IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, BHISHO

CASE NO. 308/2018

In the matter between:

NOMKHITHA NKAMELA **Plaintiff**

on behalf of OKUHLE NKAMELA

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH:

EASTERN CAPE PROVINCE **Defendant**

JUDGMENT

LAING J

[1] This is an application for leave to appeal against the judgment handed down by the court on 6 August 2021. The parties will be referred to as they appear in the main judgment.

Legal framework

[2] In terms of section 17(1)(a) of the Superior Courts Act 10 of 2013, leave to appeal may only be given where, *inter alia*, the court is of the opinion that the appeal would have a reasonable prospect of success. It is generally recognised that a higher threshold has been established than the test that previously existed under the repealed Supreme Court Act 59 of 1959. See *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen* (unreported, LCC case no. LCC 14R/2014, 3 November 2014), which

was cited with approval in *The Acting National Director of Public Prosecution v Democratic Alliance* (unreported, GP case no. 19577/09, 24 June 2016).[1]

[3] The focus of the court must be on whether the appeal *would* have a reasonable prospect of success. There must be a sound, rational basis for any conclusion to that effect. See *Four Wheel Drive Accessory Distributors CC v Rattan NO* 2019 (3) SA 451 (SCA), at 463F.

[4] The grounds of appeal are addressed below.

Absence of records

[5] The defendant argues that the court erred in finding that the absence of records demonstrated a lack of monitoring on the defendant's part. The difficulty with this, however, is that the defendant placed no evidence before the court to refute the plaintiff's allegations to that effect or to account for the dearth of written evidence in support of any assertion that the defendant's medical staff did in fact provide proper care to the plaintiff.

[6] It is common knowledge that staff are required, as a matter of good professional practice, to maintain records pertaining to the condition of a patient, the nature of care provided, the type and quantity of medication administered, and so forth. For an institution such as a hospital, with a limited number of staff operating on a rotational basis to deal with the needs of a multitude of patients, properly maintained records allow the provision of medical services at the required standard.

[7] The absence of records was never explained. The plaintiff's account of her stay in hospital without adequate monitoring was never successfully challenged.

Maternity guidelines

[8] The next ground of appeal was to the effect that another court may find that this court erred in holding that a departure from the maternity guidelines amounted to negligence. Closely related to this is the argument that the court erred in elevating the guidelines to a peremptory instrument.

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[1] See, too, *Notshokovu v S* (unreported, SCA case no. 157/15, 7 September 2016).

[9] The guidelines are intended for implementation in every South African health care facility and for training purposes at medical and nursing schools throughout the country. They purport to contain the basic minimum that must be known by all staff at a hospital such as that in the present matter.[2] Consequently, this court held that they constitute the accepted national benchmark against which to measure the standard of maternity care provided.

[10] The Supreme Court of Appeal has confirmed that the test to be used in circumstances such as these is whether or not the medical practitioner exercised reasonable skill and care; in other words, whether or not his or her conduct fell below the standard of a reasonably competent practitioner in his or her field. See *Castell v De Greef* 1993 (3) SA 501 (C), at 512 A-B, which was cited with approval in *Buthelezi v Ndaba* 2013 (5) 437 (SCA), at para 15.[3] It is submitted that the maternity guidelines set the standard to be attained. The departure from same amounts to negligence.

[11] It is, with respect, not correct for the defendant to assert that the guidelines were elevated to a peremptory instrument. They are what they are: guidelines for the provision of maternity care. However, such guidelines establish a benchmark for the services to be provided at a hospital such as the one to which the plaintiff was admitted.

Plaintiff's personal claim

[12] The defendant goes on to contend that the court erred in finding that the plaintiff proved her case with regard to her personal claim. In that regard, the defendant points out that the plaintiff returned to Cape Town once the child, Kuhle, was eight months old, leaving her with her grandmother.

[13] The above argument, however, does not take into consideration the shock and trauma that would have accompanied the circumstances during the plaintiff's labour and Kuhle's birth. Moreover, it does not allow for the implications of the plaintiff's having had to accept a child with cerebral palsy and having had to attend to

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[2] See the extract from the guidelines, quoted at [92] of the main judgment.

[3] The test was also confirmed in *Goliath v Member of the Executive Council for Health in the Province of the Eastern Cape* [2015] JOL 32577 (SCA), at [8].

her needs for at least the first eight months of her life. There was evidence to the effect that the plaintiff continued to regard herself as the child's mother; she never entirely abandoned her to the care of anyone else.

Prescription

[14] A further ground is that another court may find that the plaintiff's personal claim had become prescribed. This was never pleaded, however, and was never proved by the defendant during trial proceedings.

[15] To the extent that the defendant pleaded that the plaintiff had failed to comply with section 3(2) of Act 40 of 2002, this aspect was addressed conclusively within the context of the plaintiff's interlocutory application for condonation.

Discharge from hospital

[16] The defendant also argues that the court ought to have found that the defendant had established a basis upon which to infer that the plaintiff was discharged on 18 March 2015. This was not supported by the evidence. The testimony of the plaintiff, the nurses, and the experts, clearly indicated that there had been problems at the time of Kuhle's birth and that her early discharge had simply not been feasible.

Consideration of evidence

[17] It was asserted that the court did not consider the evidence on an even-handed basis, such that the defendant did not receive a fair trial. Counsel for the defendant did not strenuously pursue this point during argument.

[18] Allied to the above, however, is the ground to the effect that another court may find that the issues were not determined with regard to all the evidence; the defendant mentions several examples.

[19] In this regard, it cannot be denied that the state of the records was unsatisfactory. This was a factor that had to be managed carefully by both the plaintiff and the defendant in the conduct of their respective cases.

[20] Nevertheless, it was the undisputed testimony of Prof Savvas Andronikou that the MRI scan for the child displayed evidence of a hypoxic ischaemic injury. The pattern corresponded with that for a term foetus or new-born. Similarly, both Dr Yatish Kara and Prof Peter Cooper, in their joint report, were in agreement that it was probable that a peripartum[4] hypoxic ischaemic injury was the cause of Kuhle's cerebral palsy.

[21] It is necessary to pause and observe that a joint report such as the one prepared by Dr Kara and Prof Cooper is to be understood as limiting the matters with regard to which evidence is needed. In the absence of repudiation, a litigant is entitled to run his or her case on the basis that the matters agreed upon by the experts are not in issue. See *Bee v Road Accident Fund* 2018 (4) SA 366 (SCA), at [66].[5]

[22] The findings made by Prof Andronikou, the joint report of Dr Kara and Prof Cooper, the professional opinion of the former with regard to when the injury occurred, the concessions made by Dr Peter Koll and Dr Freda Janse van Rensburg, the evidence of the nurses, and ultimately the records themselves (as poor as they were), demonstrated convincingly the evidence of encephalopathy at Kuhle's birth.

[23] Consequently, the examples mentioned by the defendant are neither persuasive nor entirely relevant.[6] They are at odds with the conclusive nature of the evidence described above.

[24] The defendant also takes issue with the evidence of the plaintiff, contending that the court failed to address the numerous instances where it was allegedly shown that she had lied. Whereas there may have been shortcomings in some of the plaintiff's testimony, these were not material; in any event, she explained that she had not mentioned certain facts because she had never been asked to do by the expert or practitioner in question.

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[4] The term is understood to mean the period of time before, during or after labour.

[5] See, too, *M on behalf of L, a child v Member of the Executive Council for Health: Gauteng Provincial Government* [2021] JOL 51389 (GJ), at [20].

[6] By way of example, the defendant has challenged the record pertaining to the treatment of Kuhle with phenobarbitone, usually administered when a patient suffers convulsions. This was agreed upon by Dr Kara and Prof Cooper, however, and must be accepted as a fact.

Costs of interlocutory application and Ms Bianca Grey

[25] A further ground indicated by the defendant pertains to the costs order in relation to the evidence given by Prof Andronikou. The defendant argues that the parties had agreed that a joint report could be repudiated within an agreed framework, which is what happened; the court erred in holding that a new or supplementary report was required; and the plaintiff had sought an indulgence with regard to the leading of evidence other than in the ordinary course.

[26] In *Bee*, the Supreme Court of Appeal disapproved of the repudiation of a joint report for tactical reasons. The aim of litigation should be just adjudication, achieved as efficiently and as inexpensively as reasonably possible.[7]

[27] Here, the defendant's decision to repudiate the joint report at the eleventh hour was entirely unwarranted. Prof Andronikou resides in the United States. The decision constrained the plaintiff to make application for the leading of Prof Andronikou's evidence remotely by electronic transmission, which the defendant opposed. In the absence of clear reasons for why the defendant chose to repudiate as she did and in light of the clear benefits available to both parties in dispensing with the need for Prof Andronikou to attend trial in person, the defendant's argument about costs is puzzling. At the least, the principle that costs follow the result of the application should have been applied, which is what happened.

[28] It is also asserted that the court erred in ordering the defendant to pay the costs of Ms Grey, who was never called as a witness. The court, however, made no order to that effect.

Nature of findings

[29] A further ground of appeal was that another court may find that this court made findings that were not supported by the evidence. The defendant mentions several examples. In that regard, this court stands by the analysis of the evidence,

[7] At [67].

application of the law, and the making of the determinations apparent in the main judgment.

[30] The defendant argues further that the court attached undue value to the evidence of Dr Kara, who allegedly testified outside the area of his expertise, and understated the value of Dr van Rensburg's evidence in her capacity as a paediatric neurologist.

[31] It was agreed by both Dr Kara and Prof Cooper that the probable cause of Kuhle's cerebral palsy was a peripartum hypoxic ischaemic injury. Dr van Rensburg deferred to their views in that regard, which were consistent with Prof Andronikou's undisputed findings. Furthermore, Dr van Rensburg did not present evidence to the effect that the injury was not intrapartum and merely considered the scenario of an injury caused by late placental insufficiency as a possibility, nothing more. Importantly, she conceded that there was a high probability that the injury happened during the labour process.

[32] With regard to the defendant's contention that the court erred in finding that the latent phase of labour was prolonged, the analysis of the evidence, application of the law, and the making of the determinations apparent in the main judgment, are reaffirmed.

Relief and order to be made

[33] In the circumstances, the court is not of the opinion that the appeal would have a reasonable prospect of success. The relief sought by the defendant cannot be granted.

[34] Accordingly, the following order is made:

(a) the application for leave to appeal is dismissed; and

(b) the defendant is liable for the costs of the application.

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JGA LAING

JUDGE OF THE HIGH COURT

APPEARANCE

Counsel for the applicant:	Adv Mooki SC, instructed by Smith Tabata Attorneys, King Williams Town.
Counsel for the respondent:	Adv Wessels SC, instructed by Nonxuba Inc., East London.
Date of hearing:	14 March 2022
Date of delivery of judgment:	31 May 2022