



IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 4632/2015

In the matter between:

VUYOLWETHU GURA

Plaintiff

And

MEC FOR HEALTH, FREE STATE PROVINCE

Defendant

CORAM: **CHESIWE, J**

HEARD ON: **28, 29 & 31 MAY 2019**

DELIVERED ON: **3 OCTOBER 2019**

JUDGEMENT BY: **CHESIWE, J**

[1] The Respondent (Plaintiff in the main action) herein is suing the Applicant (Defendant in the main action) for medical negligence which is alleged to have resulted in Plaintiff suffering from emotional

shock and trauma coupled with psychological dysfunction in the form of post-traumatic stress and depression. For ease of reference the parties will be referred to as they appear in the main action. The As a consequence of suffering from emotional psychological dysfunction aforesaid Plaintiff alleges that she has suffered both special and general damages all amounting to a sum of R3 000 000,00 for which the Defendant is held liable by the Plaintiff.

- [2] The Defendant denied liability to Plaintiff's claim as well as all the material allegations submitted by the Plaintiff but admitted that there is a legal duty on the medical personnel and medical practitioners employed by the Defendant at Bongani Hospital to take reasonable care to: attempt to, where possible, keep babies born at the hospital alive; and to give medical assistance and care to mothers admitted to the hospital whilst giving birth to their babies. The Defendant admitted that the Plaintiff delivered a male boy on 23 April 2014 and that Baby Gura was born weighing 500 grams at twenty three (23) weeks gestation and would have no chance of survival due to the low birth weight and prematurity.
- [3] In terms of Rule 37 the parties agreed not to separate the issues. Both submitted their respective medical experts' reports and these were accepted by the court.

- [4] The Plaintiff testifies and called three witnesses to testify. The Defendant closed its case without leading any evidence and immediately applied for absolution from the instance.
- [5] Counsel on behalf of the Plaintiff opposed the application and submitted that the Defendant's conduct is irregular as its expert report both on merits and quantum was submitted by agreement. Counsel submitted that the Defendant cannot tender evidence and then invoke the principle of absolution from the instance.
- [6] At the commencement of the trial the Plaintiff testified that on the 21 April 2014, she went into pre-mature labour and she was admitted at Bongani Hospital on the same date at about 23:00. On arrival at the hospital, the Plaintiff was seen by Dr. Mopape who examined her and instructed the nursing staff to administer medication to her without discussing the treatment with the Plaintiff. On 23 April 2014, she was administered with medication on instruction of Dr. Moloi, and a few hours later felt the urgency to go to the toilet. Whilst in the toilet she discovered she had vaginal bleeding. She called one of the nurses for assistance. The nurse examined her and immediately informed her that she was 9cm dilated. The Plaintiff was taken to the labour ward, but was left outside the labour ward for many hours without being attended to. According to the Plaintiff the nurse were

in their staff room when she called them again for assistance. One of the nurse came to her and told her to keep quite as she was disturbing the other patients in the ward. She explained to the nurse that she felt something was coming out and she was not certain if it was the baby. The nurse stood at the foot of the bed without helping her. She gave birth to the baby without assistance. The baby was born head first and then the rest of the body was delivered.

[7] The Plaintiff said after the baby was born, it lay between her legs, in pool of water and blood without moving. The nurse then came and took the baby without checking if it was alive. The nurse put the baby in a waste plastic bag. The Plaintiff requested the nurse to hold the baby. The nurse took the baby out of the plastic bag and put it on her chest and at that moment she felt the baby move. She told the nurse the baby moved. The nurse did not listen to the Plaintiff, but instead took the baby, placenta, and umbilical cord and put everything in a waste bag.

[8] The Plaintiff said a cleaner in the ward told her she heard the cries of a baby in the waste bag and called for assistance. The baby was taken out of the waste bag and taken to the Neonatal Intensive Care Unit (NICU). She mentioned that the bay was alive for approximately two days, and in that short period she was

encouraged to express breastmilk for the baby to be fed via a feeding tube.

[9] Under cross-examination she explained that the nurses told her the baby was a stillbirth and that the doctors and nurse threw away the baby as they believed that there was no hope for the baby. She insisted that the medical staff treated her and the baby inhumanly.

[10] The three witnesses who testified on behalf of the Plaintiff all testified that they were at the hospital to see the baby and were informed by the nurses the baby was a still birth. They found the baby on a cold slab in a cold room. But later the nurse took the baby to another room where it was discovered that the baby was still alive. The Plaintiff's mother said she was happy when she was told that the baby is alive again. The baby was treated in NICU from 23 April 2014 at 20:00 and certified dead on the 25 April 2014 at 10:30. That was the Plaintiff's evidence.

[11] The Defendant without calling any witnesses made an application from the bar for absolution from the instance, which application was opposed by the Plaintiff.

[12] The Plaintiff's contention is that the Defendant submitted its expert report which was handed in as part of the expert notices. Thus the Defendant by submitting the expert report has led evidence by way

of the expert report and that the Defendants still has assertions to answer as the evidence of the Plaintiff and the witnesses remained unchallenged. And on that basis the application of the Defendant must be dismissed.

[13] The Defendant's contention is that the Plaintiff's evidence does not proof any negligence against the Defendant. Counsel on behalf of the Defendant submitted that the hospital records show that the baby was born at 23 weeks, weighing 500 grams and that the Plaintiff was given the best treatment and medication by the hospital staff. Thus there was no causal link to support the Plaintiff's evidence. Counsel submitted that the Plaintiff's cause of action shifted from what was pleaded in the particulars of claim, to a claim of Ubuntu, and that Ubuntu is not an actionable action.

[14] Rule 39 (6) of the Uniform Rules provides that at the close of the case for the Plaintiff, the Defendant may apply for absolution from instance, in which event the Defendant or one counsel on behalf of the Defendant may address the court and the Plaintiff or Counsel on Plaintiff's behalf may reply. The defendant or her Counsel may thereupon reply on any matter arising out of the address of the plaintiff or her Counsel.

- [15] The correct approach for absolution to be applied by a trial at the end of a Plaintiff's case was also formulated in the matter of **Gordon Lloyds Page and Associates v Rivera and Another**,¹ where Harmse J, stated as follows: "the test for absolution to be applied by a trial court at the end of plaintiff's case was formulated in the case of *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403 at 409 G-H. When absolution from the instance is sought at the close of the Plaintiff's case, the test to be applied is not whether the evidence led by the Plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a court, applying its mind reasonably to such evidence could or might (not should, nor ought to) find for the Plaintiff. The plaintiff has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim."
- [16] This implies that the Plaintiff has to make out a prima facie case in the sense that there is evidence relating to all the elements of the claim to survive absolution because without such evidence no court could find for the Plaintiff.² As far as the inferences from the evidence are concerned, the inference relied upon by the Plaintiff must be reasonable one, not only reasonable one (Schmidt 93) The test has from time to time been formulated in different terms,

¹ (384/98) [2000] 2ASCA 33 2001 (1) SA 88(SCA) [2000] 4 ALL SA 241 (A) (31 August 2000).

² *Marine & Trade Insurance Co Ltd v Van Der Schyff* 1972 (I SA 26 (A) Bewysreg 4th ed at 91-2.

especially where the court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff.

[17] The Plaintiff has to make out a prima facie case that there is evidence relating to all the elements of the claim, to survive absolution because without such evidence no court could find for the Plaintiff. The inferences relied upon by the Plaintiff must be a reasonable one. In *Supreme Services Station v Fox Goodridge (Pty) Ltd*,³ the court said that: “According to practice in this court in later years Judges become very loth to decide what a reasonable court might do, a judicial officer should always therefore lean on the side of allowing the case to proceed.”

[18] The test to be applied in determining the question whether the Defendant’s application for absolution from the instance should be granted is not whether the adduced evidence required an answer, but whether such evidence held the possibility of a finding in favour of the Plaintiff. Consequently, at the absolution stage the Plaintiff’s evidence should hold a reasonable possibility of success for her and should the court be uncertain whether the Plaintiff’s evidence has satisfied this test, absolution ought to be refused.⁴

³ 1971 (4) SA 90 (RA) at 93 H.

⁴ *Build-A-Brick BK en Ander V Eskom* 1996 (1) SA (O) at 123 A-E

[19] The Plaintiff testified that there are outstanding hospital record of her ante-natal care. Professor Cooper, expert on behalf of the Defendant also noted that no maternal records regarding antenatal care, labour and delivery were available. He further stated that in his opinion that without the antenatal records and those of labour and delivery, it is not clear on what basis the gestation was assessed and that the maternal notes would be important to give a more complete picture of the pregnancy and delivery. Thus the missing hospital records leaves the Plaintiff's questions unanswered.

[20] If absolution is granted, the Defendant is not called upon to answer to the Plaintiff's claim, which could result in an unfair result to the Plaintiff. If also granted a Legal Representative might have to put a version before court during cross-examination on the basis that the witnesses of the Defendant will come and testify. With the consequence that the Defendant's version is not tested. Absolution from the instance should be granted lightly. In circumstance where the Plaintiff's case is so weak that no reasonable court could find in favour of the Plaintiff, absolution from the instance may be granted. However, in the ordinary course of events, it will nevertheless be granted sparingly but when the occasion arises, a court should

order in the interest of justice. To the extent that the medical expert of the Plaintiff was of the view that the Plaintiff should receive adequate compensation.

[21] It is trite law that in a trial, evidence that is not challenged and is subsequently accepted by the Court, can be used by the Court in proving or disproving either parties case provided that it is relevant to the issues involved in the case. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged evidence is accepted as correct.⁵

[22] As a general rule where absolution at the close of the case is refused, a court should avoid unnecessary discussion of the evidence.

[23] In reaching a conclusion whether absolution should be granted, it is not required of a court to critically look at the evidence, as would be required of a court at the end of trial. The onus on the court is less stringent, as there should only be evidence on which a court could or might find for the Plaintiff.

[24] Counsel for the Plaintiff correctly stated that the Defendant submitted its expert report, which evidence was submitted by

⁵ President of the RSA v South African Rugby Football Union 2000 (1) SA 1 (CC) at 37 B-E

agreement between the parties. Thus under circumstances the Defendant by way of submitting its expert report, has tendered evidence. Had the Defendant only allowed the reports of the Plaintiff to be submitted, then it would have been fair and proper to make an application for absolution from the instance if the Defendant had not submitted any evidence.

[25] This court in applying its mind reasonably to the Defendant's application, simply cannot ignore the issues as raised by the Plaintiff as these have to be answered. In this instance the evidence by the Plaintiff, where a court applying its mind reasonably to such evidence, could or might find for the Plaintiff. Based on the above the application for absolution from the instance therefore ought to be dismissed.

ORDER

[26] In the result the following order is granted:

1. The application for absolution from the instance is dismissed with costs.

S. CHESIWE, J

On behalf of the Plaintiff: Mr. L Godla

Instructed by: Godla & Partners
C/O Matsepe Inc
BLOEMFONTEIN

On behalf of the Defendant: JMA Engelbrecht

Instructed by: State Attorney
11th Floor Fedsure Building
BLOEMFONTEIN