



REPORTABLE

CASE NO: SA 55/2022

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

CENTRAL TECHNICAL SUPPLIES (PTY) LTD

Appellant

and

**PARAGON INVESTMENT (PTY) LTD JV CHINA
HUAYUN GROUP**

First Respondent

CHAIRPERSON: REVIEW PANEL

Second Respondent

GOVERNMENT OF THE REPUBLIC OF NAMIBIA

Third Respondent

ACCOUNTING OFFICER: MINISTRY OF WORKS

Fourth Respondent

**THOMPSONS ELECTRONICS AND
TECHNOLOGY t/a TECHNIQUES CC**

Fifth Respondent

MINISTER OF FINANCE

Sixth Respondent

Coram: DAMASEB DCJ, ANGULA AJA and PRINSLOO AJA

Heard: 18 October 2023

Delivered: 13 March 2024

Summary: During August 2021, the Ministry of Works and Transport (the 'ministry') advertised a request for procurement bids for the 'Supply, Delivery, Installation, Commissioning and Maintenance of an Automated Weather Observing System to the Namibian Metrological Services' which resorts under the ministry. The appellant, the

first respondent ('Paragon'), the fifth respondent ('Thompson') and other bidders submitted bids. Paragon was the successful bidder. Dissatisfied with the award process, the appellant and Thompson, filed review applications challenging the award of the bid to Paragon in which they alleged that Paragon, did not have prior experience with the Automated Weather Observing System and that it was a Joint Venture with a company which was not Namibian, whereas the bid was aimed at benefiting Namibian citizens. They, therefore, demanded that the bid be cancelled and re-advertised.

The Minister of Finance constituted a Review Panel as stipulated by the Public Procurement Act 15 of 2015, (the 'Act'). The Review Panel after consideration upheld the appellant's and Thompson's objections and ordered that the procurement process be terminated and started afresh.

Aggrieved by the decision of the Review Panel, Paragon successfully lodged an urgent application in the High Court in which the High Court granted the following relief: declaring the decision by the Review Panel to be unlawful, null and void and set it aside; that the appellant and Thompson did not file statutorily-compliant review applications; that the Minister of Finance (sixth respondent) did not have the power to constitute a Review Panel in the absence of statutorily-compliant review applications; and directing the accounting officer of the Ministry to award the contract to Paragon. Neither the appellant nor Thompson opposed the application in the High Court.

On appeal

The appellant advanced two main grounds of appeal. First, that the court *a quo* erred when it found that it was undisputed that the accounting officer did not receive the appellant's review application within seven days of the receipt of the decision in terms of reg 14(1) and the second ground of appeal is that the court *a quo* erred in finding that a review application must be accompanied by a founding affidavit whereas that neither the Act nor the regulations prescribe what format the review application must take as reg 42(2) only provides that the review application must contain the grounds

for review together with supporting documents and be accompanied by an application fee of N\$5 000.

This appeal raises two questions for determination. The first question is whether a default judgment is final in effect and thus appealable or whether it is provisional subject to rescission and therefore only appealable with leave. The second question is whether an appellant who did not oppose the relief prayed for in the proceedings before the court *a quo* and against whom a judgment or order is granted in his or her absence, is of right entitled to appeal to this Court; or whether he or she is obliged to apply for a rescission of that judgment or order in the court *a quo* and only once rescission is refused to appeal to this Court.

Held that, for a decision to be appealable, it must be final in effect and not susceptible to alteration by the court of first instance. It must be definitive of the rights of the parties, ie it must grant definitive relief. A judgment or order is not final for the purpose of appeal merely because it takes effect. It is only final when the proceedings of the court of first instance are completed and that court is not capable of revisiting that order. The order is not appealable because it is capable of being rescinded by the court that granted it. Thus a default judgment is not appealable for the reason that until the right to apply for rescission no longer exists or the appellant had perempted his right to apply for rescission, such judgment is not final.

Held that, the test of appealability is whether the judgment was final or provisional. Provisional in the sense that it is capable of being revisited. The appellant did not oppose the granting of the orders in the court *a quo* resulting in the orders being granted by the court *a quo*, in the absence of the appellant. The appellant is thus prematurely before this Court until the court *a quo* has been asked to rescind its orders and has dismissed the rescission application. Alternatively, the court *a quo* has refused the appellant's application for leave to appeal.

The appeal is struck from the roll with costs.

APPEAL JUDGMENT

ANGULA AJA (DAMASEB DCJ and PRINSLOO AJA concurring):

Introduction

[1] This appeal raises two questions for determination. The first question is whether a default judgment is final in effect and thus appealable or whether it is provisional subject to rescission and therefore only appealable with leave. The second question is whether an appellant who did not oppose the relief prayed for in the proceedings before the court *a quo* and against whom a judgment or order is granted in his or her absence, is of right entitled to appeal to this Court; or whether he or she is obliged to apply for a rescission of that judgment or order in the court *a quo* and only once rescission is refused to appeal to this Court.

Factual background

[2] The issues for determination arose from the following factual background. During August 2021, the Ministry of Works and Transport (the 'ministry') advertised a request for procurement bids for the 'Supply, Delivery, Installation, Commissioning and Maintenance of an Automated Weather Observing System to the Namibian Meteorological Services' which resorts under the ministry. The appellant, the first respondent ('Paragon'), the fifth respondent ('Thompson') and other bidders submitted bids.

[3] On or about 5 May 2022, Paragon received a notice from the Accounting officer of the ministry advising that it has been selected to be awarded the bid. The notice further stated that in the absence of any application for review by an unsuccessful bidder, filed within seven days from the date of the notice, challenging Paragon's selection, the accounting officer of the ministry will award the contract to Paragon. The notice further stated that the period of seven days would start to run from 5 May 2022 and expire on 11 May 2022.

[4] After the appellant and Thompson received notices that they had not been selected, they filed review applications challenging the award of the bid to Paragon. In their application, they pointed out *inter alia*, that Paragon, as a successful bidder, did not have prior experience with the Automated Weather Observing System and that it was a Joint Venture with a company which was not Namibian, whereas the bid was aimed at benefiting Namibian citizens. They, therefore, demanded that the bid be cancelled and re-advertised.

[5] The accounting officer of the ministry filed her 'replying affidavit' in opposition to the review application. She pointed out *inter alia* that in relation to the appellant's and Thompson's grievances that the Joint Venture was made up of Paragon and a non-Namibian entity, the bid conditions did not restrict bidders who are in joint venture or partnership arrangements to submit bids. She deposed further that Paragon, as successful bidder, had complied with the technical requirements.

[6] In opposition to the review application, Paragon filed an affidavit in which it *inter alia* raised three points *in limine*. First, that the applications for review were not accompanied by an application-fee of N\$5000 as stipulated by the regulations, in that the fee appeared to have been paid after the applications had been lodged. Second, that the applications had not been lodged within the seven days period stated in the notice and in the regulations. Thirdly, that the applications were not supported by a founding affidavit.

[7] Upon receipt of the review application, the Minister of Finance constituted a Review Panel as stipulated by the Public Procurement Act 15 of 2015, (the 'Act') to adjudicate upon the appellant's and Thompson's review applications.

[8] Having considered the applications, the Review Panel upheld the appellant's and Thompson's objections and ordered that the procurement process be terminated and started afresh.

Proceedings before the court *a quo*

[9] Subsequent to the ruling by the Review Panel, Paragon brought an urgent application in the court *a quo* in which it sought orders *inter alia* that the decision by the Review Panel be declared unlawful, null and void and be set aside; an order declaring that the appellant and Thompson did not file statutorily-compliant review applications; an order declaring that the Minister of Finance (sixth respondent) did not have the power to constitute a Review Panel in the absence of statutorily-compliant

review applications; and that the accounting officer of the ministry be directed to award the contract to Paragon.

[10] The deponent to Paragon's founding affidavit contended that the review applications were filed outside the prescribed period of seven days in that they were filed on 12 May 2022 instead of being filed on or before 11 May 2022 and for that reason there were no valid applications which the Review Panel could adjudicate upon. Furthermore, that from the proof of payments which must accompany the applications, it appeared that they were effected two days after the prescribed period of filing the review application. It was further contended that the applications were received by the Executive Director of the ministry on 13 May 2022, about two days late. It was further argued that the review applications were non-compliant with the regulations as they were not accompanied by founding affidavits.

[11] Neither the appellant nor Thompson opposed the application.

[12] The chairperson of the Review Panel filed an 'explanatory affidavit'. She contended first, that the Minister of Finance had the power and authority under s 58 of the Act to constitute the Review Panel. Secondly, she pointed out that the review applications were filed within the prescribed period of seven days based on the calculation made in terms of the Interpretation of Laws Proclamation 37 of 1920. She pointed out further that the regulations did not prescribe what format a review application should take. Furthermore, that there is no requirement that a review application must be accompanied by a founding affidavit.

[13] As to the complaint by the applicant that the successful bidder was a joint venture and that some of the entities were non-Namibians, the chairperson stated that the Review Panel's finding was that the successful bidder was a Joint Venture (JV) between Paragon (Pty) Ltd and Chinese group of companies; and that Paragon was the only Namibian owned company while the others were non-Namibians. She further pointed out that the bidding instructions stipulated that the bid was limited to Namibian citizens. According to her, the JV was not Namibian and, as such, was disqualified by the Review Panel.

[14] The court *a quo* identified two issues for its determination: first, whether the review applications were lodged within the prescribed time period; and second, whether the applications were lodged in the prescribed manner.

[15] As regards the first question of whether the applications were lodged timeously, the court found that it was common cause that both applications were lodged on 13 May 2022, thus outside the prescribed time period of seven days. According to the court, the applications should have been filed by 12 May 2022. The court therefore found that there were no valid review applications and accordingly the Minister of Finance could not have validly constituted a Review Panel. The court, therefore, held that the Accounting officer of the ministry was in terms of s 55(5) of the Act under an obligation to conclude a procurement contract with Paragon.

[16] In respect of the second question whether the review applications were lodged as prescribed, the court found that both applications were submitted on forms RP/01, however those forms were not prescribed or contained in the Act or regulations.

[17] With regard to the proof of payments which accompanied the applications, the court found that in respect of Thompson, the proof of payment was dated 13 May 2022, a day after the prescribed period of seven days. In respect of the proof of payment for Central Technical Supplies (the appellant) the application was dated 12 May 2022. The court consequently found that both applications were filed outside the prescribed time and as a result there were no valid applications upon which the Minister of Finance could have constituted a Review Panel.

[18] The court further held that a valid review application is one accompanied by a founding affidavit in order to place evidence before the Review Panel. The court reasoned in this connection that the reason why the applicants ought to have filed founding affidavits is that in terms of reg 42(4) other bidders, or any interested persons were required to file a 'replying affidavit' to respond to the allegations contained in the founding affidavit.

[19] The court therefore made the following orders: declaring the decision made by the Review Panel as null and void and setting it aside; an order declaring that Thompson and Central Technical Supplies did not file their review applications within the stipulated period of seven days; an order declaring that the Minister of Finance did not have the power to constitute a Review Panel in the absence of compliant

review applications; and that the Accounting officer of the ministry must award the contract to Paragon in terms of s 55 of the Act.

Proceedings before this Court

Grounds of appeal

[20] The appellant advanced two main grounds of appeal. First, that the court *a quo* erred when it found that it was undisputed that the Accounting officer received the appellant's review application on 13 May 2022 whereas the letter by the appellant to the Accounting officer dated 11 May 2022 attached to the affidavit filed by the Accounting officer, pointed out that even though the notices sent to unsuccessful bidders were dated 5 May 2022, they were only sent and received by the appellant on 6 May 2022 and therefore the seven days period could only expire on 12 May 2022. In this regard reg 42(1) provides that a review application must be lodged, within seven days of the receipt of the decision.

[21] The second ground of appeal is that the court *a quo* erred in finding that a review application must be accompanied by a founding affidavit. However the only affidavit stipulated by the regulations is a 'replying affidavit' to be filed by a public entity or any interested party; and that neither the Act nor the regulations prescribe what format the review application must take. Furthermore, reg 42(2) only provides that the review application must contain the grounds for review together with supporting documents and be accompanied by an application fee of N\$5000.

[22] Paragon opposed the appeal, in essence supporting the court *a quo*'s findings.

Parties' representations

[23] Mr Heathcote appeared on behalf of the appellant assisted by Mr Ravenscroft-Jones, whereas Mr Namandje appeared with Mr Gaeb on behalf of the first respondent. Both counsel filed comprehensive and helpful heads of argument. The court is grateful for the assistance rendered.

Submissions on behalf of the appellant

[24] Mr Heathcote submitted, both in the heads of argument and during oral argument, that despite the fact that the appellant did not oppose the application in the court *a quo* which resulted in the judgment and orders appealed against being granted in default, the appellant was entitled as of right to appeal against such judgment and orders. Counsel placed reliance for his submission on *JCL Civils Namibia (Pty) Ltd v Steenkamp*¹(Civils) a judgment of this Court where it was held that an order or judgment obtained by default is final and thus appealable.

[25] Counsel further pointed out, with reference to *Minister of Health and Social Services v Amakali*² and similar matters³, that the fact that the appellant was not present in court at the time when the default judgment was moved for and granted, did not mean that the default judgment must automatically be granted. The court still has the duty to ensure that the party applying for default judgment has to discharge the onus which rests upon him or her to prove the pleaded cause of action.

¹ *JCL Civils Namibia (Pty) Ltd v Steenkamp* 2007 (1) NR 1 (SC).

² *Minister of Health & Social Services v Amakali* 2019 (1) NR 262 (SC).

³ *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 (SC) para 15; *Christian t/a Hope Financial Services v Namibia Financial Institutions Supervisory Authority* 2019 (4) NR 1109 (SC) paras 54-68.

Submissions on behalf of the respondent

[26] Mr Namandje, for his part argued contrawise, placing reliance on *Pitelli v Everton Gardens Projects (Pitelli)*⁴ a judgment of the South African Supreme Court of Appeal (SCA). In that matter, the court held at para 27 that an order is not final for the purposes of an appeal merely because it takes effect. It is final when the proceedings of the court of first instance are completed and that court is not capable of revisiting its order.

[27] Mr Namandje submitted that on the basis of the test for appealability laid down by this Court in *Di Savino*⁵ and taking into account what has been stated in *Pitelli*, the orders made by the court *a quo* in the present matter, do not have all the attributes of a final appealable order. Counsel therefore submitted that the orders are not appealable as the appellant had a remedy in the form of a rescission of those orders in the court *a quo*.

[28] In conclusion, counsel submitted that in the event of this Court finding that the law as set out in *Civils* is correct, then in that event counsel submitted that that judgment is patently and clearly wrong and should not be followed.

[29] Counsel submitted, in the alternative, that in the event that it is found that the orders are appealable, then in that event, the appellant required leave to appeal in terms of s 18(3) of the Act, which was not done.

⁴ *Pitelli v Everton Gardens Projects* CC 2010 (5) SA 171 (SCA).

⁵ *Di Savino v Nedbank Namibia Ltd* 2017 (3) NR 880 (SC).

Discussion

[30] I turn to consider the first question posed earlier in this judgment and that is whether a default judgment is final in effect and thus appealable or whether it is provisional subject to a rescission and therefore only appealable with leave.

[31] The test of whether a judgment or order is appealable was laid down by this Court in *Vaatz & others v Klotsch & others*⁶ with reference and approval of *Erasmus: Superior Court Practice* where the learned author reviewed the South African jurisprudence and concluded that an appealable judgment or order has three attributes: namely that (i) the decision must be final in effect and not susceptible to alteration by the court of first instance; (ii) it must be definitive of the rights of the parties, ie it must grant definitive relief; and (iii) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[32] This Court in *Shetu Trading v Tender Board of Namibia*⁷ observed, with reference to the view expressed by the SCA, that the question of appealability is 'intrinsically difficult' and 'a vexed issue' and that the principles set out in *Zweni v Minister of Law and Order*⁸ are not 'cast in stone' but are illustrative, and 'not immutable'. The court further pointed out that there are cases where courts have held that a judgment or order is appealable when one attribute is missing, while there are cases where the judgment or order is unappealable despite all three attributes being present.

⁶ Unreported judgment of this Court SA 26/2001 dated 11 October 2002.

⁷ *Shetu Trading CC v Chair, Tender Board of Namibia & others* 2012 (1) NR 162.

⁸ *Zweni v Minister of Law & order* 1993 (1) SA 523 at 531I -533B.

[33] Having regard to the parties' respective and diametrically opposed submissions, it would appear that the question that arises is: which of the two dicta – *Civils* or *Pitelli* – is a correct exposition of the law? That is the question to which I now turn.

[34] The facts in *Civils* (*supra*) can be briefly summarised as follows: The respondent had provided carpentry services to the appellant. When the appellant failed to pay the respondent for the services rendered, the latter issued summons and obtained default judgment and eventually a writ of execution. The respondent then attached the appellant's certificate of payment as security. A settlement agreement was reached whereby some of the money was paid to the respondent, and the balance was paid into the trust account of the appellant's lawyer pending the resolution of the dispute.

[35] Thereafter, the appellant applied to court and the offer of compromise which was made to the creditors of the appellant in terms of the Companies Act 61 of 1973, was sanctioned by the court. The respondent then filed an application to court and obtained an order by default declaring him as a secured creditor of the appellant. Subsequent thereto the appellant filed an appeal against the order granted by default in favour of the respondent.

[36] It was common cause that in the court *a quo* the appellant did not oppose the application by the respondent for default judgment, nor did it file any opposing papers. The issues the court had to determine were: whether it could entertain the appeal in

the circumstances where the appellant did not oppose the application in the court *a quo*, did not file an answering affidavit, did not oppose any of the relief claimed in the court *a quo*, and did not apply for the rescission of the order granted. And finally, whether the application in the court *a quo* was interlocutory in nature and, if so, whether leave to appeal was required.

[37] In the course of the judgment, the court referred to *Sparks v Davit Polliack*⁹ at para 22 where the following was stated:

'In the case of *Sparks v Davit Polliack & Co* (supra) the court (Trollip J, as he then was) dealt with a judgment by default granted by a magistrates' court in terms of s 83(b) of the Magistrates' Courts Act which required that a judgment should be final before it is appealable. At 494G - 495A the learned judge stated the following:

"The test of appealability in such cases is whether the judgment was final or provisional, and not whether another remedy was available in the court *a quo* which should have been first exhausted. The fact that the remedy of rescission is available in the court that granted the judgment is, of course, an important factor in determining whether the judgment is final or merely provisional, but it is not decisive as *Austin v Mills*, supra, indicates. A judgment might, in terms of the statute and practice of the court, be final and therefore appealable even though the remedy of rescission is also available; and if the statute does confer the right to appeal against the judgment, I do not think that the appeal Court is entitled to frustrate that right by refusing to entertain it merely because the remedy of rescission is also available to the defendant in the court *a quo*. (*Goldberg v Goldberg* 1938 W.L.D. 83 at p. 85). After all, the appellant is dominus litis, and it is for him to select from the remedies available to him what particular remedy he wishes to invoke, and if he chooses his statutory right to appeal, I do not think that the appeal Court could refuse to hear it.'

⁹ *Sparks v Davit Polliack* 1963 (2) SA 491 (T).

[38] Relying on *Sparks* the court reasoned that on the facts before it, the time for filing the application for rescission had lapsed, and the notice of appeal was given after the lapse of such period; and the person who could apply for the rescission was before it. It therefore decided that the case before it was one where the court could accept that the appellant had waived his right to apply for a rescission and elected to appeal.

[39] The court proceeded and held that s 18(1) of the High Court Act 16 of 1990, affords a general right of appeal to the Supreme Court. It further held that s 18(3) constitutes a limitation to such general right in so far as the subsec requires that leave be obtained before an aspirant appellant appeals against an interlocutory order or against an order of costs. In addition, the court held that the order in that case was appealable and that no leave to appeal was necessary in view of its finding that it was a final order.

[40] I must confess that *Civils* gave me a great deal of difficulty in so far as it was contended that it intended to lay down a general principle applicable in all matters. It seems to me that the question in the present matter is whether the court in *Civils* intended to lay down a general principle of law or whether its statement should be confined to the facts of that matter. My understanding of *Sparks* is that it is not authority for the proposition that a default judgment is appealable as of right. On the contrary the court in *Sparks* held that a default judgment is not appealable for the reason that until the right to apply for rescission no longer exists or the appellant had perempted his right to apply for rescission, such judgment is not final.

[41] It should also be borne in mind that in *Sparks* the court was dealing with an appeal where the appellant had a statutory right in terms of s 83(b) of the Magistrate Courts Act 32 of 1944, 'to appeal to the provincial division of the of the Supreme Court having local jurisdiction against any rule or order made in such suit or proceedings and having the effect of a final judgment. . . '. It was in that context, as I understand it, that the court in *Sparks* stated that a judgment might, in terms of the statute and practice of the court, be final and therefore appealable even though the remedy of rescission is also available; and if the statute does confer the right to appeal against the judgment. In *Civils* the appellant did not have a statutory right to appeal. Furthermore, the appellant did not preempt its right to apply for rescission. Those, in my view, are weighty considerations which distinguish *Civils* from *Sparks*. *Civils* was decided in 2007 and relied on a judgment of the High Court of South Africa given in 1963. It is doubtful, in the light of this Court's current jurisprudence in *Di Savino* and the long line of cases since then, that the Court in *Civils* could have arrived at the same conclusion today. More so because, as will soon become apparent, the line of reasoning that *Sparks* represents is clearly inconsistent with, and was in fact disapproved, in *Pitelli* by a court higher in hierarchy to the *Sparks* Court.

[42] It is important to point out that I have not come across any decided case in Namibia that has followed *Civils* on the question of appealability of default judgments. On the contrary, the *ratio* in *Civils* on that issue is clearly out of harmony with *Di Savino* and its progeny. Settled jurisprudence of this Court since *Di Savino* is that an

order lacks the quality of finality and therefore appealability if it does not result in *res judicata*. *Civils* suggests the contrary, relying as it did on first instance authority from South Africa interpreting appeal provisions in the Magistrate's Courts Act dealing with appeals from magistrates' courts to provincial divisions. It is not without significance that *Sparks* has been disapproved by the Supreme Court of Appeal of South Africa.

[43] In my view the grounds upon which the Court in *Civils* justified its conclusion are not convincing. I say so for the following reasons: In my respectful view, generally, the fact that the time for the filing of the application for rescission of judgment has lapsed, cannot be a relevant factor to determine the appealability of the order because the appellant can still apply for condonation for the late filing of the application for rescission of judgment or order by giving an acceptable and reasonable explanation for his or her delay.

[44] As to the fact that the appellant was already before court, that fact can ordinarily not justify the appealability of the order or judgment. The appellant must be before court after having followed the prescribed procedure, for instance, of having applied and granted leave to appeal given the fact that the order appealed against was provisional and therefore subject to rescission.

[45] Regarding the court's justification that it had accepted that the appellant had waived his right to apply for a rescission of judgment and had instead elected to appeal, it seems that the approach was influenced by the passage quoted by the court from *Sparks*. As pointed elsewhere in this judgment that statement in *Sparks*

was made in the context where the appellant had a judgment which was final in terms of the particular statute. The appellant, in that matter, had a choice, as a *dominus litis*, either to appeal or to apply for rescission. In *Civils* the appellant did not have such a choice. In addition, it is doubtful that the court could validly accept that the appellant had waived his right given the stringent requirements for a valid waiver, namely that it should be done by the person with a full appreciation that he or she is waiving his or her right. The waiver must be communicated before the expiry of the time period, in that case, before the expiry of the time period within which the appeal had to be noted.¹⁰ According to *Sparks*, the appellant waived his right when 'noting his appeal expressly waive or preempt his right of rescission'.¹¹ In *Civils*, there was no suggestion that the appellant had waived his right in the notice of appeal, hence, the court merely 'accepted' that he had done so. It is not the appellant's case in the present matter that it had waived its right to apply for rescission of the judgment and orders.

[46] Given all those reasons and considerations, I am of the view that to hold that *Civils* was intended to be of general application would have unintended and disruptive consequences. It would mean, for instance, that any party against whom a default judgment or order has been granted would have 'a general right of appeal . . . to the Supreme Court'. He or she would not require leave to appeal. That would result in this Court being flooded with appeals, where the issues had not been ventilated in the High Court.

[47] It would further have the effect that default judgments granted by the High Court would be open to challenge for variation and setting aside, without the judges of

¹⁰ *Borstlap v Spangenberg en andere* 1974 (3) SA 695 at 704G

¹¹ At 496E-F.

the High Court being afforded an opportunity to provide reasons for their orders before such orders are varied or set aside. Such a situation would create confusion and uncertainty in the administration of justice. Worse, the Supreme Court would be demoted from a constitutionally ordained appeal court to a court of first instance. I do not think that it was the legislature's intention to create such a situation when it enacted s 18(1). I therefore hold that *Civils* must be confined to its facts and circumstances.

[48] What are the aspirant appellant's rights who did not oppose the proceedings before the court of first instance? That is the question to which I now turn.

[49] It is to be recalled that the second question posed at the commencement of this judgment was whether an appellant who did not oppose the relief prayed for in the proceedings before the court *a quo* and a judgment or order is granted in his or her absence, such appellant is of right entitled to appeal to this Court or whether he or she is obliged to apply for a rescission of that judgment or order in the court *a quo* and only once rescission is refused he or she may appeal to this Court.

[50] Mr Namandje submitted that the appellant in the present matter ought to have first applied for rescission of the judgment before appealing to this Court or at best ought to have applied for and be granted leave to appeal. Counsel relied on *Pitelli* for this submission.

[51] In that matter, a default judgment was granted by the High Court against Mr Pitelli, whereby he was ordered to pay a certain amount of money. The proceedings were brought on notice of motion. No answering affidavit was filed. On the same day the default judgment was granted, Mr Pitelli filed an application for leave to appeal. Shortly thereafter he filed an application for rescission of the judgment. The two applications were heard simultaneously and were dismissed. Thereafter, Mr Pitelli petitioned the Supreme Court of Appeal (SCA), which granted him leave to appeal to that court.

[52] The SCA held at para 27 that '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. 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'.

[53] I consider the legal position set out in *Pitelli* to be persuasive and as a correct statement of the law applicable in this jurisdiction. It resonates with the law as set out in *Di Savino* and *Vaatz*, which can be summarised as follows: the decision must be final in effect and not susceptible to alteration by the court of first instance. It must be definitive of the rights of the parties, ie it must grant definitive relief. A judgment or order is not final for the purpose of appeal merely because it takes effect. It is only final when the proceedings of the court of first instance are completed and that court

is not capable of revisiting that order. The order is not appealable because it is capable of being rescinded by the court that granted it. The test of appealability is whether the judgment was final or provisional. Provisional in the sense that it is capable of being revisited.

[54] Mr Namandje is correct that the facts in *Christian* and *Amakali* are distinguishable from the facts of the present matter. For instance, in *Christian*, the defendant, Namfisa, had given notice of its intention to defend although it was later found to be defective. There was also no service of the summons on one of the defendants who was sued in his personal capacity, jointly and severally with Namfisa. It was also common cause that the notice of set down for the application of the default judgment had not been served on Namfisa as prescribed by the rules then in force. Lastly, it was common cause that the claim by the appellant, was for an unliquidated amount based on delict, however, no evidence was led to establish liability and no evidence was led to prove how the amount claimed was calculated and arrived at. As a result, the default judgment was set aside on appeal, and the matter was remitted to the court *a quo* for further case management. In the present matter there was no notice to defend filed. In addition, the appellant did not appear before the court *a quo*.

[55] Regarding *Amakali*, the facts in that case are equally distinguishable from the facts of the present matter. In that matter the appellant was the defendant in the court *a quo*. He was granted leave in the court *a quo* to file his special plea on or before a specified date but failed to keep to the deadline. He applied for condonation and leave to file his special plea. The application was refused whereupon the managing

judge struck the special plea as well as the defence. The court held *inter alia* that it could not allow that the appellant's door to justice was completely shut down through the striking of the appellant's defence and by not allowing the appellant to make presentations as to why the defence should not be struck. The appeal succeeded, and the matter was remitted to the court *a quo*. The distinguishing features between the two matters are obvious.

[56] In the light of the authorities referred to above and further considerations, the answer to the second question posed earlier, on this aspect, becomes self-evident, namely that an aspirant appellant who did not oppose the relief sought in the proceedings at first instance, and a judgment or order is granted against him or her in his or her absence, is not entitled to appeal to this court as of right. He or she has two options: One option is to apply for a rescission of the judgment or order of the court *a quo* and only once the application for rescission has been refused may he or she appeal to this court. The other option is that he or she has to apply to the court *a quo* for leave to appeal against the judgment or order of the court *a quo* and only once leave has been granted may he or she appeal to this Court.

[57] It is common cause in the present matter that the appellant did not oppose the granting of the orders in the court *a quo*. The orders were granted by the court *a quo*, in the absence of the appellant. They thus lack the attributes of appealability.

[58] It follows thus that the appellant is prematurely before this Court until the court *a quo* has been asked to rescind its orders and has dismissed the rescission

application. Alternatively, the court *a quo* has refused the appellant's application for leave to appeal. The appeal is therefore not properly before this Court.

[59] In the result the appeal is struck from the roll with costs such costs to include the costs of one instructing legal practitioner and two instructed legal practitioners.

ANGULA AJA

DAMASEB DCJ

PRINSLOO AJA

APPEARANCES

APPELLANT: R Heathcote (with him JP Ravenscroft-Jones)
Instructed by Engling, Stritter & Partners.

FIRST RESPONDENT: S Namandje (with him K N Gaeb)
Of Sisa Namandje & Co. Inc.

THIRD, FOURTH and SIXTH RESPONDENTS: No appearance