

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF
GAUTENG LOCAL DIVISION,



SOUTH AFRICA
JOHANNESBURG

CASE NO: 2020/1067

1. Reportable: No
2. Of interest to other judges: No
3. Revised:

(Signature)
16 January 2024

In the matter between:

ROAD ACCIDENT FUND

Applicant

and

M[...], B[...] obo M[...], S[...]

Respondent

APPLICATION FOR CONDONATION AND FOR LEAVE TO APPEAL - JUDGMENT

– WRIGHT J

WRIGHT J

1. Young S[...] M[...] was born on 24 February 2014. He is now nine years old. On 25 September 2018, at the age of four, he was injured in a motor vehicle accident. His mother, Ms B[...] M[...] instituted action against the RAF, claiming damages in an amount of over R10 million arising out of the accident. The RAF initially defended the action but later chose to stop defending the action. The matter was allocated to me for trial by default on 14 October 2021.
2. I considered the evidence, particularly in the form of expert reports as confirmed by affidavits by the experts. My typed, signed judgment was emailed by my clerk, Ms Vukeya to both sides on the same day, 14 October 2021. In short, I postponed a claim for general damages for R1.6 million as I had no jurisdiction to consider the claim as the RAF had not yet taken a position on whether or not general damages were claimable. I ordered the RAF to pay some R4.6 million as damages for loss of earnings.
3. My order contains a numbering error in that there are two paragraphs numbered 6 and two paragraphs numbered 7. I apologise for this error. Nothing turns on the error.
4. On 22 February 2023, the RAF launched an application for leave to appeal. I learnt of this only in December 2023. Despite my efforts, it is a recurring problem that applications for leave to appeal take an unacceptably long time to reach me. As soon as I learnt of the present application I suggested a hearing over Teams

last month. Both sides preferred a hearing this month. Today, 16 January 2024 is an agreed date.

5. Before dealing with this particular case, I would like to make a few general remarks. A great many cases of this kind come before this Division. The workload for judges is heavy. Many road accident trials, set down for trial in the ordinary course and set down for trial by way of default judgment have come my way and that of other judges.
6. The number of cases dealt with by the RAF is enormous. Despite the RAF's heavy load, compounded by the difficulties of Covid and its lockdown, my experience is that the overworked RAF employees and representatives are helpful, reasonable and do the best they can in difficult circumstances. My practice is to request my clerk, Ms Vukeya to invite the relevant RAF employees or representatives to attend the hearing even where the RAF is not nominally defending the matter. Often, an RAF person appears at the hearing, usually a virtual hearing but not always and makes reasonable, helpful and constructive submissions, leading often to settlement but where not, to a more informed judgment. Plaintiffs' legal practitioners, also often working under difficult conditions, act likewise. This joint pooling of effort makes a judge's task a little easier.
7. My typed, signed reasons for my order are concise, perhaps even terse, but in my view they are adequate in the circumstances. Given the pace at which cases are allocated to judges, I request the reader to forgive the brevity. The reasons

given are the only reasons for my order. I can't now give further reasoning, as opposed to reasons, as I would be manufacturing reasoning to justify an earlier order.

8. The application for leave to appeal is dated 22 February 2023. The notice of motion includes a prayer for condonation for the late bringing of the application for leave to appeal. It is about fifteen months late.
9. The RAF has never brought an application to rescind my judgment. While it appears to want to rely now on documents like school reports not before me on 14 October 2021, there is no application for the admission into evidence of these new documents.
10. Mr Brett Phillips is the acting senior claims manager for the RAF in Johannesburg. He suggests in the founding affidavit that my award is too high. He does so with reference to school reports that were not before me on 14 October 2021. As there is no application for the admission into evidence of these documents, it would be wrong of me to take them into account.
11. Mr Phillips does not suggest that the RAF only became aware of my order any considerable time after it was emailed to the RAF on 14 October 2021. He seems to think that the relevant date is 18 October 2021, but nothing turns on the four days between 14 October and 18 October 2021.
12. In paragraph 32 of his affidavit, Mr Phillips says that the RAF elected not to ask me for reasons for my award "for purposes of not further delaying" the application

for leave to appeal. This allegation is not understood. My typed, signed reasons were emailed to the RAF on 14 October 2021.

13. Mr Phillips says that after receiving internal legal advice, the RAF concluded that my award was too high. He says that the RAF considered bringing a rescission application but “I also acknowledge that judgments dismissing applications launched by the applicant for rescission of default judgments are countless, not only in the above Honourable Court but also in the remainder of the High Courts of South Africa.” Mr Phillips’ honesty is refreshing but his pessimism, perhaps understandable, would not in a vacuum amount to acceptable reason for the considerable delay in the present case.

14. Mr Phillips says that his branch of the RAF was under the bona fide belief that it could not launch an appeal as my order was not final. He refers in his affidavit to the decision of the SCA in *Pitelli v Everton Gardens Projects CC (191/09) [2010] ZASCA 35 (29 March 2010)*. In *Pitelli*, the SCA drew attention to the dangers facing litigants who choose not to attend hearings. In short, litigants in certain circumstances may not appeal because the judgment is rescindable. On the other hand, a litigant who chooses not to attend a hearing may have difficulty persuading a court in a rescission application.

15. Mr Phillips says that the RAF then secured the school reports referred to above.

16. On 2 March 2022, the sheriff attempted to execute my order of 14 October 2021.

17. In the second week of February 2023, Mr Phillips instructed the State Attorney to launch the present application for leave to appeal. He says that the State

Attorney then “began to explore the possibility “that the RAF might be able to appeal rather than rescind.

18. There is no explanation at all as to why it took the RAF from 14 October 2021 to February 2023 to ask the State Attorney to look into the question. He refers to the decision in *Malema v Afriforum (89196/16) [2023] ZAGPPHC 11* of 20 January 2023 which he says “dampened” the possibility of appealing rather than rescinding.

19. Mr Phillips, in his affidavit, relies on the judgment in this Division of A Gautschi AJ, Ismail J concurring, in the matter of *Moyana v Body Corporate of Cottonwood*. The judgment is dated 17 February 2017. In a comprehensive and learned judgment, Gautschi AJ dealt with the judgment in *Pitelli* and had the following to say in paragraph 13 - “ Doubt was cast on this last principle in the case of *Pitelli v Everton Gardens Projects CC 2010 (5) SA 171 (SCA)*. That case involved a declaration and order to pay money in terms of section 424(1) of the Companies Act No 61 of 1973, made in the absence of the appellant. The appellant had sought a postponement of the application which was refused, whereafter the appellant’s counsel withdrew. The learned judge a quo then granted the orders that were sought in the application. The appellant filed an application for leave to appeal and later filed an application to rescind the order. They were heard simultaneously and both were refused by the court a quo. Nugent JA (writing for the court) stated the principle (at para [20]) that “for an order to be appealable it must have as one of its features that the order is final in its effect, by which I mean that it is not susceptible to being revisited by the court

that granted it ...". Nugent JA then took issue with that part of the *Sparks* decision which held that an order will become appealable when it is no longer rescindable by lapse of time, waiver or peremption (at para [30]). Nugent JA reasoned that the appealability of an order is not dependent upon the action or inaction of the litigant, but is rather dependent on the nature of the order, i.e. is not dependent upon what the litigant chooses to make of it. However, he pertinently indicated that it was not strictly necessary in that case to pronounce finally upon the view expressed in the *Sparks* case, and also pointed out that there were cases in both directions. He held that in that case the orders that were made were clearly susceptible to rescission and were not appealable, notwithstanding the fact that the appellant for rescission had failed. He pointed out that the refusal of the rescission was in theory appealable. "

20. In paragraph 14 of his judgment, Gautschi AJ held that "The decision in *Pitelli* that an order which is revisitable by the court a quo is not appealable, was necessary for the outcome of that case, and is therefore definitive. However, the aspect of whether a party could elect not to apply for rescission and thereby render the judgment final and appealable was expressly left open by Nugent JA and was in any event obiter. "

21. The apparent problem for the RAF now is that all the authorities referred to by Mr Phillips, prior to the Malema case are, he says, against an appeal. The Malema case, he says, is also against the RAF. But Mr Phillips does not say at all why nothing was done between 14 October 2021 and February 2023...

22. In my view, given the somewhat open nature of the authorities referred to above, the RAF has a reasonable prospect on appeal on the question of appealability.

23. On the merits of the appeal, the RAF has a reasonable prospect on appeal. An appeal court may come to a different conclusion even if the new documents are not before it.

24. While the explanation for the delay is not strong, there seems to have been a bona fide error within the RAF, regarding how to take the matter further and in the circumstances, the explanation, when considered with the questions of appealability and the merits, passes muster, if only just. It is in the interests of justice that an appeal be heard.

25. This matter does not require the attention of the SCA.

26. The RAF seeks an indulgence regarding condonation. However, the opposition to condonation was reasonable and accordingly each side should carry its own costs in the condonation application.

ORDER

1. The late filing of the application for leave to appeal is condoned with each side to carry their own costs in the condonation application.
2. The RAF is granted leave to appeal the order of Wright J of 14 October 2021.
3. Leave is to a Full Court in Johannesburg.
4. Costs in the appeal.

GC Wright

Judge of the High Court

Gauteng Division, Johannesburg

APPEARANCES

HEARD : **16 January 2024**

DELIVERED : **16 January 2024**

APPLICANT : **Ms J Mhlanga**

Instructed by **State Attorney**

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