

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-112275

- (1) REPORTABLE: Yes ☐ / No ☒  
(2) OF INTEREST TO OTHER JUDGES: Yes ☐ / No ☒  
(3) REVISED: Yes ☐ / No ☒

Date: 01 August 2024

WJ du Plessis

In the matter between:

**SAINT GOBAIN CONSTRUCTION PRODUCTS SOUTH AFRICA (PTY) LTD** PLAINTIFF

and

**MATHULA INVESTMENT AND CONSTRUCTION CC** FIRST DEFENDANT

**PHILANI ASCENIUS SIKHAKHANE** SECOND DEFENDANT

**DAPHNEY SPHUMLILE SIKHAKHANE** THIRD DEFENDANT

**INNOCENTIA MKHWANAZI** FOURTH DEFENDANT

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JUDGMENT: LEAVE TO APPEAL

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## **DU PLESSIS AJ**

### **Background**

- [1] This is an application for leave to appeal in which the First to Third defendants (hereafter referred to as the Defendants) in the main action request leave to appeal to either the Full Bench or the Supreme Court against this court's findings to dismiss an exception where these defendants argued that the Plaintiff's particulars of claim lack the necessary averment to sustain the various causes of action as against the collectively and or individually.
- [2] Before considering the test for leave to appeal, I must first consider whether an exception that is dismissed is indeed appealable.

### **The appealability of an exception**

- [3] The Defendants argue that while it is accepted that interlocutory applications are not appealable as they are not definite of the parties' rights, as it does not finally dispose of the issues,<sup>1</sup> this position can be reconsidered based on the following submissions:
- i. If an exception against the cause of action is to weed out cases without legal merit, then it is clear that an exception, which is a pleading, determines the claim's merit. Put differently, an exception can often lead to an end of the claim or defence. It is there to prevent an unnecessary trial or claim.
  - ii. The quote authority undermines the exception instrument. It makes little sense to have an exception if its consequences can be ignored.
  - iii. It does not make sense why a trial should run when an exception is or can be dispositive. It makes no sense if the pleadings do not disclose a cause of

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<sup>1</sup> They cite *Maize Board v Tiger Oats Ltd* 2002 (5) SA 364 (SCA) para 14 and *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd* 2023 (5) SA 163 (SCA) as authority.

action and then to insist that a trial must run, only for the excipient to be vindicated after spending time and money preparing for a trial

- [4] For instance, was the exception successful in this case, then that would have been the end of the litigation between these Defendants and the Plaintiff, which shows that an exception goes to the essence of the claim itself. The cite *Venator Africa (Pty) Ltd v Watts*<sup>2</sup> where the Supreme Court of Appeal entertained an appeal arising from an exception where the plaintiff in that matter failed to make the necessary averments to sustain their cause. However, the appeal was against the upholding of an exception, which is appealable, not the dismissal, which is not. The upholding of an exception is appealable because the High Court pronounced on it.
- [5] The Plaintiff disagrees with the Defendant's contention that an appeal against the dismissal of an exception is possible. They rely on a long line of authority confirming that the dismissal of an exception is not appealable, as recently (re-)confirmed by the Supreme Court of Appeal in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd*.<sup>3</sup> That case also dealt with an exception that goes to the heart of the plaintiff's cause of action. That is because, as the Defendants already alluded to, no legal obstacle stands in the way of the trial court to finally decide the point of law. The court clearly states that dismissing an exception is not a final decision.
- [6] I am bound by the Supreme Court of Appeal's judgment and agree with the reasoning in *TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd*.<sup>4</sup> The dismissal of an exception is not appealable. Since the dismissal of an exception is not appealable, I do not need to consider the test of appeal or whether to grant leave to appeal.

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<sup>2</sup> [2024] ZASCA 60.

<sup>3</sup> 2023 (5) SA 163 (SCA)

<sup>4</sup> 2023 (5) SA 163 (SCA), see specifically paragraph 36 onwards.

- [7] The Plaintiff requested a punitive cost order. During the hearing, counsel for the plaintiff requested costs on an attorney-client scale for pursuing a baseless appeal. Since it is established law that a dismissal of an exception is not appealable, I agree that the Plaintiff should not be out of pocket for having to defend a baseless leave to appeal. Attorney and client scale is thus warranted in this instance.

## **Order**

- [8] I, therefore, make the following order:

1. The application for leave to appeal is dismissed, with costs on an attorney and client scale.

[REDACTED]

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**WJ DU PLESSIS**

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines and sending it to the parties/their legal representatives by email.

Counsel for the Excipients / Defendants: Mr F Nalane SC

Mr M Sikhakhane

Instructed by:

Mabuza Attorneys

Counsel for the Plaintiff:

Mr A Morrissey

Instructed by:

Werksmans attorneys

Date of the hearing:

01 August 2024

Date of judgment:

01 August 2024