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## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 15 January 2025

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal MEC for Health Eastern Cape v AS obo SS (842/2023) [2025] ZASCA 02 (15 January 2025)***

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Today the Supreme Court of Appeal (SCA) upheld, with costs, an appeal against the decision of the Eastern Cape Division of the High Court, Mthatha (the high court).

Ms S[...] instituted a medical negligence claim which arose from the conduct of medical staff employed by the appellant, the Member of the Executive Counsel for Health, Eastern Cape (the MEC), before and/or during the birth by the respondent on behalf of SS. Ms S[...] was referred from the local clinic to the St Barnabus Hospital at 21h32. Due to logistical factors, her baby was delivered by caesarean section some four hours later. It was common cause that the nursing staff had not regularly monitored the foetal heart rate between Ms S[...]’s admission and the operation. In addition, Ms S[...] was administered a spinal anaesthetic to which she had an adverse reaction. She was in critical danger of cardiac arrest and death. The caesarean was halted temporarily to enable both doctors to attend to and resuscitate Ms S[...].

The Eastern Cape Division of the High Court, Mthatha (the trial court) absolved the MEC of liability. Ms S[...]’s appeal to a full court (the full court) succeeded. The MEC was granted leave on petition to appeal the full court’s order and judgment to the SCA. Ms S[...]’s attorney committed several undeniable breaches of key provisions of rule 49 of the Uniform Rules of Court regulating the appeal procedure and subsequently filed an irregular application for condonation of those breaches.

The issue in this appeal was whether the full court gave proper consideration to the question of whether a case for condonation was made out by Ms S[...] and whether, in the proper exercise of its discretion, the full court should have struck the appeal from its roll.

The SCA held that although the full court found that that the non-compliance with the rules was flagrant, gross and lacking any reasonable explanation, it failed to complete the requisite exercise by weighing all relevant factors. The SCA held that the full court had failed to exercise its discretion judicially or at all, and as a result it was required to complete the exercise that the full court failed to undertake properly, and to weigh the prospects of success against these other factors.

The SCA noted that while it was mindful that the subject-matter of the appeal was a claim for damages on behalf of a minor child who is disabled, allegedly through the negligence of the MEC's employees and that the failure to comply with the rules was due to the failures of her attorney, were factors weighing in her favour in the consideration of whether condonation should have been granted, these factors had to be weighed against the prospects of success in the appeal.

On the prospects of success, the SCA held that the full court misdirected itself by failing to factor into its analysis of the facts the catastrophic 'crashing' of Ms S[...] at the commencement of the caesarean. The SCA found that the evidence pointed to at least the reasonable likelihood that it was this latter event, and not the undetected foetal distress prior to the operation, that caused the brain injury. The SCA found further that on the totality of evidence, the caesarean section could not have been performed earlier, even if the nursing staff had carried out regular heart-rate monitoring, thus concluding, contrary to the conclusion of the full court, that the evidence did not establish that but for the sub-standard monitoring in labour, the brain injury would not have occurred and causation was therefore not established.

The SCA lastly found that that there was a demonstrable misdirection on the part of the full court in assessing the prospects of success of Ms S[...]’s appeal by failing to consider the total body of evidence in reaching the conclusion that causation had been established. Accordingly, its decision to refuse to strike the appeal from the roll because of the prospects of success could not be justified. Had the full court properly exercised its discretion, it ought to have refused condonation and re-instatement of the appeal and struck it from the roll.

As a result, the SCA upheld the appeal with costs and replaced the order of the full court by striking it from the roll with costs.

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