

Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO



**IN THE HIGH COURT OF SOUTH AFRICA  
NORTH WEST DIVISION – MAHIKENG**

**Case No: 1362/2019**

**In the matter between:-**

**MEMBER OF THE EXECUTIVE COUNCIL  
FOR HEALTH NORTH WEST PROVINCE**

**APPLICANT**

**and**

**LORATO SANDRA MOTSHEGWA obo  
OMOLEMO MOTSHEGWA**

**RESPONDENT**

**ORDER**

- (i) The application for leave to appeal is granted in respect of the applicant to the Full Court of this Division.
- (ii) The costs of this application for leave to appeal are costs in the appeal.

## LEAVE TO APPEAL JUDGMENT

**REDDY AJ**

### Introduction

[1] This is an application for leave to appeal to the Full Court of this Division alternatively, the Supreme Court of Appeal predicated in terms of section 17(1)(a)(i) of the Superior Courts Act 10 of 2013 (“the Superior Courts Act”) against the whole judgment of this Court. The application for leave to appeal is opposed. For ease of reading, I propose to follow the nomenclature of the parties as cited herein.

### Grounds of appeal

[2] The applicant’s Notice of Appeal, assails the factual findings of this Court on the following grounds:

- 1 . The learned Judge found the evidence of Dr Dlangamandla-Mokoka superfluous based on the fact that she admitted in cross examination that she was not resiling from the agreed findings in the joint minute and based on the fact that she reaffirmed the content of the joint minute.
2. The learned Judge erred in this regard. The evidence of Dr Dlangamandla-Mokoka provided a good and proper context to the interpretation of the joint minute especially on the presentation of the injury which the radiologists described as a mixed pattern which is predominantly acute profound.
3. The learned judge, instead of disregarding the evidence as unnecessary or superfluous, ought to have properly analyzed the evidence together with

the evidence of other experts, like Dr Mogashoa and Mbokotha. Such analysis could have assisted the court in determining the issue of foreseeability of the injury, preventability and causation.

4. The learned judge found that it is not in dispute that the plaintiff received substandard care and that the substandard care is not only isolated to only the failure to adequately monitor the plaintiff and OM as the defendant sought to advance.
5. The learned judge made a general finding in this regard. He failed to appreciate that the admitted substandard care by the defendant related to certain time periods and not generally to the entire period the plaintiff and OM were in hospital. In particular it related to the early stages of labour and/or before the onset of labour. The learned judge erred and or misdirected himself in this regard.
6. The learned Judge found that the viva voce evidence of the plaintiff's experts was founded on logical reasoning and that "plaintiffs expert evidence provided the most reasonable and cogent explanation of why an intrapartum brain injury was most likely".
7. The learned judge erred and or misdirected himself in this regard. On the evidence before the court, in the form of the normal foetal heart rate during the active phase of labour and the normal or assuring Apgar scores at 1 minute and 7 minutes, including the lack of indications of compromised baby at birth, the conclusion and finding by the learned judge is, with respect, unjustifiable or unsustainable on the facts.
8. Even if the injury is, on the facts, proven to have occurred intrapartum, the learned judge failed to enquire whether, in the light of the normal foetal heart rate during the active phase of labour, it could have occurred in the last thirty minutes or less of labour and thus unforeseeable and impossible to prevent.

9. The learned judge found Dr Mbokota to be an unreliable witness, meaning that he found his evidence to lack accuracy. This seems from the judgement to be based on the "self-corrections" Dr Mbokota made. The learned judge found, with reference to Dr Mbokota:  
“..it is far-fetched to have expected Dr to have conceded that the "cosmetic" changes varied the substance of his report given the impact it would axiomatically have reliability of his evidence as an expert. To my mind, it casts a serious cloud of doubt over the reliability his report”.
10. The learned judge erred in this regard. First, it is trite that an expert witness is entitled generally to change his opinion and that does not of its own result in his evidence being unreliable. Second, the court does not state how the self-corrected statement and or cosmetic changes affected or changed the report and opinion of Dr Mbokota. He simply rejects his assertion that it did not change without providing any basis for such rejection.
11. Third, the evidence of Dr Mbokota is consistent with the evidence of the other witnesses, including the plaintiff’s witnesses and with the objective evidence, the records.
12. The learned judge found that Dr Mobokota critically failed to address certain main contentions in the plaintiff’s experts. With respect this is not a function of an expert witness. His is to give an opinion in his field of expertise and assist the court in determining the issues.
13. The learned judge found that Dr Mbokota sought at every opportunity to defend the conduct of the defendants, instead of being neutral. This finding is made without reference to any facts in support thereof. It is simply backed with a conclusion, without facts, that he intentionally rebuffed concessions.
14. The learned judge erred in this regard. He was overly critical of the evidence of Dr Mbokota and was consequently unfair and biased against

him. No basis existed for the finding of unreliability and for the finding that he was determined to defend the employees of the defendant. His evidence properly considered did not differ on facts with the that of the witnesses for the plaintiff.

15. The learned Judge erred in finding that "the concession by the defendant that there had been substandard care in the failure to properly monitor the plaintiff on 31 January 2014 and the failure to perform the NST is fanciful and is just the use of semantics in lieu of admitting the legal concept of negligence". Without a causal link between the undisputed failure to monitor or failure to act and the injury suffered, such failure remains just that, substandard care which can loosely be translated to poor care and not necessarily negligent.
16. The learned judge erred in inferring or implying that the labour of the plaintiff may have been prolonged and by highlighting that "it is clear from the maternity guidelines that certain steps need to be taken when labour is prolonged. These steps include frequent monitoring, especially to enable the hospital staff to identify foetal distress". There was simply no factual basis for such an inference.
17. The learned Judge erred in finding that the substandard record keeping exacerbated the lack of monitoring of plaintiff and OM. The alleged lack of monitoring is dealt with above. The unavailability of records in this case is a neutral factor. The available records were able to shed light on the foetal condition during the active phase of labour and immediately after birth.
18. The learned Judge erred in finding that there was a failure to consistently monitor the plaintiff and the foetal heartrate of OM and that this, on a balance of probabilities, caused the brain injury to OM.
19. The learned judge also erred in finding that the plaintiff established negligence of the part of the employees of the defendant and that the

defendant is liable for plaintiff's proven or agreed damages arising out of OM'S brain injury.

### The law and the discussion thereof

[3] The enabling legislation which prescribes the circumstances in which leave to appeal may be granted is set out in [section 17\(1\)](#) of the Superior Courts Act. The section reads as follows:

“Section 17(1)

(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) the decision sought on appeal does not fall within the ambit of [section 16](#); and

(b) The decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.

[4] On an ordinary reading of [section 17\(1\)](#), it exhumes that the bar to the granting an applicant leave to appeal has been raised, although it is not insurmountable. In *The Mont Chevaux Trust v Tina Goosen and 18 Others* 2014 JDR 2325(LCC) at paragraph (6) the following was stated:

“It is clear that the threshold for the granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, see *Van Heerden V Cronwright & Others* 1985(2) A 342 (T) at 343H. The use of the word “would” in the new statute

indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against.”

- [5] In *S v Smith* [2012 \(1\) SACR 597](#) (SCA), the concept of reasonable success was posited as follows:

“[7] What the test for reasonable prospects of success postulates is a dispassionate decision, based on facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.”

- [6] In *Ramakatsa and Others v African National Congress and Another* (Case No. 724/2019) [2021] ZASCA 31 (31 March 2021), Dlodlo JA reminded of the methodology of finding the existence of a reasonable prospect of success when the following was enunciate:

[10] Turning the focus to the relevant provisions of the Superior Courts Act (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. This Court in *Caratco*, concerning the provisions of s 17(1)(a)(ii) of the SC Act pointed out that if the court is unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have

an effect on future disputes. However, this Court correctly added that 'but here too the merits remain vitally important and are often decisive'. I am mindful of the decisions at high court level debating whether the use of the word 'would' as opposed to 'could' possibly means that the threshold for granting the appeal has been raised. If a reasonable prospect of success is established, leave to appeal should be granted. Similarly, if there are some other compelling reasons why the appeal should be heard, leave to appeal should be granted. The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In other words, the appellants in this matter need to convince this Court on proper grounds that they have prospects of success on appeal. Those prospects of success must not be remote, but there must exist a reasonable chance of succeeding. A sound rational basis for the conclusion that there are prospects of success must be shown to exist." (footnotes omitted)

[7] Counsel for the applicant and respondent drafted detailed heads of argument for which I am grateful. In oral argument the main principals were accentuated. It serves no purpose to regurgitate same. I have taken due cognizance of the salient points. In the final analysis I am convinced that applicant on the proper grounds set out have a prospect of success on appeal. A dispassionate decision based on the law and facts, leads me to the conclusion that the application for leave to appeal be granted to the Full Court of this Division.

[8] In respects of costs, there is no basis to deviate from the the salutary practice, that the costs of this application for leave to appeal be costs in the appeal.

**Order:**



[9] Accordingly, I make the following order:

- (i) The application for leave to appeal is granted in respect of the applicant to the Full Court of this Division.
- (ii) The costs of this application for leave to appeal are costs in the appeal.

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**A REDDY**  
**ACTING JUDGE OF THE HIGH COURT**  
**OF SOUTH AFRICA**  
**NORTH WEST DIVISION, MAHIKENG**

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**Date of Hearing:**

**26 January 2024**

**Date of Judgment:**

**31 January 2024**

