Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: **17553/2017**

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED:

..... ……

SIGNATURE DATE

In the matter between:

A[…] V[…] D[…] M[…] NO obo

MH Plaintiff

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG PROVINCIAL GOVERNMENT Defendant

Coram: Horn AJ

Heard: 02 May 2024

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 14h00 on 4 May 2024.

Summary: Repudiation by litigant of agreement reached by expert witness retained by such litigant with expert in like discipline retained by the other party – good cause for

repudiation required.

ORDER

1. The defendant is permitted to repudiate the agreement contained in paragraphs 1.2 and 1.3 of the joint minutes compiled by Prof Nolte and Prof Du Plessis.

2. The application for repudiation for the remainder of the agreements concluded between the paediatric neurologists and nursing experts is dismissed.

3. The defendant is ordered to pay the cost of the application, including the wasted costs occasioned by the matter standing down on 29 and 30 April 2024 and the costs of 2 May 2024. The costs shall include the cost of two counsel where so employed, taxable on scale C. Such costs shall exclude the appearance of the plaintiff's junior counsel on the aforesaid dates.

JUDGMENT

HORN AJ

[1] This judgment deals with an application by the defendant to repudiate agreements reached between expert witnesses retained by the defendant with expert witnesses in like disciplines retained by the plaintiff.

[2] The plaintiff has instituted a claim for damages against the defendant premised on allegations of negligence of the latter's employees on the occasion of the birth on 31 January 2015 of the minor child for whom the plaintiff has been appointed as *curatrix ad litem*.

[3] The matter had been set down as a trial of long duration, to commence on 29 April 2024, for determination of the question of liability. Both sides have filed expert reports in five disciplines, including paediatric neurology and nursing. The paediatric neurologists prepared a joint minute on 26 April 2023. The nursing experts prepared their joint minute on 11 May 2023. In light of what follows, it is necessary to quote these minutes.

[4] The joint minute prepared by the paediatric neurologists provides as follows:[1]

"The experts agree with regard to the following:

1. The minor's brain MRI changes are indicative of chronic evolution of mixed acute and partial prolonged hypoxic ischaemic injury at term. – Agree

2. The minor has mixed cerebral palsy, epilepsy, profound intellectual disability, contractures and scoliosis. – Agree

3. There exists good correlation between the minor's MRI brain abnormalities and type of cerebral palsy. – Agree

4. The minor's motor disability is severe; Gross Motor Function Classification System V. – Agree

5. The minor suffered from moderate neonatal encephalopathy. – Agree

[1] The name of the minor child has been substituted with "the minor".

6. There is evidence for timing of mixed acute and partial prolonged hypoxic ischaemic injury to the intrapartum period. HIE and Birth asphyxia is recorded in the notes. – Agree

7. There is no recorded evidence for hypoxic ischemic injury in the antepartum period (time prior to delivery/labour). – Agree

8. There is no recorded evidence for hypoxic ischemic injury in the postpartum period. – Agree

9. Both experts defer to expert obstetric opinion regarding optimal management of the antenatal and intrapartum periods, including foeto-maternal monitoring. – Agree

10. Both experts defer to expert neonatal opinion regarding optimal management of the neonatal period, including resuscitation. – Agree"

[5] The joint minute prepared by the nursing experts provides as follows:[2]

"Prof D du Plessis and Prof AGW Nolte agreed on the following aspects:

1. Pregnancy

1.1. Ms M's pregnancy progressed normally according to the few records available.

1.2. She only attended antenatal clinic three times.

1.3. There were no maternal problems or illnesses recorded during these visits.

[2] The name of the minor's mother has been substituted with "Ms M".

1.4. The fetus seemed to grow normally during pregnancy, according to the symphysis-fundal height measurements during these visits.

2. Labour

The midwives who cared for Ms M during her labour delivered sub-standard care in that they did not:

2.1. Do or record maternal and fetal observations according to the Maternity Guidelines (2007) during active phase of labour, as well as the second stage of labour.

2.1.1. The fetal heart rate was not recorded on the partograph at all.

2.1.2. The included CTG trace, done at 11:35 – 12.10 showed initial increased variability followed by prolonged deceleration to below 100 bpm present which lasted longer that 3 min between 11:50 and 11:55. This is a sign of acute hypoxia.

2.1.3. Considering the above, the CTG should not have been stopped but continued until the baby was born and medical opinion obtained.

2.1.4. Hyperstimulation of the uterus was present on the CTG trace [5-6 contractions in 10 minutes]. This necessitates meticulous, continuous observation of the fetal heart rate in response to the contractions. No observations of the fetal heart rate were done or recorded during this time, despite a prolonged FHR deceleration (sic) this stage.

2.2. Monitoring the progress of labour 2 hourly which is standard midwifery practice and according to guidelines.

2.3. Keep complete and accurate records of the case as required by SANC R2488.

2.3.1. There were no records at all after 08:00 until birth of the baby in which case only the summary and neonatal records was (sic) completed.

2.3.2. The partograph was incorrectly completed, as the latent phase observations were documented in the space allocated to active labour."

[6] At the commencement of the hearing, the defendant's counsel handed up a notice in terms of which the defendant indicated that she does not admit certain portions of the joint minutes quoted above. The notice was uploaded to Caselines at 09h23 on 29 April 2024. The plaintiff's legal representatives became aware of the notice 15 minutes before the commencement of the trial.

[7] In relation to the joint minute of the paediatric neurologists, the notice stated that paragraph 6 of the joint minute is not admitted. Three grounds were advanced. First, the notice states that there is no factual basis for the conclusion that the hypoxic ischemic injury occurred "in the intrapartum as agreed by the experts". Second, it is stated that the expert appointed by the defendant ("Dr Mteshana") refers to four criteria to be met in regard to "volpe" while the expert appointed by the plaintiff ("Prof Solomons") refers to three. Third, the notice states that "the opinion of the joint minute is based on incorrect facts". The notice does not identify the incorrect facts or what "volpe" means.

[8] In relation to the joint minute of the nursing experts, the defendant's notice states, first, that paragraph 1.3 of the joint minute is incorrect on the premise that

Ms M was admitted twice for “UTI” (urinary tract infection) during the antenatal period. Second, it is stated that the “FHR” (foetal heart rate) was recorded at 17h00 (on 30 January 2015) with reference to a document in the trial bundle. This objection pertains to paragraph 2.1.1 of the joint minute. Finally, the defendant contends that “the experts evidence referred is outside the scope of the expertise of nursing sisters”. It is not apparent from the notice whether this objection pertains to the entire joint minute or only to select portions thereof.

[9] The plaintiff objected to the defendant’s notice. Argument on the issue ensued. Before I could make a ruling, the defendant’s counsel requested that the matter stand down for purposes of taking instructions. On resumption of the hearing, the defendant’s counsel indicated that she had received instructions to bring a substantive application and sought the opportunity to do so. After the parties had agreed on times for the exchange of papers, the matter stood down to 2 May 2024 for the hearing of the defendant’s application.

[10] On the afternoon of 29 April 2024, the defendant delivered a notice of motion and founding affidavit deposed to by the defendant’s attorney. In the notice of motion, the defendant sought to repudiate the joint minutes of the paediatric neurologists and nursing experts in their entirety. In the founding affidavit, the defendant’s attorney states that the reasons for the repudiation are set out in the notice delivered shortly before the commencement of the hearing on 29 April 2024. He also refers to the report of Dr Mteshana, where she stated that the minor fulfills three of the four criteria in “Volpe’s test”, making intrapartum asphyxia most likely. This statement, the defendant’s attorney seeks to place in contrast to the statement in the relevant joint minute, where the experts agree that there is evidence for timing of the mixed acute and partial prolonged hypoxic ischaemic

injury during the intrapartum period. According to the defendant's "There are no facts that would have caused the Defendant's expert to have changed her opinion from February 2023 [when her report was compiled] and April 2023 [when the joint minute was compiled]".

[11] The defendant's attorney also questions the reference by Prof Solomons to three features for a diagnosis of an intrapartum insult, whereas Dr Mteshana refers to four criteria. The relevance of the distinction is not explained.

[12] The founding affidavit makes no mention of the joint minute compiled by the nursing experts, save for the reference to the defendant's notice of 29 April 2024.

[13] There is no indication in the defendant's application that Dr Mteshana and the nursing expert retained by the defendant ("Prof Du Plessis") are aware of the application or of the defendant's desire to repudiate the agreements reached by them in the joint minutes. There is no evidence that they support the application or that either of them had a change of heart in relation to the matters in respect of which they had reached agreement with their counterparts.

[14] The plaintiff opposed the application and delivered an answering affidavit deposed to by her attorney. She took issue with the fact that the defendant sought to repudiate the entire joint minutes of the experts concerned, whereas the defendant's position previously was that the repudiation only pertained to the select portions referred to above.

[15] The plaintiff's attorney points out that the agreement reached between the paediatric neurologists, namely that there is evidence for the timing of the

hypoxic ischaemic injury in the intrapartum period, is perfectly in line with Dr Mteshana's report. A confirmatory affidavit by Prof Solomons accompanied the answering affidavit.

[16] The plaintiff also put up a confirmatory affidavit of Prof Nolte, the nursing expert retained by her. Prof Nolte confirms that, apart from the entry on the partograph at 17h00 on 30 January 2015, no other inscriptions were made regarding the foetal heart rate. She also opined that urinary tract infections are common during pregnancy and confirmed that this fact has no impact on her opinion.

[17] Prof Nolte denies that any of the matters on which she and Prof Du Plessis had reached agreement fall outside the scope of their expertise.

[18] A replying affidavit was deposed to by the defendant's attorney. He objected to the matters confirmed by Prof Nolte in the answering affidavit as constituting matters falling outside her expert report. The defendant's attorney indicated that "any reference to issues that are falling outside the report she has filed" should be struck out. A striking application was not pursued.

[19] During the hearing of the application, the defendant's counsel indicated that the defendant only seeks to repudiate the agreement contained in paragraph 6 of the joint minutes compiled by the paediatric neurologists and paragraphs 1.2, 1.3 and 2.1 (including subparagraphs) of the nursing experts' joint minutes.

[20] It is convenient to deal with paragraphs 1.2 and 1.3 of the minutes of Prof Nolte and Du Plessis. Those paragraphs record that Ms M only attended an antenatal clinic on three occasions during her pregnancy and that no maternal problems or

illnesses were recorded during those visits. Mr Strydom SC, for the plaintiff, candidly conceded that Ms M had indeed attended an antenatal clinic on two more occasions and that she had contracted a urinary tract infection twice during her pregnancy.

[21] As I understood Mr Strydom SC, repudiation by the defendant of the agreements in paragraphs 1.2 and 1.3 of the nursing experts would be of no moment. The plaintiff certainly did not claim that any prejudice will result.

[22] The repudiation of the remainder of the agreements reached between the experts concerned was contested more strenuously. Much of the debate centered around whether the repudiating party is required to show good cause for the repudiation.

[23] Ms Makopo, for the defendant, contended that all that is required is for the defendant to repudiate before commencement of the trial and to do so clearly. It is only where the repudiation occurs after commencement of the trial, so the argument went, that the trial court may insist on a substantive application. And, if adequate reasons are required for the repudiation, counsel contended that the defendant's reasons were, in any event, adequate.

[24] Much reliance was placed by the defendant's counsel on the apparent change of heart by Dr Mteshana. The argument was that, whereas Dr Mteshana stated in her report that intrapartum asphyxia is most likely in this case, she now states in the joint minute that there is evidence for the timing of the hypoxic ischeamic injury in the intrapartum period. The latter statement, so counsel contended, is emphatic and conclusive. The crux of the objection was not so much the nature

or description of the injury, but the indication that it occurred “intrapartum”. The latter indication refers to the timing of the injury.

[25] Defendant’s counsel also vaguely suggested during argument that the agreement reached in paragraph 6 of the joint minute of the paediatric neurologists, falls outside the scope of their expertise.

[26] Mr Strydom SC contended that the defendant is required to show good cause for the repudiation. The fact that the repudiation must be clear, so it was contended, implies that it must be done for good reason. Counsel argued that the defendant has failed to show good cause for the repudiation.

[27] Mr Strydom SC also submitted that the defendant finds itself on the horns of a dilemma, because she has retained another expert, Prof Bolton, who apparently disagrees with Dr Mteshana on the timing of the minor’s brain injury. It is for this reason, so it was argued, that the defendant wishes to repudiate the agreement reached by Dr Mteshana.

[28] Both parties referred me to *Bee v Road Accident Fund*[3] which approved an earlier decision of Sutherland J, as he then was, in *Thomas v B D Sarens (Pty) Ltd*.[4]

[29] The legal position as set out in *Bee* can be summarized as follows:[5]

29.1. Where certain facts are agreed between parties to civil litigation, the court is bound by such agreement, even if it sceptical about those facts.

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3 2018 (4) SA 366 (SCA)
4 2012 JDR 1711 (GSJ)
5 At para [64] to [73]

29.2. Litigants are encouraged to reach agreement on as many matters as possible so as to limit the issues to be tried. Expert witnesses should meet with a view to reaching agreement on as much as possible so that the expert testimony can be confined to matters truly in dispute.

29.3. Where experts reach agreement on matters of opinion the court is not bound to adopt the opinion, but the circumstances in which it would not do so are likely to be rare.

29.4. In the absence of clear and timeous repudiation, the other side is entitled to proceed on the basis that matters agreed between the experts are not in issue.

29.5. Litigation is not a game. Litigants should not be encouraged to repudiate agreements for tactical reasons.

29.6. The limits on repudiation, particularly its timing, are matters for the trial court. The reason for insisting on timeous repudiation is obvious. If it were to happen during the course of the trial, a postponement may follow. The trial court is entitled to insist on a substantive application.

29.7. Unless the trial court were for any reason itself dissatisfied with the experts' agreement and alert the parties to the need to adduce evidence on the agreed material, the trial court would be bound, and certainly entitled, to accept matters agreed by the experts.

[30] In *Bee*, the Supreme Court of Appeal expressly left open the question of whether the repudiating party should show good cause for the repudiation.

[31] There are two other decisions dealing with the question of good cause in the present context. In the decision of the Full Court in *M on behalf of L v Member of the Executive Council for Health: Gauteng Provincial Government*[6] the facts were, briefly stated, these: On the eve of the trial, the defendant produced a new expert report of a paediatric neurologist (Prof Smuts), who was not previously involved in the case. She took issue with almost every material agreement reached between the paediatric neurologists previously retained by the parties. In the result, a new joint minute was compiled by the three experts, which purported to replace all previous joint minutes. Writing unanimously for the Court, Wilson AJ, as he then was, concluded as follows:[7]

"In my view, however, Professor Smuts' evidence should not have been admitted, because it sought impermissibly to undo agreements previously reached by the parties' experts. In the circumstances of this case, those agreements were binding on the parties, and on the trial court."

[32] In the event, the Full Court found that the repudiation was neither timeous nor clear. But the Court went further:

"In any event, the time has come to require more than clear and timeous repudiation of expert agreements before the trial court can disregard them."[8]

"There will no doubt be difficult cases in which, having accepted an agreed fact as true, a party will in good faith wish to change tack, perhaps because of the

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6 2021 JDR 2485 (GJ)

7 At para [29]

8 At para [36]

emergence of a series of factors or complications which were not considered by the experts previously, or because of new information about the qualifications or expertise of a particular expert, or because of the emergence of new learning on a subject that might be particularly relevant to the facts at hand. The list is not closed. There may be a variety of other reasons for re-visiting expert agreements, capable of motivation by one of the parties."[9]

However, given the importance of expert agreements, their repudiation should, in my view, be rare. When necessary, it should be motivated, on application to the trial court, and that application should be granted on good cause shown. In seeking to show good cause, a party ought, at the very least, identify the specific agreements sought to be repudiated, and the facts to which they relate; to set out, clearly and succinctly, the new facts sought to be proved; to explain why those facts are so material to the issues at trial that justify the undoing of the relevant expert agreements; and to demonstrate that the need to introduce those facts overcomes any prejudice caused to any other party by setting aside the expert agreements already reached."[10]

[33] The Full Court's decision went on appeal to the Supreme Court of Appeal.[11] That court overturned the Full Court's decision on a different point, but endorsed the Full Court's reasoning quoted above in the following terms:

"Prof Smuts' evidence led to revised joint minutes of other experts. Her evidence indeed impacted on issues which had been agreed on between the experts…"[12]

"We agree that the trial court should not have allowed Prof Smuts' evidence without a substantive application setting out the factors on which it could properly exercise its discretion."[13]

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9 At para [37]
10 At para [38]
11 Member of the Executive Council of Health and Social Development, Gauteng Provincial Government v FBM (obo LPM) 2024 JDR 0950 (SCA)
12 At para [34]
13 At para [35]

[34] The current legal position is thus that a party who wishes to repudiate an agreement reached by an expert witness retained by such party, must show good cause. And for good reason. Pre-trial and case management procedures aimed at limiting issues in dispute would be rendered entirely useless if it were open to the parties to willy-nilly repudiate such an agreement timeously and clearly, but without good reason.

[35] The question is therefore whether the defendant in the present case has shown good cause for repudiating the agreements between the paediatric neurologists and nursing experts. In assessing this question, the following are material considerations:

35.1. The repudiation sought is not supported by the experts retained by the defendant (Dr Mteshana and Prof Du Plessis). There is no suggestion that they wish to repudiate their agreements or that they have changed their stance, as was the case with the defendant's witness in *Bee*. The submission by the defendant's counsel that Dr Mteshana's view as expressed in the joint minutes differs from the view expressed in her report, is wrong. If anything, the view expressed in Dr Mteshana's report is more emphatic than the view expressed in the joint minutes.

35.2. The defendant has not produced other expert evidence to support or motivate a departure from the agreements between the experts, as was the case in *M on behalf of L v Member of the Executive Council for Health: Gauteng Provincial Government.*

35.3. Even if the defendant's experts did have a change of heart, or other conflicting expert evidence were procured, this will not always carry the day for the repudiating party, as is demonstrated by *Bee* and *M on behalf of L*.

35.4. The defendant's contention that the experts in question reached agreement on matters falling outside the scope of their expertise, is not supported by evidence. In relation to the paediatric neurologists, the issue was raised for the first time during argument. In relation to the nursing experts, the issue is raised in the notice delivered on the morning of trial. The notice is not evidence. To the extent that the defendant's attorney confirmed the notice under oath in his founding affidavit, the ambit of the expertise of Prof Nolte and Prof Du Plessis is not a matter which would ordinarily fall within the personal knowledge of an attorney. Here the attorney did not establish a factual basis to conclude otherwise. The only direct evidence on the point is from Prof Nolte, which points the other way.

35.5. The defendant says that the agreement between the paediatric neurologists is based on incorrect facts or has no factual basis. The facts upon which the defendant relies for this contention are not identified at all. It is therefore not possible to assess the substance of the submission or whether those facts are within the personal knowledge of the deponent to the founding affidavit. And the opposing party will naturally find it difficult to respond meaningfully to such a vague allegation.

35.6. Save for two additional visits to an antenatal clinic during Ms M's pregnancy and the fact that she had contracted a urinary tract infection twice, the defendant does not contend for new facts or information.

35.7. There is no evidence of new learning on a subject that might be of particular relevance to the facts at hand.

[36] Premised on the candid concession made by Mr Strydom SC, as recorded earlier in this judgment, in relation to paragraphs 1.2 and 1.3 of the nursing experts' joint minute, I will allow the defendant to repudiate the agreement recorded in those paragraphs.

[37] In relation to paragraph 2.1.1 of the joint minute compiled by the nursing experts (that the foetal heart rate was not recorded on the partograph at all) counsel for the plaintiff illustrated that the recording at 17h00, referred to in the defendant's notice, was on the previous day (30 January 2015). The defendant's counsel did not contend otherwise. In the answering affidavit, Prof Nolte acknowledged that recording, but confirms that it has no impact on the statement contained in the joint minute. As stated, there is no evidence from Prof Du Plessis to dispute this. In any event, the defendant does not explain how, if at all, the recording at 17h00 on the previous day is of any relevance.

[38] The repudiation sought in respect the remainder of the agreements reached between the experts, to wit paragraph 6 of the paediatric joint minutes and paragraph 2.1 (including sub-paragraphs) of the nursing experts' joint minute, cannot be allowed. The defendant has failed to show good cause for the repudiation.

[39] It is necessary to comment on the timing of the repudiation. In *Thomas*,[14] it was held that the repudiation must, at the latest, occur at the outset of the trial, but to do so at such a late stage is undesirable because it may provoke delay. *Bee* left the timing of the repudiation to the trial court. In the present case, at the parties' request, the matter was allocated as a trial of long duration. This request, no doubt, was motivated, at least in part, by the evidence that the parties anticipated to lead. The matter was certified as trial ready on 30 May 2023. By then, the joint minutes here in question were available to the parties. There is no indication that anything happened between 30 May 2023 and 29 April 2024, when the trial was due to commence, that warranted repudiation on the morning of trial. The fact that the defendant's counsel telephonically informed the plaintiff's counsel on the afternoon of Sunday, 28 April 2024 the defendant wishes to repudiate a portion of the joint minute of the paediatric neurologists, does not make it any better.

[40] As for costs, the defendant achieved a limited measure of success. The plaintiff, on the other hand, achieved substantial success in opposing the application. Also, it will be recalled that the defendant initially sought to repudiate the joint minutes in question in their entirety. The plaintiff's opposition to such a broad repudiation was entirely warranted. In any event, the defendant, in seeking to repudiate agreements reached by experts retained by her, seeks an indulgence. In such circumstances, unless opposition is unreasonable (it was not in this case), the defendant should pay the costs of the application.

[41] I consider the matter to be one of considerable complexity. It may be so that the defendant's application, viewed on its own, is less complex. But the plaintiff's counsel was not briefed on 29 April 2024 to oppose an application. He was

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[14] 2012 JDR 1711 (GSJ) at para [11]

briefed on trial. The application came later. In my view scale C is the appropriate scale for costs in respect of counsel.

[42] The plaintiff sought punitive costs. Notice thereof was only given to the defendant on the morning of 2 May 2024. Despite the timing of the notice, I am not inclined to grant punitive costs. The application is rather novel and I have been unable to find earlier decisions where similar applications have been made. The time may well come in future where late repudiations (or attempted repudiation) attracts punitive costs, depending on the facts and circumstances of the particular case.

[43] I therefore make the following order:

1. The defendant is permitted to repudiate the agreement contained in paragraphs 1.2 and 1.3 of the joint minutes compiled by Prof Nolte and Prof Du Plessis.

2. The application for repudiation for the remainder of the agreements concluded between the paediatric neurologists and nursing experts is dismissed.

3. The defendant is ordered to pay the cost of the application, including the wasted costs occasioned by the matter standing down on 29 and 30 April 2024 and the costs of 2 May 2024. The costs shall include the cost of two counsel where so employed, taxable on scale C. Such costs shall exclude the appearance of the plaintiff's junior counsel on the aforesaid dates.

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N J HORN

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of hearing: 2 May 2024

Date of judgment: 4 May 2024

Counsel for the Defendant/Applicant: N Makopo

Instructed by the State Attorney

Counsel for the Plaintiff/Respondent: G Strydom SC

Instructed by MED Attorneys