Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case number: 33632/2014

Reportable: Yes
Of interest to the judges: Yes
22 May 2023
Date Signature

In the matter between:

GERBRECHT ELIZABETH POHLMAN obo

M F L **Plaintiff**

and

MEC FOR THE DEPARTMENT OF HEALTH,

GAUTENG PROVINCIAL GOVERNMENT **Defendant**

NEATRAL CITATION: *Gerbrecht Elizabeth Pohlman abo M F L vs MEC for The Department of Health Gauteng Provincial Government (*Case number: 33632/2014) [2023] ZAGJHC 535 22 May 2023

Delivery: The judgment was delivered electronically through email to the legal representatives and shall be uploaded on to Caselines. The judgment shall be deemed to be delivered on 22 **May 2023**.

Summary: Application – absolution from the instance. Rule 39(6) read with rule 39(20) of the Uniform Rules of the High Court. Rule 39(6) provides that absolution from the instance may be raised at the close of the plaintiff's case. The applicant raised the absolution before the closure of the plaintiff's case. The applicant contended that it is entitled to raise absolution before the closure of the plaintiff's in the circumstances where the plaintiff had a hopeless case and that the court should apply the provisions of rule 39(20) of the Rules. Rule 39 (20) provides the court with the discretion to vary the procedure provided for in that rule. The applicant seeking absolution on the ground that the plaintiff's main expert witness, the gynaecologist and paediatrician was hopeless and failed to establish a *prema facie* case for the plaintiff.
The application failed on the ground that the plaintiff's case was based on three grounds of negligence and not limited to those that on which the gynaecologist testified. The application failed also on the ground that there was no basis upon which the court could invoke the provisions of rule 39 (20) of the Rules.

The applicant's alternative prayer was to have rule 39(6) of the Rules declared inconsistent with the Constitution in that it only allowed absolution for those defendants where the plaintiff has closed his or her case. The application dismissed and rule 39(6) declared not to be inconsistent with the Constitution.

JUDGMENT

MOLAHLEHI J

Introduction

[1] This is an interlocutory application, in the form of absolution from the instance in terms of Rule 39(6), read with Rule 39(20) of the Uniform Rules of Court ("the Rules") by the applicant, the defendant in the main action. The main action concerns a damages claim instituted by the mother on behalf of the minor child whose health it is alleged was compromised both at birth and during his stay after admission in the hospital.

[2] The applicant, the defendant in the main action, seeks absolution from the instance following the testimony of three of the plaintiff's witnesses in the main action. The application is brought before the plaintiff closes her case and in a situation where intends calling more expert witnesses. The parties will, for convenience and ease of reference, be referred to as cited in the main action, the plaintiff and defendant.

[3] The defendant, in the notice of motion, seeks an order in the following terms:

> "(1) That Rule 39(6) of the Uniform Rules of Court applies prior to the close of the first respondent's/plaintiff's case by invoking Rule 39(20) of the Uniform Rules of Court and section 173 of the Constitution of the Republic of South Africa, Act 108 of 1996.Thereby to allow the applicant/defendant to address the court after the end of the evidence of the first and primary medico-legal expert, Dr Sevenster, the obstetrician/gynaecologist upon whose evidence the first respondent's/plaintiff's entire case hinges on. In order that the applicant/defendant can show at this stage that the first respondent/plaintiff has failed to make out a *prima facie* case.
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> (2) Alternatively, to declare, that Rule 39(6) of the Uniform Rules of Court, is unconstitutional and invalid, in terms of section 172(1)(a) and (b) of the Constitution of the Republic of South Africa, Act 108 of 1996, in that it violates the applicant's/defendant's rights to equality, dignity, access to court in a fair public hearing."

Background facts

[4] This matter, which has been subjected to a protracted case management process dating back to before 18 April 2018, involves the action instituted by the plaintiff against the defendant during September 2014. The plaintiff's claim is based

on damages arising from the alleged negligence of the defendant during the plaintiff's labour and birth, including his stay in the hospital in November 2010.

[5] The case of the plaintiff is that the minor child who was born on […] November […] at the defendant's Tambo Memorial Hospital, suffered a severe injury to his brain whilst in the care of the defendant. The complaint about the failure to provide the child with proper care includes the period when he was in the hospital receiving treatment. The cerebral palsy has left the minor child with permanent disability to the extent that he will never be able to look after himself.

[6] The plaintiff's cause of action is based in general on the complaint that the Tambo Memorial Hospital having accepted and admitted the plaintiff and the minor child as patients it failed to provide them with the necessary medical care for their health and well-being. This include the complaint that the hospital failed to provide the necessary care before and after the birth of the minor child. The details relating to the cause of action as pleaded by the plaintiff are set out in her particulars of claim which I do not deem necessary to repeat in this judgment.

[7] The defendant, in its plea, denied liability and contended that there was no causal connection between the alleged negligence and the minor child's cerebral palsy.

[8] This matter initially served before a case management process on 21 January 2020. On that day, the matter was postponed to 29 January 2020 for the parties to supplement their Practice Note. However, on that day the matter was postponed because the defendant insisted that the minor child needed to be tested for

Huntington's disease before the trial could proceed. The defendant insisted on the test on the basis that the cerebral palsy could be attributed to the genetic disposition of the minor child's father.

[9] The plaintiff's Counsel objected to the minor child being subjected to the test as that was, according to him, not in line with the international protocol. The matter was postponed with a directive that the defendant should file an application compelling the plaintiff to submit the minor child to be tested for Huntington's disease. The matter was then postponed to February 2020 for the adjudication of the application to compel.

[10] On 6 February 2020, the plaintiff consented to subjecting the minor child to the test for Huntington disease, which came out negative. Following that, further case management meetings were held, resulting in the trial of the part-heard being set down for 31 October 2022 until November 2022.

[11] The trial proceeded on 31 October 2022 and after the finalisation of the evidence of Dr Sevenster, the gynaecologist/obstetrician for the plaintiff, the matter had to be postponed because the defendant requested an opportunity to file this application. It should be noted that at this stage, the plaintiff had already presented the evidence of Mrs Polhman, the plaintiff, Dr Scheepers, the nursing expert and Dr Sevenster.

Absolution from the instance

[12] As indicated above, the relief in prayer 1 of the notice of motion is sought in terms of Rule 39(6) of the Rules which reads as follows:

"At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which case the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate."

[13] The defendant further requested the court to vary the established practice of allowing an application for absolution at the close of the plaintiff's case. The request to vary the provisions of the rule is based on the fact that the application was launched before the close of the plaintiff's case. The request is made in terms of rule 39(20) of the Rules and section 172 of the Constitution.

[14] Rule 39(20) of the Rules reads as follows:

"If it appears convenient to do so, the court may at any time make any order with regard to the conduct of the trial as to it seems meet, and thereby vary any procedure laid down by this rule."

[15] Section 172 of the Constitution reads as follows:

"Powers of courts in constitutional matters-

1. When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its constitutional inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(j) (ii) an order suspending the declaration of invalidity for any period and on any condition, to allow the competent authority to correct the defect …"

[16] An absolution from the instance application is generally brought at the end of the plaintiff's case, when the plaintiff does not appear when the trial is called or at the conclusion of the whole case.

[17] The test to apply in considering an application for absolution is not that the evidence led by the plaintiff established a case that would be sustained if the case was to proceed to its final conclusion. The essential inquiry in determining whether to grant absolution from the instance is whether there is evidence upon which a court, when applying its mind reasonably, could or might find for the plaintiff. In other words, a court would not grant absolution from the instance in a case where the plaintiff has, at the end of his or her case, presented an answerable case or *prima facie* case. The test, as stated in *Supreme Service Station (1969) (Pvt) Ltd v Fox and Goodridge (Pvt) Ltd,*[1] is not "*what ought a reasonable court to do*" at the close of the defendant's case. Thus the threshold required by the law, which the plaintiff has to satisfy in opposing an application for absolution from the instance at the close of his or her case, is very low.

[18] The test for absolution was set out in *Claude Neon Lights (SA) Ltd v Daniel,*[2] as follows:

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[1] 1995 (1) ZLR 87(S).

[2] 1976 (4) SA 403. (AD).

> "(W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by 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. (*Gascoyne v Paul and Hunter*, 1917 T.P.D 170 at 173; *Ruto Flour Mills (Pty) Ltd v Adelson (2)* 1958 (4) SA 307 (T).)"

[19] In *Van Zyl N.O obo A.M v MEC for Health, Western Cape Provincial Department of Health,*[3] the full bench of the Western Cape Division, noting what was said in *Erasmus v Boss* said:

> "In *Theron v Behr* 1918 C.P.D. 442, Juta, J at p451, states that according to the practice in this Court in later years Judges have become very loath to decide upon questions of fact without hearing all the evidence on both sides.'
>
> We in this territory have always followed the practice of the Cape courts. In case of doubt at what a reasonable court 'might' do, a judicial officer should always, therefore, lean on the side of allowing the case to proceed."

The court further stated at para 12:

> "12. I must confess that, while orders for absolution do not appear to abound in this court's jurisdiction, I am not familiar with this practice in the Cape courts. But then again, there is no authority either of which I am aware, that suggests that the *dictum* of the Chief Justice is wrong or is no longer applicable. Indeed, I would have thought that in the constitutional era where s34 of the Constitution, 1996 ensures access to the courts for the determination of a civil suit in a "fair public hearing", it would be inimical to the interests of justice ("*cause an injustice*") not to continue to adopt such an approach. I leave it there."

[20] I align myself with the above sentiments. It would indeed be against the interest of justice to grant absolution from the instance on the basis of the poor performance of only one witness whose evidence comes long before the plaintiff's

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[3] (A138/2021) [2022] ZAWCHC 133; [2023] 1 All SA 501 (WCC) (4 July 2022).

case is closed and more importantly when the evidence related to only one aspect of the case. It is important to note that the evidence of the gynaecologist has little bearing on the other aspects of the case. It therefore means endorsing the proposition made by the defendant in this case would deny the plaintiff a fair hearing and would amount to a denial of access to justice in that the plaintiff would be deprived of the opportunity to ventilate all the issues she has raised in the in the particulars of claim.

[21] In support of its application, the defendant contends that the plaintiff's medical-negligence claim is based on two contradictory obstetrics scenarios, namely:

> "(a) the failure to do a caesarean section timeously; and in the alternative,
>
> (b) performance of a caesarean section in circumstances when it was not necessary and/or indicated, and as such the baby was born prematurely and subjected to all the risks and complications associated with such prematurity."

[22] The defendant further states:

> "14 Of crucial importance is that there are no antenatal, admission to hospital records or medical records on the caesarean section that was done.
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> 15. The Applicant has made a diligent search for these records, has not been able to find them, and is not in possession of the documents and does not know whether such documents exist. The documents have not been destroyed. And were never in the possession of the chief executive officer of the hospital. (CEO affidavit Tambo Memorial Hospital, dated 25 January 2022 and Reply to plaintiff's Rule 35(3) Notice). The Applicant is still

searching for the medical records and should they be found, will make them available.

16. Of crucial importance too, is that it is common cause that the baby was born in an uncompromised state. The neonatal note records that a caesarean section was done for foetal distress on 30 November 2010 at 14h30. Male baby, preterm, with APGAR scores of 7, 9 and 9 after 1, 5 and 10 minutes respectively. Mass of 2,055kg, head circumference 32cm and length 42cm. No resuscitation required.
17. Consequently, the plaintiff's entire case is underpinned by the evidence of the plaintiff's obstetrician, Dr Sevenster."

[23] The defendant criticised the evidence of Dr Sevenster for contradicting the version of Mrs Pohlman. He was also accused of contradicting himself as to when the caesarean section took place or ought to have been be done. The testimony of the expert witness is attacked also on the ground that he drew conclusions when there were no facts to support same.

[24] The defendant contended further that the case of the plaintiff could not be sustained in light of the concession made by Dr Sevenster during cross examination that it was impossible to tell what happened to cause the condition of the minor child.

[25] Mrs Pohlman is criticised for being an unreliable witness who could not remember some of the crucial facts to support her case.

Has the plaintiff made out a case for absolution at this stage of the hearing?

[26] The application for absolution in this matter has to be assessed in the context where the defendant launched the application after the plaintiff had presented three witnesses in support of her case. She gave notice in terms of rule 36(9)(a) of the Rules that she wished to call four other witnesses, Dr Lewis, paediatrician, Prof

Davies, neonatologist and Prof Gericke, geneticist. These witnesses will, according to the plaintiff, testify about the level of care and treatment of the minor child after his birth until he was discharged from the hospital, including the circumstances of his collapse on 6 December 2010.

[27] The defendant's absolution application has to further be assessed in the context of the plaintiff's cause of action as set out in the particulars of claim. To emphasise the point made earlier, it is apparent from the plaintiff's particulars of claim that the alleged negligence of the defendant is based essentially on three periods. The first period concerns the alleged failure to monitor and treat the mother and the foetus upon arrival at the hospital on 29 November 2010. The second period concerns the alleged failure to adequately observe, monitor and treat the mother and the foetus on 30 November 2010.The third period concerns the alleged failure to respond appropriately to the condition of the minor child whilst in Neonatal Intensive Care Unit (NICU) during the period 30 November 2010 to 6 December 2010.

[28] The evidence that has been led at this stage relates to the first period of the alleged negligence on the part of the defendant, namely, the antenatal labour period. The evidence relating to the birth period and the period after the birth of the minor child until his discharge from the hospital, is still to be presented by the plaintiff. It is thus clear from the reading of the particulars of claim as amended that the plaintiff's case is not based only on the "*two contradictory obstetrics scenarios*" as alleged by the defendant in its founding affidavit in support of this application.

[29] The defendant's contention that Dr Sevenster has in his testimony dealt with the obstetrics period is indeed correct. However, he did not, as stated above, deal with the periods after the birth of the minor child to the period when he was discharged from the hospital. Thus granting the relief sought by the defendant in this

application would not only, cause an injustice but would also amount to a piecemeal approach to litigation.

[30] In the circumstances, the defendant has failed to make out a case for absolution from the instance and thus its application stands to fail for this reason.

[31] The defendant has also failed to present facts and circumstances that would warrant the court invoking the provisions of rule 39(20) of the Rules. In other words, in the circumstances of this case, there is no basis for varying the procedure for the conduct of the trial. In other words, there is no basis to vary the well-established principle that absolution has to be raised at the closure of the plaintiff's case.

Is section 39(6) of the Rules inconsistent with the Constitution?

[32] The defendant's alternative prayer is that the court should declare rule 39(6) of the Rules unconstitutional and invalid in terms of section 172 of the Constitution. The prayer is based on the contention that the rule violates the defendant's right to equality, dignity and access to court in fair public hearing.[4] The defendant's case in this respect is that its right to equality is "*infringed on the current wording of Rule 39 (6) as it gives one defendant more rights than the other depending on the stage of the trial.*" In other words, the rule denies the right of the defendant to invoke the provisions rule at any stage of the trial (specifically before the closure of the plaintiff's case) but confines that right only to after the closure of the plaintiff's case.

[33] The defendant's Counsel argued that the wording of rule 39(6) of the Rules denies the defendant the right to a fair and expeditious determination and finalisation of a case where it is clear even before the closure of the plaintiff's case that there is

[4] The issues of defendant's right to equality, dignity and access to court in a fair public hearing are dealt with in Sections 7(1), 7(2), 8 and 34 of the Constitution. of 1996.

no case to answer to or that the plaintiff has a *prima facie* case. He further, argued that in the circumstances of this case, the defendant is entitled to invoke the rule because the plaintiff's case collapsed at the end of the primary expert witness's testimony, Dr Sevenster.

[34] The other proposition made by the defendant's Counsel is as follows:

> "In a medical negligence case, the case can collapse on the evidence of the first and primary expert, as in this case, and why should the court and the defendant labour through a four or five of the other experts of the plaintiff to the end of plaintiff's case before the Rule 39(6) can be invoked by the defendant."

[35] The essence of the defendant's case, as I understand it, is that the provisions of rule 39(6) of the Rules are inconsistent with the Constitution in that they limit the right to plead absolution from the instance only to those cases where the plaintiff has closed his or her case.

[36] The test to apply in determining inconsistency in matters involving constitutional issues was recently dealt with in *Seriti and Another v Judicial Service Commission and Others*.[5] In that case, the court referred to the test as described by the Constitutional Court in *Ex Parte Speaker of the Kwazulu-Natal Provincial Legislature: In Re Certification of the Constitution of the Province of Kwazulu-Natal,*[6] as follows:

> "It is important to stress that we are here dealing with the concept of inconsistency as it is to be applied to provisions in a provincial bill of rights which fall within the provincial legislature's competence but which operate in a field also covered by Chapter 3 of the interim Constitution. For purposes of section 160 there is a different

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[5] 32193/2023) [2023] ZAGPJHC 332 (14 April 2023).

[6] 1996 (11) BCLR 1419; 1996 (4) SA 1098 (6 September 1996).

> and perhaps even more fundamental type of inconsistency, namely where the provincial legislature purports to embody in its constitution, whether in its bill of rights or elsewhere, matters in respect whereof it has no power to legislate pursuant to the provisions of section 126 or any other provision of the interim Constitution. For purposes of the present enquiry as to inconsistency we are of the view that a provision in a provincial bill of rights and a corresponding provision in Chapter 3 are inconsistent when they cannot stand at the same time, or cannot stand together, or cannot both be obeyed at the same time. They are not inconsistent when it is possible to obey each without disobeying either. There is no principal or practical reason why such provisions cannot operate together harmoniously in the same field."

[37] The issue of who bears the onus in cases of this nature was dealt with by the Constitutional Court in *Ferreira v Levine No and Others; Vryenhoek and Others v Powell No and Others,*[7] as follows:

> "The task of determining whether the provisions of section 417(2)(b) of the Act are invalid because they are inconsistent with the guaranteed rights here under discussion involves two stages first, an enquiry as to whether there has been an infringement of the section 11(1) or 13 guaranteed right; if so, a further enquiry as to whether such infringement is justified under section 33(1), the limitation clause. The task of interpreting the Chapter 3 fundamental rights rests, of course, with the Courts, but it is for the applicants to prove the facts upon which they rely for their claim of infringement of the particular right in question. Concerning the second stage, "[it] is for the legislature, or the party relying on the legislation, to establish this justification (in terms of section 33(1) of the Constitution), and not for the party challenging it, to show that it was not justified."

[38] The focus with regard to the above relates to the question of interpretation and limitation. The duty to show that the infringement, in this instance by the provisions of rule 39(6) as alleged by the defendant, has taken place rests with the defendant. To sustain this duty, the defendant has to produce facts that support its proposition that the rule is inconsistent with the Constitution. If the defendant was to

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[7] 1996 (1) SA 984 (CC).

be successful, then the plaintiff would have to show that the infringement is a justified limitation in terms of section 36 of the Constitution.

[39] In general, a party seeking a relief of a variation in terms of section 172(1)(b)(i) or (ii) of the Constitution has to justify such a request. It is clear from the reading of the papers before this court and the arguments advanced that the challenge to the constitutionality of rule 39(6) of the Rules by the defendant is unsustainable. Therefore, the defendant's alternative prayer to have the rule declared invalid for being inconsistent with the Constitution stands to fail.

Order

[40] In the circumstances the following order is made:

1. The defendant's application for absolution from the instance is dismissed.

2. The application to declare rule 39 (6) of the Rules to be inconsistent with the Constitution is dismissed.

3. Rule 39(6) is declared not to be inconsistent with the Constitution.

4. The applicant is to pay the costs of this application, including the costs of employing two counsel.

E MOLAHLEHI

Judge of the High Court, Gauteng Division, Johannesburg

APPEARANCES:

Counsel for the Applicant/defendant: Adv U R D Mansingh

Attorney for the Applicant/defendant: The State Attorney.

Counsel for the plaintiff/ first respondent: Adv MJ Fourie

And JA Du Plessis

Attorney for the plaintiff/ first respondent: PG De Freitas

Hearing date: 22 March 2023

Delivered: 22 May 2023.