

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 18768 / 2020

(1) REPORTABLE: YES

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED: YES

DATE 31 October 2024

SIGNATURE

In the matter between:

ROAD ACCIDENT FUND

APPLICANT

and

**P[...] M[...] M[...] obo RM
M[...]**

RESPONDENT

SUMMARY

Sixteen months after judgment was granted by default against it, the RAF finally raised itself from its supine position in this matter and delivered a request for reasons for judgment and an application for leave to appeal. What precipitated this was that plaintiff had served a writ of attachment on it, which was necessitated by the fact that the RAF had failed to pay the quantum ordered by the court.

The plaintiff then invoked the provisions of Rule 30 to set aside the application for leave to appeal.

Held: the application for leave to appeal is set aside as irregular step as a court order is

not appealable until it becomes final, and it does not become final if it is capable of rescission.

Held: that the request for reasons was filed outside of the time limits set by Rule 49 and that no application for an extension of time had been brought. The time periods set out in Rule 49 have an obvious intention: to ensure that, once lapsed, a litigant can be secure (insofar as is possible) in the fact that the litigation has been finalized. Were a disgruntled party simply entitled, as of right, to re-open litigation years after it had been given notice of an order granted against him/her/it, it would open the floodgates: old litigation would be revived, and an already overburdened justice system overwhelmed with unmeritorious litigation. That can never be in either the interests of justice or in public interest.

Held: As a request for reasons forms the basis of an application for leave to appeal, and as that is to be set aside, so too must the request for reasons.

Held: that, given the manner in which the RAF chose to conduct itself, a punitive costs order is appropriate.

ORDER

- a) The application in terms of rule 30 is granted and the application for leave to appeal and request for reasons are set aside as an irregular step;
 - b) The RAF is ordered to pay the cost of this application on the attorney and client scale.
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JUDGMENT

NEUKIRCHER, J

[1] Before me serves the following:

- a) a request for reasons for judgment dated 2 November 2023;
- b) an application for leave to appeal dated 2 November 2023 filed by the defendant (the RAF); and
- c) a Rule 30 application to set aside the application for leave to appeal.

[2] Unfortunately, the delays in hearing were caused by a combination of me being on long leave and miscommunications regarding the filing of these documents. The availability of the parties' representatives also played a role in these 3 applications only being heard on 20 September 2024.

Background

[3] In order to give context to this matter, the background is important:

- a) the plaintiff served and filed her summons on 17 March 2020. She acts on behalf of her minor child who was injured on 16 January 2014 at the age of 6;
- b) the minor child suffered serious injuries including a moderate traumatic brain injury. Her overall WPI was 30%. She also had several orthopedic injuries. The minutiae of the minor child's injuries are not relevant for the purposes of this judgment;
- c) despite proper service being effected on the RAF, it failed to enter an appearance to defend;
- d) it also failed to get out of its starting blocks when plaintiff served an interlocutory application for permission to set the matter down for hearing. An order to this effect was granted by Davis J on 12 January 2022;
- e) the plaintiff filed all her expert reports and served all on the RAF – these were also met by a deafening silence;

f) the Notice of Set Down that was served on the RAF was similarly brushed off.

[4] Thus, when the matter served before me in the Trial Default Judgment Court on 27 July 2022, the plaintiff had jumped through every hoop set up not just in terms of the Uniform Rules, but also the Practice Directives of this division - all of these were met with deafening silence from the RAF.

[5] Thus, on 27 July 2022 after considering the papers and hearing submissions, I granted an order in terms of which, inter alia, I ordered the RAF to pay to plaintiff an amount of R5 600 129.00 in respect of the loss of earnings component of her quantum claim. The order was served on the RAF on 31 August 2022.

[6] On 3 July 2023 the plaintiff issued a writ of execution (the writ) which was followed up with a Notice of Attachment on 17 July 2023. On 20 October 2023 an application to suspend the writ was served by e-mail which plaintiff opposed on 27 October 2023 - but this application was never proceeded with. Instead, on 2 November 2023 a request for reasons and an application for leave to appeal was served on the plaintiff - this despite advice to the contrary by the RAF's attorney.¹

[7] On 20 November 2023, the plaintiff then served a Notice in terms of Rule 30 to set aside the application for leave to appeal as an irregular step. The basis of the Rule 30 notice is that the order granted by default is not susceptible to an appeal. On 12 December 2003, when the requisite 10 day period had lapsed, the plaintiff served her Rule 30 application to set aside the RAF's application for leave to appeal.

[8] Thus, I convened a formal hearing on these issues.

[9] I pause to mention that none of the above facts were placed in dispute by the RAF. Importantly, what was conceded by RAF in argument was that:

¹ The State Attorney

- a) the RAF sat supine after it was served with the court order until the Writ was served;
- b) that despite the RAF imposing a 180 day payment rule, as opposed to the 14 days set out in the Road Accident Fund Act 56 of 1996², it took no steps at all until the Writ was served.

[10] What is even more puzzling is that, from the bar, I was informed that the reason that the RAF suddenly sought leave to appeal one year and four months after the order was granted, was that the RAF had obtained the minor child's school reports which indicated that, despite the original prognosis³, she was doing "well" at school.

[11] Interestingly enough, none of this was placed before me in an affidavit opposing the Rule 30 application. Nor did the RAF bother to seek leave to introduce new evidence - this was also, in effect, conceded when it was conceded that the RAF's new information was also not before me at the time that default judgment was granted.⁴

[12] Instead, the RAF sought to rely on the judgment of Wright J in *Road Accident Fund v Mogorosi*⁵ (*Mogorosi*) where, in similar circumstances, leave to appeal was granted. But an analysis of that case reveals two important differences:

- a) in *Mogorosi*, the RAF initially defended the action "but later chose to stop defending the action"⁶ - in casu the RAF's inaction was manifest and deafening;

² S17(3)(a) "No interest calculated on the amount of compensation which a court awards to any third party by virtue of subsection (1) shall be payable unless 14 days have elapsed from the date of the courts relevant order."

³ That she had cognitive defects as a result of the brain injury, would obtain a matric and then be absorbed into the work market and NQF 4, instead of the NQF 7 pre-morbid postulation

⁴ *Bechan and Another v SARS Customs Investigations Unit and Others* 2024 (5) SA 1 (SCA) par 22: "It is a well-established general principle that this Court decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances that came into existence afterwards."

⁵ Case No 2020/1067; Gauteng Local Division, Johannesburg (16 January 2024)

⁶ Judgment at para 1

b) in *Mogorosi*, the RAF brought an application for condonation for the late filing of the leave to appeal in which the latest school reports were mentioned (although there was no application for the admission into evidence of these new documents) – in casu, there is no such application(s) before me. Instead, this information was proffered from the bar.

[13] Thus, *Mogorosi* is distinguishable on the facts.

[14] The plaintiff sought to rely on the judgment of Wilson J in *Lee v Road Accident Fund (Lee)*⁷ where Wilson J set aside the application for leave to appeal as an irregular step. In *Lee*, the RAF failed to enter an appearance to defend “despite being given every opportunity to do so”⁸. It accepted liability for the plaintiffs proven losses but failed to take any further action with regards to the quantum. It also failed to appear at the quantum hearing which saw an order of ± R13 500 000.00 awarded against it on 3 March 2022. After much to-ing and fro-ing between the RAF and the plaintiff’s attorneys, on 10 February 2023 the RAF filed an application for leave to appeal - this was 11 months after judgment was granted.

[15] After discussing the judgments in *Pitelli v Everton Gardens Projects CC*⁹ (*Pitelli*) and *Moyana and Another v Body Corporate of Cottonwood and Others*¹⁰ (*Cottonwood*), Wilson J declined to follow *Cottonwood* and followed the *Pitelli* judgment. In my view, that position is correct especially in circumstances where the RAF has abjectly failed to raise its hand at all.

[16] In *Pitelli*, a unanimous court held that a court order is not appealable until it becomes final and it does not become final if it is capable of rescission. In my view, this does not mean that it will be rescinded - it simply means that a rescission application is a competent process.

⁷ 2024 (1) SA 183 (GJ)

⁸ *Lee* at para 2

⁹ 2010 (5) SA 171 (SCA)

¹⁰ [2017] ZAGPJHC 59 (17 February 2017)

[17] In *Cottonwood*, the Full Court¹¹ stated that it was not persuaded that the decision in *Pitelli* was correct as a party who “may have been in willful default, or in great danger of being found to have been so”¹² should be allowed to take the matter on appeal rather than explain their default.

[18] But I can put it no better than Wilson J¹³:

“[18] Pitelli makes it clear that what matters is the availability of rescission in principle, not whether the party seeking to rescind an order is likely to succeed. Whatever view takes of the wisdom of that approach, it is binding on the High Court. It was not open to Gautschi AJ to depart from it simply because he thought it was wrong. Nor is that cause open to me.

[19] For what it is worth, though, I think that Pitelli is correct. It is no argument against its correctness that Pitelli may make it harder for a party who was in wilful default of appearance to challenge an order granted in their absence. But I think the decision in *Cottonwood* overstates that problem in any event. It has long been accepted that, in a common law rescission application, a weak explanation for being in default of appearance can be “cancelled out” by a strong defence on the merits (*Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA), paragraph 15). Similarly, in an application under Rule 42, an applicant’s wilful default will not save an order to which the respondent was not procedurally entitled in the first place (*Lodhi 2 Properties Investments CC v Bondev Developments* 2007 (6) SA 87 (SCA), see especially paragraph 27). The principles applicable to rescission applications are supple enough, in my view, to allow a court to set aside an order that it should never have granted, even if the applicant’s excuses for not having turned up to court turn out to be inadequate.”

[19] In this case it is clear why the RAF filed an application for leave to appeal sixteen months after the judgment was granted: it was to suspend the operation of

¹¹ Per Gautschi AJ

¹² *Cottonwood* at para 15

¹³ In *Lee*

the order of 27 July 2022 and thus suspend the Writ and thereby prevent the payment of the award to plaintiff. This was to obviate the necessity of bringing an application in terms of Rule 45A to suspend the writ pending a rescission application in which the RAF would have been obliged to set out the reasons for not only its default, but its *laissez-faire* conduct.

[20] In *Road Accident Fund v Kruger*¹⁴ Basson J considered an application for rescission where the RAF failed to enter an appearance to defend but brought an application for condonation together with the rescission application. Therein she refers to *Road Accident Fund v Ngobeni obo Phelela*¹⁵ Where the following was stated:

“[1] The woes of the Road Accident Fund ('the RAF'), whether it be financial or administrative, are well known within the legal fraternity, and probably beyond. They are well documented in several cases that have been handed down in the recent past. Although their exact details are irrelevant, they are easily found by way of a cursory search. In this division, at least, these have also been one of the reasons for an entire revamp of the trial practice directives relating to matters in which the RAF is involved. This particular matter is symptomatic of these challenges the RAF has had to contend with recently. They have blighted the road accident litigation landscape like the bubonic plague of old and, no doubt left a trail of destruction in the wake.”

[21] In casu, that is precisely what has occurred.

[22] In my view, the Rule 30 application is well founded and, given the reasons *supra*, it should be granted. I emphasize that the merits upon which the leave to appeal and reasons for judgement were sought were not relevant.

[23] The fact is that the RAF has been dilatory in every single aspect of this matter, from failing to enter an appearance, to waiting for approximately four months after the Writ was served before filing its application for leave to appeal. The dilatory

¹⁴ Gauteng Division, Pretoria case no 46442/21 (13 September 2024).

¹⁵ (35926/17) [2022] SAGPPHC 866 (18 November 2021) at para 1

conduct must also follow it as regards the issue of the reasons for judgment. In this regard, Rule 49 (1) provides as follows:

‘(1)

(a) When leave to appeal is required, it may on a statement of the grounds therefor

be requested at the time of the judgment or order.

(b) When leave to appeal is required and it has not been requested at the time of

the judgment or order, application for such leave shall be made and the grounds therefor shall be furnished within 15 days after the date of the order appealed against: Provided that when the reasons or the full reasons for the court’s order are given on a later date than the date of the order, such application may be made within 15 days after such later date: Provided further that the court may, upon good cause shown, extend the aforementioned periods of 15 days.”

[24] It is clear that neither the request for reasons, nor the application for leave to appeal, were filed within the stipulated time period. It is also clear that there is no application for condonation, nor is there an application for an extension of time. There is therefore nothing before this court to consider. In *Lipschitz NO v Saambou-Nasionale Bouvereniging*¹⁶ it was stated that where it was not possible to comply with the time periods set out in Rule 49, an application for extension of time must be made – there is none before me.

[25] The time periods set out in Rule 49 have all an obvious intention: to ensure that, once lapsed, a litigant can be secure (insofar as is possible) in the fact that the litigation has been finalized. Were a disgruntled party simply entitled, as of right, to re-open litigation years after it had been given notice of an order granted against him/her/it, it would open the floodgates: old litigation would be revived, and an already overburdened justice system overwhelmed with unmeritorious litigation. That can never be in either the interests of justice or in public interest.

¹⁶ 1979 (1) SA 527 (T): where the judge handed down an order and stated that reasons would be furnished later, the result of which was that the appeal could not be noted within the requisite period

[26] Thus, in my view, the request for reasons must follow the same path as the application for leave to appeal: the request for reasons was filed to form the basis of the application for leave to appeal. That is to be set aside, and therefore with it, the request that forms its basis.

[27] In my view, the RAF's conduct must be frowned upon and is deserving of a punitive cost order.

Order

[28] The order I make is the following:

- c) the application in terms of rule 30 is granted and the application for leave to appeal and request for reasons are set aside as an irregular step;
- d) the RAF is ordered to pay the cost of this application on the attorney and client scale.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 31 October 2024

For the applicant	:	Ms K Sibran
Instructed by	:	State Attorney
For the respondent	:	Adv MI Thabede
Instructed by	:	Nkwane Attorneys Inc
Matter heard on	:	20 September 2024
Judgment date	:	31 October 2024