IN THE HIGH COURT OF SWAZILAND

RULING

CASE NO: 1264/12

In the matter between:

THERESA-MARIE EARNSHAW ZEEMAN **PLAINTIFF**

And

THE WOMEN AND CHILDREN'S HOSPITAL **1ST DEFENDANT**

DOCTOR SHANDARE KAPUNYAMAYIKA **2ND DEFENDANT**

Neutral Citation: *Theresa-Marie Earnshaw Zeeman vs. The Women and Children's Hospital and Another Case No. (1264/12) [2018] SZHC 64*

Coram: **MLANGENI J.**

Heard: **4/7/17, 5/7/17, 4/10/17, 5/10/17, 10/10/17, 13/11/17, 7/3/18**

Ruling: **6th April 2018**

Flynote: *Civil procedure – application for absolution from the instance at the close of the Plaintiff's case in terms of High Court Rule 39 (6) – applicable principles discussed.*

In a comprehensive and complex matter, where there is a diversity of facts justifying different inferences, one of which would establish the Plaintiff's case, absolution should not be granted at this stage.

Courts should be cautious in dealing with such application at this stage and may grant it only if the Plaintiff's case is hopelessly poor.

Summary: *The Plaintiff was admitted into the defendants' medical facility for a voluntary caesarean-section operation to have a baby, after the operation she was discharged on the fourth day. Upon discharge, she was bleeding continuously, was in constant pain and unable to take or relate to her newborn baby. Two days later, she again presented herself to the Clinic feeling no better and was attended to at the outpatient department and released to go home. A day later, her condition had progressively deteriorated and a decision was taken to take her to a different institution where she underwent emergency surgery on the same day. She was discharged on the fourth day and has not required further treatment relating to the caesarean-section operation.*

Held: *The Plaintiff's evidence does establish a prima facie case for the Defendants to answer.*

Application for absolution from the instance dismissed with costs.

RULING ON ABSOLUTION FROM THE INSTANCE

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[1] At the close of the Plaintiff's case the Defendants applied for absolution from the instance in terms of Rule 36(6) of the High Court rules. The said rule is in the following terms:-

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

In other jurisdictions the rule is cast in pretty much the same terms as ours. I refer for instance, to Rule 100 of the rules of the High Court of Namibia and to Rule 39(6) of the High Court of South Africa, both of which are *pari materia* with that of the High Court of Swaziland.

[2] The rule offers no guidance on the actual principles that are applicable, hence the need to resort to judicial interpretation and application of the rule in order to see how it has evolved in practice. This process reveals well formulated principles that I will articulate presently. These

principles are discerned from a number of judgments in this jurisdiction[1] and beyond[2].

APPLICABLE PRINCIPLES

[3] The universally accepted test is in the following terms: has the Plaintiff led evidence upon which a court, applying its mind reasonably, could or might find for the Plaintiff[3]? Put differently, has the Plaintiff established a *prima facie* case[4]? His Lordship Harms J.A. has put the test in this manner:-

> **"This implies that a Plaintiff has to make out a *prima facie* case – in the sense that there is evidence relating to all the elements of the claim – to survive absolution – because without such evidence no court could find for the Plaintiff …..As far as inferences from the evidence are concerned, the inference relied upon by the Plaintiff must be a reasonable one, not the only reasonable one."[5]**

[4] In the High Court of Namibia, Main Division, Masuku J.[6] has deciphered the applicable principles in the following manner:-

4.1 Has the Plaintiff, in the mind of the court, tendered evidence upon which a court, properly directed and applying its mind reasonably to such evidence, could or might .....find for the Plaintiff;

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[1] See Phiri v The Commissioner of Police & Another (2855/2009[2012] SZHC 145
TWK Agriculture Ltd v SMI Ltd and Another, Civil Trial No.4263/05.
[2] Claude Neon Lights (S.A.) v Daniel 1974 (4) SA 403 ;Ruto Flour Mills (Pty) Ltd v Edelson (2) 1958 TPD 307;The Board of Trustees of Incorporators of the African Episcopal Church v Kooper (3244/2014) [2018] NAHCMD5 (24TH January 2018) ;
[3] Claude Neon Lights (SA) v Daniel, supra.
[4] Gascoyne v Paul &Hunter, 1917 TPD 170.
[5] In Gordon Lloyd Page & Associates v Rivera & Another, 2001 (1) SA 88 (SCA).
[6] The Board of Trustees of Incorporators of the African Episcospal Church, Supra at p19 -20.

4.2 The evidence adduced by the Plaintiff should relate to all the elements of the claim;

4.3 The court does not normally evaluate the evidence by making credibility findings at this stage. **“The court assumes that the evidence adduced by the Plaintiff is true and deals with it on that basis. If the evidence …….is however hopelessly poor, vacillating or of so romancing a character, the court may, in those circumstances grant the application.”**

4.4 Application for absolution should be granted sparingly. **“The court must generally speaking be shy, frigid or cautious in granting this application…….”.**

THE PLAINTIFF’S CASE

[5] The Plaintiff’s claim is for damages arising from alleged negligence of the First Defendant’s servants in carrying out a caesarean-section operation upon the Plaintiff who had been admitted at the First Defendant hospital to have a baby, it being alleged that the First Defendant’s servants were negligent **“in one or more of the following respects:-**

7.1 failed to perform a complete removal of Plaintiff’s placenta;

7.2 failed to attend to complications arising therefrom timeously or at all.

8 As a result of the Defendants’ negligence as aforesaid, Plaintiff experienced pain and suffering both in past and future and consequently suffered permanent disability and had to undergo further medical treatment, perform a hysterectomy with resultant medical costs.”

[6] Does the Plaintiff's evidence establish a *prima facie* case? Four witnesses gave evidence in support of the Plaintiff's case – the Plaintiff, her husband and two medical doctors who attended to the Plaintiff after her treatment and discharge from the Defendants' medical facility. Because of the conclusion that I have come to in respect of this application, I will not at this stage attempt an exhaustive analysis of the evidence. I will merely highlight aspects of it which, in the view that I take, constitute a *prima facie* case that the Defendants must answer to.

[7] In his opening statement on the 7th July 2017 attorney Rodrigues, for the Plaintiff, stated that the Plaintiff's claim was for damages emanating from the negligence of the First and Second Defendants who failed to act with due care and skill, resulting in removal of Plaintiff's placenta **"and failure to attend to complications from the caesarean-section operation (after care)."** I understood that **"placenta"** was actually in reference to **"womb"**, which it is common cause was removed in a subsequent operation. The Plaintiff's opening statement is, of course, in terms of Rule of court 39(5), which enables Plaintiff's Counsel to give a synopsis of what the Plaintiff's claim is about. Such opening statement is by no means a formality, and it is to be expected that the Plaintiff's evidence and evidence on behalf of the Plaintiff will generally and substantially be in line with the opening statement. I mention the Plaintiff's opening statement because, as it will appear later in this judgment, the defence took the view that paragraphs 7.1 and 7.2 of the Plaintiff's particulars of claim are not stand–alone pleadings, that paragraph 7.2 flows from paragraph 7.1 and that if there is no evidence to substantiate paragraph 7.1 then paragraph 7.2 falls away altogether, and this, according to the defence, is a fatal weakness in the Plaintiff's case, hence the application for absolution.

[8] In her evidence in chief the Plaintiff chronicles the relevant events from the point when she was admitted to the defendant's medical facility on the 27th January 2012 for elective caesarean-section operation to have a baby, her post-operation ordeal up to the point when her family took the decision to take her to another medical institution where she was admitted, given emergency operation and after four days discharged. It is significant that after her discharge from the second medical facility she was feeling much better and there was no need for her to go back there for follow-up treatment or consultation. In other words, as a result of the intervention of the second medical institution the Plaintiff recovered in full but for the permanent disability resulting from removal of the womb, otherwise referred to as hysterectomy.

[9] The Plaintiff's evidence is that immediately after the caesarean-section operation at Defendants' facility she was in severe pain and was in and out of consciousness. She states that the pain that she was in **"was so severe that I could not even hold the baby, I was weak, tired and in constant pain in the abdomen…….and there was a gush of blood flowing from my private parts……."**. On the evening of the 28th January 2012 she was administered a painkiller injection, and although she had gained consciousness on the 29th January 2012 the flow of blood from her private parts and the pain had not abated. She says that the pain **"was like something slicing or tearing inside of me".** During this period her husband was fully resident in the hospital and was the one looking after the newborn baby girl, in every respect.

[10] She further states that in the morning of Monday 30th January 2012 a nurse came to her ward and told her that she was being discharged. This Monday was the 4th day since her admission on the 27th.

[11] The Plaintiff's case was clearly that when she was discharged she was in a bad condition in terms of the bleeding and the intense pain, to the extent that she was actually wheeled out of the clinic to the car park where a motor vehicle awaited to take her home. Upon arrival at home she wanted to pick up the baby but the abdominal pain was unbearable. She went to the bathroom and while trying to urinate she discharged clots of blood. The pain was so severe that she required assistance to come out of the bathroom. Her mother was in the house in order to give her care and to assist with the baby. I got the clear impression that the pain that the Plaintiff was experiencing was incessant and extreme and that the bleeding was persistent, even if intermittent. On the 31st January, while trying to dress herself up the Plaintiff fell on her knees and her mum called upon Plaintiff's husband to rush the Plaintiff to hospital. She was immediately rushed back to the Defendant's hospital where she was attended to at the outpatient department. Here she was placed on a bed and administered a drip. While at this outpatient department the Second Defendant, Dr. Shandare Kapunyamanyika who had done the caesarean-section operation, came in to see her. Plaintiff told the doctor about the severe pain on her left side of the abdomen. "**The doctor took a scan of my lower abdomen and said to me that she did not see anything wrong with me……..after about 5 minutes she stood up and left me without saying a word",** said the Plaintiff. After the drip and painkiller were administered to her she was released to go back home. When she was at the car park with her husband a nurse came to say they should pay E1, 000.00 for the out-patient treatment consisting of the scan, the drip and painkiller but her husband refused to pay this amount because there was no improvement in her condition.

[12] Back home, it was another day of pain and discomfort. She was getting weaker and her eyesight was blurring. She was going to the toilet constantly and releasing blood, and the situation continued into the night of the 31st January 2012. On the following morning her stomach was swelling and she was told by her mother that she was looking pale. At this stage the Plaintiff asked her husband to take her to another hospital. In her own words:-

> **"I remember saying to my husband that my child is going to die because I had never seen so much bleeding, that I better be taken to another hospital. My husband helped me to the car, I could no longer sit, a pillow was put under me ……"**

[13] On this occasion she was taken to another hospital, Medisun Clinic, at eZulwini. This was now on the 2nd February 2012, six days after the caesarean-section operation. At Medisun Clinic she was admitted and given emergency attention. She was physically examined by Dr. Abdissa, then put on a scan and the doctor said that he was seeing black spots inside her abdomen. Further examination was required and due to the intense pain, she was put on anesthesia. Dr. Abdissa, who was in consultation with Dr. Ibrahim, determined that the Plaintiff's life was in imminent danger and that she required an emergency operation to remove the womb which, upon, examination, showed to have an infection. On the same day of admission to Medisun Clinic a hysterectomy was carried out on the Plaintiff. When she regained consciousness there were family members around her. She further stated that when she regained consciousness Dr. Abdissa explained to her that it was necessary to remove her womb because there were fragments of placenta on it. The doctor informed her that she would not have another child again.

[14] After the emergency operation at Medisun Clinic the pain and the bleeding stopped, and she was discharged on the fourth day. She stated during cross-examination that when she was discharged from Medisun Clinic the pain that she was feeling was now endurable pain, and that although she had a prescription of pain killers she did not use them. There was no follow-up treatment or consultation. When she did go back to Medisun Clinic some time later it was for depression resulting from the realisation that she would not have a baby again.

[15] Her husband testified on her behalf as PW2 and he corroborated the Plaintiff's evidence on the material issues relating to her post-operation ordeal and particularly that she was in such a helpless situation that he is the one that was looking after the baby, in all respects. He confirmed that he refused to pay E1, 000.00 for the visit to First Defendant on the 31st January 2012 because his wife's condition was bad and was not getting any better. He also testified in respect of medical expenses that he paid to the First Defendant for the caesarean-section operation as well as what he paid at Medisun Clinic for the emergency operation and matters relating thereto.

[16] Two medical doctors, Dr. Abdissa and Dr. Ibrahim, testified on behalf of the Plaintiff. These doctors attended to the emergency case of the Plaintiff at Medisun Clinic. After the evidence of the two doctors the Plaintiff closed its case, hence the present application.

[17] It appears to me that even before one considers the evidence of the two medical doctors there is a reasonable inference from the evidence of PW1 and PW2 that the Defendants could and should have done better in dealing with the stark reality that some days after the caesarean-section operation the Plaintiff was bleeding continuously, was in severe pain and virtually unable to take care of herself and the baby. A fortiori, when she went back to the Defendant's facility on the

31st January 2012 it appears to me that more could and should have been done to investigate the real cause of the persistent bleeding and unstinting pain. The declaration of the Second Defendant upon examination of the Plaintiff on the 31st January 2012, that she did not see anything wrong with the Plaintiff, raises serious questions that beg answers. The fact that after the hysterectomy and on the fourth day at Medisun Clinic the Plaintiff was discharged, feeling only bearable pain and already able to relate to her new born child, and did not need follow-up treatment thereafter, adds a positive dimension to the Plaintiff's claim. And Dr. Abdissa did, as a matter of fact, state that he would not have discharged the Plaintiff in the condition that she was in on the 30th January 2012 when she was discharged by the Defendants subsequent to the caesarean-section operation.

[18] But before I conclude the ruling I must reflect upon and deal with Advocate Flynn's argument on behalf of the Defendants that the Plaintiff has not led evidence on all the requirements of the claim, and therefore falls foul of the *dictum* of Harms J.A. in the case of Gordon Lloyd Page & Associates[7].The defence's argument is that the Plaintiff has failed to prove the averments at paragraph 7.1 that the Defendants failed to perform a complete removal of the placenta. The argument proceeds that 7.1 having not been established, 7.2 automatically falls away. Paragraph 7.2 is that the Defendant **"failed to attend to complications arising therefrom timeously or at all'**. The complications can only relate to the removal of the placenta, nothing else, so goes the argument. In my view the defence is being over – technical and could well be splitting hairs. At main paragraph 7 the Plaintiff avers that the defendants were negligent **"in one or more of the following respects"** and then mentions the contents of

[7] See Note 5 above.

sub-paragraphs 7.1 and 7.2. So clearly, according to the Plaintiff, if the negligence is not in 7.1 it is in 7.2 or both.

[19] By the time the two medical doctors had testified on behalf of the Plaintiff I had the reasonable perception that some complications did arise from the caesarean-section operation, and the evidence creates a reasonable inference that the Defendants could and should reasonably have done more than they did. It is with this in mind that I am of the view that it would not be just and equitable[8] to grant the application.

[20] In this context I find counsel in the wise words of Boshoff J.[9] which are very apposite:-

> **"In a comprehensive case, such as the present one, where there is a diversity of facts justifying different inferences, of which one can establish Plaintiff's case, the court would be acting contrary to the rules referred to, if it paused to consider the value and persuasiveness of the evidence at this stage. If the defendant wishes the court to do so, he should close his case. The court should hear all the evidence and leave itself free to express its view of the evidence for the Plaintiff at the end of the case."**

[21] Given the comprehensive and complex nature of this claim, and taking into account the effect of legal authorities as I understand them, it was on the ambitious side for the Defendants to apply for absolution from the instance. I am not required to comment on what would happen if the Defendants closed their case without leading evidence. That is for another day, and different considerations would then apply.

[22] The application for absolution from the instance is hereby dismissed with costs.

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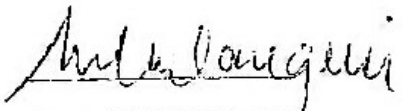
[8] See Ota J. in Lucky Phiri v The Commissioner of Police and Another, supra, at para 5.
[9] In Ruto Flour Mills (Pty) Ltd v Edelson (2), supra, at p310.



T.M. MLANGENI

JUDGE OF THE HIGH COURT

For the Plaintiff: **Mr. Rodrigues**

For the Defendants: **Advocate Flynn**