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

CASE NUMBER: 2015/44101

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

.....
N MANOIM **15 JUNE 2022**

In the matter between:

BRENT JEFFREY PETERSEN Applicant

and

DR C R OOSTHUIZEN Respondent

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

MANOIM J

[1] This an application for leave to appeal a judgment I delivered on 13 April 2022 in a case concerning alleged malpractice by the defendant, (who is the respondent in this application for leave) an orthopaedic surgeon. The malpractice related to an operation known as a laminectomy that the defendant had performed on the applicant in 2012, which all the experts now agree upon should not have been performed. As a consequence of this operation the

applicant alleged that certain sequalae followed. In my decision I found the defendant liable for some of the sequelae but not for others.

[2] Three observations need to be made first about the notice. First leave to appeal is sought against the entire judgement, despite the fact that the final order makes the defendant liable for certain sequelae that followed the laminectomy and that these issues were not in dispute during the trial.

[3] What then justifies the broad terms of the notice of appeal, as was explained to me by the applicants' counsel Mr Kruger, was the need to re-open the issue of sequelae in their entirety. As I understand the argument, it is necessary to re-open the entire issue of sequelae – those conceded by the defendant (respondent) and those that were not, in order for the applicant's case to be considered in its proper context.

[4] What was at issue in the case and remains so in the application for leave are the other sequelae alleged to have followed from the laminectomy and which on the applicants' version led to the onset of a condition known as arachnoiditis. It is this latter condition which is extremely debilitating whose cause was the subject of the trial and now the appeal.

[5] Despite this lack of limitation, I do not have an issue with the fact that the appeal is framed as widely as it has been on the unusual facts of this case.

[6] The second issue is that the applicant's heads of argument traverse grounds that are not contained in the notice of appeal. Mr Van Vuuren who appeared for the respondent whilst making this point did not press it in the interests of getting finality in this litigation. I do not then need to consider this point further.

[7] The third issue concerning the notice is that it is confined to errors of fact not law. It is for this reason that leave is sought to appeal to a full bench of this division and not the Supreme Court of Appeal. My reasons will be confined to this third issue.

[8] Mr Kruger fairly concedes that a court is more reluctant to grant leave for a case based solely on errors of fact and not of law. Nevertheless, he argued that given the consequences for the applicant this should be given consideration.

[9] I accept fully the consequences for the applicant of my decision, and it is hard not to feel sympathy with his current plight. Nevertheless, sentiment cannot interfere with the exercise of a proper approach to the burden the law imposes on an applicant in applying for leave to appeal. The defendant too has rights and a too permissive approach to the burden imposed on an applicant in a leave to appeal application can result in a misplaced exercise of discretion.

[10] The notice of appeal based on some of my findings of fact can be categorised in two ways. First specific errors, second errors of emphasis.

[11] In relation to the first category, the notice of appeal states, referring to a particular paragraph in my judgment, that I had got the facts wrong. This was because I stated that an MRI taken at a particular point in time (just prior to the 2012 laminectomy) showed that the applicant was *"… suffering from early spinal stenosis."* But when it came to the heads of argument the applicant quotes from the same medical record which shows that the judgement is correct on this point. It says verbatim, *"… there is also evidence of early spinal stenosis."* [1]

[12] The second is that I failed to take into account that arachnoiditis is a slowly evolving condition. But that observation is also a misreading of my judgment where a section is devoted to what I termed the *temporal factor* where this issue was considered. [2]

[13] The third is that I accepted an explanation from one of the defendants' witnesses Ms Poulter, a physiotherapist who had treated the applicant at the relevant time, for which version of her notes, should be accepted as correctly

[1] See paragraph 5 of the judgment and paragraph and paragraph 1.1 of the Notice.
[2] See paragraphs 154 onwards and in particular paragraphs 157 to 159 which reflect a balance approach to the experts' respective contentions.

reflecting her notes of the applicant at the time. She had explained why there two sets - a version that was handwritten and a later version which she had typed out and which in some important respects, was inconsistent with the first. However, the manuscript version formed part of a continuous record that another witness also a physiotherapist had testified to and confirmed. This made suggestions that the typed version was the one to be accepted as opposed to the manuscript version, highly improbable. I do not consider this is an error of fact.

[14] The remaining points of criticism are devoted to emphasis than any particular error. Without going into all of them, what is suggested that I overemphasised certain facts and also failed to acknowledge concessions made by the respondent's expert witness. But on closer examination of the judgment these criticisms are not borne out. For instance, the suggestion that I overemphasised the early onset of stenosis (paragraph 5 of the decision) is not borne out by an analysis of the rest of the judgment.

[15] Then certain facts raised by the applicant as highly significant (the 2014 straight leg test performed by Dr Oosthuizen) was considered and evaluated.[3]

[16] The criticism that I ignored or failed to appreciate the concessions made by Dr Marus the defendant's expert is also not borne out by the very passages in his heads of argument that the applicant seeks to rely on. Dr Marus' concessions amount, if read properly, to concessions of possibility not probability. [4]

[17] I have also been criticised for not giving greater weight to the evidence of the applicant's second expert Dr Coetzee. But I explained why this was in the decisions. My reasons for justifying this approach have not been criticised.

[18] This leads me to my final observation. This case was fact 'heavy.' It was a record comprising inter alia of extensive contemporaneous medical entries.

[3] See judgment paragraphs 132 to 135.
[4] See the applicant's heads of argument paragraph 8.5.3 where a conclusion of probability is based on a statement in the record by Dr Marus, which is quoted but suggests only possibility.

Some of these records were interpreted by the witnesses who compiled them. In this respect only the defendant called this category of witness.

[19] Then these entries and comments by the subsequent witnesses required interpretation. Here the task fell to the experts who testified – Dr Miller and Professor Coetzee for the applicant and Dr Marus for the defendant. Their task was to opine on what is a complex topic; the roots of causation of an unusual condition. The presence of certain facts over a period of time some favourable to the applicant and some not, needed to be evaluated in terms of an overall approach that I had set out in my reasons. That approach to weighing the mass of the evidence in a hierarchy of its probative value has not been attacked on appeal. Instead, the approach has been a piecemeal one in some respects or in others so broad brush that it fails to establish its necessary premise – that the applicant had made out a case based on probability not mere possibility.

[20] Were the premises of my approach the subject of serious criticism or were manifest factual errors of a material nature demonstrated that might turn my findings of only possibility in favour of the applicant to probability by another court, I would have granted leave to appeal.

[21] The threshold test of "*would"* in section 17(1)(a) (i) of the Superior Courts Act, 10 of 2013, is now more burdensome on an applicant for leave than in the past. But this is not the only challenge the applicant for leave to appeal faces. This leave to appeal as I mentioned earlier is based solely on my findings of fact and the premise that another court would decide them differently. But in a recent decision the Constitutional Court has emphasized that an appeal court should only reverse on a finding of fact if it finds that the approach to them by the trial court is clearly wrong.

[22] The applicant has not met this burden and leads me to the conclusion that leave to appeal must be refused. [5]

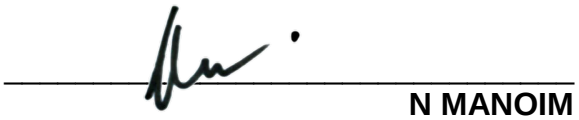
[5] On the threshold test, the frequently cited decision is *Mont Chevaux Trust v Tina Goosen.*LCC14R/2014. On the prospects of success see *Botes and Another v Nedbank Ltd* 1983 (3) SA 27 (A) at 28A-F. On the approach to

ORDER

1. The application for leave to appeal is dismissed.

2. The applicant is ordered to pay the respondent's taxed or agreed costs, which costs shall include the costs of two counsel.

This judgment was handed down electronically by circulation to the parties' and/or the parties' representatives by email and by being uploaded to Case Lines. The date and time for hand-down is deemed to be 10h00 on 15 June 2022.



N MANOIM
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 14 June 2022
Judgment: 15 June 2022

Appearances:

For Applicant: Adv T.P. Kruger SC (with Adv C. D'Alton)
Instructed by: Cilliers and Associates

For Respondent: Adv E van Vuuren SC (with Adv K. Iles)
Instructed by: MacRoberts Attorneys

findings of fact by an appeal court see *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* 2021 JDR 3149 (CC) [45].