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Z D ZWENI — Petitioner

and

MINISTER OF LAW AND ORDER
OF THE REPUBLIC OF SOUTH AFRICA — Respondent

HARMS, AJA:

CASE NO. 310/91
J VD M

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

Z D ZWENI — Petitioner

and

MINISTER OF LAW AND ORDER
OF THE REPUBLIC OF SOUTH AFRICA — Respondent

CORAM: HOEXTER, HEFER, F H GROSSKOPF, NIENABER, JJA et HARMS, AJA

HEARD: 5 NOVEMBER 1992

DELIVERED: 20 NOVEMBER 1992

J U D G M E N T

HARMS, AJA:

This is an application for leave to appeal from a decision of Goldstein J reported sub nom Zweni v

Minister of Law and Order (1) 1991 (4) SA 166 (W). The learned judge refused leave to appeal and that judgment is also reported: Zweni v Minister of Law and Order (2) 1991 (4) SA 183 (W). The petition for leave to appeal, addressed to the Chief Justice, was, in terms of s 21(3)(c)(iii) of the Supreme Court Act 59 of 1959 ("the Act"), referred to this Court for argument and consideration. It was also ordered that argument on the merits of the proposed appeal be heard simultaneously.

The late Mr Zweni ("the plaintiff") instituted an action against the Minister of Law and Order for payment of damages arising from an alleged assault perpetrated on him by a member of the police force. The action was defended and at close of pleadings the Minister's liability for damages and the nature and amount of damages allegedly suffered, were in issue. The plaintiff, on notice of motion, thereupon applied, in

terms of Rule 33(4), for the issues of liability and quantum to be separately heard. The Minister agreed to the proposed procedure and Goldstein J made an order accordingly.

In the same notice of motion a further order was prayed for, namely that the Minister disclose to the plaintiff an item contained in the second part of the first schedule of his discovery affidavit, and to permit him to inspect and make copies of it. What had happened was that the Minister had claimed that the contents of the police docket in a case laconically identified as "John Vorster Square CR 138/6/89", were privileged on the ground that it contained "witness statements" and notes obtained and made for the purpose of (presumably criminal) litigation "and for reasons of public policy". The plaintiff's contention in his founding affidavit was that no privilege whatsoever attached to the police docket. In the court

a quo (and initially before this Court) it was that the privilege claimed had terminated because it can be assumed that criminal action was no longer contemplated since none had come to trial within the 20 months between the incident and the application. The submission in its final form was that the admitted privilege attaching to a police docket lapses either at the conclusion of criminal proceedings or even earlier when it appears unlikely that criminal proceedings will materialise, unless the State can show that, on the facts of the particular case, public policy considerations require otherwise. The court a quo dismissed this part of the application on the ground that police dockets are governed by the rule "once privileged, always privileged". It refused leave on the basis that, in the light of authorities binding on it, its decision did not amount to an appealable judgment or order. At the same time Goldstein J

expressed his personal doubts about the correctness of those precedents.

The plaintiff has since passed away and the executor dative of his estate, Mr N M Barling, was substituted as plaintiff and, although it does not appear from the title of this case, he is now, in that capacity, the petitioner and prospective appellant.

The jurisdictional requirements for a civil appeal emanating from a provincial or local division sitting as a court of first instance are twofold:

1. the decision appealed against must be a "judgment or order" within the meaning of those words in the context of s 20(1) of the Act; and

2. the necessary leave to appeal must have been granted, either by the court of first instance, or, where leave was refused by it, by this Court.

> Leave is granted if there are reasonable prospects of success. So much is trite. But, if the judgment or order sought to be appealed against does not dispose of all the issues between the parties the balance of convenience must, in addition, favour a piecemeal consideration of the case. In other words, the test is then "whether the appeal - if leave were given - would lead to a just and reasonably prompt resolution of the real issue between the parties" (per Colman J in Swartzberg v Barclays National Bank Ltd 1975 (3) SA 515 (W) 518B).

The issue whether a decision is an appealable "judgment or order" is complicated by a number of factors and has been the subject of a large number of judgments over many years. In each instance the court had to consider its appellate jurisdiction in the light

of the then applicable enabling statute, but often general observations enunciated in other contexts were grafted onto those provisions. See e g the comments of Watermeyer CJ in Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) SA 839 (A) 848. Furthermore, as Schreiner JA pointed out at 867, "comment has overcome construction and to-day it is no longer possible to interpret the present or any corresponding statutory provision by a straightforward application of the ordinary meaning of the words used". It should also be mentioned that the history of the matter has been subjected to a detailed analysis in a number of recent judgments, some of which by this Court. While any comprehensive re-examination would serve little purpose, a proper perspective nevertheless requires a brief exposition and a critical review of some of the general propositions commonly (and sometimes loosely) advanced in the decided cases. I

would summerize the matter as follows:

1. For different reasons it was felt down the ages that decisions of a "preparatory or procedural character" ought not to be appealable (per Scheiner JA in the Pretoria Garrison Institutes case supra at 868). One is that, as a general rule, piecemeal consideration of cases is discouraged. The importance of this factor has somewhat diminished in recent times (S A Eagle Versekeringsmaatskappy Bpk v Harford 1992 (2) SA 786 (A) 791B-D). 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 (Priday t/a Pride Paving v Rubin 1992 (3) SA 542 (C) 548H-I).

2. In order to achieve this result, a number of different legislative devices have been employed from time to time. The requirement of leave to appeal is one. Another is to prohibit appeals unless the order appealed against has the effect of a final judgment. And the courts have, by way of interpretation, held consistently that rulings are not appealable decisions.

3. The expression "judgment or order" in s 20(1) of the Act has a special, almost technical, meaning; all decisions given in the course of the resolution of a dispute between litigants are not "judgments or orders" (Constantia Insurance Co Ltd v Nohamba 1986 (3) SA 27 (A) 35F-G; 42 I).

4. The word "judgment" has (for present purposes) two

meanings, first the reasoning of the judicial officer (known to American jurists as his "opinion"), and second, "the pronouncement of the disposition" (Garner, A Dictionary of Modern Legal Usage sv Judgments, Appellate Court) upon relief claimed in a trial action. In the context of s 20(1) we are concerned with the latter meaning only. An "order" is said to be a judgment for relief claimed in application proceedings (Dickinson and Another v Fisher's Executors 1914 AD 424, 427; Administrator Cape and Another v Ntshwaqela & Others 1990 (1) SA 705 (A) 714I-715F). I would venture to suggest that the distinction between "judgment" and "order" is formalistic and outdated; it performs no function and ought to be discarded.

5. S 20(1) of the Act no longer draws a distinction

between "judgments or orders" on the one hand and interlocutory orders on the other. The distinction now is between "judgments or orders" (which are appealable with leave) and decisions which are not "judgments or orders" (Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration 1987 (4) SA 569 (A)).

6. Whether so-called "simple interlocutory orders", i e "all orders pronounced by the Court upon matters incidental to the main dispute preparatory to or during the progress of the litigation" and not having a final or definitive effect, are either "judgments or orders" or simply "rulings" has not yet been decided by this Court (Van Streepen & Germs (Pty) Ltd case supra at 583I-584D).

7. In determining the nature and effect of a judicial pronouncement, "not merely the form of the order must be considered but also, and predominantly, its effect" (South African Motor Industry Employers' Association v South African Bank of Athens Ltd 1980 (3) SA 91 (A) 96H).

8. A "judgment or order" is a decision which, as a general principle, has three attributes, first, 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 (Van Streepen & Germs (Pty) Ltd case supra at 586I-587B; Marsay v Dilley 1992 (3) SA 944 (A) 962C-F). The second is the same as the

oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief (Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue & Another 1992 (4) SA 202 (A) 214D-G).

9. The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability (South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534 (A) 550D-H). To illustrate: the exclusion of certain evidence may hamper a party in proving his case. That party may notionally be able to prove it by adducing other evidence. In that event an incorrect exclusion would not necessarily have an effect on the final

result. In deciding upon the admissibility of evidence a court is not called upon to speculate upon or divine (with or without the assistance of the parties) the ultimate effect of its decision on the course of the litigation. Should it appear at the conclusion of the matter that an incorrect ruling amounted to an irregularity which may have had a material effect on its outcome, the court of appeal may, in adjudicating the "merits", set aside the final judgment on that ground and in an appropriate case, remit it back to the trial court (Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft Für Schädlingsbekämpfung MBH 1976 (3) SA 352 (A); Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another 1990 (3) SA 547 (A) 566C-D).

In South African Druggists Ltd v Beecham Group plc

1987 (4) SA 876 (T) 880B-C the full bench held that unless an interlocutory order has a final and definitive effect on the main action it is not, for the purposes of s 20(1) of the Act, a "judgment or order". Stated differently, it held that simple interlocutory orders are no longer appealable. And in Sistag Maschinenfabriek Sidler Stalder AG & Another v Insamcor (Pty) Ltd 1989 (1) SA 406 (T) 408D-F the same court equated rulings with simple interlocutory orders. So also Elida Gibbs (Pty) Ltd v Colgate Palmolive (Pty) Ltd (2) 1988 (2) SA 360 (W); Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd 1990 (4) SA 196 (C) 211G-212E. On the other hand, and as indicated above, Goldstein J expressed his personal reservations about the correctness of this approach and the non-appealability of his decision. He had enunciated his reasons earlier in Government Mining Engineer and Others v National Union of Mineworkers and Others 1990

(4) SA 692 (W) 704G-705G. Similar views have since been stated by Conradie J in Priday t/a Pride Paving v Rubin supra and in a thought-provoking article by Prof H J Erasmus, Leave to Appeal against 'Judgments or Orders' in terms of section 20 of the Supreme Court Act 1959, (1992) 109 SALJ 496. In essence the argument is that a decision such as the present is a simple interlocutory order; such an order was appealable with leave under s 20(2)(b) of the Act prior to its amendment by the Appeals Amendment Act 105 of 1982; the meaning of the words "judgment or order" in s 20(1) has not been changed by that amendment; they encompassed simple interlocutory orders; therefore they still do. The argument is attractive and finds apparent support in a dictum in the Van Streepen and Germs (Pty) Ltd case supra at 584C-D to the effect that, as a result of the amendment, "the importance of the distinction between simple interlocutory orders and [interlocutory] orders

having a final definitive effect has been diminished". With respect, I am of the view that this statement does not carry the import ascribed to it by Goldstein J. The distinction referred to has "diminished" inasmuch it is of little consequence - the practical implication of s 20(1) is that the real distinction is between a "judgment or order" on the one hand and a decision (conveniently called a "ruling") which is not. It is no longer necessary or conducive to clear thinking to consider, in this context, whether a decision is a simple interlocutory order. As for the remainder of the argument, I can also not agree with it. As I read the case law, it classified an interlocutory order with a final and definitive effect as a "judgment or order" because that is the attribute that typifies all "judgments and orders". The fact that there was a right of appeal (with leave) in respect of simple interlocutory orders by virtue of a special provision in

the old s 20(2)(b) which, in an indirect manner, created this class of appealable decisions, does not mean that those decisions were deemed to be true "judgments or orders".

Counsel for the appellant, in an endeavour to distinguish between "judgments or orders" and rulings, submitted that the answer is to be found in two quotations from the Dickinson and Another case, supra. That case held that a decision on a point of evidence is a ruling and not an order and also, at least by implication, not a simple interlocutory order. Innes CJ stated at 427:

> "But every decision or ruling of a court during the progress of a suit does not amount to an order. That term implies that there must be a distinct application by one of the parties for definite relief. The relief prayed for may be small, as in an application for a discovery order, or it may be of great importance, but the Court must be duly asked to grant some definite and distinct relief, before its decision upon

> the matter can properly be called an order. A trial Court is sometimes called upon to decide questions which come up during the progress of a case, but in regard to which its decisions would clearly not be orders. A dispute may arise, for instance, as to the right to begin: the Court decides it, and the hearing proceeds. But that decision, though it may be of considerable practical importance, is not an order from which an appeal could under any circumstance lie, apart from the final decision on the merits."

Solomon JA expressed similar views at 429, namely:

> "The term 'order' is a technical one, which is in common use in courts of law and which is well understood, though it may not be easy to give a precise definition of it. One thing, however, is clear, and that is that no order can be made except upon an application to the Court for relief. Such an application usually takes the form of a motion or petition, and the decision of the Court upon such motion or petition is the order, which is embodied by the Registrar in a formal document. I do not say that there can be no order of Court except upon a formal motion or petition, but what is essential is that there should be an

application to the Court for some relief."

According to the argument these statements support three propositions, first, that a decision consequent upon a formal prayer for relief is, necessarily, a "judgment or order"; second, that a decision made once the trial judge is seized with the matter (i e once it begins) is a ruling, whereas one made before that critical moment is a "judgment or order"; and third, that discovery orders are not rulings.

As far as the first of these submissions is concerned, all that was stated was that a formal request is usually a prerequisite for an order. The converse does not follow i e that once there is a formal request, the consequent decision is necessarily a "judgment or order". The second submission is also without merit. Although reference was made to rulings given "during the progress of a suit", the learned Judge

did not define those words. They can refer with equal force to any stage subsequent to the inception of litigation. But even if one could read into the words used the first two propositions of counsel, it is surprising that in the nearly 80 years since the Dickinson and Another case no court has done so. On the contrary, a number of decisions were held to be rulings in spite of the fact that they were the result of formal requests for relief prior to the beginning of the trial. Examples are Nxaba v Nxaba 1926 AD 392; Pfizer Inc v South African Druggists Ltd 1987 (1) SA 259 (T); Government Mining Engineer and Others case supra 701G-I; Priday t/a Pride Paving v Rubin supra. As to the last submission that the Dickinson & Another case is authority for the proposition that a discovery order is not a ruling, that was said albeit obiter. If regard is had to the fact that at that stage of our legislative history simple interlocutory orders (of which discovery

orders are examples) were appealable with leave, undue weight cannot be attributed to it. (This explains why appeals on discovery orders were heard in United Tobacco Companies (South) Ltd v International Tobacco Co of SA Ltd 1953 (1) SA 66 (T); Lenz Township Co (Pty) Ltd v Munnick & Others 1959 (4) SA 567 (T); Rellams (Pty) Ltd v James Brown & Hamer Ltd 1983 (1) SA 556 (N).)

How then have our courts determined whether a given decision amounts to a ruling? A few criteria have crystallized over the years. The first is the lack of finality: unless a decision is res judicata between the parties and the court of first instance is thus not entitled to reconsider it, it is a ruling. It was immaterial that it was unlikely that that court would ever change its view or its decision, provided that it was open to it to do so (see Union Government (Minister of the Interior) and Registrar of Asiatics v Naidoo 1916 AD 50; Hutton & Pearson NNO v Hitzeroth & Others 1967

(1) SA 111 (E) 114D-115B; Pfizer Inc v South African Druggists Ltd supra at 263; Constantia Insurance Co Ltd v Nohamba supra at 36H-F; Government Mining Engineer and Another case supra at 698A-701E).

Another relevant consideration was whether the appeal might turn out to be of no practical consequence because the court could, in the final result, find in favour of the would-be appellant. See Dickinson and Another case supra at 428 in fine; Klep Valves (Pty) Ltd v Saunders Valve Co Ltd 1987 (2) SA 1 (A) 41. Stated somewhat differently, a decision is a ruling if it does not affect the relief sought in the main action - Nxaba v Nxaba supra; Heyman v Yorkshire Insurance Co Ltd 1964 (1) SA 487 (A) 490H-491C; Holland v Deysel 1970 (1) SA 90 (A) 93A-C - or because no relief was granted on that claim (Union Government (Minister of the Interior) and Registrar of Asiatics supra at 50-51). See also Levco Investments (Pty) Ltd v Standard Bank of

SA Ltd 1983 (4) SA 921 (A) 928.

In the light of these tests and in view of the fact that a ruling is the antithesis of a judgment or order, it appears to me that, generally speaking, a non-appealable decision (ruling) is a decision which is not final (because the court of first instance is entitled to alter it), nor definitive of the rights of the parties nor has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. It is not in dispute that the decision of Goldstein J is characterized by all three these negative integers.

I am aware that the consequence of this conclusion is that a number of decisions which were appealable with leave prior to the amendment of s 20 of the Act by the Appeals Amendment Act 105 of 1982, are no longer appealable at all. It was the intention of the legislature in effecting that amendment to reduce the

number of appeals and, so it appears to me, to bring the appealability of decisions from provincial and local divisions of the Supreme Court more or less in line with that from a magistrate's court. See s 83 Magistrates' Courts Act 32 of 1944. This conclusion is not in conflict with the suggestion of Corbett JA in the Van Streepen and Germs case supra at 587E (and echoed in later cases) that his decision might have the effect of enlarging the meaning of "judgment or order". That dictum of the learned Judge of Appeal must be read in its context. He was dealing with the question whether a decision which does not dispose of all the issues in a case can be said to be a "judgment or order". He held that it could if, consistent with principle, it was final (see 587D-H) and had the other attributes of a "judgment or order" (see 586I-J) referred to earlier.

In the result leave to appeal cannot be granted. That being so, this Court is not empowered to consider,

at this stage of the litigation between the parties, the issue of the privilege attaching to a police docket.

The application for leave to appeal is dismissed with costs, including the costs consequent upon the employment of two counsel.

L T C HARMS
ACTING JUDGE OF APPEAL

HOEXTER, JA)
HEFER, JA) CONCUR
F H GROSSKOPF, JA)
NIENABER, JA)