

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

Not reportable

Case no: 1826/2023

In the matter between:

B[...] E[...] M[...]

PLAINTIFF

And

**MEC FOR THE DEPARTMENT OF HEALTH,
FREE STATE PROVINCE**

DEFENDANT

Neutral citation: *M[...] v MEC for the Department of Health, Free State* (1826/2023)
[2026] ZAFSHC 422 (1 September 2026)

Coram: LOUBSER J

Heard: 5 June 2026

Delivered: 3 September 2026

Summary: Application for absolution from the instance at the close of the plaintiff's case – whether there is evidence upon which a court could or might find for the plaintiff.

ORDER

- 1 Absolution of the instance is granted at the close of the plaintiff's case.
 - 2 Costs to be paid by the plaintiff on the party and party scale, including the fees of counsel on scale B.
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JUDGMENT

Loubser J

[1] In this matter the court is now seized with an application by the defendant to grant an order of absolution from the instance at the close of the plaintiff's case. The application was made after the plaintiff herself testified and also presented the evidence of her mother, N[...] M[...], of a clinical psychologist, of an actuary, an industrial psychologist, a medical doctor, a social worker, another medical doctor and a nurse. The plaintiff thereafter closed her case.

[2] Before the pleadings and the merits of the application are considered, I deem it apposite to refer briefly to the events that gave rise to the action proceedings that came before the court. It is common cause that the plaintiff suffered from a bipolar mental disorder, which manifested itself in unacceptable behaviour from time to time. After such a bout of offensive behaviour at home and in the streets, the plaintiff was admitted to the Pelonomi Hospital in Bloemfontein. That evening another psychotic patient, who happened to be a male person, was seen having sexual intercourse with the plaintiff in the psychiatric area within the casualty section of the hospital. The plaintiff cannot recall anything pertaining to this event. She was only informed of it at a later stage.

[3] In her particulars of claim, the plaintiff alleged that all the staff present at casualty at the time were employed by the department. They had a legal duty to ensure that the plaintiff was protected from exploitation, abuse and degrading treatment, which includes protection from being raped while in their care. Because of the wrongful and negligent breach of the legal duty by the employees, she was in fact raped, it was alleged. In breaching the legal duty, the employees were negligent in a number of respects mentioned in the particulars of claim. The total damages claimed by the plaintiff for the breach of the legal duty, amounted to the sum of R2 464 789.

[4] Now when it comes to an application for absolution at the close of a plaintiff's

case, the test is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the plaintiff. The test is not whether a court should or ought to find for the plaintiff.¹ In the present case, the court therefore has to analyze the evidence of the witnesses so far in relation to the alleged negligence of the staff working in the casualty area to consider whether a court could or might find for the plaintiff.

[5] The plaintiff, B[...] M[...], testified that she suffers from a bipolar mood disorder. At the time of the incident, she was employed as a security guard. In April 2022 she was not well, she testified. She has no recollection of anything that happened to her at Pelonomi Hospital. All she knew was that she woke up in the Oranje Psychiatric Hospital in May 2022. There she became informed of what happened to her at Pelonomi. She became deeply depressed as a result.

[6] Dr. Thariq Eksteen testified next. On 11 April he was on duty in the casualty area of the hospital, where the holding cubicles for manic patients were also situated. There were glass windows separating the casualty area from the holding cubicles. At around 20h00 he suddenly saw Dr. Maziya with a shocked expression on her face coming from one of the cubicles. He immediately went there and found a male patient on top of the plaintiff. They were having sexual intercourse, and there were laughter and smiles between the two of them. They were then separated, he testified. He said if there were more staff around, the incident might have been prevented. During cross-examination he testified that the casualty department is a very busy place. When you enter the department, you first pass reception, and then there are beds on both sides. When you proceed past the beds, you enter the area for psychiatric patients. This area is divided into cubicles for males and cubicles for females. When asked what could be done to prevent this sort of incident, Dr. Eksteen said he cannot say.

[7] The social worker Ethel Botha was the next witness. She did not see the incident in question, but was informed of it the following day. She then counselled the family of the plaintiff in the hospital manager's office. In cross-examination she confirmed that, according to her knowledge, there had never been such in the past

¹ *McCarthy Ltd v Absa Bank Ltd* [2009] ZASCA 118; 2010 (2) SA 321 (SCA) para 21.

twenty-six years.

[8] Dr. Kanyile Maziya then entered the witness stand. She worked the night shift as medical officer in the casualty department of Pelonomi Hospital on 11 April 2022. She confirmed that on that evening at about 20h10 she visited the cubicles in the casualty department to establish which psychiatry patients were still in casualty and which ones were already removed to the wards. At the female cubicle she found one patient asleep on one of the two beds. On the other bed, she found the plaintiff and a male patient having sexual intercourse. The witness then immediately called out for the nursing staff, and they came and removed the male patient, who was on top of the plaintiff, from her. At the time, Drs Eksteen and Dondolo were also on duty. Concluding her evidence-in-chief, Dr. Maziya opined that a greater security presence could have prevented the event, as well as more medical personnel, such as nurses and doctors.

[9] In cross-examination the witness testified that the emergencies in the casualty department are overwhelming most of the time. She conceded that it would be unreasonable to expect one doctor for every patient at any time in the casualty department. She further testified that when she called for assistance, she called on the nurses who were present in the nursing station, some 12 metres away from the cubicle in question. She also conceded that security officers in a busy department like casualty would not be able to observe everyone, and the same counted for the doctors and nurses who worked there. The doctors and nurses have to take care of other patients as well and cannot be present in a cubicle for psychiatric patients all the time, she said. She further confirmed that the nurses in the nursing station cannot see into cubicles near them.

[10] The last witness called by the plaintiff was Mokolitsoane Ramahleni. She has a degree in nursing, however, she could not take the case for the plaintiff any further. She testified that she visited the plaintiff at Pelonomi Hospital after she was allegedly raped, and she took DNA samples from her and completed a J88 form. The plaintiff could not tell her what had happened to her.

[11] When the case for the plaintiff was hereafter closed, an application was made by counsel appearing for the defendant for an order of absolution from the instance. The main ground for the application was that the plaintiff had failed to present any evidence to the effect that the defendant had breached legal duty of care towards the plaintiff by its negligent conduct, as was alleged in the particulars of claim.

[12] It has already become trite that negligence arises when (a) a *diligens pater familias* in the position of the defendant would foresee the possibility of his conduct injuring another in his person or property and causing him patrimonial loss, and would take reasonable steps to guard against such occurrence, and (b) the defendant failed to take such steps.² Moreover, foresight of a mere possibility of harm will not suffice.³ What is required is foresight of the reasonable possibility of harm.

[13] In the present matter almost all the witnesses called by the plaintiff were employees of the defendant at the time of the incident in question. Drs Eksteen and Maziya expressed the view that more doctors and nurses in the casualty area or more security personnel could have prevented the occurrence of the incident. These views were clearly expressed with the wisdom of hindsight, because neither of them gave any evidence to the effect that such an incident had been or should have been foreseen prior to its occurrence. In fact, none of the witnesses called by the plaintiff testified anything relating to the reasonable foreseeability of such an incident. This came as no surprise, since it was generally testified that the casualty area is, most of the time, a very busy place with a number of doctors and nurses in attendance. Dr. Maziya went so far as to say in cross-examination that the doctors and nurses were taking care of many patients in that department, and could not be expected to be present in a cubicle for psychiatric patients all the time. In any event there was another patient lying in a bed in the particular cubicle where the sexual intercourse took place, she testified.

² *Kruger v Coetzee* 1966 (2) SA 428 (AD) at 430 E-F

³ *Oppelt v Head: Health, Department of Health Provincial Administration: Western Cape* [2015] ZACC 33; 2016 (1) SA 325 (CC) para 107.

[14] Considering the plaintiff's evidence objectively, this Court has to find that the casualty department was probably the busiest place in the hospital where psychiatric patients could be observed all the time, having regard to the glass windows making observation possible and the constant movement of doctors and nurses around those patients. For this reason, and on the basis of the evidence presented by the plaintiff, this Court has to find, applying its mind reasonably, that no court could or might find for the plaintiff on the aspect of breach of a legal duty. A reasonable foreseeability, subsequent negligence and a breach of a legal duty of care was not shown. It follows that absolution of the instance stands to be granted at the close of the plaintiff's case.

[15] As for costs, there is no reason why the costs should not follow the result. The following order is therefore made in the premises:

- 1 Absolution of the instance is granted at the close of the plaintiff's case.
- 2 Cost to be paid by the plaintiff on the party and party scale, including the fees of counsel on scale B.

P.J. LOUBSER
JUDGE OF THE HIGH COURT

Appearances

For the plaintiff:	T Mofokeng
Instructed by:	Modisenyane Attorneys Inc, Bloemfontein
For the first defendant:	G J M Wright
Instructed by:	The State Attorney, Bloemfontein