



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

**NVM obo VKM v Tembisa Hospital and Another**

**Case CCT 202/20**

**Date of Judgement: 25 March 2022**

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**MEDIA SUMMARY**

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*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 25 March 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal a finding that a negligent omission by the medical staff at Tembisa Hospital factually did not cause the applicant's baby to be born with cerebral palsy.

The applicant was admitted to Tembisa hospital on 3 April 2009 for childbirth. She was transferred to the maternal labour ward so that the nurses would be able to monitor the labour process. On the morning of 4 April 2009 at 01:10, the applicant was in active labour according to medical records. The foetal heartbeat was monitored at 01:15, 02:15 and 03:15. After the check at 03:15 there were no further checks to monitor the foetal heart rate. The applicant contends that the failure to monitor the foetus from 03:15 was negligent and that the omission was the cause of applicant's baby being born with cerebral palsy. During the late stage of labour, at 04:45, the applicant was examined by a doctor. She was diagnosed with cephalic-pelvic disproportion, meaning that the baby's head was too big for the applicant's pelvis. The applicant was booked in

for a caesarean section, but gave birth naturally at 05:10. The applicant's baby suffered a hypoxic injury during the labour process, which caused him to be born with cerebral palsy.

The applicant sued the respondents in the High Court, seeking damages for the injury suffered by her baby. The applicant also claimed personal damages for medical expenses, loss of earnings and psychological shock and trauma. The Court concluded that the applicant had established the necessary causation to found her claim for damages against the respondents, so that the second respondent was liable to pay damages. Aggrieved by the decision of the High Court, the respondents then appealed to the Full Court in the High Court. The Full Court concluded that the trial court incorrectly applied the traditional "but for" test and concluded that factual causation was not established. The respondents were therefore successful.

Before the Constitutional Court, the applicant argued that, while the Full Court held that the trial court failed to apply the "but for" test, it was in fact the Full Court that failed to apply the test correctly. The applicant submitted that the trial Court correctly eliminated the negligent conduct of the hospital staff, which was to neglect to monitor the foetal heartbeat, and substituted it with hypothetical lawful conduct, which was monitoring every 30 minutes. It correctly held that if the applicant had been properly monitored, emergency measures could have been implemented to "buy time" for the foetus, and the harm would probably have been avoided. The respondents argued that the injury would have occurred after 4h15, the last time that the baby would have been monitored, had proper monitoring occurred. Monitoring would therefore not have changed the outcome, as there was not enough time to perform a caesarean section between the time the injury occurred and the time the baby was delivered.

The first judgment (minority), penned by Majiedt J (Madondo AJ, Pillay AJ, and Tlaletsi AJ concurring) found that this matter engages this Court's constitutional and general jurisdiction. The first judgment held that this case is a constitutional matter because it implicates the health care rights guaranteed by section 27 and the State's

related duty under section 7(2) to respect, protect, promote and fulfil the rights in the Bill of Rights. Additionally, the Full Court's invocation of a passage from *M v MEC*, decided in the Supreme Court of Appeal, violated section 34 of the Constitution by importing evidence from another case into this case. Lastly, the first judgment held that this matter raises an arguable point of law insofar as the Court is required to consider important questions on the need to consider the flexibility of the test for factual causation, particularly in light of the differing approaches adopted by our courts in cerebral palsy cases.

On the merits, the first judgment held that the applicant adduced sufficient evidence to prove factual causation, in the context of a harm which is replete with uncertainties. It reasoned that absent any countervailing evidence from the respondents, the unchallenged evidence of the applicant's medical experts, particularly that of Prof Kirsten and Dr Pistorius, together with the admitted facts and the joint minute of the obstetricians, proved the applicant's claim for damages. It further held that the negligent failure by the hospital staff to conduct adequate monitoring of the foetal heart rate during the critical period, denied them the opportunity to detect the warning signs of the onset of hypoxia. That, in turn, resulted in the failure to take emergency measures to afford V more time until a caesarean section could be arranged. Consequently, the minority judgment upheld the appeal with costs.

The second judgment (majority), penned by Rogers AJ, (Madlanga J, Mhlantla J, Theron J and Tshiqi J concurring), disagreed with the first judgment that this matter engaged this Court's jurisdiction. It explained that for a case to be a "constitutional matter", within the meaning of section 167(3)(b)(i), the resolution of a constitutional issue must be reasonably necessary in order to determine the case's outcome. It further explained that a case only "raises an arguable point of law" within the meaning of section 167(3)(b)(ii) if the answer to that question is reasonably necessary in determining the case's outcome. Furthermore, it explained that a 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.

The second judgment reiterated that this Court has consistently held that it does not have jurisdiction to decide purely factual matters, and this is so even where a lower court has gone badly wrong on the facts. It further emphasised that the Court could analyse evidence and make factual findings where a determination of such facts was reasonably necessary in order to answer or to give a practical effect to the Court's decision on a constitutional matter or on an arguable point of law, but not otherwise. It quoted authority relating to its constitutional jurisdiction confirming that it will only engage in contested factual issues if they are "connected with a well-grounded constitutional issue".

It disagreed with the first judgment's reliance on sections 27 and 7(2) of the Constitution, and on the proposition that accountability and responsiveness in a healthcare system raised constitutional issues pertaining to medical negligence in public hospitals, implicating the "rights of women and children". It explained that wrongfulness and negligence were not in issue. The question was one of factual causation. It found that sections 7(2) and 27, and considerations of accountability and responsiveness, shed no light on the answer to that question. It further held that, if section 27 were implicated in the present case, it would apply to every medical negligence case, even though the issues raised by the case were purely factual.

Furthermore, it disagreed with the first judgment's view that the Full Court's invocation of a passage from a different case violated section 34 of the Constitution by importing evidence from another case into this matter. It found that the first judgment's reliance on section 34 was peripheral. It found that it is only by way of factual reappraisal, independent of any supposed constitutional issue, that one could get out of the starting blocks to reverse the decision of the Full Court. It nevertheless concluded on this issue by observing that it is not prudent for a court to quote the factual findings in another case, even if only by way of analogy.

Finally, the second judgment disagreed with the first judgment that the application of the test for factual causation in medical negligence cases raised an arguable point of law with constitutional implications. It explained that difficult or borderline cases of factual causation can arise in any kind of case for delictual or contractual damages. Conversely, it found that factual causation is often straightforward in medical negligence cases. It further found that the application of an established test to particular facts is not a question of law. For these reasons, the second judgment held that the Court's jurisdiction was not engaged. This made it unnecessary to discuss the merits. In the result, the majority of the Constitutional Court ordered that leave to appeal be refused with no order as to costs.

The third judgment, a short judgment penned by Zondo ACJ, concurred in the second judgment. However, the third judgment was confined to commenting on *Mbatha* and *Booyesen* referred to in the second judgment, due to the fact that Zondo ACJ wrote the minority judgments in those matters.