REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: A230/2021

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

Date: 08/06/2022 N Davis / WJ du Plessis

In the matter between:

ONICCA MNIWA THWALA **APPELLANT**

and

MIWAY INSURANCE LTD **RESPONDENT**

In re:

MIWAY INSURANCE LTD **APPLICANT**

and

ONICCA MNIWA THWALA **RESPONDENT**

JUDGMENT

Du Plessis AJ (with Davis J)

[1] This is an appeal against a decision of the Magistrate's Court for the district of Tshwane Central to grant the respondent a recission against a default judgment.

[2] Thwala, the appellant (plaintiff in the main action), issued summons against MiWay insurance, the respondent (defendant in the main action), for damages arising from a motor vehicle collusion amounting to R198 237.00. I will refer to the appellant as "Thwala" and the respondent as "MiWay" for ease of reading.

[3] The claim is based on an insurance agreement concluded on 13 April 2018. An accident occurred on 11 November 2018, and Thwala lodged a claim with MiWay, which was rejected on 30 November 2018 on the basis that the vehicle was not being driven by the regular driver (Thwala's husband).

[4] On 9 September 2019, Thwala issued summons against MiWay, which was served on 12 September 2019. MiWay duly forwarded it to their attorney of record the next day. On 14 July 2020, Thwala served a notice in terms of rule 55A(7), which was forwarded to the applicant's attorneys of record on the same day. Still, there was no response from MiWay.

[5] On 17 June 2020, Thwala applied for default judgment, which was granted on 6 August 2020.

[6] On 11 September 2020, MiWay became aware of the default judgment and, on 17 September 2020, instructed their attorneys to apply for rescission of the default judgment. MiWay then applied for recission of the judgment on 7 October 2022, which Thwala opposed.

[7] For MiWay to succeed in the rescission application, it had to show good cause for its default and that it had a *bona fide* defence to Thwala's claim. MiWay argued that their default was due to a clerical or filling error in the attorney's office. While they always intended to defend the action, the file was erroneously filed in the wrong filing cabinet instead of being filed at court. As for the defence, they stated that the rejection of Thwala's claim was based on the fact that it was

not the regular driver that caused the accident, that the amount claimed was more than the value of the insured car and that the action instituted was outside the 270 days as provided in the insurance agreement.

[8] Acting Magistrate Rodrigues granted the recission on 5 March 2021, and MiWay was given leave to defend the main action. He based his decision on the discretion that courts have in such matter, after consideration of all relevant circumstances, keeping in mind that there must be a reasonable explanation for the default, that the application is made bona fide, and that there is a bona fide defence to the plaintiff's claim which prima facie has a prospect of success.[1]

[9] He iterated that in exercising the discretion, the court must do justice between the parties by balancing the interest of both parties and being mindful of any prejudice that may result from the outcome of the application.[2] Default judgments require a court not to scrutinise the defence too closely to ascertain whether it is well-founded.[3] Concluding, the Magistrate found that the applicant cannot be denied its constitutional rights (to defend its case in court) based on what happened in its attorney's office, of which it had no control or knowledge.

Grounds for appeal

[10] Thwala appeals the rescission application on the ground that the court a quo, in exercising its discretion:

[10.1] erred in finding that the respondent has provided an acceptable, reasonable explanation for defaulting;

[10.2] erred in finding that the respondent has provided a *bone fide* defence which justifies good cause / good reason for rescission of the default judgment;

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[1] *Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills* 20033 (6) SA 1 (SCA).

[2] *Grant v Plumber (Pty) Ltd* 1949 (2) SA 470 (O); *HDS Construction (Pty) Ltd v Wait* 1979 (2) SA 298 (E).

[3] *RGS Properties (Pty) Ltd v Ethekwini Municipality* 2010 (6) SA 572 (KZD).

[10.3] erred in ordering Thwala to pay the costs for the rescission application.

[11] Before this court can go into the merits of the appeal, the question is whether such an appeal is indeed possible. Thwala argues it is, as the appealability of interim orders depends on whether they are final in effect.

The appealability of interim orders

[12] In general, interim orders are not appealable. There have been instances where the courts have departed from the rule and where not allowing an appeal will bring irreparable harm to the parties involved.

[13] In *Zweni v Minister of Law and Order*[4] the court ruled against the appealability of the interim order made by the court of first instance. It tested the interim order 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. The court also clarified what is meant by "final effect", namely that it is not susceptible to alteration by the court of first instance. *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service,*[5] the court held that the test parameters applied in Zwane were not exhaustive.

[14] In *Philani-Ma-Afrika v Mailula*,[6] the court held that the interest of justice was paramount in deciding whether orders were appealable, with each case being considered in light of its facts. In this case and *Machele v Mailula,*[7] the issue was the threat of eviction of people that could render them homeless. In the latter case, the Constitutional Court allowed an appeal against an order for eviction that had been put into effect despite a pending appeal. The Constitutional Court suspended the execution order, as irreparable harm would result if leave to appeal was not granted.

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[4] 1993 (1) SA 523 (A).

[5] 1996 (3) SA 1 (A).

[6] 2010 (2) SA 573 (SCA).

[7] 2010 (2) SA 257 (CC).

[15] In *Atkin v Botes*[8] the Supreme Court of Appeal held that an interim order is appealable if it is final in effect and not susceptible to alteration by the court of first instance. Therefore, the question is whether the granting of the order was final in effect.

[16] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd,*[9] dealing with an interim interdict, the Constitutional Court warned that courts are reluctant to encourage wasteful use of judicial resources and legal costs by allowing appeals against interim orders that have no final effect. It also has the effect of delaying the final determination of disputes.

[17] *National Treasury v Opposition to Urban Tolling*[10] stated that leave to appeal to interim orders is based on the interests of justice, requiring a weighing of circumstances, including whether the interim order has a final effect.

[18] *Tshwane City v Afriforum*[11] dealt with the appealability of an interim order (interdict), stating that the decisive question is no longer whether it has a final effect or not, but rather whether the overarching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court. Here the Chief Justice remarked:

> "Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability […] If appealability or the grant of leave to appeal would best serve the interests

[8] 2011 (6) SA 231 (SCA)

[9] 2012 (4) SA 618 (CC).

[10] 2012 (6) SA 223 (CC).

[11] 2016 (2) SA 279.

> of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest. . .”

[19] *United Democratic Movement v Lebashe Investment Group (Pty) Ltd*[12] dealt with an interim interdict being appealed. Distinguishing it from the *Philani-Ma-Afrika* judgment where the appeal against an interim order was appropriate in the interest of justice, as the underlying rationale of irreparable harm was clearly demonstrated.

[20] However, most of the above cases deal with an interim interdict and not a rescission. And in most cases, the absence of the interim order will cause some irreparable harm.

[21] There are very few cases dealing with the appealability of rescission orders. *Bayport Securitisation v Sakata*[13] dealt with an appeal against the dismissal of a rescission judgment and the decision of the Eastern Cape Division of the High Court. It did not deal with whether rescission applications (in this case dismissed) can be appealed or not. Still, the fact that the Supreme Court of Appeal dealt with the reasoning of the High Court to find that the rescission was granted in error indicates that it was competent to do so.

[22] The only authority that I could find specifically on this point is the case of *Pitelli v Everton Gardens Projects CC*[14] where the Supreme Court of Appeal stated that

> [h]ad the court rescinded the orders the proceedings would then have proceeded to their ordinary completion by a final judgment.
>
> On the other hand, had the court below refused to rescind its orders, as it did, that would clearly have been appealable, 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…

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[12] [2021] ZASCA 4 (13 January 2021).

[13] [2019] ZASCA 73 (30 May 2019).

[14] [2010] ZASCA 35 (29 March 2010) paras 25 – 27.

> An order is not final, for purposes of an appeal, merely because it takes effect unless it is set aside. It is final when the proceedings of the court of the first instance are complete and that court is not capable of revisting 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.

[23] This is clear authority against the appealability of a rescission order that was granted by the trial court, as the effect of the rescission is to let the trial proceed. Likewise, in this case, when the rescission application was granted, it allowed MiWay to defend the action in the main application and place its version in front of the trial court. No doubt, the uncertainty of the outcome of such a trial, weighed up with the certainty of a default judgment that can be executed, prompted Thwala to try and set the rescission order aside. However, this is misguided.

Conclusion

[24] A rescission application is an interlocutory order since it is associated with the main action, regulating the conduct or the course of the proceedings. It is a final judgment on a particular point.[15] But it is only once an application for a rescission order is *dismissed* that it will have a final *effect*. The granting of a rescission application for a default judgment means that the defendant can file its notice of intention to defend or its plea or take whatever action is necessary for the trial to proceed. Therefore, once granted is not final in effect since the trial court must now determine the case in the trial where a final order will be made.

[25] The effect of the rescission order further does not cause irreparable harm. The plaintiff still has the opportunity to argue its case in front of the trial court. It affords the defendant an opportunity to put its side in front of the court in line with the *audi alterem partem* rule.

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[15] Segal V Diners Club South Africa (Pty) Ltd [1974] 1 All SA 359 (T) 362.

[26] Lastly, the interest of justice does not require that an appeal be entertained, as the Magistrate's court must now bring the proceedings to a conclusion by granting a final order after hearing both parties.

[27] Since I find that it is not possible to appeal a rescission order once granted, there is no need to go into the merits of the findings of the court a quo.

ORDER

[28] I suggest the following order be granted:

[1] The appeal is dismissed with cost.

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WJ du Plessis
Acting Judge of the High Court

I agree, and it is so ordered

N Davis
Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	No appearance
Instructed by:	Maoba Attorneys
Counsel for the respondent:	No appearance
Instructed by:	H J Badenhorst & Associates Inc
Date of the hearing:	05 May 2022
Date of judgment:	08 June 2022