

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: A465/2007

In the appeal between:

TIASHI SA (PTY) LTD

Appellant

and

MPHO GLORIA MOLEMELA

Respondent

CORAM:

VAN ZYL *et* MOCUMIE JJ

JUDGMENT:

MOCUMIE J

HEARD ON:

15 SEPTEMBER 2008

DELIVERED ON:

30 OCTOBER 2008

APPEAL: RESCISSION OF JUDGMENT

- [1] The respondent/plaintiff, Mpho Gloria Molemela, instituted action against the appellant/defendant in the Magistrates' Court, Bloemfontein, for payment of R60 000,00 for general damages she suffered as a result of a burn-wound sustained due to the alleged negligence of the appellant.

- [2] The appellant/defendant is TIANSHI SA (Pty) Ltd, a company registered in terms of the South African company laws with its principal place of business situated at corner Zastron and Kellner streets, Bloemfontein.
- [3] On 23 February 2006 plaintiff, a paraplegic since 1992, attended a leather warm bed demonstration. The allegations of negligence made in the particulars of claim, are the following: The bed purportedly increases blood circulation or improves blood circulation in the body or body tissues. The demonstration was conducted on the defendant's premises by its employees acting in the course and within their scope of employment. During the presentation plaintiff was made to lie on her back on the bed mattress for 3 hours. The defendant's employees evidently set the bed at too high a temperature. In addition they failed to alert plaintiff that whilst lying on the bed she must move her body at regular intervals as the circumstances demand. Regard being had that the plaintiff was a paraplegic the defendant should have ensured that one of its employees kept a close watch over her therapeutic intervention.

[4] Plaintiff claims that as a result of the defendant's negligence she sustained an ischemic burn-wound to her left buttock and consequently suffered damages set out in her particulars of claim as follows:

4.1 Pain and suffering: R 30 000, 00

4.2 Disfigurement: R 20 000, 00

4.3 Loss of amenities: R 10 000, 00

[5] Appellant filed a notice through its attorneys of its intention to defend the action on 24 January 2007. On 23 February 2007 a notice of bar was served on appellant. On 7 March 2007 advocate Willem Edeling, acting on instructions of the appellant's attorneys, requested a week's grace to file a plea. The attorney on behalf of the respondent agreed to it. During this period of indulgence no plea was filed nor was there any further extension requested. On 15 March 2007 appellant served its plea on the respondent and filed same with the Registrar on 16 March 2007.

[6] The plea was accompanied by a notice of application for upliftment of the bar. The reasons advanced for the failure

to file the plea timeously were that Mr Edeling misplaced the brief and was overloaded with work. Mr. Joubert, the respondent's attorney, refused to accept the plea on the ground that it was out of time and notwithstanding that the rejected plea was accompanied by a notice of application to uplift the bar.

- [7] On 20 April 2007 the application was removed from the roll by virtue of a point in *limine* raised by the respondent that appellant had failed to apply for extension of the limited time prescribed in Rule 60(5). Appellant was ordered to pay the costs of that application. On 4 May 2007 appellant requested Mr Joubert to indicate whether he would oppose the application for condonation. Mr Joubert did not respond. This was because, according to Mr Joubert, he already indicated in a letter of 23 April 2007 that should the appellant not lodge its application in terms of rule 60(5) within 5 days, default judgment would be applied for. The same request was forwarded to him on 4 June 2007 with no success. On this very day respondent brought an application for default judgment, which was granted. This is what gave rise to the application for rescission of the

default judgment. The application was dismissed with costs on 27 July 2007.

[8] Appellant is now appealing this order on the following grounds:

- “1. Die Agbare Verhoorlanddros het verkeerdelik bevind dat die Appellant nie oor ‘n *bona fide* verweer beskik nie.
2. Die Agbare Hof het gefouteer deur nie in aanmerking te neem dat die Appellant reeds ‘n verweerskrif geliasseer het nie.
3. Die Agbare Hof het gefouteer deur geensins dit in ag te neem dat die Respondent ‘n aansoek om verstekvonnis geloods het sonder om kennis, alternatiewelik behoorlike kennis, aan die Appellant daarvan te gee desnieteenstaande dat daar reeds ‘n verweerskrif geliasseer was en reeds ‘n aansoek geloods was om opheffing van die pleitbelet.
4. Die Agbare Hof gefouteer het deur geen gewig te verleen alternatiewelik onvoldoende gewig te verleen aan die feit dat Respondent nie kon aantoon welke getuienis aangebied is ten einde die vordering vir algemene skade te fundeer by die aansoek om verstekvonnis nie.

5. Die Agbare Hof gefouteer het deur te bevind dat Mnr. Bruwer, gesien die spesifieke omstandighede van die saak, nie oor die nodige *locus standi* beskik het om die aansoek om tersydestelling te bring nie.
6. Die Agbare Hof fouteer het deur nie in aanmerking te neem dat die Respondent geensins betwis het dat Mnr. Bruwer bevoeg en gemagtig is om die verklaring namens die Appellant af te lê nie.“

(See Notice of Appeal, record, page 134 – 136)

Appellant is also seeking condonation for the late filing of the original court record.

- [9] It is convenient in this matter to dispose first of the issue of condonation and deal with the merits thereafter. On 16 November 2007 appellant served respondent's attorney with a notice of appeal and filed same with the Clerk of the Court on 19 November 2007. When the appellant approached the Clerk of the Court to arrange for the record to be typed, the tapes of the hearing could not be found. The records were subsequently traced but at that stage the time limits within which to file the original record had

prescribed. This application for condonation is not opposed by the defendant.

- [10] Factors which are usually taken into account when condonation is sought are set out as follows in **Federated Employers Fire and General Insurance Co Ltd and Another v McKenzie** 1969 (3) SA 360 (A) at 362G:

“In considering petitions for condonation ..., the factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice;...”

- [11] Where there are undisputed prospects of success on appeal a court would usually incline towards granting condonation. If there are no such prospects condonation may be refused. However, where there was flagrant disregard of the Rules a court is entitled to refuse condonation and dismiss an application on that basis only.

See **De Vos v Cooper & Ferreira** 1994 (4) SA 1290 (SCA) at 1298.

[12] In this case I am of the view that the delay was not solely attributable to the negligence on the part of the appellant and his lawyers but the court system played a substantial part when the court file was misplaced. The respondent did not oppose the application and the delay was not inordinate. Condonation is granted; without implying that there are merits in appellant's rescission application.

[13] The procedure to be followed in the magistrate's court in an application for rescission of a judgment is regulated by Rule 49 of the Magistrate's Court. Rule 49(1) and (3) read as follows:

"49(1) A party to proceedings in which default judgment has been given, or any person affected by such judgment, may within 20 days after obtaining knowledge of the judgment serve and file an application to court, on notice to all parties to the proceedings, for a rescission or variation of the judgment and the court may, upon good cause shown or if it is satisfied

that there is good reason to do so, rescind or vary the default judgment on such terms as it may deem fit.

(2) ...

(3) Where an application for rescission of default judgment is made by a defendant against whom the judgment was granted, who wishes to defend the proceedings, the application must be supported by an affidavit setting out the reasons for the defendant's absence or default and the grounds of the defendant's defence to the claim. "

[14] An applicant who claims relief under this Rule should comply with the following requirements which are succinctly set out in **Grant v Plumbers (Pty) Ltd** 1949 (2) SA 470 (W) at 476-477:

- “(a) He must give a reasonable explanation of his default. If it appears that his default was wilful or that it was due to gross negligence the Court should not come to his assistance.*
- (b) His application must be bona fide and not made with the intention of merely delaying plaintiff's claim.*
- (c) He must show that he has a bona fide defence to plaintiff's claim. It is sufficient if he makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him to the relief asked for. He*

need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour. (Brown v Chapman (1938 TPD 320 at p. 325).)

[15] It was found by the Court a quo that the appellant's application for rescission should be dismissed on two grounds. First, that the appellant (through Mr. Bruwer) did not disclose a *bona fide* defence in his supporting affidavit. Secondly, that Mr Bruwer did not have *locus standi* to have brought the application.

[16] Rule 49 permits that default judgment may be rescinded '*if good cause be shown*'. In **De Vos v Cooper & Ferreira** *supra* at 1304 the Supreme Court of Appeal had this to say concerning the phrase "*on good cause shown*":

"It seems clear that by introducing the words "and if good cause be shown" the regulating authority was imposing upon the applicant for rescission the burden of actually proving, as opposed to merely alleging, good cause for rescission, such good cause including but not being limited to the existence of a substantial defence (cf Du Plessis v Tager 1953 (2) SA 275 (O) at 278). The position under the subrule is thus that if the

defendant fails to show good cause for relief or if the plaintiff shows that the defendant was in wilful default the magistrate is not entitled to rescind the judgment;'

- [17] Mr Bruwer in paragraph 9 of his affidavit (record, page 70) stated the following which he regarded as a *bona fide* defence:

"... die respondent se aksie om skadevergoeding as gevolg van algemene skade is, derhalwe word daar geensins geëis vir enige hospitaal-en/of mediese onkoste wat werklik gely is nie. Dit word met eerbied aangevoer dat die bedrag van R60 000,00 in die vorm van algemene skade vir die tipe wond wat na bewering opgedoen is, buitensporig hoog is en op die oog af regtens ongefundeerd voorkom."

- [18] This statement was not substantiated or supported by any facts and did not deal with the substance of the claim. It is just a bare denial. For instance Mr Bruwer does not state and in fact cannot state from personal knowledge that the plaintiff did not attend the appellant's premises on the occasion in question and did not sustain the injuries described in the manner set out in paragraph 3 (above).

[19] When this matter was argued before us counsel attempted to indicate that the appellant had a *bona fide* defence. He argued with reference to decided cases including **Julie v Winter** 1955 (1) SA C&B 567(C) that indeed respondent's claim was not in line with precedents and therefore "*buitensporig hoog*".

[20] This averment was not made in the founding papers nor was the argument advanced in the court *a quo* and the **Julie v Winter** decision is distinguishable from the present matter.

[21] Dr Efraim van der Walt, a plastic and reconstruction surgeon, stated in his affidavit that served before court for purposes of obtaining default judgment and attached to the papers, page 107-109, that plaintiff consulted him during 24 February 2006 and went on to say:

"Die eiseres het 'n derde graadse brandwond opgedoen. Daar is dan 'n area van ongeveer 7x8 sentimeter wat hipgepigmenteerd en ge-indireer is. Dit kan nodig wees om

hierdie litteken op 'n later stadium te hersien en onkoste daaraan verbonde mag min of meer soos volg wees:

<i>HOSPITALISASIE</i>	<i>R 12 000,00</i>
<i>CHIRURGIE</i>	<i>R 4 000,00</i>
<i>NARKOSE</i>	<i>R 2 000,00</i>

Hierdie kostes is ook die billike en redelike kostes.

Die litte kenne kan nie totaal verwyder word nie.

Die eiseres het derhalwe baie mediese uitgawes gehad ten aansien van die operasies en sal sy waarskynlik in die toekoms ook mediese uitgawes hê. Die verweerderes het vanweë die operasies pyn, lyding en ongerief verduur.”

Appellant did not file a replying affidavit or apply in the court below to amplify its papers by means of a supplementary affidavit. It was held in Hanekom v Landros, Keetmanshoop 1983(1) SA 911 (SWA) at 915F-G that, while there is no express provision in Rule 12 that the judgment debtor must file a replying affidavit, if regard is had to the definition of ‘application’ in Rule 1, it is clear that the compilers of the Rules intended that a replying affidavit may be filed. (*Jones and Buckle: The Civil Practice of the*

Magistrates Courts in South Africa Vol II, The Rules at 49-6A). In the absence of a replying affidavit, the aforesaid averments and contentions made on behalf of the respondent, stand uncontested.

- [22] The appellant's statement that the amount of R 60 000, 00 is exorbitant seems to imply that appellant is responsible for the burn-wound but is only liable for a reduced amount. Even if regard is had to the appellant's plea to plaintiff's particulars of claim this cannot rescue the appellant because the plea is only a bare denial. Normally *quantum* should be established by oral evidence but in special circumstances the court may accept evidence on affidavit. See **Trust Bank van Afrika Bpk v Krause** 1959 (1) SA 574 (O); **Western Bank Limited v Meyer** 1973 (4) SA 697 (T). (*Jones and Buckle, supra 12-11*). The fact that the respondent was a paraplegic and had indeed suffered damages as evidenced by Dr van der Walt and the fact that the matter was dragged out unnecessarily by appellant clearly dictated that the magistrate could accept evidence on affidavit. The amount claimed and awarded is not out of the ordinary but in line with cases of a similar nature. See

Nconywa v Cantor 1983 (3) SA 475 (SE) in which the court made an award of R 74 000,00 for general damages where the plaintiff had sustained burn- wounds similar to this matter.

[23] The unsubstantiated allegations made on behalf of the appellant pertaining to a purported defence, are patently unfounded. (See **Du Plooy v Anwes Motors (Edms) Bpk** 1983 (4) SA 212 (O) at 217H) I am consequently satisfied that the trial court adopted the correct approach in holding that the appellant did not disclose a *bona fide* defence in his affidavit.

[24] In its heads of argument and in the notice of appeal the appellant submitted that the respondent had not given notice to it before filing an application for default judgment. Appellant conceded that this point was not raised at the magistrates' court. In general a court of appeal will decide a case on an issue not pleaded in the court below only if the issue has been fully canvassed and requires no further evidence for its decision. A question of law may be advanced for the first time on appeal if its consideration

involves no unfairness to the party against whom it is directed. See **Cole v Government of the Union of SA** 1910 AD 263 at 272-273. A second requirement for the raising of a new point on appeal is that the point must be covered by the pleadings. (**Cole v Government of Union of SA** *supra* at 272).(*Van Winsen and others The Civil Practice of the Supreme Court of South Africa*,913).

- [25] In **Donnelly v Barclays National Bank Ltd** 1990(1) SA 375 (W) at 380H-381B **Kriegler J** (**Weyers J** concurring) gave the following succinct summary of the principles applicable on a point sprung on appeal: Generally speaking, a court of appeal will not entertain a point not raised in the court below and especially one not raised in the pleadings in the court below. In principle, a court of appeal is disinclined to allow a point to be raised for the first time before it. It will generally decline to do so unless (i) the point is covered by the pleadings;(ii) there would be no unfairness to the other party;(iii) the facts are common cause or wellnigh incontrovertible; and (iv) there is no ground for thinking that other or further evidence would

have been produced that could have affected the point.
(*Van Winsen (supra)*,914).

[26] This argument can therefore not be sustained not only because it was raised before us for the first time but more fundamental in terms of Rule 12 when a litigant is under bar, plaintiff is not required to send any notice to the defaulting party.

[27] Although the issue of *locus standi* was not pertinently raised before the court *a quo*, the court *mero motu* addressed it in the same way it was done in **Legal Expenses Insurance Southern Africa Ltd v Du Randt & Louw Ing** 2001 (1) SA 667 (O). In ***Legal Expenses*** the statement in issue was:

“Ek is deur die applikant aangestel as regsverteenwoordiger om hierdie aangeleentheid namens hom te bestry en val die feite hierin vervat as sulks binne my persoonlike kennis en wete tensy die samehang anders blyk.”(My emphasis).

However, the aforesaid averment was made in founding papers filed in support of an application for rescission of judgment and therefore the words “te bestry” was indicative of the attorney’s authority to represent the applicant in that matter in defending the main action and not necessarily or automatically to depose to the said affidavit on his behalf or to have instituted the application on his behalf.

[28] In this case the averment relied on by the magistrate to come to the conclusion that appellant did not have *locus standi* is the following:

“Die applikant is Tianshi SA (Edms) Bpk. Ek is bevoeg en gemagtig om hierdie verklaring namens die applikant af te lê....Ek was nog deurgaans die applikant se prokureur van rekord en dra persoonlike kennis van al die feite en omstandighede wat daartoe gelei het dat daar vonnis teen die applikant geneem is op 4 Junie 2007.” (My emphasis).

This, in my view, is different from the circumstances of the **Legal Expenses** matter in that the averment pertaining to his authority is specifically made with reference to the application for rescission as such.

[29] I am therefore of the view that Mr Bruwer had *locus standi* to act on behalf of the appellant in the application for rescission in the magistrates' court. He was the attorney of record at the trial court up to and including this application. He had personal knowledge of the reasons and circumstances for the default when judgment was granted against the appellant and gave a detailed exposition on how judgment was granted against the appellant. He did so in the same way that the appellant would have done it, if not better. The fact that Mr Bruwer did not have personal knowledge of whether or not plaintiff sustained the injury as described and the extent of that injury does not detract from his competence to depose to the affidavit and to have brought the application.

[30] In view of what I have stated in the above paragraphs 28 and 29, the magistrate's ruling in this regard is not correct. However, considering the finding made in paragraph 23 above, the trial court was still correct in dismissing appellant's application for rescission of judgment with costs and the appeal can not succeed.

[31] With regard to the issue of costs, I am of the view that because the appellant was not substantively successful with the appeal, there is no reason why the costs should not follow the outcome of the appeal.

[32] In the circumstances I make the following order:

Order:

The appeal is dismissed with costs.

B. C. MOCUMIE, J

I concur.

C. VAN ZYL, J

On behalf of appellant: Adv. M.D.J. Steenkamp

Instructed by:
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On behalf of respondents: Adv. C. Snyman
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