THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 191/09

In the matter between:

FRANCESCO PITELLI **Appellant**

and

EVERTON GARDENS PROJECTS CC **Respondent**

Neutral citation:	***Pitelli v Everton Gardens Projects CC*** (191/09) [2010] ZASCA 35 (29 March 2010)
Coram:	NUGENT, CLOETE, MLAMBO, TSHIQI JJA and MAJIEDT AJA
Heard:	**01 MARCH 2010**
Delivered:	**29 MARCH 2010**
Summary:	Appealability of order taken by default – order capable of being rescinded by court below – not appealable.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Van der Merwe J sitting as court of first instance)

The appeal is struck from the roll with costs.

JUDGMENT

NUGENT JA (CLOETE, MLAMBO, TSHIQI JJA and MAJIEDT AJA concurring)

[1] The limited liability that is afforded to persons who conduct business through the medium of a company is not there to protect them against conduct that is reckless or that takes place with fraudulent intent. Section 424(1) of the Companies Act 61 of 1973 protects creditors in those circumstances. It provides that when it appears to a court that 'any business of [a] company was or is being carried on recklessly or with intent to defraud creditors of the company' the court may declare that 'any person who was knowingly a party to the carrying on of the business' in that manner shall be 'personally responsible ... for all or any of the debts or other liabilities of the company ....'

[2] In this case the North Gauteng High Court at Pretoria (Van der Merwe J) made such a declaration and ordered Mr Pitelli, the appellant, to pay to Everton Gardens Projects CC, the respondent, the amounts of R382 500 and R607 611, together with related relief. Those orders were

made on 22 June 2007 in proceedings from which Mr Pitelli pertinently absented himself.

[3] Mr Pitelli now appeals against the orders with the leave of this court. I deal later in this judgment with whether the appeal is competent. First I set out the facts that gave rise to the application and with the course that the proceedings took.

[4] The proceedings were brought on notice of motion. No answering affidavit was filed by Mr Pitelli for reasons that will emerge presently. The facts that I relate are thus drawn from the allegations in the founding affidavit.

[5] The business of the respondent was the development of housing estates, mainly for the purpose of the government's Reconstruction and Development Programme. One of its projects was a massive development in an area known as Everton Gardens. It employed the services of Eldima Construction (Pty) Ltd to install the water reticulation and sewerage infrastructure. At the time that is now relevant Mr Pitelli was the sole shareholder and director of the company.

[6] During the course of executing the project the respondent paid Eldima Construction R382 500 on 26 February 1999 and R607 611 on 18 March 1999. Those payments were made in error because the relevant accounts had already been paid. In June 2003 the respondent sued Eldima Construction for the return of the moneys.

[7] In response to an application for summary judgment Mr Pitelli deposed to an affidavit on 11 September 2003 in which he said that work

had indeed been done for the respondent for the sum of R990 111 but he denied that any payment for that work was made before the payment of R607 611 on 18 March 1999. As for the amount of R382 500 that was paid on 26 February 1999 he denied that that payment was made at all. He also alleged that the claim had prescribed. In due course a plea to similar effect was filed together with a counterclaim in which Eldima Construction alleged that it was owed the sum of R195 544 by the respondent for goods and services that had been provided. The pleadings closed in October 2004.

[8] The proceedings were set down for trial on 15 June 2006. Meanwhile, on 30 May 2006 Mr Pitelli, who was then the sole member of the company, purported to adopt a resolution authorizing the voluntary winding up of the company. The Registrar of Companies declined to accept the resolution for want of compliance with the Companies Act and the proposed winding up did not proceed. I think the inference is inescapable that Mr Pitelli hoped to commence the winding up so as to avoid the consequences that would otherwise follow from a judgment being entered against the company.

[9] At the proceedings on 15 June 2006 the company was not represented and judgment was granted against it by default for the amounts that had been claimed and the counterclaim was dismissed. Needless to say, a writ of execution rendered a nulla bona return.

[10] The proceedings with which we are now concerned – for an order declaring Mr Pitelli to be personally liable for the debts – were then commenced. In support of the application an affidavit deposed to by Mr de Luca was filed. Mr de Luca and Mr Pitteli were the sole members of

the company, in equal shares, and were its directors, at the time that the erroneous payment was made. Mr Pitelli was in charge of its financial affairs, and was assisted by his wife who was the bookkeeper. Mr de Luca said in his affidavit that he and Mr and Mrs Pitelli were all aware that the moneys I have referred to were an overpayment. Some three to six months later Mr de Luca sold his shares to Mr Pitelli but he remained with the company as an employee. He said that he did not know what happened to the moneys that had been paid in error. On the basis of that uncontroverted evidence it follows that Mr Pitelli perjured himself when he resisted summary judgment and that he filed a dishonest plea.

[11] The basis of the claim, as it was stated in the founding affidavit, was that the retention of the moneys by Mr Pitelli when he knew full well that the company had been overpayed constituted conduct that occurred with intent to defraud the respondent. To that was added in argument before us that his conduct in protracting the proceedings that were brought for recovery of the money, not least by perjuring himself in resisting summary judgment, when those proceedings were bound to end in favour of the respondent, and by resolving to wind up the company so as to avoid the consequences of a judgment, constituted a course of deceitful conduct directed at preventing the respondent from recovering what Mr Pitelli knew to be due, which fell within the provisions of the section.

[12] The proceedings were launched on 26 March 2007. Mr Pitelli and the company were both cited but the company has no direct interest in the matter and I refer hereafter only to Mr Pitelli. In April 2007 a notice of opposition was filed. On 8 May 2007 Mr Pitelli’s attorney was given

notice that the application had been set down for hearing on 22 June 2007.

[13] On 18 May 2007 Mr Pitteli's attorney wrote to the respondent's attorney, saying that he understood that settlement negotiations between the parties had taken place but had come to nothing, and he enclosed a notice under rule 35(12) to produce certain documents. The respondent's attorney replied on the same day, hotly denying that any settlement negotiations had taken place, and pointing out that the time within which the notice should have been filed had long passed.

[14] There was no response for a month. Four days before the matter was to be heard, on 18 June 2007, Mr Pitelli's attorney wrote to the respondent's attorney requesting him to 'confirm that you will remove the matter from the roll until such time as you have complied with our rule 35 notice', failing which an application to stay the proceedings would be launched. The respondent's attorney declined to remove the matter from the roll.

[15] The respondent nonetheless replied to the rule 35(3) notice, no doubt out of caution, in an affidavit that was served on Mr Pitelli's attorneys on 19 June 2007. In that affidavit the deponent said that he had been unable to locate one of the documents that had been called for, and that the other documents were amongst the founding papers.

[16] On 21 June 2007 Mr Pitelli filed an application for an order postponing the proceedings that had been set down for the following day. The postponement was required, according to Mr Pitelli, to enable him to secure the documents before proceeding. In support of that application

Mr Pitelli referred to the alleged settlement negotiations and said that ‘the exchange of affidavits was suspended pending the outcome of the settlement talks’. He said that he was thus entitled to require the production of documents before he filed his affidavit and that an application to compel production was ‘pending’. No reference was made to the affidavit that had been served on his attorneys on 19 June 2007. Neither was an explanation given for why the ‘settlement talks’ suspended the time for filing affidavits, because no agreement to that effect was alleged. Nor was it said why the documents were necessary to resist the claim.

[17] I have little doubt that the filing of the notice under rule 35 was no more than a ploy to provide a basis for avoiding the impending hearing. The documents that were sought had been mentioned in the founding affidavit to sketch the background to the application but they were otherwise irrelevant to the relief that was claimed. In any event, as the deponent to the affidavit explained, all but one of the documents were already amongst the papers.

[18] The following day the matter came before Van der Merwe J who refused to postpone the matter. Mr Pitelli’s counsel thereupon withdrew on the basis that he had no instructions to pursue the matter. The learned judge then granted the orders that had been sought. While he gave full reasons for refusing the postponement he gave no reasoned judgment for granting the relief but that is not surprising.

[19] What then occurred was rather unusual. An application for leave to appeal was filed on behalf of Mr Pitelli on the same day (which naturally had the effect of suspending the operation of the order). Then on 27 July

2007 Mr Pitelli filed an application to rescind the order. It took some time for the filing of affidavits in that application to be completed and the record of those proceedings is not before us.

[20] The filing of both an application for leave to appeal and an application to rescind the orders was contradictory. Because 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 (*Zweni v Minister of Law and Order*).[1] The fact alone that it was thought fit to file an application for rescission immediately raises the question whether the orders are appealable.

[21] Nonetheless, Van der Merwe J heard the application for leave to appeal, and the application for rescission, simultaneously, and refused both. Precisely when that took place does not appear from the record, but the learned judge signed a reasoned judgment on 8 September 2008. Upon petition this court granted Mr Pitelli leave to appeal against the orders that were made on 22 June 2007.

[22] The terms in which the order was made by this court naturally focused the attention of the parties and of this court on the underlying merits of those orders. Yet the very consideration of the appeal has brought some oddities to the fore. All the submissions that were presented in this case turned around the allegation that Mr Pitelli knew full well that the moneys had been overpaid. When asked whether we are to accept that as an established fact counsel for Mr Pitelli was constrained to concede, though he did so with considerable discomfort, that we must indeed accept that as an established fact because the allegation has not been

[1] 1993 (1) SA 523 (A) at 532J.

answered. But of course the allegation has not been answered, in either direction, only because Mr Pitelli walked out of the case without filing answering affidavits. Which raises the question why this court is hearing an appeal when the proceedings were abruptly ended before they had reached their ordinary conclusion.

[23] That invites the further question what would have happened had the proceedings been brought by way of summons and Mr Pitelli had walked out before any evidence had been presented. A court could not possibly have considered an appeal against orders that might then have been made by default because there would then have been nothing to form the basis for the appeal (unless, perhaps, if it had been contended that the summons was excipiable, or that the court had no jurisdiction).

[24] What also strikes one as odd is that submissions on behalf of Mr Pitelli should be made for the first time in this court, when they could have been made to the court below before it made its orders, but were deliberately withheld. This is not a court of first instance. It seems to me that it would be most unfortunate for a court of first instance to find its orders reversed only because the litigant chose not to tell that court why the orders should not be made, and thought it better to make those submissions to a court of appeal only after that had occurred.

[25] Those oddities arise because once the orders were made by the court below the proceedings in that court were not complete, notwithstanding that the orders took full effect. They were not complete because the orders were still susceptible to being revisited and rescinded by the court that granted them. Had the court rescinded the orders the

proceedings would then have proceeded to their ordinary completion by a final judgment.

[26] On the other hand, had the court below refused to rescind its orders, as it did, that would clearly have been appealable,[2] because it would have brought the proceedings to completion in the court of first instance. And had this court then upheld the appeal the matter would have been remitted to that court to bring the proceedings to completeness in the manner I have described.

[27] An order is not final, for the purposes of an appeal, merely because it takes effect unless it is set aside. It is final when the proceedings of the court of first instance are complete and that court is not capable of revisiting the order. That leads one ineluctably to the conclusion that an order that is taken in the absence of a party is ordinarily not appealable (perhaps there might be cases in which it is appealable but for the moment I cannot think of one). It is not appealable because such an order is capable of being rescinded by the court that granted it and it is thus not final in its effect. In some cases an order that is granted in the absence of a party might be rescindable under rule 42(1)(a), and if it is not covered by that rule,[3] as Van der Merwe J correctly found, it is in any event capable of being rescinded under the common law.

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[2] *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A); *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A).

[3] See in that regard *Marais v Standard Credit Corporation Ltd* 2002 (4) SA 892 (W) and *Lodhi 2 Properties Investments CC v Bondev Developments (Pty) Ltd* 2007 (6) SA 87 (SCA).

[28] That an order granted in the absence of a party is not appealable was held as early as 1877 in *Ross v Dramat*,[4] when De Villiers CJ said, in respect of such an order that

'the defendant is premature in applying to this Court [to appeal against the order] until the Magistrate has been asked and has refused to re-open the case'.

[29] An order that was susceptible to being rescinded was also held not to be appealable in *Sparks v David Polliack & Co. (Pty) Ltd.*[5] In that case the defendant applied for the postponement of a trial, and when the postponement was refused his attorney withdrew, and judgment was entered against him under rule 55(2) of the Magistrates' Courts rules.

[30] In the course of his judgment, though it was not necessary for the decision in that case,[6] Trollip J said that such an order will become appealable when it is 'no longer rescindable', which could occur 'either through lapse of time … or by the defendant's waiving or perempting his right to rescind, or both.' He went on to say:

'In practice, if the defendant considered that, because of the particular circumstances, it would be preferable to appeal instead of trying to have the judgment rescinded by the same magistrate or court that granted it, he could, in noting his appeal, expressly waive or perempt his right of rescission, and that would, in my view, render the default judgment final for appellate purposes.'[7]

[31] Reluctant as I am to question the view of so eminent a judge[8] I must respectfully do so in this case. I do not see how the question whether an order is appealable can be dependant upon the choosing of the litigant concerned, whether by action or inaction. It seems to me that the

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[4] 1877 Buch. 132 at 133.
[5] 1963 (2) SA 491 (T).
[6] At 496C-D.
[7] At 496E-F.
[8] A similar view was expressed in *Dawood v C. & A. Friedlander* 1913 CPD 291.

appealability of an order must be dependant on the nature of the order and not upon what the litigant chooses to make of it. An order made by default is by its nature not final in its effect because it is capable of being revisited, albeit that condonation might be required for the delay. It is true that once rescission has been refused, and an appeal against that order has been dismissed, the order is then not capable of being revisited. But that order of the court of appeal brings the proceedings as a whole to an end and it is not then open to a litigant to return to an order that was made midway in the proceedings.

[32] The learned judge based his contrary view on analogy with orders that are considered to be final for the purpose of founding a plea of res judicata but I do not think that the questions that arise in that regard are comparable. Nonetheless it is not strictly necessary in this case to pronounce finally upon the view that was expressed in that case.

[33] *Sparks* was followed in *De Freitas v Addisionele Landdros, Heidelberg*,[9] and in *Trustees for the time being of Ramvali Trust v UDC Ltd.*[10] In both those cases the order that was taken by default was held not to be appealable. Both cases appear to have adopted the view that I have referred to but that was not necessary for the decisions in those cases. There are also cases that appear to go in the other direction. I express no view on the correctness of those decisions because they are distinguishable on their particular facts.[11]

[9] [1998] JOL 3645 (T).
[10] [1998] JOL 2803 (ZS).
[11] In *Chimanzi v Mukange* 1966 (2) SA 347 (RAD) the court found that the order was appealable because, although it had granted in the absence of the defendant, it was nonetheless not susceptible to rescission. In *Van Graan v Smith's Mills (Pty) Ltd* 1962 (3) SA 170 (T) it was held that the order was made in consequence of an irregularly in the proceedings.

[34] I am mindful of the considerable hurdle that would need to be overcome by a litigant who seeks to have an order rescinded when he or she deliberately allowed it to be taken by default, bearing in mind that in order to succeed the litigant will need to provide a 'reasonable and convincing explanation' for the default.[12] But the appealability of the order is dependant upon whether it is capable of being revisited and not upon whether such an application will succeed. And if a litigant deliberately chooses to permit an order to go by default then he or she can hardly complain if a court refuses to allow the matter to be re-opened. A litigant cannot expect to blow hot and cold depending upon which is most advantageous at the time.

[35] The terms in which this court made its order naturally diverted attention from the appealability of the order and the submissions that were made by counsel were not directed to that question. We have considered inviting the parties to make further submissions but we do not think we should tempt the respondent to incur more costs than it has already been put to. We have had the advantage of full argument on the merits and we would in any event have dismissed the appeal. In view of the conclusion to which I have come I do not think it is necessary or appropriate to explain why we would have done so.

[36] The orders that were made in this case were clearly susceptible to rescission. In those circumstances they are not appealable, notwithstanding that the application for rescission failed, and this court ought not to have allowed the appeal. No doubt the refusal of rescission was appealable, with the necessary leave, but that is another matter.

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[12] See *Chetty*, above, at 765A-D.

[37] Although the order refusing rescission is not before us I think I would be remiss if I did not say something about it now that we have heard all there is to say in this matter, in view of the course that the proceedings against Mr Pitelli and his company have taken, which in my view has clearly been dilatory from beginning to end. The court below cannot be faulted for having refused to rescind its order on any basis and I consider there to be no prospect that it might be reversed on appeal. Needless to say, that view is not binding on this court should Mr Pitelli nonetheless choose to seek leave to appeal against that order, albeit only with condonation. But in that event he should not be surprised if he is found to have acted vexatiously and he is penalised accordingly.

[38] The appeal is struck from the roll with costs.

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R W NUGENT
JUDGE OF APPEAL

APPEARANCES:

For appellant:	R Stockwell SC J F Pretorius Instructed by Zwiegers C/o Sanet de Lange Attorneys, Pretoria Symington & De Kok, Bloemfontein
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