



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: [N] |
| (3) | REVISED: [N]  |
| (4) | Signature:  Date: 18/10/24 |

CASE NO.: 34095/2020

In the matter between:

ROAD ACCIDENT FUND

Applicant/Defendant

and

RACHAEL STEPHANIE BILOGHO BI ONDO

Respondent/Plaintiff

JUDGMENT

Kumalo J

Introduction

- [1] This is an application for leave to appeal an order of this Court granted on 1 March 2023.

- [2] The Applicant is the Road Accident Fund which is the Defendant in the Court *a quo* and the Respondent is Ms. Rachel Stephanie Bilogo BI Ondo who was the Plaintiff in the Court *a quo*. For convenience, I will refer to the parties as they were in the Court *a quo*.
- [3] At the time of the hearing of the matter, the parties had previously dispensed with the issue of merits and agreed that the Defendant would be liable for 100% for the Plaintiff's proven damages.
- [4] The issues of general damages, loss of income and past and future medical expenses was dealt with.
- [5] Plaintiff had previously filed her expert reports and in terms of the Certificate of Trial readiness dated 10 February 2022, it was noted that should the Defendant fail to file its own expert reports, the matter will proceed based on the Plaintiff's expert reports and they will be deemed to have been admitted.
- [6] The notice of set down was served on the Defendant on 31 May 2022 and the import thereof will become apparent herein below.
- [7] I was advised by Ms. Strydom counsel for the Plaintiff on the day of the hearing that there was an attorney on record on behalf of the Defendant, but she would not be appearing in this matter as she has another matter. I was advised that she was engaged in another matter.
- [8] It is to be noted that this has almost become a daily occurrence where attorneys from the State Attorney's office would be double booked and advise that they would be attending other matters. The matter then proceeded on a default basis.
- [9] The Plaintiff had instituted action against the defendant for damages suffered as a result of a motor vehicle accident that occurred on the 24th of August 2018 at the premises of the Tshwane University of Technology.

- [10] Merits were previously conceded. The concession was recorded in the pre-trials held on the 1st of December 2021 and the 10th of November 2022 respectively. Further the pre-trial minute of 10 November 2022 recorded that the matter is ready to proceed on both the loss of earnings and general damages.
- [11] Whether the Defendant had given instructions regarding general damages is with respect of no consequence in the light of what is recorded in the minutes of 10 November 2022. Ms. Van Zyl of the State Attorney's office represented the Defendant during the said pre-trial conference when the parties agreed that the matter was ready for both loss of earnings and general damages. She clearly must have had apparent authority to represent the Defendant as the legal representative.
- [12] In *MEC for Economic Affairs, Environment & Tourism: Eastern Cape v Kruizenga and Another*^[3] this Court, dealing with the apparent authority of a legal representative to bind a client at a pre-trial conference convened in terms of rule 37 of the Uniform Rules, reasoned that:
- '... The proper approach is to consider whether the conduct of the party who is trying to resile from the agreement has led the other party to reasonably believe that he was binding himself. Viewed in this way it matters not whether the attorney acting for the principal exceeds his actual authority or does so against his client's express instructions. The consequence for the other party, who is unaware of any limitation of authority, and has no reasonable basis to question the attorney's authority, is the same. That party is entitled to assume, as the respondents did, that the attorney who is attending the conference clothed with an 'aura of authority' has the necessary authority to do what attorney's usually do at a rule 37 conference – they make admissions, concessions and often agree on compromises and settlements. In the respondents' eyes the State Attorney quite clearly had apparent authority.'*

- [13] This issue is addressed here in the light of the fact that the Defendant alleges that general damages were also dealt with when it had not considered same.
- [14] The expert reports submitted on behalf of the Plaintiff confirmed that she sustained very serious injuries. She fractured the C4 vertebra and there was body protrusion into the spinal column. She had several subluxation of level 5 of the neck with quadriplegia.
- [15] The orthopedic surgeon's report stated that additional to the injury at the C4 and C5 level, Plaintiff sustained an injury to her lumbar spine. He stated that it was a soft tissue injury and when he took x-rays of her back, he could see the muscle spasm in the lumbar spine coupled with some loss of lordosis, a loss of vertebral height in the lumbar spine.
- [16] She underwent an anterior neck-corpectomy of C5, as well as cage and plate fixation of C4 and C5. The accident had rendered her quadriplegic.
- [17] With regard to her occupational functioning, the experts noted that she demonstrated cognitive difficulties which are expected to compromise the completion of her studies as well as her future employability, career progression and earning capacity.
- [18] The industrial psychologist assessing her pre-morbid earning potential reckons that within 6 to 12 months from the time of the accident she would have secured work earning a market related package at the Paterson B1/B2 median level and within a two to three years after completion of her studies, she would have secured skilled employment in line with her level of education experience, earning in line with Paterson C2 median.
- [19] In view of the fact that she would have obtained a master's degree level, she would have earned an annual guaranteed package at Paterson D5 upper quartile upon reaching her career ceiling. Thereafter she would have received inflationary increases until retirement age.

- [20] Post-morbid, the expert noted that she had not been successful in securing employment.
- [21] She was 28 years old at the time and had no working history. Further the length of time out of the labour market impacts a person's ability to re-enter the labour market as result of loss of skills and work resilience.
- [22] The occupational therapist categorized her currently as unemployable, and it is unforeseen that she will secure opportunities in alternative fields of vocation.
- [23] The actuarial calculations summary indicated that the value of past loss of earnings less 5% contingencies amounted to R1,103,871.00 and future loss of earnings at R20,935,976 less 20% contingency which amounted to R16,748,781 with a total net of loss at R17,852,652.00.
- [24] The claim was however subject to the limits and the net past loss amounted to R799,530.00 and future loss at R9,904,712.00 totaling a net loss of R10,704,242.00.
- [25] In the light of the fact that the matter was unopposed and the Defendant had not filed any expert reports to gainsay the expert reports of the Plaintiff, this court had to accept that the Plaintiff had proved its damages.
- [26] The Defendant some months later approached this court and requested its reasons for the order it made. Subsequently, the Defendant served and filed a notice for a 'leave to appeal' the court order made on 1 March 2023. No condonation application was served or filed. This court did not provide any reasons then and the Defendant had prematurely made an application for leave to appeal.
- [27] The matter was then set down for a hearing on 15 March 2024. On 15 March 2024, the Defendant had not filed any heads of argument and sought a postponement to obtain the transcript of proceedings in the court *a quo*.

- [28] The necessity came about when the defendant's attention was drawn to the fact that the matter was not opposed on the day in question and proceeded on a default basis.
- [29] The attorney dealing with matter in the state Attorney's office could not remember whether she was present or not in court on that day. I specifically confirmed that I was advised earlier in chambers on that day that the attorney responsible would not be attending because she had another matter to attend to. It also must be borne in mind that there was no application to postpone or a request to stand the matter down to enable her to attend and argue the matter.
- [30] More importantly, Counsel for the Defendant intimated that should it be correct that the matter proceeded on an unopposed basis, the appeal would have to be withdrawn, and they would bring an application for a rescission.
- [31] Clearly the preliminary issue to be determined is the appealability of the order made by this court on 1 March 2023, which order was made in default of appearance by the Defendant.
- [32] In the matter of *Lee v Road Accident Fund*¹, the following question was posed..."is the default judgment appealable?" Wilson J relied on the Supreme Court of Appeal's decision answered the question in the negative.
- [33] In *Pitelli v Everton Gardens Projects CC*², 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.
- [34] At paragraphs 12 and 13 of the judgment, Wilson J said the following:

"12 ...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 perfectly sensible way of dealing with challenges to orders

¹ (22812/2020) [2023] ZAGPJHC 1079 (26 September 2023)

² 2010 (5) SA 171 (SCA)

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 is 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 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."

- [35] On 15 March 2024, the Defendant requested a postponement of the hearing on the basis that it required the record of the proceedings of 1 March 2023 for it to ascertain if indeed Ms. Van Zyl was not in attendance in Court and if so, it would withdraw the leave to appeal and proceed with a rescission application. This it had not done despite the fact that it now is certain that the matter proceeded on that day in the absence of it or its attorney.
- [36] Instead it argued that its application for leave to appeal is premature in the absence reasons for the court's order that it seeks to appeal and sought to rely on *Mphahlele v First National Bank* for its submission that the court's duty to give reasons.
- [37] As correctly submitted by the Plaintiff in this matter, the decision it sought to rely on refers to opposed matters and issues that have been argued. In the current case, the matter was unopposed and no issues argued as there were no issues raised by the absent defendant.

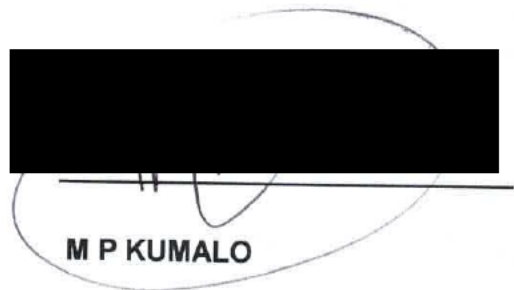
[38] The Defendant further contended that there was an irregularity add to the proceedings. The irregularities that the defendant seeks to rely upon is the absence of reference to the rule 38(2) procedure. The Plaintiff's practice note clearly indicated that the matter should proceed on paper unless oral evidence be required by the court. This court relied on the evidence submitted on paper by the experts of the Plaintiff including their affidavits.

[39] Moreso, the irregularity that complained of is not a ground of appeal but a subject of a rescission application.

[40] In the light of the above, the following order is made:

Order

1. The Defendant's application is dismissed; and
2. The Defendant is to pay the costs of this application.

A black rectangular box redacts the signature of the judge. Below the box, the name "M P KUMALO" is printed in a serif font.

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Appearances:

For the applicant/defendant: Adv G Edwards

Instructed by: State Attorney, Pretoria

For respondent/plaintiff: Adv K Strydom

Instructed by: Ehlers Attorneys