SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

DATE 10 August 2021

STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

The Member of the Executive Council for Health & Social Development of the Gauteng Provincial Government v Mashonganyika **(380/2019) [2021] ZASCA 110 (10 August 2021)**

The Supreme Court of Appeal today, by a majority, upheld an appeal against a judgment of the Gauteng Division of the High Court, Johannesburg (Fisher J), in which the High Court had held the appellant liable for such damages as the respondent might prove by virtue of the latter's child having suffered, *in utero*, acute profound hypoxic ischaemia which resulted in the child suffering from cerebral palsy. The child was born at the Charlotte Maxeke Johannesburg Academic Hospital (CMH).

The majority (Rogers AJA, with Mbatha and Nicholls JJA concurring) held that the High Court had been correct in finding that the appellant's failure to have a second functioning theatre for caesarean sections at the CMH as at

August 2010 was not negligent. The majority also agreed with the High Court's finding that the hospital staff had not been negligent in prioritising another patient, Ms G, over the respondent when both of them required caesarean sections.

The majority, however, disagreed with the high court's finding that the staff had been negligent in the way they had managed the maternity unit's single theatre for caesarean sections in the hours preceding the time when both Ms G and the respondent required prompt caesarean sections. In order to make out such a case (which had not been properly pleaded), the respondent would have needed to establish a complete picture of the triage decisions required in the maternity unit during the day in question, and this had not been done.

The majority also considered two aspects which the high court did not find necessary to decide. The first was whether there had been negligence in failing to apply intrauterine resuscitation while the respondent awaited her operation. The majority held that such failure had not been proved. The second aspect was whether there had been negligence in failing to investigate the respondent's referral to a neighbouring hospital. The evidence, so the majority held, did not establish that such a referral would have resulted in the respondent's child being delivered more quickly than happened at CMH.

The majority also concluded that even if the appellant and the hospital staff had been negligent in any of the respects alleged, it was not shown that non-negligent conduct would have resulted in the delivery of the child in time to avoid the brain injury.

In a minority judgment, Ledwaba AJA, with whom Saldulker JA concurred, would have dismissed the appeal. While reaching the same conclusion as the majority on the three issues considered by the high court, the minority considered that the hospital staff had been negligent in failing to apply

intrauterine resuscitation and in failing to investigate the referral of the respondent to a neighbouring hospital, and found that had the staff not been negligent in these respects the child would probably not have suffered the brain injury which he did.

~~ ends~~