THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 842/2023

In the matter between:

MEC FOR HEALTH EASTERN CAPE **APPELLANT**

and

APHILISIWE SIKOTA OBO SANELISIWE SIKOTA **RESPONDENT**

Neutral citation: *MEC for Health Eastern Cape v AS obo SS* (842/2023) [2025] ZASCA 02 (15 January 2025)

Coram: NICHOLLS, WEINER and KEIGHTLEY JJA and DOLAMO and MOLITSOANE AJJA

Heard: 13 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website, and released to SAFLII. The date for hand down is deemed to be 15 January 2025 at 11h00.

Summary: Civil procedure – uniform rule 49 – condonation and reinstatement of appeal – discretion to condone not exercised judicially - delict – medical negligence – causation – total body of evidence not establishing causation – full court ought to have struck appeal from roll.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Rugunanan J with Smith and Potgieter JJ concurring, sitting as court of appeal):

1 The appeal is upheld with costs, including those of two counsel.

2 The order of the full court is set side and replaced with the following order:

'The appeal is struck from the roll with costs, including those of two counsel where so employed.'

JUDGMENT

Keightley JA (Nicholls and Weiner JJA and Dolamo and Molitsoane AJJA concurring)

[1] The subject matter of this appeal is a medical negligence claim arising 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, Ms Sikota, of her child, SS, at the St Barnabus Hospital (St Barnabus) in the Eastern Cape in 2012. Ms Sikota instituted the claim on behalf of SS, who is a minor. The Eastern Cape Division of the High Court, Mthatha (the trial court) absolved the MEC of liability. Ms Sikota's appeal to the full court (the full court)succeeded, and the MEC was ordered to pay such damages as are proven consequent on the hypoxic ischaemic encephalopathy and brain injury sustained by

SS as a result of the medical negligence of the medical staff. The MEC was granted leave on petition to appeal the full court's order and judgment to this Court.

[2] Medical negligence claims linked to cerebral palsy in new-borns are increasingly prolific in our courts. They often involve complex questions around negligence and, in particular, causation. The present case is no exception. Complicating matters further are the multiple failings on the part of Ms Sikota's attorney to comply with the relevant Uniform Rules of Court (the rules) regulating the appeal from the trial court to the full court. These failings raise the important anterior question of whether the full court erred in overlooking these failings and, effectively (although not expressly), condoning them.

[3] The two aspects of the appeal are linked. Condonation of a failure to comply with the rules almost inevitably involves weighing the prospects of success on the merits of the appeal as a key factor. For reasons that will become apparent later in this judgment, this case illustrates that where condonation is opposed a court must give proper consideration to the question of whether a case for that relief has been made out by the defaulting party. The first question that arises in this appeal is whether the full court did so.

[4] The trial court handed down judgment in the matter on 27 August 2020. Leave to appeal was duly filed by Ms Sikota and was granted to the full court on 12 November 2021. On 19 November 2021 the Notice of Appeal was served and filed. This was the last time that the rules governing the appeal were properly adhered to by Ms Sikota's attorney, Mr Mjulelwa of Mjulelwa Inc. What occurred thereafter was the serial non-compliance with almost all of the relevant rules by Mr Mjulelwa.

[5] To begin with, rule 49(6)*(a)* requires an appellant to make written application to the registrar for a date for the hearing of the appeal. This must be done within 60 days of delivery of the notice of appeal. If the appellant does not do so, the respondent may apply for a date. However, if neither party does so, 'the appeal. . . shall be deemed to have lapsed'. No application was made in terms of rule 49(6)*(a)*.

[6] Rule 49(7) regulates the filing of the record of appeal. It requires the appellant to file three copies with the registrar and to furnish two copies to the respondent. This must be done at the same time as the application for a date for the hearing of the appeal. The registrar must also be provided with a complete index and copies of all the papers. The rules make provision for the process that should be followed if the record is not available at this time. In that case, application may be made to the registrar to accept an application for a date for the hearing without copies of the record, either on the basis of a written agreement between the parties or, failing this, an application by the appellant supported by an affidavit.[1] Rule 49(8) prescribes the format that must be followed when compiling the record, down to the required spacing, line numbering etc. The parties may consent, in writing, to the omission of portions of the record.[2]

[7] There was a wholesale failure by Mr Mjulelwa to comply with the rules pertaining to the record. The only semblance of an attempt to do so took place on 10 February 2022. Ms Sikota's attorneys emailed to the MEC's attorneys two documents, each headed 'Index to Appeal', listing various documents, including 'Transcribed records for the court proceedings.' These indexes did not relate to any

[1] Rule 49(7)*(a)*.
[2] Rule 49(9).

actual appeal record, nor even to the trial record. The MEC was simply not furnished with an appeal record at all nor, by all accounts, was the registrar. What is more, no appeal case number was provided, nor was there any indication that the appeal was to the full court. Quite what the registrar was expected to make of this is not clear although, given that Ms Sikota's attorneys had not even applied for a date for the hearing of the appeal, the registrar must have been blissfully unaware that an appeal was on its way. There was also no approach to the MEC's attorneys to agree to parts of the record that could be omitted.

[8] The next major failure on the part of Ms Sikota's attorneys was in relation to the obligation to provide security for costs. Rule 49(13) requires an appellant to enter into 'good and sufficient' security for a respondent's costs of appeal save where a respondent has waived their right to security, or the court, in granting leave to appeal, has released an appellant from the duty to provide security. It is common cause that the MEC did not waive her right to security, nor did the high court release Ms Sikota from her obligation to provide it. Nonetheless, no security was filed. The failure to do so was described by Mr Mjulelwa as 'an oversight'.

[9] It appears that at some point the appeal was subject to case management by a designated judge. It was only as a result of this that a date was secured for the hearing of the appeal on 25 July 2022. In the run up to this date the MEC's attorneys wrote to Mjulelwa Inc listing the latter's failure to comply with the rules in respect of, among others, the absence of an appeal record having been provided to the MEC or to the court. The MEC's attorneys recorded that they would proceed to file an application under rule 49(7)*(d)* for an order declaring that the appeal had lapsed.

[10] Mr Mjulelwa's response, somewhat surprisingly, was that the MEC had been provided with an 'electronic version of the record' and that on his (Mr Mjulelwa's) reading of the rules he was not required to serve hard copies. He also accused the MEC's attorneys, who had raised the absence of security as a further failing, of engaging in delaying tactics. It seems that the Deputy Judge President was also concerned about the status of the appeal and whether it would proceed as scheduled. Having been apprised of the situation, he informed the parties that the appeal would not be heard on 25 July 2022, and that the allocated judges would instead attend to other matters.

[11] On 5 October 2022 the MEC filed an application under rule 49(7)*(d)* for an order declaring that the appeal had lapsed for want of compliance with the rules. Mr Mjulelwa filed an answering affidavit on behalf of Ms Sikota in opposition to the application. It was filed out of time and, although in the body of the affidavit Mr Mjulelwa made reference to seeking condonation for his failures to comply with the rules, there was no counter-application for relief of that nature.

[12] There matters rested until shortly before the second hearing date of the appeal, which was set for 13 February 2023. On 10 February, which was the Friday preceding the appeal hearing on Monday 13 February, Mr Mjulelwa served and filed a 'Notice of Application/Notice of Relief Sought Rule 49 Application.' The relief sought included that Ms Sikota's failure to comply with rule 49 be condoned and that 'the hearing of the appeal' be re-instated. This application was bereft of a supporting affidavit. From submissions subsequently made on behalf of Ms Sikota, and as appears, too, from the judgment of the full court, Mr Mjulelwa placed reliance on the contents of the answering affidavit to the MEC's application under rule 49(7)*(d)* to support the case for condonation and re-instatement.

[13] At the hearing of the appeal before the full court the MEC opposed the request for condonation and reinstatement. I say 'request' because the notice filed on 10 February by Mr Mjulelwa was itself non-compliant with the rules. Despite this, the matter proceeded. Without discussing its reasons for doing so, the full court appears largely to have ignored the fact that the condonation and reinstatement application was not supported by an affidavit. It proceeded to treat the answering affidavit filed on behalf of Ms Sikota in the MEC's application in terms of rule 49(7)*(d)* as the affidavit supporting the case for condonation.

[14] The full court correctly identified several undeniable breaches of key provisions of rule 49, including sub-rules (6)*(a)*, (7)*(a)*, (9), (13)*(a)* and *(b)* and (15). In his answering affidavit Mr Mjulelwa had attempted to explain his failures to comply with the rules. He placed reliance on the fact that the matter had been subject to case management, implying that the appeal process was regulated by the case-managing judge, rather than the ordinary appeal processes prescribed in the rules. As the full court noted, however, the case management of the appeal had occurred after the failure to comply with rule 49(6)*(a)*, and thus after the appeal had lapsed. In other words, case management did not provide a solution to the lapsing of the appeal.

[15] Mr Mjulelwa's further explanations were equally unpersuasive. Shockingly, he blamed his abject failure to comply with the rules on the fact that he had opened a branch office in East London at the time that the appeal process commenced. Consequently, he had left the appeal in the hands of a candidate attorney in the Mthatha office. Mr Mjulelwa himself had not been in the Mthatha office to oversee either the candidate attorney or the file. As if this were not enough, he also relied on

the fact that this was the first appeal that his office was attending to as a reason for the 'oversight' in not filing security. In other words, Mr Mjulelwa left the first appeal his legal firm was responsible for in the hands of a candidate attorney in an office at which he was not present.

[16] As to the complete disregard of the rules relating to the appeal record, his explanation was no better. In Mr Mjulelwa's view, the MEC already had possession of all the documents that formed part of the trial record and so his office needed to do no more than provide electronic indexes to her attorneys. The MEC was not prejudiced in any way, as she would simply be 'expected to index and paginate [her own] documents'. This attempt at an explanation is completely contrary to the scheme of record management central to the smooth running of the appeals systems in all courts. It ignores the fact that a common record is the central source upon which not only the parties, but the courts, too, depend. In the absence of a common record available to all parties, the registrar, and the judges who comprise the appeal panel, the appeals system cannot function.

[17] One final aspect is Mr Mjulelwa's propensity to place the blame for his failures on the MEC's attorney not having pointed out to him earlier that he (Mr Mjulelwa) was at fault. Mr Mjulelwa expressed this view in respect of both the deficiencies in the record and the failure to provide security. It need hardly be stated that this can never be an acceptable explanation for such fundamental and multiple breaches of the rules as occurred in this case. It speaks, too, to a lack of candour on the part of Mr Mjulelwa, who, after all, was seeking an indulgence from the court on behalf of his client. His high-handed attitude was completely inconsistent with this fact.

[18] In its judgment the full court described Mr Mjulelwa's approach to condonation as fallacious, misguided, disingenuous and as revealing 'a disquieting history indicative of a reckless disregard for the rules of court'. It also noted the inherent prejudice to the MEC in expecting her to incur the substantial cost of compiling her own record from the indexes provided. In fact, the full court itself appears to have had difficulty in working with the 'dishevelled and illegible' record provided to it. The full court found merit in the MEC's opposition to the request for condonation. Yet, despite this, it did not proceed to make a ruling on the issue of condonation. Instead, the full court simply proceeded to consider the merits of the appeal, finding in favour of Ms Sikota and overturning the absolution granted by the trial court.

[19] It is trite that the high court has an inherent right to grant condonation for a failure to comply with the rules of court where the interests of justice demand this. The discretion to do so is extensive,[3] but it must be exercised judicially. A party seeking condonation must give a full explanation for the failure to comply with the rules and this explanation must be reasonable.[4] The court must weigh all relevant factors including, depending on the facts of each case, the degree of non-compliance, the explanation therefor, the importance of the case, the avoidance of unnecessary delays in the administration of justice and the prospects of success.[5] These factors are interrelated and must be weighed one against the other. For example, a slight delay and a good explanation might compensate for weak prospects of success.[6]

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[3] *Cairn's Executors v Gaarn* 1912 AD 181 at 186.
[4] *Van Wyk v Unitas Hospital and Another* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) para 22.
[5] *Mbutuma v Xhosa Development Corporation Ltd* 1978 (1) SA 681 (A) at 682E.
[6] *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G.

However, in a case of flagrant or gross non-observance of the rules, a court may refuse condonation regardless of the prospects of success.[7]

[20] Where an attorney is to blame for the non-compliance, a blameless litigant may escape penalisation,[8] but there is a limit beyond which she or he may be indemnified against the attorney's lack of diligence and absence of a reasonable explanation.[9] The negligence of the attorney is weighed together with the other relevant factors in considering whether condonation is justified.[10]

[21] Mr Mjulelwa's conduct in this matter is both flagrant and gross. The failings were multiple, extending so far as to include the failure properly to institute the condonation application itself. Mr Mjulelwa's explanations, such as they were, served to aggravate, rather than mitigate his failings. An attorney who has been instructed to note an appeal is duty-bound to acquaint him or herself with the rules.[11] Not only did Mr Mjulelwa patently not do so, but he exacerbated this disregard of his duties by leaving the appeal in the hands of a candidate attorney, seemingly without supervision, in a different office.

[22] This resulted in prejudice to the MEC, as noted by the full court, as well as prejudice to the due administration of justice. Three judges, who were originally allocated to hear the appeal in November 2022, had to be re-allocated to other duties shortly before the scheduled hearing because there was no record to speak of. The MEC, who faces a barrage of claims of this nature, was expected to compile her own

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[7] *Ferreira v Ntshingila* [1989] ZASCA 149; [1990] 2 All SA 47 (A); 1990 (4) SA 271 (A) at 281J-282A (*Ferreira*).
[8] *Reinecke v Incorporated General Insurances Ltd* 1974 (2) SA 84 (A) at 92F.
[9] *Saloojee and Another NNO v Minister of Community Development* 1965 (2) SA135 (A) at 141C-E.
[10] *Regal v African Superslate (Pty) Ltd* 1962 (3) SA 18 (A) at 23B.
[11] *Ferreira* fn 7 at 281F.

record, and was subjected to a completely unnecessary delay in the finality of this claim. These are all factors that, on a judicial exercise of the full court's discretion, ought to have weighed against it approaching the condonation request with alacrity.

[23] Although the full court appeared to have accepted that the non-compliance was flagrant, gross and lacking any reasonable explanation, it failed to complete the requisite exercise by weighing all relevant factors together. Contrary to the tried-and-tested approach to condonation established over decades, what the full court did was to consider, as the sole factor, the merits of the appeal. Save for recording its reluctance 'to order an outright striking from the roll', it gave no reasons for not doing so. Indeed, the full court did not even include as part of its order a paragraph granting condonation and reinstatement of the appeal. In my view, in adopting this approach, the full court failed to exercise its discretion judicially or at all, and this Court is free to interfere in the exercise of that court's discretion.

[24] The question to consider is whether the appeal ought to have been struck from the full court's roll. What this Court must do is to complete the exercise that the full court failed to undertake properly, and to weigh the prospects of success against these other factors.

[25] There is no need to repeat the egregious nature of Mr Mjulelwa's multiple breaches of the rules and the absence of a reasonable explanation. I am mindful of the fact 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. This is a factor weighing in favour of Ms Sikota and leniency on the issue of condonation. It is also relevant that the failings were on the part of her

attorney. This factor, too, may point to leniency, depending on the circumstances of the case.

[26] Turning to the prospects of success, from the authorities cited earlier it is clear that this is not necessarily a decisive factor. In the case of gross negligence, as in this case, even strong prospects may not justify condonation. This is particularly so, again as in this case, where there is no reasonable explanation for that conduct. In my view, against these factors, in such a case there would have to be extremely strong, and not just arguable, prospects of success to justify the exercise of the discretion in favour of the defaulting party. In its assessment, the full court viewed the prospects of success as being so strong that it found in favour of Ms Sikota. Was it correct in this assessment? If not, there could have been no justification for its decision not to strike the matter from the roll. This question requires a consideration of the facts and merits of the case.

[27] The relevant facts are largely common cause. Ms Sikota was 17 years old when she was referred from the local clinic to St Barnabus at 21h32 on 25 December 2012. She was in labour and was examined by the nursing staff at 21h34. They noted that her cervix was 8cm dilated. Her clinical records also show that the foetal heart rate was measured as 'deceleration mixed and lasting', indicating some foetal distress. The 'caput' or head measurement was '++' pointing to obstruction in the pelvic canal. At this stage, there was only one doctor on duty at the hospital, Dr Madikane. She was already in theatre putting up a chest drain in another patient, and was only able to examine Ms Sikota at 22h50.

[28] On the available evidence it was common cause that the nursing staff conducted no further foetal heartrate monitoring on Ms Sikota save for the first one

on her admission. This failure formed the basis of the complaint that the nursing staff had been negligent in their care. In light of the conclusion I reach on the element of causation, it is not necessary to determine whether negligence was established in this respect.

[29] Dr Madikane took the decision to prepare Ms Sikota for a caesarean section when she examined her. As this required two doctors, she telephoned the 'on call' doctor, Dr Mlandu, who was not on site. Dr Mlandu was at her lodgings in Mthatha as the hospital did not have accommodation for its doctors on its premises. The trip from Mthatha to the hospital took about 30 to 40 minutes. Ms Sikota had to be prepared for surgery, and the staff on duty had to explain to her what the procedure entailed for purposes of her consent. The theatre itself also had to be readied for the surgery and, of course, Dr Mlandu had to arrive and prepare herself for the surgery as well.

[30] The surgery commenced at 00h20. Dr Madikane acted as the anaesthetist, with Dr Mlandu performing the caesarean surgery. Ms Sikota was administered a spinal anaesthetic. Unfortunately, she had an adverse reaction to this, becoming desaturated with her pulse dropping and her blood pressure reading 50/35. In common parlance, Ms Sikota 'crashed' and was in critical danger of cardiac arrest and death. A further consequence of her reaction was that the oxygen supply to the foetus was interrupted. The decision was made for Dr Mlandu to halt the caesarean section in order to assist Dr Madikane in resuscitating Ms Sikota. They managed to do so and, when Ms Sikota was stable, Dr Madikane continued with, and completed, the caesarean. The hospital records show that the operation was completed at 01h20 on 26 December 2012.

[31] When SS was born she had low apgar scores and was subsequently diagnosed with cerebral palsy. The parties' respective radiologists agreed that the imaging features of her MRI brain scan showed features typical of an acute profound (central) hypoxic ischemic injury pattern, with no additional imaging features suggestive of a prolonged partial injury component. This was the cause of the cerebral palsy.

[32] Reduced to its essence Ms Sikota's case was that there was insufficient monitoring of the foetal heart rate from the time of admission to the time that the caesarean was performed. If conducted properly, signs of foetal distress would have been detected earlier. Other signs of foetal distress were apparent, requiring timeous delivery of the baby to avoid harm. The decision to perform a caesarean should have been made at 21h34. Instead, the surgery was delayed for three hours. Ms Sikota contended that the most likely cause of the brain injury was the untreated foetal distress and asphyxiation suffered by SS during the three hours before her delivery.

[33] The parties agreed that the joint minutes of experts were admissible without the necessity of calling the experts concerned to testify. The MEC led the evidence of both Dr Madikane and Dr Mlandu. In addition, they relied on the evidence of Dr Brannigan, a specialist anaesthesiologist with a sub-specialty in critical care. He filed two reports and gave evidence at the trial. It is not necessary to summarise the evidence of these witnesses as this was comprehensively dealt with in the judgments of both the trial court and the full court.

[34] Ms Sikota placed substantial reliance on the joint minutes of the obstetricians and the paediatricians. This found favour with the full court. Referring to *Bee v Road*

Accident Fund[12] it noted that a court is bound by the facts agreed on between experts in their joint minutes unless these are repudiated timeously by a party. With reference to the joint minutes of the obstetricians, the full court found that: '. . . it is common cause between [them] that the cerebral palsy most likely resulted from "hypoxic ischaemic encephalopathy" and obvious resultant brain damage "due to f[o]etal distress in labour" that was "not detected because of sub-standard f[o]etal heart rate monitoring in labour".' This conclusion, noted the full court, was in line with the paediatricians' joint minutes, in which it was agreed that: 'The most likely time period of hypoxic ischaemic brain injury was the peripartum period (i.e. the period shortly before, during or immediately after delivery.' The full court concluded from this that:

'There can accordingly be little doubt that the injury occurred during the period when the relevant clinicians were required (but failed) to properly monitor the foetal heart rate and determine foetal distress. . . I am therefore satisfied that on the available evidence (i.e. the joint minutes) and the probabilities, causation has been established.'[13]

[35] What the full court failed to appreciate was the distinction that must be drawn between factual evidence given by expert witnesses and their opinions. As this Court explained in *HAL obo MML v MEC for Health, Free State (HAL)*:[14]

'As to the former, there is no difficulty in applying *Bee* to the facts on which the experts agree, any more than there is a difficulty where the parties themselves reach agreement on factual issues. The opinions of the experts stand on a completely different footing. Unlike agreement on questions of fact, the court is not bound by such opinions. It is still required to assess whether they are based on facts and are underpinned by proper reasoning.'

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[12] *Bee v Road Accident Fund* [2018] ZASCA 52; 2018 (4) SA 366 (SCA) para 66.

[13] *Sikota obo S v MEC for Health Eastern Cape* [2023] ZAECMHC 27 paras 75 and 77.

[14] *HAL obo MML v MEC for Health, Free State* [2021] ZASCA 149; [2022] 1 All SA 28 (SCA); 2022 (3) SA 571 para 220 (*HAL*).

[36] Illustrating this point, the Court in *HAL* extrapolated:

'Counsel's approach was that the radiologists' agreement confined the insult. . . to the perinatal period and it was not open to Dr Kganane to question the severity of the insult at that time. But the agreed minute related to their opinion in regard to the period when the insult occurred, not to a question of fact.'[15]

And finally:

'In summary, the position in regard to agreements between experts, is as follows. In accordance with *Bee*, if they agree on issues of fact and the appropriate approach to technical analysis, the litigants are bound by those agreements, unless they have been withdrawn in circumstances where no prejudice results, or any prejudice can be cured by an adjournment or other means. *If the experts have reached agreement on a common opinion on a matter within their joint expertise, that is merely part of the total body of evidence. The court must still determine whether to accept the joint opinion.* The existence of that agreement between the experts will not ordinarily preclude evidence that qualifies or contradicts their opinion, unless the case has been conducted on the basis of the agreement and the admission of that evidence will prejudice the other party in a manner that cannot be cured. If the parties choose to place an agreed minute before the court reflecting both shared opinions and areas of disagreement and do not call the parties to the minute to deal with the areas of disagreement, the minute will do no more tha[n] reflect that there is disagreement on the point. While it is for the parties to determine which witnesses they call, if they fail to call the authors of a joint minute they cannot object when other witnesses express views that qualify or dissent from the views in the minute.'[16] (Emphasis added.)

[37] The experts' opinion that the cerebral palsy was caused by undetected foetal distress due to sub-standard foetal heart rate monitoring was nothing more than an opinion. The court was not bound by it. What it was required to do was to consider

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[15] Ibid *HAL* para 222.
[16] Ibid *HAL* para 229.

that opinion as part of the full body of evidence before it. Instead, the full court misdirected itself by placing undue reliance on the joint opinions of the obstetricians and paediatricians in concluding that causation was established.

[38] The most obvious misdirection by the full court its failure to factor into its analysis of the facts, the catastrophic 'crashing' of Ms Sikota at the commencement of the caesarean. By all accounts, this placed Ms Sikota's life in danger and must have severely compromised the blood, and hence oxygen flow, to SS. Aligned with this uncontested evidence, was that of the radiologists, which identified the cerebral palsy as having resulted from an acute profound hypoxic ischaemic injury, rather than a partial, prolonged injury. It was not in dispute that the former type of injury is associated with a sentinel event. Consequently, the reasonable possibility is that the sentinel event that ultimately caused the brain injury was Ms Sikota's adverse reaction to the spinal anaesthetic.

[39] What is more, there was no evidence to support the conclusion that proper monitoring prior to the operation would have averted the brain injury. The opinion of the experts, which was endorsed by the full court, was based on the assumption that had there been proper monitoring to identify ongoing foetal distress the caesarean would have been performed at 21h34 or soon thereafter. However, this assumption ignores the evidence that was before the court. When Ms Sikota was first examined at 21h34 the only doctor at the hospital was unavailable because she was in theatre with another patient. For obvious reasons, it was never suggested that the nurses who examined her could have made the decision that a caesarean section was necessary and, without the say-so of Dr Madikane, put that process in motion.

[40] Dr Madikane was the only one who could have made that decision and she did so immediately after she examined Ms Sikota at 22h50. Thereafter, on the uncontested evidence, it was necessary to summon Dr Mlandu, who was 30 to 40 minutes away, prepare Ms Sikota and the theatre for the operation. On the totality of evidence, then, the caesarean section could not have been performed earlier, even if the nursing staff had carried out regular heart-rate monitoring. In other words, contrary to the conclusion of the full court, the evidence did not establish that but for the sub-standard monitoring in labour, the brain injury would not have occurred. Thus, causation was not established.

[41] Counsel for Ms Sikota did not press the argument that the MEC was negligent in the manner in which resources were allocated to St Barnabus as a level 1 district hospital, and that this negligence had led to a shortage of staff and hence, indirectly, caused the delay in the operation and the brain injury. There was insufficient evidence before the trial court to sustain that case and, in my view, it was correctly not relied on by Ms Sikota in the appeal before this Court. On the available evidence, at the time of this sentinel event, the medical staff did all they could to resuscitate Ms Sikota and there was nothing the doctors could have done to prevent the interruption of the flow of oxygen to SS at the time.

[42] Nor was reliance placed on the possible negligence of Dr Madikane and Dr Mlandu in stopping the caesarean section when Ms Sikota ‘crashed’ to attend to her resuscitation rather than prioritising the delivery of SS. Again, in my view, this is not a case that could have succeeded on the evidence before the trial court. Dr Brannigan’s evidence established convincingly that prioritising the mother’s resuscitation was a reasonable surgical response in the circumstances in which the two doctors found themselves.

[43] The upshot of all of this is that there was a demonstrable misdirection on the part of the full court in assessing the prospects of success of Ms Sikota's appeal. It failed 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 cannot be justified. It follows that in the proper exercise of its discretion, the full court ought to have refused condonation and re-instatement of the appeal and struck it from the roll.

[44] My final word is reserved for the conduct of Ms Sikota's attorney. I earlier detailed the myriad respects in which it fell short of the standard of service expected of an officer of court. This had serious implications for Ms Sikota's appeal, ultimately leading to its failure. The ethical thing to do would be for Mr Mjulelwa to refer Ms Sikota to another attorney to advise her on the prospects of her succeeding in a claim against him arising from his unprofessional conduct in this case. I trust that Mr Mjulelwa will heed this injuction and act accordingly.

[45] In the result, I make the following order:

1 The appeal is upheld with costs, including those of two counsel.

2 The order of the full court is set aside and replaced with the following order:

'The appeal is struck from the roll with costs, including those of two counsel where so employed.'

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R M KEIGHTLEY

JUDGE OF APPEAL

Appearances

For appellant:	H J van der Linde SC with N James
Instructed by:	Norton Rose Fulbright SA Inc, Johannesburg
	Webbers Attorneys, Bloemfontein
For respondent:	A G Dugmore SC with N P Mnqandi
Instructed by:	Mjulelwa Inc Attorneys, Mthatha
	Phatshoane Henney Inc, Bloemfontein.