FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. 1226/2008

In the matter between:-

THE ROAD ACCIDENT FUND Applicant

and

ELIZABETH LISEBO RADEBE Respondent

HEARD ON: 25 NOVEMBER 2010

DELIVERED ON: 2 DECEMBER 2010

JUDGMENT

RADEBE AJ:

[1] The respondent instituted action against the applicant in her representative capacity as mother and natural guardian of the minor child, Nkosana Phillip Radebe, born on 16 June 1993. The cause of action arose out of the negligent driving of a motor vehicle which occurred on 26 March 2004. The action was defended by the applicant. On 13 October 2009 the applicant conceded liability *in toto* and accepted that it would pay 100% of respondent's proven hearing damages. The hearing was postponed *sine die* for the determination of

the quantum damages on a later date. In her summons, the respondent had claimed a total of R2 181 075,00 under the following heads of damages:

1.1	**Special damages:**	
1.1.1	Future medical expenses -	R220 692.00
1.1.2	Future loss of earning capacity -	R1 660 383.00
1.2	**General damages:**	
1.2.1	Pain and suffering -	R150 000.00
1.2.2	Permanent disability -	R150 000.00
	TOTAL	R2 181 075.00

[2] On 26 November 2009 the matter was re-instated for hearing (on quantum) on 17, 18 and 20 August 2010. On 17 August 2010 the matter came before the Honourable Justice C.B. Cillié. The applicant was in default and there was also no legal representative appearing on behalf of the applicant. Evidence was then led, on the same date, and judgment was granted in default as follows:

"1.	Toekomstige mediese koste,	R84 997.00
2.	Toekomstige verlies aan verdienste,	R1 499 651.00
3.	Algemene skadevergoeding vir skok, pyn lyding, ongerief en ongeskiktheid,	R245 000.00

4. Gedingkoste, welke koste sal insluit die kwalifiserende fooite van die deskundige getuie, Mnr Rosslee."

[3] The total amount, excluding costs is R1 829 648,00. The award was based on the oral evidence adduced by the respondent and the expert, Mr. Rosslee, an actuary, whose report forms part of the respondent's bundle in the main action. The said report had been filed in terms of Rule 36(9) (a) and (b) on 15 July 2009.

[4] The applicant subsequently filed a notice of motion, applying for the rescission of the aforesaid default judgment and an order setting aside any warrant of execution steps taken against the applicant. The order prayed in the notice of motion reads as follows:

"1. That the default judgement granted herein on 17 August 2010 be rescinded;
2. An order setting aside any warrant of execution steps taken against the applicant;
3. Costs in the event of the respondent opposing this application."

The application was opposed by the respondent. Ms R.

Hawman appeared for the applicant and Mr. S.J. Reinders appeared for the respondent.

[4] When the application came before this Honourable Court on 25 November 2010 the counsel for the applicant, submitted that the applicant abandons prayer 2 and is only proceeding with the application for rescission in terms of common law. Further, she submitted the following as the grounds upon which the applicant seeks relief:

4.1 that the applicant was not in wilful default;

4.2 that the applicant has a *bona fide* and substantive defence to the quantum) action and has therefore good cause for the relief to be granted.

[5] The respondent's opposition is in essence based on the following:

5.1 that the applicant had been given sufficient notice of set down through same having been served on its attorneys of record as well as through faxed correspondence;

5.2 that the applicant does good cause entitling it to the relief sought;

5.3 that even if regard could be had to the provisions of

Rule 42(1)(a) of the Uniform Rules as an alternative, the judgment had not been erroneously sought and granted, when the matter was before court on 17 August 2010.

[6] The applicant relies on the founding and replying affidavit of the Senior Claims Handler, Mr. Surprise Senne, employed as such at its Pretoria Head Office. The gist of Mr. Senne's averments is that:

6.1 the applicant was not aware that the matter had been set down for hearing on 17 August 2010; applicant's attorneys of record, Messrs Maponya Incorporated, per Ms B. Rangata, who is an admitted attorney in charge of the main action at Maponya Incorporated, had not been served any notice setting the matter down for 17 August 2010; that the respondent had proceeded to apply for default judgment on quantum without further notice by telephone or by letter to the applicant. The applicant only became aware of the default judgment on 18 August 2010, after its attorney, Ms Rangata, enquired (from the applicant) as to the reasons for the applicant's failure to attend trial; Ms Rangata had not received the notice of set down and that such notice

was never in her file nor had she been made aware of such notice; the notice of set down had been served on Messrs Bokwa Attorneys who had withdrawn as attorneys of record; such notice of withdrawal had not been brought to Ms Rangata's attention; the applicant was not in flagrant disregard of the Rules of Court and hence not in wilful default.

6.2 the applicant avers that it has no *bona fide* defence and its defence lies in the fact that it needs to assess the extent to which it is liable towards the minor child for damages suffered as a result of the accident; there is a reasonable prospect that the minor child is entitled to a lesser or a greater amount than that which the court has granted; the minor child ought to be referred to other specialists, like a neuro psychologist and an educational psychologist in order to assess his mental and intellectual and scholastic functioning, the default judgment has therefore been prematurely requested and granted.

6.3 The respondent disputes all of the above and her attorney deposed to the opposing affidavit setting out the following: the notice of set down was served upon the erstwhile correspondent attorneys of record, Bokwa

Attorneys, on 26 November 2009, prior to their notice of withdrawal as attorneys of record on 2 July 2010; thereafter there was correspondence to the applicant's attorneys wherein the respondent's attorneys invited the applicant through its attorneys of record to engage in some settlement negotiations; there are sufficient proofs of fax and of registered mail sent to applicant's attorneys in respect of the notice of withdrawal by Bokwa Attorneys, as well as prior warnings of such intended withdrawal; there is proof of correspondence and dispatch of the notice of set down by fax and by post, dated 27 November 2009 by Bokwa Attorneys, as well as correspondence dated 12 April 2010, 24 May 2010, both of which were sent per fax by respondent's attorneys; and both of which were intended to *inter alia* draw the applicant's attorneys to the pending date of hearing; there had been telephone messages on 11 and 13 August 2010 left for Ms Rangata to which she did not respond.

6.4 The respondent disputes that the applicant has a *bona fide* defence and hence good cause entitling it to the relief sought on the basis that: the court properly and fully assessed the quantum of damages against the

backdrop of the available expert reports filed of record by both the respondent and the applicant, as well as oral evidence adduced by the respondent and the actuary, Mr Rosslee, the additional expert reports that the applicant refer to could not be secured because the applicant's attorneys had not paid for them and despite several telephonic reminders and requests made by respondent's attorneys to Ms Rangata, there had been no response or co-operation; the respondent's minor child had been presented for investigation and assessment by the applicant's experts on 31 August 2009, 10 November 2009 and 11 November 2009 and despite having such ample opportunity the applicant had not filed any further expert reports; the delay in finalising this matter has caused great prejudice to the minor child.

6.5 In its replying affidavit, the applicant acknowledged that the notice of set down, notice of withdrawal, correspondence incorporating the date of trial, as well as the telephone calls by respondent's attorneys, had been sent and/or received by its attorneys of record. However, as a result of Ms Rangata's office having misfiled or somewhat not being aware of such

correspondence, she could therefore not have been in a position to notify the applicant of the dates of trial.

[7] Ms Rangata did not file any supporting affidavit to fully explain what exactly caused her to be somewhat not aware of the notices, the correspondence, as well as the telephone calls between her office and respondent's offices. Suffice to say that what the applicant deposed to regarding its attorneys of record is based on what it verily obtained from Ms Rangata. There are indeed disturbing instances where Ms Rangata was not aware of vital aspects. However, it is not necessary to deal with these since she has not submitted any comprehensive affidavit.

[8] At common law, in order to succeed with an application of this nature, the applicant has to show good cause or sufficient cause. Good cause can be shown through what courts generally expect from an applicant in the following three aspects, which are discussed in the decision in **COLYN v TIGER FOOD INDUSTRIES LTD t/a MEADOW FEED MILLS (CAPE)** 2003 (6) SA 1 (SCA) at 9 D – E:

"*(a)* by giving a reasonable explanation of his default; *(b)* by

showing that his application is made *bona fide*; and *(c)* by showing that he has a *bona fide* defence to the plaintiff's claim which *prima facie* has some prospect of success."

[9] When dealing with the first element of reasonable explanation, it is incumbent to look at the applicant's explanation of its default. It is a well-known fact that the applicant, like any juristic statutory *persona*, does not itself come to court, but relies on its attorneys of record and witnesses, if any, only on certain occasions. I refer here to paragraphs 2 and 6 of the particulars of claim which read as follows:

> "2. Die Verweerder is die Padongelukkefonds, 'n liggaam met regspersoonlikheid ingestel kragtens die bepalings van die Padongelukkefonds Wet 56 van 1996....."
>
> "6. Voormelde botsing was te wyte aan die uitsluitlike nalatigheid van T I Moletsane in die bestuur van motorvoertuig MBB992FS....."

The above is designed to illustrate that any explanation of default ought to be made largely by the applicant's attorneys. The explanation given by the Senior Claims Handler is largely based on what applicant's attorney, Ms Rangata, told

him. Most aspects of his replying affidavit are hearsay and Ms Rangata has not confirmed these.

[10] There appears to be inexcusable negligence on the part of the applicant's attorneys. I refer again to the decision in **COLYN v TIGER FOOD INDUSTRIES**, *supra*, at 9 H where the following was said:

> "Courts are slow to penalise litigants for inept conduct of litigation by attorneys, but there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorney."

See also **SALOOJEE AND ANOTHER, NNO v MINISTER OF COMMUNITY DEVELOPMENT** 1965 (2) SA 135 (A) where it was held that the litigant should not be absolved from the normal consequences of the relationship with his attorney, irrespective of the circumstances of the failure by the attorney to attend promptly and efficiently to the affairs of his client. Ms Rangata not only failed to attend promptly to the affairs of her client (the applicant) but she also does not give any reasonable explanation. What was advanced as reasons for default in the applicant's founding affidavit, has been substituted by a great degree of being "unaware" in the

replying affidavit, wherein the applicant describes what happened as a filing inefficiency or mistakes in the offices of its attorneys. Such mistakes or errors or being not aware, are not errors/mistakes in the proceedings. This means that even if the applicant were to be relying on Rule 42(1)(a) for relief, the application would not succeed.

[11] The second element, at common law, is that the applicant has to show that his application is *bona fide*. When the application was argued on 25 November 2010, applicant's counsel conceded, albeit reluctantly, that prior to making the application there had already been a writ of execution against movable property, which was filed on 23 August 2010. The notice of notion is dated 7 September 2010 yet the applicant knew as early as 18 August 2010 that default judgment in the sum of R1 829 648,00 had been taken against it. The applicant and/or its attorneys handled this issue very lackadaisically despite the large amount involved. I have already commented on the laxity of the applicant's attorneys in handling this matter, especially after liability had been conceded.

[12] The writ of execution is directed to the sheriff, Pretoria and

the first paragraph thereof reads as follows:

> "U word hierby gelas om op die roerende goed van die Verweerder, die Padongelukkefonds, h/v Andries- en Pretoriusstrate 252, PRETORIA beslag te lê en dit by openbare veiling uit te win tot 'n bedrag van R1 829 864-00 synde kostes van die genoemde Eiser wat by uitspraak van hierdie Hof gedateer 17 Augustus 2010 in die bogemelde saak verhaal het; ..."

The only reasonable inference that can be drawn, is that the applicant was prompted by being served with the writ of execution against its movable assets, to bring the application on 23 September 2010, more than a month after it had become aware of the judgment.

[13] The applicant's Senior Claims Handler avers in paragraph 9.7.7 of his founding affidavit that the default judgment was granted prematurely and goes on to say in paragraph 9.8 that

> "the Educational- and Neuropsychologist <u>might</u> (my emphasis) foresee further psychological and educational treatment for the minor in future, which at this stage, has not been provided for in

the amount of R84 997,00."

It is highly inconceivable that a litigant who is a defendant would seek to increase an award in favour of a plaintiff who has not asked for such an increase. I see nothing preventing the applicant from rather making an *ex parte* application for variation to increase the award, once what it says might be foreseen by the neuropsychologist and educational psychologist has come in place. This court cannot speculate on what may or may not happen.

[14] It is clear that the application for rescission, which has an effect of automatically staying any writ pending the outcome of such application, was brought merely to delay the execution against applicant's movable property. The applicant says in paragraph 6.11 of its founding affidavit:

"..... in view of the substantive defence that the Applicant has in this matter ....."

but then does not say what defence it has; or what the Honourable Mr Justice Cillié ought to have awarded; and/or what basis such an amount ought to have been awarded. An application based on farfetched speculative imaginations

lacks the requisite *bona fides*. In **GRANT v PLUMBERS (PTY), LTD** 1949 (2) SA 470 (O) at 476 and 478, the following was said:

> "... the applicant who claims relief... should comply with the following requirements:
>
> *a)* .....
>
> *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..."

In casu, the applicant cannot say that it has shown any defence or for that matter the true relief that it seeks. Applicant merely seeks rescission of judgment to avoid execution but paradoxically abandoned even that at the commencement of the hearing of the application. No affidavits by any of the experts, on whom the applicant wants to rely, have been put up. Applicant is not patently qualified to express expert opinion on what the neuropsychologist or

educational psychologist might find and has not given this court any idea of what amounts ought to be claimed.

[15] The third element for consideration is that the applicant should show not only that it has a *bona fide* defence to the plaintiff's claim but that such defence *prima facie* has some prospects of success. The reasons for applicant's default, as said above, has two-fold significance: those relevant to the question of whether or not it had been in wilful default and whether or not the applicant has shown good causes which incorporates *bona fide* defence with prospects of success on a *prima facie* basis. I refer in this respect to the decision in **SILBER v OZEN WHOLESALERS (PTY) LTD** 1954 (2) SA 345 (A) at 352 G – H, where the following was said:

> "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."

[16] Clearly therefore, if an applicant for rescission fails to show good cause for relief or if the respondent shows that the

applicant was in wilful default, the court is not entitled to rescind the judgment. There is therefore an onus on the applicant to show good cause by not merely alleging, but actually proving that good cause exists in its favour. On the other hand, the burden of proof of presence of wilful default rests on the respondent. If the applicant fails to discharge its burden of showing good cause and/or the respondent discharges its burden by showing wilful default on the part of the applicant, then the application for rescission ought to fail. Concerning wilful default, all that the applicant ought to do is to furnish an explanation of his default sufficiently full to enable the court to understand how it really came about and to assess its conduct properly. This full sufficient explanation is lacking on the part of the applicant. On the other hand the respondent has shown that her attorneys did everything to draw the attention of the applicant's attorneys to the approaching trial dates, going the extra mile of telephoning the applicant's attorney, Ms Rangata, on 11 and 13 August 2010. See in this respect paragraph 4.3.2 of respondent's opposing affidavit; where the respondent's attorney says:

> "Ek het haar verder daarop gewys dat ek op Woensdag, die 11de Augustus 2010 en Vrydag, die 13de Augustus 2010

telefonies geskakel het na die kantore van Maponya prokureurs om met Me Rangata te praat oor die voortsetting van hierdie saak op 17de Augustus 2010 ....."

[17] The conduct of the applicant cannot be considered in isolation from that of its attorney, Ms Rangata, who does not even take the trouble of submitting a full affidavit regarding her apparent lack of diligence, as well as gross negligence. Reference is made to the applicant's replying affidavit, at paragraph 7.1 where the following is said:

"..... she had forgotten about the telephone discussion and that she also did not make a note on her office file of the conversation. It was only after she had read the Answering Affidavit by Mr Van Wyk that she recalled the telephonic conversation between the parties."

[18] In the case of **CAVALINIAS v CLAUDE NEON LIGHTS SA LTD** 1965 (2) SA 649 (T) at 651 E – F the following was said:

"But facts which were relevant to show 'wilful default', for example negligence of the defendant or of his attorney, may again be looked to. There might be a case, for example, in which the defendant was found not to be in wilful default because his default was careless and not intentional, and yet his

lack of care might be such as to prevent his showing good cause for relief."

[19] As this is a case largely involving fault on the part of the applicant's attorneys as well, it is important to consider it in the light of the other cases having a bearing on more or less similar situations.

19.1 In **ROSE AND ANOTHER v ALPHA SECRETARIES LTD** 1947 (4) SA 511 (AD) at 519 G the following was said in regard to the comprehensive test as to the effect of an attorney's negligence on his client's prospects of obtaining relief:

"It is preferable to say that the Court will consider all the circumstances of the particular case in deciding whether the applicant has shown something which justifies the Court in holding, in the exercise of its wide judicial discretion, that sufficient cause for granting relief has been shown."

Ms Rangata does not even confirm what the applicant says in the founding and in the replying affidavits. She merely deposes to a supporting affidavit which has no date and in which she refers to an affidavit by one Hilda Kuppen. There is no such affidavit by Hilda Kuppen before this court.

19.2 Further, Ms Rangata has shown a total and

contemptuous disregard of the process of the court on the issue of wilful default.

19.3 There is clear lack of frankness on the part of Ms Rangata. She does not come up with any explanation why she did not give the matter to another attorney if she was, as applicant alleges on her behalf, too busy with other matters. Refer here to paragraph 8.1.3 of the applicant's replying affidavit:

"Being inundated with trial matters in July and August 2010, she did not further attend to the file."

[20] There is no reason to hold that the judgment in this case was granted without due regard having been taken about all the issues and evidence being properly assessed. The applicant has not shown any good cause for the relief sought. The respondent has, on the other hand, shown that the applicant was in wilful default. The conduct of the applicant's attorneys is imputed to it.

[21] It is true that there are sanctions other than penalising the applicant to ensure that the rules of court are observed, e.g.

orders for costs *de bonis propiis* could be given against attorneys and they might be faced with damages actions. Although I would be prepared to make an order for costs *de bonis propiis*, but is has not been feasible to give notice to the applicant that such order is appropriate, to enable them to respond or challenge such a situation.

[22] In the result the following order is made:

22.1 The application is dismissed with costs.

MADAME JUSTICE N.H. RADEBE, AJ

On behalf of applicant: Adv. R. Hawman
Instructed by:
Maponya Attorneys
c/o Honey Attorneys
BLOEMFONTEIN
(REF. S vd Walt/cs/I19052

On behalf of respondent: Adv. S.J. Reinders
Instructed by:
Rosendorff Reitz Barry
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/sp