

SOUTH AFRICA / JUDGMENT

NSS obo AS v MEC for Health, Eastern Cape Province (017/22) [2023] ZASCA 41; 2023 (6) SA 408 (SCA) (31 March 2023) [2023] ZASCA 41

COURT

Supreme Court of Appeal

BEFORE

Van der Merwe, Schippers, Gorven, Olsen, Mali

CASE / FILE NUMBER

017/22

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 017/2022

In the matter between:

NSS obo AS APPELLANT

and

MEC FOR HEALTH, EASTERN CAPE PROVINCE RESPONDENT

Neutral citation: NSS obo AS v MEC for Health, Eastern Cape Province (Case no 017/22) [2023] ZASCA 41 (31 March 2023)

Coram: VAN DER MERWE, SCHIPPERS and GORVEN JJA, and OLSEN and MALI AJJA

Heard: 15 March 2023

Delivered: 31 March 2023

Summary: Evidence – statement by party that opponent’s expert opinion can be handed in as evidence – not a ‘fact admitted’ on the record of proceedings within the meaning of s 15 of the Civil Proceedings Evidence Act 25 of 1965 – decision on expert evidence for the court – party cannot bind court to opinion of opponent’s expert – court entitled to make findings contrary to opinions of experts.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Nhlangulela DJP sitting as court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the high court is set aside and replaced by the following order:

‘The application for an order that the plaintiff is not entitled to adduce evidence in order to disprove the contents of Prof Lotz’s

report dated 30 July 2015, and Dr Alheit’s report dated 27 July 2018, is dismissed with costs, including the costs of two counsel.’

Schippers JA (Van der Merwe and Gorven JJA and Olsen and Mali AJJA concurring)

[1] The appellant (plaintiff), the mother and natural guardian of her minor son (the child), sued the respondent (defendant) in the Eastern Cape Division of the High Court, Mthatha (the high court) for compensation on behalf of the child who in 2006, sustained perinatal asphyxia during labour, which rendered him a cerebral palsy quadriplegic.[1] In the particulars of claim the plaintiff alleges that the defendant’s employees at St Patrick’s Hospital, Mthatha,

breached an agreement to provide her with obstetric, maternal and neonatal care with reasonable skill and diligence; alternatively,

that they were negligent in failing to provide her with such care, resulting in irreversible and thus permanent injury to the child.[2]

[2] The trial of the plaintiff’s action is pending in the high court. It could not proceed when, during the presentation of her case, the high court made an order which prevents the plaintiff from adducing crucial expert evidence in support of her claim, on the basis that that evidence was precluded by the provisions of the Civil Proceedings Evidence Act 25 of 1965 (the Act). The appeal is with its leave.

[3] The basic facts are uncontroversial and can be shortly stated. In terms of the Uniform Rules of Court, the plaintiff gave notice of her intention to present expert evidence by two specialist paediatric radiologists, Prof J W Lotz and Dr B Alheit, and delivered summaries of their opinions and reasons. In a report dated 30 July 2015, and based on a magnetic resonance imaging (MRI) scan, Prof Lotz opined that the ‘MRI features are diagnostic of an acute profound hypoxic injury in a term brain in a chronic stage of evolution’.[3] This injury results from a combined insult of hypoxia (lack of oxygen) and ischaemia (not enough blood pressure due to circulatory

collapse) to the brain.

[4] Dr Alheit expressed a similar opinion in respect of this MRI scan in his report dated 27 July 2019:

‘The MRI features, in the appropriate clinical context, are considered as diagnostic of an acute profound (central) hypoxic ischaemic injury of the brain, as seen from 35-36 weeks’ gestation onwards, now visualised in the chronic stage of evolution on the MR scan done at the age of 9 years and 4 months.’[4]

[5] The defendant sought to turn these opinions to her advantage, by informing the plaintiff’s attorney in correspondence dated 5 April 2018 and 21 August 2019, that both the expert summaries of Prof Lotz and Dr Alheit were ‘admitted’; and that they could ‘be handed in as evidence in the case’. In this correspondence the defendant specifically recorded her ‘admission’ that the child had sustained an acute hypoxic ischaemic injury (HII), ie the injury was sudden, unexpected or without warning. In what follows, I refer to all of this as ‘the purported admission’.

[6] An acute profound HII must be distinguished from a partial prolonged HII. According to the reports by both experts, an acute profound HII is essentially a severe asphyxial event (deficient supply of oxygen) that occurs suddenly and progresses rapidly in term neonates,

resulting in a primarily central pattern of injury involving the deep grey matter of the brain. The cause of an acute profound HII is generally referred to as ‘a sentinel event’. Partial prolonged partial HII develops over a period of time, allowing

compensatory redistribution of blood flow to occur, which results in a different pattern of injury to the white matter or peripheral

structures of the brain. The importance of the distinction is that experts in many cases have opined that the onset of an acute profound HII is often undetectable, as a result of which claimants have been non-suited for failing to prove causation.[5]

[7] The plaintiff delivered a supplementary report by Dr Alheit dated 21 August 2019 (the supplementary report), in which he stated that he had expressed the opinion in his report of 27 July 2019 ‘without knowledge of the clinical background’, and that he subsequently became aware that the child did not suffer an intrapartum sentinel event. The significance of this is stated in the report as follows:

‘5. This type of injury was originally claimed to be the result of a sentinel event. While the final circulatory collapse may occur suddenly, earlier experimental research has shown that repeated transient episodes of asphyxia over a 2-hour period, compromise the ability of the heart to tolerate additional insults, which then result in specific hypoxic ischaemic injury of the central grey nuclei. The events that lead up to the circulatory collapse can more accurately be divided into “external” sentinel (obstetric emergency) and “internal” sentinel events.

6. The “external” sentinel events are identified and well described in the literature (abruptio placenta, uterine rupture, cord rupture, cord prolapse, shoulder dystocia and maternal cardiac arrest). These events are by and large unpredictable and lead to a sudden severe lack of blood supply to the foetus which could lead to APHII.

7. However, the large majority of cases with hypoxic ischaemic encephalopathy do not suffer external sentinel events during labour. In one published study of children, who developed HII in the absence of a sentinel obstetric emergency event, gradual emergence of a non-reassuring foetal condition, which emerged 81 to 221 minutes prior to delivery, was described. (Murray et al Am J Perinatal 2009). The eventual circulatory collapse, necessary for HII to develop in these children, can be regarded as an internal sentinel event.'

[8] It appears that the supplementary report elicited the following response by the State Attorney in a letter to the plaintiff's attorney, dated 21 August 2019:

'5. Defendant has . . . placed on record that the nature of injury being sudden, unexpected and without warning, is admitted.

6. We hereby give notice that any attempt by plaintiff to disprove the above nature and description of the injury, mentioned whether through evidence or otherwise, will be objected to by defendant in terms of the provisions of section 15(1) of the Civil Proceedings Evidence Act 25 of 1965.'

[9] Dr Alheit confirmed the supplementary report in evidence. In short, he explained that the injury pattern described in his report of 27 July 2019 could result without an obstetric sentinel event; that although the injury is described as an acute profound HII, that does not necessarily mean that there was an abrupt interruption of the blood supply, but one which could develop over a period of time; and that this view is supported in the literature.

[10] The plaintiff then called Dr A Redfern, a paediatrician, as an expert, after which the case was postponed. Subsequently Dr Alheit filed a third report dated 8 March 2021, in which he expressed the following opinion. The MRI features are diagnostic of a basal ganglia and thalamus (BGT) central HII of the brain. If there is a history of

an intrapartum sentinel event, then this injury pattern could be due to an acute profound hypoxic ischaemic event. In the absence of a recorded obstetric emergency sentinel event, it is not possible to determine the timing, during labour, of the injury from the MRI features alone. The timing and mechanism of injury should be addressed by obstetricians and neuro-paediatricians.

[11] When the trial resumed on 15 November 2021, the defendant applied for an order that the plaintiff was not entitled to present evidence to disprove the 'facts' set out in the reports by Prof Lotz

and Dr Alheit, dated 30 July 2015 and 27 July 2019, respectively. The basis of the application was that the defendant had admitted these reports in terms of s 15 of the Act. It provides:

'Admissions on record

It shall not be necessary for any party in any civil proceedings to prove nor shall it be competent for any such party to disprove any fact admitted on the record of such proceedings.'

[12] The high court (Nhlangulela DJP) granted the application and made the order sought by the defendant. Given that this order was made in the course of proceedings and at first blush seems interlocutory, the first question is whether it is appealable. The general rule is that a judgment or order is appealable if it is a decision which has three attributes: it must be final and not susceptible to alteration by the court of first instance; it must be definitive of the rights of the parties; and it must have the effect of disposing of a substantial part of the relief claimed in the main proceedings.[6] However, this Court has held that the rule is not cast in stone and the three attributes are not exhaustive.[7] More recently, the classification of an order is not determinative of whether it is appealable;[8] rather, the question is whether it is in the interests of justice that an order be corrected.[9]

[13] Thus, in *NDPP v King*,[10] Nugent JA said:

‘[W]hen the question arises whether an order is appealable, what is most often being asked is not whether the order is capable of being corrected, but rather whether it should be corrected in isolation and before the proceedings have run their full course. . . . [T]wo competing principles come into play when the question is asked. On the one hand justice would seem to require that every decision of a lower court should be capable not only of being corrected, but also of being corrected forthwith before it has any consequences, while on the other hand the delay and inconvenience that might result if every decision is subject to appeal as and when it is made might itself defeat the attainment of justice.’[11]

[14] Applied to the present case, it is beyond question that the interests of justice require that the high court’s order be corrected forthwith. It was wrongly made for the reasons set out below. The defendant is seeking to eliminate all evidence which suggests that the HII which the child sustained, was not sudden or without warning. Fundamentally, the order irreparably prejudices the child, who is permanently disabled and whose best interests are paramount, by preventing the plaintiff from placing evidence which might be held to be decisive before the trial court in support of her claim.[12] Solely for this reason, the order is appealable.

[15] The order renders Dr Alheit’s evidence on the supplementary report inadmissible (that an acute profound HII could ensue without an obstetric sentinel event). It further precludes the plaintiff from adducing any expert medical evidence in support of Dr Alheit’s opinion. In the latter regard, the plaintiff intends to present evidence by Dr Yatish Kara, a neuro-paediatrician, and Dr Ashraf Ebrahim, a specialist obstetrician and gynaecologist. In Dr Kara’s

opinion, the view that the HII in this case probably occurred in the last 30 minutes of labour (based on the MRI scan finding of BGT injury), is not supported in the literature, which states that the pattern of injury can occur over hours (a prolonged period); and that one cannot time an injury based solely on MRI scan findings. Similarly, Dr Ebrahim is of the view that since there is no evidence of a perinatal sentinel event, the time of the injury cannot be determined with certainty, save to say that it probably occurred during labour; and that BGT injury is the most prevalent injury pattern in a neonatal HII without a perinatal sentinel event.

[16] A further reason which renders the order appealable is that the administration of justice has been impeded, in that the high court has foreclosed its own assessment of Dr Alheit's evidence (and that of Dr Kara and Dr Ebrahim). The court is duty-bound to assess expert evidence, together with all the other evidence adduced by the parties to the litigation.[13] It must be satisfied that the expert's opinion is based on facts and underpinned by proper reasoning.[14] But here, the high court has already excluded from its assessment of the expert evidence, the possibility that in the absence of a sentinel obstetric event, the pattern of injury sustained by the child could have occurred over a prolonged period, and was not sudden. I revert below to the duty of a court when assessing expert evidence.

[17] That brings me to s 15 of the Act. It finds no application in this case, for the simple reason that the purported admission is neither an admission, nor a formal admission within the meaning of s 15. On first principles, an admission is a statement adverse to the party making it.[15] The purported admission is not an admission by the plaintiff, of a fact which she does not dispute. Neither is it an admission by the defendant – it is not an acknowledgement of a fact

detrimental to her cause.

[18] The purported admission is not a formal admission. Section 15 deals only with a 'fact admitted on the record of . . . proceedings'

(a wider concept than pleadings). Such an admission is generally made in pleadings. Thus, rule 22(2) of the Uniform Rules requires a defendant in her plea to admit or deny, or confess and avoid, all the material facts alleged in the combined summons. The latter rule must be read together with rule 22(3), which states that every allegation of fact in the combined summons that 'is not stated in the plea to be denied or to be admitted, shall be deemed to be admitted'.[16] A formal admission may also be made orally or in court by the litigant or her representative.[17] The purported admission (made in correspondence) was not admitted on the record of proceedings before us and is accordingly not a formal admission as contemplated in s 15 of the Act.

[19] A party must intend to make a formal admission. The requisite intention is determined subjectively. The admission is binding on its maker and normally cannot be withdrawn or contradicted unless certain legal requirements have been met. [18] A formal admission is regarded as conclusive proof of an admitted fact, 'rendering it unnecessary for the other party to adduce evidence to prove the admitted fact, and incompetent for the party making it to adduce evidence to contradict it'.[19] It is this effect of a formal admission that is regulated by s 15 of the Act.[20]

[20] Since a formal admission has important and serious evidential implications for its maker, the latter must intend the admission to be an admission of fact which she does not wish to dispute.[21] Thus, this Court has held that ‘it must clearly and unequivocally appear from the pleadings that the alleged admission has been made expressly, or by necessary implication, or according to rule 22(3) by omitting to deny or deal with the relevant allegation

of fact in the plaintiff’s claim’.[22]

[21] In the present case and as already stated, there is simply no formal admission by the plaintiff on the record that the child suffered an acute profound HII, which can be regarded as conclusive proof of that

fact. The reports by Prof Lotz and Dr Alheit are nothing more than opinions based on their interpretation of an MRI scan of the brain, performed on 15 July 2015. Section 15 of the Act is not engaged at all.

[22] The defendant however sought refuge in *MEC for Health, Eastern Cape v DL obo AL*,[23] in which this Court referred to an argument by the appellant in that case, that the court below had misdirected itself. It was submitted that the court disregarded two of the appellant’s expert reports, which by agreement had been admitted into evidence, and preferred the evidence of the respondent’s expert, despite the latter’s evidence being contrary to the former’s reports. For that submission the appellant relied on s 15 of the Act. Molemela JA remarked that she was not aware of any authority that had deviated from the trite principle enunciated in that provision. To the extent that this remark could be understood as meaning that s 15 applies to expert opinions, it should not be followed.

[23] The purported admission must be seen for what it is: an opportunistic attempt by the defendant to utilise to her own advantage the opinions by the plaintiff’s expert witnesses – untested by cross-examination – under the guise of a ‘fact’

admitted by the defendant in terms of s 15 of the Act. Little wonder then, that the defendant was constrained to submit that the word ‘fact’ must be interpreted as meaning ‘information used as evidence or as part of a report’,[24] wrenched from its context in s 15.

[24] What is more, a party cannot bind the court to the opinion of her opponent’s expert witness, by merely conceding that that opinion is correct. Indeed, this illustrates why an expert’s opinion is not a fact, within the meaning of s 15 of the Act. Put simply, the decision on the opinion is for the court, not the witness. For this reason, it is open to the judge to make findings contrary to the opinions of experts, even where their reports are agreed.[25] In *S v M*,[26] Kriegler J aptly described the position thus:

‘A court’s approach to expert evidence has been dealt with on many occasions. The court is not bound by expert evidence. It is the presiding officer’s function ultimately to make up his own mind. He has to evaluate the expertise of the witness. He has to weigh the cogency of the witness’s evidence in the contextual matrix of the case with which he is seized. He has to gauge the quality of the expert qua witness. However, the wise judicial officer does not lightly reject expert evidence on matters falling within the purview of the expert witness’s field.’[27]

[25] It is a settled principle that in order to evaluate expert evidence, the court must be apprised of and analyse the process of reasoning which led to the expert’s conclusion, including the premises from which that reasoning proceeds.[28] The court must be satisfied that the opinion is based on facts and that the expert has reached a defensible conclusion on the matter.[29] The purported admission by the defendant cannot, and does not, absolve the court from this duty. Even if experts agree on a matter within their joint expertise, that is merely part of the total body of evidence. The court must still assess the joint opinion and decide whether to accept it.[30]

[26] Otherwise viewed, it would mean that when a party admits the correctness of an expert’s opinion and the reasons for it, as the defendant purported to do in this case, both the opposing party and the court are bound by that admission. Despite being the arbiter of the dispute, the court may then not reject the expert’s opinion, even if it is wholly indefensible. Such an approach is untenable, and at odds with the rule that experts have a principal and overriding duty to the court, not to the party by whom they are retained, to contribute to the just determination of disputes.[31]

[27] In the result, the following order is issued:

A SCHIPPERS

JUDGE OF APPEAL

Appearances:

For appellant: P A C Rowan SC and S J Sephton Instructed by: Z Y M Ndzabela Incorporated, Butterworth Matsepes Incorporated, Bloemfontein For respondent: P J De Bruyn SC and S Gagela Instructed by: The State Attorney, Mthatha The State Attorney, Bloemfontein

[1] The plaintiff also claimed compensation for injuries suffered in her personal capacity.

[2] Section 28(2) of the Constitution provides: ‘A child’s best interests are of paramount importance in every matter concerning the child.’

[2] Section 28(2) of the Constitution provides:

‘A child’s best interests are of paramount importance in every matter concerning the child.’

[3] Emphasis in the original.

- [4] Emphasis in the original.
- [5] M obo M v Member of the Executive Council for Health, Eastern Cape
- [2017] ZAECMHC 6; Magqeya v MEC for Health, Eastern Cape
- [2018] ZASCA 141; AN v MEC for Health, Eastern Cape [2019] ZASCA 102; The Member of the Executive Council for Health, Eastern Cape v Zimbini Mpetsheni oho Luyanda Mpetsheni
- [2020] ZASCA 169; The Member of the Executive Council for Health, Eastern Cape v DL obo AL
- [2021] ZASCA 68.
- [6] Zweni v Minister of Law and Order 1993
- (1) SA 523 (A) at 532I-J. Although this case was decided under the now repealed Supreme Court Act 59 of 1959, the position is no different under the Superior Courts Act 10 of 2013. See DRDGOLD Limited and Another v Nkala and Others
- [2023] ZASCA 9 and the authorities collected in para 27.
- [7] Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service 1986 (3) SA 1 (A) at 10F; Phillips v SA Reserve Bank 2013
- (6) SA 450 (SCA) para ... 457D-E.
- [8] Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS [2010] ZASCA 65; 2010 (6) SA 469 (SCA) para 19.
- [9] Government of the Republic of South Africa and Others v Von Abo
- [2011] ZASCA 65; 2011 (5) SA 262 (SCA) para 17.
- [10] National Director of Public Prosecutions v King
- [2010] ZASCA 8; 2010 (2) SACR 146 (SCA); 2010 (7) BCLR 656.
- [11] Ibid para 50.
- [12] See fn 2.
- [13] HAL obo MML v MEC for Health, Free State
- [2021] ZASCA 149 (HAL) para 226, citing with approval Huntley v Simmons
- [2010] EWCA Civ 54 para 9.
- [14] Ibid.
- [15] 18 LAWSA 3 ed para 157; C W H Schmidt and H Rademeyer Bewysreg 4 ed (2000) at 204 (Bewysreg); Law of Evidence Lexis Nexis 3 ed 1-7.
- [16] Principles of Evidence at 507 para 26.4.

- [17] Hoffman and Zeffert *The South African Law of Evidence* 3 ed at 1066 (*The South African Law of Evidence*); P J Schwikkard and S E Van der Merwe *Principles of Evidence* 4 ed (2015) at 507 para 26.4.
- [18] *Ibid* at 506 para 26.2.1.
- [19] *Gordon v Tarnow* 1947
- (3) SA 525 (A) at 531; *Ibid* at 506 para 26.2.1.
- [20] *Principles of Evidence* at 507 para 26.4; *The South African Law of Evidence* at 1066; *Bewysreg* at 505.
- [21] *Ibid*.
- [22] *AA Mutual Insurance Association v Biddulph and Another* 1976 (1) SA 725 (A) at 735.
- [23] *The MEC for Health, Eastern Cape v DL obo AL fn 5* para 22.
- [24] The definition of ‘fact’ relied on was that in the *Oxford SA Dictionary* 2016 at 977.
- [25] T Hodgkinson *Expert Evidence: Law and Practice* (1990) at 352.
- [26] *S v M* 1991 (2) SACR 91 (T).
- [27] *Ibid* at 99J-100A, emphasis in the original.
- [28] *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingbekämpfung MBH* 1976
- (3) SA 352 (A) at 371F-G.
- [29] HAL fn 13 para 220.
- [30] *Ibid* para 229. This however is subject to the qualification that where experts agree on factual issues and the applicable approach to technical analysis, the litigants are bound by such agreement, unless it has been withdrawn and no prejudice results, or any prejudice caused can be cured by a postponement or an appropriate costs order. See *Bee v Road Accident Fund*
- [2018] ZASCA 52; 2018 (4) SA 366 (SCA) para 73; HAL fn 13 para 229.
- [31] *National Justice Compania Naviera SA v Prudential Assurance Co Ltd: ‘The Ikarian Reefer’* [1993] 2 Lloyd’s Rep 68 at 81-82.

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