

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE Number:19835 /2021

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES:
YES/NO
(3) REVISED: YES/NO

2024

In the matters between: -

ADVOCATE SAYED N.O

FIRST APPLICANT

(CURATOR AD LITEM)

And

ROAD ACCIDENT FUND

FIRST RESPONDENT

LEAVE TO APPEAL JUDGMENT

BAQWA, J

Introduction

[1] This is an application for leave to appeal against an order of this court handed down on 27 February 2023. Subsequent to that order this court delivered its reasons for judgment upon being requested to do so by the applicant.

The Law

[2] Section 17 (1) of the Superior Courts Act No 10 of 2013 (The Act) provides:

“Leave to appeal may only be given when the judges concerned are of the opinion that;

- I. The appeal would have a reasonable prospect of success;
- II. There is some compelling reason why the appeal should be heard, including conflicting judgments on the matter:

Background

[3] Adv Sayed No (*Curator-ad-litem* for KJD Lee Swarts) claims for damages subsequent to a motor-collision which occurred on 23 February 2019 when she was 11 years old. The plaintiff lost her mother in the accident.

[4] Merits were conceded 100% in favour of the plaintiff and it was agreed between parties that the matter would proceed on the issue of loss of earnings, general damages as well as future medical expenses.

[5] Only the plaintiff appointed experts and the order made at the judicial case management meeting, the experts reports of the plaintiff were deemed to be admitted as the defendant was in a default of filing its own reports within three months of service of the form 10.

Plaintiff's injuries

[6] In terms of the 2022 report of the off the orthopaedic surgeon, doctor Engelbrecht, the plaintiff suffered the following injuries:

6.1 A fracture of humerus

6.2 Open/compound fracture of the right femur

6.3 Laceration of the scalp

6.4 Abrasions of the left knee

[7] She underwent a debridement/external fixator to the right femur. The left humerus fracture was treated conservatively with a plaster of paris.

Expert Evidence (Reports)

[8] The plastic surgeon, Dr Pienaar foresees improvement on only 30% with treatment and states that she would retain considerable scarring which would not lend itself to further surgical improvements.

[9] Dr Pienaar further notes that the serious permanent scarring and disfigurement affects the quality of life of the plaintiff and would do so in future and that it affects her appearance and dignity which would in turn cause her social anxiety and embarrassment.

[10] The expert also qualified her for general damages in terms of the narrative test.

[11] According to Dr Botha (Specialist Physician), the patient underwent a CT-scan which though not revealing any underlying pathology explained intermittent discomfort and pain as a function disorder associated with psychological consequences of the accident.

[12] Michael Sision, the clinical psychologist noted as reported by the grandmother that the patient struggles to concentrate and is forgetful and that she forgets her school books and homework. She derives less life's pleasure and has socially withdrawn into the house. She also displayed anxiety when travelling in a motor vehicle,

[13] The clinical psychologist opines that her trauma and significant loss will play out in distractedness and forgetfulness influencing her cognitive functioning and academic performance and that this will impact her capacity to hold and assimilate new learning information.

[14] The neuro psychologist, Ingrid Jonker concludes that from the above information the plaintiff has been left vulnerable as a result of the accident which in turn affects her overall functioning.

[15] With regard to her scholastic functioning, she notes that her grade 5 school report in 2020 demonstrated mostly poor results in which the plaintiff achieved below 40% in maths, science, history, as well as geography. Her class teacher had complained about her forgetfulness.

[16] Regarding premorbid career progression, the industrial psychologist postulates that plaintiff would have progressed to reach her career ceiling at Paterson D5 level by the age of 45. He further states categorically that

her premorbid career path will not prevail which leaves her at the unskilled career path level. This means that there she will reach her career ceiling learning a basic salary commensurate with Paterson B1/3 median level by the age of 45.

[17] Taking into account the summary of her loss of income in the actuarial report in which contingencies of 20% and 35% were applied to the value of income but for the accident and the value of income even regard to the accident, I accepted that the net future loss at R8 899 575 was the appropriate one not only in light of the facts set out above but also the fact that the claim is affected by the Road Accident Fund Amendment Act 19 of 2005. The annual loss at the time of the accident amounted R266 200 per annum. The limit is accounted for in the calculations. Due to the limitation of the losses, the loss of income reduces to the said amount. See *Southern Association Insurance Ltd v Bailey*.¹

[18] In *Bailey*, the court quoting Koch said;

“what's is described SA sliding scale is used under which it is allocated a 1 / 2 percent for year to retirement age, i.e. 25% for a child, 20% for a youth and 10% in the middle age”.

¹ 2015 (2) 2 1997 at 107 par 19..

[19] The uncontested postulation of the industrial psychologist was incorporated in the calculation by the actuary, Mr Jacobson. In my view, the calculation was reasonable and fair and on that basis, I accepted it.

[20] Regarding general damages the courts approach as stated in *Protea Assurance Company Ltd vs Lamb*² is that a judge has a large discretion to award what the judge, in the circumstances considers to be fair and adequate compensation to the injured party for the sequelae of the injuries and guided by the evidence, expert reports and the law, I assessed these at R850 000 see *Janse Van Rensburg v Road Accident Fund*.³

[21] A total amount of R9 749 575.00 was awarded to the plaintiff and an appropriate order was granted.

Application for Leave to Appeal

[22] Subsequent to the order, I received a request for reasons for the order from the applicant defendant. These were prepared and dispatched on or about 31 October 2023.

[23] Notably, the grounds for application for leave are set out on an incorrect basis in alleging that an order was made with regard to liability despite the fact that it was not in issue. There was no order regarding liability.

² 1971 (1) SA 503 (A).

³ [11522\ 2011] [2014] ZAGPJAC 71 [4 April 2014].

[24] The applicant also disputes the total amount awarded for the loss of earnings and general damages without setting out the basis therefor.

[25] It is common cause that the order was granted on 27 February 2023 and that the application for leave is dated the 17 October 2023. Even if applicant would count the days with reference to the reasons for judgement those are dated 31 October 2023. That would necessitate the filing of an application for condonation for the late filing of the application for leave to appeal which had not been filed on the date of hearing of the application.

[26] On that date, I requested counsel for both parties to address me regarding the issue of the appealability of judgments given against the RAF in default of the appearance. It is necessary to deal with this as a preliminary issue before considering condonation or merits of the application for leave to appeal.

Appealability

[27] On the day of trial, the applicant/defendant (applicant) was represented by the State Attorney who chose not to appear when the matter was called.

The respondent submits that the default of appearance by defendant ought to be considered as wilful default for purposes of rescission.

[28] The respondent submits further that the applicant's stratagem around the inconvenience of explaining their wilful default for the purpose of rescission has been to launch this application for leave to appeal.

[29] Applying for leave to appeal instead of applying for rescission in a case such as the present application is an irregular step which ought not to be allowed. I can do no better than make a reference to a decision of Wilson J of this division in the matter of *Lee v Road Accident Fund*,⁴ where he states as follows;

“[13] 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 the 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 the first and final instance (unless a further appeal is, exceptionally allowed), or remitting the case to the court

⁴ (22812/2020) [2023] ZAGPJHC 1068 2024(1) SA 183 (GJ)26 September 2023 par 13-15.

a quo to be decided again, which is exactly what the effect of the 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 where the proceedings in the court below are complete. For as long as the court a quo can, in principle, after or reconsider its order, an aggrieved party's remedy lies in there.....

[15] On the decision in *Pitelli*, then, Lenyai AJ's order (as she then was) 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 common law. It follows from *Pitelli* that the attempt to appeal rather than rescind the order is irregular.”

[30] Even though the respondent seemed to understand the principle referred to above in both in *Lee and Pittelli* ⁵ judgments it seems to miss the point where *Pitelli* specifies the very narrow grounds upon which an appeal would be allowed as an exception, namely, where the court a quo has made a wrong order where there is lack

⁵ 2010 [5] SA 171 [SCA].

of jurisdiction or in the case off an exception. Such was not the case in the present application, *caedit questio*. The respondent seeks to apply *Pittelli* incorrectly.

[31] Further, the applicant seeks to argue that the application enjoys prospects of success. That question is otiose and I am satisfied that there are no such prospects.

Costs

[32] There are no grounds upon which the leave to appeal can be granted.

As suggested by the respondent, the applicant has engaged in dilatory tactics which ought to be justifiably met with costs on a punitive cost order.

Order

[33] In the result, I make the following order:

The application for leave is dismissed with costs on an attorney and client scale which will include costs off employment of one counsel.

SELBY BAQWA
JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Date of hearing: 28 March

Date of judgment: May 2024

Appearance

On behalf of the Applicants

Adv C Setlhako

On behalf of the Respondents

Adv K Strydom