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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

- | | |
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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **9th October 2020** Signature: _____

CASE NO: 37431/2013

DATE: 9th OCTOBER 2020

In the matter between:

E, P o b o E, L

Plaintiff

and

**THE MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH OF THE GAUTENG PROVINCE**

Defendant

Coram: Adams J

Heard: 8 October 2020

Delivered: 9 October 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GLD and by release to *SAFLII*. The date and time for hand-down is deemed to be 12h00 on 9 October 2020.

Summary: Practice and Procedure – Evidence – admission of further – application to re-open case in order to lead further evidence – when to be granted – requirements reiterated.

ORDER

- (1) The plaintiff is granted leave to re-open her case and to adduce further evidence by a radiologist, Dr B Alheit.
 - (2) The plaintiff is granted leave to file an expert notice and summary as envisaged in Uniform Rule of Court 36(9)(a) and (b) with reference to the expert testimony of Dr Alheit.
 - (3) The costs of this application are reserved for decision by the trial court.
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JUDGMENT

Adams J:

[1]. The evidence in this action was completed some twenty months ago on the 23rd of January 2019, whereafter the matter was postponed *sine die* for closing arguments. There was also an indication from the parties that in order to assist them in settling heads of argument and preparing for closing arguments, a transcript of the proceedings would be requisitioned. To date closing submissions have not been presented. I am advised from the bar that the transcript of the proceedings has at least now been produced.

[2]. In the interim, the plaintiff has also thought it advisable 'out of an abundance of caution and in the best interest of [her] case' to lead further evidence to address possible shortcomings in the case presented on her behalf up to the point when the evidence was completed. This rethink in approach by the plaintiff was brought on by a number of recent judgments in both the Supreme Court of Appeal and the High Court in which claimants, with claims similar to that of the plaintiff *in casu*, had been unsuccessful, the courts having

found that causation had not been proven. Hence the application presently before me by the plaintiff, who applies in terms of the common law for leave to lead the expert evidence of a further witness, a radiologist, Dr B Alheit.

[3]. The defendant opposed the application for admission of this evidence. The way I understand the submissions made by Ms Mansingh, Counsel for the defendant, is that the defendant strongly contests the materiality of the evidence by Dr Alheit. Ms Mansingh submitted that the testimony of Dr Alheit, if allowed to be admitted, would in any event be rejected on the basis of a judgment by Kruger J in *Zodwa Shange v MEC for Health for the Province of KZN*, case no. 9019/207P, delivered on 5 December 2019. In that matter the KZN High Court coincidentally had rejected the evidence of the self-same Dr Alheit on the basis *inter alia* that he did not possess the necessary expertise to give the evidence which he is intended to give in this matter.

[4]. The defendant also contended that the plaintiff in this application seeks to introduce a new ground for the leading of further evidence, namely 'an abundance of caution and in the best interests of the plaintiff's case'. This, so the defendant contends, is not a ground for leading new evidence and on this basis alone the application should fail.

[5]. As pointed out by Davis J in *Porterstraat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C), relying on the decisions in *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A) at 626A-G and in *Barclays B Western Bank Ltd v Gunas and Another* 1981 (3) SA 91 (D) at 95C-96E, the relevant considerations in an application to admit further evidence are:

- (i) The reason why the evidence was not led timeously.
- (ii) The degree of materiality of the evidence.
- (iii) The possibility that it may have been shaped to 'relieve the pinch of the shoe'.
- (iv) The balance of prejudice, *viz* the prejudice to the plaintiff if the application is refused and the prejudice to the defendant if it is granted.
- (v) The stage which the particular litigation has reached. Where judgment has been reserved after all evidence has been heard and, before judgment is

delivered, plaintiff asks for leave to lead further evidence, it may well be that he or she will have a greater burden because of factors such as the increased possibility of prejudice to the defendant, the greater need for finality, and the undesirability of a reconsideration of the whole case, and perhaps also the convenience of the Court.

- (vi) The 'healing balm' of an appropriate order as to costs.
- (vii) The general need for finality in judicial proceedings.
- (viii) The appropriateness, or otherwise, in all the circumstances, of visiting the fault of the attorney upon the head of his client.

[6]. In his affidavit in support of this application Mr Du Plessis, the plaintiff's attorney, provided an explanation for why the application was only made during January 2020. The High Court and Supreme Court of Appeal judgments were handed down during the course of 2019, whereafter he referred the matter to Dr Alheit for an opinion dealing with the issues raised in these judgments, which would have become relevant in this matter. This, in my view, is a reasonable explanation for the fact that the evidence was not led before. The stakes, at least for the plaintiff, being a severely handicapped minor child, are high and an unsuccessful action would have far-reaching implications in his life.

[7]. As regards the issue of the degree of materiality of the evidence, as rightly argued by Mr Du Plessis SC, who appeared on behalf of the plaintiff, the considerations pertaining to admission of the new evidence are, of course, different to those which apply in assessing the importance of this evidence with regard to the outcome of the main action. We cannot, at this stage, pre-judge the value of the evidence which Dr Alheit will give. That is so despite the judgment of Kruger J in the *Shange* matter. I agree that different considerations may apply to the evidence of Dr Alheit *in casu* to those applicable to his testimony in the *Shange* matter – that would always depend on the evidence led in the matter.

[8]. Therefore, applying the above principles *in casu*, I am of the view that the plaintiff should be granted leave to lead the evidence of Dr Alheit. Importantly, we are here dealing with a claim on behalf of a minor child and it would, in my

view, be innately iniquitous if all of the evidence is not placed before the court so as to ensure that justice is done for the child and his claim.

[9]. In the circumstances, I am satisfied that the plaintiff has made out a case for leave to lead the evidence of Dr Alheit.

Costs

[10]. Mr Du Plessis submitted that an appropriate costs order would be one which reserves the costs of this application. The trial court would be in a much better position to assess the necessity for the plaintiff to have launched this application. I agree.

[11]. I therefore intend ordering the costs in the application to be reserved for decision by the trial court.

Order

In the result, I make the following order:

- (1) The plaintiff is granted leave to re-open her case and to adduce further evidence by a radiologist, Dr B Alheit.
- (2) The plaintiff is granted leave to file an expert notice and summary as envisaged in uniform rule of court 36(9)(a) and (b) with reference to the expert testimony of Dr Alheit.
- (3) The costs of this application are reserved for decision by the trial court.

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 8th October 2020

JUDGMENT DATE: 9th October 2020

FOR THE PLAINTIFF: Advocate T D R Du Plessis SC

INSTRUCTED BY: Du Plessis Attorneys, Johannesburg

FOR THE DEFENDANT: Adv U R D Mansingh

INSTRUCTED BY: The State Attorney, Johannesburg