IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 5900/2008

In the matter between:

PRELLER PLAIN APTEEK Applicant**/**Defendant

and

BERNADETTE MARION HESKETH Respondent/Plaintiff

In re:

BERNADETTE MARION HESKETH Plaintiff

and

PRELLER PLAIN APTEEK Defendant

HEARD ON: 1 NOVEMBER 2018

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 08 NOVEMBER 2018

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[1] The applicant seeks leave to appeal against my judgment delivered on 29 June 2018. In respect of that judgment the applicant seek leave to appeal against the decision on the merits. It should be noted that merits and quantum were separated per agreement in terms of 33 (4).

[2] The grounds of appeal filed on behalf of the applicant are eleven in number and clearly set out in the notice of application for leave to appeal. I do not intend to deal with them individually as there is an overlap and some repetition. They can be categorized broadly premised on hearsay evidence, the reasoning of Dr. Edeling and credibility of the defendant.

[3] The essence of the applicant's argument is that hearsay evidence was accepted relating to Electroencephalography (EEG) reports compiled by authors who did not give evidence. It was argued that section 3(1)(a) of the Law of Evidence Amendment Act 45 of 1998 is applicable any this matter.[1] Relying on **S v Ndlovu[2]** and **Withuhn v Road Accident Fund[3]** , counsel submitted that hearsay evidence is not evidence at all unless admitted in accordance with the provisions of the aforementioned Act.

[4] The second point of contention relates to the reasoning of Dr. Edeling. It was argued that his reasoning relies on a series of events commencing with an injection, followed by the loss of consciousness and later an excruciating pain in the back.

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[1]Hearsay evidence.- (1) Subject to the provisions of any law, hearsay evidence shall not be admitted as proceedings, unless-each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings

[2] 2002(6) SA 305 (SCA) paras [13] and [14]

[3] 2017 ZAGPJHC 285 para [20] to [22]

Accordingly this reasoning was flawed and the chain of logical reasoning was broken particularly given the existence of the weak spots in her brain that could have triggered the epileptic fit.

[5] The last aspect relates to the mutually destructive versions of the plaintiff and defendant regarding the site of the injection and the needle used. It was submitted that the plaintiff adapted her evidence in order to advance her case. She contradicted herself in material respects.

[6] The application is opposed by the respondent. Counsel for the respondent submitted that the first ground relating to hearsay evidence is devoid of any logical reasoning. He quoted and relied on the decision in **Glenn Marc Bee v Road Accident Fund** particularly paragraph 66[4]. In that matter the court dealt with the approach to be adopted when dealing with expert witnesses were there is an agreement between experts. In the event that the party does not repudiate such agreement "the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not an issue". There was such and agreement between Drs Edeling and Wilkinson. In this matter it was common cause that the plaintiff did not suffered any epileptic fit prior to the unfortunate incident. She suffered the epileptic fit at the time and for some time thereafter had to be put on medication for it.

[7] Dealing with the reasoning of Dr. Edeling, it was contended that he explained that when there is a disc rupture, it takes time for the disc material to migrate to other parts of the body. No wonder

[4] 2018 ZASCA 52

shortly after the fall the test proved negatively. However, few days later she had to be operated on.

[8] Counsel submitted that no court will lightly interfere with credibility findings of the trial court. He urged me that the application for leave to appeal be dismissed with costs.

[9] The test to be applied in an application such as the present is that referred to in section 17 of the Superior Courts Act 10 of 2013. Section 17(1) provides:-

> **"Leave to appeal**
> **(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) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;**
> **(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a); and**
> **where 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 that real issues between the parties."**

[10] It is now trite law that the bar of the test has been raised as opposed to the traditional test before leave to appeal is granted.[5]

[11] I have painstakingly perused and considered the grounds that have been raised by the applicant. Those have been covered in detail in

[5] **Acting National Director of Public Prosecution and Others v Democratic Alliance (unreported, GP case number 19577/09 dated 24 June 2016) paragraph 25.**

my judgement. I am in agreement with counsel for the respondent regarding his submission in opposition on all three main issues which form the basis for the application. I could not find any ground upon which another court may arrive at a different conclusion. There are no conflicting judgements on the matter. Therefore the appeal ought to be dismissed.

[12] In the result, I make the following order:-

12.1 Leave to appeal is refused with costs.

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MATHEBULA, J

On behalf of Applicant/Defendant:	Adv. D.J. Vd Walt SC
Assisted by:	Adv. H. J. Benadè
Instructed by:	Symington & De Kok

On behalf of Respondent/Plaintiff:	Adv. S. Joubert SC
Assisted by	Adv. H. F. Botha
Instructed by:	Bezuidenhout Inc.

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