IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case No.: **7965/2009**

And Case No.: **13710/2009**

In the matter between:

OLIVER BRADLEY SCHOLTZ	First Applicant
GERARD DAVID PETER SCHOLTZ	Second Applicant
And	
ANDREW MERRYWEATHER	First Respondent
NICHOLAS MERRYWEATHER	Second Respondent
JOEL THACKWRAY	Third Respondent
LIAM HECHTER	Fourth Respondent

JUDGMENT: 1 AUGUST 2014

GAMBLE J

INTRODUCTION

1. In the early morning hours of Saturday, 9 September 2006, the first respondent (hereinafter "*Merryweather*") was involved in an incident which changed his life forever. As a consequence of an altercation with a number of other young men at an all-night service station in Newlands, Cape Town, Merryweather was left

in a state of permanent paralysis from the chest downwards and is now confined to a wheelchair.

2. Arising from his injuries and the *sequelae* thereof sustained in this incident, Merryweather instituted a damages action on 20 April 2009 in this Court against the first applicant ("*Scholtz*"), the third respondent ("*Thackwray*") and the fourth respondent ("*Hechter*") claiming some R15,5 m in respect of general damages, loss of earnings and medical expenses. It was alleged that Scholtz, Thackwray and Hechter were jointly and severally responsible for Merryweather's injuries.

3. For reasons which I shall set out more fully hereunder, Scholtz did not enter an appearance to defend the claim and on 25 March 2010 an order was granted separating the action against Scholtz from that against Thackwray and Hechter. The Court (per Madima AJ) directed that the action against Scholtz was to continue by way of default proceedings.

4. On 18 May 2010 default judgment was granted in terms of Rule 31(2) (by Olivier AJ) pursuant whereto Scholtz was directed to pay to Merryweather such damages as were later to be proved.

5. On 14 June 2013 Smit AJ determined the *quantum* of Merryweather's claim and ordered Scholtz to pay the sum of R10 291 100,00, together with interest, costs and the qualifying expenses of a number of expert witnesses.

6. On 10 September 2013 Scholtz launched this application to rescind the judgments of Olivier and Smit AJJ. Besides Merryweather being cited as the

first respondent, his brother, Nicholas Merryweather ("*Nicholas*"), Thackwray and Hechter were cited as second to fourth respondents respectively.

7. Nicholas was cited as the second respondent in this application because he was the second plaintiff in Merryweather's action against Scholtz, Thackwray and Hechter, the allegation being that he too had suffered injuries in the incident which left his brother a paraplegic. It appears that after the separation of trials was ordered by Madima AJ on 25 March 2010, no judgment was taken by Nicholas against Scholtz and that the proceedings against him have not progressed any further.

8. Nicholas has not opposed the relief now sought by Scholtz and it is common cause that if rescission is granted, Scholtz will have to answer Nicholas' claim too. Thackwray and Hechter were joined in these proceedings by virtue of their potential interest therein, but no relief is sought against them.

9. Shortly before the application was first heard in March 2014, Merryweather sought the joinder of Scholtz's father ("*Scholtz snr*") as a co-applicant on the basis that he was the person funding Scholtz's litigation and, for that reason, a costs order was sought against father and son, jointly and severally, in the event that the application for rescission failed. This application for joinder was not opposed and so the matter proceeded with Scholtz snr as the second applicant.

10. The Scholtzs' were represented by Advv. B D J Gassner SC and A Heese and Merryweather by Advv. J R Whitehead SC and E Benade. The Court is indebted to the parties' legal representatives for the preparation and

presentation of the matter and for the assistance in argument, which has facilitated preparation of this judgment.

RESCISSION UNDER THE COMMON LAW

11. Scholtz's application is brought, not in terms of Rule 31(2)(b), but under the common law. This Court has inherent powers of rescission under the common law provided that "*good*" or "*sufficient*" cause therefor has been shown by an applicant.[1]

12. Our Courts have often said that the phrase "*good cause*" defies comprehensive definition: since it involves the exercise of a judicial discretion, it requires a flexible approach involving broad principles of justice and fairness, and a consideration of all the relevant facts and circumstances of the case as a whole.[2]

13. In practice, however, there have traditionally been two requirements which an applicant is generally expected to establish to succeed in a rescission application, *viz.* a reasonable explanation by the applicant for the default, and a *bona fide* defence which has some prospects of success.[3]

14. The cases referred to above pre-date our constitutional jurisprudence. More recently, in considering the approach to be taken, the Constitutional Court in

[1] *Silber v Ozen Wholesalers (Pty) Limited* 1952 (2) SA 345 (A); *De Wet and Others v Western Bank Limited* 1979 (2) SA 1031 (A); *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).
[2] *Silber* at 352H-353A; *De Wet* at 1042G-H and *Chetty* at 765A-B.
[3] *Chetty* at 765A-C.

Fick[4] confirmed the traditional approach adopted, for instance, in *Chetty* at 765D-F -

> *"It is not sufficient if only one of these two requires is met; for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits. The reason for my saying that the appellant's application for rescission fails on its own demerits is that I am unable to find in his lengthy founding affidavit, or elsewhere in the papers, any reasonable or satisfactory explanation of his default and total failure to offer any opposition whatever to the confirmation on 16 September 1980 of the rule nisi issued on 22 April 1980."*

15. Jaftha J accepted in Fick[5] the approach adopted by the Supreme Court of Appeal in *Colyn*[6] that in appropriate cases "an unsatisfactory explanation furnished by an applicant for rescission may be compensated for by good prospects of success on the merits". Jaftha J accepted too the summation by

[4] *Government of the Republic of South Africa v Fick* 2013 (5) SA 325 (CC) at 350D.
[5] 351C para [89].
[6] *Colyn v Tiger Food Industries Limited* 2003 (6) SA 1 (SCA) at 10A para [12].

Jones AJA in *Colyn*[7] of the common law approach to which I have already referred. Consideration of that passage, however, reveals a third factor:

> *"With that as the underlying approach the Courts generally expect an applicant to show good cause (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 (Grant v Plumbers (Pty) Limited 1949 (2) SA 470 (O) at 476, HDS Construction (Pty) Limited v Wait 1979 (2) SA 298 (E) at 300F-301C, Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 764I-765F)."*

So, in this matter, Scholtz must also prove that his application is *bona fide*.

16. A further consideration which has arisen more recently is the question of "*wilful default*". In *Harris*[8] Moseneke J (as he then was) observed at 529E para [6], with reference to *Silber* that the phrases "*sufficient cause*" (which embraces the common law approach to rescission) and "*good cause*" (which is what Rule 31(2)(b) requires) are synonymous. He went on to discuss wilful default as follows:

> *"The absence of 'wilful default' does not appear to be an express requirement under Rule 31(2)(b) or under the common law. It is, however, clear law that an enquiry whether sufficient cause has been shown is inextricably linked to or dependent upon whether the applicant acted in*

[7] 9E para [11].
[8] *Harris v Absa Bank Limited t/a Volkskas* 2006 (4) SA 527 (T).

wilful disregard of Court rules, processes and time limits. While wilful default may not be an absolute or independent ground for refusal of a rescission application, a display of wilful neglect or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause."

17. But Moseneke J was of the view that the existence of wilful default did not place a complete bar on an application for rescission:

> *"[9] A decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an applicant required to establish sufficient cause. However, I do not agree that once wilful default is shown the applicant is barred; that he or she is then never entitled to relief by way of rescission as he or she as acquiesced. The Court's discretion in deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description in bears, should be one of the several elements which the Court must weigh in determining whether sufficient or good cause has been shown to exist. In the words of Jones J in De Witts Auto Body Repairs (Pty) Limited v Fedgen Insurance Co. Limited 1994 (4) SA 705 (E) at 708G, '… the wilful or negligent or blameless nature of the defendant's default now becomes one of the various considerations which the courts will take into account in the exercise of their discretion to determine whether or not good cause is shown'."*

18. Rather, Moseneke J found that the court is enjoined to consider the various criteria conjointly and effectively perform a balancing exercise in coming to a decision that is just and fair in the circumstances. He concluded thus:

> *"[10] A steady body of judicial authorities has held that a court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation.*
>
> > *'Instead, the explanation, be it good, bad or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of the case as a whole.'*
>
> *De Witts Auto Body Repairs (Pty) Limited v Fedgen Insurance Co. Limited (supra) at 711D.*
>
> *[11] In amplifying the nature of the preferable approach in an application for rescission of judgment, I can do no better than quote Jones J with whose dicta I am respectfully in agreement:*
>
> > *'An application for rescission is never simply an enquiry whether or not to penalise a party for failure to follow the rules and procedures laid down for civil proceeding in our courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or*

negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of his court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties …. He should also do his best to advance the good administration of justice. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the courts which are properly taken in accordance with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard.'"

19. *Harris* was referred to with approval in general terms by Jaftha J in his judgment in *Fick* in which he disagreed with the majority of the Court on the merits of that matter. There is nothing in either his judgment or that of the Chief Justice for the majority to suggest that Moseneke J's approach in *Harris* was wrong[9] and, given that counsel on both sides in this matter relied unreservedly on *Harris*, I do not know of any reason not to follow the approach suggested by Moseneke J in paragraph [11] thereof.

[9] Moseneke DCJ concurred with the Chief Justice in *Fick*.

PROSPECTS OF SUCCESS – THE MERITS

Available evidential material

20. The evaluation of this leg of the approach on rescission is aided by a fairly solid body of evidence. This is because after the incident, Merryweather laid criminal charges with the police. Eventually, eight young men, including Scholtz Thackwray and Hechter, were charged in the Regional Court, Wynberg with the attempted murder of Merryweather and assault with intent to do grievous bodily harm to Nicholas.

21. The trial (at which all of the accused were represented by a prominent local criminal lawyer, Mr William Booth) was protracted and enjoyed considerable publicity in the local media. At the conclusion of the State case, a number of the accused were discharged. Scholtz was acquitted at the end of the case, along with the remaining accused, of the attempted murder of Merryweather. With the exception of Thackwray, all were acquitted of the assault on Nicholas. Thackwray's conviction of assault on Nicholas was later set aside on appeal to this Court.

22. At the criminal proceedings both Merryweather and Nicholas gave evidence on behalf of the prosecution, along with a number of other lay witnesses who witnessed the event, including a friend of the Merryweather's, Progress Mpanda. Scholtz was the only person amongst the accused who gave evidence in his defence.

23. The State also adduced the evidence of Dr David Welsh, a neurosurgeon, who testified about Merryweather's pre-existing medical condition to which I shall refer shortly. Substantial passages from the record in the criminal proceedings were thus included in both the founding affidavit and the answering affidavit in these proceedings.

24. In addition, Merryweather, Nicholas and Mpanda testified in the proceedings before Olivier AJ and the transcript in that regard was also included in the founding affidavit. At the hearing before Smit AJ, expert evidence was adduced by way of affidavit and those affidavits form part of the pleadings in the main file in this matter which was made available to the Court at the hearing.

The background facts relevant to the merits of the claim

25. As I have already noted, the incident occurred sometime after midnight on a Friday night. The service station in question is located close to a number of nightclubs in the Claremont CBD which are apparently frequented by youthful nocturnal revellers. There is evidently a fast food take-away facility at the service station where those in need of late night sustenance can recharge their batteries, as it were. It seems as if both Scholtz and Merryweather went to the shop for that purpose.

26. The versions of the facts giving rise to the injury are quite divergent. Merryweather said in the criminal trial (and before Olivier AJ) that he, Nicholas and Mpanda were walking towards the take-away shop. He was mildly inebriated and sought physical support from Mpanda. Merryweather said that a group of younger men (later identified as the eight accused in the criminal

proceedings) had directed insulting slurs at him and Mpanda – certainly homophoebic, and potentially racist. Merryweather took umbrage thereat and an altercation ensued which led to various acts of bravado and ultimately confrontation and scuffling.

27. Merryweather described how a person whom he later identified as Scholtz had aggressively run at him and tackled him rugby-style. The tackle was described as a "spear tackle"[10] and Merryweather said that he was flung head-first into a nearby parked car. He immediately experienced a lack of sensation in his lower body and realised that he was very seriously injured.

28. Scholtz's explanation is completely different. In the founding affidavit he said that Merryweather had been verbally abusive to him and some of his friends, and adopted an aggressive and condescending attitude to Scholtz, then aged 18 years and in his matric year at school. When Merryweather came charging towards him, Scholtz claims that he stepped to one side to avoid Merryweather, while fending him off at the same time. He claims that in the process Merryweather staggered back, lost his balance and knocked the back of his head against a nearby car.

29. Scholtz accordingly claims that he acted in self-defence in response to an unlawful attack on him by Merryweather. He goes on to suggest, with reference to the opinion of Dr Welsh, that Merryweather suffered from a pre-existing condition (osteoporosis) which rendered his spine more brittle than an average

[10] This is evidently a reference to a dangerous type of rugby tackle in which the tackler lifts his opponent off the ground and raises the opponent's legs above the horizontal so that he is dumped head-first onto the ground.

person of his age (24 years old at the time of the incident), and that this may have contributed to the devastating *sequelae* of his injuries.

30. During argument Ms Gassner SC accepted that Scholtz was the last person to make contact with Merryweather before his head collided with the motor vehicle. Adopting the most neutral of language, it is then fair to say that it is common cause that Scholtz caused Merryweather to fall against the car. The issue is whether this was an intentional attack on Merryweather, or an act of self-defence. If permitted to file a plea, Scholtz intends to plead the latter.

31. Ms Gassner SC argued that to succeed in this application, Scholtz was required to establish, on a balance of probabilities, that he was capable of putting up a defence of self-defence in the main proceedings. He is not required to prove conclusively at this stage that he has such a defence. In the passage from *Colyn* cited in para 15 above, the Court noted that the articulated defence had to have *prima facie* prospects of success. In *Grant*[11], cited with approval in *Colyn*, Brink J said that:

> *"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."*

32. As Ms Gassner SC correctly pointed out, this case is most unusual in the sense that much of the material evidence has already been placed before this Court in

[11] *Grant v Plumbers (Pty) Limited* 1949 (2) SA 470 (O) at 477.

the form of the transcripts of the earlier criminal and civil proceedings, together with a fair degree of detail in the affidavits filed of record.

33. Mr Whitehead SC proceeded to analyse Scholtz's current version of events with a fair degree of interrogation. He sought to demonstrate that there were significant discrepancies between the facts raised by Mr Booth in his cross-examination of the State witnesses in the Regional Court, Scholtz's testimony in that Court and his version as set out in the founding affidavit in these proceedings. The discrepancies are undoubtedly material particularly when the dissonance between Mr Booth's cross-examination of the State witnesses (based as it would have been on instructions from his client) and Scholtz's evidence under oath in that Court are considered. Importantly, counsel pointed out, self-defence was never put up as a defence in the criminal trial and it is inconsistent with the cross-examination which sought to demonstrate that Merryweather had fallen accidentally in a scuffle with Scholtz.

34. I do not believe, however, that it is the function of this Court in this application to apply too detailed an analysis of the earlier evidence. This Court must primarily consider the version put up by Scholtz in the founding affidavit and determine whether that makes out a *prima facie* defence to Merryweather's claim for damages. Mr Whitehead SC correctly in my view conceded that the version put up in the founding affidavit did make out such a defence.

35. The veracity of that version will be capable of evaluation at a prospective civil trial with reference, *inter alia*, to the earlier evidence in the criminal trial and all the other testimony and evidential material which may be presented before that

Court. But it does not seem to me that the application for rescission should fail, *per se*, because of such obvious inconsistencies in the versions put up by Scholtz. At best I would think that at this stage the inconsistencies in the evidence are a factor to be considered when this Court exercises its general discretion in relation to the relief now claimed, and in particular, in determining whether the *bona fides* of the applicant in bringing this application has been established.

THE QUANTUM

36. Ms Gassner SC dealt briefly with the quantum and submitted that were Scholtz to be given an opportunity to defend that aspect of the claim, he may well persuade a trial Court to look at the quantum afresh. On that score she argued that the issue of Merryweather's pre-existing medical condition was relevant because it may be that the condition would have deteriorated naturally and resulted in pain, loss of amenities of life and disability in any event.

37. Very little is said in the application in relation to the quantum. The highwater mark of Scholtz's case in this regard is the following paragraph contained in the founding affidavit:

> *"34. I point out that in the limited time available, my legal representatives were unable to investigate and fully consider the views expressed in the numerous expert reports filed in the main action in support of [Merryweather's] damages claim and the accuracy and correctness of the facts on which these opinions were based. The quantum of damages awarded is high and I wish to appoint experts to*

investigate and consider this aspect, particularly in the light of the fact that the first respondent suffered from a pre-existing bone disease of which he was well aware. I do not admit the quantum of damages awarded in favour of the first respondent and also wish to pursue this aspect of my defence."

38. In the answering affidavit Merryweather denies that there is any merit in relation to his pre-existing medical condition which he says was as a consequence of earlier drug abuse and, in the replying affidavit Scholtz simply restates what he said in the founding affidavit, namely, that his attorneys have not had an opportunity to explore the question of the quantum and that they should be given an opportunity to do so.

39. At the end of the day, all that can be said is that the quantum is substantial and although Scholtz has filed no expert reports dealing with this part of the claim, it may be that once other experts have considered the reports put up by Merryweather before Smit AJ, the quantum may ultimately be reduced. Certainly, Scholtz has not alluded to any obvious misdirections or incorrect assumptions in relation to the evidence before Smit AJ which was explained by Merryweather's attorney in an explanatory affidavit filed after the hearing at the request of the Court.

THE EXPLANATION FOR THE FAILURE TO ENTER AN APPEARANCE TO DEFEND

Personal details

40. The criminal proceedings dragged on until 17 March 2008 when Scholtz was acquitted. Throughout that time Scholtz lived with his father in Constantia, one of Cape Town's affluent southern suburbs. His parents are divorced and his mother lives and works in the United Kingdom.

41. Scholtz claimed that during his matric year, and prior to the incident in which Merryweather was injured, he had planned on taking a so-called "*gap year*" in Europe in 2007. Given that he had to remain in Cape Town to attend the criminal trial, Scholtz decided to enrol for an engineering degree at the University of Cape Town in 2007. This did not turn out to be a success (no doubt the criminal proceedings were a weighty consideration) and Scholtz did not re-enrol at the university in 2008. He decided to take his gap year once the criminal proceedings had ultimately been concluded.

42. In August 2008 (i.e. about five months after his acquittal in the Regional Court), Scholtz left for England. He says his departure was delayed by the necessity to procure a so-called "*ancestral visa*" but throughout this time he continued to reside with his father in Constantia.

43. It is not in dispute that in October 2008 Scholtz took up employment with an engineering company in the UK known as Hayes Control where he remained

until January 2010. During this time Scholtz stayed continuously at 30 Elizabeth Road, Henley-on-Thames in the county of Oxfordshire.

Issue and service of summons

44. After the issue of summons on 20 April 2009 (i.e. some 31 months after the incident in which Merryweather was injured), the Sheriff attempted to serve it at 13 Zomerlust Avenue, Constantia at 12h45 on 13 May 2009. The return of non-service records that:

> *"I ascertained that the party has left the given address, as informed by Mr G Scholtz, Father.*
>
> *Present whereabouts are: DEFENDANT HAS BEEN RESIDING IN THE UK SINCE AUGUST 2008".*

45. Scholtz says that his father told him in mid-May 2009 during a Skype conversation that the Sheriff had attempted to serve the summons as aforesaid. He says that his father told him that he had taken informal advice at that time from the late Adv. Gerrit van Schalkwyk SC. It appears that the late Van Schalkwyk SC (a highly experienced and respected former Senior Counsel at the Cape Bar who retired from practice at the end of 2009 on account of, and subsequently succumbed in August 2010 to, poor health) had advised Scholtz snr in relation to the criminal trial, had thereafter retained a personal interest in Scholtz's future and was generally supportive of the family.

46. In his confirmatory affidavit accompanying the founding papers Scholtz snr says that the late Van Schalkwyk SC (who at that stage had been informed of the personal circumstances of Scholtz's residence in the UK) told him informally that he held the view that:

46.1. Scholtz snr was under no legal duty to accept the summons on behalf of his son;

46.2. Scholtz snr should advise the Sheriff that Scholtz no longer lived in the Republic and that he had been living in the UK since August 2008;

46.3. neither Scholtz snr nor his son were under any legal duty to take active steps to notify Merryweather of Scholtz's address in the UK;

46.4. Merryweather's attorneys would have to obtain the leave of the High Court to sue Scholtz in the UK; and

46.5. a solicitor in the UK would have to serve the papers on Scholtz there.

47. Scholtz snr says that he acted in accordance with this informal advice and told his son that he had done so, hence the recordal of the Sheriff on the return of non-service to which I have already referred. Scholtz snr points out that during the attempt at service in May 2009, the Sheriff did not ask for his son's address in the UK.

48. Merryweather's attorneys responded to the return of non-service by appointing a firm of tracing agents to locate Scholtz. A representative of the firm called Scholtz snr's telephone number in the Cape Town directory and spoke to a

young woman called Anthea (apparently Scholtz's younger sister). She informed the tracing agents that Scholtz had been in the UK since the end of 2008 and that he was working there. She told them that she did not have his telephone number in the UK and said that Scholtz did have a work e-mail address, but that she was unable to provide it. Anthea suggested that the tracing agents make use of the Facebook computer-based social networking site, or contact Scholtz's friends in Cape Town.

49. In light of the information conveyed to the tracing agents, Merryweather's attorneys considered it prudent to make application to this Court for an order for substituted service of the summons on Scholtz. Pursuant thereto Zondi J gave an order on 14 July 2009 authroising service on Scholtz as follows:

49.1. by personal service on Scholtz snr at the aforementioned Constantia address; and

49.2. by effecting one publication in the Independent Newspaper in the UK.

50. Publication as aforesaid took place on 24 July 2009 and on 3 August 2009 the Sheriff returned to Scholtz snr's home in Constantia and effected personal service of the papers on him.

51. Scholtz snr stresses in his confirmatory affidavit that he was at no stage asked by Merryweather's attorneys or the tracing agents for his son's address in the UK. He now claims that had this simple question been posed to him in 2009 "openly and properly" by Merryweather's attorneys, he would have readily provided them with Scholtz's physical address or work address in the UK. He

somewhat piously takes the attorneys to task for allegedly misleading Zondi J as to the true state of affairs claiming that the Court was not told of this failure on the part of Merryweather's agents.

52. Scholtz snr's claim now that he would readily have furnished his son's residential address had he been asked therefore does not sit comfortably with the attitude seemingly adopted in the Scholtz household at that stage. Scholtz snr clearly felt no moral obligation to come to the aid of a badly hurt young man who had suffered injuries at the hands of his son. His daughter, too, seems to have been forewarned to protect the whereabouts of her brother. Indeed, as will appear hereunder, Scholtz snr was more concerned about the state of his son's mental health and, I have little doubt, was well advised at that stage about the looming issue of prescription which would arise just a few months hence.

53. Be that as it may, after service of the summons and the order of Zondi J on him, Scholtz snr reverted to the late Van Schalkwyk SC for further informal advice. He says that the late Van Schalkwyk SC was "flabbergasted" at what he perceived to be an irregularity, since he thought that it was incumbent on Merryweather to sue by way of edictal citation for service outside of the Republic. Scholtz snr was however advised to formally seek legal advice, which he says he did. That advice was different to the late Van Schalkwyk SC's advice and Scholtz snr says that he chose to ignore it.

54. Scholtz snr says he never told his son about the legal advice to the contrary (he had told him of the late Van Schalkwyk SC's views) or of the fact that the order for substituted service had been served on him. He claims that all that he told

his son during another Skype conversation in August 2009 was that the papers had been served on him, but that Scholtz had no reason to be concerned since he (Scholtz snr) was content to follow the advice of the late Van Schalkwyk SC.

55. The position then is that as a matter of fact, Scholtz knew sometime in early August 2009 that the summons claiming some R15,5m from him had formally been served on his father. There could have been little doubt in his mind what the basis for the claim was or that Merryweather was serious about recovering damages for his injuries. The reason put up by Scholtz snr for intentionally withholding the true state of affairs from his son and thereby purportedly misleading him is that he felt that he did not want to further distress Scholtz, who had just managed to settle into a new life in the UK.

56. Scholtz says that he visited Cape Town in October 2009 for a two week holiday. In the founding affidavit he said nothing about having had sight of the summons, just that he remained of the view that the summons was not effective because it had not been served on him in the UK. It was only when Merryweather raised the point in the answering affidavit (that it was beyond comprehension that Scholtz could claim to only "recently [have] had sight" of the summons) that Scholtz suggested in reply that he had not seen the papers during October 2009.

57. The order against Scholtz on the merits granted by Olivier AJ was reported widely in the local press and Scholtz says that when his mother returned to the UK "*sometime in May/June 2010*", she gave him a copy of a local newspaper circulating in the southern suburbs in which it was reported that judgment had

been granted against him, and that Merryweather's attorneys were in the process of calculating their client's damages.

58. Scholtz was undeterred by this and appears to have doggedly believed that the order could not be effective against him since he had not been served in the fashion allegedly suggested to his father by the late Van Schalkwyk SC. Scholtz says that it was only in the second half of 2013, when he eventually consulted his current attorneys, that he was advised that a judgment remained valid and enforceable until set aside by a subsequent court order.

59. Scholtz says that he stayed in the UK until October 2011 when he returned to live permanently in South Africa. At the beginning of 2012 he enrolled at the University of Stellenbosch for a Bachelor of Arts degree in music technology.

60. The judgment of Smit AJ of 14 June 2013 in the sum of R10 291 100,00 came to Scholtz's attention almost immediately: on 15 June 2013 an article was published in the Weekend Argus newspaper in Cape Town and his attention was drawn thereto by a friend. Scholtz snr then told his son that he (Scholtz snr) would see an attorney regarding the implications and validity of the judgment.

61. Scholtz snr says that he saw the attorneys who currently represent him and his son on 21 June 2013 – just a week after the order had been granted by Smit AJ. Scholtz did not attend this consultation, nor a follow-up meeting on 2 July 2013. At that stage, says Scholtz snr, he was advised that the judgment could not automatically be regarded as invalid and that an application for rescission was necessary.

62. Scholtz left for England on 3 July 2013 to visit his mother on a trip which he says had been planned long before the judgment of Smit AJ was handed down. He returned to the Republic on 25 July 2013 and consulted with Mr Booth on 5 August 2013. Scholtz says that he had, in the meantime, been told by his father that a formal application for rescission was required and on 30 July 2013 his attorneys of record were instructed to take the necessary steps to prepare such an application. He does not explain why he consulted first with Mr Booth rather than seeing Mr Williams of his attorneys of record herein.

63. There was a delay of some five to six weeks while consultations were held with counsel and the transcript of the criminal proceedings procured. Affidavits were speedily drawn and settled by 6 September 2013, signed on 9 September 2013 and the application formally launched on 10 September 2013.

DELAY

64. Mr Whitehead SC accepted that the application for rescission was lodged within a reasonable time after the judgment on the quantum was handed down by Smit AJ. It goes without saying that the focus of the argument on behalf of Merryweather was the inordinate delay between the issue of the summons in April 2009 and the judgment on the quantum more than four years later.

65. The explanation put up by Scholtz is a fairly simple one. As a young man in his early 20s he says he relied throughout on the advice of his father who had assumed effective control of his son's affairs in relation to the litigation. Scholtz contends that he had no reason to doubt the advice given to him by his father based as it was in turn on the advice of Senior Counsel and other lawyers.

Given that both men knew unequivocally in May 2009 that the summons had been issued and that attempts were being made to effect service thereon on Scholtz, his failure thereafter to enter an appearance to defend the matter was manifestly intentional. To that extent, his conduct can be correctly described as "wilful".[12]

66. In *Maujean*[13] King J described the act of wilfulness thus:

> *"More specifically in the context of a default judgment 'wilful' connotes deliberateness in the sense of knowledge of the action and of the consequences, its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be".*

67. Ms Gassner SC readily accepted this and relied heavily on *Harris* for the submission that wilfulness *per se* did not constitute an absolute bar to rescission. She argued that the intentional conduct had to be considered and evaluated in the context in which it occurred.

68. It was argued that the younger man, evidently less experienced in the ways of the world than his father, cannot be faulted for following the advice of the older man. After all, it was said, Scholtz was impecunious and working overseas and for him to have taken independent legal advice from afar, would have been costly and difficult. I did not understand Mr Whitehead SC to seriously take issue with the suggestion that the father was really protecting his son and

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[12] The Shorter Oxford English Dictionary defines "wilful", in relation to an action as "*done on purpose; deliberate; intentional …".*

[13] *Maujean t/a Audio Video Agencies v Standard Bank of SA Limited* 1994 (3) SA 801 (C) at 803H-I.

shielding him from the ultimate consequences of the litigation – a massive damages award against an impecunious young man who is not likely to be able to settle the debt for many, many years to come.

69. The issue in such circumstances seems to be whether the proverbial sins of the father should be visited upon the son. In entering upon this enquiry one cannot loose sight, however, of the fact that Scholtz was, at all material times, aware of what the claim was against him and what steps were being taken to thwart it. Whatever the overbearing influence of his father's conduct might have been on him, he clearly acquiesced in the effort being taken to protect his interests. And, while he may have deferred to his father's influence, he is obvioulsly an intelligent and independent young adult who was clearly capable of looking after his own affairs: his overseas jaunt bears testimony to this.

70. The question that arises is whether the father should have conducted himself differently. It appears that his casual sounding out of the late Van Schalkwyk SC (whom he had come to know socially) was just that, rather than a formal instruction to a lawyer for advice on how to proceed. One would have thought that Scholtz snr would have considered a claim for R15,5m having been initiated by a severely disabled young man as a serious step and one which warranted an earnest and immediate response, whatever the legal niceties thereof may have been. His response (seemingly aimed at later reliance on a strict application of the law) carried with it grave risks. Scholtz snr must have been alive to those risks and he must bear the consequences (both morally and legally) of his decision.

71. Ms Gassner SC (accepting that the Court was being asked to consider hearsay evidence incapable of being verified) submitted that the alleged advice to Scholtz snr had the ring of truth to it. Referring to a number of authorities on the interpretation of Rule 5 (Edictal Citation) read in conjunction with Rule 4(2) (Substituted Service)[14], Ms Gassner SC argued that an application for leave to sue by way of edictal citation was a necessary preliminary procedural step preceding the institution of proceedings against a person who was living (not necessarily domiciled) outside of the Republic. She said that the failure to follow Rule 5 was not a mere technical formality which could be dispensed with.

72. Counsel went on to argue that Zondi J had been misled during the unopposed proceedings before him in the motion Court when, in response to a query from the Bench as to whether it was not necessary to apply for leave to sue by way of edictal citation, His Lordship had been assured by counsel for Merryweather that this was not necessary since Scholtz was still domiciled in South Africa. Ms Gassner SC pointed out that this was an incorrect proposition of the law since the incidence of domicile is irrelevant for purposes of determining whether leave to sue by way of edictal citation was necessary: it is simply a question of the defendant's physical whereabouts at the time of service.

73. Mr Whitehead SC accepted in argument that he may have erred before Zondi J in moving for substituted service when the law seems to require an application for leave to sue by way of edict. But given the fact that Scholtz no longer seeks to set aside the order of Zondi J, it is not necessary to decide the point or whether condonation could and/or should have been granted. However, in light

[14] *Steinberg v Steinberg* 1962 (4) SA 321 (E); *Walster v Walster* 1971 (4) SA 442 (E); *Erasmus, Superior Court Practice*, B1-30A.

of the cases referred to by Ms Gassner SC, it seems possible that the late Van Schalkwyk SC may have given advice consistent with Scholtz's interpretation of the common law and Rule 5 put forward by Ms Gassner SC and I consider it churlish of Merryweather to contend that advice in that regard was not given to Scholtz snr. In the absence of any allegation that this is a statement of Machiaevellian proportions devised for purposes of defeating this litigation, one has to ask where Scholtz snr came upon such evidence.

74. As a consequence of this alleged irregularity in the proceedings, Scholtz sought, as part of the relief initially claimed, to set aside the order of Zondi J as well. The prayer for that relief was formally abandoned by Scholtz in March 2014 with the filing of his heads of argument. As I understood it, he accepted the advice of his legal representatives to do so to avoid the potential for any argument on prescription.

75. What is important, however, is the allegation that in August 2009 Scholtz snr was advised by the late Van Schalkwyk SC to seek independent legal advice in regard to the irregularity around substituted service. When he did so, Scholtz snr says he was informed that the substituted service order was not automatically invalid by virtue of the irregularity in the obtaining thereof. He thereafter consciously chose to ignore this advice preferring the informal opinion of the late Van Schalkwyk SC. Scholtz snr offers the Court no explanation for this decision: after all his informal advisor had specifically suggest that he take such steps.

76. Equally strange is Scholtz snr's averment that he did not tell his son of the receipt of the papers in the substituted service application, the order of Zondi J or the formal advice furnished to him by the lawyer, who remains unnamed. Having told his son that the summons had now been formally served upon him, it beggars belief that Scholtz snr would not have told him that there was now a Court order which authorised service on him. His feeble excuse that he did not want to further distress an already upset child is not worthy of serious consideration. Rather, one must bear in mind that the claim would have prescribed within a month or so of service on Scholtz snr and that it would have been expedient not to have taken any steps at that stage which may have compromised a later claim by Scholtz that the claim had prescribed.

77. And, finally, Scholtz snr's assertion that, having come to hear of the fact that Thackwray and Hechter had entered appearances to defend and were intent on filing pleas, he considered there to be no risk that a default judgment could be taken against his son, is similarly illogical and disingenuous. One is left then with the abiding impression that Scholtz snr and his son must have discussed the matter in August 2009 and, conscious of the fact that prescription was looming, the pair took a conscious decision, in the full knowledge of the consequences thereof, not to oppose the claim.

78. An attitude displaying a complete lack of interest on the part of Scholtz and his father in opposing the proceedings is further borne out by the response to the order of Olivier AJ in May 2010. Scholtz heard of the order from his mother who showed him a newspaper clipping in May/June 2010, but he appears to have blissfully assumed that it did not apply to him because of what his father

had told him a year before: that he had heard informally from a lawyer-friend that the summons had to be served on his son personally in the UK. Scholtz, curiously it must be said, did not revert to his father at that stage and ask him what was going on, nor did he seek independent legal advice or ask his father to do so on his behalf.

79. Scholtz snr says that he too learnt about the judgment on the merits from a media article when an attorney-friend mentioned to him that he had read about the case in a local newspaper. Scholtz snr claims he did not seek out a copy of the article, nor did he discuss it with his son and, says he was unaware of the fact that Scholtz was in the know. Scholtz snr claims to have thereafter discussed the matter with the same attorney-friend (whom he again fails to name) and who is alleged to have told him to wait and see whether there would be any mention of a judgment on the quantum since he was of the view that a judgment without any quantum could hardly be regarded as a judgment at all. It would seem that the said attorney-friend was not familiar with the provisions of Rule 33(4) and the common practice in damages claims to separate merits and quantum.

80. The fact that Scholtz snr decided to adopt a "*wait and see*" approach, combined with his alleged failure to discuss the matter with his son in the face of a judgment of this Court validly granted, is once again demonstrative of an attitude of disdain, evincing a complete lack of interest in resisting the claim. Further, Scholtz snr's reluctance to identify his sources of informal legal advice, other than one who is now incapable of deposing to an affidavit to confirm the

discussions and advice given, casts serious doubt over the nature and extent of advice purportedly received.

81. When judgment on the quantum was finally delivered three years later, Scholtz snr seems to have been impelled to take action on account only of the magnitude of the award. Once again, no convincing explanation is forthcoming from either father or son why they then decided to contest an order which they had believed all along was of no force and effect. After all, the claim was large from the outset (R15,5 million) and an award exceeding R10 million could hardly have come to them as a bolt out of the blue.

82. I agree with Mr Whitehead SC's submission that it is probable that both Scholtz snr and Scholtz knew at all material times after issue of the summons what was taking place in relation to Merryweather's claim. Indeed, even at the stage of the criminal proceedings, a casual (if not callous) remark was made by Mr Booth to Merryweather during cross-examination regarding the prospect of an ensuing damages claim. Both Scholtz snr and Scholtz are educated people and it is truly difficult to believe that they did not appreciate the seriousness of the situation in light of the devastating consequences for Merryweather of his injury. Their behaviour, both collectively and individually, is, to use the words of Miller JA in *Chetty* at 787H:

> *"Indicative of a high degree of indifference or unconcern … and is of a piece with [their] apathetic and ineffectual approach to the question of putting up opposition … [to Merryweather's claim]".*

83. Ms Gassner SC urged the Court to exercise its discretion in favour of Scholtz and to grant him the indulgence now so eagerly sought. She assured the Court that no technical points or defences would be put up and alluded to the abandonment of the relief sought to set aside the order of Zondi J as a demonstration of his *bona fides*. Further, Counsel pointed to Section 34 of the Constitution and said that all that Scholtz really wanted at this stage was to exercise his right to a fair public hearing. He seems to forget that he was given that right in May and August 2009, and he would have been reminded thereof again in May/June 2010. On each occasion he spurned it and his assertion of the right now that a substantial award has been made following upon Merryweather having exercised his same right, seems to me to be rather cynical.

PREJUDICE

84. Undoubtedly, a Court exercising a discretion in response to an application for rescission of judgment will look at issues of prejudice.[15] To this end, on the resumption of argument on 15 April 2014, after the two week Easter recess, Ms Gassner SC handed up a draft order which she asked the Court to adopt. The draft incorporated a tender by Scholtz in respect of certain of Merryweather's costs as follows:

84.1. a tender to pay Merryweather's costs in the rescission application up to the date of the filing of Scholtz's heads of argument on 6 March 2014. The choice of this date was based on the intimation in the heads of

[15] *De Witts Auto Body Repairs (supra)* at 714D.

argument that Scholtz would no longer rely on the relief sought to rescind the judgment of Zondi J;

84.2. a tender to pay Merryweather's costs in respect of the hearings on the merits and quantum, the latter to exclude the qualifying fees of the experts;

84.3. all costs were to be payable on the party and party scale.

85. Scholtz's tender was supported by a suretyship put up by his father in which Scholtz snr bound himself as surety and co-principal debtor with his son in respect of the latter's tender of costs. The suretyship, however, goes a little further than Scholtz's tender and includes an undertaking to pay any party and party costs arising out of an order of Court in respect of costs incurred by Merryweather in the rescission application after 6 March 2014. The suretyship is, however, limited to the extent that it can only be relied upon by Merryweather in the event that rescission of the judgments of both Olivier AJ and Smit AJ is granted. Ms Gassner SC then argued that the tender and suretyship alleviated any financial prejudice that might accrue to Merryweather as a consequence of the granting of rescission.

86. The tender certainly provides more solace for Merryweather than prayer 6 in the notice of motion which asks that such respondents as oppose the application for rescission be ordered to bear the costs of suit thereof jointly and severally. Mr Whitehead SC accepted that the tender removed a degree of prejudice in relation to a re-trial of the case. He went on to confirm that there was no concern that any of the eyewitnesses, who had already testified on the

merits, would not be available at a further hearing. Similarly, all of the experts who had examined Merryweather and/or prepared medico-legal and actuarial reports were available to testify, subject to their reports being updated.

87. However, he pointed out that Merryweather had been assisted by Counsel and attorneys who were acting in terms of a contingency fee arrangement and the ability of these professionals to continue to hold themselves available was a source of concern.

88. The issues of contingency fees and medico-legal expenses were dealt with in a supplementary affidavit filed by Merryweather's attorneys at the request of the Court. In that affidavit, (filed after judgment had been reserved and to which Scholtz elected not to reply), Ms Solomons explains how the matter proceeded before Smit AJ and how the claim was reduced and the particulars of claim amended before the hearing after the Court had informally indicated a preference for a particular scenario sketched in an actuarial report put up by Merryweather.

89. Ms Solomons goes on to explain that on 19 November 2008 her firm concluded a contingence fee arrangement with Merryweather under the Contingency Fees Act, 66 of 1997. The agreement specified the hourly rates to be charged by the senior and junior attorneys handling the matter and records that such hourly rate would increase in accordance with any increase in the Law Society tariff. Similarly, a daily fee and an hourly rate were agreed in respect of Mr Whitehead SC, which fees were also capable of increase. A separate contingency fee

arrangement is yet to be entered into in respect of the services rendered by junior counsel to Mr Merryweather.

90. Finally, Ms Solomons points out that 10 experts were consulted by Merryweather in respect of the quantum and that their combined costs to date amount to R158 720,35. Save for two experts who have jointly been paid R12 825,00, and in respect of one of whom R8 420,00 is still outstanding, the remaining experts have also agreed to act on a contingency basis. The position is therefore that a sizeable sum of professional fees have been incurred by Merryweather. The bulk of these fees, certainly the medico-legal experts, were incurred after the order of Olivier AJ and would have been saved had Scholtz reacted to the news of that order and moved for a rescission at that stage. His failure to do so is directly linked to the incurring of further costs.

91. The amounts payable to counsel and the attorneys are not set out in the affidavit of Ms Solomons but must be assumed to be substantial given that the matter has been on-going for almost six years now. No doubt a substantial portion of those legal fees have been incurred in response to the application for rescission, and an order for payment of those costs by Scholtz (underwritten by his father) will go some way towards reducing Merryweather's costs burden. However, the tender is only made for costs on the party and party scale and the suretyship is similarly limited. Merryweather will therefore be saddled with an attorney client bill in respect of the rescission application and this portion (the extent whereof is not known) will in all likelihood be irrecoverable given Scholtz's impecuniosity and the fact that they are not covered by the terms of the suretyship.

92. As I have already said, the limitation in the tender to pay the fees up to the date of filing of the heads of argument was based, so Ms Gassner SC said, on the fact that Merryweather and his legal team would then have known of the decision not to apply to set aside the order of Zondi J, and there was thus an assurance that prescription would not be raised by way of a special plea. But the tender misses the point: there was no concession in the heads that Merryweather's costs up to the date of filing thereof would be covered by Scholtz and/or his father. Merryweather therefore had no choice but to battle on and incur the substantial costs associated with three days' argument, the tender only coming on the resumption of argument on the third day, after the recess.

93. Further, and notwithstanding the terms of the tender, the undertaking in respect of payment of the wasted costs of the hearings before Olivier AJ and Smit AJ will only realistically be capable of quantification at the end of the matter when the extent of that which is wasted and that which is not, is known.

94. Finally, the professional fees payable in respect of the legal representatives under the Contingency Fees Act are recoverable only in the event of success in the litigation. As matters presently stand, those fees are recoverable by counsel and the attorneys given the fact that Merryweather has been successful in the litigation against Scholtz. The tender made by Scholtz places the lawyers in the invidious position that they are now expected to forego their immediate entitlement to fees and to soldier on in the hope that something may be recoverable in the future. In light of the fact that the contingency fee

agreement with the medico-legal experts has not been placed before the Court, one can only assume that a similar situation will apply to them.

95. The consequences therefore of the supremely indifferent attitude adopted by Scholtz and his father to what was happening in the litigation arena are broader than the direct prejudice to Merryweather. It is not inconceivable, for example, that the lawyers and experts may be reluctant to spend more time and money on the case, thereby prejudicing Merryweather's prospects of success in a re-trial. Mr Whitehead SC in fact intimated as much at the end of his argument.

96. As I have already observed, much was made in argument by Ms Gassner SC of the fact that Zondi J was misled into granting an order for substituted service. In light of the abandonment of the relief sought against that order, I do not need to finally determine the point. But even if Scholtz is correct on this score, the alleged irregularity is actually a red herring: there was no real prejudice occasioned to him thereby since he was in fact informed twice of the issue of summons – first in May and later in August 2009. Scholtz was given ample opportunity to take proper legal advice and defend the claim if so advised. In light of the aforegoing, I am of the view that the prejudice to Merryweather far outweighs the prejudice to Scholtz.

PARTIAL RESCISSION

97. Both counsel were *ad idem* that the Court could refuse to set aside the order of Olivier AJ on the merits, but grant rescission of Smit AJ's order on the

quantum.[16] I agree. There is manifestly no bar to such an order being made given the fact that there are two separate judgments issued by different Courts years apart. Clearly, the reasons for the failure to enter an appearance to defend initially may differ materially from the reasons for the failure to move immediately for the setting aside of the merits order once Scholtz had knowledge thereof. Accordingly, both counsel suggested in the alternative that the Court may consider granting rescission of the quantum order only.

98. In my view, there are two potential obstacles to this approach. Firstly, no *prima facie* case has been put up by Scholtz to show that the order of Smit AJ is excessive. Rather, Scholtz seeks an opportunity to have the quantum considered afresh and to attempt to persuade the Court hearing the evidence on quantum that the damages should be less than those awarded by Smit AJ. It is not difficult to conceive that a reduction in damages of just five or 10 percent would still be a significant amount of money. There is of course also the possibility, I would venture to suggest, that the Court considering the quantum afresh may be persuaded by Merryweather to award a higher amount. But in the absence of any allegation that the award is excessive or wrong in any respects, I consider that Scholtz holds no prospects of success in obtaining rescission on the quantum order and that the alternative relief should not be granted.

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[16] Reference was made to cases such as *GD Haulage (Pvt) Limited v Mumurgwi Bus Service (Pvt) Limited* 1980 (1) SA 729 (ZR AD); *SOS Kinderdorf International v Effie Lentin Architects* 1993 (2) SA 481 (Nm HC); *Silky Touch International (Pty) Limited and Another v Small Business Development Corporation Limited* [1997] 3 All SA 439 (W) and *Revelas and Another v Tobias* 1999 (2) SA 440 (W).

99. A further obstacle is whether Scholtz has given an adequate and reasonable explanation for his failure to attack the Olivier AJ order before the additional costs of preparation on the quantum had been incurred.

100. However, at the end of the day, the entitlement to a partial rescission order and a reconsideration of the merits is but one of the considerations which must be taken into account when a Court exercises its discretion to do justice to the two litigants before it.

CONCLUDING REMARKS

101. As the many cases referred to by counsel show, in matters such as these the Court's function is to perform a balancing act and to evaluate all of the relevant facts before it in order that justice can be done between the parties. In my view, the facts in this case demonstrate, firstly, that Scholtz's prospects of succeeding on the merits are not strong. This is not to say that there are no such prospects leading one to conclude that there is no *bona fide* defence to Merryweather's claim. Rather, in light of the conflicting versions put up in the criminal case and in this application, it seems that Scholtz has a long way to go to persuade a court that he was not responsible for Merryweather's injuries – whether intentionally or negligently. This may account for his manifest indifference throughout.

102. Secondly, Merryweather has gone by the book and with the assistance of committed legal representatives and medico-legal specialists who have offered freely of their time thus far to help a severely disabled young man, has litigated responsibly. His lawyers saw to it that the issue of summons came to Scholtz's

attention timeously before the commencement of prescription. When no appearance to defend was entered, Merryweather's attorneys took the prudent step of separating the actions and pursuing default proceedings against Scholtz, first on the merits to avoid unnecessary expense, and then ultimately, when the default judgment was unchallenged for more than three years, by proceeding on the claim for quantum.

103. All the while, the Scholtzs' knew what was happening and, it must be said, that if they had had any doubt as to the status of the litigation, they knew which attorneys represented Merryweather and could readily have contacted them. At the very least, they would have been in a position to monitor any developments through their contact with Thackwray and Hechter, there being no suggestion that there was any bad blood between the young men.

104. Their indifference to Merryweather's plight and the refusal on the part of Scholtz to accept responsibility for Merryweather's catastrophe is startling to say the least. In my view their conduct falls into the category described by the Court in *De Wet*[17]: having divested themselves of collective responsibility, and having ostensibly relied on conflicting, informal, second-hand legal advice, they are really the authors of their own demise. Ultimately, I am not persuaded that the application for resassia is brought *bona fide* and in my view it would be inequitable to visit Merryweather with the prejudice and inconvenience flowing from such conduct. In such circumstances, the interests of justice will not be served by acceding to the application for rescission, either in respect of the judgment on the merits or on the quantum.

[17] At 1044C-E.

COSTS

105. As pointed out at the beginning of this judgment, the joinder of Scholtz snr as a co-applicant in these proceedings and a co-defendant in the main action at the commencement of the hearing on 20 March 2014, was intended to place Merryweather in a position to ask that Scholtz snr be directed to bear, *inter alia*, the costs of the application for rescission in the event that it did not succeed.

106. In the affidavit supporting the application for joinder, Merryweather pointed to his own financial circumstances which he described as “dire” and which necessitated *pro bono* legal assistance on a contingency basis. He went on to deal with Scholtz’s financial position, which he described as analogous to that of an insolvent. He directed the Court’s attention to the fact that Scholtz replied to his request for security for costs in the sum of R250 000,00 by saying that he was not insolvent, had minimal debt, but also had minimal assets. Scholtz claimed that he was unable to put up security and his position is no doubt consonant with that of many average young South African students.

107. Indeed, in the newspaper article in the Peoples Post of 25 May 2010, referred to earlier and which Scholtz said his mother showed him in the UK, Merryweather is quoted as having remarked somewhat philosophically in relation to the judgment on the merits that it was a win on paper but that it was another thing to obtain satisfaction of the judgment debt.

108. Scholtz did not file an affidavit in response to that filed in support of the application for joinder while Scholtz snr filed a notice to abide.

109. Counsel were in agreement with the approach in principle to the joinder of Scholtz snr. It is said that as a person effectively controlling the litigation, or as Mr Whitehead SC put it "calling the shots", he is liable to be mulcted in the costs attributable to his impecunious son.[18] If on the other hand he was what has been termed a "pure funder" of the litigation, he is generally immune from such an order.[19]

110. The judgment of Louw J in *EP Property* contains a thorough exposition of the development of our law on this point in line with developments in the Commonwealth.[20] It is a judgment which I intend to follow.

111. Louw J summarised the guidelines set out in *Dymocks* thus:

> *"1. Such costs orders are exceptional in the sense that they applied to cases where the order is considered against a party who does not fall into the ordinary run of cases where parties pursue or defend claims for their benefit and at their own expense. The ultimate question in any such 'exceptional' case is whether in all the circumstances it is just to make the order.*
>
> *2. Generally, the discretion will not be exercised against 'pure funders' (i.e. funders with no personal interest in the litigation, who do not*

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[18] *EP Property Projects (Pty) Ltd v Registrar of Deeds, Cape Town and Others* 2014 (1) SA 140 (WCC); Confirmed on appeal *vide Naidoo v EP Property Projects (Pty) Ltd* [2014] ZASCA 97 (31 July 2014).

[19] *Hamilton v Al Fayed (No. 2)* [2002] 3 All ER 641 (CA); *Price Waterhouse Coopers Inc v National Potatoe Co-op Ltd* 2004 (6) SA 66 (SCA); *Price Waterhouse Coopers Inc v IMF (Australia)* 2013 (6) SA 216 (GNP).

[20] See, for example, *Carborundum Abrasives Ltd v Bank of New Zealand (No. 2)* [1992] 3 NZLR 757 (HC); *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and Others* [2005] 4 All ER 195 (PC); *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655; *Jeffrey and Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43.

stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course). In such cases the usual approach is to give priority to the public interest in the funded party getting access to justice over that of the unsuccessful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

3. *Where, however, the non-party not merely funds the proceedings but substantially also* ***controls*** *or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purpose. He himself is 'the real party' to the litigation, the party to the litigation 'in all but name', or, if not the only 'real party', then 'a real party in … very important and critical respects'."* (Emphasis added)

112. In *EP Property* there was an attempt to hold a certain Ms Naidoo responsible for the opposing party's costs. In confirming her liability Louw J said the following at 163I:

"[82] In my view the circumstances relevant to the exercise of the discretion in this case are, firstly, that Naidoo is the 'real party' to the litigation. She not only funds the whole of the litigation but is also in full control thereof and stands to benefit substantially if the funded party is ultimately successful."

113. Ms Gassner SC urged the Court to find that Scholtz snr fell into the “pure funder” category, while Mr Whitehead SC argued to the contrary. The facts of this case are fairly unambiguous as far as Scholtz snr’s role in the litigation is concerned. Firstly, we see him stalling service of the summons in May 2009, no doubt to protect his son. Then in August 2009 he informally sought out legal advice and, he says, took it upon himself to withhold vital information garnered therefrom from his son in relation to the application and order for substituted service.

114. When, in May 2010, the order of Olivier AJ came to his attention, he once again took informal advice to ensure that his son was not exposed to litigation. Immediately after the judgment on the quantum was handed down, Scholtz snr took the initiative, consulted attorneys on the way forward and it was he who attended the first set of consultations. Manifestly, Scholtz snr had an interest in seeing to it that his son was not saddled with a huge debt at such a young age. The consequences for Scholtz snr from the perspective of his common law duty of support towards his son are obvious.

115. Ms Gassner SC conceded in argument that the father, in ignoring the sage advice of Senior Counsel to obtain a proper opinion, had behaved negligently and committed an error of judgment. In so doing it was Scholtz snr, and he alone, who was responsible for the protraction of the matter. Had he taken proper advice it is conceivable that a default judgment may not have been taken against his son, but certainly that an award on the quantum could have been avoided.

116. I am therefore satisfied that justice demands that Scholtz snr be held liable, jointly and severally with his son, for the costs of this application.

117. Mr Whitehead SC asked that the costs be awarded on the scale as between attorney and client. He pointed to various factors to which I have already referred, which he said were demonstrative of a lack of *bona fides*. He asked the Court to express its displeasure at the way in which Scholtz snr attempted to subvert the legitimate claims of an indigent paraplegic and to grant such a costs award.

118. I am not persuaded that the conduct of either father or son, in relation to this litigation, is sufficiently reprehensible to warrant a punitive costs order. His earlier manipulation of the process and the ostensible withholding of information from his son are factors which are relevant to the decision to make a costs order against Scholtz snr in the first place. His conduct in relation to the litigation, once he was properly advised by his current legal team, was not such as to warrant any rebuke from the Court. His acceptance ultimately of the responsibility which this litigation embraces is borne out, for example, by the instruction to the legal representatives not to press for the rescission of the order of Zondi J, which would have opened the door for a plea of prescription, as well as the provision of an extensive suretyship to cover the potential costs attributable to his son in the event of success. Costs will therefore be taxed on the ordinary scale.

ORDER OF COURT

119. In the circumstances the application is dismissed with costs, such costs to be borne by the first and second applicants jointly and severally.

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GAMBLE, J