Appeal in the matter of the *Electoral Commission and Another v Lydia Ladies' Residence and Another* (Preliminary Judgment) 03/23

Judgment of the Appeal Court

Handed down on 12 May 2023

Introduction

The notice of appeal and the cross appeal seek to vary the order of the court a *quo* in various respects. The extent of the variation sought on appeal is set out in these notices and will not be independently traversed in the Appeal Court's judgment, save to the extent that these issues are relevant to determining the appealability of the judgment of the court *a quo*.

Appealability

The submissions

The court *a quo* indicated[1] that its 'preliminary' judgment is of an interlocutory nature and is likely not appealable. The appellants in their notice of appeal argue that the judgment of the court *a quo* is indeed appealable. They base their contention on various grounds, including that the:

- judgment in question is not a rule *nisi*;
- concept of 'preliminary judgment' is not recognised in SA law;
- judgment is a final judgment on issues of standing, joinder, and the rest;
- judgment is definitive of rights (such as the right of access to courts);
- order has resulted in dismissal of substantial part of the relief sought by the respondents;
- matter will not necessarily be reinstituted if it is dismissed;
- court a *quo* has indicated that the issues will not be revisited and that only the merits will be dealt with; and
- appellant and respondent viewed the matter as appealable.

[1] See email correspondence dated 17 March 2023, addressed from JW Beukes on the court a quo's behalf to ms Wassenaar and Mr Oosthuizen.

The law

It is worthwhile to provide a brief exposition of the legal position pertaining to appealability of judgments or orders, at least in part given the parties' and the court *a quo*'s reference to judicial precedent in so far as the issue of appealability is concerned.

The recent judgment of the Supreme Court of Appeal in *DRDGOLD Limited and Another v Nkala and Others*[2] is instructive on the issue of the issue of appealability of judgments or orders. The matter relates to the appealability of a decision by the Gauteng Division of the High Court to certify a class action. In *DRDGOLD*, the court referred to *Zweni v Minister of Law and Order*,[3] in which the court held that an appealable decision has three attributes. First, the decision must be final in effect and not susceptible to alteration by the court of first instance. Secondly, it must be definitive of the rights of the parties. Thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

The *Zweni* attributes are not exhaustive.[4] Following the *Zweni* judgment, the law relating to appealability has undergone further development. In this regard, the court in *Philani-Ma-Afrika & Others v Mailula & Others*[5] indicated that "what is of paramount importance in deciding whether a judgment is appealable is the interests of justice".[6] What the interests of justice require is not determined by a closed list of considerations and it depends on the relevant facts and circumstances of each individual case.[7]

Nugent J in *Liberty Life Association of Africa Ltd v Niselow*[8] held that "[t]he question which is generally asked…is whether the particular decision is appealable. Usually what is being asked relates to not whether the decision is capable of being corrected by an appeal court, but rather to the appropriate time for doing so. In effect the question is whether the particular decision may be placed before a court of appeal in isolation, and before the proceedings have run their full course."[9] (own emphasis).

[2] 688/2016) [2023] ZASCA 9 (6 February 2023).
[3] 1993 (1) SA 523 (A).
[4] Par 22 of *DRDGOLD*.
[5] (2010) 2 SA 573 (SCA).
[6] Par 20.
[7] Par 25 of *DRDGOLD*.
[8] (1996) 17 ILJ 673 (LAC) at 676H.
[9] Cited with approval in *DRDGOLD* at par 25.

Importantly, the court in *DRDGOLD* went on to state as follows:

> "The problem often arises when one of other party seeks to appeal against some preliminary or interlocutory decision, which is made by a court before it has arrived at a final conclusion on the merits of the dispute between the parties. The approach of the court in such circumstances is a flexible approach. In the words of Harms AJA in Zweni….'The emphasis is now rather on whether an appeal will necessarily lead to a more expeditious and cost-effective final determination of the main dispute between the parties and, as such, will decisively contribute to its final solution'".[10] (own emphasis).

Application to the facts

From the outset, it must be determined whether the judgment of the court a quo is appealable. This is because, if it is found not to be appealable, then the Appeal Court has no jurisdiction to adjudicate over the appeal.

As a point of departure, it is worthwhile to consider the nature of the decision of the court *a quo* in relation to the factors set out in *Zweni*, mentioned above. In this regard, the first factor to be considered is whether the 'preliminary judgment' of the court *a quo* is final in effect and not susceptible to alteration by it. The 'preliminary judgment' handed down by the court *a quo* is an interlocutory order. The order pertains to matters that are incidental to the main dispute and is made during the course of the litigation before a final judgment is given. It is clear from the reading of the judgment, including using the word 'preliminary' to describe the judgment, that the court a *quo* categorised the judgment as one being interlocutory of nature. Interlocutory orders are generally not appealable.[11] The nature of the order is such that it does not dispose of the relief sought in the main proceedings. Further, the interlocutory order may be varied or set aside by the court *a quo* before final judgment is given. In this regard, the court *a quo* is empowered to determine its own procedure.[12] The Student Constitution does not require that all eventualities be catered for in the Rules.[13] The fact that the Rules do

[10] Par 25 of *DRDGOLD*.
[11] *Halstead v Durant NO* [2001] 4 All SA 501 (W). According to Schreiner JA in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) 343*: "… [A] preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or … unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing".
[12] Student Constitution, section 87(1).
[13] Student Constitution, section 87(2).

not expressly provide for the reconsideration by the court *a quo* of interim orders does not deprive said court of its ability to do so. For example, if it becomes apparent to the court *a quo* that its interim order was based on an incorrect interpretation of a provision of the Student Constitution, the court may vary its order. The interim order is not final and definitive in effect with the result that it is *res judicata*.[14] The interim order does not need be in the form of a rule *nisi* for it be regarded as being of an interim nature. Further, the fact that the parties may agree that the matter is appealable, has no bearing on the Appeal Court's determination as to whether the matter is, by nature, one that should be regarded as being appealable.

The Appeal Court further finds that the court a quo's interim order is not definitive of the rights of the parties, nor does it have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. It therefore falls short of the second and third "attributes" for appealability set out in *Zweni*. The court *a quo's* interim order was made to facilitate the resolution of the main dispute. The order is incidental and preparatory to the adjudication and resolution of the main dispute. The order does not dispose of the relief claimed in the main proceedings.[15] The fact that the order contains a decision on issues such as *locus standi* and jurisdiction does not by itself render the interim order final in effect and dispositive of the rights of the parties. This may be illustrated with reference to the finding by our courts that a certification decision in class action proceedings constitutes an interim order that is generally not appealable, even though the order may dispose of issues such a *locus standi* and jurisdiction.[16]

The Appeal Court further finds that the appellant has failed to prove that the grant of leave to appeal would lead to a just and prompt resolution of the real issues between the parties. In fact, the Appeal Court finds that the appeal will likely delay the final determination of the main dispute between the parties and that it would be preferable for the main proceedings to proceed without further delay.

[14] *Dr Maureen Allem Inc and another v Jooste and others* [2021] JOL 51781 (GJ); *MK v DK* [2021] JOL 50630 (ECP)
[15] *Ngqula v South African Airways (Pty) Limited* [2013] JOL 30360 (SCA) para 14-16
[16] See DRDGOLD; *Gold Fields and Another v Motley Rice LLC* 2015 (4) SA 299 (GJ) at paras 15-16; *Permanent Secretary, Department of Welfare, Eastern Cape and Another v Ngxuza and Others* 2001 (4) SA 1184 (SCA) at par 29; *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) at par 43.

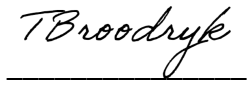
The Appeal Court is further unpersuaded that there are other factors that sufficiently militate against a finding that the judgment of the court *a quo* is not appealable. A finding of appealability is not in the interests of justice.

Conclusion

The Appeal Court accordingly finds that the decision of the court *a quo* is not appealable.

The appeal and the cross appeal are accordingly dismissed.

The Appeal Court



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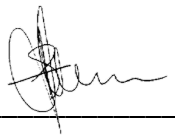

Dr S van der Merwe