



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 5 May 2023

Status: Immediate

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TWK Agriculture Holdings (Pty) Ltd v Hoogveld Boerderybeleggings (Pty) Ltd and Others (273/2022) [2023] ZASCA 63 (5 May 2023)

Today, the Supreme Court of Appeal (SCA) struck an appeal from the court roll. Each party was required to pay their own legal costs.

The respondents had instituted an action against the appellant in the Mpumalanga Division of the High Court, Middelburg (the high court). For reference purposes, the parties were referred to in the appeal as they were cited in the action. The plaintiffs (the respondents in the appeal) were shareholders of the defendant (the appellant).

The plaintiffs' cause of action was based on appraisal rights (the appraisal remedy). The defendant excepted to the plaintiffs' particulars of claim. Two relevant grounds of exception were taken by the defendant. First, the defendant complained that there was no cause of action to secure an appraisal remedy, unless the company had more than one class of shares, however, it was averred that the defendant had a single class of shares (the class exception). Second, the defendant complained that the adoption of the amended memorandum of incorporation (MOI) did not have a material and adverse effect on the preferences, rights, limitations, interests and other terms of the shares in the defendant, but, at worst, upon the persons who happen to own those shares. Thus, the particulars of claim were said by the defendant to lack averments necessary to sustain a cause of action because the appraisal remedy required a material and adverse effect on the shares, and not merely upon the persons who own those shares (the relatedness exception).

The high court upheld the exceptions. The full court upheld the appeal to it and dismissed both the class exception and the relatedness exception. With special leave, the defendant appealed to the SCA.

Before the SCA the question was whether the full court's order dismissing the exceptions was appealable to the SCA.

The SCA considered notable precedent so as to settle the jurisprudence in regard to appealability. The SCA found that in *Maize Board v Tiger Oats Ltd and Others* [2002] 3 All SA 593 (A); 2002 (5) SA 365 (SCA), the position in our law was affirmed, whereby a long line of cases, stretching back to *Blaauwbosch Diamonds Ltd v Union Government (Minister of Finance)* 1915 AD 599 (A) had consistently held, save in very limited circumstances, that the dismissal of an exception was not appealable. The basis of this holding was that such an order was not final in effect because there was nothing to prevent the same law points being argued at the trial. *Maize Board* has been followed in a long line of cases.

Yet, in *National Commissioner of Police and Another v Gun Owners of South Africa* [2020] ZASCA 88; [2020] 4 All SA 1 (SCA); 2020 (6) SA 69 (SCA) it was held that the traditional requirements that render an order appealable, namely that it was final in effect or dispositive of a substantial part of the case, had now been subsumed under the broader constitutional ‘interests of justice’ standard. Thus, on this approach, the lineage of the rule from *Blaauwbosch* to *Maize Board*, though based on considerations that remain relevant, must ultimately yield to the overarching criterion of the interests of justice.

In order to decide a consistent approach to appealability, the SCA considered the following question: should the SCA determine whether a decision of the high court or a full court was appealable by recourse to the overarching principle of the interests of justice?

The SCA found that whether the decision of a court was appealable was a matter of great importance, both for litigants and for the discharge by an appellate court of its institutional functions. That was why the doctrine of finality had figured so prominently in the jurisprudence of the SCA. As a general principle, the high court should bring finality to the matter before it. Only then should the matter be capable of being appealed to the SCA. It allowed for the orderly use of the capacity of the SCA to hear appeals that warrant its attention. It prevented piecemeal appeals that were often costly and delay the resolution of matters before the high court. It reinforced the duty of the high court to bring matters to an expeditious, and final, conclusion. And it provided criteria so that litigants could determine, with tolerable certainty, whether a matter was appealable. These were the hallmarks of what the rule of law required.

The SCA found further that to adopt the interests of justice as the foundational basis upon which the SCA decided whether to entertain an appeal would put in place a regime that was both unpredictable and open-ended. It would encourage litigants to persuade the high courts to grant leave, when they still had work to do, failing which, to invite the SCA to hear an appeal under the guidance of a standard of commanding imprecision. That would diminish certainty and enhance dysfunction. It would also compromise the freedom with which the Constitutional Court selected the matters it heard from the SCA.

Therefore, the SCA affirmed that the doctrine of finality had to figure as the central principle of consideration when deciding whether a matter was appealable to it. The SCA accordingly remarked that recent decisions of the SCA that may have been tempted into the general orbit of the interests of justice should henceforth be approached with the gravitational pull of the doctrine of finality.

In regard to the particular matter in the appeal, the SCA found that the class exception and the relatedness exception struck at the validity of the plaintiffs' claim. The dismissal of the two grounds of exception went to the heart of the plaintiffs' cause of action. Applying the doctrine of finality, the SCA found that authority of considerable pedigree had held that the dismissal of an exception was not appealable because no legal obstacle stood in the way of the trial court finally deciding the point of law. The dismissal of an exception was simply not a final decision, and until the matter was finally decided, an appeal should not lie to the SCA to pre-empt what the high court had yet to bring to finality.

The SCA found further that there were principled considerations which supported this position. In sum, bringing the matter to trial, as quickly as possible, upon the dismissal of an exception, had many advantages. They were advantages yielded by avoiding piecemeal litigation.

Thus, the SCA held that the orders made by the full court did not meet the requirements of appealability to the SCA. As a result, despite special leave having been granted, the appeal was not properly before the SCA and the appeal had to be struck from the roll. The SCA held further that since the parties both sought, and failed, to persuade the SCA that it should entertain the appeal, it was appropriate that each party bore its own costs of the appeal.

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