CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 270/21

In the matter between:

TM obo MM Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH AND SOCIAL DEVELOPMENT, GAUTENG Respondent

Neutral citation:	*TM obo MM v Member of the Executive Council for Health and Social Development, Gauteng* [2022] ZACC 18
Coram:	Madlanga J, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ.
Judgment:	Mathopo J (unanimous)
Heard on:	15 February 2022
Decided on:	30 May 2022
Summary:	Jurisdiction — constitutional issue — interests of justice Leave to appeal — not in the interests of justice to grant leave — leave to appeal is refused — no order as to costs

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ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg), the following order is made:

1. Leave to appeal is refused.

JUDGMENT

MATHOPO J (Madlanga J, Kollapen J, Majiedt J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ concurring)

Introduction

[1] This application concerns a claim instituted by Ms TM in her representative capacity as the mother and natural guardian of her minor child, MM, who was diagnosed with cerebral palsy as a result of a hypoxic ischemic injury during birth. The issues surface in an application for leave to appeal by Ms TM against the judgment and order of the majority of the Supreme Court of Appeal. That Court set aside the decision of the High Court of South Africa, Gauteng Local Division, Johannesburg which found the respondent, the Member of the Executive Council for Health and Social Development, Gauteng, liable for damages arising from injuries sustained from the alleged negligent conduct of the medical staff at Charlotte Maxeke Academic Hospital.

Background

[2] On 8 July 2010, at 33 to 35 weeks of pregnancy, Ms TM made her first visit to an antenatal clinic and was informed that there were no complications with her pregnancy. On 30 July, she returned to the clinic and after her blood pressure and the heart-rate of her unborn child were checked, she was told that her pregnancy was progressing normally. Thereafter, on 20 August, she went for a follow-up, but the clinic was closed due to the nurses being on strike. Ms TM returned a week later, on

27 August, but the strike was still in progress. That afternoon she experienced lower abdominal pains and went back to the clinic, but it was still closed. When she made another attempt the next morning, she found that the strike was still ongoing.[1]

[3] On 28 August 2010, in the early active stage of labour, Ms TM took a taxi to the maternity ward at the hospital and arrived at 12h55. On admission, she was found to be four centimetres dilated and her membranes ruptured shortly thereafter. The nursing staff then conducted regular foetal monitoring by way of cardiotocography. Nothing abnormal was detected and her labour continued normally.

[4] Earlier that day, at 03h35, another patient, Ms CM, who was pregnant with twins had already been admitted. She required a caesarean section and was scheduled for the procedure at 05h00. However, it was cancelled because the maternity unit had run out of sterilised theatre gowns. Due to this shortage, the theatre was unused from 04h34 to 06h05 (first down time). At 06h00, this issue was resolved and another patient, whose foetus was in distress, had her caesarean section.

[5] From 07h05 to 09h30, the theatre was again unused (second down time). Between 09h30 and 11h40, two other patients were taken to the theatre for caesarean sections due to foetal distress. At 09h50, Ms G was admitted to the ward and since she had previously undergone two caesarean sections, a natural birth posed a risk of uterine rupture. From 11h40 to 14h15, the theatre was unused (third down time).

[6] Ms DM was also admitted. At 13h45 her baby went into foetal distress and a decision to perform a caesarean section was taken. Ms CM eventually went in for her caesarean section nine hours after it was originally scheduled and the procedure was completed at 15h20. At 15h30, Ms DM was taken to theatre for her caesarean section.

[1] *Tendai v MEC Health and Social Development, Gauteng Provincial Government* 2018 JDR 1849 (GJ) (High Court judgment) at paras 5-6.

[7] At 15h45 an abnormal cardiotocography reading, which indicated foetal distress, was detected on Ms TM and, at 16h00, a decision was taken that an emergency caesarean section be performed. However, Ms DM was still undergoing a caesarean section from 15h50 to 16h25, and thereafter Ms G occupied the theatre between 16h45 and 17h55. As a result, Ms TM could only be attended to at 18h15 and her caesarean section was finalised at 19h20. MM was born at 18h43, approximately 155 minutes after the initial decision to perform Ms TM's caesarean section was taken.

[8] MM suffered a hypoxic ischemic injury due to perinatal asphyxia which resulted in a mixed-type cerebral palsy, that is, permanent brain damage. On 28 November 2013, a magnetic resonance imaging (MRI) scan performed on MM when he was three years old reflected that this had been caused by an acute profound insult.

[9] At birth, MM was found to be severely acidotic. Professor Johan Smith, a specialist neonatologist, testified on behalf of Ms TM that the process leading to acidosis occurs when the tissues are deprived of oxygen. This leads to the cells generating excess acid which, if allowed to accumulate, leads to a drop in the pH of the blood of the foetus. This, in turn, can lead to an ischemic injury. Essentially, Professor Smith testified that the cause of the brain injury was the lack of oxygen to MM's brain.[2] Professor Smith further testified that MM suffered a hypoxic ischemic injury during the period 17h43 to 18h43.

[10] Dr Linda Ruth Murray, a specialist obstetrician and gynaecologist, testified on behalf of Ms TM that during birth a foetus will move along the birth canal by virtue of the contractions of the muscles of the maternal uterine wall. These contractions occur periodically through labour and with greater frequency and intensity as the baby is about to be born. During this process, the placenta and umbilical cord are compressed and the oxygen flow to the foetus is temporarily occluded. As the contractions end, the

[2] Id at paras 11-2.

compression on the placenta and umbilical cord is relieved, and the oxygen flows freely to the baby.[3]

[11] Dr Murray further testified that at the time that the foetus is constricted by the contractions of the uterine muscles, the occlusions to the cord and placenta affect free flow of oxygen to the foetus. This may exhaust the foetus' reserves and ability to cope, and it will eventually succumb to hypoxia and suffer brain injury. Dr Murray compared this to a person in a tub of water who is kept under water for a time and allowed up to catch their breath periodically. This process can be performed for a relatively long period, but at a certain point, the person's energy reserves are depleted, and that person will not be able to catch their breath.[4]

[12] Professor Keith Bolton, a specialist paediatrician, testified on behalf of the respondent that the injury could have been caused by the fact that the distress of the foetus was not alleviated before the unborn child succumbed to the injury. However, he was of the opinion that there could have been other possible reasons which rendered MM compromised and thus unable to cope with the rigour of the birth process in the first place. Professor Bolton posited that the cause of the cerebral palsy may have been an intra-amniotic infection known as chorioamnionitis, a bacterial infection with attendant inflammation of the foetal membranes. This condition is associated with prolonged labour. The fact that antibiotics were prescribed to the foetus and the mother and that Ms TM's wound became infected some days later after the birth were said to support this proposition. It was, however, conceded that these aspects were inconclusive as to the cause of the injury.[5]

[3] Id at para 12.

[4] Id at para 13.

[5] Id at para 15.

Litigation history

High Court

[13] There were two issues, according to the pleadings, which the High Court was called upon to decide. The first was whether the respondent failed to provide adequate resources (facilities and personnel). And the second was whether the hospital rendered substandard care to Ms TM. The respondent admitted that it owed Ms TM and MM a duty of care, subject to the availability of resources. In her plea, the respondent denied liability for the claim and further averred that the hospital and its staff members performed the caesarean section as soon as they reasonably could.

[14] In the pre-trial minute, the respondent made the following admissions:

(a) She undertook to render medical care and treatment to Ms TM and her unborn child on her admission to the hospital.

(b) By virtue of the provisions in the Constitution (sections 9, 10, 11 and 27), she owed Ms TM a duty of care to ensure the rendering of medical care, treatment and advice to her with skill, care and diligence as could reasonably be expected of medical practitioners and nursing staff in similar circumstances; thus placing an obligation on the respondent to ensure that proper, sufficient and reasonable health care services are provided to members of the public (particularly those who cannot make use of services in a private hospital).

(c) The hospital staff undertook to render medical examinations, care, treatment and advice to Ms TM and to monitor her labour as was reasonably required in the circumstances.

[15] After considering the evidence, the High Court held that there was a direct link between the failure to treat the patients efficiently throughout the day in question and the injury that occurred.[6] It reasoned that the failure by the hospital staff to prevent the

[6] Id at para 42.

second and third down times when they knew that there were women who were in the labour ward in need of caesarean sections amounted to negligence.[7] Accordingly, the Court held the respondent liable on the basis that the hospital had not managed its resources adequately.[8] It further emphasised that this case was about the management of available resources and in so doing it declined to make a finding on whether the allocation of resources was actionable.[9]

[16] It bears noting that the finding in relation to negligence was made despite the fact that neither the non-utilisation of the theatre earlier in the day nor the alleged mismanagement of resources was pleaded. Aggrieved by the outcome, the respondent sought and was granted leave by the High Court to appeal to the Supreme Court of Appeal.

Supreme Court of Appeal

[17] The Supreme Court of Appeal was split. Both the majority and minority judgments accepted that the respondent, acting through the medical staff, owed Ms TM a legal duty to exercise reasonable care, skill and diligence in her treatment.[10]

[18] The majority judgment assumed wrongfulness in favour of Ms TM. It observed that the legal duty alleged to have been owed to MM by the hospital was pleaded in broad and general terms and that the respondent and its medical staff were charged with the management of the maternity unit. As a result, the majority found that there is a legal duty in delict "to manage the [maternity] unit's resources with reasonable efficiency" and this duty could "have been breached by acts or omissions preceding"

[7] Id at para 41.

[8] Id at para 43.

[9] Id at paras 31 and 33.

[10] *The Member of the Executive Council for Health & Social Development of the Gauteng Provincial Government v TM* [2021] ZASCA 110; 2021 JDR 1819 (SCA) (Supreme Court of Appeal judgment) at paras 53 and 56.

Ms TM's admission at 12h55 on 28 August 2010.[11] In coming to this conclusion, the majority judgment focused its attention on the following:

(a) The failure by the hospital to have a second functioning maternity theatre so that when Ms G and Ms TM needed caesarean sections at 16h00, they could both be promptly attended to.
(b) The failure by the hospital staff to use the operational theatre earlier during the day as the need arose so that it would be available for Ms TM's procedure.
(c) The triage decision to prioritise Ms G's caesarean section over Ms TM's.
(d) The failure by the hospital staff to take interim measures to improve the foetus' oxygenation while Ms TM waited for her procedure.
(e) The failure to refer Ms TM to another hospital.

[19] On the first issue, the majority found that although there was space for a second maternity theatre, the second theatre was not equipped and had no staff.[12] It noted the fact that this issue was not pleaded by Ms TM and held that if it was, it would have had to be supported by expert evidence as well as the hospital's detailed financial records.[13] As a result, having considered the limited evidence before it, the majority judgment could not find that the respondent was negligent in failing to allocate capital to ensure that the second maternity theatre was functional in 2010.[14]

[20] On the down time issue, the majority found that since this was also not pleaded by Ms TM, it would be unfair to penalise the respondent for failing to adduce evidence in respect of this particular issue. According to the majority, if Ms TM wanted to rely on this ground she should have specifically called for that evidence. The majority further disagreed with the High Court and held that Ms TM failed to discharge this

[11] Id at para 56.

[12] Id at para 69.

[13] Id at para 70.

[14] Id at paras 73 and 77.

onus.[15] Concerning the triage decision, the majority noted that it was also not pleaded but that it was instead developed during the cross-examination of Dr Murray. It then found that the High Court was correct to reject the submission that Ms TM's caesarean section should have been prioritised over Ms G's.[16]

[21] The majority then considered the failure by the hospital staff to take interim measures to improve the foetus' oxygenation which included giving Ms TM an oxygen mask and getting her to lie on her left side. It found that since Ms TM's medical record did not indicate whether Atosiban was administered, this alleged omission was questionable – especially considering that it could do no harm – but there was not enough evidence to indicate that it would have had a material effect on Ms TM's situation.[17] Regarding the use of an oxygen mask, the majority considered Dr Murray's testimony that it was part of standard procedure to give the mother oxygen but that it did very little to help the foetus, and it was generally not used much.[18] In contrast, Dr Hlengani Lawrence Chauke, an obstetrician and gynaecologist with expertise in maternal and foetal medicine, who testified on behalf of the respondent, did not agree with the use of an oxygen mask regardless of it being part of the Guidelines for Maternity Care in South Africa (2007 Guidelines).[19] Insofar as the issue of placing Ms TM on her side, the majority found that although the experts agreed that this measure would help the mother and not harm her, there was no evidence about the extent of its usefulness and Ms TM was not pressed about her position since she testified eight years after the fact.[20]

[15] Id at paras 89-90.

[16] Id at paras 93 and 96.

[17] Id at para 101.

[18] Id at para 102.

[19] Id. See also Department of Health *Guidelines for Maternity Care in South Africa, Department of Health, Republic of South Africa: A manual for clinics, community health centres and district hospitals* 3 ed (Department of Health, 2007).

[20] Supreme Court of Appeal judgment above n 10 at para 103.

[22] In analysing the failure to refer Ms TM to another hospital, the majority stated that no evidence was led to determine: which hospitals existed; the facilities they had; the distance to those hospitals; and whether an ambulance service was available and the estimated duration of the transfer.[21] It concluded that the procedure could not have been performed earlier than 16h15, taking into account the nature of caesarean section intervals.[22] The majority emphasised the fact that this issue was also not pleaded.

[23] Lastly, the majority criticised Professor Smith's opinion about the final-hour hypothesis on the basis that it was not supported by a "respectable body of expert opinion".[23] It therefore reversed the judgment of the High Court and held that no negligence and causation had been established by Ms TM.

[24] The minority judgment, however, would have dismissed the appeal on the grounds that Ms TM should have been prioritised over Ms G because her condition was not dire compared to that of Ms TM. The minority found the hospital staff negligent for its failure to promptly refer Ms TM to another facility. In support of its decision, the minority relied on the 2007 Guidelines, which provided that a caesarean section should be performed within one hour of the decision to operate and disagreed with the majority about the procedure not being performed any sooner had Ms TM been referred to another hospital.[24]

In this Court

Applicant's submissions

[25] Ms TM submits that this Court's jurisdiction is engaged as the matter raises constitutional issues of significance. She submits that she has the right to have access to adequate and emergency health care services and also relies on MM's section 28(2)

[21] Id at para 106.

[22] Id at para 110.

[23] Id at para 126.

[24] Id at paras 46-7.

right.[25] She also argues that the matter implicates the constitutional norms of accountability, responsiveness and good governance, which require this Court to consider whether a public hospital can be held accountable for its failure to properly manage its resources, before and after admission to a labour ward, and the standard of care afforded to pregnant mothers.

[26] Ms TM also contends that the matter raises an arguable point of law of general public importance which requires this Court to determine whether the respondent bears a legal duty, through the management of public maternity units, to ensure the efficient use of resources.

[27] Ms TM submits that after prioritising Ms G's caesarean section over hers, knowing that her foetus was in distress and that they could not provide the necessary caesarean section within the required time, the hospital staff ought to have referred her to another hospital which might have been able to help. This, Ms TM argues, is because the hospital is in a province with other public hospitals, such as Chris Hani Baragwanath, which are located within a 30 kilometre radius, and it would have been reasonable to do so in accordance with its Hospital's Policy for Admission of Patients from Casualty which provides that:

> "If no space can be found for the patient within the hospital, the clinical executive on call must be contacted so that arrangements can be made for the patient to be transferred to another medical facility or, alternatively, to ensure that additional nursing staff are acquired to provide the necessary nursing care, thus enabling the patient to remain at this hospital."[26]

Thus, reasonable hospital staff would have taken steps to ascertain whether MM would have been able to be delivered sooner elsewhere.

[25] Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child".

[26] Supreme Court of Appeal judgment above n 10 at para 43.

[28] Ms TM further submits that, from the time the decision to perform a caesarean section on her was taken to the time the procedure was finally carried out, the staff failed to take appropriate interim measures to mitigate the risks associated with foetal distress. In particular, they failed to administer tocolytic medication, to provide an oxygen mask and to get her to lie on her side.

[29] Ms TM contends that the majority of the Supreme Court of Appeal erred when it found that she did not discharge the burden of proof in respect of the down times. This is so because, as the minority found, the pleadings were clear and concise and were supported by the pre-trial minute and the submissions. Once the down times were established, the respondent had an obligation to demonstrate that the maternity theatre could not be reasonably utilised. The failure to utilise the maternity theatre resulted in the unacceptable delay in her operation and there was no way for her to know, or be able to ascertain, how that happened. For that reason, she submits that the establishment of the down times must have at least created an evidentiary burden on the respondent to show they happened in reasonable circumstances.

[30] Ms TM contends further that in order to establish factual causation, a claimant must prove a causal link between the defendant's action and the omission, on the one hand, and the harm suffered by the plaintiff, on the other. To determine this, continues the submission, the courts apply a "but for" test which does not require the plaintiff to satisfy a court that the harm would certainly not have occurred in the absence of the negligent conduct. The plaintiff is only required "to establish that the wrongful conduct was probably a cause of the loss".[27]

[31] Ms TM also argues that had the hospital used its resources efficiently and managed the theatres properly, Ms CM's caesarean section would have taken place from 07h05 to 08h10 or 11h40 to 12h45 and Ms G's procedure would have taken place from 11h40 to 12h50 or 12h55 to 14h04. Ms DM's caesarean section would have taken place

[27] *Minister of Safety and Security v Van Duivenboden* [2002] ZASCA 79; 2002 (6) SA 431 (SCA) at para 25.

around 14h15 to 15h15 and by the time the decision was taken at 16h00 to operate on Ms TM, the theatre would have been available. Importantly, this would have prevented the brain injury to MM.

[32] Ms TM submits that the hospital's failure to properly manage its resources is indicative of a systemic failure and the respondent should not escape accountability even where the cause of the harm is impossible to pin down.

[33] Lastly, Ms TM argues that the majority of the Supreme Court of Appeal was incorrect to disregard Professor Smith's final-hour hypothesis since it had no basis to assume that the injury to MM occurred within 30 minutes after foetal distress as this assumption was not raised or proved in evidence. The evidence of Professor Smith, which was not contradicted or challenged, ought to have been accepted. Therefore, the application for leave to appeal should succeed with costs.

Respondent's submissions

[34] The respondent submits that this Court has no jurisdiction because the matter does not raise a constitutional issue, nor does it raise an arguable point of law of general public importance and, as a result, leave to appeal should not be granted. The respondent also contends that the difficulty facing Ms TM is that all the issues she contends engage the Court's jurisdiction were not pleaded.

[35] The respondent contends that the principles enunciated in *Jiba*[28] are relevant here since the application does not raise issues of law but an evaluation of facts. This is because what is before this Court is whether, on the facts, negligence and causation have been established. This, the respondent submits, is not a question of law, nor is it a question of general public importance.

[28] *General Council of the Bar of South Africa v Jiba* [2019] ZACC 23; 2019 JDR 1194 (CC); 2019 (8) BCLR 919 (CC) (*Jiba*).

[36] The respondent submits that its alleged failure to ensure that public resources are used efficiently does not constitute a breach of a legal duty and, accordingly, does not establish a claim for delictual damages. This is because the measures relied on by Ms TM do not anticipate, directly or by inference, an obligation to pay damages for loss suffered as a result of the breach or non-compliance and a finding otherwise would have a chilling effect. Importantly, a finding by this Court that would extend delictual liability in respect of medical negligence would not be in the public interest given the financial state of health care facilities.

[37] In relation to the majority judgment that it was reasonable for the hospital to have the second theatre fully operational, the respondent submits that this is an issue entrusted by law to public officials and not to the courts, and no case has been made out for challenging this decision. Regarding the down time issue, the respondent submits that even if the use of the theatre was negligent, the High Court was wrong to find the respondent liable for conduct that occurred before Ms TM was admitted to the facility and that there was sub-optimal use even when there was no indication that she would undergo a caesarean section. The respondent submits that even if there was poor management of the resources, that did not translate to negligent conduct for purposes of delictual liability. In this respect, the findings of the minority that there was no legal duty on the hospital before Ms TM was admitted and that of the majority that she failed to establish negligence should stand.

[38] In respect of the triage decision, the respondent argues that the choices of Dr Sibeko, who had her hands full as the senior doctor and registrar on duty on the day in question, were not negligent and, because of her passing, there was no explanation of the criteria she used for prioritising other patients over Ms TM and no adverse inference should be drawn against them. Importantly, the respondent contends that the majority's views, that even if a senior doctor had been consulted it had not been established that the decision would have been different, should prevail.

[39] On the issue of interim measures, the respondent submits that the majority judgment was correct in its finding that the failure to administer Atosiban was questionable, and there was no evidence that its administration would have a material effect. The respondent also argues that the use of an oxygen mask provided little assistance to the foetus and that getting the mother to lie on her side would have also had no substantial effect.

[40] On the question whether Ms TM should have been referred to another hospital, the respondent submits that the policy relied on by the minority judgment did not apply and since reference was made to material that was not before the High Court, the issue should not have been considered. Lastly, on the issue of causation, the respondent submits that where an MRI scan indicates the injury pattern as acute profound as opposed to a partial prolonged one, the time to take precautionary measures is limited. Thus, the majority's findings in this regard should be upheld.

Issues

Jurisdiction and leave to appeal

[41] There are two issues before this Court, namely whether a constitutional issue is raised and, if so, whether it is in the interests of justice for this Court to grant leave to appeal.

[42] Section 167(3)(b) of the Constitution provides that:

> "The Constitutional Court—
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> . . .
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> (b) may decide—
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> (i) constitutional matters; and
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> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

[43] In order to determine whether this matter engages the jurisdiction of this Court, we must consider its character.[29] It is now settled that this Court will entertain matters which involve—

> "(a) the interpretation, application or upholding of the Constitution itself, including issues concerning the status, powers or functions of an organ of state and disputes between organs of state; (b) the development of (or the failure to develop) the common law in accordance with the spirit, purport and objects of the Bill of Rights; (c) a statute that conflicts with a requirement or restriction imposed by the Constitution; (d) the interpretation of a statute in accordance with the spirit, purport and objects of the Bill of Rights (or the failure to do so); (e) the erroneous interpretation or application of legislation that has been enacted to give effect to a constitutional right or in compliance with the Legislature's constitutional responsibilities; or (f) executive or administrative action that conflicts with a requirement or restriction imposed by the Constitution."[30]

The character of this appeal turns on the divergent factual findings of the Supreme Court of Appeal. This factual evaluation is not a precursor to reaching and deciding a constitutional issue.

[44] This Court in *Gcaba* said:

> "Jurisdiction is determined on the basis of the pleadings . . . and not the substantive merits. . . . . In the event of the Court's jurisdiction being challenged at the outset (*in limine*), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the Court's competence."[31]

[45] This Court in *Jiba* then went a step further:

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[29] *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* [2021] ZACC 35; 2021 JDR 3149 (CC); 2022 (5) BCLR 532 (CC) at para 35.

[30] *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* [2006] ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) at para 38.

[31] *Gcaba v Minister for Safety and Security* [2009] ZACC 26; 2010 (1) SA 238 (CC); 2010 (1) BCLR 35 (CC) at para 75.

> "The proper approach to this inquiry is to have recourse to the pleadings and interpret them with a view to determine the nature of the claim advanced. It must be clear from that claim that a constitutional issue or an arguable point of law of general public importance is raised. For a constitutional issue to arise the claim advanced must require the consideration and application of some constitutional rule or principle in the process of deciding the matter."[32]

And it recognised that "[t]he apparently incorrect determination of facts by the majority in the Supreme Court of Appeal and the erroneous application of [a legal test] to those facts also [does] not raise a constitutional issue".[33]

[46] Thus, this Court has and will refuse "to entertain appeals that seek to challenge only factual findings or [the] incorrect application of the law by the lower courts".[34] A challenge to a decision of the Supreme Court of Appeal on the sole basis that it is wrong on the facts is not a constitutional matter.[35]

[47] To fully appreciate and understand what this case is about, it is necessary to look at the pleadings and make the following observation. The pleadings in this case are not a model of clarity and not all of the issues on which the evidence was led were pleaded. It must be clear from the pleadings that a constitutional issue or an arguable point of law of general public importance is being raised.

[48] As stated earlier, the High Court did not find for Ms TM on the two pleaded issues. The respondent admitted that it owed her and MM a duty of care subject to the availability of resources. The High Court held—

[32] *Jiba* above n 28 at para 38.

[33] Id at para 49.

[34] *Mankayi v Anglogold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 12.

[35] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 15.

> "that those responsible for managing and staffing the Maternity Unit were negligent in not seeing to it that the facility was not managed in a manner which would have rendered the theatre available to the plaintiff sooner than occurred. It is not in dispute that the defendant is vicariously liable for their conduct."[36]

[49] This finding is at odds with the pleaded case. Neither the non-utilisation of the theatre earlier in the day nor the alleged mismanagement of resources were pleaded as grounds of negligence. In the Supreme Court of Appeal, both judgments rejected this finding. Following a thorough analysis of the pleadings and evidence, the majority adopted a view that wrongfulness was not in dispute and assumed the issue in favour of Ms TM. It concluded that she had failed to prove that the hospital had been negligent and, in any event, failed to establish that such negligence would have been the factual cause of MM's injury. Once wrongfulness had been assumed in favour of Ms TM, it was out of the way and no longer an issue that needed to be determined. The only issues that remained were negligence and causation and both turned on the evaluation of factual evidence. That is still the position in this Court.

[50] Before us, Ms TM asserts that the hospital failed to manage the limited resources that were available in a manner that was reasonable. This issue essentially involves a determination of facts. Ms TM also seeks to rely on this Court's judgment in *Mashongwa*[37] where jurisdiction was established on the basis of wrongfulness. This Court's jurisdiction in that matter was engaged on the basis that "an enquiry into wrongfulness 'focuses on the conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable'".[38] It is clear that the issue of wrongfulness was an additional, separate basis for jurisdiction in that matter. This Court also held that a matter that appears to be factual in nature

[36] High Court judgment above n 1 at para 43.

[37] *Mashongwa v Passenger Rail Agency of South Africa* [2015] ZACC 36; 2016 (3) SA 528 (CC); 2016 (2) BCLR 204 (CC).

[38] Id at para 13.

may still engage its jurisdiction where constitutional issues are "the pillars on which the superstructure of [that] case rests".[39] That is not the position in this matter.

[51] In the stated case before the High Court, there was an admission of wrongfulness with the result that the debate before the Supreme Court of Appeal was solely on negligence and causation, hence the Supreme Court of Appeal correctly accepted, in my view, that this was not a live issue. The appeal was not upheld on the basis of wrongfulness; thus no constitutional issue was raised. The difficulty standing in the way of Ms TM is that the finding of the majority regarding wrongfulness was in her favour and a party cannot appeal a judgment that is in its favour.

[52] It is also my view that Ms TM has brought a narrow case before this Court and does not argue that the Supreme Court of Appeal and the High Court held different views about the content of the law. What remains is negligence and causation and the question to be asked is whether a resolution of these issues engages the jurisdiction of this Court. I do not think so. The disagreements between the majority and minority together with the decision of the High Court stem from the evaluation of facts and not the application of legal principles. The issue before the Supreme Court of Appeal was whether, on the facts, Ms TM had established that the conduct of the hospital staff had been negligent and, if so, whether such negligence was causally linked to MM being afflicted with cerebral palsy. These are purely factual issues which cannot be framed as "constitutional matters".

[53] These are factual issues which Ms TM is inviting us to grapple with and we should decline the invitation. Whether the hospital staff administered the tocolytic medication is a factual issue. Whether the hospital staff reached out to other hospitals about their availability and whether they could assist Ms TM, are also questions of fact. Whether the injury to MM occurred in the first hour or much later, is unfortunately, another question of fact. These questions do not require the interpretation of sections

[39] Id.

in the Bill of Rights. Importantly, it is accepted that there was a duty to treat Ms TM reasonably.

[54] Thus, the Court must refuse to entertain an appeal that seeks to challenge only factual findings. I cannot overstate that a challenge to a decision of the Supreme Court of Appeal on the basis only that it is wrong on the facts does not raise a constitutional matter.

[55] Ms TM further contends that the disagreement before us is not on the facts but on the legal duty to manage the resources efficiently. She states that in assessing the legal duty involved, there must be a duty to make use of the facilities available. The question of the legal duty, in my view, did not arise; it was agreed that there was a legal duty on the respondent and that there was a duty to ensure proper treatment. As far as the resources are concerned, courts should be slow to interfere with budgetary decisions and the allocation of resources.[40]

[56] This Court recently considered a similar matter in *NVM*.[41] That matter concerned the birth of a minor child who suffered severe brain injury which resulted in cerebral palsy. The issue in that matter was whether the respondent was liable for damages.

[57] The minority judgment held that the matter engaged this Court's jurisdiction on the basis that "the factual disputes in this matter are both underpinned by the right of access to healthcare, and are also ancillary to this constitutional issue"[42] and found that the applicant "adduced sufficient evidence to prove factual causation".[43] However, the majority judgment found differently.

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[40] *Soobramoney v Minister of Health, Kwazulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

[41] *NVM obo VKM v Tembisa Hospital* [2022] ZACC 11; 2022 JDR 0608 (CC) (*NVM*).

[42] Id at para 49.

[43] Id at para 87. The minority judgment at para 79 relied heavily on the fact that:

[58] The majority judgment held that "[a] peripheral 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".[44] It further held that it was uncontentious that the respondent owed a duty to the applicant to "provide her with a reasonably competent level of care, the breach of which would be wrongful".[45] Importantly, the majority, in line with what this Court has held on numerous occasions, found that the application of factual causation to the facts of a case does not raise a constitutional matter.[46]

[59] It is clear from *NVM* that where a matter concerns an evaluation of facts or the application of factual causation to the facts of a matter, it will not engage the jurisdiction of this Court. Importantly, where the Court has to consider the existence of a legal duty, wrongfulness in the context of causation, it may be a constitutional matter. The position here is different. The legal duty was admitted by the respondent and neither the High Court nor the Supreme Court of Appeal were called upon to examine sections 7(2)

"(a) The foetus was evidently in a healthy condition at 03h15, judging by the clear amniotic fluid and the apparently normal foetal heart rate.

(b) During the critical period, between 03h15 and 04h45, there was no foetal heart rate monitoring at all by the hospital staff. Monitoring should have occurred at half hourly intervals, that is, at 03h45 and again at 04h15, as Ms NM was in active labour by that time.

(c) V suffered an acute profound hypoxic injury intrapartum during the critical period.

(d) There were no emergency measures adopted by the nursing staff – none were recorded in the hospital records and none were mentioned at the trial.

(e) Absent any foetal heart rate monitoring during the critical period, no warning signs of a possible hypoxic event were capable of being detected. This was very properly conceded at the trial to constitute a negligent omission and the attempt to withdraw that concession in this Court falls to be rejected.

(f) Had the monitoring been done, on the probabilities the hospital staff would have picked up the warning signs (that probably would have been present) to indicate foetal distress caused by hypoxia. In the face of these warning signs, the staff would on the probabilities have taken urgent steps to "buy time" for V and to make arrangements for an urgent caesarean section so as to prevent the injury to V's brain. It is probable that with the proper emergency measures, V's brain injury would not have occurred."

[44] Id at para 88.

[45] Id at para 91.

[46] Id at paras 98-9.

and 27 of the Constitution. What distinguishes this case from *Mashongwa* is that there the claim was a constitutional matter because the very existence of the legal duty or wrongfulness had to be determined. In this matter, wrongfulness has been assumed in favour of Ms TM and the only question which was answered in the negative was whether the admitted breach of the required standard of care factually caused MM's injury.

[60] I accept that questions relating to the existence and scope of the legal duty to manage resources efficiently could be said to be connected to a constitutional issue. However, the difficulty facing Ms TM is that this issue was not pleaded. Another difficulty facing her is the inconclusive and divergent expert evidence which is further compounded by the insufficient evidence and inadequate pleading of the down times. No effort was made to plead or lead evidence regarding the activities of the hospital staff during these times.

[61] As a second string to her bow, Ms TM contends that this matter implicates the right to health care services. What Ms TM is attempting to do is dress her claim in terms of sections 7(2) and 27 of the Constitution. This is, however, not enough to make the case a constitutional matter. In *Mbatha,* this Court held that a factual issue does not become a constitutional issue because it has been clothed in constitutional garb,[47] and this rings true in this matter too.

Conclusion

[62] This matter does not raise a constitutional issue. Therefore, leave to appeal must be refused.

[47] *Mbatha v University of Zululand* [2013] ZACC 43; (2014) 35 ILJ 349 (CC); 2014 (2) BCLR 123 (CC) at para 222.

Costs

[63] The respondent is the successful party and costs should follow the result; however, it is a state institution which draws its budget from the national fiscus. In accordance with *Biowatch*,[48] each party must then pay its own costs as there are no exceptional circumstances that would warrant ordering Ms TM to pay the respondent's costs.

Order

[64] The following order is made:

1. Leave to appeal is refused.

[48] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

For the Applicant:	S Budlender SC and E Webber instructed by Wim Krynauw Attorneys
For the Respondent:	V Soni SC and P Muthige instructed by the State Attorney, Johannesburg