REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

(1) NOT REPORTABLE

(2) NOT OF INTEREST TO OTHER JUDGES

(3) REVISED.

CASE NO: 2014/22984

21/5/2018

In the matter between

THE MEMBER OF THE EXECUTIVE COUNCIL:
HEALTH AND SOCIAL DEVELOPMENT,
GAUTENG PROVINCE **APPLICANT**

and

MTHIMKULU, DAPHNE BUSISIWE
o b o M M **RESPONDENT**

J U D G M E N T

Olivier AJ:

[1] The applicant (defendant) was unsuccessful in defending a medical negligence claim instituted against her by the respondent (plaintiff) on behalf of respondent's minor child. It was held by the court that the child's cerebral palsy resulted from the negligence of the medical and/or nursing staff at Chris Hani Baragwanath Hospital. The court ordered the defendant to pay the plaintiff's agreed or proven damages as a result of the negligence.

[2] The applicant now applies for leave to appeal to the Supreme Court of Appeal, alternatively to the Full Bench of this division, against the order of this court granted on 19 April 2017. The application for leave to appeal is accompanied by an application for condonation for the late filing of the application for leave to appeal. The application for condonation is opposed by the respondent.

[3] The facts of the case are set out comprehensively in the main judgment and need not be repeated here, except where relevant in discussing the prospects of success.

[4] The appeal was filed more than three months late. I was not "readily available"[1] at the time to hear the application for leave to appeal as I was no longer resident in Gauteng. The matter was then assigned to Van Oosten J for hearing, but the parties later requested that I hear the application, considering my familiarity with the case. It was agreed that the parties would file heads of argument. A process was agreed upon and heads of argument were subsequently filed by the parties, which are now before me.

CONDONATION APPLICATION

[5] Condonation is not a mere formality and is not to be had "merely for the asking".[2] What is required is an explanation not only of the delay in the timeous

[1] S 17(2)(a) of the Superior Courts Act.
[2] *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para [6].

prosecution of the appeal but also the delay in seeking condonation for non-compliance.[3] The applicant must show that she did not willfully disregard the timeframes provided for in the Rules of Court.[4] She is obliged to satisfy the court that there is sufficient or good cause for excusing her from compliance.[5]

[6] Condonation may be refused where there has been a flagrant breach of the rules especially where no explanation is proffered.[6] The applicant should convince the court to exercise its discretion in her favour.

[7] An application for condonation should be brought without delay and as soon as possible once an applicant realizes that he has not complied with a rule of court.[7] And it is not to say where non-compliance was due entirely to the neglect of the applicant's attorney, condonation will be granted.[8]

[8] In the recent *Mulaudzi* case the Supreme Court of Appeal set out the factors to take into account when considering an application for condonation:

> A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility.[9] Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.[10]

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[3] *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* 2017 (6) SA 90 (SCA) at para [26].
[4] *Shabalala v Goudine Chrome (Pty) Ltd and Another,* unreported, case no: M 342/2016, Northwest Provincial Division, Hendricks J, 2 November 2017, at para [3].
[5] *Erasmus v Absa Bank Ltd and Others*, unreported, case no: A/982/13, Gauteng Provincial Division, Pretoria, Full bench per Potteril J, at para [11].
[6] *Erasmus supra* at para [11].
[7] *Mulaudzi supra* at para [26].
[8] See *Darries v Sheriff, Magistrate's Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40I—41D.
[9] *Uitenhage Transitional Local Council supra* at para [6].
[10] At para [26].

[9] In the earlier case of *Melane v Santam Insurance Co Ltd*[11] the then Appellate Division explained the broad approach to be adopted in such an enquiry:

> In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.

[10] From these two cases the following can be distilled:

- The court has a discretion which should be exercised judicially.
- There ought to be fairness to both sides.
- Relevant facts to consider include: degree of lateness and of non-compliance; the explanation offered by the applicant; the prospects of success; the interest of the respondent in the finality of the judgment; any unnecessary delay in the administration of justice; and the importance of the case.
- The factors should not be considered individually but as part of an objective conspectus of all the facts.
- If there are no prospects of success there would be no point in granting condonation.

[11] 1962 (4) SA 531 (AD) at 532 B—E.

- A slight delay and a good explanation may help to compensate for prospects of success which are not strong.
- The importance of the issue and strong prospects of success may tend to compensate for a long delay.
- The respondent's interest in finality must be considered.

[11] These factors should not be considered in a piecemeal fashion but cumulatively so the court can determine whether sufficient cause has been shown to grant condonation. However, for purposes of convenience, they are briefly set out individually below.

Degree of lateness

[12] Judgment was delivered on 19 April 2017. The application for leave to appeal must have been delivered by 12 May 2017. The notice of the application for leave to appeal was served on 16 August 2017. This is a delay of over 3 months.

The explanation for the delay

[13] The applicant is required to provide a "full, detailed and accurate account of the causes of the delay and their effects … It must be obvious that, if the con-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out."[12] There must be an explanation for the entire period of the delay.[13]

[14] Mr Paul Cartwright, of the State Attorney's office in Johannesburg, deposed to an affidavit in support of the application for condonation.

[12] *Uitenhage Transitional Local Council supra* at para [4].
[13] See *Darries supra* at 41A.

[15] The judgment was served on the State Attorney on 21 April 2017. The file was handled by Ms Catherine Sethlako, but she had left the office by the time that judgment was given. The file had not been allocated to another attorney.

[16] The procedure at the office is that documents are placed in attorneys' pigeon holes for their personal collection. It was not collected as no one was in position to collect it.

[17] Mr Cartwright only became aware of the judgment when informed thereof by junior counsel on 28 May. Senior Counsel was informed on the same day.

[18] When informed by junior counsel, Mr Cartwright says that he attempted to locate the file. He says that after a period of searching, he managed to track down the file and a copy of the judgment. He reallocated the matter to himself.

[19] Senior counsel drafted the notice of leave to appeal and a condonation application on 21 June 2017, which he sent to junior counsel.

[20] Both Mr Cartwright and junior counsel were subsequently not at work for extended periods. Mr Cartwright's absence included family responsibility leave from 19 June to 29 June, and again from 4 July to 14 July, due to an injury suffered by his daughter, of whom he is the single parent. He was back at work on 17 July. He says that this incident gave rise to various delays which should not be attributed to the Defendant.

[21] Junior counsel was away and returned only on 3 July 2017. She suffered a family bereavement on 24 July resulting in her absence from chambers from 28 July. Mr Cartwright was able to consult with her only on 3 August. Junior Counsel then settled the drafts and forwarded them to Senior Counsel, who finally settled them on 7 August.

[22] Mr Cartwright says that he was in the meantime awaiting feedback from the applicant, after the State Attorney had sent a copy of the judgment and the draft notice of application for leave to appeal to her department.

[23] Mr Cartwright submits that the delays were not the fault of the applicant and that she should not be made to suffer prejudice in this matter as a result of an incident out of anyone's control.

[24] In my view the affidavit could have dealt with the delay more comprehensively. It is unclear when Junior Counsel became aware of the judgment. There is no explanation why the papers were only served on the respondent on 16 August, more than a week after Senior Counsel settled the application on 7 August.There is no explanation why the application for leave and the condonation application were drafted by Senior Counsel only on 21 June 2017, more than 3 weeks after the attorney and Senior Counsel were made aware of the judgment. It is not stated why Junior Counsel did not to settle the drafts between the date of her return (3 July) and the date of her family bereavement (24 July). It is not stated when Ms Sethlako resigned or why another attorney was not allocated to the matter. It is not stated when instructions were requested by, or given to, the State Attorney to apply for leave to appeal. Mr Cartwright does not explain how his own absence contributed to the delays experienced in finalizing the application.

Prejudice to the plaintiff and her interest in the finality of the judgment

[25] One must not lose sight of the interest of the respondent in the finality of the judgment. In her answering affidavit, the respondent describes the prejudice she and her 12 year old child would suffer as a result of the matter not being finalized.

[26] At the start of the trial merits and quantum were separated in terms of Rule 33(4). The end is not yet in sight for the respondent as the amount of damages is still to be determined in a new trial. This is likely to be a long process. If the matter were to proceed unnecessarily to appeal, this could cause undue prejudice to her and her minor child.

Avoidance of unnecessary delay in the administration of justice

[27] The administration of justice requires that matters be dealt with efficiently and without delay.

Prospects of success and importance of the case

[28] A court must assess the prospects of success unless the other facts, considered cumulatively, are such that it makes the application for condonation "obviously unworthy of consideration".[14] This would be in instances of flagrant breaches of the rules, especially where there is no acceptable explanation for the breach.

[29] As already recorded above, if there are no prospects of success there would be no point in granting condonation; a slight delay and a good explanation may help to compensate for prospects of success which are not strong; and the importance of the issue and strong prospects of success may tend to compensate for a long delay.

[30] The time delay of three months is not so egregious or the explanation so unsatisfactory or incomplete that condonation should be refused out of hand. A fuller picture would have been desirable, but the court is still able from the facts presented by Mr Cartwright to determine in broad terms the reasons for the delay. I do not consider it appropriate, in the circumstances of the case, to refuse condonation without first considering the prospects of success, the importance of the case, and whether there is some other compelling reason for leave to be granted.

[31] The standard of reasonable prospects of success has been developed by our courts over time.[15] It is now specifically set in section 17 of the Act as a

[14] *Mulaudzi supra* at para [34].
[15] *R v Baloyi* 1949 (1) SA 523 (A) at 524, *R v Nzumalo* 1939 AD 580, *R v Ngubane* 1945 AD 185 at 187; *Afrikaanse Pers Bpk v Olivier* 1949 (2) SA 890 (O); *Paulsen & Another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) at paras [21]–[24].

substantive requirement.[16] Previously, applications for leave to appeal were governed by Section 20(4)(b) of the Supreme Court Act and Rule 49 of the Uniform Rules of Court, both of which dealt exclusively with the practical aspects of leave to appeal applications.[17]

[32] Section 17 provides that leave to appeal may be granted only where the judge is of the opinion that the appeal *would* have a reasonable prospect of success, or if there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.[18]

[33] This is a more stringent approach than before,[19] and thus the bar to qualify for leave to appeal has been raised.[20] The word "only" means that leave to appeal may be granted in the stated circumstances only.

[34] The new test requires a greater measure of certainty of a different outcome on appeal, according to Bertelsmann J in *The Mont Chevaux Trust:*

> It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The formed test whether appeal should be granted was a reasonable prospect that another court might come to a different conclusion. 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.[21]

[35] The wording of the legislation is deliberate. However, the provision should not be interpreted as setting the bar so high as to effectively deny an applicant any chance of being granted leave to appeal. This cannot be what the legislature intended.

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[16] For an analysis of s 17, see *Hunter v Financial Services Board and Others*(case no: 3275/2016) [2017] ZAGPPHC 258 (16 March 2017) at paras [3] to [7].
[17] *Hunter supra* at para [4].
[18] S 17(1)(a)(i) and (ii).
[19] *Notshokovu v S* (unreported, SCA case no 157/15, dated 7 September 2016).
[20] *The Mont Chevaux Trust (IT 2012/28) v Tina Goosen* (unreported, LCC case no LCC14R/2014, dated 3 November 2014), cited with approval in *The Acting National Director of Public Prosecutions v Democratic Alliance* (unreported, GP case no 19577/09, dated 24 June 2016) at para [25].
[21] *The Mont Chevaux Trust supra* at para [6].

[36] The applicant has raised several grounds on which she challenges the judgment. She contends that I misdirected myself on both facts and law. Grounds include that the finding that the nursing staff had failed to monitor the foetus properly in light of the CTG, is not found in the evidence. The applicant also challenges my finding that the probabilities favoured an intrapartum injury, contending that this finding is not founded in the evidence.

[37] I consider it unnecessary to deal with each of the different grounds individually. I shall consider only those which I think could potentially have some prospects of success, or which require specific comment. Many of the grounds were addressed adequately in the judgment, and there is no need for repetition.

Assessment and evaluation of expert evidence

[38] The applicant criticises my findings in respect of the respondent's experts.

[39] The applicant contends that Professor Smith ventured into areas that were not part of his expertise. The respondent calls this a "very superficial and unconvincing" argument. I am satisfied that I correctly found that Prof Smith is an expert and that he did not exceed the bounds of his expertise.[22]

[40] The applicant also challenges my conclusions in respect of Drs Volmer and Pearce, and argues that Dr Volmer is not an expert. I am satisfied with the correctness of my findings in this regard, as set out in the judgment.[23]

[41] It is argued by the applicant that the respondent's expert witnesses sought to draw inferences adverse to the applicant in an unscientific manner. In particular, that they drew on assumptions and worked on the basis that if something was not written down in the records, it did not happen. The applicant calls the experts' methodology "suspect". On reflection, I view the applicant's argument in respect of methodology and the reliance, if any, placed on missing or incomplete records by the experts worthy of further consideration.

[22] See paras [110]—[115] of the main judgment.
[23] Ibid.

[42] The applicant thus contends that the matter should head to the Supreme Court of Appeal because the assessment of the (expert) evidence, the drawing of inferences and the ambit of the expert evidence merit the attention of the SCA. Accordingly, she argues, a judgment on appeal is required which deals with all those aspects and will bind all lower courts.

Recordkeeping – the court's assessment of the incomplete or missing records

[43] The hospital records of the minor child and the respondent play a pivotal role in this case. Some, but not all, records were missing or incomplete.

[44] The applicant calls my approach to recordkeeping "strange". It is contended that I equated the absence of records with causal negligence. In other words, that I conflated negligence and the failure to keep proper records. The respondent argues that sufficient records were available to make the findings in respect of negligence and causation. This was also my conclusion in the main judgment.

[45] At the end of the judgment I commented generally on the statutory duty of health institutions to keep records.[24] Considering the facts of this particular case and others in this Division, I do not think it was inappropriate to remind health institutions of this duty.

[46] The applicant contends that if records or documents are missing, they are simply missing. The applicant maintains that if something was not written down, it does not mean that it was not done. Applicant's senior counsel's refrain throughout the trial was that, due to the incomplete records, "we simply don't know" what happened.

[47] The applicant's witnesses, significantly Sister Mkhonto, who was on duty the day of the birth, conceded that if something which should have been recorded was not recorded, it means it was not done. The applicant argues that Sister

[24] Paras [195]—[198] of the main judgment.

Mkhonto's concession cannot assist the respondent; her contention is that as a matter of law, if something is not recorded, no adverse inference can be drawn.

[48] The applicant thus argues that leave to the SCA should be granted "to express definitive views on professional negligence, causation and, in that context, the role of incomplete recordkeeping. It cannot be law that, as has been prevalent in many provincial decisions, inadequate recordkeeping plays a role (albeit subjectively) in the conclusions of the fact-finder."

[49] The applicant points out that even though the loss of records amounts to a contravention of rules, regulations and legislation, it is irrelevant to the determination of causation and negligence. The respondent says that there is no novel legal point on the aspect of recordkeeping that requires the attention of the Supreme Court of Appeal and there is accordingly no reason to grant leave.

[50] So are these points raised by the applicant sufficient to establish prospects of success? The Supreme Court of Appeal outlined the test of reasonable prospects of success on appeal as follows in *Smith v The State:*[25]

> What the test … postulates is 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 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 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 categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success an appeal.

[51] In the recent *Hunter v Financial Services Board* case[26] in this division, Jacobs AJ explained it thus:

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[25] 2012 (1) SACR 567 (SCA)(15 March 2011) at para [7].
[26] *Hunter supra* at para [5].

> An appeal will have prospects of success if it is arguable in the narrow sense of the word. It requires that the argument advanced by an applicant in support of an application for leave to appeal must have substance. The notion that a point of law is arguable on appeal, entails some degree of merit in the argument. The argument, however, need not be convincing at the stage when leave to appeal is sought but it must have a measure of plausibility.

[52] On reflection, I am of the view that the applicant has established reasonable prospects of success. There is sufficient merit in the arguments raised by the applicant about recordkeeping to justify consideration by a higher court, particularly in respect of any weight this court may have attached to the missing or incomplete records in the determination of causation and negligence. In respect of the expert evidence also, there is sufficient merit in the applicant's arguments pertaining to the methodology employed by the experts and their reliance, if any, on the incomplete or missing records, to warrant a higher court's consideration. The applicant's arguments are based on proper grounds. No absolute certainty of success is required at this stage for leave to be granted.

[53] The number of medical negligence cases involving incomplete or absent records is on the rise. The public has an interest in the correctness and fairness of the outcome of these cases.

[54] On an objective assessment of all the facts, I am of the view that the applicant has shown sufficient cause for condonation to be granted. However, granting condonation in this case does not imply that the suboptimal functioning of the State Attorney's office should be a general justification for delay in all cases. Each case should be assessed on its own facts.

[55] I am satisfied also that it would be appropriate under all the circumstances to exercise my discretion in favour of granting leave to appeal. There are adequate prospects of success to meet the threshold. This is also a matter of sufficient importance to justify consideration by a higher court.

[56] A single judge as a court of first instance is enjoined to direct that an appeal be heard by a full bench, unless he considers that the decision involves a question of law of importance, whether because of its general application or otherwise, or in respect of which a decision of the SCA is required to resolve differences of opinion, or that the administration of justice, either generally or in the particular case, requires consideration by the SCA of the decision, in which case they direct that the matter be heard by the SCA.[27]

[57] Considering the circumstances of the case, its importance and the nature of the issues involved, I agree with the applicant that leave should be granted to the Supreme Court of Appeal.

ORDER

[58] The following order is made:

58.1 The late filing of the application for leave to appeal is condoned.

58.2 The applicant is granted leave to appeal the whole of the judgment/order to the Supreme Court of Appeal.

58.3 The costs of this application shall be costs in the appeal.

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M OLIVIER

ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT ***ADV PAUW SC***

[27] S 17(6) of the Superior Courts Act.

	ADV MKOLO
COUNSEL FOR RESPONDENT	***ADV COETZER***
DATE OF JUDGMENT	***21 MAY 2018***