

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

In the matter between:

LUNGILE NTSELE

Plaintiff

and

MEC FOR HEALTH, GAUTENG PROVINCIAL GOVERNMENT

First Defendant

LEGAL SUMMARY

MOKGOATHLENG J

The plaintiff instituted action on behalf of her minor child (A) against the defendant for damages from the alleged negligent medical treatment accorded them by the defendant's employees during 1996 at Zola Clinic (*the clinic*) and Baragwanath Hospital (*the hospital*).

At the commencement of the trial the parties requested the court to separate the issues of liability and quantum of damages. The court granted their request in terms of Rule 33 (4) of the Uniform Rules of Court. Accordingly, the court only dealt with the issue of causation and negligence in this matter.

The court stated that for the plaintiff to succeed with her claim she had to establish a prima facie case of negligence against the defendant's employees. Alternatively, the plaintiff has to "show that the factual injurious eventuality happened in a manner which when explained by implication carries a high probability of negligence regarding the defendant's employees' conduct." In casu, the court was satisfied that the plaintiff, through circumstantial evidence, established a prima facie case of negligence against the defendant's employees and the treatment accorded to her and her foetal child was not in accordance with the skill and diligence prevailing in the medical profession, and as a consequence, her child suffered hypoxia and peri-natal asphyxia which resulted in cerebral palsy. It was held that the occurrence of A's cerebral palsy provides circumstantial evidence which shows the existence of negligence on the defendant's employees' conduct which justifies the court to draw an inference of negligence from the proven facts, if the inference is consistent with the proved facts and the proved facts exclude all other reasonable inferences that can be drawn.

Consequently, once that has been done, the rebuttal burden shifts to the defendant, who must provide evidence by giving a reasonable explanation of the incident that it happened without any negligence attributable to its employees. Furthermore, the court held that if the plaintiff did not have within her grasp the means of knowing how the clinic and hospital staff administered treatment to her and her child, the court is

permitted to draw an inference of negligence by applying the doctrine of ***res ipsa loquitor***, as all the crucial specific treatment facts are exclusively within the defendant's employees' knowledge. The court also held that it was unfair and unjust for the defendant's, without any cogent evidence from the defendant's employees regarding the treatment of accorded to the plaintiff or any reasonable explanation regarding the disappearance of the plaintiff's clinic and hospital records, to expect the plaintiff to be precise and specific about the treatment accorded her at the clinic and hospital whilst under anaesthesia after a lapse of over 15 years.

The defendant did not tender any explanation why the hospital records were not available and did not call any of its employees to give reasons of the steps they took in attempting to get them or explain the treatment accorded the plaintiff. This accordingly justified an adverse inference of negligence to be made against the defendant. Furthermore, under the prevailing exceptional circumstances the invocation of the maxim ***res ipsa loquitor*** was justified, to have recourse to the applicable evidential evidence as the defendant's employees had within their grasp, the knowledge how the incidence occurred. Further, the defendant bears the rebuttal burden of disproving causation by showing that A's brain damage was not attributable to the defendant's employees negligence.

The Court criticised and rejected the evidence of the expert witness called by the defence, as unreliable, without cogent scientific basis and biased. Further, all the experts, including the one called by the defence agreed that the plaintiff was a high-risk patient because she was a first time pregnant patient, whose membranes were ruptured at about 5.30am at the clinic and was thereafter transferred and arrived at the hospital

at 8.00am as an emergency patient in need of prompt treatment because after the rupture of the plaintiff's membranes, the risk of A being afflicted by hypoxia was ever present and such risk would be exacerbated if an unreasonable delay occurred in treating the plaintiff and expeditiously delivering of A. On arrival of the plaintiff at the hospital, had the defendant's employees monitored the heart beat rate of the foetus, they would have established that the foetus was in distress. This would have led them to realise that time was of the essence in relieving the foetus's distress by delivering Ayanda in the quickest possible method by caesarean section to prevent the occurrence of hypoxia which resulted in per-natal asphyxia.

The defendant did not lead evidence to show that the delivery of A was the most expeditiously indicated delivery under the circumstances and same was carried out promptly and efficiently with the skill and diligence prevailing in the medical profession. In the absence of such exculpatory rebuttal explanatory evidence, the inference was inescapable that because there was an emergency, a long time was allowed to elapse before the plaintiff was attended, consequently, there was a failure to provide skilled and diligent treatment during this critical period, because there was no doctor to treat the plaintiff in attendance, at that critical period, as a result, vital time to diagnose from the onset of hypoxia was lost.

The view of the court was that, the circumstantial evidence regarding the nature of Ayanda's cerebral palsy justifies an inference on the probabilities that it occurred because of the defendant's employee negligence.

Because the defendant failed to discharge the evidential burden disproving a causal connection between the negligence of his employees and Ayanda's cerebral palsy, the summation that the eventuality speaks for itself was unanswered. The defendant was therefore declared liable to compensate 100% of the plaintiff's proven damages.