

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 55938/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
24 August 2026	
DATE	SIGNATURE

In the matter between:

OLIVIER, JOLIEN ESTELLE

Plaintiff/Applicant

and

MEC FOR HEALTH, GAUTENG PROVINCE

Defendant/Respondent

JUDGMENT IN RE: APPLICATION TO REOPEN CASE

DOMINGO, AJ

Introduction

[1] This application has been brought by the plaintiff to reopen the plaintiff's case. The merits of the case are not required to be assessed and will therefore not be addressed in this judgment.

[2] The background to this case is that the plaintiff had instituted action against the defendant for damages which she alleged arose from the medical negligence of

the employees of the defendant, acting in the course and scope of their employment, during and following a total laparoscopic hysterectomy (TLH) procedure which was performed on 30 May 2016 at the Kalafong Provincial Hospital. The trial on the merits commenced on 24 November 2025. The plaintiff closed her case on 27 November 2025. The defendant's case ran from 28 November 2025 to 3 December 2025, stood down on 4 December 2025 and ran again on 5 December 2025 and was then postponed to 10 December 2025.

- [3] The plaintiff during the running of the defendant's case, placed on record for the first time that she would apply to re-open her case at the end of the day of the expert witness, Professor Mutambirwa's evidence in chief on 3 December 2025. The plaintiff raised the issue of applying to re-open her case, on record on 5 and 10 December 2025. Thus, providing warning to the defendant that the application to re-open would take place.

Relief Sought by Plaintiff

- [4] The relief sought by the plaintiff is to be granted the leave to reopen her case and to call and/or recall the following expert witnesses:

- 4.1 Dr LR Murray, specialist obstetrician and gynaecologist.
- 4.2 Dr MR Lebos, specialist surgeon.
- 4.3 Dr LJE Coetzee, specialist urologist.

Overview of Plaintiff's submissions and arguments

- [5] It is submitted by the plaintiff that the basic principle in our law, in medical negligence cases and other delictual matters, is that if the parties are going to employ the use of experts, that their reports be served prior to the trial, with a summary of their opinion and reasons, and that opposing experts meet to prepare joint minutes, so that issues can be defined. It is averred by the plaintiff that this is the purpose of Rule 36(9)(a) and (b) of the Uniform Rules of Court. It is further submitted by the plaintiff that opinion evidence is hearsay, and not admissible. Expert opinion evidence is the exception to that rule, provided that the expert qualifies him or herself by providing a report which sets out his or her

reasons for that opinion, in advance of a trial. The other party/parties are then at liberty to also obtain expert evidence and to file reports accordingly. It is averred by the plaintiff to do otherwise renders any evidence led inadmissible.

- [6] It is further submitted by the plaintiff, that it is therefore trite that any expert who qualifies himself by filing a report, must therefore testify in terms of the opinion that he has submitted, and if he wishes to amend his opinion for any reason, to also do so prior to the trial, once again giving a summary of his opinion and reasons; I am in agreement with the plaintiff on these points.
- [7] The plaintiff submitted that in this case, two of the defendant's experts (Dr Malebane and Prof Mutambirwa) changed their minds, ostensibly when giving evidence about their previously expressed opinions, either in their reports or in their joint minutes. It is on this ground that the plaintiff submitted that she is entitled to reopen her case, to lead evidence to address what the plaintiff regards as essentially new or unheralded or not foreshadowed evidence in their reports or joint minutes. The new, unheralded or not foreshadowed evidence it is submitted by the plaintiff would be led in a reopened trial that would be *viva voce* evidence, which the defendant would then be entitled to cross-examine, as in the normal course of a trial.
- [8] The plaintiff respectfully submitted the following in arguing for the reopening of her case:
- 8.1 The plaintiff is presently in a severely prejudiced position, occasioned by the change of opinion by the defendant's experts after the closure of the plaintiff's case, and the defendant's failure to address any changes of opinion prior to the plaintiff's closure of her case. There were no new expert reports providing details of the changed opinion, nor were relevant propositions put to the plaintiff's experts to enable them to address the changed opinions. The events have therefore effectively violated the *audi alteram partem* rule.
- 8.2 There is presently no prejudice to the defendant, nor will the defendant be prejudiced if the plaintiff's case is re-opened. The defendant is at

liberty to cross-examine the evidence in a reopened case. The defendant would be entitled to recall their own witnesses, if necessary.

- 8.3 If the plaintiff is not afforded an opportunity to reopen her case, an argument is available to the plaintiff to argue that the evidence of Dr Malebane and Prof Mutambirwa, wheresoever their evidence deviates from their reports and/or joint minutes is inadmissible hearsay for non-compliance with Rule 36(9) of the Uniform Rules of Court. This is to the detriment of the defendant, who opposes this application.
- 8.4 This honourable court is prejudiced, because the court will be required to make a decision on evidence that has not been properly placed before the court.
- 8.5 The circumstances which prevail, are also likely to plague a future court. If the matter were to go on appeal without the plaintiff having been afforded the opportunity to deal with the changed opinions of the defendant's expert evidence in rebuttal, then there is a possibility that a Higher Court may have to refer the matter back for evidence, alternatively, the issues will represent the same obstacles facing this honourable court.
- 8.6 It is in the interest of justice, that the plaintiff be allowed to re-open her case, so that there can be full ventilation of all issues. The evidence that will be lead and cross-examined in a reopened case, does not prejudice the defendant at all, as it is not tantamount to a finding, but is merely evidence to be considered with the evidence lead by the defendant, by the court, for the purposes of arriving at a judgment.

Overview of Defendant's submissions and arguments

- [9] The defendant notes that the basis for the plaintiff's application was originally introduced by the plaintiff's counsel at the end of Prof Mutambirwa's testimony, the defendant's last witness as follows. It is submitted by the defendant that the plaintiff's counsel adopted the position of forewarning the court that the plaintiff may apply to re-open her case, particularly following the court's questioning of

Prof Mutambirwa regarding the relationship between an elevated CRP (C-reactive protein) and a temperature within normal range. It is averred by the defendant that the plaintiff now seeks, in substance, to reopen and restart her case to revisit issues that have already been canvassed in order to repeat the evidence and to cure the deficiencies in her case.

[10] It is further submitted by the defendant that the plaintiff also seeks to introduce and address issues that she has not pleaded. For example, the plaintiff's pleaded case on sepsis is confined to wound sepsis. It is averred by the plaintiff that this is evident from subparagraphs 4.11.2, 4.11.3 and 6.4 of the particulars of claim as well as admissions sought by the plaintiff at subparagraph 13.1.4 during the last pre-trial conference held between the parties on 20 November 2025. The defendant further averred that regarding septicaemia, this being an infection of the bloodstream or what is termed "*toxic*" in the original urologists' joint minutes, this was neither pleaded nor does it appear from the medical records. It is submitted by the plaintiff that it therefore unclear on what basis the plaintiff persists in advancing the contention that she suffered from septicaemia.

[11] It was further submitted by the defendant that civil litigation is adversarial in character and that the conduct of the adversaries is regulated by procedural rules. The conduct and prosecution of a party's case, however, is premised on autonomy. A party is free to decide how it wishes to prosecute its case subject only to the overriding legal and ethical obligations of which mediate such autonomy. A party is bound to by the choices it makes or those which are made on its behalf in the conduct of the litigation.

[12] It was submitted and argued by the defendant's counsel that the plaintiff had failed to make out a case for the relief sought or the court to exercise its discretion in her favour for reasons amongst others that:

12.1 The plaintiff had failed to demonstrate the relevance and materiality of the new opinions sought to be adduced.

12.2 In her replying affidavit, the plaintiff had not factually addressed the prejudice identified by the defendant in the answering affidavit, and her heads of argument merely play lip service to the issue. It is averred by

the plaintiff that the suggestion in the plaintiff's heads of argument that the application to reopen her case is, in some way, intended to assist the defendant, is with respect, entirely misconceived and rather improper.

- 12.3 The issue of sepsis had, apart from not being pleaded, been fully ventilated by all relevant experts through their evidence. What remains is the responsibility of the court to weigh that evidence and apply the relevant legal principles to make its final determination.
- 12.4 Equally, the issue relating to the elevated CRP (C-reactive protein) was dealt with extensively by the experts, notably, Dr Lebos.
- 12.5 It is averred by the defendant that it is therefore not necessary nor appropriate for the identified issues to be reintroduced at this stage of the proceedings, as the so-called further expert evidence would in substance amount to argument. Those matters properly fall within the domain of counsel's submissions and should be dealt with during argument rather than through further evidentiary processes. It is also unnecessary to adduce further evidence on the issues identified in the application as that would amount to the experts usurping the role of the court.

Legal Principles

- [13] It is trite in our law that the discretion to grant or refuse an application to reopen a case lies within the court. I agree with the defendant's submission that such discretion must be exercised judicially upon a consideration of all relevant facts. In other words, the plaintiff cannot claim an automatic entitlement to the reopening of her case because the proverbial "shoe is pinching." Counsel for the defendant directed the court to the case of *Mkwanazi v van der Merwe and Another*¹ where the court held in exercising the discretion to reopen a case, the court must be satisfied that sufficient grounds exist to justify a departure from the ordinary course of proceedings, taking into account the interests of justice, the need for finality in litigation, the potential prejudice to the defendant, explanation

¹ 1970 (1) SA 609 (A) at 616B-E.

why the defendant omitted the evidence now sought to be adduced, the materiality and relevance of the evidence sought to be adduced and the stage of the proceedings. Thus, “[a]n application to reopen a closed case is not simply there for the asking. It must be properly and thoroughly explained and motivated.”²

[14] In terms of Rule 36(9)(a) of the Uniform Rules of Court, any party wishing to call expert witnesses must give formal notice of the name and qualifications of the expert and in terms of Rule 36(9)(b) must then provide a report or summary of the expert’s evidence, setting out the expert’s opinion and reasons thereto. The Practice Directive 1/2024 of this Court, provides at paragraph 8 as follows:

“8 REQUIREMENTS FOR EXPERT REPORT

- 8.1 Expert reports must be drafted in the format designated for lucidity, brevity, and convenient cross-referencing. To this end it must be in numbered paragraphs. When referring to other expert reports, refer to the numbered paragraphs therein.
- 8.2 Where more than one expert has reported on a given aspect, joint minutes of experts must identify precisely what is agreed and what is not agreed, with reasons stated why an agreement could not be achieved, especially as to whether their disagreement relates to a fact clinically observed or an interpretation of the facts.
- 8.3 The attorney responsible for the reports’ procurement is accountable for compliance in this respect and failure to adhere hereto may imperil hearing date allocation.”

[15] I am in agreement with the plaintiff, where the plaintiff directed the court that the procedure that must be followed when a party or an expert wishes to alter, repudiate or revise the opinion, has been described in the Supreme Court of Appeal judgment, *Bee v The Road Accident Fund*³ wherein it was held that:

² *A.S v Member of the Executive Council for the Department of Health KwaZulu Natal* [7630/2013P] [2025] ZAKZPHC 115 (14 November 2025) at 11.

³ 2018 (4) SA 396 (SCA) at paras 64 and 68.

“...where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement unless it does so clearly, and at the very latest, at the outset of the trial. In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings, or facts agreed in the pre-trial conference. Where two or more experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement....”

“There may be cases where the expert rather than the litigant wishes to depart from what he previously agreed. The same rules of fair play apply. The expert should notify the attorney through whom he or she was engaged, and due warning should be given to the other side. In such a case there will be further procedural requirements, namely the furnishing of a supplementary report by the expert whose views have changed.” [Emphasis my own].

[16] It is apt to be reminded of the duty of an expert to the court as pointed out by the defendant. The role of the expert witness was confirmed in *Schneider N.O and Others v Aspeling and Another*⁴ where the court held that:

“In Zeffert and Paizes -The South African Law of Evidence (2ed), at 330 the learned authors, citing an English judgment of *National Justice Compania Navierasa v Prudential Assurance Co Limited* 1993 (2) Lloyd’s Reports 68 at 81, set out the duties of an expert witness, thus:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation;
2. An expert witness should provide independent assistance to the Court by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate;
3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to

⁴ 2010 (5) SA 203 (WCC) at 211 -212 and 341 and 342.

consider material facts which could detract from his concluded opinion;

4. An expert witness should make it clear when a particular question or issue falls outside his expertise;
5. If an expert opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is not more than a provisional one. In cases where an expert witness who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.

In short, **an expert comes to court to give the court the benefit of his or her expertise.** Agreed, an expert is called by a particular party, presumably because the conclusion of the expert, using his or her expertise, is in favour of the line of argument of the particular party. But that does not absolve the expert from providing the court with as objective and unbiased opinion, based on his or her expertise, as is possible. **An expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor give evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.**" [Emphasis my own].

[17] Having regard to the role of the expert witness, it is important to emphasise that the credibility, veracity, merits and the weight the court will afford to the expert witnesses' testimony do not fall to be determined in this application. The court will assess and weigh the expert evidence, apply the relevant legal principles, and make its final determination in the main cause of action, where both counsel will have the opportunity to present their respective arguments. However, in deciding this application it is important to be mindful of the role and purpose of an expert witness.

Discussion

a) Recalling Dr Murray (specialist obstetrician and gynaecologist)

- [18] It was averred by the plaintiff that the evidence of Prof Snyman (the defendant's witness) was not put to Dr Murray. Prof Snyman's evidence was that whilst he would not have suggested the TLH for polyps, nor would he suggest surgery for LOSIL(low-grade squamous intraepithelial lesion), nor was there an indication that the plaintiff had adenomyosis, his opinion was that the compounding effect of all three conditions, was what prompted him to say that the TLH was indicated.
- [19] The plaintiff submitted that it was never put to Dr Murray that Prof Syman would testify that this combination of circumstances was what prompted him to be of the view that the TLH was indicated. Thus, it was submitted by the plaintiff that it would therefore be fair to the plaintiff for Dr Murray to be given a chance to consider this evidence, to provide her views on it, so this honourable court can weigh the evidence and make a finding.
- [20] I am in agreement with the defendant that the claim that Dr Murray was not afforded the opportunity to comment on Prof Snyman's evidence is entirely inaccurate. The defendant attached an extract of Dr Murray's cross-examination on the relevant issues regarding the facts from Prof Snyman, which were put to Dr Murray, and she provided her opinion thereon.
- [21] For example, regarding the compounding effect of the conditions of the plaintiff prompting Prof Snyman to say that TLH was indicated the following exchange took place during the cross-examination of Dr Murray:

Ms Manaka: *They did several other tests which shows some concerns, if I may put it that way, some of those concerns which **would viewed individually, not necessarily indicate a TLH.***

Dr Murray: Yes

Ms Manaka: *And my instructions were that they had to look at consents [sic][concerns] that were **raised and that they were seeing collectively, particularly in view of their attempt to give medication that was not even helping including painkillers.***

Dr Murray: ***I cannot comment on how they came to that decision.***

- [22] Having regard to the record of proceedings, it is my view that Dr Murray was given the opportunity to comment on Prof Snyman's evidence.
- [23] Dr Malebane, specialist obstetrician and gynaecologist (expert witness for the defendant) in two of his reports concluded that TLH was not indicated. However, it was submitted by the plaintiff that when Dr Malebane testified, he changed his opinion by saying that he thought that the TLH was indicated because he was persuaded by Prof Snyman's testimony. Furthermore, he changed his mind by saying that the TLH was indicated because of Prof Snyman's seniority and super speciality. Furthermore, Dr Malebane said that his own reports were "*theoretical*." The plaintiff therefore submitted that Dr Murray be given the opportunity to respond on this evidence by Dr Malebane and that the plaintiff's case should be reopened to hear her opinion on this issue.
- [24] The defendant in turn submitted that Dr Malebane did not amend or repudiate his original opinions. It was averred by the defendant that as with Dr Murray, Dr Malebane simply answered questions put to him based on new facts that were not previously available to him when he drafted his opinion and joint minutes. It is also submitted by the defendant that the circumstances of this case differ materially from those in *Bee*⁵ and that the plaintiff's reliance on that authority is ill-conceived.
- [25] Having regard to the record, Dr Malebane acknowledges that he "*changed his mind*" after hearing the evidence of Prof Snyman. However, he at the same time testified that his reports are now to be regarded as theoretical. It is my view that the application of *Bee*⁶ is not ill-conceived in regard to Dr Malebane changing his mind. There was no foreshadowing by the defendant that Dr Malebane, who was the defendant's third witness, after he had heard Prof Snyman's evidence, who was the defendant's first witness, that he would change his mind to say that the TLH was indicated. Having said this, the circumstance of this case is different to *Bee*⁷ as the reports of Dr Malebane still stand as his theoretical opinions in which he draws the conclusion that TLH was not indicated.

⁵ See *supra* note 3 above.

⁶ *Supra*.

⁷ *Supra*.

[26] Taking all of the above into account, it is my view that both Dr Murray and Dr Malebane had and were given the opportunity to engage with the Prof Snyman's evidence. The only difference is that the Dr Murray, unlike Dr Malebane did not hear the testimony of Prof Snyman. I am in agreement therefore, with the defendant's submission that the evaluation of Dr Malebane's evidence falls within the exclusive purview of the Court. It is not for Dr Murray to evaluate Dr Malebane's opinion of Prof Snyman's evidence, that would amount to usurping the court's function. I am of the view that further evidentiary evidence through the recalling of Dr Murray is not necessary at this stage of the proceedings; all the matters regarding this aspect of the case should be dealt with during counsels' argument. Thus, the plaintiff cannot make the argument that her section 34 constitutional right⁸ has been infringed or that she was denied the right to be heard. In the premises, I am not persuaded that the recalling of Dr Murray is warranted. The application to recall Dr Murray is accordingly refused.

b) Calling Dr Coetzee (specialist urologist)

[27] The plaintiff seeks to call Dr Coetzee to testify on the following issues:

- 27.1 The circumstance which led to the signing of the two joint minutes with Prof Mutambirwa.
- 27.2 To affirm the opinion on the matter as expressed in his report and the joint minutes.
- 27.3 To respond to issues raised by Prof Mutambirwa in his evidence.

[28] Regarding the circumstances which led to the signing of the joint minutes and the addendum to the joint minutes. As I stated before during the hearing of the trial, both joint minutes were signed by the experts, the circumstances that led to the signing of the joint minutes fall outside of what is before the court, the court will confine itself to the opinions expressed in the signed joint minutes.

⁸ Constitution of the Republic of South Africa, Act 108 of 1996: section 34 Access to Courts provides that: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or where appropriate another independent and impartial tribunal or forum."

[29] The plaintiff's application to call Dr Coetzee to affirm his opinion on the matter as expressed in his report and the joint minutes is in my view warranted. According to Prof Mutambirwa's testimony, he signed the first joint minute, which was drafted by Dr Coetzee without reading it, because he trusted Dr Coetzee. However, after reading it within a short space of time, he was of the view that the joint minute was incorrect and asked Dr Coetzee telephonically if he could please amend the minute and that it be signed again. A second addendum minute was drafted by Prof Mutambirwa which he submitted to Dr Coetzee for signature. The addendum was signed by both experts. It is submitted by the plaintiff, which I am in agreement with that Prof Mutambirwa during his testimony repudiated or resiled himself from about 60 or 70 percent of the joint minute and also from significant parts of the second addendum joint minute, which he had drawn up himself.

[30] There was no foreshadowing that Prof Mutambirwa would repudiate or resile significant parts of the joint minute addendum which he drew up himself. Having heard the testimony of Prof Mutambirwa, I am persuaded that he repudiated, resiled or changed his mind on aspects of the addendum joint minute while engaging it on the stand.

[31] For example, Prof Mutambirwa said that he would not have used the words sepsis or septicaemia but rather would have used "raised inflammatory markers." It is submitted by the plaintiff that this is not what the joint minutes said but is a new interpretation by Prof Mutambirwa of what he meant to say. Furthermore, it is submitted by the plaintiff that Prof Mutambirwa said that Dr Coetzee agreed to remove the word "toxic"; this is also not true as the addendum minute was agreed to be read together with the original minute, and this is specifically stated on the addendum. The plaintiff's position is that Dr Coetzee had signed the minutes on the face value of the minutes. In other words, the ordinary meaning of words should be applied to what was stated.

[32] The following is an excerpt of exchanges that took place:

"Adv Munro: *Dr Coetzee signed it on the face value of it*

Prof Mutambirwa: *Hm, okay.*

Adv Manaka: *Yes, My Lady all that I wanted to say is that the two doctors had a meeting, and so they understood what they meant by writing it here. What Prof is saying is what they understood during their meeting. And if Dr Coetzee is going to say something different to what Prof is saying they understood, they meant here, then he must come and testify to that.*

Court: *Yes, he would have to come, yes.*

Adv Manaka: *Yes*

Court: *So we have one version what is understood and would have to bring Dr Coetzee to understand what his version is.”*

[33] In the premises, I am of the view that it is in the interest of justice that Dr Coetzee be given the opportunity to either confirm what he said on face value in his expert report, the joint minute and addendum joint minute; that it is indeed what he meant or alternatively that he understood the words in the joint minute and addendum joint minute to mean what he and Prof Mutambirwa “understood” them to mean during their meeting. It would therefore also follow that by calling Dr Coetzee to testify, he would also be competent to respond to issues raised by Prof Mutambirwa in his evidence, which in my view also falls within the interest of justice to do so, particularly since Dr Coetzee is the counterpart to Prof Mutambirwa, as both experts are urologists.

[34] The application by the plaintiff to reopen her case to call Dr Coetzee is granted.

c) Recalling Dr Lebos (specialist surgeon)

[35] The plaintiff’s main expert witness was Dr Lebos who testified on the issue of the treatment of the plaintiff post TLH, including amongst others; the clinical signs of developing septicaemia and sepsis, the role of that CRP (C-reactive protein) and the role that procalcitonin plays in diagnosing septicaemia and sepsis, the manner in which septicaemia and sepsis is treated and managed, and the degree of urgency required to treat sepsis and septicaemia to avoid long-term complications.

[36] It is correctly pointed out by the plaintiff that during the cross-examination of Dr Lebos, the defendant put to him that because urine is sterile, any sepsis that would develop would take 72 hours to develop. Dr Lebos dealt with this evidence. However, during his testimony, Prof Mutambirwa raised further issues that were not put to Dr Lebos, and which according to the plaintiff, were also in conflict with the medical literature. These aspects include the following (as submitted by the plaintiff):

- 36.1 Professor Mutambirwa said that the plaintiff was not very ill, and he would not have suspected anything wrong with her, because she did not have a high temperature, despite her other symptoms. It was averred by the plaintiff that the defendant did not put to Dr Lebos that the plaintiff's temperature was an issue in the trial. The defendant said in the replying affidavit that Dr Chasumba (defendant's specialist surgeon expert) also mentioned raised temperature in his evidence. The plaintiff conceded that this is true but submitted that Dr Chasumba mentioned this as one of the signs, and he did not say that the plaintiff did not have sepsis. It was averred by the plaintiff, that in fact he said that the CRP of 370 indicated a septic picture.
- 36.2 Prof Mutambirwa disputed that a CRP of 370 or a procalcitonin of 20 was diagnostic of sepsis or septicaemia. He vacillated a bit on this evidence, but on the whole, he came back to saying that the plaintiff had an infection, but not one that he would have taken her back to theatre to remedy. He would have left her for at least a week to four weeks before taking her back to theatre. He also said that he would not have bothered to do the tests for CRP, procalcitonin or liver function, and that this was a waste. It is averred by the plaintiff, correctly, that this was never put to Dr Lebos to comment on. Prof Mutambirwa was presented with articles and the diagnosis on the laboratory reports themselves, which it is submitted by the plaintiff were in conflict with his opinion. The plaintiff, therefore, respectfully submitted that Dr Lebos ought to be afforded an opportunity to comment on Prof Mutambirwa's evidence and on the

articles and blood results in so far as Prof Mutambirwa raised issues not put to Dr Lebos previously.

36.3 Dr Lebos testified that the left lung pleural effusion diagnosed in the plaintiff was caused by the developing sepsis in the abdomen. Prof Mutambirwa testified that the pleural effusion was a consequence of the anaesthetic. This was never put to Dr Lebos.

[37] Regarding the issue of the temperature, I find that aspect of Prof Mutambirwa's evidence a material factor in this case. He concluded that the plaintiff was not very ill and that he would not have suspected anything wrong with her. While not wanting to go into the merits of this case, it is important to note that Prof Mutambirwa isolated the temperature as a factor to consider in determining whether the plaintiff was ill or not, despite her having other symptoms. In rendering a judgment in this case, that aspect of his evidence deals with aspects of negligence and causation, thus I am in agreement with the plaintiff that this issue should have been put to Dr Lebos and that nothing was said on this issue until Prof Mutambirwa testified. I am not persuaded by the arguments put forth by the defendant that Dr Lebos elected not to testify on the positive implications of the patient's temperature, notwithstanding that the evidence was available to him, and he was able to do so. In terms of the *audi alteram partem* rule, it would have only been fair to the plaintiff, that the defendant put to the plaintiff that Prof Mutambirwa would lead evidence on this issue in the context that he did not regard the patient as being ill because she did not have a high temperature, despite her other symptoms.

[38] Regarding Prof Mutambirwa's evidence where he disputed that a CRP of 370 or a procalcitonin of 20 was diagnostic of sepsis or septicaemia; and that he would have left her for at least a week to four weeks before taking her back to theatre. And that he would also not have bothered to do the tests for CRP, procalcitonin or liver function, and that this was a waste. In my view, I find these aspects of Prof Mutambirwa's testimony material to this case. I am not persuaded by the defendant's averment that there is nothing material that is placed before this court to support any of the evidence and/or opinion that Dr Lebos can testify on which he has not already expressed his opinion. In the interest of justice, I am of

the view that Dr Lebos be afforded the opportunity to comment on these aspects of Prof Mutambirwa's evidence and on the articles and blood results in so far as Prof Mutambirwa raised issues not put to Dr Lebos previously.

[39] Regarding Prof Mutambirwa's testimony that the pleural effusion was a consequence of the anaesthetic. On the day of the hearing of this matter, it was agreed between the parties and acknowledged by the court that Prof Mutambirwa's evidence regarding the pleural effusion would be regarded as inadmissible evidence.

[40] In the premises, in the interests of justice and in accordance with the *audi alteram partem* rule, the application by the plaintiff to reopen her case to recall Dr Lebos is granted only in respect to the issues listed in paragraphs 36.1 and 36.2 above.

Costs

[41] The plaintiff submitted that there would indeed be an argument in relation to costs and the scale of costs, but this is best left to the conclusion of the matter when the court can assess the matter as whole. The defendant had submitted that it is trite that where a party seeks an indulgence from the court, such party must show good cause and bear the consequences thereof, including an appropriate order as to costs. It was further submitted by the defendant that in the circumstances, the defendant also seeks a cost order even if the application is granted and the plaintiff is successful, because she is seeking an indulgence and there is no reason why the defendant should be out of pocket. Having heard the submissions of both counsel, I am of the view that the costs be costs in the cause of the action, where the costs can be assessed as a whole.

Conclusion

[42] Having made the decision to grant the plaintiff the opportunity to reopen her case by calling Dr Coetzee and recalling of Dr Lebos, in my view this case is distinguishable from a case where a plaintiff having heard the defendant's case simply seeks a second opportunity at the "bite of the cherry", to remedy an evidentiary deficiency in her own case. The plaintiff's case had already been closed. Prof Mutambirwa advanced opinions in his testimony that were not

contained in either the first joint minute and/or the addendum minute. Furthermore, the evidence advanced was also not in Prof Mutambirwa's expert report. The significance of this is not merely procedural in nature. The evidence advanced by Prof Mutambirwa, in my view is material to the central issue in this trial, namely whether the plaintiff was suffering from sepsis and/or sepsis wound as pleaded in the case, the consequences thereof, is important to the court in making a determination/finding in respect of negligence and causation. I am accordingly not persuaded by the defendant's averments that there is no legal justification to grant the plaintiff leave to reopen her case to call Dr Coetzee and recall Dr Lebos.

[43] I have considered the possible prejudice which may be occasioned by the defendant with the reopening of the plaintiff's case. I am of the view that the prejudice can be substantially ameliorated by limiting the scope of the reopening. The plaintiff will not be allowed to reopen her entire case or to introduce evidence concerning matters unrelated to Prof Mutambirwa's evidence. The defendant will retain the right to cross-examine Dr Coetzee and Dr Lebos in consequence of this order. The plaintiff will also provide the defendant with a summary of the experts' opinion and reasons therefor in the context of the rules encapsulated in Rule 36 of the Uniform Rules of Court.

Order

[44] In the circumstances, having read the papers and heard both counsel in this matter, and in the interests of justice, I hereby make the following order:

- 44.1 The plaintiff is granted leave to reopen her case.
- 44.2 The reopening is strictly limited to the calling of Dr Coetzee to a) affirm his opinion on the matters expressed in his report, the joint minutes and joint addendum report; and b) respond to issues raised by Prof Mutambirwa in his evidence.
- 44.3 The reopening is strictly limited to the recalling of Dr Lebos to address the following: a) the role of the issue of

temperature as raised by Prof Mutambirwa in his evidence;
b) respond to the issues where Prof Mutambirwa disputed that a CRP of 370 or a procalcitonin of 20 was diagnostic of sepsis or septicaemia; he would have left the plaintiff for at least a week to four weeks before taking her back to theatre and that he would not have bothered to do the tests for CRP, procalcitonin or liver function, and that this was a waste; as raised by Prof Mutambirwa in his evidence.

- 44.4 Before Dr Coetzee is called and Dr Lebos is recalled, and in accordance with Rule 36(9) of the Uniform Rules of Court, the plaintiff shall furnish the defendant with a summary of the experts' opinion and the reasons therefor, insofar as such opinion and reasons relate to the evidence contemplated in paragraphs 44.2 and 44.3 above.
- 44.5 The plaintiff shall ensure that the evidence of Dr Coetzee and Dr Lebos is confined to the matters contemplated in paragraphs 44.2 and 44.3 above and the plaintiff shall not be entitled to introduce evidence directed at any other issue(s) or to supplement, repair or remedy any other deficiency in her case.
- 44.6 The defendant shall be afforded the opportunity to cross-examine Dr Coetzee and Dr Lebos and be permitted to lead responsive expert evidence, by recalling her own witnesses, subject to compliance with Rule 36(9) of the Uniform Rules of Court.
- 44.7 The application to recall Dr Murray is not granted.
- 44.8 The costs of this application shall be the costs in the cause of the main action.


W DOMINGO
ACTING JUDGE OF THE HIGH COURT
PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. This matter was heard on a Teams Meeting Online platform on 25 May 2026. The date for hand down is deemed to be 24 August 2026.

APPEARANCES

For the Applicant:	ADV WL MUNRO instructed by JL LaGRANGE, ADAMS & ADAMS
For the Respondent:	ADV N MANAKA instructed by MR N L NKUNA, THE OFFICE OF THE STATE ATTORNEY, PRETORIA

For the Applicant:

A instructed by B

For the Respondent:

X instructed by Y