



**THE EASTERN CAPE DIVISION OF THE HIGH COURT
OF SOUTH AFRICA, BHISHO
JUDGMENT**

Not Reportable

Case no: 586/2017

In the matter between:

A.M. obo L.M.

APPLICANT

and

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

RESPONDENT

Date heard: 25 August 2023

Date delivered: This judgment was handed down electronically by email delivery to the attorneys for the parties and to the Registrar, for lodging on the court file. The date of delivery shall be deemed to be 09h30 on 30 August 2023.

ORDER

1. The applicant is granted leave to appeal to the Supreme Court of Appeal, against the whole of the judgment and orders of this court dated 25 April 2023.
2. The costs of the application for leave to appeal shall be costs in the appeal.

JUDGMENT

Goosen J:

[1] I shall refer to the parties as at trial. The plaintiff seeks leave to appeal against an order¹ dismissing an action for damages arising due to negligent medical care during the birth of the plaintiff's child. The plaintiff's claim was dismissed on the basis that she had failed to establish that the negligent failure to monitor the foetus during labour, caused the hypoxic ischaemic brain injury suffered by her child.

[2] The plaintiff advances several grounds upon which it is said that there is a reasonable prospect that another court would come to a different conclusion. It is unnecessary to traverse all of them in turn. They are framed in terms suggesting that this court's characterization of the nature of the hypoxic ischemic injury follows a so-called 'traditional view' of the causes of basal ganglia thalamus pattern (BGT pattern) injury suffered by the child. This approach is said to have been overtaken by more recent scientific thinking which points to BGT pattern injury arising in the absence of identifiable sentinel events. It was argued that this court had erred in adopting the so-called traditional conception, whereas it ought to have adopted the more recent reasoning exemplified in the study by

¹ Judgment in the action was delivered on 25 April 2023. The application for leave to appeal was timeously filed and, by arrangement with the parties representatives, the application for leave to appeal was conducted on a virtual platform on 25 August 2023.

Professor Smith, to which reference was made at trial. This latter approach, so the argument went, has been endorsed by the Supreme Court of Appeal.

[3] This distinction between a ‘traditional’ and more ‘recent’ approach is, in my view, of little or no assistance in relation to the facts of the case. It featured throughout the trial. As indicated in the main judgment, the ‘reformulation’ caused Prof Andronikou, who testified for the plaintiff, to redefine the terms ‘acute’ or ‘sudden’ to mean something that might occur over a prolonged period of time. Professor Andronikou testified that the Magnetic Resonance Image (MRI) depicted BGT injury pattern, that is, an injury to the deep tissues of the brain. Professors Davies, Anthony and Andronikou explained that such injury pattern occurs when there is a global insult to the brain, that is one resulting in either complete or near complete occlusion of oxygenated blood to the brain. None of the experts could, however, say when the injury occurred. Nor why it had occurred. There was no evidence of a sentinel event, as has been fully described in medical literature and in the evidence.

[4] Significantly, Prof Andronikou did not accept that the injury pattern exhibited signs of repeated short duration occlusions, as might be expected from prolonged ischemic insults. In the light of this clear evidence, I remain unpersuaded that the characterization of the nature of the insult suffered by the foetus is assailable. That, however, is not the end of the matter. The question remains whether the conclusion that the failure to monitor was not the factual cause of the injury, might reasonably be overturned on appeal.

[5] Mr McKelvey marshalled in aid, the judgment of *MEC for Health, Limpopo Provincial Government v L W M obo D M* [2022] ZASCA146 (the *D M* matter). That judgment, as I understood the argument, accepted the opinion of

Professor Smith in the study referred to, and therefore, that the SCA had endorsed the basis of the opinions expressed by the plaintiff's experts in this matter. For that reason, this court ought to grant leave to appeal.

[6] I accept that the Supreme Court of Appeal has expressed itself in terms which, apparently, support the views of Prof Smith. I would point out, however, that a careful reading of the judgment, indicates, that the court found that the factual cause of the injury was the delay in delivering the baby after there were clear indicators that immediate intervention was required. At paragraph 55 of the judgment, Molemela JA (as she then was) states the finding of the court in the following terms:

‘To sum up in respect of the respondent’s delictual claim, it is clear from the conspectus of all the medical evidence that there was a lack of adequate monitoring at the most critical stage of the respondent’s labour. This conduct fell far short of the very guidelines intended for public hospitals and clinics in South Africa. In the face of slow progress in labour and the presence of thick meconium, there was no intervention on the part of hospital staff to expedite the delivery of DM to avoid the eventuation of harm. However, it must be borne in mind that the doctor was summoned for the first time at 01h30. Based on the evidence, it is more probable than not that had the doctor who had been summoned arrived, he would, upon noting the unfavourable maternal and a foetal condition and the fact that the respondent was full dilated, have delivered D M by forceps within 20-25 minutes of that doctors arrival. This means that D M would probably have been delivered by 02h15. It follows that D M’s brain injury would not have eventuated if ger delivery had been expedited, which is the intervention spelt out in the maternity guidelines confirmed by Dr Murray.’

[7] The court went on in paragraph 57 of the judgment, to express some support for Prof Smith's reasoning. That dictum, however, does not alter the finding as to the factual cause of injury. I would point out two further aspects. The first is that Prof Smith testified in the *DM* matter. His expert evidence was

before the court. Prof Smith did not testify in this matter. Other experts sought to place reliance upon his published study. I dealt with the shortcomings of this evidence in the main judgement. Those observations need not be repeated. The second is that in the present matter the facts did not establish a case for intervention and the failure to intervene, which was the factual basis of the ten case studies referenced in the Smith study. Those facts, in my view, would need to be inferred in order to allow for the further inferential reasoning to conclude that but-for the failure to monitor, the injury would not have occurred.

[8] Having said that, I accept that in the light of the *DM* judgment more broadly construed, and the treatment of probabilities that might flow from that judgment, it is reasonably possible that an appeal court would come to a different conclusion on the question of factual causation. For that reason alone leave to appeal must be granted. I accept that the matter is one of considerable importance to the plaintiff. I also accept that the controversy regarding prior and current descriptions of hypoxic ischemic brain injuries and their causes, requires consideration in light of the evidence in this matter. It follows that I am persuaded to grant leave to appeal. I consider it appropriate that leave be granted to the Supreme Court of Appeal.

[9] I make the following order:

1. The applicant is granted leave to appeal to the Supreme Court of Appeal, against the whole of the judgment and orders of this court dated 25 April 2023.
2. The costs of the application for leave to appeal shall be costs in the appeal.

G GOOSEN
JUDGE OF THE HIGH COURT

Appearances

For the plaintiff / applicant: K McKelvey SC
Instructed by: Enzo Meyers Attorneys
East London.

For the defendant / respondent: B Dyke SC
Instructed by: Smith Tabata Attorneys
East London.