been so created, sent or received on/or about the date appearing from the document in question;*
- 16.1.3 *the documents contained in the core bundle shall not be regarded as constituting proof of the correctness of their content;*
- 16.1.4 *a document contained in the core bundle shall not be regarded as having been adduced in evidence unless it has been referred to during the course of the hearing by a witness called by either party;*
- 16.1.5 *any party may not later than five (5) court days after receipt of the core bundle, give notice to the other party to object to the application of this agreement to any document in the core bundle whereupon the ordinary rules of evidence relating to proof of*

*documents shall apply. Where it is not reasonably possible to comply with this provision, notice within a reasonable time may be given, subject to such consequences which may flow therefrom.”*

[3] In a further pretrial conference held on **24 August 2021**, the parties confirmed this agreement, and agreed that the records reflect the contemporaneous notes by the medical and nursing staff at the respondent's medical facilities, indicating their management and treatment of the plaintiff during **March 2015 to July 2015**.

[4] Despite the above agreement the respondent's counsel during cross examination sought to challenge reliance by the applicant's expert witness on statements contained in the bundle which formed part of the core bundle agreed to by the parties.

[5] During his testimony, Dr Davis, an expert specialist gynecologist and obstetrician, testifying in support of the applicant's claim, referred to certain aspects of the clinical notes, inscriptions, and hospital records contained in the core bundle. These pertained to the treatment of the applicant at various medical facilities of the respondent during the period **March to July 2015**.

[6] Dr Davis was cross- examined by counsel on behalf of the respondent for a few days before an objection was raised to the effect that his reference and indeed, his reliance on an inscription by Dr Ben Kahla, constitutes hearsay evidence. On the next day of the trial the applicant brought the present application.

[7] The applicant's contention is that there exists an agreement between the parties pertaining to how the said evidence should be treated, which the respondent could not resile from. Relying on a decision of the SCA in **MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga and Another**

**2010 (4) SA 122 (SCA)**, the applicant contends that, being an admission made at a pre-trial conference, the respondent's admissions at the pretrial conferences in **2020** and **2021** constitute sufficient proof of the facts contained in the documents in the bundle. It was thus contended on behalf of the applicant that 'it is difficult for a party who refers to documents as if they are admissible, to later deny their admissibility'.

[8] The respondent's contention on the other hand, is that as it is common cause that Dr Kahla was not present at the first and second laparotomy procedures on **1 and 5 May 2015**, his inscriptions and clinical notes in this regard, absent his own evidence, constitute hearsay. It is unclear how Dr Kahla obtained the information, or what his inscription means, and any attempt to decipher it would be pure speculation, contends the respondent. The respondent thus places into question Dr Davis's reliance on these notes, to reach a conclusion as to when the bowel injury occurred, stating that it is not based on facts.

[9] While the respondent initially took issue with the fact that the pretrial minute attached to the founding affidavit is unsigned, the respondent appears not to take issue with the fact that agreement was reached between the parties. A signed pretrial minute was later provided. What the respondent disputes, is the scope of the agreement and avers that it only applies to the truthfulness of the documents and not the accuracy of the content thereof. He does not say whether he holds himself bound by the agreement reached at the pretrial conference.

[10] I do not understand Dr Davis's testimony to be that the contents of the inscription by Dr Kahla, nurses, and medical personnel featured on the medical records, are true. That is not the point of his testimony. What he said is that these notes support his finding that the injury occurred during the first laparotomy on **1 May 2015**. As an expert in his own right, he is at liberty to base his opinion on any information available to him. This is what distinguishes him from a lay witness. I do not agree with the respondent that his evidence must be based on facts. Quite to the contrary, an expert witness need not base their opinion on personal observations. He relies on information and data collected throughout his working life as a professional, 'which he must everyday treat as working truths'. He is at liberty to place reliance on the reported data of fellow scientists learned by perusing their

reports in books and journals. The law must and does accept this kind of knowledge from scientific men.’ – **S v Kimimbi 1963 (3) SA 250 (C)**.

[11] I associate myself with the above text. The import of it is that, in the facts of the present case, Dr Davis, an expert in his own right, is permitted in law, to glean on the evidence of other people in support of his opinion. He examined the patient, he analysed the data available to him and based on all these factors, reached his findings. As I understand his testimony, the clinical notes relied on, whether correct or not, support his finding that the injury to the patient occurred during the first laparotomy procedure. Their truthfulness or otherwise is not a *sine qua non* for his findings. In any event, it is not the respondent’s case that the evidence relied upon by Dr Davis is incorrect, but only that it is hearsay. As such, the respondent’s reliance on the decision of Lord Justice Tomlinson in **Mr Robert Synclair and East Lancashire Hospitals NHS Trust Case No. B3/2014/1943** is not well grounded.

[12] In as much as the respondent relies on the decision in **Dass v Masih**, this also does not assist the respondent. The following extract by Lord Denning from that judgement, is instructive:

*“P’s report giving his expert opinion that the postscript was not written by the defendant and his reasons for that conclusion, was admissible in evidence at the trial by virtue of s.1(1) of the Evidence Act, as a statement tending to establish that fact.”*

[13] In the same vein, the statement of Dr Kahla is admissible in evidence as a statement tending to establish what is conveyed in the clinical notes he authored, based on the information at his disposal.

[14] As was the case in **Kimimbi**, oftentimes experts refer to literature and articles in print form, from authors all and sundry. It would be absurd to require that every author on whose work an expert relies should be called to testify. Moreso, the evidence that the respondent seeks to challenge was agreed upon during the pretrial

conference, and relied upon by the respondent as admitted during that pretrial conference.

[15] The respondent further avers that the application is too broad and would prejudice the respondent, as the applicant seeks to have all the contents of Bundles A, B and C, admitted into evidence. This cannot avail the respondent. For the simple reason that the parties in the pretrial conference elected to include all medical records in the core bundle. It follows then that all medical records fall within the scope of the agreement, and were admitted into evidence by virtue of that agreement. What is more is that these documents form part of the documents discovered by the respondent and admitted during the pretrial conference. The respondent aligned himself with them. Dr Davis was also cross- examined at length on these documents without any inhibitions. The respondent can therefore not approbate and reprobate at the same time.

[16] It is apposite to set out the full text in respect of hearsay evidence as set out in Section 3 of the Law of Evidence Amendment Act 45 of 1988. It reads thus:

### **3. Hearsay evidence**

*“(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless—*

*(a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*

*(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*

*(c) the court, having regard to—*

*(i) the nature of the proceedings;*

- (ii) *the nature of the evidence;*
- (iii) *the purpose for which the evidence is tendered;*
- (iv) *the probative value of the evidence;*
- (v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
- (vi) *any prejudice to a party which the admission of such evidence might entail; and*
- (vii) *any other factor which should in the opinion of the court be taken into account,*

*is of the opinion that such evidence should be admitted in the interests of justice.*

- (2) *The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.*
- (3) *Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such*

*proceedings, the hearsay evidence shall be left out of the account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.*

(4) *For the purpose of this section—*

*‘hearsay evidence’ means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;*

*‘party’ means the accused or a party against whom hearsay evidence is to be adduced, including the prosecution.”*

[17] Equally of relevance, are the provisions of the Civil Proceedings Evidence Act 25 of 1965. Section 34 thereof provides:

**34. Admissibility of documentary evidence as to facts in issue.**

(1) *In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided-*

(a) *the person who made the statement either-*

(i) *had personal knowledge of the matters dealt with in the statement;*  
*or*

(ii) *where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and*

(b) *the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.*

(2) *The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in sub-section (1) as evidence in those proceedings-*

(a) *notwithstanding that the person who made the statement is available but is not called as a witness;*

- (b) *notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof proved to be a true copy.*
- (3) *Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.*
- (4) *A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.*
- (5) *For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of this section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of a registered medical practitioner may be acted upon in deciding whether or not a person is fit to attend as a witness.*

[18] The respondent contends that the provisional admission of the record is not admission of hearsay evidence. He places reliance on the decision in **AM obo KM v MEC for Health, Eastern Cape (699/17) [2018] ZASCA 141 (1 October 2018)**. I do

not understand this decision to be of assistance to the respondent. For the simple reason that no part of the record has been disputed by any of the parties. It could not be. The documents originate from the respondent and were relied on by both parties, at least for some time. As such, the respondent could not be heard to be objecting to the same documents he has placed in evidence. It was common cause in the **AM** matter that the documents were falsified. **AM** is distinguishable in these respects, and in other respects I do not consider prudent to deal with at this stage.

[19] To the extent that the respondent avers that the statement of Dr Kahla is hearsay, I consider it to be admissible hearsay within the contemplation of the Civil Proceedings Evidence Act, in that the clinical notes of Dr Kahla *“form part of a record purporting to be a continuous record,(and were) made (in so far as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information **supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters.**”*

[20] In the circumstances, I hold that the provisions of section 3(1)(c) have been satisfied. To the extent that I may be wrong in holding as I do, I am firmly of the view that the interests of justice dictate that the records should be admitted.

### **Order**

[21] In the result, I make the following order:

- 1. The medical records contained in the core bundles marked as exhibits “A”, “B” and “C”, as admitted by the parties in the pretrial conference, are admitted into evidence in terms of section 3(1) of the Law of Evidence Amendment Act 45 of 1988, read with section 34(1)(ii) of the Civil Proceedings Evidence Act 25 of 1965.**
- 2. The respondent shall pay the costs of the application.**

**S MFENYANA**  
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**  
**NORTHWEST DIVISION, MAHIKENG**

**APPEARANCES**

**DATE OF HEARING : 27 MARCH 2023**

**JUDGEMENT RESERVED : 27 MARCH 2023**

**DATE OF JUDGEMENT : 11 JULY 2023**

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