



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 30 November 2023

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

The Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Motubatse & Another (182/2021) [2023] ZASCA 162 (30 November 2023)

Today the Supreme Court of Appeal (SCA) upheld an appeal against an order of the full court of the Gauteng Division of the High Court, Johannesburg (the full court).

On 22 May 2015, the respondents, in their capacity as parents and guardians of their minor child, instituted a damages claim against the MEC for delictual damages in the amount of R29 158 000. They alleged that their child had suffered cerebral palsy as a result of the negligence of the employees of the MEC during the birth. After the pleadings were closed, the respondents sought an order for the discovery of the mother's hospital records and the child's ECG records. The MEC failed to provide these records. The respondents then obtained an order compelling the MEC to comply with the order (the compelling order). Despite having been served with this order, the MEC still failed to discover the documents.

On 18 April 2017, an order was granted striking out the defence of the MEC on the basis of their failure to comply with the compelling order. The respondents were granted leave to apply for default judgment against the MEC (the striking order). The MEC applied for an order rescinding the striking order and one condoning the failure to comply with the compelling order. The court of first instance accepted the explanation for non-compliance, and was satisfied that the MEC had a valid defence to the respondents' claim. It accordingly condoned the MEC's non-compliance with the rule 35(1) request, and rescinded the striking out order. The court of first instance granted leave to appeal to the full court.

The full court found that the court of first instance had not exercised its discretion properly when it rescinded the striking order, as the MEC had failed to: (a) give a satisfactory explanation for the delays and, (b) to establish a *bona fide* defence to the respondents' claim. The MEC applied for special leave to the SCA, and the SCA referred the application for special leave to appeal for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013.

In addition to the special leave to the SCA, the MEC, sought condonation for the late filing of the notice of appeal and the record of appeal as well as an order for the reinstatement of the appeal, which lapsed when the record was not filed timeously. Both parties sought condonation for the late filing of their heads of argument.

In addressing the application for special leave to appeal, the SCA held that it **was** duty-bound to intervene and set aside the order of the full court as that court committed a material error of law and it

cannot stand. The SCA reasoned that it was trite that a rescission order is not appealable as it is interlocutory in nature and does not deal with the definitive rights of the parties. If left undisturbed, in terms of the doctrine of precedent, the order of the full court would bind all the judges in the Gauteng Division, and have persuasive force in other divisions of the high courts. The SCA concluded that the MEC had succeeded in showing special circumstances which justify that special leave to appeal be granted.

The SCA further held that, under any other circumstances, the application for special leave to appeal would not have succeeded as the MEC's flagrant non-compliance with the rules of the high court and the SCA was indicative of a disturbing pattern, regard being had to the instances in the high court which led to the defence being struck out.

In the result, the SCA upheld the appeal and set aside the order of the full court. The applicants were ordered to pay the costs of the appeal, due to their disregard of the court rules.

-----oOo-----