THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 1055/13
Reportable

In the matter between:

LEGAL-AID SOUTH AFRICA **APPELLANT**

and

MZOXOLO MAGIDIWANA **FIRST RESPONDENT**

INJURED AND ARRESTED PERSONS **SECOND RESPONDENT**

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **THIRD RESPONDENT**

THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT **FOURTH RESPONDENT**

THE MARIKANA COMMISSION OF ENQUIRY **FIFTH RESPONDENT**

PARTIES TO THE MARIKANA COMMISSION OF ENQUIRY **SIXTH TO NINETEENTH RESPONDENTS**

Neutral citation: *Legal-Aid South Africa v Mzoxolo Magidiwana* (1055/13) [2014] ZASCA 141 (26 September 2014)

Bench: Ponnan, Maya, Swain, Zondi JJA and Fourie AJA

Heard: **8 September 2014**

Delivered: **26 September 2014**

Summary: Appeal – s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 – power of court to dismiss appeal where judgment or order sought would have no practical effect or result – discretion of court - where the parties have by agreement settled all disputes between them - there is no discretion for the court to exercise.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Makgoka J sitting as court of first instance)

The appeal is dismissed in terms of s 16(2)*(a)*(i) of the Superior Courts Act 10 of 2013 and each party is ordered to pay its own costs.

JUDGMENT

Ponnan JA (Swain and Fourie AJA concurring):

[1] In this appeal counsel were, at the outset of the hearing, required to address argument on the preliminary question of whether the appeal and any order made thereon would, within the meaning of s 16(2)*(a)*(i) Superior Courts Act 10 of 2013 (the Act),[1] have any practical effect or result. After hearing argument on this issue the appeal was dismissed on 8 September 2014 in terms of that section and each party was ordered to pay its own costs of the appeal. It was intimated then that reasons would follow. These are those reasons.

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1 The date of commencement of the Act was 23 August 2013.

[2] Courts should and ought not to decide issues of academic interest only. That much is trite. In *Radio Pretoria v Chairman, Independent Communications Authority of South Africa & another* 2005 (1) SA 47 (SCA), this court expressed its concern about the proliferation of appeals that had no prospect of being heard on the merits as the order sought would have no practical effect. It referred to *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 26 where the following was said:

> 'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle . . . that Courts will not make determinations that will have no practical effect.'

[3] Section 16(2)*(a)*(i) provides:

> 'When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

Of its predecessor, s 21A of the Supreme Court Act 59 of 1959,[2] this court stated in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) para 7:

> 'The purpose and effect of s 21A has been explained in the judgment of Olivier JA in the case of *Premier, Provinsie Mpumalanga, en 'n Ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA). As is there stated the section is a reformulation of principles

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2 Section 21A(1) of the Supreme Court Act 59 of 1959 provides:
'When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.'

> previously adopted in our Courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of long standing.'

[4] The primary question therefore, one to which I presently turn, is whether the judgment sought in this appeal will have any practical effect or result. It arises against the backdrop of the following facts: On 26 August 2012 and by virtue of the powers vested in him by section 84(2)*(f)* of the Constitution,[3] the President of the Republic of South Africa (the President) appointed what has come to be as described as the Marikana Commission of Enquiry (the Commission) to:

> [I]nvestigate matters of public, national and international concern arising out of the tragic incidents at the Lonmin Mine in Marikana . . . from Saturday 11 August to Thursday 16 August, 2012 which lead to the deaths of approximately 44 people, more than 70 persons being injured, approximately 250 people being arrested and damage and destruction to property.' (The Marikana incident)

According to the terms of reference of the Commission, it is required to inquire into, make findings, report on and make recommendations concerning five discrete matters, namely: (a) the conduct of Lonmin Plc (Lonmin); (b) the conduct of the South African Police Services (SAPS); (c) the conduct of two unions, namely the Association of Mine Workers and Construction Union (AMCU) and the National Union of Mine workers (NUM); (d) the role played by the Department of Mineral Resources or any other Government Departments or agencies in relation to the incident and whether this was appropriate in the circumstances and consistent with their duties and obligations according to law; and (e) the conduct of individuals and loose groupings in fermenting and/or otherwise promoting a situation of conflict and confrontation which may have given rise to the tragic incident, whether directly or indirectly.

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3 Proclamation 50 of 2012, *GG 35680,*12 September 2012.

[5] The Commission was required to submit interim reports and recommendations to the President each month prior to the final report being presented to him and was to have completed its work within the period of four months from the date of its establishment. But not having completed its task, the life of the Commission has been extended by the President from time to time. In terms of s 1 of the Commissions Act 8 of 1947 the President: (a) declared the provisions of that Act to be applicable to the Commission; and (b) promulgated regulations with reference to the Commission.[4]

[6] Depending on which of the competing contentions ultimately carry the day, the first, second and further respondents, in all some 300 of them (the respondents), were involved in the incident that gave rise to the establishment of the Commission as either victims or perpetrators. The nature of their involvement, which is contested before the Commission, does not have to be resolved for the purposes of determining the issues raised by this appeal.

[7] Contending that the South African State in its various different guises had failed and or refused to assume responsibility for the legal costs and fees associated with the presentation of their case before the Commission, the respondents applied to the North Gauteng High Court, Pretoria for an order against the President, the Minister of Justice and Constitutional Development (the Minister) and Legal Aid South Africa (LASA) for, inter alia, an order that they 'take all reasonable steps to provide adequate legal and equitable aid to the applicants in respect of the future proceedings of the Commission, including all reasonable costs incurred to date less any amount

4 Published under Proclamation 59 of 2012, *GG* 35730, 28 September 2012.

previously received from third parties, on the same or equitable basis as those provided for the state parties'.

[8] The application failed in respect of the President and the Minister but succeeded in respect of LASA. The high court (per Makgoka J) ordered LASA to: 'forthwith take steps to provide legal funding to the applicants for their participation in [the Commission]' and 'to pay the applicants' costs'.

[9] The appeal by LASA against that order is with the leave of the high court. The respondents have not sought to prosecute a cross appeal against the dismissal of their application against the President and the Minister. The President and the Minister have accordingly filed a notice with the registrar of this court intimating that they will abide the decision of this court. The Commission and various other parties to the Commission were also cited as respondents - some of them filed affidavits and participated in the proceedings before the high court. Of those, the eighth respondent, described as the Families of the Deceased, the ninth respondent, AMCU, and the eighteenth respondent, the Ledingoane Family, filed heads of argument with the registrar of this court and participated in the appeal. As all three aligned themselves with the respondents' contention that the appeal was moot and none sought any costs on appeal, nothing further need be said about any of them.

[10] In terms of s 2 of the Legal Aid Act 22 of 1969 there is established a board to be known as the Legal Aid Board (the LAB). Section 3 of that Act sets out the objects and general powers of the LAB, of which the more relevant are 'to render or make available legal aid to indigent persons and to provide legal representation at State

expense as contemplated in the Constitution'. To that end, the LAB has the power to: obtain the services of legal practitioners (subsec *(a)*); fix conditions subject to which legal aid needs to be rendered (subsec *(d)*); and provide legal representation at State expense as contemplated in s 25(1)*(c)* and (3)*(e)*, read with sec 33(2), of the Constitution, where substantial injustice would otherwise result (subsec *(d*A*))*. In terms of s 3A, the LAB must in consultation with the Minister include the particulars of the scheme under which legal aid is to be rendered and the procedure for its administration in a guide called the Legal Aid Guide (the guide). The provisions of the guide are binding on the LAB, its officers and employees.

[11] The respondents took issue with LASA`s decision to decline their application for funding principally on the basis that it had previously granted funding to 23 families who had lost breadwinners during the Marikana incident. According to LASA, its CEO had exercised her discretion in favour of the survivors of the deceased miners primarily on the basis that they consisted of women, children and elderly persons who are all recognised as vulnerable groups and whose vulnerability, so it was suggested, 'was further exacerbated by the loss of their breadwinners in circumstances unknown to them'. She also exercised her discretion for the practical reason that those families, not having been present at the time of the occurrence, 'would not be in a position to provide their attorneys with instructions in any civil claim as to how their events of tragedy unfolded as they were not present'.

[12] The high court held that LASA`s decision was irrational and unconstitutional. Its conclusion appears to have rested on two pillars. First, it held that s 34 of the Constitution was applicable to the proceedings before the Commission. That, so the

reasoning proceeded, carried with it the constitutional obligation to ensure that the respondents were legally represented before the Commission. And, as the respondents could not afford to pay their legal representatives themselves, the high court held that the entitlement flowing from s 34 included the entitlement to funding of their legal team at State expense. Moreover, according to the high court, such funding could only be provided by the State through LASA. Second, the high court held that the decision by LASA to decline funding to the respondents when viewed against its earlier decision to fund the 23 families who had lost breadwinners in the Marikana incident, violated the respondents' equality rights under section 9 of the Constitution, in that it was both irrational and unfairly discriminatory.

[13] LASA accepts that the decision of the high court was made in the context of the specific circumstances of this case and that as the high court made plain its judgment was not to be construed as 'authority for the proposition that in all commissions of inquiry, there is a right for State-funded legal representation'. LASA contended, however, that in ordering it to provide legal funding to the applicants for their participation in the Commission, the high court had usurped the discretion of the CEO in what is essentially a complex polycentric enquiry, and supplanted its decision for that of LASA. That decision, so the contention proceeded, potentially opens the floodgates to claims on LASA's scarce resources and leaves its decision to refuse applications for funding vulnerable to judicial scrutiny in the future. Accordingly, so we were urged, this is an appropriate matter for the exercise of this court`s discretion to allow the appeal to proceed. In that regard we were referred, inter alia, to *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA); *Land en Landbouontwikkelingsbank van SuidAfrika v Conradie* 2005 (4) SA 506 (SCA) and *The Merak S: Sea Melody*

Enterprises SA v Bulktrans (Europe) Corporation 2002 (4) SA 273 (SCA) as instances where this court, notwithstanding the mootness of the issue as between the parties, has nonetheless entered into the merits of the appeal.

[14] The facts in *Gould* were: An election for the office of president of the appellant rugby union was held at its annual general meeting. A review application to the high court alleging that the election was invalidated by procedural irregularities succeeded. But before the appeal to this court against that decision was heard the rugby union convened a special general meeting to hold fresh presidential elections at which a president was duly elected. In explaining why it was nonetheless appropriate for the appeal to be entertained by this court, Howie JA stated (at 444I-445B):

'Had there been no appeal the judgment of the Court below would in all probability have continued to influence the procedure adopted in respect of office bearer elections at future union meetings. There was, of course, nothing irregular or unfair in the procedures adopted at the re-election meeting, viewed purely in isolation, without regard to the constitution. But the union does have this constitution. It is the chosen instrument by which the union`s affairs are to be regulated and the union, its office bearers and council members are entitled to have it interpreted in order to guide them for the future. In the circumstances I consider that determination of the appeal will, quite apart from the issue of costs in the Court below, have a "practical effect or result" within the meaning of s 21A of the Supreme Court Act.'

[15] Both *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* and *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* were concerned with questions of law. All three of the cases called in aid by LASA are thus distinguishable from the present. For, as Wallis JA pointed out in *Qoboshiyane NO &*

others v Avusa Publishing Eastern Cape (Pty) Ltd & others 2013 (3) SA 315 (SCA) para 5:

'The court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal.[5] With those cases must be contrasted a number where the court has refused to deal with the merits.[6] The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose.'

[16] The fallacy in the approach of LASA is to assume - erroneously so - that what confronts us is a discrete legal issue. It is not. This case plainly falls into the latter of the two classes alluded to by Wallis JA in *Qoboshiyane.* No doubt, any future application (should there be one) will be decided by that court, as this was, on its own peculiar facts. That being so, it must be accepted – as counsel did - that the Marikana incident is a highly unusual occurrence, the likes of which, hopefully, will not recur in our lifetime. In addition, it was primarily the differential treatment between the 23 families who had lost breadwinners on the one hand, and the respondents on the other, that prompted the high court application in the first place and provoked the

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5 In addition to *Natal Rugby Union v Gould*; *The Merak S: Sea Melody Enterprises SA*; and *Land en Landbouontwikkelingsbank van Suid-Afrika v Conradie* see for example *Executive Officer*, *Financial Services Board v Dynamic Wealth Ltd* 2012 (1) SA 453 (SCA).

6 See for example: *Radio Pretoria v Chairman, Independent Communications Authority of South Africa above*; *Rand Water Board v Rotek Industries (Pty) Ltd* above; *Minister of Trade and Industry v Klein NO* [2009] 4 All SA 328 (SCA); *Clear Enterprises (Pty) Ltd v Commisioner, SARS* (757/10) [2011] ZASCA 164 (29 September 2011); *The Kenmont School v DM* (454/12) [2013] ZASCA 79 (30 May 2013) and *Ethekwini Municipality v SAMWU* (442/11) [2013] ZASCA 135 (27 September 2013) 7 Above para 12.

rationality enquiry undertaken by that court. Those factors, which appear to be unique to this case, will in all likelihood distinguish this case from any other that LASA, and in turn a court, is likely to be confronted with in the future. And, as it was put in *The Kenmont School v DM*:[7]

'It is trite that every case has to be decided on its own facts. And efforts to compare or equate the facts of one case to those of another are unlikely to be of assistance. For, as we well know, parties frequently endeavour to distinguish their case on the facts from those reported decisions adverse to them.'

[17] Moreover, the grant of assistance by LASA requires that any applicant must pass an indigency test, which is one of two gateway requirements for the provision of legal aid. The second is the 'substantial injustice' threshold. Whether those gateway requirements are satisfied by an applicant in any given future application, for now remains a matter for speculation. All things considered, only rarely, I imagine, would decisions of LASA be subject to review by a court. It also goes without saying that on those rare occasions any court considering an application to review a refusal of funding by LASA must of necessity be heedful of the following admonition by this court in *Legal Aid Board v The State* 2011 (1) SACR 166 (SCA) para 45:

'We need hardly remind ourselves that courts do not control the public purse, nor do they have the power to conscript the legal profession to render services without reward. It is for the other arms of government to ensure that adequate provision is made for legal representation at State expense. Here they have chosen to do so through the LAB. Demands other than legal aid on the public purse may limit the availability of funds. Courts should be slow to attribute superior wisdom to themselves in respect of matters entrusted to other branches of government. As O'Regan J puts it: "A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a

person or institution with specific expertise in that area must be shown respect by the courts."[7] The LAB is undoubtedly one such institution.'

[18] Thus however the appeal turns out, the position of the respondents will remain unaltered and the outcome, certainly as far as this case is concerned, will be a matter of complete indifference to LASA. What LASA really seeks is to have this court express a view on a legal conundrum that it hopes to have decided in its favour without in any way affecting the position between the parties. It follows that what was stated in *Clear Enterprises (Pty) Ltd v SARS* above is particularly apposite. It was there held:

'[17] Simply put, whatever issues do arise in the pending matters none of them are yet "ripe" for adjudication by this Court. To borrow from Kriegler J in *Ferreira v Levin NO & others*; *Vryenhoek v Powell NO & others* 1996 (1) SA 984 (CC) at paragraph [199]:

"The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness". That term has a particular connotation in the constitutional jurisprudence of those countries which need not be analysed now. Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor *Sharpe* points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. And the present cases seem to me, as I have tried to show in the parody above, to be pre-eminent examples of speculative cases. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered." [18] Although expressed somewhat differently and in the different context of constitutional adjudication where "ripeness" has taken on a particular meaning, both the principles and policy

7 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 48.

considerations articulated by Kriegler J resonate with the jurisprudence of this Court. Thus in *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & others* 2001 (2) SA 872 (SCA) at paragraph [9], Plewman JA quoted with approval from the speech of Lord Bridge of Harwich in the case of *Ainsbury v Millington* [1987] 1 All ER 929 (HL), which concluded at 930g:

"It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved".

In a similar vein, in *Western Cape Education Department v George* 1998 (3) SA 77 (SCA) at 84E, Howie JA stated:

"Finally, it is desirable that any judgment of this Court be the product of thorough consideration of, *inter alia*, forensically tested argument from both sides on questions that are necessary for the decision of the case."

And in *Radio Pretoria* (at paragraph [44]), Navsa JA said:

"Courts of appeal often have to deal with congested court rolls. They do not give advice gratuitously. They decide real disputes and do not speculate or theorise (see the *Coin Security* case (*supra*) at paragraph [7] (875A-D)). Furthermore, statutory enactments are to be applied to or interpreted against particular facts and disputes and not in isolation."

[19] In effect what the parties are seeking is legal advice from this Court. But as Innes CJ observed in *Geldenhuys & Neethling v Beuthin* 1918 AD 426 at 441:

"After all, Courts of Law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) at paragraph [21] footnote 18, the Constitutional Court echoed what the learned Chief Justice had stated over eight decades earlier when it said:

"A case is moot and therefore not justifiable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law."'

[19] The cumulative consequence of all of the aforegoing factors is that our discretion, were we to have one, would have to be exercised against LASA. I say 'were we to have one' because I am not persuaded, for the reasons that follow, that we do indeed have a discretion in this case. Prior to the hearing of the appeal the parties entered into an agreement of settlement. According to counsel for the respondents:

'Since the delivery of the appellant`s supplementary heads of argument and following their meeting held on 10 July 2014, the primary parties have resolved all their differences. It was further agreed that this development would be brought to the attention of the court in these heads of argument, as we hereby do.

The essence of the agreement reached was that the appellant would provide the required funding for the full duration of the unfunded period of the Commission, ie from 11 March 2013 to the end date thereof. This removed any outstanding dispute or controversy, resulting in the disposal by agreement of this leg of the enquiry.'

From the bar in this court counsel for LASA confirmed that to be the position. We were further advised that the work of the Commission will be completed well within the next two months.

[20] The practical effect of the settlement agreement is that there is no longer any dispute or *lis* between the parties. In those circumstances, as it was put by Brand JA in *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 7:

‘It can be argued, I think, that s 21A is premised upon the existence of an *issue* subsisting between the parties to the litigation which requires to be decided. According to this argument s 21A would only afford this Court a discretion not to entertain an appeal when there is still a subsisting *issue* or *lis* between the parties the resolution of which, for some or other reason, has become academic or hypothetical. When there is no longer any *issue* between the parties, for instance because all issues that formerly existed were resolved by agreement, there is no “appeal” that this Court has any discretion or power to deal with. This argument appears to be supported by what Viscount Simon said in *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 (HL) at 114, when he said, with reference to facts very similar to those under present consideration:

“. . . I think it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.”

Consequently, he found that in a matter where there was no existing *lis* between the parties the appeal should be dismissed on that ground alone (at 115). (See also *Ainsbury v Millington* [1987] WLR 379 (HL) at 381.) More recently, however it was said by Lord Slynn of Hadley in *R v Secretary of State for the Home Department, Ex parte Salem* [1999] 2 WLR 483 (HL) at 487H ([1999] 2 All ER 42 at 47c) that:

“. . . I accept . . . that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties *inter se*.”

It is true that Lord Slynn immediately proceeded to confine this discretion to entertain an appeal, where there is no longer a *lis* between the parties, to the area of public law and added that the decisions in the *Sun Life* case and *Ainsbury v Millington* must accordingly be read as limited to disputes concerning private law rights between the parties to the case (at 487H488A (WLR) and 47*c-d* (All ER)). In my respectful view it seems, however, that this distinction

between public law and private law is founded on considerations of expedience rather than on principle. If, as a matter of principle, a court has no power and therefore no discretion to consider an appeal where there is no *lis*, in the sense of a matter of in actual controversy *inter se*, I can see no reason why this principle should not apply to matters of public law as well. Conversely, if a court has the discretion to entertain an appeal despite the absence of a *lis*, in the above sense, there seems to be no reason in principle why this discretion should not also extend to litigation between two private individuals as well. However, in the view that I hold regarding the outcome of this matter, it is unnecessary to resolve these questions. I will assume in favour of the appellant, without deciding, that this Court has a discretion to entertain the instant appeal under s 21A.'

[21] But even in the area of public law, according to Lord Slynn (*R v Home Secretary of State for the Home Department, Ex parte Salem* (above at 488B)), the discretion to hear disputes must:

'[B]e exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'

[22] In *Absa Bank Ltd v Van Rensburg* (228/13) [2014] ZASCA 34 (28 March 2014). Leach JA (albeit in a minority judgment) described the reasoning of Brand JA in *Port Elizabeth Municipality* as 'unassailable'. Leach JA added (para 22) that once the parties settled, the litigation between them terminated and there were thereafter no disputes between them upon which this court could exercise its appellate jurisdiction. Jurisdiction in the present context means the power vested in a court by law to

adjudicate upon, determine and dispose of a matter (*Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) at 256F-G).[8] Once the parties have disposed of all disputed issues by agreement *inter se*, it must logically follow that nothing remains for a court to adjudicate upon and determine. In my view the approach of Brand JA is juristically sound and merits endorsement by this court. I would accordingly hold that in a situation such as the present, where the parties have by agreement settled all disputes between them, as a matter of principle there is no discretion for this court to exercise under s 16(2)*(a)*(i) of the Act.

[23] It accordingly followed that the appeal had to be dismissed (*Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para 83) and it was so ordered when the matter was heard on 8 September 2014.

[24] That leaves costs. On 30 June 2014 the registrar of this court directed the attention of the parties to the provisions of s 16(2)*(a)*(i) of the Act and enquired whether the appeal was being persisted in. LASA filed additional heads of argument in which it intimated that it was persisting in the appeal. That was the stance adopted before us in argument as well. It must be accepted, as was urged upon us in argument, that LASA genuinely believed that it was acting in the public interest in seeking to have the judgment of the high court overturned by this court. No doubt, LASA genuinely hoped that it would obtain some guidance from this court for its future administration of what, after all, are public funds. Moreover, the point which was held to be decisive of the matter was raised by the court and not the respondents. In those circumstances it was deemed appropriate that each party be ordered to pay its own costs.

8 See also the judgment of Kentridge AJ in *S v Mhlungu* 1995 (2) SACR 277 (CC) para 71.

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V PONNAN

JUDGE OF APPEAL

MAYA JA (ZONDI JA concurring):

[25] I have had the advantage of reading the judgment prepared by my colleague Ponnan JA. I respectfully agree with him that the appeal had to be dismissed for the reasons he gives. But I have just one reservation. This relates to his unqualified finding that a court of appeal has no discretion under s 16(2)(a)(i) of the Superior Courts Act 10 of 2013 to determine the merits of an appeal where the parties have disposed of all disputed issues by agreement *inter se*.

[26] Section 16(2)(a)(i) provides that '[w]hen at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone'. The purpose and effect of the provisions after which the section is fashioned – its predecessor s 21A of the Supreme

Court Act 59 of 1959 (the old Act) – is aptly described in this court's judgment in *Coin Security Group v SA National Union for Security Officers.*[9] There, Plewman JA said:

'The purpose and effect of s 21A has been explained in the judgment of Olivier JA in the case of *Premier, Provinsie Mpumalanga, en 'n ander v Groblersdalse Stadsraad* 1998 (2) SA 1136 (SCA). As is there stated the section is a reformulation of principles previously adopted in our Courts in relation to appeals involving what were called abstract, academic or hypothetical questions. The principle is one of long standing. In the case of *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441 (as an example) it was said as follows by Innes CJ:

'After all, courts of law exist to the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however important."

9 *Coin Security Group v SA National Union for Security Officers* 2001 (2) SA 872.

This is a principle which is common also to other systems – where the doctrine of binding precedent is followed. It has particular application in Courts of appeal. The attitude of the House of Lords is illustrative of this. What that Court has held is that it is an essential quality of an appeal (such as may be disposed of by it) that there should exist between the parties to the appeal a matter "in actual controversy which (the Court) undertakes to decide as a living issue'. See *Sun Life Assurance Co of Canada v Jervis* [1994] 1 All ER 469 (HL) at 471A – B. This phrase accurately states the standpoint of our Courts. It is a principle consistently adopted by this Court and the other Courts in the Republic.'

[27] Thus a court of appeal will concern itself with issues that subsist between and will have practical effect for the parties to the litigation. However, it appears that the courts may have a tightly circumscribed discretion to enquire into the merits of an appeal even in the absence of a *lis* between the parties in an appropriate case.

[28] Following the *Jervis* decision, *R v Secretary of State for the Home Department, Ex Parte Salem*[10] dealt with a case where it was contended on appeal to the House of Lords that the appeal should be heard although there was no longer a live issue between the parties, because the matter raised a question of public importance. Lord Slynn of Hadley, writing for a unanimous court, approved the *Jervis* dictum and continued:[12]

'In *Ainsbury v Millington (Note)* [1987] W.L.R. 379, 381 Lord Bridge of Harwich, with whom the other members of the House agreed, said at p. 381: "In the instant case neither party can have any interest at all in the outcome of the appeal. Their joints tenancy of property which was the subject matter of the dispute no longer exists. Thus, even if the House thought that the judge and the Court of Appeal had been wrong to decline jurisdiction, there would be no order which could now be made to give effect to that view. It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved.'

Lord Slynn then drew a distinction between cases involving disputes about private rights and issues involving public law which the court had entertained[11] and took the view that the strict principle in *Ainsbury v Millington* was limited to disputes that concerned private rights. He said:[14]

'… I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided which will directly affect the rights and obligations of the parties inter se. The decision in the *Sun Life*

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10 *R v Secretary of State for the Home Department, Ex Parte Salem* [1999] 2 All ER 42 (HL) at 46b-47d. [12] At 46c-d.

11 *Reg. v. Board of Visitors of Dartmoor Prison,* ***Ex parte*** *Smith* [1987] Q.B. 106; *Reg. v. Secretary of State for the Home Department,* ***Ex parte*** *Abdi* [1996] 1 WLR 298. [14] at 47c-d. [15] at 47e.

case and *Ainsbury v Millington* (and the reference to the latter in Rule 42 of the Practice Directions Applicable to Civil Appeals (January 1996) of your Lordships' House) must be read accordingly as limited to disputes concerning private law rights between the parties to the case.'

But the learned judge warned:[15]

'The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.'

[29] The above decision has since been followed by the Court of Appeal and others in a number of cases – and as far as I can discover, it has not been disapproved of or qualified in any later decision of that court. *Bowman v Fels*[12] involved a point of law arising from the interpretation of a recent statute (s 328 of the Proceeds of Crime Act 2002) involving the conduct of litigation by legal professionals which had caused great uncertainty within the legal profession. The parties had settled the litigation by the time the appeal was heard. Nevertheless, the Court of Appeal held that it was entitled to assume the jurisdiction to entertain the merits of the appeal because what was at issue concerned public law duties; a discrete point of statutory construction arose which did not involve detailed consideration of facts; a large number of similar cases existed so that the issue would in any event most likely need to be resolved in the near future. There was also an extra public interest element arising out of the court's supervisory role in connection with solicitors as officers of the court who were perplexed as to the content of their obligations under the Act when conducting or settling litigation which made the case par excellence one which the court should determine. In the court's view, to send the parties away empty-handed 'seemed not only churlish but also in breach of the overriding objective which illuminates all civil court practice today.'[13]

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12 [2005] EWCA Civ 226, [2005] 4 All ER (CA) 609.

13 See also *Donaldson v Secretary of State for the Home Department* [2014] CSIH 31; *Neath Port Talbot Country Borough Council v Ware* [2007] EWCA Civ 1359, [2007] All ER (CA) 266; *Fletcher and others v NHS Pensions and others* [2006] EWCA Civ 517, [2006] All ER 436 (CA); *PO (Nigeria) v*

[30] The *Ex Parte Salem* decision has been cited in cases of this court.[14] A majority of these judgments have done so guardedly but none have disavowed its dictum – that courts have the discretion, which must be applied sparingly, to hear disputes in appeals which are academic between the parties if there is a good reason in the public interest for doing so. And in quite a few cases involving discrete legal questions of public importance which were likely to arise in future, the courts have dealt with the merits of appeals notwithstanding the mootness of the issues between the parties.[15] In *Sebola v Standard Bank*,[16] the successful party had abandoned the judgment and the costs awarded against the applicants. But for the costs incurred by the applicants in resisting the sale of their home the issues in the appeal had gone dead. The Constitutional Court highlighted the provisions of s 21A(3) of the old Act, which are replicated in s 16(2)(a)(ii). Their effect is that it is only in exceptional circumstances (which did not exist in the matter) that the question whether the decision sought will have practical effect or result is to be determined with reference to the question of costs. The fact that the matter involved the interpretation of statutory provisions whose meaning had long been shrouded in uncertainty, weighed heavily with the Court in deciding to hear the appeal.

[31] But that said, as my colleague points out at paragraphs [16] to [18] of the main judgment, whether or not this court has the discretion to decide the appeal makes no

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Secretary of State for the Home Department [2011] EWCA Civ 132, [2011] All ER (CA) 240; *R v Lambeth* [2010] EWHC 507 (Admin), [2010] All ER (Ct) 129; *R v Secretary of State for the Home Department* [2014] EWHC 2015 (Admin).

14 *Absa Bank Ltd V Van Rensburg* (228/13) [2014] ZASCA 34 (28 March 2014); *Executive Officer of the FSB v Dynamic Wealth Ltd* [2012] 1 All SA 135 (SCA) paras 43 and 44; *Rand Water Board v Rotek Industries (Pty) Limited* 2003 (4) SA 58 para 18; *Port Elizabeth Municipality v Smit* 2002 (4) SA 241 (SCA) para 7.

15 See, for example, *Land en Landbouontwikkelingsbank van Suid Afrika v Conradie* 2005 (4) SA (SCA); *The Merak S: Sea Melody Enterprises SA v Bulktrans (Europe) Corporation* 2002 (4) SA 273 (SCA); *Natal Rugby Union v Gould* 1999 (1) SA 432 (SCA).

16 *Sebola v Standard Bank* 2012 (5) SA 142 at paras 32 – 34.

difference for the appellant's case. The appeal raises no discrete legal point which does not involve detailed consideration of facts and no similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future. What happened at Marikana is extremely rare and hopefully a tragedy of its kind will never happen again. As pointed out in the main judgment, the high court judgment states in terms that it was decided in the specific context of this case; it is no authority for a right to State-funded legal representation in all commissions of inquiry. Any case that may seek to rely on it would be decided on its own merits and all persons who apply for legal aid will still have to go through the appellant's rigorous screening procedures to qualify therefor.

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M MAYA
JUDGE OF APPEAL

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