

✓✓ 17/01/2018



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / <u>NO</u>	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
17/01/2018	
<u>DATE</u>	<u>SIGNATURE</u>

CASE NO: 34997/2015

DATE: 17/01/2018

IN THE MATTER BETWEEN:

SWART, JOHANNES RENIER N. O.

First Applicant

SWART, LEIGH ANN N. O.

Second Applicant

LOUW, WYNAND WESSELS N. O.

Third Applicant

(In their capacities as trustees of the RJS Trust, IT4300/2003)

and

DE WITT, JOSIAS ALEXANDER

Respondent

JUDGMENT

KOLLAPEN J:

1. This is an application for leave to appeal against the whole of the judgment of this court of the 18th of October 2016 when the Applicants' exception to the Respondent's particulars of claim was dismissed with costs.
2. The grounds upon which the application is premised are comprehensively set out in the Notice of Application for leave to appeal and in the main relate to the findings by this Court that the provisions of the National Credit Act (No. 34 of 2005) were applicable to the agreements concluded between the parties and upon which the action was based.
3. The applicants contend that the Court erred in finding that the agreement between the Applicants and Magnolia was an agreement within the ambit of the National Credit Act and that by so doing erred in thus finding that the provisions of Section 40 (1)(a) of the National Credit Act were activated.
4. During the hearing of the application for leave to appeal the Court raised with Counsel for the applicants the question of whether the order of the Court of the 18th October of 2016, dismissing the exception was appealable.
5. In **BALISO v FIRSTRAND BANK 2017(1) SA 292 (CC)**, the Constitutional Court dealt with the very same issue and in the majority judgment of FRONEMAN J, the following is said (at 294I to 296D):

[5] The first hurdle facing the applicant is procedural in nature. The disposal of the exceptions on appeal presents particular problems in relation to the attributes of an appealable judicial decision. In *Zweni*, the Supreme Court of Appeal canvassed different rationales distinguishing between non-appealable rulings and appealable orders. Harms AJA, writing for the court, noted that, in determining in which category a judicial determination falls, one must look 'not merely [at] the form of the [judicial pronouncement]...but also, and predominantly, [at] its effect'. He then enumerated three attributes that an appealable judgment has:

'(F)irst, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings....'

[6] In *Hamilton*, Cameron JA noted the difference in the Supreme Court of Appeal authority between the appealability of decisions upholding exceptions and the apparent inconsistency in deciding the appealability of decisions dismissing exceptions. In the particular circumstances of that case the Supreme Court of Appeal declined to overrule the decisions that held that the dismissal of an exception was not appealable.

[7] In this court, the principles applicable to the appealability of decisions were comprehensively dealt with by Moseneke DCJ in *ITAC*:

The question whether an appeal against a decision of the High Court may lie directly to this court is governed by s 167(6)(b) of the Constitution read with rule 19. The constitutionally prescribed standard is whether it is in the interests of justice for this court to hear an appeal. In *Khumalo and Others v Holomisa* this court held that it is not a jurisdictional requirement for an appeal to this court that the matter must involve a "judgment or order" within the meaning of s 20(1) of the Supreme Court Act. However, the court pointed out that it will not often be in the interests of justice for this court to entertain appeals against interlocutory rulings which do not have a final effect on the dispute between the parties.

The same point was made again in *Minister of Health and Others v Treatment Action Campaign and Others (No 1) (TAC(1))*:

"The policy considerations that underlie the non-appealability of interim execution orders in terms of s 20 of the Supreme Court Act, are also relevant to the decision whether it is in the interests of justice to grant an application for leave to appeal to this Court against an interim execution order."

In this sense, the jurisprudence of the Supreme Court of Appeal on whether a “judgment or order” is appealable remains an important consideration in assessing where the interests of justice lie. An authoritative restatement of the jurisprudence is to be found in *Zweni* which has laid down that the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. On these general principles the Supreme Court of Appeal has often held that the grant of an interim interdict is not susceptible to an appeal.

The “policy considerations” that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined.

6. Applying those principles it must in my view follow that none of the three attributes to which reference is made find any presence in the judgment of this court of the 18th of October 2016 as it could hardly be said that the judgment on the applicability of the National Credit Act is final and binding, is definitive of the rights of the parties, or disposes of a substantial portion of the relief claimed.
7. It remains open to the applicant to pursue the issue before the trial Court and that court may well upon consideration of the evidence advanced in support of the contention relating to the applicability of the National Credit Act, find otherwise than this Court did. In this regard it bears mention that an exception is generally dealt with and disposed of on the basis of the correctness of the factual matrix advanced in the particulars of claim. The matter is considerably different at trial where the trial Court is called upon to determine the correctness of that very same factual matrix and may well conclude differently.

It is precisely on that basis that the trial court may well take a different view on the matter that in essence, does not render the order of this Court of the 18th of October 2016 final in effect, or for that matter, dispositive of the relief, or definitive of the rights of the parties.

8. Under those circumstances and for the reasons given, the application for leave to appeal falls to be dismissed.

Order

9. I make the following order:

The application for leave to appeal is dismissed with costs.

CASE NO.: 34997/2015

HEARD ON: 03 October 2017

LEGAL REPRESENTATIVES:

FOR THE APPLICANTS: Adv. S D Wagener SC

INSTRUCTED BY: Weavind & Weavind Inc. (ref.: E le Roux/PM/R223630)

FOR THE RESPONDENT: D J L Nel

INSTRUCTED BY: Louis Nel Incorporated (ref.: D.230)