

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO

Case Number: **10242/2017**

**28 November 2023** \_\_\_\_\_  
DATE SIGNATURE

In the matter between:

**THE MEC FOR HEALTH, GAUTENG**

Applicant

And

**MTWAZI CIKIZA CYNTHIA**

Respondent

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**JUDGMENT**

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[1] The applicant appeals against the whole judgment and costs order delivered on 25 April 2023. The applicant appeals on the basis that the court erred on various grounds :

By holding the applicant liable for severance of the respondent's sphincter muscle, that event could have occurred at the time of delivery of the respondent's baby during the cutting and suturing of the episiotomy. When such delivery occurred on 28 March 2013, the period falls outside the prescription period of three years before the issue of summons on 27 March

2017. A claim based on the episiotomy would have accordingly prescribed on 28 March 2016. It contends the applicant ought not to be held liable for such injury, which could possibly have occurred 4(four) years earlier than the issue of the summons.

[2] The applicant contends that the court failed to consider the respondent's case, as articulated in the particulars of the claim; the applicant's surgeon was negligent in failing to recognise the harm they caused to the respondent's sphincter muscle on 7 February 2014. Furthermore, the court erred in holding the applicant liable for severance of the respondent's sphincter muscles that could have occurred at the time of delivery of the baby during the cutting and suturing of the episiotomy. The delivery occurred on 28 March 2013. As such, this period occurred outside of and before the issue of the summons. A claim based on the episiotomy would accordingly have prescribed on 28 March 2016. The applicant could not be held liable for such injury, which occurred four years earlier than the issue of summons.

[3] It is also contended that the court erred in failing to consider the respondent's case as set out in the particulars of the claim, where it alleged that the applicant's surgeon was negligent in failing to recognise the harm caused to the sphincter muscle on 7 February 2014. The court erred in finding the applicant liable for the sphincter injury that occurred at the time of delivery when the respondent specifically excluded that period from its particulars of claim, opening address and during the trial. Thus, it denied the applicant an opportunity to defend itself against a claim based on cutting or suturing of the episiotomy.

[4] The court erred in finding that Dr Francis did not see the red-striated muscle of the internal anal sphincter. Dr Francis explained it was difficult to distinguish between anatomical structures as sepsis distorted them. Dr Francis said that despite the distorted anatomy, he could see the red sphincter muscle. The court erred in failing to accept that severance of the sphincter muscles is a recognised and normal complication of a fistulectomy. The surgeon cannot be held liable for the causation of such a normal complication. Thus, the court did

not consider the trite principle in medical negligence cases that “ with the best will in the world things sometimes went amiss in surgical operations or medical treatment. A doctor was not to be held negligent simply because something went wrong”<sup>1</sup>.

[5] The established test for leave to appeal encompassed in section 17(1)(a) of the Superior Courts Act 10 of 2013 posits whether reasonable prospects of success exist; the tests refer to are the oft-cited *Mont Chevaux Trust v Goosen*<sup>2</sup> and *Ramakatsa and Others v African National Congress and Another*<sup>3</sup> where the Supreme Court of Appeal indicated that there might be reasons to entertain an appeal:

[10] Turning the focus to the relevant provisions of the Superior Courts “Act[5] (the SC Act), leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice.[6]

[6] I have considered the submissions made by both counsel, which I thank them for. Having considered the reasons in my judgment dated April 2023 and counsel submissions, I am of the view that the applicant has reasonable prospects of success on appeal.

ORDER

[7] Consequently, I grant the following order:

1. The applicant is granted leave to appeal to the Full Court of this Division with costs to be costs in the appeal.

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**SC MIA**  
**JUDGE OF THE HIGH COURT**

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<sup>1</sup> Lord Denning MR in *Hucks vs Cole* [1968] 118 New LJ at 469

<sup>2</sup> 2014 JDR 2325 (LCC) at para 5 and 6

<sup>3</sup> [2021] ZASCA 31 (31 March 2021) Para 10

**JOHANNESBURG**

For the Applicant:

T Masevhe  
Instructed by State Attorney

For the Respondent:

C Cremen  
Instructed by Houghton Haper Inc

Heard: 03 November 2023

Delivered: 28 November 2023