IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

SIGNATURE DATE: 26 September 2023

Case No. 22812/2020

In the matter between:

ALEXANDRA LEE Applicant

and

ROAD ACCIDENT FUND Respondent

Summary

Practice – Appeals – A judgment or order granted in default of appearance is not appealable – An application for leave to appeal such a judgment or order is an irregular step – The contrary decision in *Moyana v Body Corporate of Cottonwood* [2017] ZAGPJHC 59 (17 February 2017) is wrong, and should not be followed.

JUDGMENT

WILSON J:

1 The applicant, Ms. Lee, wanted to be an actuary. She was shortly to commence her studies towards qualifying as one when, on 10 January 2019, she was in a car crash. During the collision, she suffered a brain injury which put paid to her ambitions. On 21 October 2020, Ms. Lee instituted an action

for her damages arising from the collision. She brought the action against the respondent, the Road Accident Fund ("RAF"), which is the statutory insurer of the vehicles that caused the collision. The RAF accepted liability for Ms. Lee's proven losses on 6 November 2020.

The default judgment

2 Ms. Lee's legal representatives then started to prepare Ms. Lee's action for a trial to determine the value of her losses. Despite being given every opportunity to do so, the RAF failed to give notice of its intention to defend the action. Nor did it place on record anything that took issue with the quantum of loss Ms. Lee claimed. On 7 September 2021, Nel AJ directed that the matter should proceed by default.

3 On 3 March 2022, my sister Justice Lenyai, then sitting as an Acting Judge, heard evidence of Ms. Lee's loss, and assessed her damages at just under R13.5 million. Despite the facts that it had sought to settle the general damages portion of Ms. Lee's claim (in an amount significantly below the amount Lenyai AJ ultimately awarded), and that it had not yet fully engaged with Ms. Lee's claim for loss of earning capacity (which made up the bulk of her claim), the RAF chose not to appear at the hearing.

4 For a while, it appeared lost on the RAF's employees that judgment had been taken against it. The RAF's employees continued to invite Ms. Lee to respond to its offer on general damages, and to attend appointments with experts that the RAF had employed to assess the quantum of her loss of earning capacity. Each invitation was met by Ms. Lee's attorney's polite but

firm insistence that Ms. Lee had obtained a court order and that she intended to enforce it.

5 By 6 May 2022, it appears to have dawned on the RAF that there was a judgment against it. The RAF wrote to Ms. Lee's attorney to ask for an updated set of bank details. On 8 June 2022, in response to Ms. Lee's attorney's further entreaties for satisfaction of the default judgment, the RAF appeared to accept that it was liable for the amounts Lenyai AJ had awarded in respect of general damages and past medical expenses (payment of those amounts had been "requested" internally), but the amount awarded for loss of future earning capacity (itself around R12 million) had apparently been referred to the RAF's "inhouse legal advisors".

6 There then followed a confusing litany of communications from several RAF officials and the State Attorney. The RAF first assured Ms. Lee's attorney that payment to Ms. Lee of all of the amounts due under Lenyai AJ's order had been "requested". The State Attorney then assured Ms. Lee's attorney that the RAF accepted that it had to comply with Lenyai AJ's order, but that he was in the process of producing a memorandum formally advising the RAF of that reality before the payment could be processed. The RAF then sought to induce Ms. Lee to abandon some of the amount Lenyai AJ awarded. When Ms. Lee refused, the RAF again assured her that payment would be made in terms of the court order. When the RAF did nothing to honour that undertaking, Ms. Lee's attorney brought an application to compel the "loading" of the payment due to Ms. Lee onto the RAF's payment system.

7 That drew a further response from the State Attorney. On 20 December 2022, Mr. Coetzee, who appeared for the RAF before me, informed Ms. Lee's attorney that the RAF would be opposing the application to compel. He also said that the RAF had resolved to seek to rescind Lenyai AJ's order, more than 8 months after it was made. Ever the model of patience, Ms. Lee's attorney agreed to remove the application to compel payment from the roll in order to allow the RAF to bring its recission application. On 10 January 2023, Mr. Coetzee said that a rescission application would be brought by 27 January 2023.

The application for leave to appeal

8 The rescission application was never instituted. On 27 January 2023, Mr. Coetzee wrote to Ms. Lee's attorney, saying that he "had managed to find a judicial precedent" which, in his view, had a "significant impact" on the RAF's approach. It appears from Mr. Coetzee's letter that he had informed his principals of what he clearly regarded as a critical precedent, and that he was awaiting further instructions in order to progress the matter. He promised to revert to Ms. Lee's attorney by no later than 30 January 2023.

9 Predictably, Mr. Coetzee did not revert by 30 January 2023. Instead, on 10 February 2023, the RAF filed an application for leave to appeal Lenyai AJ's decision, almost a year after it was handed down. Ms. Lee's attorney took the view that the application for leave to appeal was an irregular step, and now applies to me to set that step aside. The RAF says, however, that it is open to a party to appeal an erroneous order granted in their absence. What makes an order appealable, the RAF argues, is that the order is wrongly

granted, not that it is granted in the face of opposition from the person to whom it applies.

Is the default judgment appealable?

10 Ms. Lee's case is based squarely on the Supreme Court of Appeal's decision in *Pitelli v Everton Gardens Projects CC* 2010 (5) SA 171 (SCA) ("*Pitelli*"). There, Nugent JA, writing for a unanimous court, held that a court order is not appealable until it becomes final. A court order does not become final if it is rescindable. It follows that an order that can be rescinded is not appealable.

11 Pitched at that level of generality, the decision in *Pitelli* seems hard to reconcile with earlier decisions of the Appellate Division that appear to contradict it. In *Tshivhase Royal Council v Tshivhase* 1992 (4) SA 852 (A) at 865B, for example, the Appellate Division had previously decided that an appeal against an erroneous order could be pursued simultaneously with a rescission application under Rule 42 (1) (c), which deals with the rescission of order granted as a result of a mistake common to the parties.

12 But the tension is more apparent than real. In *Pitelli*, Nugent JA was only concerned with orders granted by default. Understood as confined to that class of cases, the principle set out in *Pitelli* does not, as far as I can see, present any precedential difficulties. It seems to me, in fact, to be a perfectly sensible way of dealing with challenges to orders granted in the absence of one of the parties. The difficulty with taking such orders on appeal is that the

case that would have been made by the party against whom the order was given forms no part of the appeal record. It cannot therefore be presented to the court of appeal, except perhaps by way of an application to introduce new evidence.

13 Whether or not such an 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. 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 rescission application would have been.

14 Neither of these courses of action is consistent with the hearing of an appeal in the true sense. The decision in *Pitelli* recognises this. A court of appeal ought generally only to intervene when the 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 (see *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) para 25). But that need not concern me here.

15 On the decision in *Pitelli*, then, Lenyai AJ's order is plainly not susceptible to appeal. 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.

The *Cottonwood* Decision

16 Mr. Coetzee submitted that *Pitelli* is not binding on me. He argued that the decision in *Moyana v Body Corporate of Cottonwood* [2017] ZAGPJHC 59 (17 February 2017) ("*Cottonwood*") departed from *Pitelli*, and that I am free to do so as well. In *Cottonwood*, Gautschi AJ (with whom Ismail J agreed) had to decide whether a party could waive their right to rescind an order by bringing an appeal against it. This is what Mr. Coetzee tells me the RAF has done in this case. Such a waiver would obviously be impossible if *Pitelli* is correct, and there is no right of appeal against a rescindable order in the first place.

17 Gautschi AJ decided, in the context of an appeal from the Magistrate's Court to this court, that such a waiver is possible. What is more, Gautschi AJ stated that he was "not persuaded" that Nugent JA's decision in *Pitelli* was correct. A party who was (or who is likely to be found to have been) in wilful default of appearance, Gautschi AJ said, should be allowed to take a matter on appeal rather than explain their default (see *Cottonwood*, paragraph 15).

18 *Pitelli* makes clear that what matters is the availability of recission in principle, not whether the party seeking to rescind an order is likely to succeed. Whatever view one 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 that it was wrong. Nor is that course 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.

No other reason to permit an appeal against a rescindable order

20 That leaves only one other procedural advantage that appeals generally have over recission applications: the automatic suspension of the order appealed against. There are plainly good reasons why that procedural advantage ought only to benefit those who have actually participated in the proceedings that led to the order being challenged on appeal. In this Division, the benefit only accrues to an applicant who has brought their

application for leave to appeal in time, or whose failure to do so has been condoned (see *Panayiotou v Shoprite Checkers (Pty) Ltd* 2016 (3) SA 110 (GJ), paragraphs 11 to 15).

21 In any event, a party that finds themselves subject to an order granted in their absence – and that they must consequently rescind rather than appeal – can ask a court to exercise its powers under Rule 45A to suspend the execution of the order while the rescission application is heard. A court will generally grant that request if to do otherwise would result in irreparable harm. For example, in a case where an eviction order is granted against a community of poor and vulnerable people who could not muster the resources necessary to defend the main application, and who now face a real risk of homelessness if the order is executed, there will generally be no reason not to suspend the execution of the eviction order while it is rescinded or varied to the extent necessary to prevent homelessness – especially as, in those circumstances, the court granting the order had no power to evict in the first place (see *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* [2010] 4 All SA 54 (SCA), paragraphs 14 to 16). The same goes for other types of cases in which execution may lead to irreparable harm.

22 Finally, Mr. Coetzee contended that the arguments that the RAF intends to raise on appeal are not “defences” in the true sense, but reasons why Lenyai AJ’s judgment was wrong on its own terms. These types of arguments, Mr. Coetzee submitted, cannot be made on rescission. They can only be made on appeal.

23 I do not think any of that follows. If Lenyai AJ would not have granted the order she did had she heard the specific evidence or argument the RAF intends to place before the court if her order is rescinded, then her order should probably be rescinded under the common law. If, alternatively, the evidence Lenyai AJ heard in the default judgment proceedings could not have sustained the order she made, then Ms. Lee was not "in terms of the Rules entitled to the order sought", and the order should be rescinded under Rule 42 (see *Lodhi*, paragraph 27). These two situations, it seems to me, accommodate all the types of argument that the RAF could possibly advance on appeal.

24 For all these reasons, an order granted in a party's absence is not appealable, because it is rescindable. It follows from this that a party that seeks leave to appeal against an order granted in their absence takes an irregular step that falls to be set aside. Mr. Coetzee very fairly conceded that Lenyai AJ's order is susceptible to rescission in principle. That concession was enough to put an end to the RAF's right to seek leave to appeal against it. In addition, as I have sought to explain, there is no good reason why the RAF should be able to appeal Lenyai AJ's order, and no real procedural advantage to it being able to do so.

Order

25 Accordingly –

25.1 The respondent's application for leave to appeal against the default judgment of Lenyai AJ dated 3 March 2022 is set aside as an irregular step.

25.2 The respondent is directed to pay the costs of this application, including the costs of two counsel, where two counsel were employed.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 26 September 2023.

HEARD ON:	28 August 2023
DECIDED ON:	26 September 2023
For the Applicant:	N Maritz SC (Heads of argument drawn by G Goedhart SC and H Cassm) Instructed by Joseph's Inc
For the Respondent:	D Coetzee Instructed by the State Attorney