



## THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

### MEDIA SUMMARY OF JUDGMENT DELIVERED

***Member of the Executive Council for Health, Eastern Cape v Mpetsheni obo Mpetsheni***  
**(Case no 576/2019) [2020] ZASCA 169 (14 December 2020)**

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

**Date:** 11 December 2020

**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***

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Today the Supreme Court of Appeal (SCA) handed down judgment in an appeal against an order of the Eastern Cape Division of the High Court, Bhisho (Hartle J), which turned mainly on the high court's treatment of the opinion of an expert witness. The appeal was upheld.

The matter concerned an action for damages, instituted by Ms Mpetsheni on behalf of her minor son, Luyanda (the child). The child suffered a severe brain injury during labour, due to a lack of oxygen and blood flow, and was consequently born with severe brain damage. As a result, the child suffers from cerebral palsy. Ms Mpetsheni alleged that the child's injuries were due to the hospital staff's negligence.

The appellant and Ms Mpetsheni were in agreement in respect of two issues at the trial: that the period in contention was the second stage of labour; and that the report of Dr Pretorius, an expert radiologist, along with its addendum, be admitted into evidence. In this report Dr Pretorius concluded that the MRI scan indicated an acute profound hypoxic ischemic event that occurred during labour (as opposed to a prolonged partial brain injury that occurred during labour). The former is severe – a total or near-total lack of oxygen, occurring suddenly and lasting only for a brief period, generally occurring 30 minutes prior to delivery. The latter is a

less severe injury that develops slowly, over several hours, and is often preceded by a deteriorating foetal heart rate that gives a warning of developing hypoxia, ie a lack of oxygen.

The expert called to testify on behalf of the appellant stated that an acute profound injury is caused by a catastrophic sentinel event which, in this case, was most likely the compression of the child's umbilical cord. The expert who testified on behalf of Ms Mpetsheni ultimately agreed. Nevertheless, the high court took a different view, holding that the possibility of a so-called 'mixed injury pattern' – an injury pattern that is partly characteristic of an acute profound injury and partly characteristic of a prolonged partial injury – could not be ruled out on the evidence. This view was based on the judge a quo's own recourse to literature, coupled with the absence of substantiating reasons proffered by Dr Pretorius in support of his conclusion.

The principal issue on appeal was thus whether the high court legitimately departed from the opinion of Dr Pretorius, namely that the child had suffered an acute profound injury. On this score the SCA found that the high court had erred. While in the normal course a court is to consider the opinion of an expert and come to its own conclusions, this case was different because the parties had agreed to accept the conclusion reached by Dr Pretorius and for the trial to proceed on this basis. The SCA held that a judge was not, as a rule, permitted to perform an independent analysis of the subject-matter by having recourse to literature not introduced into evidence, and without notice to the parties, especially where the parties had already accepted the opinion of an expert.

The SCA accordingly approached the matter from the premise that the parties had agreed to adopt at the trial, ie that Luyanda suffered an acute profound injury. Such injury resulted from a catastrophic event, which meant that the high court's consideration of the cumulative risks borne by Ms Mpetsheni – the rupture of her membranes, the length of her labour, the failure by hospital staff to undertake proper monitoring, and the fundal pressure applied to her belly – were altogether irrelevant. It added nothing to the enquiry into the catastrophic event that caused the child's acute profound injury.

The SCA concluded that what was done by the hospital staff in the last hour of Ms Mpetsheni's labour was not causally implicated in the acute profound injury suffered by the child.

In the result, the appeal was upheld. Counsel for the appellant made it plain that if the appeal was good, no costs would be sought. The SCA agreed that this was the proper stance to adopt.

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