MATTHEWS v. GREEN.

1910. *November* 1. MAASDORP, C.J., and FAWKES and WARD, JJ.

Practice.—Pauper suit.—Absolution from the instance.—Refusal of leave to sue again in formâ pauperis on the same facts.

Where M had sued G, a medical practitioner, *in formâ pauperis* for damages alleged to have been sustained as a result of G's wrong diagnosis and failure to treat M's broken leg with reasonable skill, and absolution from the instance had been granted, *Held*, that leave to sue G again *in formâ pauperis* on the same facts, on the ground that further evidence was forthcoming to corroborate that given by M and his witnesses at the trial, could not be granted.

The applicant had brought an action *in formâ pauperis* in July against the respondent for damages on the ground that the respondent, who is a medical practitioner, had failed to diagnose an impacted fracture of the leg sustained by M, and that he had also failed to treat the fracture with reasonable skill. The majority of the Court (consisting of FAWKES and WARD, JJ.) had granted absolution from the instance. Since then, it was alleged by the applicant, further evidence had been obtained of a most important nature in regard both to the diagnosis and the treatment.

P. U. Fischer, for the applicant: I am instructed that there is further evidence corroborating the plaintiff on the question of diagnosis and treatment.

[MAASDORP, J.P.: You want to upset a judgment of the majority of this Court, which was not in your favour. You must therefore show a very good reason before the Court will grant you leave, especially as the case turned upon the credibility of the witnesses.

FAWKES, J.: Your fresh evidence will have to be strong enough to force the Court to say in effect that both Mr.

Middleton, the assistant resident magistrate, and the defendant committed perjury at the first trial.]

I am prepared to go as far as that. By granting leave to sue again the Court would merely ask for a certificate of *probabilis causa*, and could refuse that certificate if necessary when it is filed.

Blaine, K.C., for the respondent, was not called upon.

FAWKES, J.: The applicant was unsuccessful in the action which he was allowed to bring last term as a pauper. As there was absolution from the instance, there is nothing to prevent his bringing a fresh action in the ordinary course if so advised; but he now asks leave to again bring the action *in formâ pauperis*. The case when heard last term was decided on a question of credibility, and the majority of the Court disbelieved the plaintiff and his witnesses, while for the defence the evidence of Mr. Middleton, the Assistant Resident Magistrate of Vredefort, weighed very considerably with us.

On the point of the correctness of the diagnosis made by the defendant, we were satisfied that the defendant, on his return from attending the plaintiff, informed the magistrate that it was a case of impacted fracture, and we believed the account given of the treatment of the case deposed to by the defendant. It is not suggested that there are any fresh facts which can be proved. The applicant merely wishes to call additional evidence—which was available at the previous trial—to corroborate the witnesses whose evidence we then discredited. In these circumstances I do not think we should allow the plaintiff to sue *in formâ pauperis*.

MAASDORP, C.J.: I quite agree with the principle laid down by my brother FAWKES. The applicant is asking for a privilege. That privilege was granted to him by the Court on a previous occasion, but he failed to avail himself of it fully. He did not produce all the evidence he could have produced, and he now wishes us to give him another chance. If he wishes to bring another action he must proceed *de novo* without the assistance of the privilege he asks for. The defendant has already had to

defend one action; yet, though he won it, as the plaintiff was proceeding *in formâ pauperis*, he had to pay his own costs. In the ordinary course, if the case had not been a pauper suit, defendant would have been entitled to his costs. The granting of the application would therefore seem to be an abuse of the privilege referred to.

WARD, J.: I concur.

Applicant's Attorneys: *McIntyre & Watkeys;* Respondent's Attorney: *G. A. Hill.*