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Can you appeal orders granted in default? Lee vs Road Accident Fund

(22812/2020) [2023] ZAGPJHC 1068; 2024 (1) SA 183 (GJ) (26 September 2023)

By **Funeko Makhubela** (Candidate Attorney), and **Kerry Theunissen** (Partner)

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INTRODUCTION

This case dealt with an application for leave to appeal an order granted in a party's absence and the appropriateness of such an application in light of the judgments in Pitelli v Everton Gardens Projects CC[1] (**"Pitelli"**) and Moyana v Body Corporate of Cottonwood[2] (**"Cottonwood"**).

BACKGROUND

Ms. Lee brought an action against the Road Accident Fund (**"RAF"**) for damages suffered as a result of a collision. The RAF accepted liability for Ms. Lee's proven losses and, accordingly, Ms. Lee's legal representatives prepared for trial to determine the value of her losses.

The RAF failed to deliver its notice of intention to defend and, furthermore, chose not to appear at the trial, which proceeded by default. Lenai AJ heard the evidence of Ms. Lee's loss and assessed her damages at just under R13.5 million.

Almost a year after the order was granted, the RAF filed an application for leave to appeal the order.

APPLICATION FOR LEAVE TO APPEAL

Ms. Lee's case relied on the Pitelli judgment and contended that the application for leave to appeal was an irregular step and ought to be set aside.

The RAF argued that it is open to a party to appeal an erroneous order granted in its absence and, furthermore, what makes an order appealable is that the order is wrongly granted, not that it is granted in the face of opposition from the person to whom it applies.

Furthermore, the RAF submitted that Pitelli is not binding on it and argued that the decision in Cottonwood departed from Pitelli. In Cottonwood, the court had to decide whether a party could waive their right to rescind an order by bringing an appeal against it, which is what the RAF has done in this case.

In coming to its decision whether the default judgment against the RAF is appealable, the High Court of South Africa, Gauteng Division, Johannesburg (the "Court"), relied on the Supreme Court of Appeal's decision in Pitelli. Nugent JA, writing for a unanimous court, held that a court order is not appealable until it becomes final; and a court order does not become final if it is rescindable.

The Court held that the decision in Pitelli was a perfectly sensible way of dealing with challenges to orders granted in the absence of one of the parties and recognised the following difficulties in taking orders granted by default on appeal:

1. The case that would have been made by the party against whom the order was granted forms no part of the appeal record and cannot be presented to the court of appeal, except perhaps by way of an application to introduce new evidence. Whether or not such application is successful or even available to a defaulting party wishing to appeal, the very concept of appealing against an order granted in default of appearance is incompatible with an appreciation of a court of appeal's true function: to reconsider cases that have been fully argued at first instance.

2. A court of appeal asked to reconsider an order granted in the absence of the party against whom it operates will always be faced with the choice of deciding a case as a court of first and final instance (unless a further appeal is, exceptionally, allowed) or remitting the case to the court a quo to be decided again, which is exactly what the effect of a successful recission application would have been.

A court of appeal ought generally only intervene when proceedings in the court below are complete. For so long as the court a quo can, in principle, alter or reconsider its order, an aggrieved party's remedy lies there. One exception to this rule is where it is in the interests of justice to entertain an appeal against an interim interdict that would cause irreparable harm to the party against whom it operates[3].

The Court found that on the decision in Pitelli, then, Lenyai AJ's order is plainly not susceptible to appeal and having been granted in the RAF's absence, the order is only rescindable, whether under Rule 42(1)(a), or under Rule 31 (2)(b), or under the common law. It follows from Pitelli that the attempt to appeal rather than rescind the order is irregular.

Having regard to the RAF's reliance on Cottonwood, the Court held that what Pitelli makes clear is the availability of recission in principle, not whether the party seeking to rescind an order is likely to succeed. Furthermore, the Court found that whatever view one takes, the decision in Pitelli is binding on the High Courts of South Africa, and it was not for the court in Cottonwood to depart from it simply because it thought that it was wrong.

The Court found that the principles applicable to rescission applications are supple enough, to allow a court to set aside an order that should never have been granted, even if the applicant's excuses for not having attended court turn out to be inadequate.

The Court highlighted that the one procedural advantage that appeals generally have over rescission applications is the automatic suspension of the order appealed against. However, a party that finds themselves subject to an order granted in their absence can ask a court to exercise its powers under Rule 45A to suspend the execution of the order while the recission application is heard.

Accordingly, the Court held that an order granted in a party's absence is not appealable, because it is rescindable, and that a party that seeks leave to appeal against an order granted in its absence takes an irregular step that falls to be set aside.

The Court therefore ordered that the Respondent's application for leave to appeal against the default judgment of Lenyai AJ be set aside as an irregular step.

VALUE

Orders granted in default are not appealable because they are rescindable. The contrary decision in Moyana v Body Corporate of Cottonwood [2017] ZAGPJHC (17 February 2017) is wrong and should not be followed.

[1]*Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA)*
[2]*Moyana v Body Corporate of Cottonwood [2017] ZAGPJHC 59 (17 February 2017)*
[3]*National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) para 25*

Kerry Theunissen
(Partner)

Funeko Makhubela
(Candidate Attorney)