



## CONSTITUTIONAL COURT OF SOUTH AFRICA

**MEC for Health, Gauteng v Vuyisile Eunice Lushaba**

**CCT 156/15**

**Date of hand down: 23 June 2016**

---

### MEDIA SUMMARY

---

*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

Today the Constitutional Court handed down judgment in a matter concerning an appeal against two consecutive orders issued by the High Court of South Africa, Gauteng Local Division, Johannesburg. In the main order the applicant, as a nominal defendant in the trial court, was held liable for 100 per cent of the plaintiff's damages, arising out of the wrongful birth of the plaintiff's son at a state hospital. The applicant challenges the ancillary order on costs on the ground that it was improperly issued.

The applicant is the Member of Executive Council for Health, Gauteng (MEC). The respondent is Ms Vuyisile Eunice Lushaba, in whose favour the impugned orders were granted. Ms Lushaba instituted a damages claim in the High Court, arising from medical negligence at the hands of officials in the employ of the MEC.

The trial Court held that the MEC was liable for Ms Lushaba's damages and ordered the MEC to pay costs of the action on attorney and client scale. In addition the trial Court ordered the MEC to show cause on 28 October 2014 why he should not be liable for the costs *de bonis propriis* (from his own pocket) in his personal capacity and further directed him in the alternative and if he held the view that he should not be held liable personally for the costs, that he should identify persons in his department as well as in the office of the State Attorney, who should be held personally liable for the costs. In compliance with the order the MEC filed an affidavit deposed to by him in which he confirmed that Mr Jabulani Macheke and Dr Kgoposi Cele were authorised to take decisions on whether to defend actions brought against the department. But, contrary to the direction of the Court, the MEC, having shown why he should not be held liable, did not identify persons who should be held liable. Despite this the Court proceeded to order Mr Matlou, Mr Macheke and Dr Cele to pay out of their own pockets 50 per cent of the costs which the same Court had on 16 October 2014 ordered the MEC to pay.

This Court held that the court a quo's order was irregular and incompetent for a number of reasons. First, this was not how parties who were not litigants should be joined. Second and more seriously, the order reveals that the trial Court impermissibly authorised one of the parties before it to exercise judicial power. This does not accord with section 165 of the Constitution which declares that judicial authority of the Republic is vested in the courts alone. Moreover, the order breached a principle entrenched in our law that no one should be a judge in their own case.

This Court further highlighted that the rule nisi issued on 16 October 2014 did not call any of them to show cause why they should not be held liable. They deposed to affidavits in support of the MEC's contention that he could not be held personally liable. Therefore, there was no legal basis for the trial Court to exercise its judicial authority over them. In punishing the three officials without notice and opportunity to make representations, the High Court breached a fundamental principle of the law that no one should be condemned without a hearing.

In a unanimous judgment, written by Jafta J, the Constitutional Court held that the affidavits were not meant to show cause why these officials should not be held personally liable for costs. On the contrary, they were filed in support of the MEC's case. It was the MEC who was properly heard and not them. An order that was issued in these circumstances violates the officials' right to a fair hearing guaranteed by section 34 of the Constitution.

With regard to the order of 16 October 2014 which dealt with the merits, the Constitutional Court concluded that the decision reached by the High Court on the merits was unassailable and that leave to appeal should be refused, except to the extent of the alternative order on whether the MEC should be held personally liable for costs and if not that he should identify persons who should be held liable and give reasons for the decision.