NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)

Case No. 583/2018

In the matter between:

MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH, EASTERN CAPE PROVINCE Applicant

and

PERM BANGILIZWE DIKO Respondent

JUDGMENT IN RESPECT OF
APPLICATION FOR LEAVE TO APPEAL

HARTLE J

[1] The applicant seeks leave to appeal against the whole of my judgment and order made on 22 March 2022.

[2] I do not intend to repeat the grounds relied upon, which are succinctly set out in the application.

[3] Firstly, regarding the issue of the identity of the debtor, Mr. Du Toit, who appeared on behalf of the applicant, suggested that it was not the plea of the respondent that he was unaware of the identity of the applicant. He referred me to the "ambiguous" passage in paragraph 2.4 of the respondent's replication. I, however, read the word "creditor" in the first line thereof (last word) as "debtor" and as an obvious typographical error. I say so because this issue of the respondent's lack of knowledge of the identity of the organ of state is repeated in sub-paragraphs 8.4 and 8.5 of the replication as a consistent theme. Mr. Mpahlwa (who appeared on behalf of the respondent) confirmed this to have been the case of the respondent in the replication and by his submission in the present application that the question of the identity of the party causing and allegedly responsible for the damage is inextricably bound up with the question of the minimum facts giving rise to the debt. In other words, as was submitted by him, the identity of the debtor could only have become known to the respondent after gaining either actual or constructive knowledge of the minimum facts necessary to institute the action.

[4] I therefore disagree that I decided a matter that was not in issue between the parties.

[5] On the issue of my failure to have attached any or sufficient weight to the evidence of Dr. Osman regarding what he said the respondent revealed to him concerning his knowledge of the facts giving rise to the debt, I concede that in

the absence of any serious cross examination of him and in the light of the fact that the respondent failed to testify himself, that another court would likely come to a different conclusion on the value of his testimony and its application to the legal determination at hand.

[6] Likewise, I agree that another court would likely find that the respondent's failure to have testified was fatal to his case and that I ought to have drawn the appropriate negative inference that precedent demands.[1]

[7] On the issue of information about the medical staffs' negligence, I am not necessarily in agreement, but given my concession above, it is probably of little consequence to refute the suggestion that I did not recognize that knowledge of negligence (as a conclusion of law) falls outside of the provisions of section 12 (3) of the Prescription Act, No. 68 of 1969.[2]

[8] To the contrary I repeated what the Constitutional Court in Links v Department of Health, Northern Province[3] emphasized should form the full-fact knowledge in a claim for professional medical negligence. The court there stated that a party relying on prescription must at least show that the plaintiff was in possession "of sufficient facts (the primary facts) to cause them on reasonable grounds to think that the injuries were due to the fault of the medical staff.[4] This is the test that I applied and the extent of the negligence kept in mind.

[9] On the issue of deemed knowledge, I agree that a different outcome would likely pertain assuming the acceptance of Dr. Osman's evidence as providing the "primary facts".

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[1] Galante v Dickson 1950 (2) SA 460 (A) at 465.
[2] See Mtokonya v Minister of Police 2017 (11) BCLR 1443 (CC).
[3] 2016 (4) SA 414 (CC).
[4] Pars 19 and 20 of my judgment. See as well as footnotes 15 and 16.

[10] Finally, I agree that the question of costs, seen through the prism of the reasonable prospect of success that the applicant contends for, would likely attract criticism that the matter was not, after all, so complex as to justify the costs of two counsel.

[11] In the result I issue the following order:

1. The applicant is granted leave to appeal to the full bench of this court against the judgment and order of Hartle J dated 22 March 2022.

2. Costs are in the appeal.

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B HARTLE
JUDGE OF THE HIGH COURT

DATE OF HEARING: 12 September 2021
DATE OF JUDGMENT: 14 September 2022*

*Judgment deemed delivered at 09h30 on this date by email to the parties.

APPEARANCES:

For the applicant: Mr. P Du Toit instructed Norton Rose Fullbright South Africa Inc., c/o Smith Tabata, East London (ref. Ms. M Demmer)

For the respondent: *Mr. T Mpahlwa instructed by Cinga Nohaji, East London (ref. Mr. Nohaji)*