



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 182/2021

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL
FOR HEALTH AND SOCIAL DEVELOPMENT OF
THE GAUTENG PROVINCIAL GOVERNMENT**

APPLICANT

and

ELIZABETH MAMANTHE MOTUBATSE

FIRST RESPONDENT

ANDRIES MOKGANYETSI MOTUBATSE

SECOND RESPONDENT

Neutral citation: *Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government v Motubatse & Another* (182/2021) [2023] ZASCA 162 (30 November 2023)

Coram: MOCUMIE, MAKGOKA and WEINER JJA and NHLANGULELA and WINDELL AJJA

Heard: 21 AUGUST 2023

Delivered: 30 November 2023

Summary: Civil procedure – rescission of default judgment – interlocutory in nature and thus not appealable – application for condonation and special leave to appeal – condonation of the late filing of the record of appeal and reinstatement of appeal – principles re-stated.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mabuse, Francis and Adams JJ sitting as court of appeal):

- 1 Condonation is granted to the applicant for the late filing of the notice of appeal; the record of appeal; and the application to reinstate the application for leave to appeal and the heads of argument.
- 2 Condonation is granted to the respondents for the late filing of their heads of argument.
- 3 The application for leave to appeal is reinstated.
- 4 Special leave to appeal is granted.
- 5 The appeal is upheld and the applicant is to pay the costs of the appeal, save for the costs of the respondents' late filing of their heads of argument, which are to be borne by the respondents.
- 6 The order of the full court is set aside and replaced with the following:
'The appeal is struck off the roll with costs'.

JUDGMENT

The Court

[1] In this matter, the full court of the Gauteng Division of the High Court, Johannesburg (the full court) upheld an appeal from a single judge of that division (the court of first instance). The court of first instance had granted a rescission of a default judgment granted against the applicant, the Member of the Executive Council for Health and Social Development of the Gauteng Provincial Government (the MEC). It

is this order from the full court that is the subject of an application for special leave to appeal before us.

[2] The order of the full court is plainly wrong because it is trite that a rescission order is not appealable. It is interlocutory in nature and does not deal with the definitive rights of the parties. This principle is so trite that extensive reference to, and citation, of authorities is not necessary. A useful summary of the authorities in this regard is collated in this Court's judgment in *FirstRand Bank Ltd v McLachlan and Others*,¹ (*McLachlan*) where the following was stated:

'The law on which judgments are appealable is settled. I am in full agreement with the counsel for the appellant that the rescission order granted by the magistrate's court was not appealable in terms of s 83(b) of the Magistrates' Court Act 32 of 1944. It was an interlocutory order, which placed the parties back in the position in which they were before the re-arrangement order was granted. This Court in *HMI Healthcare Corporation (Pty) Ltd v Medshield Medical Scheme and Others* [2017] ZASCA 160 stated in para 18:

"It is plain that a rescission order does not have a final and definitive effect. ...The rescission order simply returns the parties to the positions which they were in prior to the ex parte order being granted. *De Vos* relied *inter alia* on *Gatebe v Gatebe* and *Ranchod v Lalloo*. In *Gatebe*, De Villiers JP held:

"The order therefore does not dispose of the main case or of any of the issues in the main case, and therefore has not the effect of a definitive sentence in this behalf. It still remains to consider whether it has not the effect of a definitive sentence in that it causes irreparable prejudice. Here again it seems to me to be clear that an order merely rescinding a default judgment does not cause irreparable prejudice, for in the definitive sentence the effect of the decision can obviously be repaired." (Footnotes omitted.)

The judgment sought to be appealed by the respondents lacked any of the attributes in the *Zweni v Minister of Law and Order of the Republic of South Africa* 1993 (1) SA 523 (AD); [1993] 1 All SA 365 (A), (536B-D) where the court ruled against the appealability of the interim order made by the court of first instance. It held that the interim order should be tested against (i) the finality of the order; (ii) the definitive rights of the parties; and (iii) the effect of disposing of a substantial portion of the relief claimed.'

¹ *FirstRand v MacLachlan and Others* [2020] ZASCA 31; 2020 (6) SA 46 (SCA) para 21-22.

On the weight of the authorities referred to in *McLachlan*, the correct order which the full court ought to have made, was to strike off the appeal from the roll with costs.

[3] The application has its genesis in a damages claim for R29 158 000 instituted on 22 May 2015, by the respondents in their capacity as parents and guardians of their minor child, against the MEC. They alleged that the minor child had suffered cerebral palsy as a result of the negligence of the employees of the MEC during birth. The MEC defended the matter and filed her plea denying liability. After the pleadings were closed, the respondents sought an order in terms of rule 35(1) of the Uniform Rules of Court for the discovery of the mother's hospital records and the child's ECG records. The MEC failed to make a discovery of the records. As a result, the respondents obtained an order in terms of rule 35(3) compelling the MEC to make discovery (the compelling order). Despite having been served with this order, the MEC still failed to comply with the request to discover.

[4] On 18 April 2017, Van der Linde J granted an order striking out the defence of the MEC on the basis of her failure to comply with the compelling order and the respondents were granted leave to apply for default judgment against the MEC (the striking-order). On 11 November 2018, the eve of the respondents' application for default judgment, the MEC applied for an order rescinding the striking-order. She also sought an order condoning the failure to comply with the compelling order. It was explained in that application that the order could not be complied with as the MEC's employees were in the process of locating the requested documents. It was also contended that the MEC had a *bona fide* defence as fully set out in her plea. The court of first instance accepted the explanation for non-compliance, and was satisfied that the MEC had a valid defence to the respondents' claim. It accordingly condoned the MEC's non-compliance with the rule 35(1) request, and rescinded the striking-out order. The respondents were not happy with the order of the court of first instance, and applied to that court for leave to appeal against it, which was granted to the full court.

[5] In due course, the appeal served before the full court which concluded that the court of first instance had not exercised its discretion properly when it rescinded the striking order, as the MEC had failed to: (a) give a satisfactory explanation for the delays, and; (b) establish a *bona fide* defence to the respondents' claim, because the MEC had simply attached her plea to the founding affidavit without any confirmation of the correctness of the contents thereof. The full court made no reference to the law on appealability of an order of rescission or whether it had the power to hear the appeal. In dismissing the appeal, it focused, inter alia, on the various delays for which the MEC gave an unsatisfactory explanation. On these bases, the full court set aside the rescission order. The MEC then applied for special leave to this Court to appeal the judgment and order of the full court.

[6] On 19 May 2021, this Court referred the application for special leave to appeal for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013. The parties were warned to be prepared to argue the merits of the appeal, should they be called upon to do so. In this Court, the MEC, in addition, seeks condonation for the late filing of the notice of appeal and the record of appeal, as well as an order for the reinstatement of the appeal, which lapsed when the record was not filed timeously. There is also an application for condonation for the late filing of the respondents' heads of argument. These condonation applications are all intrinsically linked to each other, and to the merits of the appeal such that a discussion of each discreetly, is neither feasible nor desirable.

[7] In this Court, the MEC's explanation for the delay in filing the record, which led to the lapsing of the application, is set out in an affidavit deposed to by an assistant state attorney and is briefly this. Two attorneys who had been assigned to deal with this application, had resigned, one in September 2020 and the other in November 2020. She was appointed in February 2021 and assigned to the matter. There was confusion about the appeal case number with the registrar of the high court and the transcribers, which delayed the transcription of the full record. She was not able to file the record in November 2021, when it was due, as the record was not ready. As to the

explanation for the late filing of the heads of argument, the attorney stated that she was not familiar with the rules and procedures of this Court, and was 'alerted' by her correspondent attorney about the filing of heads of argument.

[8] On the merits, it was submitted that the application raises an important point of law as the full court had effectively ruled that a rescission order is appealable, which is against established authorities. Thus, this Court's judgment is necessary to correct the misdirection of the full court. For their part, the respondents persisted in their opposition to the reinstatement of the application. They pointed to a pattern of disregard for the rules, both in the high court and now, in this Court. They sought the dismissal of the applicant's application for the reinstatement of the lapsed application for leave to appeal.

[9] For their part, the respondents submitted that the delays, coupled with the inadequate explanations, should lead to the dismissal of the application to reinstate the application. Counsel further submitted that, even if there may be reasonable prospects of success on the merits, where a party has failed to comply with the rules of this Court, there is no need to consider the merits. With regard to the merits, counsel submitted that the full court was entitled to set aside the rescission order if it deemed to be in the interests of justice to do so. For this proposition, counsel placed reliance on *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*.² There, the Constitutional Court emphasised the 'interests of justice' requirement in addition to those enunciated in *Zweni v Minister of Law and Order (Zweni)*.³ It held that, what is to be considered and is decisive in deciding whether a

² *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others*

[2022] ZACC 34; 2022 (12) BCLR 1521 (CC); 2023 (1) SA 353 (CC) (*UDM*) para 45.

³ *Zweni v Minister of Law and Order of the Republic of South Africa* 1992 ZASCA 197; 1993 (1) SA 523 (A); [1993] 1 All SA 365 (A) at 536B where this Court ruled against the appealability of the interim order made by the court of first instance. It held that the interim order should be tested against (i) the finality of the order; (ii) the definitive rights of the parties; and (iii) the effect of disposing of a substantial portion of the relief claimed.'

judgment is appealable, even if the requirements as set out in *Zweni* are not fully met, is the interests of justice of a particular case.⁴

[10] Before we consider whether the various procedural lapses by the MEC should be condoned, we dispose of the respondents' submission that, on the interests of justice considerations, the rescission order was appealable. Recently, in *TWK v Hoogveld Boerderybeleggings*,⁵ this Court held that, when confronted with appealability of interlocutory orders, the *Zweni* triad still holds good in this Court, and that '[a]ny deviation [from *Zweni*] should be clearly defined and justified to provide ascertainable standards consistent with the rule of law'. In the present case, we are concerned with a purely interlocutory order which is accessory to the main action pending between the parties. It does not determine any definitive rights of the parties, nor does it dispose of any substantive portion of the dispute between the parties. Even on the interests of justice test, it is not in the interests of justice, in this instance, to find that the rescission order was appealable.

[11] With regard to the explanations for the delays on behalf of the MEC, there is no doubt that they are far from satisfactory. They are excessive, and the explanations therefor are woefully inadequate. The ignorance of the rules and procedures of this Court for failing to timeously file the record and the heads of argument, is no excuse.⁶ Counsel for the MEC was hard-pressed to concede that the non-compliance with the rules of Court were excessive, and the explanations for non-compliance were inadequate. This is indicative of a disturbing pattern regard being had to the instances in the high which led to her defence being struck out. Ordinarily, on these facts, that would be the end of the matter.

⁴ *UDM* para 45.

⁵ *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others* [2023] ZASCA 63; 2023 (5) SA 163 (SCA) para 30.

⁶ See *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 (3) SA 98 (A) at 101G.

[12] It is trite that good prospects on the merits may compensate for poor explanation for the delay.⁷ However, as pointed out in *PAF v SCF*,⁸ where special leave is sought, the existence of reasonable prospects of success must be accompanied by special circumstances. In order to obtain special leave from this Court, an applicant must, in addition to showing the existence of reasonable prospects of success on appeal, show that special circumstances exist for the granting of such leave.⁹ Although not a closed list,¹⁰ special circumstances may include that the appeal raises a discrete point of law, or that the prospects of success are so strong that a refusal of leave may result in a manifest denial of justice, or that the matter is of great importance to the public or the parties.¹¹

[13] By holding that a rescission order is, without more, appealable, the full court has ignored binding authorities of this Court. In our view, this constitutes a discrete point of law of great importance to the public, as it offends the doctrine of precedent. In *Camps Bay Ratepayers and Residents Association and Another v Harrison and Another (Camps Bay)*,¹² the Constitutional Court reminded us of the importance of the doctrine of precedent as ‘a manifestation of the rule of law itself’ and cautioned that ‘[t]o deviate from this rule is to invite legal chaos.’ If left undisturbed, in terms of the same doctrine of precedent, the order of the full court binds all the judges in the Gauteng Division, and has persuasive force in other divisions of the high court. The order creates uncertainty and disharmony in our procedural law. This is precisely the ‘legal chaos’ cautioned against in *Camps Bay*. Thus, this Court is not only at large, but

⁷ *United Plant Hire (Pty) Ltd v Hills and Others* 1976 (1) SA 717 (A) at 720E-G; *Darries v Sheriff, Magistrate’s Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 40H-41E; *Valor IT v Premier, North West Province and Others* [2020] ZASCA 62; 2021 (1) SA 42 (SCA) para 38.

⁸ *PAF v SCF* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) para 24, with reference to *Cook v Morrison and Another* [2019] ZASCA 8; 2019 (5) SA 51 (SCA) para 8.

⁹ *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A) at 564H-I.

¹⁰ *Director of Public Prosecutions: Gauteng Division, Pretoria v Moabi* [2017] ZASCA 85; 2017 (2) SACR 384 (SCA) para 21.

¹¹ *Cook v Morrison and Another* [2019] ZASCA 8; 2019 (5) SA 51 (SCA) para 8.

¹² *Camps Bay Ratepayers’ and Residents’ Association & Another v Harrison & Another* [2010] ZACC 19; 2011 (2) BCLR 121 (CC); 2011 (4) SA 42 (CC) para 28.

it is also duty-bound to intervene and set aside the order of the full court. On this basis, the MEC has succeeded in showing special circumstances.

[14] The application for condonation for the late filing of the record must be granted. The applications to condone the late filing of the MEC's and the respondents' heads of argument, must also be granted. The application for special leave to appeal must be reinstated. And, for all policy considerations mentioned, special leave to appeal should be granted and the appeal must be upheld.

[15] It remains to consider the issue of costs. The MEC has been successful in her application for special leave to appeal and on the merits. The general rule is that successful parties should usually be awarded their costs. However, this is not an inflexible rule. A court may in the exercise of its discretion, deny the successful litigant of her or his costs. However, good grounds should exist for departing from the general rule. In *Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and Others*,¹³ the Constitutional Court explained that depriving successful parties of their costs can depend on circumstances such as 'the conduct of parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings'.¹⁴

[16] Although successful, the MEC and her legal representatives have been found to have flagrantly not complied with court rules – both in the high court and in this Court. We have already outlined those. It seems that this is an appropriate case to deviate from the general principle, and for this Court to mark its displeasure by depriving a successful party of her costs. The MEC should accordingly bear the costs of the application for leave to appeal, those in respect of the merits, and the various condonation applications it sought. The respondents should only bear the costs in relation to their application for the late filing of their heads of argument.

¹³ *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) para 155.

¹⁴ *Ibid.*

[17] In the result the following order is granted:

- 1 Condonation is granted to the applicant for the late filing of the notice of appeal; the record of appeal; and the application to reinstate the application for leave to appeal and the heads of argument.
- 2 Condonation is granted to the respondents for the late filing of their heads of argument.
- 3 The application for leave to appeal is reinstated.
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B C MOCUMIE
JUDGE OF APPEAL

T MAKGOKA
JUDGE OF APPEAL

S WEINER
JUDGE OF APPEAL

Z NHLANGULELA
ACTING JUDGE OF APPEAL

L WINDELL
ACTING JUDGE OF APPEAL

Appearances:

For the applicant:	N Makopo
Instructed by:	State Attorney, Johannesburg State Attorney, Bloemfontein
For the respondents:	J O Williams SC
Instructed by:	Masekela Masenya Attorneys, Pretoria Green Attorneys, Bloemfontein.