



CONSTITUTIONAL COURT OF SOUTH AFRICA

**TM obo MM v Member of the Executive Council for Health and Social Development,
Gauteng**

CCT 270/21

Date of hearing: 15 February 2022

Date of judgment: 30 May 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 30 May 2022 at 10h00, the Constitutional Court handed down a judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal in which that Court set aside the decision of the High Court of South Africa, Gauteng Local Division, Johannesburg, to award damages to Ms TM, the applicant, on behalf of her minor child, MM, against the Member of the Executive Council for Health and Social Development, Gauteng, the respondent, for the alleged negligent conduct of the staff at the Charlotte Maxeke Academic Hospital.

On 8 July 2010, at 33 to 35 weeks of pregnancy, Ms TM made her first visit to an antenatal clinic and was informed that there were no complications with her pregnancy. On 30 July, she returned to the clinic and after her blood pressure and the heart-rate of her unborn child were checked, she was told that her pregnancy was progressing normally. Thereafter, on 20 August, she went for her follow-up, but the clinic was closed due to the nurses being on strike. Ms TM returned a week later, on 27 August, but the strike was still in progress. That afternoon she experienced lower abdominal pains and went back to the clinic, but it was still closed. When she made another attempt the next morning, she found that the strike was still ongoing.

On 28 August 2010, in the early active stage of labour, Ms TM took a taxi to the hospital and arrived at 12h55. On admission, she was found to be four centimetres dilated and her membranes ruptured shortly thereafter. The nursing staff then conducted regular foetal

monitoring by way of cardiotocography. Nothing abnormal was detected and her labour continued normally.

Earlier that day, at 03h55, another patient, Ms CM, who was pregnant with twins had already been admitted. She required a caesarean section and was scheduled for the procedure at 05h00, however, it was cancelled because the maternity unit had run out of sterilised theatre gowns. Due to this shortage, the theatre was unused from 04h34 to 06h05 (first down time). At 06h00, this issue was resolved and another patient, whose foetus was in distress, had her caesarean section. From 07h05 to 09h30, the theatre was again unused (second down time). Between 09h30 and 11h40, two other patients were taken to the theatre for caesarean sections due to foetal distress. At 09h50, Ms G was admitted to the ward and since she had previously undergone two caesarean sections, a natural birth posed a risk of uterine rupture. From 11h40 to 14h15, the theatre was unused (third down time). Ms DM was also admitted and at 13h45 her baby went into foetal distress. A decision to perform a caesarean section was taken. Ms CM eventually went in for her caesarean section nine hours after it was originally scheduled and the procedure was completed at 15h20. At 15h30, Ms DM was taken to theatre for her caesarean section.

At 15h45, an abnormal cardiotocography reading, which indicated foetal distress, was detected on Ms TM and, at 16h00, a decision was taken that an emergency caesarean section be performed. However, Ms DM was still undergoing a caesarean section from 15h50 to 16h25, and thereafter Ms G occupied the theatre between 16h45 and 17h55. As a result, Ms TM could only be attended to at 18h15 and her caesarean section was finalised at 19h20. MM was born at 18h43, approximately 155 minutes after the initial decision to perform Ms TM's caesarean section was taken. MM suffered a hypoxic ischemic injury due to perinatal asphyxia which resulted in a mixed-type cerebral palsy, that is, permanent brain damage. On 28 November 2013, a magnetic resonance imaging scan performed on MM when he was three years old reflected that this had been caused by an acute profound insult.

Ms TM approached the High Court seeking damages on behalf of MM and the Court was called upon to decide, first, whether the respondent failed to provide adequate resources (facilities and personnel). And second, whether the hospital rendered substandard care to Ms TM. After considering the evidence, the High Court held that there was a direct link between the failure to treat the patients efficiently throughout the day in question and the injury that occurred. It reasoned that the failure by the hospital staff to prevent the second and third down times when they knew that there were women who were in the labour ward in need of caesarean sections amounted to negligence. Accordingly, the Court held the respondent liable on the basis that the hospital had not managed its resources adequately. It further emphasised that this case was about the management of available resources and in so doing, it declined to make a finding on whether the allocation of resources was actionable. Aggrieved by this outcome, the respondent approached the Supreme Court of Appeal.

The Supreme Court of Appeal was split. Both the majority and minority judgments accepted that the respondent, acting through the medical staff, owed Ms TM a legal duty

to exercise reasonable care, skill and diligence in her treatment. However, the majority judgment held that no negligence and causation had been established by Ms TM. On the contrary, the minority judgment held that the wrongful conduct of the hospital staff caused the injury to MM and would have dismissed the appeal.

Unhappy with the outcome of the Supreme Court of Appeal, Ms TM sought leave to appeal to the Constitutional Court. Before this Court, Ms TM argued that despite prioritising Ms G's caesarean section over hers, knowing that her foetus was in distress, the hospital staff did not provide the necessary caesarean section within the required time and failed to refer her to another hospital which might have been able to help. Ms TM further argued that between the time the decision to perform a caesarean section on her was taken and the actual procedure, the staff failed to take appropriate interim measures to mitigate the risks associated with foetal distress. Finally, she submitted that the hospital's failure to properly manage its resources was indicative of a systematic failure and the respondent should not escape such accountability even where the cause of the harm is impossible to pin down.

The respondent contended that the alleged failure to ensure that public resources were used efficiently does not constitute a breach of a legal duty and accordingly does not establish a claim for delictual damages. This was because the measures relied on by the applicant did not anticipate an obligation to pay damages for loss suffered as a result of the breach or non-compliance and a finding otherwise would have a chilling effect. Furthermore, the impugned conduct of the respondent constituted administrative action and attracted a public remedy instead of a private one. Lastly, a finding by this Court that would extend delictual liability in respect of medical negligence would not be in the public interest given the financial state of health care facilities.

In a unanimous judgment penned by Mathopo J (Madlanga J, Kollapen J, Majiedt J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ concurring), the Court had to determine whether the respondent was liable for the injuries sustained from the alleged negligent conduct of the medical staff at the hospital. In doing so, it considered whether the matter raised a constitutional issue, and if so, whether it was in the interests of justice to grant leave to appeal. The Court considered the character of the matter and noted that the pleadings were not a model of clarity and not all of the issues on which the evidence was led were pleaded by Ms TM. Importantly, relying on *Gcaba v Minister for Safety and Security* [2009] ZACC 26, the Court held that it must be clear from the pleadings that a constitutional issue or an arguable point of law of general public importance is being raised.

The Court noted that the majority of the Supreme Court of Appeal found in favour of Ms TM regarding wrongfulness and once this had been assumed in her favour, it was out of the way and no longer an issue that needed to be determined. The only issues that remained were negligence and causation. The Court questioned whether a resolution of these issues engaged its jurisdiction and held that they did not because both those issues turned on the evaluation of factual evidence. Furthermore, the disagreements between the majority and minority judgments, together with the decision of the High Court, stem from the evaluation of facts and not the application of legal principles. Relying on this Court's judgment in *NVM obo VKM v Tembisa Hospital* [2022] ZACC 11 where the majority held

that “[a] peripheral constitutional issue or arguable point of law is not a justification for embarking on a factual reappraisal of a case where the reappraisal is not rendered reasonably necessary by the answer to the constitutional issue or arguable point of law” and “where a matter concerns an evaluation of facts or the application of factual causation to the facts of a matter, it will not engage the jurisdiction of this Court.” The Court in this matter emphasised that these are purely factual issues which cannot be framed as constitutional matters and a challenge to a decision of the Supreme Court of Appeal on the basis only that it is wrong on the facts, does not engage its jurisdiction.

Lastly, on whether there was a legal duty to manage resources efficiently, the Court held that the question of the legal duty did not arise as it was agreed that there was a legal duty on the respondent to ensure proper treatment. And as far as the resources were concerned, courts should be slow to interfere with budgetary decisions and the allocation of resources.

Therefore, the Court found that the matter did not raise a constitutional issue and refused leave to appeal. The Court dismissed the application with no order as to costs.