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DISPUTE RESOLUTION ALERT

IN THIS **ISSUE**

A COMMERCIAL COURT? A BLESSING OR A CURSE?

On 3 October 2018, the office of the Judge President of the Gauteng division of the High Court of South Africa released a Commercial Court Practice Directive which comes into effect immediately, creating a specialised Commercial Court administered as part of the High Court. The aim of the Commercial Court is to "promote efficient conduct of litigation in the High Court and resolve disputes quickly, cheaply, fairly and with legal acuity".

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A COMMERCIAL COURT? A BLESSING OR A CURSE?

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As to what constitutes a matter worthy of being heard in the Commercial Court, the Directive defines a "Commercial Court case" as "a substantial case that has as its foundation a broadly commercial transaction or commercial relationship".

Schedule 1 to the Directive sets out a list of the types of claims that the Commercial Court may hear and adjudicate. These claims include, among others:

1. Import and export of goods;
2. Insurance related claims;
3. Banking and finance services;
4. Commercial matters arising out of the business rescue and insolvency crisis; and
5. Commercial matters effecting companies arising out of the Companies Act, No 71 of 2008 and its interpretation thereof.

It is important to note that Schedule 1 serves only as a guideline and is not an exhaustive list.

Both motion proceedings and action proceedings can be adjudicated in the Commercial Court. An application must be made by addressing a letter to the Judge President or Deputy Judge President setting out (i) an uncontroversial description of the case; and (ii) essentially, a motivation as to why the case should be treated as a commercial case heard by the Commercial Court.

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On the face of it, it appears that the requirements for such an application in respect of motion and action proceedings differ. For action proceedings, the requirements are as follows:

1. A broad and uncontroversial description of the case; and
2. Why the case is a commercial case or should be considered as such, warranting treatment under the Commercial Court directives.

While the requirements for motion proceedings are as follows:

1. A broad and uncontroversial description of the case;
2. Motivation for the allocation of the case as a commercial case; and
3. Motivation for the case warranting treatment under the Commercial Court directives.

On a closer analysis, it appears that the requirements are the same as essentially one must motivate to the Judge President or Deputy Judge President as to why the Commercial Court should hear the matter.

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A COMMERCIAL COURT? A BLESSING OR A CURSE?

CONTINUED

The Directive now nullifies the general principal that "commercial urgency does not constitute urgency".

As to the stage at which such application can be made, in respect of action proceedings, Chapter 2 of the Directive states that "at any time after a summons has been issued out of the High Court, any party to the suit may apply to have the case allocated as a Commercial Court case". In respect of motion proceedings, a party may seek to have the matter allocated as a Commercial Court case in three instances:

1. Where a party has already instituted an application to the High Court;
2. A party intends to institute an application to the High Court; or
3. All the papers comprising the application have been filed and any party may apply for an expedited hearing of a matter as a commercial case for reasons of commercial urgency or on other grounds.

Another new feature is that all motion proceedings allocated to the Commercial Court must now undergo case management. The Judge President or Deputy Judge president will allocate a judge or two judges to case manage the matter. This essentially means that a case management conference must be held to determine, among other things, the time periods for filing of affidavits, heads of argument, and the date and length of the hearing. This was not previously required.

In respect of commercial urgency, the Directive now nullifies the general principal that "commercial urgency does not constitute urgency". As eluded to above, any party may apply for an expedited hearing of the matter as a commercial case for reasons of commercial urgency or on other grounds. The Directive goes on to state that to institute an application on an urgent basis, depending on the degree of urgency, the applicant must make a written or telephonic request to have the matter allocated as an urgent commercial matter. In making such request, the applicant must set out the following:

1. A broad and uncontroversial description of the case;
2. A motivation for the designation of the case as a commercial case;
3. The motivation for the case warranting treatment under the Commercial Court directives; and
4. The reason why the applicant contends that the matter is urgent.

It is not exactly clear as to whom such requests must be made, but it is assumed, based on the reading of the entire Directive, that such requests must be made to the Judge President's office or the Deputy Judge President's office.

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A COMMERCIAL COURT? A BLESSING OR A CURSE?

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The Directive allows the Commercial Court to adjudicate on a very broad category of cases.

This is not the first specialised court in South Africa. It joins the likes of the Labour Court, Electoral Court, Tax Court, Land Claims Court, Competition Appeal Court, Equality Courts as well as several specialist criminal courts. Specialist courts are also not unique to South Africa as this is a growing trend across countless jurisdictions worldwide.

Some academics are of the view that specialised courts are more efficient, lead to higher-quality decision-making and will enhance uniformity in decision-making. Other academics believe that judges will develop too narrow a view of the matters before them due to the singular focus of specialised court.

This, in turn, could lead to lower quality decisions in the long run and less flexibility in the development of the law if judgments are always delivered by the same limited number of persons.

The Directive allows the Commercial Court to adjudicate on a very broad category of cases. Practically speaking, this could lead to a strained court roll. The Directive does, however, give judges a discretion as to which matters should be allocated to the Commercial Court and this could be the court roll's saving grace.

Only time will tell whether the Commercial Court is a blessing or a curse.

Julian Jones, Roxanne Wellcome and Courtney Jones

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MEDICAL NEGLIGENCE: EXPERT EVIDENCE NOT NECESSARILY DECISIVE – THE SCA HAS SPOKEN

The High Court relied on an isolated statement of the hospital's expert to arrive at its factual causation finding.

In two recent cases, the Supreme Court of Appeal (SCA) illustrated a court's role in evaluating expert evidence in matters concerning medical negligence. In doing so, the SCA issued a reminder that a court should not uncritically substitute its own judgment with the opinion of an expert witness. The logical reasons (or lack thereof) underpinning expert opinions should guide a court as to what weight to attach to it.

Expert evidence must be weighed, as a whole, and it is the exclusive duty of a court to make the final decision on the evaluation of expert opinion.

Life Healthcare Group (Pty) Ltd v Dr Suliman **(529/17) [2018] ZASCA 118 (20 September 2018)**

The alleged grounds of negligence related to the nursing staff's failure to alert the attending doctor of decelerations in the foetal heart rate, and the unavailability of the requisite instruments and skills for the urgent delivery of the baby. The allegation in respect of the doctor's negligence lies in the doctor's hands-off approach in that he only saw the mother for the first time approximately 10 hours after she had been admitted. The only question before the High Court was the apportionment of liability between the hospital and the doctor.

The High Court held the hospital 100% liable for the damage as a causal link between the doctor's negligence and the damage was not proved.

Shongwe ADP, writing for the SCA, reiterated that establishing factual causation with sufficient certainty can be difficult in medical negligence matters. It must be established that, 'but for' the doctor's conduct or omission, the harm would not have occurred (*Lee v Minister of Correctional Services* [2012] ZACC 30). In respect of factual causation, the SCA stated that the High Court should have asked whether it was "more probable than not that the birth injuries suffered by the baby could have been avoided if Dr Suliman had attended the hospital earlier".

The High Court relied on an isolated statement of the hospital's expert to arrive at its factual causation finding, when the expert said that he "could not say that the baby would have been saved [if the baby was] delivered by caesarean section at some time between 17h30 and 20h00". On appeal the SCA found that the expert contradicted his own statement when he indicated that:

> There is strong reason to believe that, [an earlier decision to do a caesarean section] would have [prevented the cerebral palsy], because cerebral palsy or brain damage does not occur to that extent that rapidly.

The joint minute of the respective experts also confirmed that the damage could have been prevented if the doctor had seen the patient earlier as the brain damage probably only occurred at a later stage of the labour process.

After careful consideration of all the evidence, the SCA cautioned judges against readily accepting isolated statements of experts, especially when dealing with a field where medical certainty is virtually impossible. Expert evidence must be weighed, as a whole, and it is the *exclusive* duty of a court to make the final decision on the evaluation of expert opinion.

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MEDICAL NEGLIGENCE: EXPERT EVIDENCE NOT NECESSARILY DECISIVE – THE SCA HAS SPOKEN

CONTINUED

Where proper reasons are advanced in support of an opinion, the probative value of the opinion is strengthened.

Accordingly, the SCA held that the doctor's conduct was causally connected to the damage. The SCA upheld the appeal and ordered an apportionment of 60% - 40% in favour of the hospital.

***MEC for Health, Western Cape v Quole* (928/2017) [2018] ZASCA 132 (28 September 2018)**

This case concerned allegations of negligence against medical staff, which essentially related to the pre-natal period, as it pertained to the treatment of the mother's urinary tract infection and the non-intervention of medical staff to deliver the baby at an earlier stage. The baby in this matter was born with an abnormally small head (known as microcepahly). The main questions in the case related to the cause and time of occurrence of the microcephaly, and whether the cause was connected to the conduct of the medical staff.

The High Court found that the defendant's medical staff breached their legal duty towards the mother and baby, and ordered that the MEC pay damages.

The SCA was critical of the High Court's acceptance of the evidence of the plaintiff's expert, which had no factual basis, while the opinion evidence of the MEC's experts was logical, well-reasoned and founded on established facts. The High Court came to a general conclusion which made no factual finding as to the cause of the brain damage, nor did it set out reasons for its preference of the opinion of the plaintiff's expert, over that of the defendant.

JA Dambuza, writing for the SCA, repeated the principle that "she who asserts a damage causing event must prove it". The medical staff's legal duty to the mother and her baby entailed, as set out in *Van Wyk v Lewis* 1924 AD 438, "an adherence to the general level of skill and diligence possessed and exercised at the time by members of the branch of the profession to which they belong".

The SCA confirmed that the evidence of medical experts is central to the determination of the required level of care and whether there was a breach of it. The requirement in evaluating such evidence is that expert witnesses support their opinions with valid reasons. Where proper reasons are advanced in support of an opinion, the probative value of the opinion is strengthened. As was held in the matter of *Menday v Protea Assurance Co Ltd* 1976 (1) SA 565 (E):

> It is not the mere opinion of the witness that is decisive but his ability to satisfy the Court that, because of his special skill, training and experience, the reasons for the opinion which he expresses are acceptable.

The SCA ultimately held that both the cause of the damage and its timing remained unidentified and accordingly upheld the appeal, dismissing the plaintiff's claim. The SCA warned that the fact that harm had been occasioned was not, on its own, proof that the medical staff caused it, or that they had done so negligently, or even that it resulted in the brain injury.

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To make an informed finding, a court should enquire into the logical reasons which underlie the expert opinion. This is exactly what the SCA did in these judgments.

Such reverse reasoning from effect to cause is impermissible. (*Goliath v Member of Executive Council for Health, Eastern Cape* 2015 (2) SA 97 (SCA))

Conclusion

In both judgments, the SCA referred to the case of *Michael & another v Linksfield Park Clinic (Pty) Ltd & another* [2002] 1 All SA 384 (A) wherein it was stated that:

> The court is not bound to absolve a defendant from liability for allegedly negligent medical treatment or diagnosis just because evidence of expert opinion... . The court must be satisfied that such opinion has a logical basis, ... that the expert has considered comparative risks and benefits and has reached a "defensible conclusion".

The SCA overturned both High Court judgments after proper consideration of the expert evidence. Neither expert opinions, nor the agreements contained in a joint minute of expert witnesses should be regarded as conclusive on its own. To make an informed finding, a court should enquire into the logical reasons which underlie the expert opinion. This is exactly what the SCA did in these judgments.

Willie van Wyk and
Marissa van der Westhuizen

Tim Fletcher was named the exclusive South African winner of the **ILO Client Choice Awards 2017 – 2018** in the litigation category.

Richard Marcus was named the exclusive South African winner of the **ILO Client Choice Awards 2018** in the Insolvency & Restructuring category.

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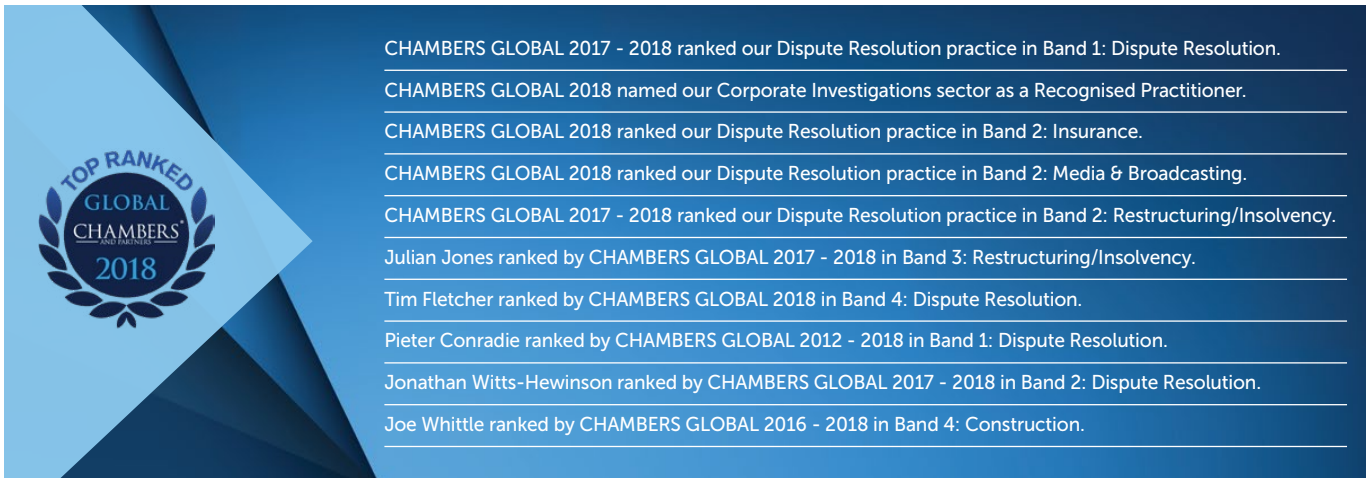

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BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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