



**IN THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION,
(MBOMBELA MAIN SEAT)**

Case No. 450/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED YES/NO

DATE 25 August 2026

SIGNATURE

K[...] V[...] K[...]
obo MINOR

APPLICANT

And

**MEC FOR HEALTH AND SOCIAL DEVELOPMENT,
MPUMALANGA PROVINCE**

RESPONDENT

JUDGMENT

(LEAVE TO APPEAL)

MONTSHO-MOLOISANE AJ

INTRODUCTION

- [1.] This is an application for leave to appeal against the judgment and order granted by the Court *a quo* on 17 November 2025.
- [2.] For ease of reference, the parties shall be referred to herein as in the trial proceedings.
- [3.] In terms of the judgment *a quo*, the Plaintiff's claim against the Defendant was dismissed on the basis that she had failed to establish, on a balance of probabilities, any negligence and factual causation on the part of the Defendant's employees during her ante natal care attendance at the Mayflower clinic in Empuluzi, and later on 18 March 2016 when MK, on whose behalf she instituted the action, was born, and during her admission at the Embhuleni hospital ("the hospital"), Mpumalanga after her birth.
- [4.] The Plaintiff's claim was dismissed on the basis that on the conspectus of the evidence adduced during the trial proceedings, she failed to prove, on a balance of probabilities, any negligence and factual causation on the part of the Defendant's employees. Each party was ordered to bear own costs.
- [5.] Subsequent thereto, the Plaintiff filed a Notice of application for leave to appeal approximately 73 (seventy-three) days after the expiry of the 15(fifteen) day period stipulated in Rule 49(1)(b) of the Uniform Rules of the High Court within which it had to be lodged, together with an application for condonation for the late delivery of the said Notice.

THE CONDONATION APPLICATION

- [6.] The deponent to the Founding affidavit in support of the Condonation application is the Plaintiff's attorney of record, Mr Edward Mafori Lesufi, who stated therein that the reason for the failure to lodge the Notice of application for leave to appeal within the period stipulated in Uniform Rule 49(1), was that he only became aware that the judgment had been delivered on 12 February 2026 when he wrote a letter to the Office of the Judge President, inquiring about the expected date of delivery thereof. The Office of the Judge President responded, on the same date by sending the judgment. It was then that he noticed that the judgment was delivered electronically on 17 November 2025.
- [7.] He noticed that the judgment had only been sent to his correspondent attorney, Ms Lufuno Patience Ramarumo, using her previous email address, which had not been operational since 17 August 2025. He attached a Confirmatory affidavit of the correspondent attorney to that effect.
- [8.] Having perused the judgment, he consulted with Mr Sibuyi, the Counsel who represented the Plaintiff during the trial proceedings, on 17 February 2026, in order to consider the option of lodging an appeal.
- [9.] Pursuant to the consultation he had with Counsel, he consulted with the Plaintiff on 24 February 2026. She then mandated him to lodge an appeal against the whole judgment.
- [10.] He further stated that there was a reasonable explanation furnished for the delay in filing the Notice of application for leave to appeal, and further that

the Plaintiff had reasonable prospects of success on appeal. He further averred that it was in the interest of justice that the condonation sought be granted.

[11.] The Answering affidavit was deposed to by Mr Ernest Ripfumelo Hlungwani, the Acting Director, Legal Services in the Defendant's department.

[12.] He opposed the Condonation application on the basis that the correspondent attorney was, for all intents and purposes, the attorney of record in so far as correspondence pertaining to Court documents is concerned. Furthermore, he averred that no explanation was furnished in the Founding affidavit as to what steps were taken by the correspondent attorney to inform the Judge's registrar that the email address was no longer operational.

[13.] It is further stated in the Answering affidavit that the primary issue in the matter was whether the nursing staff who attended to the Plaintiff during the birth process of MK on 18 March 2018, and the nurses and doctors who attended to her at the hospital, were negligent regarding the treatment they rendered to MK, and if they were, whether there was any causal connection between the said negligence and the neurological condition and disability suffered by MK.

[14.] On this basis, the deponent averred, it is not in the interest of justice to grant the condonation sought, as there were no prospects of success on appeal that would justify the granting thereof.

Parties' submissions

[15.] Counsel for the Plaintiff, Mr Sibuyi, submitted that Condonation should be granted as there is sufficient cause shown for the non-compliance. He referred the Court to the judgment of the Constitutional Court in *Grootboom v National Prosecuting Authority*¹, where it was held that:

“It is now trite that condonation cannot be had for mere asking. A party seeking condonation must make out a case entitling it to the Court’s indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or Court’s directions. Of great significance, the explanation must be reasonable enough to excuse the default”.

[16.] Mr Sibuyi further referred this Court to the Supreme Court of Appeal (“SCA”) judgment in *Mulaudzi v Old Mutual Life Insurance Company*², where the Court held that:

“Factors which usually weigh with this Court in considering an application for condonation includes the degrees 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 avoidance of unnecessary delay in the administration of justice”.

[17.] He submitted that in the said case, it was further held that condonation for failure to comply with the rules almost inevitably involves weighing the prospects of success of, and the merits as key factors.

¹ *Grootboom v National Prosecuting Authority* 2014 (2) SA 68 (CC) at para 23

² *Mulaudzi v Old Mutual Life Insurance Company* 2017 (6) SA 90 (SCA) at para 26

- [18.] Lastly, relying on the *dicta* of the SCA in *MEC for Health, Eastern Cape v A.S. obo S.S*³, he submitted that the High Court has an inherent right to grant condonation for a failure to comply with the rules of Court where the interests of justice demand, and that such discretion must be exercised judicially.
- [19.] In this case Mr Sibuyi submitted, the Plaintiff had made out a case for condonation to be granted as the factors referred to were fully addressed and satisfied in the Founding affidavit.
- [20.] In his submissions opposing the application, Counsel for the Defendant, Mr Dlamini SC, reiterated averments made in the Founding affidavit. He repeated the factors for consideration by the Court when exercising its discretion, to grant condonation. He added that in *casu*, no explanation was furnished by the correspondent attorney as to what steps she took to make it known to the registrar and/or the Defendant's legal representatives, that her email address was no longer operational.
- [21.] He submitted that the deponent could therefore not escape the consequences of his correspondent attorney's lack of diligence. He referred this Court to the *obiter dicta* of Zulman JA in *Uitenhage Transitional Local Council v South African Revenue Service*⁴, where the Court emphasized that a detailed explanation for the delay had to be furnished by the Applicant's legal representatives in that instance.

³ MEC for Health Eastern Cape v A.S. obo S.S [842/2023] [2025] ZASCA at para 19

⁴ Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 at paras [6] and [9] 297 H- 298 B

[22.] On the prospects of success as a factor to be considered by the Court, Mr Dlamini SC submitted that the application for leave to appeal challenges only factual conclusions reached by the Court from an evaluation of the evidence presented at the trial.

Analysis of the application

[23.] The main issue for determination at the hearing was whether the Plaintiff had made out a proper case for condonation to be granted, having regard to the factors referred to in the legal authorities referred to above.

[24.] This Court, considered the principles enunciated by the SCA in the case of *Madinda v Minister of Safety and Security*⁵, where it was held that:

“...Good cause looks at all those factors which bear on the fairness of granting the relief as between the parties and as affecting the proper administration of justice. In any given factual complex it may be that only some of many such possible factors become relevant. These may include prospects of success in the proposed action, the reasons for the delay, the sufficiency of the explanation offered, the bona fides of the Applicant, and any contribution by other persons or parties to the delay and the Applicant’s responsibility therefor”,

[25.] Notably, in the case of *Grootboom v National Prosecuting Authority*⁶, the Court reaffirmed that the Applicant has to show sufficient or good cause for the delay, and that the explanation furnished “*must be reasonable enough to excuse the default*”. The Court held:

⁵ *Madinda v Minister of Safety and Security* 2008 (4) SA 312 (SCA) at paragraphs 10

⁶ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at para 35

“It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the Court seized with a matter based on the facts of that particular case...”

[26.] Having heard submissions of Messrs Sibuyi and Dlamini SC, this Court considered the factors mentioned in the legal authorities referred to above. Of importance in this case is that condonation was sought by the Plaintiff, who is acting in her representative capacity as the mother and natural guardian of her disabled minor child. In exercising my value judgment, I am of the view that it would not be in the interest of justice to impute the lack of diligence of the correspondent attorney, or that of the attorney of record, on the Plaintiff. The fact of the matter is that the Plaintiff was not responsible for the actions or inadequate performance of her legal representatives, to whom she had entrusted the management and handling of the case.

[27.] I was therefore satisfied that it was in the interests of justice to grant the condonation sought.

[28.] Accordingly, this Court, during the hearing of this application, granted the condonation sought by the Plaintiff for the late filing of the Notice of application for leave to appeal.

[29.] In the premises, the Court proceeded to hear the application for leave to appeal.

THE TEST FOR LEAVE TO APPEAL

[30.] Section 17(1) of the Superior Courts Act, 10 of 2013 (“the Act”), provides the threshold for leave to appeal to be granted. It provides:

“17(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

(b) The decision sought on appeal does not fall within the ambit of Section 16(2)(a); and

(c) ...”

[31.] The case of *MEC for Health, Eastern Cape v Mkhita and Another*⁷ is a key SCA case that dealt with delictual liability based on medical negligence and causation. The Court had to deal with the above-mentioned statutory provisions. The Mkhita case was decided after the Act, in its current form, came into effect. It was held that:

“[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

⁷ MEC for Health, Eastern Cape v Mkhita and Another [2016] ZASCA 176

reasonable prospect of success; or there is some other compelling reason why it should be heard.

[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".* (emphasis added)

[32.] The interpretation of Section 17(1)(a), as set out in *Mkhitha supra*, was reaffirmed by Schippers JA in the case of *Four Wheel Drive Accessory Distributors CC v Rattan NO*⁸, as follows:

"There is a further principle that the Court a quo seems to have overlooked. Leave to appeal should be granted only when there is a sound, rational basis for the conclusion that there are prospects of success on appeal".

[33.] The correct interpretation of Section 17(1)(a) is therefore whether there are reasonable prospects of success on appeal, to be determined on rational basis. This is the statutory threshold to be satisfied.

The merits of the case

[34.] It is important to state that the Plaintiff's cause of action as pleaded, is that during labour, she was made to alight from the bed in the maternity ward by

⁸ *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA) at para 34

a female nurse, and that whilst standing, the baby came out and fell to the floor, and as a result the baby suffered cerebral palsy.

[35.] As Mr Dlamini SC contended, that the primary issues that arose for determination in the Court *a quo*, was whether the nursing staff who attended to the Plaintiff when she was in labour, and during the birth process of baby MK on 18 March 2016, as well as the nursing staff and medical doctors who attended to her at the hospital after admission, acted negligently with regard to the services they rendered to baby MK, and if so, whether such negligence is causally linked to the neurological harm suffered by baby MK.

[36.] In an endeavour to prove her case, the Plaintiff, as well as her medical experts, adduced *viva voce* evidence. They were Dr Songabau, an Obstetrician and Gynaecologist; Dr Mudau, a Neurologist; Sister Fletcher, a Nursing expert; and Dr Lefakane, a Paediatrician. The Joint Minutes of experts, including those of the Radiologists, Dr Sanyaval and Dr Swartzberg, and the medical records, were admitted as evidence.

[37.] Evidence was also adduced by the Defendant's experts to wit, Sister Smit, a Nursing expert; Drs Pearce, a Paediatric Neurologist; Dr Koll, an Obstetrician and Gynaecologist; and factual witness, Sister Mhlanga, a midwife at the clinic and Sister Nkosi, a nursing sister at the Embhuleni hospital ("the hospital").

[38.] Of importance is the Joint Minutes of experts, which constitutes admissible evidence, Dr Songabau and Dr Koll, in their Joint Minutes expressed an opinion that:

“The presence of Intra Uterine Growth Restriction (“IUGR”) is associated with adverse outcomes, including severe neurological consequences in the neonate and later in life”.

[39.] In the Joint minutes compiled by Drs Mudau, a Neurologist, and Lefakane, a Paediatrician, who both furnished medico-legal reports for the Plaintiff, and Dr Pearce, a Paediatric Neurologist engaged by the Defendant, the three experts agreed that they considered the MRI reports of the Radiologists wherein it is indicated that baby MK had a generalized brain atrophy of the cerebellar and cerebral hemispheres, which is the aetiology or origin of the neurological condition of MK. They also agreed that MK has severe global developmental delay, profound intellectual disability, refractory epilepsy and visual impairment, as well as lower limb contractures and microcephaly. The atrophy observed on the brain of baby MK, as the radiologists, Drs Sayanvala and Swartzberg noted, is not in dispute. There is also no evidence adduced by the Plaintiff that such atrophy or volume loss of brain, was due to a head injury.

[40.] Relying on the *stare decisis* doctrine, I am satisfied that the trial Court was in law justified to admit the Joint Minutes of Drs Songabau and Koll. This ground of appeal has no merit and should fail.

[41.] In the Joint Minutes of Radiologists, Dr Sayanhala and Dr Swartzberg, engaged by the Plaintiff and the Defendant respectively, they expressed an opinion that the Magnetic Resonance Imaging (“MRI”) reflected that there was a diffuse parenchymal volume loss of the cerebellar and cerebral

hemispheres or atrophy and that inflammation, infection, genetic disorder as a cause of brain damage, were unlikely.

[42.] The Court *a quo* made its findings after consideration of the evidence adduced. In the result, the Plaintiff's action was dismissed as she did not discharge the onus of proving, on a balance of probabilities, any negligence on the part of the clinic midwife, Sister Mhlanga and any of the employees of the Defendant at the hospital.

The Plaintiff's grounds of appeal

[43.] This application raises several grounds of appeal, which are that the Court erred in the following respects:

43.1. in finding that Dr Ebinga, a medical doctor at the hospital who attended to baby MK after her admission, recorded that she was "*received to the ward via labour ward*" and observed that "*no problems were noted*", and that a diagnosis of Intra Uterine Growth Restriction ("IUGR"), was made at the hospital. That in fact, there was no such diagnosis made by the said doctor when baby MK was admitted⁹;

43.2. in admitting the Joint minutes of the Obstetricians Dr Songabau and Dr Koll, when they agreed that there was no time to monitor the Plaintiff as she arrived at the clinic already fully dilated at 11h45 with the edge to bear down¹⁰;

⁹ At para 1 of the Notice of application for leave to appeal

¹⁰ At para 3 of the Notice of application for leave to appeal

- 43.3. on this basis, this Court should have rejected the said Joint Minutes, as they were based on wrong facts in placing more reliance on the Summary of Labour, as it was incorrect;
- 43.4. in that the Plaintiff's evidence was that she was with Sister Mhlanga in the Labour ward, which evidence was never disputed by Sister Mhlanga during her evidence in Court, whereas in the Summary of Labour, Sister Mhlanga recorded that she was assisted by Sister Mwalase¹¹;
- 43.5. in failing to assess properly the contradictions between the Applicant and Sister Mhlanga "*as stated in Stellenbosch Winery case in relation to reliability and credibility of the witnesses*"¹²;
- 43.6. in finding that the only plausible inference that can be drawn from the totality of evidence adduced, is that baby MK did not fall during the birth process as "*it is clear that she informed the nurses about the falling of the baby at Embhuleni hospital on the 17 March 2017 after realising that the child has problems*".¹³ (sic)
- 43.7. in its finding at paragraph [78] of the judgment, where the Court stated as follows:

"[78] Lastly, the agreement made by Drs Songabau and Koll, in their Joint Minutes that the Plaintiff's obesity and HIV positive status, were risk factors, and that baby MK

¹¹ At para 5 of the Notice of application for leave to appeal

¹² At paragraph 6 of the Notice of application for leave to appeal

¹³ At paragraph 7 of the Notice of application for leave to appeal

suffered severe IUGR, has not been repudiated and forms an integral part of the evidence before this Court, in accordance with the Bee and Thomas principles.”

43.8. In finding that the IUGR suffered by baby MK was the probable cause of the neurological harm she suffered, which finding Mr Sibuyi contended, is clearly wrong as there was no basis in making such a finding¹⁴, and that this Court failed to take into account the evidence of Dr Songabau and Dr Pearce (the Paediatric neurologist), who testified that “*some children with IUGR continue and live their normal lives*”, and that Dr Songabau in particular testified that a question mark next to the diagnosis on the clinical records, as an indication that the diagnosis of IUGR is inconclusive. It is further stated in the application, that:

“Of importance is that IUGR is a disease and the very same radiologists’ Joint Minutes which the trial Court relied on, excluded infection as the cause of the minor child’s condition. The radiologists agreed that the causes of brain atrophy are dementia, infection or head injury”¹⁵(sic).

43.9. in not taking into account the evidence of Dr Koll, who testified that “*the cause of IUGR is placental insufficiency*”, and that the Plaintiff’s placenta was recorded as complete and normal in appearance,

¹⁴ At paragraph 9 of the Notice of application for leave to appeal

¹⁵ At paragraph 9 of the Notice of application for leave to appeal

which negates the trial Court's finding that the probable cause of the minor child's neurological harm is IUGR¹⁶;

43.10. in finding that the Plaintiff was not a credible and reliable witness, and that there is no evidence that the nursing staff or midwife who attended to her during the birth process at the clinic were negligent in anyway, "*as this is not supported by any medical record*"¹⁷.

43.11. that this Court's conduct in allowing the objection by Defendant's Counsel during the cross-examination of Dr Pearce, the Defendant's expert witness, prevented the Plaintiff's Counsel, from cross-examining the witness, which conduct justifies that the matter be remitted back to trial for cross-examination, or the appeal Court should order a trial *de novo*.

[44.] It is on the basis of the above stated grounds that the Plaintiff's Counsel, Mr Sibuyi contended that the Plaintiff has a reasonable prospect of success on appeal, and that another Court would come to a different conclusion.

[45.] During the hearing of the application, Mr Sibuyi reiterated the grounds referred to *supra* and contended that there are prospects of success on appeal. He further, correctly so, referred the Court to the Mkhita judgment *supra*, regarding the threshold for leave to appeal to be granted. He referred this Court to legal authorities on the test for negligence and on the status of Joint Minutes of experts.

¹⁶ At paragraph 10 of the Notice of application for leave to appeal

¹⁷ At paragraph 15 of the Notice of application for leave to appeal

[46.] Mr Dlamini SC, on the other hand opposed the application and submitted that the application failed to meet the threshold set out in Section 17(1)(a)(i) of the Act. He referred the Court to applicable legal authorities on wrongfulness, negligence and causation.

[47.] He argued that in *casu* it was improbable, if indeed baby MK had fallen to the floor, that the Plaintiff would not have informed the hospital staff on arrival from the clinic, and more importantly, no injury was observed on admission. Furthermore, he contended, the radiology reports did not reveal any evidence of a head injury.

Do the grounds of appeal relied on meet the threshold in Section 17(1)(a)

[48.] On the first ground stated in the Notice regarding the fact that Dr Ebinga recorded that the baby was “*received to the ward via labour ward*” and observed “*no problems were noted*”, Mr Sibuyi fails to acknowledge that the recording made by Dr Ebinga was never challenged or proven to be incorrect, nor was he called to testify.

[49.] It is important to state that the medical records of the Plaintiff and baby MK from the clinic and the hospital, constituted admissible documentary evidence as they were admitted as such by the parties at the commencement of the proceedings.

[50.] In this regard, the provisions of Section 15 of the Civil Proceedings Evidence Act, 25 of 1965, are applicable. It provides:

“15. Admission on record-

It shall not be necessary for any party in any civil proceedings to prove, nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings.”

[51.] In light of the agreements of the parties made at the commencement of the proceedings, I cannot find any rationale for not having regard to the observation and entries made by Dr Ebinga after the admission of the Plaintiff and baby MK to the hospital as recorded, which stands as evidence. There was therefore no legal basis for such documentary evidence to be excluded by the trial Court.

[52.] In the premises, any ground of appeal disputing the veracity of the medical records, cannot be sustainable, and should fail.

[53.] As to whether the trial Court erred in admitting the evidence of the Joint Minutes of the Obstetricians and Gynaecologists, as the ground relied on for leave to appeal to be granted, it is important to reiterate paragraph [16] of the judgment *a quo*, where I made reference to the *ratio decidendi* in the case of *Bee v The Road Accident Fund*¹⁸, where it was held that:

“...The joint report of experts is a document which encapsulates the opinions of the experts and it does not lose the characteristic of expert opinion. The joint report must therefore be treated as expert opinion. The fact that it is signed by two or more experts does not alter its characteristic of expert opinion. The principles applicable to expert evidence or reports are also applicable to a joint report. The joint report before the Court is consequently part of evidential material which the

¹⁸ *Bee v The Road Accident Fund* 2018 (4) SA 366 (SCA)

Court must consider in order to arrive at a just decision.¹⁹(emphasis added)

[54.] On the ground that the trial Court erred in placing reliance on the Summary of Labour, which Mr Sibuyi contended, is incorrect, I find it appropriate to quote what Dr Songabau and Dr Koll, in their Joint Minutes as Obstetricians, stated that:

“The discrepancy recorded in the Summary of Labour indicating that the Plaintiff was fully dilated at 11h45, and began bearing down at 11h45, and delivered at 12h10, is of no significance.”

[55.] This ground, based on the *Bee* case *supra*, cannot be sustainable in terms of Section 17(1)(a), and has to fail.

[56.] On the ground that the trial Court erred by finding that the IUGR suffered by baby MK was the probable cause of the neurological harm she suffered, which finding Mr Sibuyi contended is wrong, I am of the view that the Joint Minutes of Dr Songabau and Dr Koll, as I have already alluded to, constitute admissible evidence before the trial Court. Of importance, the two experts expressed an opinion, referred to above, that IUGR is associated with, amongst others, severe neurological consequences.

[57.] Based on these Joint minutes of Obstetricians and the *Bee* case *supra*, I repeat that there is no merit in this ground of appeal, and it has to fail.

[58.] On the ground that the trial Court erred in its finding that the Plaintiff was not a credible and reliable witness, this Court reiterates paragraph [6.5] to [6.5.2]

¹⁹ At para 30

of the judgment *a quo* regarding the material contradictions in the Plaintiff's evidence in chief in the trial Court, and what she told the various medical experts who interviewed her regarding the matter, which are that:

58.1. in her Particulars of claim, it is pleaded that "*whilst the Plaintiff was standing, the baby came out and fell on the floor and the baby suffered Cerebral Palsy*"²⁰; (sic)

58.2. in her evidence in chief in the trial Court, she testified that the nursing sister asked her to alight from the bed to change linen and as she was trying to climb back onto the bed, the baby came out and she was told by the female nurse that the baby fell to the cement floor;

58.3. Dr Songabau testified in the trial Court that during the interview with the Plaintiff, she informed him that "*she was unattended at delivery, and the baby fell on her head when she was standing next to the bedside*";

58.4. Dr Lefakane, the expert Paediatrician, testified for the Plaintiff in the trial Court that during the interview he had with her, she informed him that baby MK fell to the floor, then the nursing sister picked her up, took her to the Labour Ward where she was given Oxygen;

[59.] It has to be pointed that the version given by the Plaintiff at the trial Court is contradictory to each of the versions she gave to Dr Songabau, Dr Lefakane and the case pleaded in her Particulars of claim.

²⁰ At paragraph 7 of the Particulars of claim

- [60.] The Plaintiff's evidence in the trial Court was also not corroborated by what Dr Ebinga who examined baby MK after admission to the hospital, and as recorded in the hospital records that there were "*no problems noted on baby MK*".
- [61.] In the premises, the finding of the Court *a quo* regarding the improbabilities and contradictions in the Plaintiff's case, has to stand in light of the Radiology reports which did not find any evidence of a head injury, as Mr Dlamini SC correctly contended.
- [62.] The contention of Mr Sibuyi that IUGR is a disease, and that one of the causes thereof, as testified by Dr Koll, is placental insufficiency, is incorrect, based on the Joint Minutes he compiled with Dr Songabau.
- [63.] On the contrary, the evidence of Dr Koll, the Defendant's expert witness and Obstetrician, was that IUGR is a condition and cannot be treated. This is contradictory to the contention by Mr Sibuyi that it is a disease.
- [64.] Mr Sibuyi further failed to address this Court that in the trial Court, evidence adduced by Dr Koll, which is corroborated by the medical records, was that the transfer of the Plaintiff and MK to hospital was due to low birth weight.
- [65.] The issue of the IUGR as a probable cause of the current condition of MK, is unequivocally stated in the evidence of the Obstetricians. Dr Mudau, a neurologist, also testified that "*it is not always possible to see an oedema which may have been caused inside the head, that is the cerebral oedema, on physical examination, which can only be seen on neuro imaging, and that from the MRI done on MK at the age of 5(five) years, there was no evidence*

of a head injury". He further conceded, under cross-examination by defence Counsel, Mr Dlamini SC, that:

65.1. IUGR may be the cause of the severe neurological condition of MK;
and

65.2. if MK had suffered a head trauma, there should be evidence to that effect, which was not revealed on the MRI.

[66.] Based on the evidence of Dr Mudau referred to above, I am of the view that any contention that MK fell to the floor during birth, or that she suffered a head injury as a result thereof, due to the negligence of Sister Mhlanga who did not attend to her, is improbable, in the absence of any evidence of a head injury or head trauma observed on admission to the hospital by Dr Ebinga, and as recorded in the hospital records.

[67.] On the ground that the trial Court erred in finding that the Plaintiff was not a credible and reliable witness, and that there is no evidence that Sister Mhlanga was negligent, this is not supported by the evidence adduced at the Court *a quo*. There is no merit in this ground and it has to fail.

[68.] It is trite that in delictual claims, negligence is a key element that the Plaintiff has to establish, by proving the existence of the duty of care, breach thereof and causation.

[69.] In the case of *Goliath v MEC for Health, Eastern Cape*²¹, the SCA reaffirmed the general rule regarding negligence and causation as follows:

²¹ *Goliath v MEC for Health, Eastern Cape*, 2015(2) SA 97, (SCA) at para 8

“The general rule is that she who asserts must prove. Thus, in a case such as this, a Plaintiff must prove that the damage that she has sustained has been caused by the Defendant’s negligence”.

[70.] I am therefore satisfied that the Plaintiff failed to prove, on a balance of probabilities, any negligence on the part of clinic midwife, Sister Mhlanga or of doctors and nursing staff at the hospital or any causal nexus between the neurological condition of baby MK and any of the employees of the Defendant. On this basis, the Plaintiff’s claim had to be dismissed.

FINDINGS

[71.] In light of the evidence adduced in the trial Court, I am of the view that the requirements of Section 17(1)(a) of the Superior Courts Act were simply not met by the Plaintiff in that:

71.1. the presence of IUGR in the case of baby MK is no doubt associated with adverse perinatal outcomes, including severe neurological consequences in the neonate and later in life as opined by the Obstetricians in their Joint Minutes;

71.2. the uncontradicted evidence in the Joint Minutes of Drs Mudau, Lefakane and Pearce, that the aetiology or cause of the neurological condition of MK, is the generalized brain atrophy of the cerebellar and cerebral hemisphere as stated in the MRI reports of the Radiologists, Drs Sayanvala and Swartzberg, is undisputed; and

71.3. there is no evidence of a head injury from the MRI done by the Radiologists on MK.

[72.] There is therefore no sound and rational basis to conclude that there is a reasonable prospect of success on appeal.

ORDER

In the result, the following Order is made:

1. The application for leave to appeal is dismissed;
2. There is no Order as to costs.

L.M. MONTSHO-MOLOISANE
ACTING JUDGE OF THE HIGH COURT
MPUMALANGA DIVISION, MBOMBELA

Date heard : 31 July 2026

Judgment electronically delivered

by circulation to all parties'

representatives : 25 August 2026

Appearances

Counsel for the Plaintiff : M. Sibuyi

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Mbombela

Counsel for the First Respondent : MW Dlamini SC
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