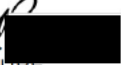


IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No: 34591/2020

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED.</u>
	
DATE	SIGNATURE

In the matter between:

MOSES KIM CANDICE

PLAINTIFF

and

ROAD ACCIDENT FUND

DEFENDANT

JUDGMENT - LEAVE TO APPEAL

PIENAAR, AJ

Introduction

[1] This is an application for leave to appeal against an order of this court handed down on 1st November 2024.

[2] On 22nd January 2025, the day of the appeal hearing, the defendant filed their condonation for the late filing of the intention to oppose. The applicant did not object to the respondent's late filing of the notice of intention to oppose the leave to appeal.

[3] As a result, the court granted condonation for the late filing of the intention to oppose.

Background

[4] This matter was on the default judgment roll on 3rd September 2024 which was standing down until 6 September 2024. The reason why this matter was standing down is for the Respondent to prepare and bring an application for condonation or to make a fair and reasonable offer for the Plaintiff.

[5] On 6 September 2024 this matter proceed by way of default judgment with no appearance of the Respondent. The Court refused the default judgment application, because there was no proper application for default judgment served on the Respondent (RAF).

Applicant's submissions

Counsel for the applicant, Adv Zidel SC submitted as follows:

- [6] Plaintiff Counsel, referred and read to the Court , Rule 31(4), which is the applicable rule with regards to a default judgment application. Rule 31(5) do not apply here.
- [7] Rule 31(2) and Rule 31(4) is the applicable Rule for a default judgment application.
- [8] Adv Zidel (SC) further reported that he has not seen the revised consolidated practice directive 1 of 2024 as amended on 12 June 2024.
- [9] Counsel submitted the Supplementary Heads of Argument via email on 22nd of January 2025, after the hearing had taken place. As the Defendant did not have the opportunity to address the court regarding these Supplementary Heads of Argument, the Court is unable to accept the aforementioned Heads of Argument submitted after the hearing. Counsel submitted the Heads of Argument on 22nd of January 2025, without the permission of the court.

Respondent's submissions

- [10] The State Attorney, Mrs Davis apologized for not being at court on 6th September 2024, as she was on maternity leave.
- [11] Mrs Davis further reported that she consented to the judgment. Mrs Davis referred the court to the revised consolidated practice directive 1 of 2024 as amended on 12 June 2024, pg 00-117, paragraph 5 which reads as follows:
“A notice of motion informing the RAF of the bringing of this application

together with a founding affidavit fully setting out the grounds on which application for default judgment is being sought has been uploaded to the Caselines” [1]

[12] Mrs Davis reported that Rule 31(5) is the correct rule to apply to bring a default judgment application. The court has a discretion to make a decision.

[13] Mrs Davis further submitted to the court that the attorney should be personally liable for the costs, or that the costs should be awarded on an attorney and client scale.

The Law

[14] In terms of Section 17(1) of the Superior Courts Act No 10 of 2013 Act, [2] there are two grounds upon which leave to appeal can be granted.

First, the Judge who granted an order must be of an opinion that the appeal would have a reasonable prospect of success. [3] It goes without saying that there is always a possibility of another judge reaching a different conclusion. However, that is not the test. The test is a subjective view of the judge who decided the matter of whether the appeal would have a reasonable prospect of success, and not “may” or “could” have a reasonable prospect of success.

Is the decision not to give judgment by default appealable?

[15] It is important to note that this Court had not given a default judgment sought by the applicant but refused to give a default judgment. It can also not be said that this Court had issued an order granting an absolution from the instance. Therefore, the judgment has the same effect as if it were removed from the roll.

[16] The veritable question to be addressed in the present application is whether the refusal to give default judgment is appealable or not.

[17] The question is akin to the question whether refusal to grant a summary judgment is appealable or not. In *Luke Jim v Active Power (Pty)Ltd* [4] the appeal Court of Mpumalanga Division of the High Court of South Africa, as beacons by the erudite Ratshibvumo AJ and Langa AJ, guided by *Kgatlhe v Metcash Trading Ltd* [5] held as a general rule, an order refusing a summary judgment is not appealable for reason that it is an Interlocutory order that does not have the effect of a final order. *Mutatis mutandis*, this Court reaches a conclusion that a refusal to give a default judgment is Interlocutory in nature and has no final effect, thus unappealable.

[18] In my view, there is nothing preventing the Plaintiff from placing this matter back on the default judgment roll in accordance with the Judge President's directives, with a proper default judgment application and service on the defendant.

ORDER

1. The application for leave to appeal is refused with no order as to costs.



M PIENAAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

APPEARANCES:

For the Plaintiff : Adv Zidel SC
Instructed by : De Broglio Attorneys Inc
Ref: M4060/Prishani Singh/Moses
email: prishani@onlinelaw.co.za

For Defendant : Mrs Davis
Instructed by : Road Accident Fund
The State Attorney
Link no: 4981943
Date of hearing : 22 January 2025
Date of judgment : 25 March 2025

[1] Caselines 00: Opposition of leave to appeal, item 2, pg 00-117

[2] 10 of 2023

[3] Section 17(1)(a)(i) of the *Superior Courts Act*

[4] Unreported judgment case number A121/2018 dated 21 June 2019

[5] 2004 (6) SA 410 (T) at 416 C