



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **7630/2013P**

In the matter between:

A[...] S[...]

PLAINTIFF

and

**MEMBER OF THE EXECUTIVE COUNCIL FOR THE
DEPARTMENT OF HEALTH KWAZULU-NATAL**

DEFENDANT

Coram: MOSSOP J
Heard: 3 November 2025
Delivered: 4 November 2025

ORDER

The following order is granted:

1. Leave is granted to the plaintiff to:
 - 1.1 Re-open her case.
 - 1.2 Adduce the further expert evidence at the resumed trial of:
 - 1.2.1 Prof J. Anthony;
 - 1.2.2 Prof J. Smith; and
 - 1.2.3 Dr Y. Kara.
 - 1.3 Give further evidence herself.
2. The costs of the application shall be costs in the cause.

JUDGMENT

MOSSOP J:

Introduction

[1] The parties to this application are presently opposing parties in a partly heard trial before me. In the trial, the plaintiff seeks damages from the defendant as a consequence of her child (the minor child) being born with cerebral palsy. The plaintiff has presented her evidence to the court in that trial and has closed her case. The defendant has almost presented her case to the court, with her last witness, a Professor Eckhart Buchmann (Prof Buchmann), being cross-examined when the trial was adjourned approximately two years ago. No further evidence has been led since then and the cross-examination of Prof Buchmann has neither been resumed nor finalised.

[2] What is presently before me is an application by the plaintiff to reopen her closed case. I shall refer to the parties as they are referred to in the trial and the reference to the plaintiff is thus a reference to the applicant in this application.

[3] I stood the matter down after hearing argument yesterday morning and indicated that I would prepare this judgment overnight and deliver it this morning. I was of the view that the parties should have access to a decision as soon as possible to allow for the further planning and conduct of the matter as expeditiously as possible. This judgment may be less than perfect given the haste with which it was prepared, for which I apologise in advance.

The prior agreement to permit the reopening of the plaintiff's case

[4] While this is an application to reopen her case, the plaintiff has already, by agreement, been permitted to reopen her case. Prior to the trial being adjourned with Prof Buchmann still in the witness box, the defendant agreed that the plaintiff could reopen her case to deal with certain specific issues. I was advised of this agreement by the parties and accordingly it is mentioned in a judgment that I delivered on 28

November 2023 pursuant to the plaintiff moving an application to amend her particulars of claim

[5] Upon the consensual reopening of the plaintiff's case, it was anticipated that the plaintiff herself would give evidence on the issue of her allegedly feeling her baby moving prior going into labour. The further evidence of a previous expert witness called by the plaintiff, Dr Yatish Kara (Dr Kara), would also be called to comment on blood test results relating to samples of blood extracted from the minor child shortly after his birth. Those blood test results only came to hand at the eleventh hour and after the plaintiff had closed her case.

The re-enrolment of the trial

[6] The trial was finally enrolled for the hearing of further evidence, commencing yesterday and continuing until 7 November 2025. It was accepted that this would be sufficient time to complete the cross-examination of Prof Buchmann and to permit the further evidence of the two identified witnesses after the consensual re-opening of the plaintiff's case.

[7] Thus, as of yesterday, the defendant had consented to the re-opening of the plaintiff's case for the defined purposes just mentioned. Mr *Mullins SC*, who appears for the defendant, confirmed yesterday that the defendant had no objection to the plaintiff reopening her case for those purposes.

The further application to reopen the plaintiff's case

[8] However, on 16 October 2025, just over two weeks before the matter was enrolled for the hearing of further evidence, the plaintiff delivered an application in which, inter alia, the following relief was sought:

- '2. The plaintiff be permitted to:
 - 2.1 Re-open the plaintiff's case.
 - 2.2 Adduce further expert evidence in the trial from:
 - 2.2.1 Prof J. Anthony, (Obstetrician/Gynaecologist).
 - 2.2.2 Prof J. Smith, (Neonatologist).
 - 2.3 Recall the plaintiff.'

[9] Given the fact that the plaintiff already had the defendant's leave to reopen her case and also had the defendant's blessing for herself to give further evidence, it seems to me that the relief claimed in paragraphs 2.1 and 2.3 narrated above was unnecessary. The true focus of the application is, thus, the intended evidence of Professor Anthony (Prof Anthony) and Professor Smith (Prof Smith), identified in paragraph 2.2 of the notice of motion.

[10] Having earlier consented to the reopening of the plaintiff's case on the grounds adumbrated, the defendant opposes the broader reopening now required by the plaintiff.

The requirements to reopen a closed case

[11] An application to reopen a closed case is not simply there for the asking. It must be properly and thoroughly explained and motivated. It is settled law that a trial court, such as this court is, has the power to allow a plaintiff to call a fresh witness even after the defendant has closed his case and that the exercise of that power is in the discretion of the court.¹ That discretion must, however, be exercised judicially.²

[12] The requirements which should be considered when evaluating an application to re-open a closed case were considered in *Oosthuizen v Stanley*,³ where Tindall JA observed that:

'Several considerations have a bearing on the exercise of such discretion, for instance, the reason for the plaintiff's failure to call the witness before, the danger of prejudice to the opposite party owing to his being no longer able to bring back his own witnesses, and, of course, the materiality of the evidence. In application for leave to lead fresh evidence in this Court the test as to materiality laid down in *Colman v Dunbar* is that the evidence tendered must be presumably to be believed and such that it would be practically conclusive. In a trial Court, however, in my judgment the test of materiality should be held to be satisfied where the evidence tendered, if believed, is material and likely to be weighty.' (Citation omitted)

¹ *Bellstedt v South African Railways* 1936 CPD 397.

² *Embling v Two Oceans Aquarium* CC 2000 (3) SA 691 (C) 694G-H; *R v Zackey* 1945 AD 505 at 513.

³ *Oosthuizen v Stanley* 1938 AD 322 (*Oosthuizen*) at 333.

[13] In *Mkwanazi v Van der Merwe*,⁴ Holmes JA synthesised the abovementioned dicta from *Oosthuizen*, and came up with the following criteria which usually need to be traversed and considered when the re-opening of a closed case is sought:

1. The reason why the evidence was not led timeously.
2. The degree of materiality of the evidence.
3. The possibility that it may have been shaped to relieve the pinch of the shoe.
4. The balance of prejudice, i.e. the prejudice to the plaintiff if the application is refused, and the prejudice to the defendant if it is granted. This is a wide field. It may include such factors as the amount or importance of the issue at stake; the fact that the defendant's witnesses may already have dispersed; the question whether the refusal might result in a judgment of absolution, in which event whether it might not be as broad as it is long to let the plaintiff lead the evidence rather than put the parties to the expense of proceedings *de novo*.
5. The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been led on both sides and, just before judgment is delivered, the plaintiff asks for leave to lead further evidence, it may well be that he will have a harder row to hoe, because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of throwing the whole case into the melting pot again, and perhaps also the convenience of the court, which is usually under some pressure in its roster of cases. On the other hand, where a plaintiff closes his case and, before his opponents have taken any steps, asks for leave to add some further evidence, the case is then still *in medias res* as it were.
6. The healing balm of an appropriate order as to costs.
7. The general need for finality in judicial proceedings. This factor is usually cited against the applicant for leave to lead further evidence. However, depending on the circumstances, finality might be sooner achieved by allowing such evidence and getting on with the case, than by granting absolution and obtaining and opening the indeterminate way to litigation *de novo* in all its tedious amplitude.
8. The appropriateness, or otherwise, in all the circumstances, of visiting the remissness of the attorney upon the head of his client.'

The issues in the trial

[14] The principal issue that falls to be determined in the trial is when the insult that led to the minor child's condition occurred. Did it occur prior to the plaintiff being finally admitted to the East Griqualand and Usher Memorial Hospital at Kokstad (the

⁴ *Mkwanazi v Van der Merwe* 1970 (1) SA 609 (AD) (*Mkwanazi*) at 616G- 617D.

hospital) and going into labour? Or did it occur only after she went into labour in the hospital? That the plaintiff received sub-optimal treatment and care by the defendant's servants during her extended period of labour is admitted by the defendant. The defendant's case is that such treatment did not contribute to the condition of the minor child because he had already received the insult that determined his condition before being admitted to the hospital and before his mother's labour commenced. Everything, thus, hinges on when the insult to the baby occurred.

The plaintiff's submissions

[15] Mr *P Uys* appeared yesterday morning to represent the plaintiff.⁵ He confirmed

that the plaintiff still intended to re-enter the witness box to give further evidence and that Dr Kara would also be recalled to give evidence on the significance of the blood test results previously mentioned.

[16] The plaintiff delivered a comprehensive founding affidavit in support of her application for a more extensive reopening of her case, which was both detailed and thorough. Equally detailed heads of argument from the plaintiff were handed up yesterday morning as well.

[17] In the plaintiff's founding affidavit supporting the notice of motion in this application, it was pointed out that since the plaintiff had closed her case, the defendant had delivered further opinions and reports intended to establish that the insult that the minor child suffered occurred before the plaintiff was admitted to the hospital for which the defendant is responsible. In addition, further clinical reports, chemical pathology reports, and haematology records were only discovered by the defendant on 12 August 2025, substantially after the plaintiff closed her case. These were particularly important documents because they related to results, and samples collected from the minor child, on the first day of his life.

⁵ Mr *N van der Walt SC* was briefed to lead Mr *Uys* to move the application and signed the plaintiff's heads of argument (which are ordinarily not signed in this division). However, as a consequence of an ageing and weakened chair, the inexorable power of gravity and a solid and immovable surface, Mr *van der Walt* sustained an injury last week and could not appear yesterday for medical reasons. Bereft of a leader, Mr *Uys* thus competently moved the application on his own.

[18] Mr *Uys* furthermore submitted that Prof Buchmann's opinion had morphed since the matter commenced and drew my attention to those alleged changes. I confess that I am not entirely sure what relevance this has to the application to reopen the plaintiff's case. Such a submission places me in a difficult position because Prof Buchmann is still testifying, and the defendant has not yet closed her case. I am loath in such circumstances to comment upon the nature of Prof Buchmann's evidence. I do not think that it would be appropriate for me to do so, and I choose not to do so.

[19] As regards what Prof Anthony and Prof Smith would testify to, Mr *Uys* indicated in the plaintiff's heads of argument that:

'... there is significant clinical relevance in the interpretation of the blood results considered through the spectrum of the intrapartum events and what is clinically reasonably expected and foreseeable when a 41 week gestation foetus develops foetal distress over time and is born in a compromised condition.'⁶

[20] It was stressed, in particular, that the evidence of Prof Anthony was of critical relevance to the determination of the issue of when the insult occurred. His evidence would focus on the unacceptable treatment that the plaintiff received in hospital and would indicate that the insult suffered by the minor child was caused intrapartum and not antenatally. His evidence would also be relevant to the blood results and whether the markers found to be present could be associated with what allegedly occurred intrapartum.

[21] Mr *Uys* suggested that the plaintiff's legal representatives had not been remiss in any way in the manner in which her case had been presented to the court. The reason for the need to reopen the plaintiff's case was because of:

'[t]he belated blood results, the factual evidence and the late reporting by the defendant's experts which includes a superspecialist Neonatologist [which] necessitated further reports and evidence.'

The defendant's submissions

⁶ Plaintiff's heads of argument, para 40.

[22] The thrust of the defendant's complaint to the expanded reopening of the plaintiff's case is that the plaintiff seeks to introduce the evidence of two new witnesses after all the other expert witnesses, called by both the plaintiff and the defendant, have already completed their evidence. What is intended to be testified about by the two new expert witnesses has not been put to any of the previously led expert witnesses. Witnesses consequently may have to be recalled to allow this to occur. Thus, it is submitted, what the plaintiff is really attempting to do is to commence her case again.

[23] The defendant further submits that if the application is successful, there will be a further delay in the trial, this occurring in a matter that has already taken inordinately long.

Analysis

[24] If the further expert evidence proposed to be led by the plaintiff establishes that the insult occurred during labour and not before the plaintiff was admitted to hospital, it would go a long way to assisting in resolving the conundrum that the court is required to resolve. There is, however, no way of knowing whether the proposed evidence would be determinative of the outcome of the matter. It may be determinative. Or it may not be. However, it can be confidently said that if it is not heard, it will not be determinative of the outcome of the trial.

[25] It seems to me that, on the face of it, the additional evidence proposed to be led by the plaintiff, if true, would indeed meet the threshold of being classified as 'weighty,' as contemplated in *Oosthuizen*.

[26] That, however, is not the only issue to be determined before deciding on the desirability of hearing the further evidence. Why was it not called during the plaintiff's case? One answer would be that the blood test results were not known when the trial commenced nor later when the plaintiff closed her case. That reasoning appears to me to be sound and unanswerable. As to the other evidence that the plaintiff proposes to lead, Mr *Uys* candidly acknowledged that he could not advance any reason why that evidence had not been led earlier in the trial. He simply did not know why the witnesses had not been called. That, perhaps, is understandable, to an

extent. Mr *Uys* has previously not been involved in the matter at all. The plaintiff was represented initially by a local senior counsel, who later withdrew from the matter after a considerable amount of evidence was led. The plaintiff was then briefly represented by a silk from Pretoria, who moved an application to amend her particulars of claim, which application led to the judgment that I delivered on 28 November 2023. When the application to amend was dismissed, that silk did not reappear, and the plaintiff is now represented by Mr *van der Walt* and Mr *Uys*, who are both from Johannesburg. There is correspondence before me in the application that indicates that the matter is being conducted on a contingency basis by the plaintiff's legal representatives and that may explain the coming and going of counsel. But all that movement of counsel is not good for a fluid and consistent presentation of the plaintiff's case. Why decisions taken by a predecessor were taken may not be known by the next counsel that comes into the matter, although the plaintiff's attorney ought to have provided some assistance in this regard.

[27] It is so that there has been a substantial amount of expert medical evidence already led. Some of it is contradictory. Some of it is speculative. If the evidence proposed to be led by the plaintiff were to provide any clarity on the probable cause of the insult that the minor child undoubtedly suffered, it should be heard in my opinion. This is not a game but a quest for fairness and the elusive concept of justice. I accordingly am not able to agree with the defendant that this is an attempt by the plaintiff to recommence her case. The issues remain the same and have not been changed, nor will they be changed, by the introduction of the evidence of the two professors.

[28] As to whether this is a stratagem by the plaintiff to avoid a difficulty that has emerged from the evidence already led, I do not perceive that to be the case. The versions advanced by the parties at this stage do not noticeably lean in favour of any one of them. It will only be possible to determine the outcome of the matter once all the evidence has been heard. It cannot be excluded that one possible outcome may be that absolution from the instance may be granted.

[29] It would probably be fair to state that this is a matter of considerable importance to both parties, but I daresay that it is probably more important to the

plaintiff than to the defendant. Both sides have instructed eminent senior counsel to secure an outcome in their favour. I have not heard from the defendant that if the application were to be granted that it would cause any insurmountable problems for the defendant as regards any further witnesses she might wish to call or to recall. It seems to me that the plaintiff would suffer the greater prejudice should her application be refused than any prejudice that the defendant may suffer if her application is granted.

[30] In any event, the defendant had already consented to the plaintiff re-opening her case. All that is sought is the broadening of the grounds upon which further expert evidence may be led. The defendant has not yet closed its case and is therefore at liberty to call any further witnesses that it believes is necessary if the application is granted.

[31] I do not lose sight of the fact that there must be finality in legal proceedings. However, this matter has been permitted to proceed at a glacial speed, and I do not believe that the defendant can claim with any sincerity that it will be prejudiced by a further adjournment if the application were to be granted.

Conclusion

[32] I am satisfied that this is an instance where I should exercise my discretion in favour of the plaintiff and permit her to reopen her closed case.

Costs

[33] Holmes JA in *Mkwanazi* mentioned the 'healing balm' of an appropriate costs order. Mr Uys, most properly in my view, submitted that whilst the application was opposed, and whilst the applicant had asked for its costs to be paid by any party unsuccessfully opposing the application, he could not in good conscience ask for costs in the light of the fact that the plaintiff was effectively seeking an indulgence. He proposed, rather, that the costs to be awarded be costs in the cause. I think that is a sensible submission.

Order

[34] In formulating the order that I make, I have inserted the name of Dr Y Kara into it to remove any uncertainty over whether he is entitled to be recalled as a witness, this previously having been agreed to. He is not required to testify again but he may do so, dependent on the guidance provided to the plaintiff by those advising her.

[35] I accordingly grant the following order:

1. Leave is granted to the plaintiff to:
 - 1.1 Re-open her case.
 - 1.2 Adduce the further expert evidence at the resumed trial of:
 - 1.2.1 Prof J. Anthony;
 - 1.2.2 Prof J. Smith; and
 - 1.2.3 Dr Y. Kara.
 - 1.3 Give further evidence herself.
2. The costs of the application shall be costs in the cause.

MOSSOP J

APPEARANCES

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