

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

Appeal No: A174/2013

In the appeal between:

PUMLA BALOYI

Appellant

and

MEC FOR HEALTH OF THE FREE STATE

Respondent

CORAM: RAMPAL et KRUGER et VAN DER MERWE, JJ

JUDGMENT: KRUGER, J

HEARD ON: 10 MARCH 2014

DELIVERED ON: 13 MARCH 2014

- [1] This is an appeal against the order of absolution from the instance with costs granted at the end of appellant's case by Ebrahim J. The case concerned an incident on 28 June 2002 when appellant fell on her knee and was taken to the Harrismith Hospital by ambulance where she was seen by Dr Bekker who diagnosed soft tissue injury and prescribed tablets. She left for Johannesburg the following day by car where she was seen by an orthopaedic surgeon a day or two later who had x-rays taken and diagnosed a fracture of the

acetabulum, (the socket of the hip bone into which the head of the femur fits) which was displaced. Appellant underwent corrective surgery in Johannesburg. Appellant's case is that the surgery was made necessary by the incorrect diagnosis by Dr Bekker. The grounds of negligence set out in the particulars of claim are that the hospital staff at Harrismith (1) failed to correctly diagnose the condition of the appellant; (2) failed to have x-rays taken, and (3) failed to take any or adequate steps to ensure that appellant would not further injure herself.

- [2] In the plea respondent denied that appellant suffered a fractured or displaced acetabulum, alternatively defendant pleaded that such fracture or displacement occurred after her release from the care of the Harrismith Hospital.
- [3] Appellant's case is that the displacement occurred after she was seen by Dr Bekker in Harrismith. Dr Schnaid, the expert orthopaedic surgeon called by the appellant testified that it was possible that the displacement occurred before Dr Bekker saw her but probable that it occurred thereafter.
- [4] The trial commenced on 15 November 2005. On 20 June 2006 the cross-examination of the appellant (who was the first witness to testify) continued.
- [5] The trial continued on 20 June 2007. On that day Dr Schnaid testified. He said that when he examined the appellant in

Johannesburg after looking at the x-rays he found that there was a displacement of the acetabulum. His view was that at Harrismith Hospital the appellant should have been immobilised on a bed. In cross-examination Dr Schnaid said: “I can’t say, look, this definitely happened. What I can say is there are probabilities that could have happened because she was subjected to everything afterwards.” His view was that the displacement of the acetabulum probably occurred due to the delay in treatment. His view was that even sitting in a wheelchair created enough force to disturb the fracture appellant had. The appellant was subject to stressing of the hip joint from the moment she fell on her knee until she was admitted to the Brenthurst Clinic in Johannesburg. The only time she was not stressed out was when she lay flat on her back in traction. Dr Schnaid agreed that the displacement could have taken place when appellant was carried out of the boat (she took a two-hour boat trip after having fallen and being unable to stand). Dr Schnaid said, in response to a question by the court, that he was unable to comment at all on the time when the displacement occurred.

- [6] Appellant’s case was closed at the end of Dr Schnaid’s evidence, on 20 June 2007. Mr Hefer brought an application for absolution. Judgment was given on 22 June 2007.
- [7] The trial judge found that she was unable to make a finding that the displacement occurred after admission to the Harrismith Hospital. She found it far more probable that the displacement occurred immediately after the fall and before the diagnosis at Harrismith

Hospital. She accepted that the misdiagnosis of Dr Bekker amounted to negligence, but found that “the evidence before me is not such upon which a reasonable court might find for the plaintiff and give judgment against the defendant”.

- [8] Application for leave to appeal was filed with the registrar on 5 July 2007.

- [9] The court *a quo* heard the application on 30 November 2012 and, according to counsels’ Heads of Argument, granted leave to appeal to this court. The record does not contain the proceedings relating to the application for leave to appeal or the judgment granting leave to appeal.

- [10] To determine whether absolution should be granted at the end of plaintiff’s case the question is whether there is a reasonable inference which favours the plaintiff (**Marine & Trade Insurance Co Ltd v Van der Schyff** 1972 (1) SA 26 (A) at 38C-D; 39A-B). If there are two possible inferences of about the same probability, absolution should be refused (**Du Toit v Vermeulen** 1972 (3) SA 848 (A) at 855A-F). In the ordinary course of events absolution at the end of plaintiff’s case is exercised sparingly (**Gordon Lloyd Page & Associates v Rivera and Another** 2001 (1) SA 88 (SCA) at 92 I – J). The question is 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 appellant (**Claude Neon Lights (SA) Ltd v Daniel** 1976 (4) SA 403 (A) at 409 G – H).

[11] Even bearing in mind Dr Schnaid's concession that he cannot say with certainty when the displacement occurred, it is possible that a reasonable court might find (at the end of respondent's case) that the displacement had not occurred at the time Dr Bekker saw the appellant. A reasonable court might find that the treatment the appellant received from the Harrismith Hospital, and in particular Dr Bekker, amounted to negligence leading to liability towards appellant. Absolution should not have been granted.

[12] An application for condonation served before us at the hearing of the appeal:

"1.

Granting condonation to the Applicant/Plaintiff as far as need be by reason of Applicant's/Plaintiff's failure to have lodged the record of appeal timeously and to have requested a date for the hearing of such appeal in terms of the provisions in terms of Rule 49(6)."

Rule 49(6) requires the appellant to apply for a date for the hearing of the appeal within 60 days after delivery of the notice of appeal. The appellant must lodge three copies of the record together with the application for the date of hearing (Rule 49(7)).

[13] In the affidavit filed in support of the application for condonation the applicant's attorney states that immediately after the hearing of the application for leave to appeal, he requested copies of the record from the transcribers. He made repeated requests. The record only

became available on 12 August 2013 and was lodged with the registrar on 16 August 2013. Appellant's attorney says he had no control over the preparation and furnishing of the record.

[14] The respondent opposed the application for condonation and lodged an opposing affidavit. Therein the deponent states that when the application for leave to appeal was heard in the court *a quo* on 7 December 2012 the complete record had already been transcribed. He says with reliance on **Unitrans Fuel & Chemical (Pty) Ltd v Dove-Co Carriers CC** 2010 (5) SA 340 (GSJ) at 341 G-H that the appellant's attorney does not give details of requests to the transcribers.

[15] In the replying affidavit filed by appellant's attorney in the condonation application, Mr Rontgen states that he requested the completion and delivery of the record from the transcribers on the day he filed his application for leave to appeal, being 5 July 2007.

[16] In our view the appellant's attorney has provided sufficient reasons for the delay and condonation should be granted with no order as to costs.

ORDER

1. The appeal succeeds with costs.
2. The order of the trial court is set aside, and the matter is referred back to the trial court to continue with the trial.

A. KRUGER, J

I agree.

M.H. RAMPAL, J

I agree.

C.H.G. VAN DER MERWE, J

For Appellant: Mr K.M. Röntgen
 Instructed by:
 Symington & De Kok
 BLOEMFONTEIN

For Respondent: Adv J.J.F. Hefer
 Instructed by:
 State Attorney
 BLOEMFONTEIN