



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

CASE NO. 502/2017

Reportable	Yes / No
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In the matter between:

NOPHELO KHITSHI

Plaintiff

and

**THE MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH,
EASTERN CAPE**

Defendant

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

ZILWA J

[1] Pursuant to the dismissal of the applicant's damages claim in her personal capacity in a medical negligence action in which she had brought an action, both in her personal as well as in her representative capacity on behalf of her minor child, the applicant seeks leave to appeal to the Full Court of this Division.

- [2] The basics upon which the leave to appeal is sought are the following:
- 2.1 The Court *a quo* failed to have any or sufficient regard to the undisputed evidence before Court supporting on a balance of probabilities the existence and merits of the plaintiff's personal claim.
 - 2.2 The Court *a quo* failed to have any or sufficient regard to the undisputed evidence from the plaintiff that she had been diagnosed with depression in consequence of the traumatic events relating to the birth of her child and the ensuing onerous duties of caring for a brain damaged child, and that the plaintiff had been receiving medical treatment in respect of such depression.
 - 2.3 Having found that by reason of the negligence of the servants of the defendant the plaintiff had endured a severely complicated intrapartum stage and birth process, and that it was evident and undisputed on the record that following the birth of the plaintiff's severely brain damaged child with far-reaching sequelae placing a burden on the plaintiff as the primary caregiver of the minor child, the Court erred in failing to uphold the plaintiff's personal claim.
 - 2.4 The Court *a quo* erred in failing to apply the salutary approach to the issue of the plaintiff's personal claim as contained in the similar matter of *Nkamela obo Okuhle Nkamela v MEC for Health, Eastern Cape Province* (308/2018) [2022] ZAECBHC 15 (31 May 2022) especially at paragraph [13].

- 2.5 The Court *a quo* erred in the circumstances of this matter, in holding that the plaintiff's personal claim could not be upheld without expert evidence.
- 2.6 The Court *a quo* erred in not having any or sufficient regard to the contents of reports from the witnesses Ebrahim and Redfern, which were tendered in evidence, which reflects on the condition of the plaintiff's child and the consequences thereof on the plaintiff.
- 2.7 The Court *a quo* erred in failing to uphold the plaintiff's personal claim on the evidence before it.
- 2.8 The Court *a quo* erred in awarding costs in respect of the plaintiff's personal claim against the plaintiff in circumstances where no additional costs relating to the conduct of this claim were demonstrated or shown to exist.

[3] As indicated in paragraph [3] of the judgment the applicant's claim in her personal capacity is premised on the contention that in consequence of the respondent's pleaded negligence she had experienced severe psychological and / or psychiatric shock and trauma and will continuously experience same in future.

[4] On trite legal principles in order to succeed in such claim the applicant had the *onus* to prove her claim and damages at the required scale of the balance of probabilities.

[5] There was a duty on the applicant to substantiate her claim by proving the alleged severe psychological and / or psychiatric shock and trauma that she claimed to have suffered and will allegedly continued to experience in the future.

[6] Such proof would, of necessity, entail the leading of expert evidence. To succeed, in her claim the plaintiff had to prove that she sustained a detectable psychiatric injury which is not trivial.¹

[7] The applicant is a lay person and there is no suggestion that she has any expertise that would enable her to diagnose herself of the alleged ailments. A Claimant cannot simply make bald and unsubstantiated allegations of psychological and / or psychiatric shock and trauma that allegedly exists in the present and that will persist in the future. This requires proper accompanying diagnosis from relevant experts such as psychiatrists and psychologists.

[8] It is common cause that in this case no such expert evidence from any psychiatrists or psychologists has been led by the plaintiff to substantiate her claim of having sustained the alleged psychological and / or psychiatric shock and trauma. The mere *ipse dixit* by the lay applicant to have suffered such injuries has no evidential value that would ground a damages award in her favour for such alleged but unsubstantiated injuries. This is a specially so where the applicant in her evidence had

¹ *Bester v Commercial Union Versekeringsmpy van Suid Afrika Bpk* 1973 (1) 769 (A) at 782 and 799.

alleged that there are many things that cause her depression. The condition of her child whose claim was upheld in the trial, is one of them.

[9] There is a faint suggestion in the applicant's notice of application for leave to appeal that the evidence of the expert witnesses, Drs Ebrahim (Obstetrician and Gynaecologist) and Redfern (Paediatrician) about the condition of the plaintiff's child and the consequences thereof on the plaintiff should somehow be used as proof that the plaintiff has suffered the alleged psychological and psychiatric shock. None of those experts claimed to have any expertise in psychological or psychiatric issues and there was no suggestion in their expert notices that their testimony would be also used to also prove psychological and psychiatric shock and trauma on the part of the plaintiff. It is hardly surprising that in argument Mr Dugmore SC did not attempt to rely on their testimony as expert proof of the alleged psychological and psychiatric shock and trauma on the applicant. Such argument would have been totally devoid of basis or merit.

[10] *In Barnard v Santam Bpk*² it was held that the existence of a recognisable psychological lesion in a claim that is based on a serious psychiatric injury should, as a rule, be proved by supporting psychiatric evidence. No such evidence was led in this case.

² 1999 (1) SA 202 (SCA) at 216E - F

[11] In *Road Accident Fund v Sauls*³ it was held that in order to be successful in a claim such as the one in issue herein the applicant has to prove, not mere nervous shock or trauma, but that she had sustained a detectable psychiatric injury.

[12] In *Komape v Minister of Basic Education*⁴ the SCA held at paragraph 45 that liability (in a case such as the present) can only follow if there is a psychiatric lesion. As indicated above no such evidence has been led in *casu*.

[13] During argument reference was made by applicant's Counsel to the case of *Nkamela obo Okuhle Nkamela v MEC for Health – Eastern Cape Province*⁵ and in particular to paragraph [13] thereof. The factual matrix in that judgment for the upholding of the plaintiff's claim in her personal capacity is not apparent in the judgment itself. In any event, in the event that the factual matrix therein is similar to the one in *casu* I would respectfully decline to follow the result therein in so far as it would be at odds with the SCA judgments and other judgments referred to above.

[14] Section 17(1)(a) of the Superior Courts Act 10 of 2023 provides that 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. In *Four Wheel Drive Accessory Distributors CC v Rattan NO*⁶ it was held that the focus of the Court must be on whether

³ 2002 (2) SA 55 (SCA).

⁴ 2020 (2) SA 347 (SCA).

⁵ (308/2018) [2022] ZAECBHC 15 (31 May2022).

⁶ 2019 (3) SA 451 (SCA) at 463F.

the appeal would have a reasonable prospect of success. There must be a sound, rational basis for any conclusion to that effect.

[15] I am not persuaded that the applicant would have a reasonable prospect of success on the contemplated appeal.

[16] In *MEC for Health, Eastern Cape v Mkhitha and Another*⁷ the SCA reiterated that leave to appeal must not be granted unless there truly is a reasonable prospect of success or there is some other compelling reason why the appeal should be heard. A mere possibility of success, an arguable case or one that is not hopeless, is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.

[17] For the reasons stated above I am not in the least persuaded that the present contemplated appeal would have a reasonable prospect of success or that there is some other compelling reason why it should be heard.

[18] **In the result the application for leave to appeal is dismissed with costs.**

⁷ (1221/2015) [2016] ZASCA 176 (25 November 2016).

**P ZILWA
JUDGE OF THE HIGH COURT
BHISHO**

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Date Heard: 04 August 2013

Judgment Delivered: 15 August 2013