



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 14756/2017

<u>DELETE WHICHEVER IS NOT APPLICABLE</u>	
(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
07/02/2024 DATE	 SIGNATURE

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

MICHELLE GONSALVES

Respondent

JUDGMENT

YACOOB J:

1. The applicant seeks leave to appeal a judgment granted against it by default on 13 May 2022. The application was instituted on 11 April 2023, almost a year after the date of the judgment. It was accompanied by a notice of condonation of the late filing of the application. Due to some lapses of communication with the Appeals Registrar the matter came much later to my attention, and the application was heard on 22 November 2023.
2. The amounts awarded in respect of general damages and past medical expenses were awarded in accordance with a settlement between the parties. The applicant

therefore seeks only to appeal the loss of earnings award, which is by far the largest part of the quantum.

3. The respondent raised a point in *limine* to the effect that it was not open to the applicant to appeal the judgment when it was still open to rescission. I asked the parties to submit supplementary argument on the issue of appealability, before the remainder of the application is dealt with, as it seems to me if the judgment is not appealable at this stage nothing will be served by hearing the merits of the application for leave. I note also that the respondent opposes the condonation application on the basis that the delay was unreasonable.
4. The applicant's defence had been struck out on 6 October 2021, due to the applicant's non-compliance with the rules and applicable practice directives. It did not seek to have that order rescinded. Nevertheless, the applicant was kept informed of when the matter was enrolled, and sent counsel to defend the matter on the day of the hearing. Taking into account that the defence had already been struck, and no formal application brought to enable the applicant to resume its defence, I declined to hear the applicant's counsel.
5. The applicant's own affidavit in support of the application for condonation states that in February 2023 the applicant was under the impression that an application for rescission was appropriate. However, the applicant was troubled by the fact that a number of its other applications for rescission had been unsuccessful. I pause to note that the success or failure of other applications for rescission is irrelevant. Each application for rescission is considered on its own merits. Further, the applicant does not disclose how many applications for rescission it has brought, how many were unsuccessful, and what the reasons for the failures were.
6. The applicant apparently delayed bringing the application for rescission until it found an authority that purportedly confirms the appealability of default judgments by the party against which judgment was taken. There is no explanation of what would have happened had no such authority been found, nor of why the application for rescission was not properly brought in good time. The applicant apparently was attempting to settle the matter with the respondent in attempt to avoid court processes. It must be noted that the applicant finds itself in the position it is in with this matter in large part because of its preferring to avoid participating in court processes.
7. Until the applicant "discovered" authority that permitted it to apply for leave to appeal, it was under the impression that it was obliged to bring an application for rescission by the judgment of the Supreme Court of Appeal in *Pitelli v Everton Gardens Projects CC*,¹ in which the appellant had sought both an application for leave to appeal and an application for rescission, which were heard together. Both applications were unsuccessful and Nugent JA held that an order is not final until the court of first instance is incapable of revisiting the order, and that since an order

¹ 2010 (5) SA 171 (SCA)

taken in the absence of one party is open to being revisited, it is ordinarily not appealable until an application for rescission has been unsuccessful.²

8. Nugent JA referred to a judgment of this division, *Sparks v David Polliack & Co (Pty) Ltd*,³ in which Trollip J noted in an *obiter* comment that an order is appealable when it can no longer be rescinded, which could occur by the lapse of time or by the waiver or peremption of the right to rescind, or both. Nugent JA disagreed with the view of Trollip JA that appealability of an order can rely on the preference of a litigant, or on that litigant's action or inaction. It is open to a litigant to "prefer" to appeal. He noted that even if condonation may be required, an order made by default is still capable of being revisited.⁴
9. The judgment on which the applicant relies is that of *Moyana and Another v Body Corporate of Cottonwood and Others*.⁵ In that judgment, Gautschi AJ found that it was open to a party to "prefer" to take a matter on appeal rather than to apply for rescission. He relied on the comment of Nugent JA in *Pitelli* that it was "not strictly necessary in this case to pronounce finally upon the view that was expressed" in *Sparks*.⁶
10. The *Moyana* judgment was an appeal from the Magistrates' Court, in terms of section 83 of the Magistrates' Courts Act 32 of 1944, which creates a right of appeal to the High Court against, *inter alia*, any judgment granted in terms of section 48 of that Act,⁷ or any order having a final effect.⁸ Section 83 also explicitly permits appeal against a costs order,⁹ and against the dismissal of an exception if the parties consent or if a costs order has been made.¹⁰
11. For completeness, I note that section 36 of the Magistrates' Court Act makes provision for what judgments may be rescinded. Section 36(1)(d) empowers the court to rescind or vary "any judgment in respect of which no appeal lies". In the Magistrates' Court, then, appealability cannot be determined by whether a judgment is open to rescission, since only a judgment which is not appealable is open to rescission. The considerations are therefore different when an order of the High Court is at issue, as opposed to one of the Magistrates' Court. I do not believe that *Moyana* finds application in this matter.
12. The respondent then referred me to a judgment of Wilson J in this court, dealing with a similar issue as that before me, *Lee v Road Accident Fund*,¹¹ in which Wilson

² At [27] – [30]

³ 1963 (2) SA 491 (T)

⁴ At [31]

⁵ (A3068/16/ [2017] ZAGPJHC 59 (17 February 2017)

⁶ At [32]

⁷ Section 83(a)

⁸ Section 83(b)

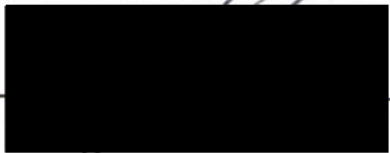
⁹ Section 83(b)

¹⁰ Section 83(c)

¹¹ 2024(1) SA 183 (GJ)

J found that an order granted against the RAF in similar circumstances to this one was not appealable as it was still susceptible to rescission.

13. Thereafter, the applicant referred me to a judgment in which leave to appeal was granted to the RAF in similar circumstances, *RAF v Mogorosi*,¹² in which leave was granted, despite the authorities to the contrary, on the basis that in that matter the RAF had reasonable prospects of success on appeal. With respect, the question of prospects of success on appeal does not come into the equation at this stage. The question is whether, as a matter of principle, the order which the RAF seeks to challenge, is at this stage final and therefore appealable. I am satisfied that it is not.
14. Even if it were open to the RAF, as a litigant, to change the status of the order by its own preference, by following the line of case which begins with *Sparks*, there is no explicit waiver in the application for leave or in the affidavit filed in support of the application for condonation. I do not think the applicant can simply rely on the fact that it has brought an application for leave to ask the court to infer that it has waived a right to apply for rescission.
15. As far as the effluxion of time is concerned, the applicant is as much out of time for an application for leave to appeal as it is for an application for rescission. It would have to obtain condonation either way, so that does not weigh on either side of the debate.
16. There may be some circumstances where it is appropriate that an order that is still open to rescission should be appealable, but I cannot see that any such circumstances are present in this case.
17. For these reasons, the application for leave to appeal is dismissed with costs.


S. YACOOB
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

For the applicant:	L Klaas
Instructed by:	The State Attorney, Johannesburg
For the respondent:	WJ van Wyk

¹² (2020/1067) 16 January 2024 per Wright J, unreported.

Instructed by:

Van der Elst Inc

Date of hearing:

11 November 2023

Further submissions received:

08 December 2023, 24 January 2024

Date of judgment:

07 February 2024