IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 270/2021

In the matter between:

TM obo MM Applicant

and

MEC FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG PROVINCE Respondent

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APPLICANT'S HEADS OF ARGUMENT

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INTRODUCTION

1 This matter concerns the nature and scope of the legal duties borne by public maternity units when managing patients in the context of limited resources.

2 At its centre is a child, Mthabile, who suffered a brain injury during birth. Ms M (the appellant) gave birth to Mthabile on the evening of 28 August 2010 at Charlotte Maxeke Hospital ("**the Hospital**").

3 Earlier that day, at 15h45, the Hospital detected that Mthabile was in foetal distress, and decided that an emergency C-section had to be performed. The applicable maternal care guidelines stipulate that once foetal distress is detected, the C-section must be completed within 60 minutes (which means that it must commence approximately 15 to 30 minutes earlier).

4 The C-section only commenced some 2.5 hours after foetal distress was detected, at 18h35. Mthabile was delivered at 18h43. As a consequence of this delay, Mthabile suffered an intrapartum hypoxic-ischemic injury which caused permanent brain damage.

5 The delay resulted from the Hospital's negligent management of its patients (including Ms M). The negligence took two forms:

5.1 First, despite there being a number of pregnant patients awaiting C-sections over the course of the day, the operating theatre lay dormant for significant periods of time on 28 August 2010. Patients who could have had C-sections earlier in the day were only seen to later. This

meant that, by the time that Ms M's emergency arose, the operating theatre was in use.

5.2 Had the operating theatre been used consistently and efficiently throughout the day, the other patients' C-sections would have been performed earlier that day and there would have been no backlog. As a consequence, the theatre would have been available for Ms M's operation at the time that her emergency arose.

5.3 This would likely have prevented the damage to Mthabile's brain. The staff's failure to efficiently manage hospital resources, in this context, was negligent.

5.4 Second, when it was clear that the operating theatre was booked up, the staff did not refer Ms M to another nearby hospital for her C-section.

5.5 The hospital staff's failure to take the above steps was negligent. Had these steps been taken, the harm to Mthabile would likely have been avoided.

6 The refrain of limited resources is no answer to the above failings. This is not a case about the misallocation or lack of resources to public hospitals. Rather, it is about the hospital staff's failure to manage the limited resources that were available in a manner that was reasonable and not negligent.

7 Ms M sued the respondent ("**the MEC**"), on behalf of Mthabile, for damages.

8 In the Johannesburg High Court, Fisher J found the Hospital had failed to properly manage its resources and that the respondent is liable for damages to be proved or agreed.

9 On appeal to the Supreme Court of Appeal, the bench split 3-2. The majority, per Rogers AJA, found that Ms M had failed to prove the Hospital had been negligent and had in any event failed to establish that such negligence would have been the factual cause of Mthabile's injury.

10 The dissenting judgment of the SCA, penned by Ledwaba AJA, held that the Hospital was negligent in failing to check if another hospital could render assistance to Ms M within a shorter time frame, and that the failure to take reasonable steps to ensure the C-section was performed timeously was the cause of Mthabile's injury. The minority would have held the respondent liable.

11 Ms M seeks leave to appeal against the order of the SCA.

12 In these heads of argument, we submit that the majority of the SCA erred in its understanding of the scope of a public hospital's duties in respect of pregnant women in the position of Ms M, and in respect of Mthabile, and erred also in its application of the test for factual causation.

13 In these submissions we address the following issues in turn:

13.1 The grounds upon which this Court has jurisdiction to hear this appeal;

13.2 The relevant events on the day of Mthabile's birth;

13.3 The litigation history in this matter;

13.4 The Hospital's negligence; and

13.5 The issue of causation.

JURISDICTION

14 This Court has jurisdiction to decide constitutional matters, and to hear any other matter that raises an arguable point of law of general public importance.[1]

15 This matter falls within both of these categories.

Constitutional issues

16 This matter raises a number of constitutional issues:

17 First, this matter is inherently linked to the constitutional right of access to adequate and to emergency healthcare,[2] and the rights of children.[3]

17.1 This Court recently held, in a case determining whether the MEC had a legal duty to prevent harm to children in certain contexts, that "*although a matter will not be constitutional merely on the basis that the interests of children are affected in some or other way, the impact on children in this matter is neither remote nor indirect*."[4]

17.2 This principle applies with equal force to this case. The impact on children in this matter is neither remote nor indirect.

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1 Section 167(3) of the Constitution; *General Council of the Bar v Jiba and Others* 2019 (8) BCLR 919 (CC) at para 35

2 Section 27 of the Constitution

3 Section 28 of the Constitution stipulates that in all matters concerning children, the best interests of the child are of paramount importance.

4 *BE obo JE v MEC for Social Development, Western Cape* [2021] ZACC 23 at para 7.

18 Second, this matter implicates the constitutional norms of accountability, responsiveness and good governance.[5] It asks whether a woman may hold a public hospital accountable for its failure to properly manage its resources both prior and subsequent to her admission to a labour ward. As importantly, it concerns the standard of care that is afforded to pregnant mothers, and particularly the responsiveness of public hospitals once foetal distress is detected.

19 Third, this matter concerns a determination on the nature and scope of the delictual element of wrongfulness. This Court has held that, in this context, such a determination raises a constitutional issue:

> "In Loureiro, this Court held that an appeal against a finding on wrongfulness on the basis that a Court failed to have regard to the normative imperatives of the Bill of Rights ordinarily raises a constitutional issue. This is because the wrongfulness element in delict depends on the evaluation of public policy, duly informed by the Constitution and constitutional values. Accordingly, this Court has jurisdiction to entertain this application."[6]

20 In the circumstances, the words of this Court in *Mashongwa* are apposite:

> "Although it may not look like the outcome turns on the meaning or vindication of any constitutional provision or right, sections 7(2) and 12(1)(c) of the Constitution are the pillars on which the superstructure of this case rests. Mr Mashongwa's claim owes its origin largely to the obligations imposed on PRASA, an organ of state, by these provisions. In addition, an enquiry into wrongfulness 'focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable'. On these bases this Court does have jurisdiction in terms of section 167(3)(b)(i) of the Constitution."[7]

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[5] These norms are set out in section 1(d) of the Constitution.

[6] *BE obo JE v MEC for Social Development, Western Cape* [2021] ZACC 23 at para 7.

[7] *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) at para 13

Arguable point of general public importance

21 This matter also raises an arguable point of law of general public importance.

In particular, this matter concerns the nature and scope of the delictual duty owed by the MEC to mothers in labour. While it may be common cause that the MEC (through the hospital staff) owed a duty to the applicant to exercise reasonable care, skill and diligence in her treatment, the question is whether the MEC bears a legal duty (through the management of public maternity units) to ensure the efficient use of resources. The existence of this duty in the context of the law of delict is contested.

22 A recognition of the latter legal duty is critical.[8] Many public maternity units and public hospitals operate in a position of limited resources. The questions of what duties the law and Constitution impose on them in those circumstances is obviously of pressing public importance.[9]

23 In the circumstances, this Court has jurisdiction to entertain this appeal. For reasons we demonstrate below, we respectfully submit it should do so.

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[8] In *Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC) (*"Oppelt"*) at para 18, this Court held that legal certainty regarding the scope of the right to access to healthcare services and emergency medical treatment, as well as certainty regarding the appropriate approach to the assessment of evidence in these types of matters, is beneficial to the public.

[9] See: *Mashongwa* at para 14.

FACTUAL BACKGROUND

24 Ms M was admitted to the labour ward of the Charlotte Maxeke Hospital at about 12h55 on 28 August 2010.[10]

25 Her labour progressed normally until 15h45, when an abnormal cardiotocographic ("**CTG**") reading indicated foetal distress. At 16h00, the decision to perform an emergency C-section was taken.[11]

26 Once foetal distress is detected, a C-section ought to be performed as quickly as possible. At a *maximum*, it must be performed (and completed) within 60 minutes of the decision to operate.[12]

27 However, Ms M's C-section was performed 155 minutes – more than 2.5 hours – after the decision to operate was made.[13]

The down times

28 The delay in performing Ms M's C-section at the Hospital resulted from a backlog in the C-sections to be performed on that day. That backlog, in turn, resulted from the fact that there were three stretches of time, on 28 August 2010, during which the maternity operating theatre was not used. These periods (referred to as "**down times**") were:

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[10] Summary of Evidence of Professor Smith, p 7 para 10, p 139 - 140; SCA minority judgment, at para 9, p 1583, vol 16.

[11] Summary of Evidence of Professor Smith, p 14 para 14.7**,** p 146; SCA minority judgment, at para 9, p 1583, vol 16.

[12] SCA minority judgment, at para 46, p 1596, vol 16.

[13] SCA minority judgment, at para 10, p 1583, vol 16; Joint minute of obstetricians, at para 13, p 367**,** vol 4

28.1 From 04h35 – 06h05 ("**the first down time**");

28.2 From 07h05 – 09h30 ("**the second down time**"); and

28.3 From 11h40 – 14h15 ("**the third down time**").

29 The C-sections of other patients could have been performed during these periods. This is evident from the timeline of admissions and theatre use on 28 August 2010:[14]

29.1 Ms Munchenzi[15] was admitted at 03h35. She was pregnant with twins, one of whom was in the breach position. It was clear that she required a C-section, which was scheduled for 05h00. That scheduled operation was cancelled because the unit had run out of sterilized theatre gowns. The lack of theatre gowns resulted in the theatre being unused from 04h35 – 06h05 (the first down time).[16]

29.2 By 06h05, the theatre gown issue was resolved. As this time another patient, whose foetus was in distress, went into the theatre for a C-section.[17]

29.3 Then, from 07h05 – 09h30, and despite the Hospital knowing that Mrs Munchenzi required a C-section, the theatre again sat unused (the second down time).[18]

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[14] See founding affidavit in application for leave to the Constitutional Court, at para 10 – 13, 1545 – 1546, vol 16

[15] The SCA refers to Ms Munchenzi as "**CM**".

[16] High Court judgment at para 18, p 1568, vol 16

[17] High Court judgment at para 19, p 1568 – 1569, vol 16

[18] High Court judgment at para 19, p 1568 – 1569, vol 16

29.4 Between 09h30 and 11h40, two other patients were taken into theatre for C-sections, due to foetal distress.[19]

29.5 At 09h50, Ms Gumbe was admitted to the labour ward. Due to the fact that she had previously undergone two C-sections, a natural birth posed the risk of uterine rupture. The risk was not high, but if such rupture occurred it would result in the death of both mother and child. Therefore, it was clear that at some point she would require a C-section.[20]

29.6 Between 11h40 - 14h15, despite the Hospital knowing that both Mrs Munchenzi and Ms Gumbe required C-sections, the theatre was once again empty ("**the third down time"**).[21]

29.7 Ms Maluleka was another patient in the labour ward. At 13h45 it became clear that her baby was in foetal distress. The decision was taken to perform a C-section.[22]

29.8 Eventually, at 14h15, more than 9 hours after the time originally scheduled for her operation, Ms Munchenzi was taken to theatre for the delivery of her twins via C-section. The procedure finished at 15h20.[23]

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[19] High Court judgment at para 19, p 1568 – 1569, vol 16

[20] High Court judgment at para 20, p 1569, vol 16

[21] High Court judgment at para 19, p 1568 – 1569, vol 16

[22] SCA majority judgment at para 82, p 1607-1608, Vol 16.

[23] High Court judgment at para 18 and para 19, p 1568 – 1569, vol 16

29.9 At 15h30, Ms Maluleka was taken into theatre for her C-section.[24] Although the decision to perform a C-section had been taken at 13h45, she could not go into theatre until Ms Munchenzi's C-section was complete.

29.10 At 15h45, while Ms Maluleka's surgery was in progress, it became clear that Ms M's foetus was in distress, and that she required a C-section.[25]

29.11 However, at 16h15, it was also decided that Ms Gumbe should have a C-section.[26] The hospital staff decided that Ms Gumbe's C-section should take priority over Ms M's.

29.12 Ms Maluleka's C-section was completed at 16h25. Ms Gumbe was in the operating theatre from 16h45 to 17h55.[27]

29.13 Ms M was taken into theatre at 18h15 and her C-Section commenced at 18h35.[28] Mthabile was delivered at 18h43.[29]

30 What emerges clearly is that the theatre could have (and should have) been utilised during the second and third down times.

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[24] High Court judgment at para 20**,** p 1569, vol 16

[25] High Court judgment at para 20, p 1569, vol 16

[26] SCA majority judgment at para 83, p 1608, vol 16.

[27] SCA majority judgment at para 82 – 83, p 1607-1608, vol 16.

[28] Joint minute of the obstetricians para 13, p 367**,** vol 4

[29] Minutes of the 4th pre-trial meeting held on 26 July 2018, para 11.6, p 108, vol 2.

The Hospital's failure to refer Ms M to another facility

31 Despite deciding to prioritise Ms Gumbe's C-section over Ms M's, and knowing that Ms M's foetus was in distress and that they could not provide Ms M with a C-section within the required time, the Hospital staff failed to make any endeavours to refer Ms M to another medical institution which might have been able to perform the C-section sooner.

32 The Hospital is in a province with other public hospitals, including Chris Hani Baragwanath and others located within 30 kilometres of Charlotte Maxeke.[30] Despite this, the Hospital made no effort to assess whether any other hospital had capacity to perform Ms M's C-section in better time.

The absence of interim measures

33 In addition, in the time that passed between the decision to perform Ms M's C- and the actual procedure, the Hospital staff failed to take appropriate interim measures to mitigate the risk associated with foetal distress.

34 In particular, during that period, the Hospital failed:

34.1 to administer any tocolytic medication to Ms M;[31]

34.2 to provide Ms M with an oxygen mask;[32] and

34.3 to get Ms M to lie on her side.[33]

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30 SCA minority judgement, at para 44**,** p 1595, vol 16.

31 SCA majority judgment at para 101, p 1615, vol 16.

32 SCA majority judgment at para 102, p 1615, vol 16.

33 SCA majority judgment at para 103, p 1615, vol 16.

LITIGATION HISTORY

35 This trial in this matter was conducted in the High Court, before Fisher J. At the commencement of the trial, the parties agreed to proceed by way of a stated case, incorporating agreements reached in a series of pre-trial conferences. The issues to be adjudicated centred on negligence and causation.

36 Ms M testified herself, and two expert witnesses testified in support of her claim. The experts were Dr Linda Ruth Murray, a specialist obstetrician and gynaecologist, and Professor Johan Smith, a paediatrician and neonatologist.

37 For the respondent, three experts testified. They were Dr Helengani Lawrence Chauke, an obstetrician in gynaecology; Dr Thomas Matle Marishane, a specialist gynaecologist and obstetrician; and Dr Keith Duncan Bolton, a paediatrician.

38 The High Court ruled in the appellant's favour. It held that the Hospital had been negligent in allowing the down times. It had failed to reasonably manage its resources, and such failure resulted in Ms M's C-section taking place far later than acceptable, and the consequent harm to her child.[34]

39 On appeal, the SCA was split 3 to 2. The majority held that Ms M had not established negligence and that, even if she had, it was not shown that such negligence was the factual cause of the harm to Mthabile.[35] The appeal was accordingly upheld.

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[34] High Court judgment at para 41-43, p 1574 – 1575, vol 16.

[35] SCA judgment para 55, p 1598, vol 16.

40 The minority would have dismissed the appeal and held that the respondent was negligent in not checking if other hospitals in the area could render assistance.[36] Like Fisher J in the High Court, the minority held that the final hour hypothesis of Professor Smith was not meaningfully challenged. Instead, Dr Marishane simply said he did not know if it was correct. For the minority, that was no basis for rejecting the hypothesis, and factual causation was established.[37]

ISSUES IN DISPUTE

41 It is trite law that in order to succeed in a delictual claim, a claimant must prove the following elements: conduct, causation, wrongfulness, fault and harm. In this matter, the questions of harm and conduct are not in dispute.

42 It was ultimately common cause that the MEC (through the hospital staff) owed a duty to the applicant to exercise reasonable care, skill and diligence in her treatment.

43 With regard to wrongfulness, the MEC owes pregnant patients the following duties:

43.1 The duty to exercise reasonable care, skill and diligence in their treatment; and

43.2 The duty to manage the unit's resources with reasonable efficiency.

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[36] SCA judgment para 43, p 1594, vol 16

[37] SCA judgment para 51, p 1597, vol 16

WRONGFULNESS

44 It is clear that the MEC bears a legal duty (through the management of public maternity units) to ensure the efficient use of resources.

45 This duty derives from the constitutional right of persons of access to health care services.[38] The State is required to take reasonable measures, within its available resources, to achieve the progressive realization of these rights. This necessarily implies that the State must use its available resources efficiently.

46 The duty also arises from the state's duties to respect, protect, promote and fulfil other rights contained in the Bill of Rights, including the right to bodily and psychological integrity (section 12(2)).

47 This duty also derives from the constitutional norms of good governance, accountability and responsiveness.[39] Section 195(1)(b) of the Constitution states that the public administration must be governed by the democratic values and principles enshrined in the Constitution, including that "*efficient, economic and effective use of resources must be promoted*."

48 A recognition of this legal duty is critical. It will impact upon the operation and management of hospitals across the country.

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[38] Constitution, section 27(1)(a).

[39] *Lee v Minister of Correctional Services* at para 30. These norms are set out in section 1(d) of the Constitution.

THE HOSPITAL'S NEGLIGENCE

49 It is trite law that the test for negligence entails asking if a reasonable person would have foreseen the possibility of harm and would have taken reasonable steps to guard against it.[40] It is equally trite that, when the person in question is an expert, for example a healthcare practitioner, the question is asked with regard to a reasonable expert, and not a reasonable layman.[41]

50 The Hospital negligently failed to take reasonable steps to guard against the harm to Mthabile. Its negligence manifested in three separate omissions.

50.1 First, the Hospital negligently failed to prevent the second and third down times when its staff knew that there were women in the labour ward in need of C-sections.

50.2 Second, the Hospital negligently failed to take any steps toward referring Ms M to another facility for her C-section, in circumstances where it knew that her foetus was in distress and that it would not provide her with a C-section within a medically permissible timeframe.

50.3 Third, the Hospital negligently failed, in the period between detecting that Ms M's foetus was in distress and commencing her C-section, to take interim measures designed to mitigate the risk to Mthabile.

51 We deal with each of these grounds of negligence in turn.

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[40] *Kruger v Coetzee* 1966 (2) SA 428 (A) 430

[41] *Louwrens v Oldwage* [2006] 1 All SA 197 (SCA) at para 20; *Meyers v MEC, Department of Health, EC* 2020 (3) SA 337 (SCA) ("*Meyers v MEC, Department of Health"*) at para 66-68

The negligent failure to prevent the down times

52 This Court in Oppelt said "[P]roficient healthcare entails providing urgent and appropriate emergency treatment whenever a medical condition requires it." [42]

53 The decision to perform a C-section on Ms M was considered urgent, and an emergency,[43] and denoted as "stat" on the Hospital's medical records.[44]

54 The C-section was performed at 18h35, 155 minutes after the decision to operate.[45]

55 In the agreed stated case before the High Court, the expert gynaecologists acknowledged that the Guidelines for Maternity Care in South Africa 2007 **("the Guidelines")** recommend that C-sections be performed within one hour of the decision to operate. They agreed that a delivery interval of 155 minutes was unacceptable.[46]

56 The Guidelines embody the recognised standard of care accepted by reasonable medical opinion.[47]

57 In the High Court's judgment, Fisher J appropriately cited *Pitzer v Eskom*, where the SCA said:

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[42] *Oppelt* at para 56

[43] Summary of Medico-Legal Opinion of Dr Bolton, p 319, vol 4.

[44] Summary of Evidence of Professor Smith, p 14 para 14.7, p 146, vol 2; Summary of Evidence of Dr Du Plessis, p 314, vol 4; Joint minute of the pediatricians, p 2 para 7, p 362, vol 4;

[45] Joint minute of the obstetricians, p 2 para 13, p 367**,** vol 4

[46] SCA minority judgment, para 34, p 1591, vol 16.

[47] See for example the recent remarks of the SCA in *AM and Another v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA), at para 74, in relation to the 'Western Cape Head Injury Guidelines Handbook'

> "What is or is not reasonably foreseeable in a particular case is a fact bound enquiry.. Where questions that fall to be answered are fact bound there is seldom any assistance to be had from other cases that do not share all the same facts".[48]

58 It is within the ordinary course of a public hospital's experience that, on a given day, a woman in labour may present with a foetus in distress, and may be in need of an urgent C-section.

59 In this case then, the Hospital accordingly foresaw, or ought to have reasonably foreseen, that the failure to utilise the down times for C-sections for women who were already admitted to the ward and who clearly would require C-sections, may lead to a delay in another C-section beyond the maximum permitted time for foetal distress.

60 For that reason, the Hospital was obligated to take reasonable steps to utilise its resources in an efficient manner, and one that is likely not to unacceptably delay emergency operations on women in labour.

61 In the SCA, both the majority and the minority judgments erred in their dismissal of the down times as a ground of negligence.

The flawed approach of the majority

62 The majority, per Rogers AJA, held that Ms M had not discharged the burden of proving negligence in respect of the down times. It reasoned that the down times had not been properly pleaded, and the respondent had accordingly not had an opportunity to produce all the other patient records necessary to demonstrate

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[48] *Pitzer v Eskom* [2012] ZASCA 44 at para 24. See also *MEC for Health, Eastern Cape v DL obo AL* [2021] ZASCA 68 (*"MEC v DL obo AL"*) at para 8

that reasonable management of the Hospital's resources required the down times to take place.

63 Similarly, it said that Dr Sibeko, the registrar on duty on 28 August 2010, had passed away before the trial, and the respondent could not be blamed for the inability to adduce her evidence.

64 We submit that this approach is not correct.

64.1 The pleadings, as the dissent in the SCA held, were clear and concise, and were duly amplified by a wide set of admissions and agreements contained in the pre-trial minutes and in the stated case. [49]

64.2 Once it was established that the down times had taken place and that, had they not, Ms M's C-section would likely have been conducted earlier, it was incumbent on the respondent to demonstrate that it could not reasonably have utilised the down times to perform C-sections.

64.3 In that regard, the respondent offered no evidence, with the exception of Dr Chauke's broad and generalised comments, in his oral evidence, about Dr Sibeko's range of duties.[50]

64.4 Dr Chauke, who began working at the Hospital more than five years after Mthabile's birth, testified that the respondent was unable to contact the other doctor's that worked in the labour ward that day. Ms M ought not to bear negative consequences of that inability.[51]

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[49] SCA minority judgment at para 4, p 1581, vol 16.

[50] Transcript of proceedings in the High Court on 17 August 2018, p 50 – 51, p 1305 - 1306

[51] Transcript of proceedings in the High Court on 17 August 2018, p 1260, at 8 - 9

64.5 In the High Court, Fisher J aptly described the second down time as "*inexplicable*".[52] That description holds true in respect of the third down time as well. There was no evidence before the trial court that demonstrated any proper reason why, on 28 August 2010, the down times occurred. As this exchange under cross-examination revealed:

> Ms Munro: "And you were not there that day and you do not have any specific information about what was happening in those two and a half hour breaks?"
>
> Mr Chauke "Yes, so that is my, this I am trying to make sense of what are the possibilities that could have happened, it is not that I have this information that indeed this is what happened".[53]

64.6 The failure for long periods in the day to utilise the maternity theatre resulted in the unacceptable delay in Ms M's operation. There is no way for Ms M to know, or be able to ascertain, how that happened. For that reason, we submit, the establishment of the down times must have at least created an evidentiary burden on the respondent to show they happened in reasonable circumstances.

64.7 Instead, the respondent was unable to offer any information as to why the second and third down times took place. Whether that inability is understandable or not, it ought not to result in Ms M's claim failing.

64.8 The SCA held that it would be unfair to make a finding against Dr Sibeko, given that she had passed and not been able to give evidence.

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[52] High Court judgment at para 19, p 1568 - 1569

[53] Transcript of proceedings in the High Court on 17 August 2018, p 1334 at 17 to 25, to p 1336 at 1

On the contrary, it is unjust that Ms M should be prejudiced by those circumstances.

64.9 In its recent decision in *Meyers v MEC, Department of Health, EC*, where the SCA had found the evidence established a reasonable inference on the part of a doctor, the Court held that the inference was undisturbed by the Doctor's inability to account, by memory, for the specific operation in question.[54]

64.10 Put differently, the plaintiff was not punished for the defendant's inability to evidence an absence of negligence.

64.11 The same should be true in this matter.

64.12 As Fisher J put it, "When one is dealing with a facility that is set up for the purposes of attending to emergency cases and there is one working theatre, one would expect that cases which are not pressing would be attended to so as to free up the theatre for possible dire emergencies."[55] The respondent ought not to escape liability without providing any evidentiary justification for why this was not done.

The limited error of the minority

65 The minority of the SCA would have found for Ms M. The minority conclusion was correct.

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[54] *Meyers v MEC, Department of Health, EC* at para 72-82

[55] High Court judgment at para 40, p 1574, vol 16.

66 However, for the sake of completeness, we note that the minority erred in one respect. It held that the down times were not negligent. It did so on the basis of *AN v MEC for Health, Eastern Cape,*[56] which it took as authority for the proposition that no duties were owed to Ms M before she was admitted to the Hospital. This is not correct.

67 *AN* is not authority for the proposition that the Hospital did not owe Ms M a duty to properly manage its resources and avoid the down times. That duty is a function of the state's obligations to respect, protect, promote and fulfil the rights in the Bill of Rights.[57]

68 In *AN*, the SCA simply said that the relevant legal duty in that matter – which was to provide direct care to the soon-to-be mother – *"arose when the mother was admitted to the hospital in labour"*. The Court immediately proceeded to state the nature of that duty as follows: *"The staff assumed a duty to care for mother and fetus [sic] during the birth process without negligence, in other words, as would reasonable staff in their position"*.[58]

69 Of course, that duty began when the mother arrived at the hospital. The matter concerned an alleged failure to properly monitor the condition of a mother and her foetus after admission. It cannot be taken as authority for a hospital owing no duties to anyone but those already admitted to its care.

70 Although Ms M was admitted in the midst of the third down time, and her foetus' distress was identified after that period, the duty to take steps to ensure she could

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[56] *AN v MEC for Health, Eastern Cape*

[57] Section 7(2) of the Constitution

[58] *AN v MEC for Health, Eastern Cape* at para 3

be afforded appropriate care to protect the interests of Mthabile was triggered before then.

71 The converse position would, we respectfully submit, be constitutionally absurd. If hospitals owed no duties to members of the public before they were admitted, the scheme of the socio-economic entitlements in the Bill of Rights would be irredeemably undermined. The state would escape liability for any mismanagement of healthcare resources, no matter how dire, provided it could show that, subsequent to a person being admitted, it had acted reasonably with regard to that person. Even where a hospital was so poorly managed as to render effective care functionally impossible, reasonable steps post-admission would indemnify the state. That approach could never meet constitutional standards.

The negligent failure to refer Ms M to another facility

72 Reasonable healthcare workers in the position of those caring for Ms M and her foetus would have foreseen the possibility of serious injury to Mthabile, once foetal distress was detected, and would have taken steps to refer Ms M to another facility.

73 The Hospital failed to do so.

74 It was on this basis that the minority decision in the SCA found a negligent breach of the duties owed to the appellant and her foetus. We submit, with respect, it was correct.

75 That it is reasonable to attempt to refer a mother whose foetus is in distress to another facility for a timeous operation is borne out by the respondent's own

policies. As the minority judgment of the SCA pointed out, the Hospital's Policy for Admission of Patients from Casualty dated 14 August 2006 states:

> "If no space can be found for the patient within the hospital, the clinical executive on call must be contacted so that arrangements can be made for the patient to be transferred to another medical facility or, alternatively, to ensure that additional nursing staff are acquired to provide the necessary nursing care, thus enabling the patient to remain at this hospital."[59]

76 Similarly, reasonable hospital staff, having recognised that an emergency C-section is required, and knowing that the operation would not commence timeously at their facility, ought to have taken steps to ascertain whether Mthabile could have been delivered sooner elsewhere.

CAUSATION

77 The Hospital's negligence caused Mthabile's brain damage.

78 In this section, we consider the test for factual causation in cases of negligent omissions, the proper application of that test and the SCA majority's error in applying the test.

The test for factual causation

79 In order to establish factual causation, a claimant must prove a causal link between a defendant's action or omission, on the one hand, and the harm suffered by the claimant, on the other. To determine whether such a causal link exists, the courts apply the "but for" or "*condictio sine qua non*" test. Corbett JA provided a clear and comprehensive explanation of this test:

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[59] SCA minority judgment at para 43, p 1594, vol 16.

> "In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the unlawful act or omission of the defendant. In some instances this enquiry may be satisfactorily conducted merely by mentally eliminating the unlawful conduct of the defendant and asking whether, the remaining circumstances being the same, the event causing harm to plaintiff would have occurred or not. If it would, then the unlawful conduct of the defendant was not a cause in fact of this event; but if it would not have so occurred, then it may be taken that the defendant's unlawful act was such a cause. This process of mental elimination may be applied with complete logic to a straightforward positive act which is wholly unlawful. So, to take a very simple example, where A has unlawfully shot and killed B, the test may be applied by simply asking whether in the event of A not having fired the unlawful shot (ie by a process of elimination) B would have died. In many instances, however, the enquiry requires the substitution of a hypothetical course of lawful conduct for the unlawful conduct of the defendant and the posing of the question as to whether in such case the event causing harm to the plaintiff would have occurred or not; a positive answer to this question establishing that the defendant's unlawful conduct was not a factual cause and a negative one that it was a factual cause. This is so in particular where the unlawful conduct of the defendant takes the form of a negligent omission. [It has been] suggested that the elimination process must be applied in the case of a positive act and the substitution process in the case of an omission. This should not be regarded as an inflexible rule."[60]

80 In practice, the test is applied as follows:

80.1 First, the court must mentally eliminate as much of the conduct as (but no more of the conduct than) was negligent. In the case of a negligent omission, this involves eliminating the omission and substituting it with a hypothetical course of lawful conduct.

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[60] *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A) at 951B–H. Quoted by the majority in *Lee v Minister of Correctional Services* at para 48.

80.2 Second, the court must ask whether, if this much, but no more, of the conduct were eliminated (and the lawful conduct is substituted in), would the harm probably still have occurred?

80.2.1 If the answer is 'yes, the harm probably would still have occurred', then the negligent conduct probably was not a factual cause of the harm.

80.2.2 If the answer is 'no, the harm probably would not have occurred' then the negligent conduct probably was a factual cause of the harm.

81 The 'but-for' test does not require a plaintiff to satisfy a Court that the harm would certainly not have occurred in the absence of the negligent conduct. As Nugent JA held in *Minister of Safety and Security v Van Duivenboden*

> "A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics."[61] (our emphasis)

82 In endorsing this approach, the SCA in *Minister of Finance v Gore* said:

> "The legal mind enquires: What is more likely? The issue is one of persuasion, which is ill-reflected in formulaic quantification. The question of percentages does not arise… Application of the 'but for' test is not based on mathematics, pure science or philosophy. It is a matter of common sense, based on the practical way in which the ordinary person's mind works against the background of everyday-life experiences."[62] (our emphasis)

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61 *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) at para 25

62 *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) at para 33

83 Similarly, in *Oppelt,* this Court favoured a common sense *'close link'* application of the but-for test. In that case, the appellant had sustained a serious injury during a rugby match, and the Department of Health delayed, for a number of hours, in performing the required closed reduction surgery.

83.1 The SCA had held that a causal link between the harm to Mr Oppelt and the conduct of the Department of Health had not been established.[63]

83.2 There was a dispute between experts for the respective parties, as to the importance, for purposes of preventing injury, of performing the operation within a period of four hours.[64]

83.3 Drawing on *Lee,*[65] this Court ruled in favour of the appellant. It held that the 'but for' test requires flexibility and a common-sense approach when the issue of causation has to be decided on the ground of an alleged negligent omission. It said:

> "While it may be more difficult to prove a causal link in the context of a negligent omission than of a commission, Lee explains that the "but-for" test is not always the be-all and end-all of the causation enquiry when dealing with negligent omissions. The starting point, in terms of the but-for test, is to introduce into the facts a hypothetical non-negligent conduct of the defendant and then ask the question whether the harm would have nonetheless ensued. If, but for the negligent omission, the harm would not have ensued, the requisite causal link would have been established. The rule is not inflexible. Ultimately, it is a matter of common sense whether the

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63 *Oppelt* at para 1

64 *Oppelt* at para 20 – 33

65 *Lee v Minister of Correctional Services*

facts establish a sufficiently close link between the harm and the unreasonable omission." [66] (our emphasis)

84 So, the first question for the Court to consider is whether the evidence demonstrates, on a common sense rather than a purely scientific application, that the negligent omissions by the hospital staff probably led to Mthabile's injury.

85 As we explain below, that traditional test is amply satisfied in this case.

86 But even if it were not, that would not be the end of the matter. In *Lee v Minister of Correctional Services*,[67] this Court modified the traditional test for factual causation, in the context of a systematic failure by a state institution to uphold its constitutional obligations to those under its power or care.[68]

86.1 In *Lee,* this Court dealt with causation in the context of the Department of Correctional Services' negligent failure to reasonably guard against an incarcerated person contracting tuberculosis.

86.2 The Court held that the common law test has to be applied flexibly, and that *"common sense may have to apply over strict logic".*[69] In appropriate circumstances, it held, factual causation would be established where the plaintiff has proved that, but for the negligent conduct, the risk of harm would have been reduced.[70]

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66 *Oppelt* at para 48

67 *Lee v Minister of Correctional Services*

68 In *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC) ("*Mashongwa v PRASA")* this Court held that *Lee* never sought to replace the pre-existing common law approach to factual causation. It held, at paragraph at 65 that the *Lee* test is "*particularly apt where the harm that has ensued is closely connected to an omission of a defendant that carries the duty to prevent the harm*." That is precisely the case in this matter.

69 *Lee v Minister of Correctional Services* at para 49

70 *Lee v Minister of Correctional Services* at para 63-65

86.3 The rule captured in *Lee* is designed to guard against a situation where factual causation could never be proved because the specific incident leading to an injury could not be identified. Absent such a rule, this Court said, even the wrongful and negligent conduct of the Department of Correctional Services or its officials could never, in those instances, ground a finding of delictual liability.[71]

86.4 On that score, Justice Nkabinda, for the majority, wrote:

> "It would be enough, I think, to satisfy probable factual causation where the evidence establishes that the plaintiff found himself in the kind of situation where the risk of contagion would have been reduced by proper systemic measures."[72]

86.5 The same must be true this matter. The risk of Mthabile's brain injury, at the hands of the state and in circumstances where the appellant was owed constitutional duties, would have been reduced if not for the Hospital's numerous negligent omissions. In the absence of evidence that those negligent failures were probably not the cause of Mthabile's brain damage, the rule in *Lee*, and its underlying rationale, finds application.

The correct application of the test for factual causation

87 On a common-sense application of the traditional 'but-for' test, the Hospital's negligence is the probable cause of Mthabile's injury. This is true of all three negligent omissions:

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[71] *Lee v Minister of Correctional Services* at para 63

[72] *Lee v Minister of Correctional Services* at para 60

88 With regard to the second and third down times, had the hospital's resources been properly managed and the theatre been used throughout the day, the following would likely have occurred:

88.1 Ms Munchenzi's C-section would have taken place from **07h05 to 08h10** (during the second down time) or **11h40 to 12h45** (during the third down time). This timing is based on the fact that Ms Munchenzi was admitted at 03h35; was ready for a C-section at that point; and, on the evidence, her C-section took 65 minutes.

88.2 Ms Gumbe's C-section would have taken place from **11h40 to 12h50** (assuming that Ms Munchenzi's C-section took place in the first period of down time) or around **12h55 to 14h05** (assuming that Ms Munchenzi's C-section took place in the first period of down time). This timing is based on the fact that Ms Gumbe was admitted at 9h50; was ready for a C-section at that point; and, on the evidence, her C-section took 70 minutes.

88.3 Ms Maluleka's C-section would have proceeded from around **14h15** (or 14h20) **to 15h15**. This timing is based on the fact that the decision was taken to perform the C-section at 13h45; and that, on the evidence, her C-section took 55 minutes.

88.4 By the time that the decision was taken, at **16h00**, that Ms M required a C-section, the theatre would have been free. According to the internationally accepted standards, Ms M's C-section would likely have been performed by **17h00**.

88.5 This would likely have avoided (or dramatically reduced) the brain injury to Mthabile.[73] Professor Smith testified that the injury likely occurred in the last hour (**17h43 - 18h43**).

89 Even if the above is not accepted, *Lee* finds application.

89.1 There is no dispute that the delay in performing Ms M's C-section was unacceptable and presented a risk to Mthabile. The Hospital's failure is indicative of a broader absence of constitutional protection for pregnant women. In *AN,* the SCA said

> "It is appropriate to say something about the prevalence of matters such as these. Far too often this court is confronted with serious and serial negligence in hospitals falling under the respondent. Whether or not the negligence can be said to have caused harm in the delictual sense, it is clear that studied neglect of standards has become pervasive in many such hospitals. Those reliant upon their services are receiving substandard care. During the hearing, this situation was put to counsel for the respondent. The response was that this sad state of affairs and the need for urgent remedial intervention had pertinently been brought to the attention of the relevant authorities. Despite this, such conduct does not appear to have abated significantly, if at all."[74]

89.2 So, the risk that the mismanagement of the Hospital's resources presented to Mthabile was one which is associated with a systematic failure to provide expecting mothers with access to the healthcare to which they are constitutionally entitled.

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[73] The High Court correctly concluded that there was *"a direct link between failure to treat patients efficiently throughout the day in question and the injury that occurred"*. High Court judgment at para 41, p 1574 – 1575, vol 16

[74] *AN v MEC for Health, Eastern Cape* at para 28

89.3 In *AN*, the majority of the SCA said the *Lee* test was not applicable because counsel in that matter conceded its non-applicability, and because, as a matter of fact, it could not be said that the creation of risk by the hospital's negligence caused the injury suffered by the baby.[75]

89.4 This matter is different. Here, nobody provided evidence that a timeous C-section could not have prevented Mthabile's injury, and we have submitted that *Lee* is on point.

89.5 In her dissenting decision in *AN*, Molemela JA applied the reasoning in *Lee*. In doing so, the learned Judge made the following comments, which echoed Nkabinde J's concern, in *Lee*, over a perennial absence of liability, and of accountability.

> "Prof Buchmann postulated that despite the substandard medical care dispensed to the appellant, the baby's injury was not preventable because the MRI scan showed that the injury was of an acute profound pattern. This seems to suggest that (1) there can be no intervention during obstetric emergencies and (2) that substandard management of a patient's labour automatically becomes irrelevant once a hypoxic ischemic insult of an acute profound nature has been identified as a cause of the HIE. Taken to its logical conclusion, it in essence, exempts the hospital staff from exercising the requisite reasonable care and skill and absolves them from liability once an obstetric emergency occurs during labour. I find this proposition perplexing. None of the articles relied upon by the expert witnesses suggested that there is a stage when intervention becomes irrelevant because of an obstetric emergency."[76]

89.6 That concern is well placed.

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[75] *AN v MEC for Health, Eastern Cape* at para 26

[76] *AN v MEC for Health, Eastern Cape* dissenting judgment at para 65

89.7 In *Suliman*, the SCA, in its discussion on factual causation, noted that the area of brain injuries to new-born children is a *"field where medical certainty is practically impossible"*.[77]

89.8 However, as we have demonstrated, the *Lee* test is designed to avoid an absence of accountability where public institutions fall short of constitutional standards by not guarding properly against the risk of subsequent harm, even where the precise cause of that harm appears impossible to pin down.

89.9 So, where there is an undisputed relationship between an omission to manage a public hospital's resources properly and the risk of serious injury to a new-born child, medical uncertainty should not unduly burden the children and mothers who suffer as a result. If those mothers and children were unable, in the absence of what may be an unattainable standard of evidential proof, to attain redress, the concern of Nkabinda J, and of Molemela J, would certainly remain unremedied.

89.10 Accordingly, the majority of SCA ought not to have been pre-occupied by what it perceived as the plaintiff's failure to show that a mismanagement of the Hospital's resources was the cause of the harm to Mthabile. Even if the SCA was correct in dismissing the probability of Professor Smith's final-hour hypothesis, it ought to have asked also whether the Hospital's failure to reasonably guard against a two-and-

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[77] *Life Healthcare Group* at para 15

a-half-hour delay in Ms M's C-section falls short of addressing the risk of serious injury to Mthabile.

89.11 We submit that it clearly does.

The majority's reasoning on causation

90 The majority summarised the position as follows:

90.1 Ms M's C-section needed to be performed as soon as reasonably possible.[78]

90.2 However, the joint minute of the radiologists identified Mthabile's injury as a hypoxic ischaemic injury **("HII")** of an 'acute-profound' nature, occurring perinatally in a term brain. They said no more about when the injury was suffered.[79]

90.3 The radiology reports did not define an "acute-profound' hypoxic ischemic injury.[80]

90.4 The perinatal period includes the 'intrapartum' period, which takes place between the start of labour and the birth of the baby.[81]

90.5 Professors Smith and Bolton agreed in their joint minute that the injury was suffered intrapartum.[82]

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78 SCA majority judgment at para 109, p 1617, vol 16

79 SCA majority judgment at para 111**,** p 1618, vol 16

80 SCA judgment at para 111**,** p 1618, vol 16

81 SCA majority judgment at para 111, p 1618, vol 16

82 SCA judgment at para 111, p 1618, vol 16

90.6 In the summary of his expert evidence, Professor Smith agreed that the MRI revealed an acute-profound HII to a term brain. He considered that the insult probably occurred during the intrapartum period, with sub-optimal care (and particularly the delay in performing the C-section) as the most probable causal factor.[83]

90.7 In oral evidence, Professor Smith testified that Mthabile's brain injury was probably more correctly described as a 'central brain injury', or a 'sub-acute cause', and sustained during the last hour of birth labour ("**the final-hour hypothesis**") i.e. between 17h43 and 18h43.[84]

90.8 Counsel for the respondent did not challenge this final-hour hypothesis.[85] Professor Smith was not cross-examined on it.

90.9 Dr Marishane agreed that the C-section should have been done earlier, but testified that nobody could say when the damage occurred.[86]

90.10 In response to being asked whether he agreed with Professor Smith's final-hour hypothesis, Dr Marishane said he did not know.[87] However, he said it would depend on the cause, and that it is hard to reconcile the view that the baby's injury was suffered as an accumulation over time with the idea that it was an acute injury.[88]

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[83] SCA judgment at para 116, p 1620, vol 16

[84] SCA majority judgment at para 117, p 1620, vol 16

[85] SCA majority judgment at para 118, p 1621, vol 16

[86] SCA majority judgment at para 120, p 1621, vol 16

[87] SCA majority judgment at para 120, p 1621, vol 16

[88] SCA majority judgement at para 121, p 1622, vol 16

91 The majority then reasoned that because the injury was described in the expert reports as “acute”, this was irreconcilable with the final-hour hypothesis.

91.1 The majority’s conclusion on this score was based on an assumption – that in the case of an acute profound injury, the injury occurs within 30 minutes of the onset of foetal distress.

91.2 Based on this assumption, the majority concluded that the damage to Mthabile’s brain would have occurred by 16h15 (i.e. within 30 minutes of the abnormal CTG).

91.3 The majority found that, in the absence of the assumed negligence, the C-section would not have been performed on Ms M before 16h43. As such, it held that Ms M had not proven factual causation.[89]

91.4 The majority therefore rejected the final-hour hypothesis because it was inconsistent with the above assumption. It concluded that an acute profound injury could not have occurred so long after the foetal distress was detected (i.e. between 2 to 3 hours after detection).

92 In sum then, the majority decision of the SCA found that causation had not been proved because the experts agreed that Mthabile’s injury was ‘acute-profound’ and the Court surmised that this did not accord with the final-hour hypothesis.

93 By contrast, the minority took a different approach. It held (in our submission, correctly) that:

[89] SCA majority judgement at para 127, p 1625, vol 16

> "The final hour hypothesis of Prof Smith is that the baby suffered HII during the period 17h43-18h43. This was not challenged. Dr Marishane said he did not know. There is no basis to reject the final hour hypothesis"[90]

94 For reasons we set out below, we submit the majority's approach was incorrect. It made at least two fundamental errors in its causation analysis.

94.1 First, it ought not to have found that Professor Smith's final-hour hypothesis was susceptible to challenge.

94.2 Second, it failed to apply to proper test for factual causation in matters such as this.

95 We deal with these errors in turn.

The majority ought to have accepted the "final-hour" hypothesis

96 There was no basis for the majority's assumption that the brain injury to Mthabile must have occurred within 30 minutes after foetal distress was detected (by virtue of the fact that the injury was of an "acute profound" nature). This assumption was not raised or proved in the factual or expert evidence.

97 While a number of the experts used the term "acute profound", they did not define it. Nor is there evidence regarding the precise timing of an acute profound injury.

98 Rather, Rogers AJA appeared to rely on the factual findings of other judgments as the basis for this assumption. Rogers AJA noted that, in *AN v MEC for Health, Eastern Cape,* the minority concluded that 'acute' did not necessarily convey that

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90 SCA minority judgment at para 52**,** p 1597, vol 16

hypoxia happened over a short period of time. However, he observed, the majority in that case rejected that view.[91] The majority in AN held that "*acute-profound*" injuries are sudden in nature, rather than progressive. To the extent that Rogers AJA relied on the factual finding in *AN* as support for the assumption that an acute profound injury occurs over a short period of time, he erred.

98.1 A court cannot rely on factual or expert findings made in separate proceedings to decide the dispute before it. This is a function of the right to have disputes resolved in a fair public hearing, in terms of section 34 of the Constitution.

98.2 There is a serious difficulty in adopting the factual findings of another case, without having heard and examined the factual and expert evidence upon which that case was decided and having allowed the parties in the present case to challenge and interrogate that evidence.

98.3 That is especially the case where the factual or expert conclusion is a controversial or contested one. That is precisely the case here. Various other courts have held that an "*acute profound*" injury can take place over a number of hours and is not indicative of a suddenly and unexpected injury that cannot be prevented.[92]

99 Thus, there was simply no evidence before the court to suggest that the injury to Mthabile's brain occurred within 30 minutes of foetal distress being detected. By

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[91] SCA majority judgment at para 114, p 1619, vol 16. See *AN v MEC for Health, Eastern Cape* [2019] ZASCA 102 at para 9 and 13.

[92] See, for example, *LM on behalf of DM v MEC for Health, Limpopo* Case Number: 31261/2015 (8 March 2021) GDHC, Pretoria; *SZ obo RZ v MEC For Health and Social Development, Mpumalanga,* Case Number 74482/2014 (3 May 2021) GDHC, Johannesburg.

contrast, the evidence of the appellant's expert witness – Professor Smith – was that the injury occurred in the final hour before birth (17h43 – 18h43). The summary of Professors Smith's expert evidence showed that, in his view, the injury to Mthabile probably occurred during labour, and the sub-optimal care for Ms M, particularly in the form of the delay in performing the C-section, was the probable cause.[93]

100 However, the majority rejected Professor Smith's evidence on the following grounds:

100.1 First, that Professor Smith's oral evidence, insofar as his explanation of the final-hour hypothesis, went beyond his expert summaries.[94] This is not a valid criticism. In reality, Professor Smith merely amplified his view.

100.1.1 His expert summary suggested his opinion that there was an absence of *"sentinel, or acute catastrophic event"*, and traversed literature on which he based his view that *"suboptimal obstetric management of a patient during the intrapartum period (labour and birth) clearly emerges as the most probable causal factor…"*.[95]

100.1.2 Later in the summary, Professor Smith expressed the view that "[S]uboptimal intrapartum obstetric management caused a significant delay in expediting delivery after foetal distress

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93 SCA majority judgment at para 116, p 1620, vol 16

94 SCA majority judgment at para 117, p 1620, vol 16

95 Summary of Evidence of Professor Smith, p 27 – 36 para 43 – 45

and therefore directly caused the permanent brain injury that the child sustained".[96]

100.2 Second, the majority held that the final-hour hypothesis was irreconcilable with the fact that the injury was acute-profound in nature. This criticism is based on the assumption that an acute profound injury will occur within 30 minutes after the onset of foetal distress. As is demonstrated above, there was no evidential basis for this assumption.

101 The evidence of Professor Smith, which was not contradicted and on which he was not cross-examined, ought to have been accepted.

102 This Court has held that the right to cross-examine implies a duty, and that our law recognises a rule, albeit a flexible one, that suspected untruths in a witness's testimony are to be challenged.[97] In the absence of that challenge, the party who called that witness is entitled to assume that the witness's testimony has been accepted as correct.[98]

103 There is no sound reason for departing from that rule in this matter. The respondent's counsel knew, or must have known, that the timing of the injury to Mthabile would always be a significant matter for consideration in the trial.

104 The majority of the SCA appears to have cast significant doubt on the final-hour hypothesis merely on the basis of the use of the undefined term "acute-profound" in the joint expert minutes.

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[96] Summary of Evidence of Professor Smith, p 36 para 48

[97] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) (*"SARFU"*) at para 61 - 63

[98] *Browne v Dunn* 1893 (6) R 67, H. L, (endorsed in *SARFU)*

105 That, with respect, is no basis to reject the contention that the final-hour thesis represents at least a probable and common sense basis for a finding that the negligent failure to prevent the down times caused the injury to Mthabile.

106 A Court is required to determine whether opinions advanced by experts are founded on logical reasoning.[99]

107 The majority, however, fell into what this Court in Oppelt, and with reference to the SCA's decision in Michael v Linksfield Park Clinic,[100] described as "the trap of focusing on scientific proof instead of assessing where the balance of probabilities lies, based on an evaluation of the whole evidence."[101] It, we respectfully submit, took a restrictive view of the fact that the expert radiologists noted agreement on an 'acute-profound' injury, and focused its attention too much on that undefined scientific term, and too little on the preponderance of the evidence before it.

108 That misdirection is evidenced in the following passage from Rogers AJA's discussion of causation:

> "The radiologists used the term 'acute', not 'sub-acute'. As I understand it, this means that the damage was of the kind one would typically see after a sentinel event. The fact that no sentinel event was recorded in this case, and the fact that no sentinel event may have occurred, does not as a matter of logic detract from the fact that the damage was from the asphyxia typically caused by sentinel events, ie profound asphyxia which causes injury over a relatively short period of time (about 15 minutes, according to Prof Smith)."[102]

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99 *Linksfield* at para 36

100 *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA) (*"Linksfield"*) at para 40

101 *Oppelt* at para 41

102 SCA majority judgment at para 124

109 Respectfully, the evidence of an absence of a sentinel event, along with the unchallenged evidence of Professor's Smith's opinion on the final hour hypothesis, does indeed logically detract from the conclusion that the damage to Mthabile was caused by a sentinel event.

110 As the SCA in Linksfield said, "it would be wrong to decide a case by simple preference where there are conflicting views on either side, both capable of logical support. Only where expert opinion cannot be logically supported at all will it fail to provide 'the benchmark by reference to which the defendant's conduct falls to be assessed'".[103]

111 Similarly, in the context of expert evidence in applications, the SCA in *Imperial Marine Company,* the SCA held that where a Court concludes that an expert opinion is one that can reasonably be held on the basis of the facts and the chain of reasoning of the expert, the threshold [for establishing a *prima facie* case] will be satisfied, even if it is not the only opinion that can reasonably be expressed.[104]

112 We submit the same must hold true for expert evidence which is not meaningfully controverted.

113 Absent the apparent conflict with the undefined term 'acute-profound', there was nothing illogical about Professor Smith's unchallenged evidence. On the contrary, faced with no evidence of any sentinel event, and uncontroverted evidence regarding the final hour hypothesis, there was no logical basis for a finding that a sentinel event might have occurred.

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[103] *Linksfield* at para 39

[104] *MV Pasquale Della Gatta MV Filippo Lembo Imperial Marine Co v Deiulemar Compagnia Navigazione Spa* 2012 (1) SA 58 (SCA) at para 26

114 As the High Court and the dissenting judgment in the SCA recognised, there was simply no proper contrary evidence weighing against Professor Smith's hypothesis. The High Court concluded that *"[A] compelling case is made for [Ms M] that the brain injury to the baby was sustained due to the inordinate length of time spent in distress"*.[105]

115 For these reasons, the SCA ought to have concluded that a preponderance of the evidence pointed to the absence of a sentinel event, and ought to have accepted the final hour hypothesis.

CONCLUSION

116 For the reasons set out above, this matter implicates fundamental rights and the scope for holding the state to account when substandard resource management and medical care is provided, and where a child suffers a devastating injury. In the circumstances, we submit that the interests of justice favour this Court entertaining the appeal.

117 In light of the above, we submit that leave to appeal should be granted and the appeal should be upheld with costs, including the costs of two counsel.

STEVEN BUDLENDER SC

EMMA WEBBER

Counsel for the applicant

Chambers, Sandton
14 January 2021

[105] High Court judgment at para 22, p 1570, vol 16

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: **270/2021**

In the matter between:

TM obo MM Applicant

and

MEC FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG PROVINCE Respondent

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APPLICANT'S LIST OF AUTHORITIES

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1. *AM and Another v MEC for Health, Western Cape* 2021 (3) SA 337 (SCA)
2. **AN v MEC for Health, Eastern Cape* [2019] 4 All SA 1 (SCA)
3. *General Council of the Bar v Jiba and Others* 2019 (8) BCLR 919 (CC)
4. *Kruger v Coetzee* 1966 (2) SA 428 (A) 430
5. **Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC)
6. *Life Healthcare Group (Pty) Ltd v Suliman* 2019 (2) SA 185 (SCA)
7. *Louwrens v Oldwage* [2006] 1 All SA 197 (SCA)
8. *M v MEC for Health, Eastern Cape* (699/17) (2018) ZASCA
9. **Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC)
10. *MEC for Health, Eastern Cape v DL obo AL* [2021] ZASCA 68
11. *MEC for Health, Eastern Cape v Z M* [2020] ZASCA 169
12. *Meyers v MEC, Department of Health, EC* 2020 (3) SA 337 (SCA)

13. **Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another* 2001 (3) SA 1188 (SCA)

14. *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA)

15. *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA)

16. *MV Pasquale Della Gatta MV Filippo Lembo Imperial Marine Co v Deiulemar Compagnia Navigazione Spa* 2012 (1) SA 58 (SCA)

17. **Oppelt v Department of Health, Western Cape* 2016 (1) SA 325 (CC)

18. *Pitzer v Eskom* [2012] ZASCA 44

19. *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC)

20. *Siman & Co (Pty) Ltd v Barclays National Bank Ltd* 1984 (2) SA 888 (A)

Legislation

21. Constitution of the Republic of South Africa, 1996

Foreign case

22. Browne v Dunn 1893 (6) R 67, H. L,

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
BRAAMFONTEIN

CC CASE NO: 270/21
SCA CASE NO: 230/2019
HC CASE NO: 20454/2014

In the matter between:

TM obo MM Applicant

and

MEC FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG PROVINCE Respondent

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RESPONDENT'S HEADS OF ARGUMENT

Introduction

1. This is an application for leave to appeal against an order and judgment of the Supreme Court of Appeal upholding Respondent's appeal against a decision of the High Court holding the Respondent liable to compensate the Applicant in respect of a claim brought on the basis of alleged medical negligence by a state health facility.

2. The claim arose against the following brief backdrop. Over weekends (and on week nights) the Charlotte Maxeke Hospital in Johannesburg ("the Hospital") operates

only one of its two theatres in its maternity section. The Applicant, who was in labour, was admitted to the maternity section of the Hospital at 12:55 on 28 August 2010, which happened to be a Saturday. After the Applicant was examined, it was anticipated that there would be a vaginal delivery. However, at 16:00 hours, on account of concerns about the well-being of the foetus, it was decided that the birth process should be way of caesarean section (C-section). Unfortunately, the theatre was in use at the time and the C-section could be performed only at 18:15. The child, Baby M, was born in a compromised state and suffers from cerebral palsy. One of the pleaded grounds of negligence was that in her capacity as the provincial MEC of Health the Respondent had failed in her duty to ensure that the Hospital was suitably and adequately equipped to enable the Hospital staff to perform the C-section on Plaintiff timeously. Applying the principles set out by this Court in *Soobramoney*[1], the High Court rejected that complaint as a ground of negligence. However, the High Court went on to hold that the Respondent was liable in delict, but on a different ground. That ground was this. The failure by the Hospital staff members to utilize the theatre (during two short periods prior to Applicant's admission to Hospital and a short period before it was decided that Applicant required a C-section) constituted negligence in that they had mismanaged available resources. It is necessary to hasten to note that the finding of negligence on this ground was made notwithstanding that neither the non-utilisation of the theatre earlier in the day nor the alleged "mismanagement" of resources was pleaded as a ground of negligence.

[1] *Soobramoney v Minister of Health (KwaZulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC)

3. All five judges of the SCA rejected the High Court's finding that the Respondent should be held liable on the basis that the alleged non-utilisation of the theatre or other resources was negligent. However, the SCA Judges were still split three-two on the Respondent's liability. The majority held that the Respondent was not liable as neither negligence nor causation had been established. However, the minority found that negligence had been established, but on different grounds and that causation too had been established. In this application, the Applicant contends that the majority erred and ought to have found the Respondent liable in delict.

4. It is submitted that, having regard to what has been set out above, the matter before this Court does not raise a constitutional issue. Nor does it raise an important question of law that ought to be determined by this Court. In the premises, the requisites for the grant of leave to appeal to appeal have not been met. Accordingly leave to appeal ought not to be granted. It is further submitted that, even if it is found that the requirements for the grant of leave to appeal are met, leave to appeal ought still to be refused as it is not in the interests of justice that leave to appeal is granted.

5. In light of the foregoing, the following matters are addressed in these Heads: the requirements that an Applicant must meet in order to be granted leave to appeal; why this matter does not raise a constitutional issue or an important question of law that ought to be determined by this Court; why the interests of justice do not require that this Court hears this matter; a brief synopsis of the relevant facts; the findings of High Court; the new basis of wrongfulness and liability raised by the

Applicant; the issues as considered in the two judgments delivered in SCA; and why, even if leave to appeal is granted, the appeal ought to be dismissed.

6. In the next section of these Heads, the requirements that must be met before leave to appeal is granted are dealt with. However, before those requirements are considered, it is submitted that it will be instructive to emphasise the following matters.

7. First, the High Court held that the Respondent was liable in delict on the basis that the Hospital had not managed its resources adequately. Accordingly, the principal issue before the SCA was whether an MEC for Health may be held liable in delict where it is found that a state hospital had not managed its resources adequately. It is not without significance that all five Judges of the SCA agreed that the High Court had erred in holding the Respondent liable on the ground that the Hospital had not utilized its resources efficiently. However, the SCA was split on whether the Respondent was delictually liable to compensate the Plaintiff, on other grounds: three Judges said no and two said yes.

8. A proper reading of the two judgments of the SCA makes it clear that the difference between the majority and the minority judgments was this: whether, *on the facts*, the Applicant had established that the conduct of the hospital staff had been negligent and if so whether such negligence was causally connected to the minor child being afflicted with cerebral palsy.

9. In the premises, the following submissions are reiterated: this application does not raise a constitutional matter; the application for leave does not raise an arguable

point of law or a matter of general public importance that ought to be considered by this Court; and it is not in the interests of justice to grant leave. Accordingly, leave to appeal ought not to be granted.

Requirements for leave to appeal

10. The requirements that an applicant for leave to appeal to this Court must meet are in essence two-fold: the matter must fall within the jurisdiction of this Court, and it must be in the interests of justice to grant leave. In this connection, this Court has said:[2]

> It is trite that for leave to appeal to be granted, an applicant must show that the matter falls within the **jurisdiction** of this Court and that **the interests of justice** warrant the granting of leave. [Emphasis added.]

11. In respect of the first requirement, namely jurisdiction, this Court has noted[3] that [in terms of s 167(3)(b) of the Constitution]**:**

> This Court's jurisdiction is engaged when a matter raises a constitutional issue or an arguable point of law of general public importance that ought to be considered by this Court.

12. The requirement that an arguable point of law of general public importance is raised is satisfied, this Court said in *Paulsen,*[4] if the point is in fact a *point of law* and if *it* is in addition *arguable.* [Emphases added.] The latter requirement, namely that the

[2] In *Ramabele v S; Msimango v S* [2020] ZACC 22, at [30]; *General Council of the Bar v Jiba* [2019] ZACC 23, at [35]
[3] In *Ramabele* (above)
[4] *Paulsen v Slip Knot Investments 777* 2015 (3) SA 479 (CC), at [20]; *Big G Restaurants (Pty) Ltd v Commissioner for South African Revenue Service* [2020] ZACC 16, at [12]

point is arguable, is met if: there is some degree of merit, or there is substance, in the argument; and while it need not be convincing at the stage that leave is being sought, it must have a measure of plausibility and some prospects of success.[5]

13. *Paulsen*[6] (above) also laid down that the requirement that the matter must be one of general public importance is fulfilled if the matter transcends the narrow interests of the litigants and implicates the interests of a significant part of the general public. In *Big G Restaurants* (above), for example, where the contracts in question were franchise agreements that were likely to affect franchisees throughout South Africa, it was held that this requirement had been fulfilled. On the other hand, in *Tiekerdraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited and Others*[7] it was held that this requirement had not been met as the issue involved the interpretation of a specific lease agreement: it might have been different if the lease had been a standard form document in widespread use, affecting a large number of consumers. But that was not the case.

14. Whether it is in the interests of justice for this Court to adjudicate a matter, it was pointed out in *Tasima,*[8] requires a consideration of an open list of factors. As regards this requirement, among the factors that this Court listed as relevant in *BE*[9] are the following: reasonable prospects of success;[10] the importance of the

[5] *Paulsen*, at [21] and [22]
[6] At [26].
[7] [2019] ZACC 14, at [13]
[8] *Road Traffic Management Corporation v Tasima (Pty) Limited*; *Tasima (Pty) Limited Road Traffic Management Corporation* [2020] ZACC 21, at [25]; *Jiba* (above), at [36]
[9] *BE obo JE v MEC for Social Development, Western Cape* [2021] ZACC 23, at [8]
[10] See also *Paulsen* (above), at [29]; *S v Boesak* 2001 (1) SA 912 (CC), at [12]

issue raised;[11] whether a decision by this Court is desirable; and the public interest in determining the issue.[12]

15. On the bases of what is set out hereunder, it is submitted that this application does not meet the requirements for leave to be granted for at least the following reasons: it does not raise a constitutional issue or an arguable point of general public importance that ought to be heard by this Court. This is so, it is submitted, on account of the approach this Court adopted in *Jiba* (above) to determine if these requirements are met.

16. In *Jiba*, this Court said:[13]

> "The proper approach to [an enquiry into this Court's jurisdiction] is to have recourse to the pleadings and interpret them with a view to determine the nature of the claim advanced. It must be clear from that claim that a constitutional issue or an arguable point of law of general public importance is raised. For a constitutional issue to arise the claim advanced must require the consideration and application of some constitutional rule or principle in deciding the matter."

17. As regards the requirement that this application raises a constitutional issue, the following matters bear emphasising. First, it is clear from the pleadings that the Applicant's claim was based on the ordinary principles applicable to medical negligence claims.[14] Second, the negligent conduct that is alleged in the Plaintiff's amended Particulars of Claim may be grouped into two broad categories: the failure to provide adequate resources, in the form of facilities and/or personnel;

[11] *Road Traffic Management Corporation v Waymark (Pty) Limited* 2019 (6) BCLR 749 (CC), at [28]
[12] *De Reuck v Director of Public Prosecutions, WLD* 2004 (1) SA 406 (CC), at [3]-[4]
[13] At [38]
[14] The Applicant's amended Particular of Claim are contained in Vol 1 of the Record, at pp 3-23

and sub-standard care rendered to the Applicant by the Hospital staff. (It perhaps should be reiterated in parenthesis that the issue of the earlier non-use of the theatre was not pleaded. However, evidence was led on that issue.) Third, having regard to the pleadings, and the principles applicable to claims in delice, if the Applicant established negligence and that such negligence was the cause of the injury, liability would follow. Fourth, the only constitutional issue that arose was whether the Respondent was under a duty in terms of s 27 of the Constitution to provide the further resources contended for and, if so, would that failure constitute negligence for the purposes of a claim in delict. Fifth, all six Judges (Fisher J in the High Court and the five Judges of the SCA) were agreed that, on the facts, and based on what this Court said in *Soobramoney* (above), negligence had not been established in respect of the resources issue. Seventh, there is no appeal to this Court against that finding.

18. In addition to the foregoing, the following further matters also bear noting. All the Judges were agreed on how the *Soobramoney* principle falls to be applied to the facts of this case. There was no dispute about this issue in either the High Court or the SCA: all the Judges accepted that in respect of budgetary matters and allocation of resources "[a] Court will be slow to interfere with rational decisions taken in good faith by political organs and medical authorities".[15] As the High Court held in favour of the Respondent on this issue, this was not a ground of appeal when the Respondent approached the SCA. Moreover, the Applicant has not appealed against the judgments of the SCA in respect of that issue.

[15] Soobramoney (above), at [29]

19. It is accordingly submitted that, applying the test laid down in *Jiba*, this matter does not raise a constitutional issue.

20. As regards to the requirement that the matter must be a question of law, in *Jiba*[16] this Court also found that, although the SCA was divided three-two, the differences did not flow from the application of legal principles: it stemmed from an evaluation of the facts.

21. It is submitted that in this matter too the differences between the majority and the minority stem from an evaluation of facts, not an application of legal principles. In this regard the following matters deserve mention. As is clear from the two SCA judgments that were handed down by the SCA on appeal to it, what was in issue in the SCA was whether on the facts, negligence and causation had been established. With respect, neither of these is a point of law, still less are they issues of general public importance: their determination is confined to the facts of the case. To the extent that the majority and the minority made different findings, it may suggest that this application raises an arguable point, but that is not the requirement that the Applicant must meet: the requirement that must be met is that the issue that is arguable is a *point of law* of general public interest that ought to be considered by this Court. The evaluation of facts is not a point of law. It is submitted that, because the issue is not a point of law, this Court's jurisdiction is not engaged. In the premises, it is submitted that the issues raised in this matter are also not of general public importance that ought to be considered by this Court.

[16] At [[57]-[59]

22. However, notwithstanding what is set out in the paragraphs immediately above, it is contended on behalf of the Applicant that this application raises constitutional matters. The bases of that contention are as follows:[17] it is inherently linked to the constitutional right of access to adequate and to emergency healthcare and the rights of children; it implicates the constitutional norms of accountability, responsiveness and good governance; and it concerns a determination of the nature and scope of the delictual element of wrongfulness.

23. It must immediately be noted that, in support of the contention that this matter raises a constitutional issue, there is no reference to the pleadings. This is not surprising, as the issues set out in the paragraphs immediately above had not been pleaded.

24. Be the foregoing as it may, in support of the submission that this matter raises a constitutional issue the Applicant places reliance in part on what this Court said in *BE* (above). It is submitted however that Applicant's reliance on *BE* is misplaced. This is because of the following. First, as noted in this Court's judgment in *BE*,[18] the application for leave to appeal in that case required it determine whether, the governing statutory and regulatory provisions in that matter imposed on the MEC concerned a legal duty to take reasonable steps to prevent harm to children in Early Development Centres, places of care and similar institutions. Second, relying

[17] Applicant's Heads of Argument: paragraphs 16-20
[18] At [7]

on its decisions in *Loureiro*[19] and other matters, this Court immediately went on to point out the following:[20] "*an appeal against a finding on wrongfulness* on the basis that a Court failed to have regard to the *normative imperatives of the Bill of Rights* ordinarily raises a constitutional issue". [Emphases added.] Third, however, the majority in the SCA in the present matter, against whose judgment the Applicant seeks to appeal, did not find against the Applicant on the basis of wrongfulness. As is detailed later in these Heads, for the purposes of Applicant's delictual claim, the majority in the SCA assumed that the requirement of wrongfulness had been met but found against the Applicant on the basis that she had failed to prove that the conduct of the Hospital's personnel had been negligent or that such conduct was the cause of the unfortunate consequence of the delay in performing the C-section on the Applicant. In light of the foregoing, it is submitted that, as there was no adverse finding on the issue of wrongfulness, on the basis of what was said in *BE* as set earlier in this paragraph, it ought not to be accepted that the constitutional issue contended for by the Applicant arises.

25. On the same basis as set out in the paragraph immediately above, it is further submitted that, as the absence of wrongfulness was not the basis of the majority in the SCA upholding the appeal, what this Court said in respect of wrongfulness in *Mashongwa*[21] is of no application: it cannot be a legitimate basis to contend that this matter raises a constitutional issue.

[19] *Loureiro v Imvula Quality Protection (Pty) Limited* [2014] ZACC 4,
[20] *BE*, at [7]
[21] *Mashongwa v Passenger Rail Agency of South Africa* 2016 (3) SA 528 (CC)

26. It is also contended on behalf of the Applicant that this matter implicates the constitutional norms of accountability, responsiveness and good governance. In response to the raising of this issue, it must be immediately be reiterated that this issue was not pleaded: what was pleaded was that the Respondent's failure to ensure that public hospitals were well resourced to cope with all exigencies that arise constitutes negligence. Moreover, at the trial the issue of inadequate resources was not raised in general terms: the complaint made, although as has been pointed out it was not pleaded, was that the theatre had not been used over three specified periods earlier in the day. Again, in the circumstances of this matter, the non-use issue arose not as a constitutional one or a legal question, but a factual one and whether the non-use constituted negligence and was causally related to the unfortunate consequence.

27. Finally, on the issue of this Court's jurisdiction to consider this matter, it is contended on behalf of the Applicant that this application raises an arguable point of law of general public importance. That point is said to be this: the nature and scope of the delictual duty owed by the MEC to mothers in labour . . . to ensure efficient use of resources.[22] In response to this contention, it is again stressed that this issue was not pleaded. In addition, no basis is set out as to why there is a general duty. The Particulars of Claim, properly construed, alleged that the negligence was in respect of the Applicant, not to mothers in labour. In any case, it is not at all clear why a special duty is owed to mothers in labour when the rights set out in s 27 of the Constitution are expressly granted to *everyone*. That wider

[22] Applicant's Heads: para 21

extension to all users of state health facilities, it is submitted, is a matter that must be kept in mind when determining whether it is in the interests of justice for this Court to hear this matter.

28. In light of the foregoing considerations, it is submitted that as regards the question of whether or not this matter engages this Court's jurisdiction, there are parallels between the approach adopted by the Applicant and that of the General Council of the Bar when, in the matter of *Jiba* (above), the GCB sought leave to appeal against the decision of the majority in the SCA dismissing its appeal to the SCA. It is submitted with respect that this Court ought to follow the approach that it adopted in *Jiba* and that it ought to reach the same conclusion, namely this matter does not engage the jurisdiction of this Court and leave to appeal accordingly should be refused

29. That conclusion, it is submitted ought to be dispositive of the application. However, even if that conclusion is not reached, it is submitted that leave to appeal falls to be refused on the basis that it is not in the interests to grant leave to appeal.

30. The factors that are ordinarily taken into account by this Court when determining whether it is in the interests of justice to grant leave to appeal have been set out above. Regard being had to those factors, it is submitted that it is not in the interests of justice that leave to appeal is granted in this case. This is on account of the following: the appeal does not bear reasonable prospects of success;[23] the manner in which the questions that the Applicant asks to be decided have arisen;

[23] *Paulsen* (above), at [29]; *S v Boesak* (above), at [12]

and the limited factual bases on which to draw conclusions that may well have far-reaching consequences in medical negligence claims against the state whether in general or in respect of maternity matters.

31. In the premises, it is submitted that the jurisdictional requirement for leave to appeal have not been met, alternatively if they are met, it is not in the interests to grant leave to appeal in this matter.

32. In the remainder of these Heads, the merits of the appeal are considered under the following headings: the relevant facts; the High Court's decision; the issue of unlawfulness as contended for by the Applicant; the issues distilled by the SCA and how they were dealt with by the minority and the majority; and why the appeal ought to be dismissed.

Relevant facts

33. The relevant facts are largely common cause, being based principally on the Plaintiff's[24] antenatal record, the relevant Hospital records, reports of experts engaged by the parties and the joint minutes they prepared. They may be summarized as set out hereunder.

[24] In these parts of the Heads, to facilitate referencing, the parties will be referred to as they were in the Pleadings and the High Court: the Applicant herein will be referred to as the Plaintiff and the Respondent as the Defendant.

34. First, the Plaintiff's first visit to an antenatal clinic was on 8 July 2010, at 33-35 weeks' gestation. She was then 25 years old. It was to be her second baby. She was regarded as low risk, and a midwife delivery was planned.[25]

35. Second, the Plaintiff was admitted to the maternity section of the Hospital at 12:55 on 28 August 2010 in the early active stage of labour. It appears that she was on continuous cardiotocograph (CTG) during her labour. The foetal heart rate, which was plotted on the Partogram at half hourly intervals between 13:00 and 15:00, was within the normal limits and the progress of labour in terms of cervical dilation was adequate.[26]

36. Third, the description of a CTG at 15:45 was in keeping with an abnormal CTG and a decision to perform a C-section was taken at 16:00.[27] However, the theatre was being used at the time. The patient undergoing a CS was Ms M, who was in theatre from 15:50 to 16:25. In addition, a CS had thereafter first to be performed on Ms G, who occupied the theatre between 16:45 and 17:55. The Plaintiff's C-section began at 18:15 and ended at 19:20.[28] The interval between the decision [to perform the C-section] and the delivery [of the baby] was 155 minutes.

37. Fourth, the Apgar scores were low and suggested a baby born in a depressed condition. Baby M had suffered an intrapartum hypoxic ischemic injury which resulted in permanent brain damage, that is, mixed-type cerebral palsy (spastic-

[25] Appeal Record: Vol 4, pp 374-5. See also the Expert Report of Prof Nolte: Vol 3, p 293
[26] Ibid: Vol 4, pp 377-385. See also the Expert Report of Prof Nolte: Vol 3, p 294-296
[27] Ibid: Vol 4, p 385
[28] This appears from the theatre record for the day, which appears in Vol 9, p 883

dystonic quadriplegia). An MRI scan reflected that this had been caused by an acute profound insult.[29]

In the High Court[30]

38. In her amended Particulars of Claim,[31] as noted by the High Court in paragraph [3] of its judgment,[32] the Plaintiff alleged that the Defendant was liable to compensate her in delict for the damages she had suffered in her representative capacity on account of the alleged negligent conduct of the Defendant, the Gauteng Department of Health and the Hospital's staff members.

39. As has already been noted above, the amended Particulars of Claim set out three sets of grounds on which the Plaintiff claimed the Defendant had been negligent: Defendant's alleged failure to provide adequate and properly qualified or trained medical and/or nursing personnel and facilities at the Hospital;[33] the alleged failure to take steps or put in place measures or steps to prevent complications during Plaintiff's labour;[34] and the alleged sub-standard monitoring and/or care provided by the Hospital's medical and nursing staff.[35] In view of the finding of the minority in the SCA that the Hospital's medical and nursing members were negligent because they did not attempt to seek an alternative hospital that could perform the C-section on the Plaintiff, the following point is worth stressing: despite itemizing

[29] Ibid: Vol 4: Joint Minutes of Paediatricians: p 363, paras 12 and 13
[30] Up to this point in these Heads, the parties have been referred as they are referred to in the application for leave. However, for ease of reference, in this section of the Heads, the parties will be referred as they were in the High Court, namely as Plaintiff and Defendant.
[31] The amended Particulars of Claim are in Vol 1 of the Record: pp 3-23
[32] The High Court's Judgment is in Vol 16, pp 1563-1577
[33] Amended Particulars of Claim: Vol 1, p 10, paras 7.1.1-7.1.4
[34] Ibid, pp 10-11, paras 7.1.5-7.1.7
[35] Ibid, pp 11-14, paras 7.2.1-7.2.19

19 acts or omissions in respect of which the Hospital staff members were alleged to have been negligent, the non-referral to an alternative hospital was not one of them.

40. There was a large measure of agreement among the respective experts in each of the five disciplines on which they compiled reports: radiology; neurology; nursing; obstetrics; and paediatrics/neonatology. As emerges from a consideration of the judgment of the High Court, the issues in dispute were relatively limited. As a result, only the respective obstetric and paediatric experts of the parties testified: Dr Murray and Prof Smith (for the Plaintiff) and Dr Marishane and Prof Bolton (for the Defendant). In addition, Dr Chauke gave evidence principally on the processes and procedures followed by the Maternity Unit, how its medical staff members are deployed over weekends and why only one theatre is operated over weekends and on week nights.

41. As has already been noted, the High Court found the Defendant liable in delict on the ground of the Hospital's sub-optimal use of the theatre, a ground of negligence that had not been pleaded.

42. It should also be noted that the issue of wrongfulness did not arise in the High Court, certainly not on the question of the sub-optimal use of available resources. Nor did it arise in the SCA. However, as noted above, it is a matter that has been raised in this application – for the first time. The question of unlawfulness must accordingly be addressed in these Heads. It is most conveniently dealt with in the

section of the Heads immediately hereunder, before a consideration of the majority and minority judgments of the SCA.

Wrongfulness

43. Earlier in these Heads, the issue of wrongfulness was addressed in the context of whether, having regard to the findings of the SCA and the pleadings, the question is a live issue and can be raised only now and thereby invest this Court with jurisdiction in the application for leave to appeal. As submitted earlier: such an approach ought not to be countenanced. In this section of the Heads, however, the issue considered is the alleged legal duty imposed on the Defendant outside the common law rules relating to claims founded on alleged medical negligence.

44. It is instructive to begin by considering the bases on which the Applicant now contends that *the Respondent* bears a legal duty, through the management of public resources, to ensure the efficient use of resources.

45. The Applicant contends[36] that this duty derives from the following: s 27 of the Constitution, which requires the state to take reasonable measures within its available resources to achieve the progressive realisation of the right of everyone to access to health care services; the state's duty to respect, protect, promote and fulfil other rights contained in the Bill of Rights, including the right to bodily and psychological integrity; the constitutional norms of good governance, accountability and responsiveness; and the provisions of s 195(1)(b) of the Constitution, which

[36] At paragraphs 44 to 48 of her Heads of Argument

state that public administration must be governed by democratic values and principles enshrined in the Constitution, including that "efficient, economic and effective use of resources must be promoted".

46. The question of whether a claim that a breach of or non-compliance with statutory measures is wrongful, and can give rise to delictual liability, was considered recently again by this Court in *BE* (above). It is submitted that what was said in *BE* and the cases that were referred to in the judgment are instructive for the consideration of the issue of wrongfulness as raised by the Applicant.

47. As has been noted above, in *BE* the question was whether, having regard to the applicable statutory measures, the MEC concerned had a legal duty to take reasonable steps to prevent harm to children in Early Development Centres.

48. Relying on what the SCA had said in *Olitzki*,[37] as endorsed by this Court in *Steenkamp N.O.*[38], this Court formulated the applicable test, which may be summarised as set out hereunder.[39]

49. One of the considerations in determining whether a claim that a breach or non-compliance with statutory measures is wrongful, and can give rise to delictual liability, is whether the operative measures anticipate, directly or by inference, an obligation to pay damages for loss suffered as a result of the breach or non-compliance. If the measures do not expressly, or by clear implication, impose any

[37] *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA)
[38] *Steenkamp N.O. v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC)
[39] *BE*, at [20]

duty, the focus of the inquiry will be on whether the breach or non-compliance, when taken with all relevant factors, leads to the conclusion that it was wrongful so as to attract delictual liability. Those relevant factors would be whether the regulations provide alternative remedies for their enforcement and whether the power conferred by the measure is discretionary and whether the imposition of delictual liability on the Minister will have a "chilling effect" on the exercise of the statutory powers. Ultimately, the question is whether public policy and interest favour holding the Minister liable for damages arising from incident in issue.

50. This Court then endorsed what the SCA said in the earlier case of *CB*[40], which dealt with the same statutory and regulatory provisions and held as follows:[41] nothing in the legislative framework on which the claimants rely is indicative of an intention to visit with delictual liability non-compliance with any particular regulatory function.

51. It then went on to hold that the SCA had been correct in dismissing the claim for damages, as wrongfulness (for purpose of imposing delictual liability) had not been established.

52. For the purposes of this application for leave to appeal, what the SCA said when the *BE* matter came before it is also helpful.[42] In essence, the SCA said the following.[43] A claim that a breach of, or non-compliance with, statutory provisions

[40] *Government of the Western Cape: Department of Social Development v CB* [2018] ZASCA 166 (SCA)
[41] *BE*, at [23]
[42] The SCA's judgment is reported as *MEC for Social Development, Western Cape v BE* [2020] ZASCA 103 ("BE (SCA)")
[43] *BE (SCA)*, at [11] and [12]

is wrongful and gives rise to delictual liability can rest on two possible bases: properly construed, and having regard to the object and purpose of the legislation, the provision imposes an obligation to pay damages for any loss caused by breach or non-compliance; or the breach or non-compliance, when taken together with all other relevant factors, of which the constitutional norms founded in the Bill of Rights will be fundamentally important, leads to the conclusion, in accordance with common law principles, that it was wrongful so as to attract delictually liability. The two enquiries tend to overlap as the first involves a consideration of similar policy issues to the second. If the policy of the statute is not to create a statutory liability to pay compensation for breach of its provisions, those same policy factors will point against the existence of a common law duty of care. When the statutory provisions in question involve conduct that constitutes administrative action in terms of s 33 of the Constitution, the breach or non-compliance relied upon is a breach of or non-compliance with a public duty and that ordinarily attracts a public remedy rather than a private law remedy of damages.

53. Based on the foregoing, it is submitted that the alleged failure of the MEC in this matter to ensure that resources are used efficiently does not constitute the breach of a legal duty (as opposed to a public duty) and accordingly does not found a claim for delictual damages. That submission is based on the following. First, the measures upon which the Applicant relies do not anticipate, directly or by inference, an obligation to pay damages for loss suffered as a result of the breach of or non-compliance therewith. Second, having regard to the chilling effect of imposing delictual liability for the alleged inefficient use of resources and the

applicability of the measures to all aspects of public administration, public policy and the public interest do not favour holding the Respondent in this matter liable for damages based on the inefficient use of public resources. Third, as the impugned conduct (of the MEC) largely constitutes administrative action, her alleged breach of or non-compliance with her public duty should attract a public remedy rather than a private law remedy of damages. Fourth, extending the ambit of delictual liability in respect of medical negligence matters, or some of them, given the perilous financial state of health care facilities, which was referred to in this matter as well, and as was noted by this Court in *DZ*[44], will not be in the public interest.

54. As regards the issue of wrongfulness as now raised by the Applicant, the following further issue should be considered. It is the main pillar on which her claim that the application for leave to appeal raises a constitutional matter rests. If the submissions set out above are accepted, the consequence will be that the Applicant's claim, insofar as it is based on a constitutional issue, must fail. In that case, the only issues before this Court will be the findings on negligence and causation. However, those are not constitutional matters, and accordingly fall outside the jurisdiction of this Court. Accordingly, leave to appeal ought not to be granted.

55. It is convenient now to deal with the merits of the appeal. This is done in the next section of these Heads.

[44] *MEC, Health and Social Development, Gauteng v DZ* [2017] ZACC 37

In the SCA

56. As is detailed hereunder when considering the two judgments of the SCA, during the course of the trial, in deciding whether or not the Defendant should be held liable in delict, the High Court dealt with three matters: should the hospital have had a second operational theatre at the time;[45] was the decision to perform a C-section on Ms G before performing a C-section on Plaintiff negligent;[46] and was the non-use of the theatre during three periods *before* Plaintiff was admitted to the Hospital negligent.[47]

57. Importantly for the purposes of this application for leave to appeal, the High Court did not uphold Plaintiff's claim on the second theatre issue or the triage issue. However, it found the Defendant liable in delict on the basis of the downtime issue.

58. The basis of the High Court's finding in respect of Defendant's liability appears to be as follows.[48] The theatre had not been optimally used earlier in the day: the theatre record showed that it had not been in use during the following times: between 04h35 and 06h05; between 07h05 and 09h30; and between 11h40 and 14h15. Had it been put to use during those periods, the High Court said, the C-sections on the other patients would have been performed earlier and there would not have been a delay in performing the C-section on the Plaintiff. The poor management of resources by the Unit's staff members had led directly to the delay

[45] In the SCA judgments, this is referred to as the "second theatre issue".
[46] In the SCA judgments, this is referred to as the "triage issue".
[47] In the SCA judgments, this is referred to as the "downtime issue".
[48] High Court Judgment: Vol 16: pp 1572-1574, paras [33]-[41]

in performing the C-section on the Plaintiff, with the resultant injury to Baby M. The Hospital's staff members had been negligent in not seeing to it that the Unit had managed its resources in a manner that would have rendered the theatre available to the Plaintiff sooner.

59. On appeal to the SCA, the Defendant challenged the High Court's finding of liability on three broad grounds. She alleged that the High Court had erred on account of the following: the non-use of the theatre had occurred mainly before Plaintiff's admission to the Hospital High Court, that is prior to Defendant's legal duty to the Plaintiff arising; all the non-uses had occurred before there was an indication that the Plaintiff would need to undergo a C-section; and the evidence, especially that given by Dr Chauke, indicate that there were cogent reasons for the non-use, which in any case did not translate into negligent conduct for the purposes of delictual liability.

60. The minority judgment in the SCA found for the Plaintiff. Significantly, however, as is detailed hereunder, it found that the Defendant ought not to be held liable on the ground on which the High Court found for the Plaintiff, but on ground that the staff had been negligent in two other respects. The majority judgment found that negligence by the MEC or the Hospital staff had not been established, either on the ground upon which the High Court had relied, or on the grounds relied upon by the minority. Nor, it found, had causation been established.

61. The majority and minority differed on the outcome of the appeal before the SCA. They also differed on whether or not, having regard to the pleadings, the Plaintiff

was entitled to rely on some of the alleged "failings"[49] of the Defendant or the Hospital staff for which Plaintiff had contended during the trial and/or in the appeal. Importantly, all those failings, which numbered five, were considered by both the majority and the minority.

62. The five alleged "failings" may be summarized as follows:[50] the failure to have a second functioning maternity theatre ("the second theatre issue"); the failure to use the theatre earlier in the day ("the downtime issue"); the decision to take Ms G, rather than the Plaintiff, to theatre at 16:00 ("the triage issue"); the failure to take interim measures to improve the foetus' oxygenation while Plaintiff waited for her operation ("the interim measures issue"); and the failure to refer the Plaintiff to another Johannesburg hospital ("the referral issue").

63. As regards these five issues, it is submitted that it will helpful, for the purposes of this application, and should leave to appeal be granted, for the merits of the appeal, to consider each issue as it was dealt with by either the minority or the majority and then as it was dealt by the other set of Judges.

Failure to have a second operational theatre

[49] This is the word that the majority judgment uses to describe the negligent conduct on which the Plaintiff relied: at paragraph [59] and further of the SCA judgment: Record: Vol 16, p 1600 .
[50] They are set out at [59]

64. It is perhaps instructive to begin the consideration of this issue by reiterating the following: the High Court had rejected the Plaintiff's case on the second theatre issue; in addition, both the minority and the majority in the SCA agreed that this was not a ground on which to hold the Defendant liable.

65. On this issue, the minority noted that the Plaintiff's argument on the second theatre issue was this.[51] The MEC had been negligent in not ensuring that two theatres were operational [notwithstanding that it was a Saturday, and based on figures provided by Dr Chauke, the number of C-sections that are performed over weekends did not justify the expenditure of scarce funds on a second theatre]. Relying on what this Court had said in *Soobramoney* (above), the minority pointed out that a Court should be slow to interfere with rational decisions taken in good faith by government regarding the funding that should be made available for health care. Accordingly, this could not be a ground for holding the MEC liable.

66. The initial approach of the majority on the issue of the Hospital's not having a second maternity theatre operational on the Saturday in question was similar to that of the minority: the majority judgment pointed out that the way in which money that is allocated to public hospitals is used is entrusted by law to the Minister and senior officials, not the courts.[52] However, the majority then went on to consider the evidence given on this issue by Plaintiff's obstetrician, Dr Murray, but found that it did not address the question of whether, given budgetary constraints and other demands, it was unreasonable for there not to be a second maternity theatre.

[51] The minority's consideration of this issue is set out at paras [22] and [23]
[52] At para [70]

In determining whether the provision of one theatre only was reasonable, it referred to matters that Dr Chauke said rendered the decision reasonable.[53]

67. It is submitted that no case has been made out for challenging the unanimous finding of the SCA on this issue.

The downtime issue

68. In considering this issue, the minority noted that the Defendant had challenged the correctness of the High Court's finding of liability on this ground on the following three bases.[54]

69. First, even if the sub-optimal use of the theatre was negligent, which was disputed, the High Court had erred in holding Respondent liable for negligent conduct that had occurred at a stage prior to Plaintiff's being admitted as a patient, and accordingly prior to the MEC's legal duty to the Plaintiff arising. This contention was based on what the SCA had said in the earlier matter of *AN obo EN v MEC for Health, Eastern Cape.*[55]

70. Second, the High Court had further erred in holding the Defendant liable in delict for such sub-optimal use, as that sub-optimal use had occurred at a time when there was no indication that the Plaintiff would need to undergo a CS.

[53] At paras [75]-[76]
[54] At paras [15]-[21]
[55] [2019] ZASCA 102

71. Third, even if there had been a poor management of resources, which it was contended had not been established when proper account was taken of the evidence of Dr Chauke, that did not translate into negligent conduct for the purposes of delictual liability.

72. The minority refused to hold the Defendant liable on this ground. In support of its refusal, it said the following:[56] it had been held correctly in *AN* (above), that a hospital's legal duty to a patient arises when the patient is admitted to the hospital; the Defendant's employees did not foresee that the Plaintiff would be admitted at 12:55 and would have complications with her pregnancy; the Hospital assumed a legal duty of care to the Plaintiff from the time she was admitted, that is, from 12:55; the alleged mismanagement of resources on which Plaintiff based her claim for relief, namely the non-utilisation of the theatre for certain periods, should not, in the circumstances of this case, attract delictual liability.

73. The minority thereafter pointed out[57] that the wrongfulness of the MEC's conduct depended on the existence of a legal duty, which as noted immediately above, in relation to the Plaintiff had begun only at 12:55 on that day.

74. These correctness of these findings of the minority are challenged by the Applicant. It is submitted that the challenge is not well founded.

75. In respect of the downtime issue, the approach of the majority was as follows. It was willing to assume, without so deciding, that the Defendant, acting through

[56] At paras [17]-[21]
[57] At [42]

those charged with the management of the Unit, had a legal duty, for delictual purposes, to manage the Unit's resources with reasonable efficiency and that this legal duty could, in relation to the Plaintiff, have been breached by acts or omissions preceding her admission at 12:55 that day.[58]

76. However, the majority went on to point out the following:[59] in deciding on the question of whether or not the non-use of the theatre during the downtime was negligent, regard had to be had to the evidence given by Dr Chauke on the different duties performed by Dr Sibeko, the senior doctor on duty on the day; it would also be necessary to consider the medical records of all patients in the unit on that day; however, as the issue had not been pleaded, it would not be right to penalize the MEC for having failed to produce all medical records and undertake a complete reconstruction. Accordingly, the Plaintiff had failed to discharge the burden of proving negligence on the downtime issue.

77. The downtime issue was the sole basis on which the High Court had found that Defendant was liable to the Plaintiff in delict. However, it is clear from what is set out immediately above that both the minority and the majority were of the view that the High Court had incorrectly held the Defendant liable in delict on that ground: the former because there was no legal duty and the latter because negligence had not been established.

[58] At [56]
[59] At [78]-[90]

78. It is submitted that, having regard to the evidence of Dr Chauke, the finding of the majority on this issue ought to be accepted.

The triage issue

79. The High Court had rejected the Plaintiff's case on the triage issue. However, the minority was of the view that it had erred in doing so, while the majority found that the evidence did not justify a conclusion that the Hospital staff had been negligent or that causation had been established.

80. The minority view was that the Plaintiff ought to have been taken to theatre before Ms G on account of the following:[60] Dr Murray's evidence that in respect of Ms G the risk of rupture was only 0,74% and the risk could have been reduced by giving her a tocolytic drug; she would have probably prioritized the Plaintiff over Ms G; and the decision of a senior doctor was necessary. It noted Dr Chauke's evidence that it was a principle that where there was a risk to both mother and child, a reasonable gynaecologist would favour the mother and that he would have made the same decision as Dr Sibeko. However, the minority said that there were no reasons on record why Dr Sibeko had preferred Mrs G, while Dr Murray had stated why the Plaintiff should have been given preference.

81. It is submitted that in considering the correctness of the finding of the minority on this issue, following ought to be kept in mind. Quite why Dr Sibeko, whose hands were clearly full dealing with patients under her care on that day, would include in

[60] At [25]-[27]

her notes the bases on which she had triaged the patients on whom C-sections were to be performed, is not at all clear from the judgment of the minority. In any case, whilst there may be a difference of opinion among doctors on such an issue, this does not mean that the choice made, unless unreasonable, should be classified as negligent. Moreover, as Dr Sibeko had passed away, she was not in a position to consider the files and possibly explain the criteria she had used in triaging the patients for C-sections. It is submitted that the minority view ought not to be accepted.

82. The majority also considered the evidence of Dr Murray and Dr Chauke on this issue.[61] However, it also took into account the evidence of Dr Marishane and Dr Bolton on the potential risk to the baby even when a CTG reading indicated foetal distress. And, it noted, even if a senior doctor had been consulted, it had not been established that the decision would probably have been different. Accordingly, the High Court had correctly rejected the argument that the Plaintiff should have been prioritized.

83. It is submitted that the approach of the majority is to be preferred to that of the minority and so should its finding on the triage issue.

The interim measures issue

84. The question on this issue was this.[62] Whether, given that the Plaintiff's operation had started only two and a quarter hours after the decision to operate, interim

[61] At [91]-[93]
[62] At [97]

measures should have been implemented to improve the foetus' oxygenation, such as administering tocolytic medication, giving the mother an oxygen mask and getting her to lie on her left side.

85. In considering the issue of interim measures,[63] the minority said: given that the hospital records do not reflect that tocolysis was not administered to the Plaintiff or that she had been turned on her side, it must be accepted that these steps had not been taken.[64] But Dr Murray had testified that these omissions constituted sub-standard care.

86. On the question of the administering of tocolysis, the majority noted the following: there was a dispute between the experts, especially Dr Murray and Dr Marishane, on whether administering tocolysis was beneficial; as the Plaintiff's hospital records did not record that tocolysis was given, it must be assumed that it was not; and whilst this failure was questionable, the evidence fell short of showing its administration would probably have had a material effect.

87. As regards giving the mother an oxygen mask, Dr Murray said that while it was a practice in 2010, she was of the view that it helped the infant very little. Dr Chauke did not agree with its use. On the question of issue of getting the mother to lie on her left side, the majority was of the view that, based on the nurses' notes, it was not clear that this had not been done.

[63] The minority dealt with this issue at [28]-[38]
[64] At [38]

88. On this issue too, it is submitted that the majority view approach and finding ought to be accepted.

The referral issue

89. On this issue, the majority began by pointed out that in response to Plaintiff's Rule 35(3) notice for the Hospital's protocols on the transfer of patients to other hospitals during periods of high patient loads, the Defendant's response was as follows: no protocols existed; the Hospital was an academic hospital, and that patients were transferred to, not from the Hospital; and that only ICU patients were transferred to other surrounding hospitals.

90. The majority went on to note that Dr Murray had testified that at Tygerberg Hospital they were proactive in emergencies such as phoning other hospitals. However, neither Dr Chauke nor Dr Marishane were cross-examined on this issue.

91. It accordingly found that the evidence on the referral issue was insufficient for the Court to reach a fair conclusion, such as what other public hospitals existed, their distance from the Hospital, and whether their facilities were likely to have been available to the Plaintiff sooner than at the Hospital.

92. On the referral issue, the minority said: if the theatre was booked, the MEC should have checked with other hospitals in the area if they could render assistance.[65] It

[65] At [43]

appeared to rely on Dr Murray's evidence that in the Western Cape, if there was no space at a hospital, patients are diverted to other facilities.[66]

93. As regards the Hospital's policy, the minority quoted it as follows:

> "If *no space* can be found for the patient within the hospital, the clinical executive on call must be contacted so that arrangements can be made for the patient to be transferred to another medical facility, or alternatively, to ensure that additional nursing staff are acquired to provide the necessary nursing care, thus enabling the patient to remain at the hospital." [Emphasis added.]

94. The minority went on to say that Gauteng has other public hospitals, one being the Chris Hani Baragwanath Hospital and others, which a search on Google maps showed were within a 30 km radius of the Hospital.

95. It is submitted with respect that what emerges from the minority's consideration of this issue is this. On a proper reading of the policy, it applies to the time the patient is being *admitted* to the Hospital. The position of the Plaintiff was quite different: there was *space* when she arrived; she was admitted and was being attended to; however, her procedure had to be delayed because the theatre was being used at the time. Accordingly, the policy upon which the minority relied did not apply. In addition, it is clear that in determining the proximity of other hospitals, reference was made to material that was not on the Court record. In addition, it was not an issue that had been pleaded.

[66] At [43]

Causation

96. One of the other issues on which the minority and the majority differed is whether in respect of the alleged “failures” the requirement of causation had been met in order to hold the Defendant liable, even if negligence had been established.[67]

97. In determining the issue of the requisite causal link between negligence and the adverse outcome, it is submitted that, as pointed out by the majority, the pattern of injury to the brain can be quite decisive in determining whether the harm could have been avoided by expediting delivery.

98. In this case, the injury pattern was identified by the radiologists as being acute profound, meaning that the hypoxia happened over a short period of time. This is as opposed to a partial prolonged pattern, which would signify that hypoxia occurred over a longer period of time. In effect, the difference means that in respect of an acute profound injury there is less time to accelerate delivery and prevent damage to the brain. It is clear from the respective analyses of the minority and the majority that they differed on the import and relevance of the evidence that had been led and came to different conclusions: the minority concluding that the evidence had established causation, but the majority concluding that it had not.

99. It is submitted that Applicant’s criticism of the majority’s decision is unfounded. The general considerations relating to the brain injury suffered by a foetus during the birth process are the subject matter of numerous cases. In particular, it is accepted

[67] The minority considered the issue at [46]-[52], while the majority considered it at [107]-[127]

that, where an objective finding based on an MRI is made that the injury was acute profound as opposed to partial prolonged, the time to take precautionary measure is limited. That emerges from the expert evidence in this case as well. In the circumstances, there is no cogent basis to reject the majority's finding on causation. Nor is there a proper basis to impugn its approach to the issue of causation.

General issues arising from the judgments

100. The matters considered by the majority and the minority in the SCA have been considered in some detail in what has been set out above. What they illustrate is that in respect of the matters on which the majority and the minority differed their differences related to the import of the documents on record and the evidence that was tendered in the High Court. The essence of the differences makes it clear that the differences related not to issues of law or even principle but on what the documents and evidence established.

101. In light of the foregoing, it is submitted that, having regard to the grounds on which the Applicant seeks leave to appeal from this court, there are three issues that are deserving of emphasis.

102. The first is the pleadings. The majority dealt quite extensively with the issue of whether all the issues on which evidence had been led had been pleaded.[68] It found that they had not been. One of the consequences of this, it had earlier

[68] At paragraphs [58]-[68]

pointed out (at paragraphs [64] and [65]) was that some relevant documents were not included in the court record. As a result, it said: "[I]t would not be fair to place too much emphasis on the supposed evidential burden resting on the MEC to explain the supposed failings. The burden of proof remained throughout on [the Plaintiff"]. It is submitted that that conclusion is well founded.

103. Whilst the minority does not appear to have addressed the issue of the burden of proof squarely, it is submitted that a reading of its judgment suggest that it placed emphasis on this evidential burden and made findings against the Defendant, even though the evidence led did not lead to the conclusion that the [overall] burden of proof resting on the Plaintiff had been discharged.

104. Be the foregoing as it may, the second issue that is deserving of emphasis is that it is clear from the pleadings that the principal issue in the trial was whether the Defendant had been negligent in not providing adequate facilities for and reasonable care to the Plaintiff when she was treated at the hospital. However, as is clear from the judgments of the High Court and the SCA, these required the determination of factual matters, given the judgment of this Court in *Soobramoney* (above).

105. Third, even when the matter was argued in the SCA, there was no suggestion that constitutional questions proper were in issue.

106. In this application, however, the Applicant seeks to re-characterise or re-frame the issues that served before the High Court and the SCA as constitutional matters

engaging the jurisdiction of this Court. It is submitted with respect that the Applicant's approach ought not to be countenanced. Neither the High Court nor that SCA were required to look at the Plaintiff's claim on the basis that it involved wider constitutional issues, save for the principle enunciated in *Soobramoney* that, as noted by the minority in the SCA, Courts should be slow to interfere with rational decisions taken in good faith by government regarding the funding that should be made available for health care. Tellingly, that issue is not a matter raised in this application.

107. Based on the foregoing, it is submitted that this matter does not raise a constitutional issue. Nor does it raise questions of law, still less questions of law that should be determined by this Court.

Conclusion

108. In premises, it is submitted that, based on the approach of this Court in *Jiba* (above), and having regard to the pleadings, it ought to be found that this application does not meet the jurisdictional requirements for leave to appeal to be granted.

109. Alternatively, if it is found that the jurisdictional requirements are met, leave to appeal should still be refused on the basis that it is not in the interests of justice that leave to appeal is granted, particularly because this Court is required to make a decision that will have far-reaching consequences for medical negligence claims

against state health facilities in a case where the issues have not been properly pleaded and limited evidence has been led.

110. In the further alternative, if leave is granted, it is submitted that, on the facts, the appeal against the decision of the majority in the SCA ought not to be upheld.

V Soni SC

Phathu Muthige

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