THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case No: 034/16

In the matter between:

FIRSTRAND BANK LIMITED
T/A FIRST NATIONAL BANK **APPELLANT**

and

MODINGWANA HARRY MAKALENG **RESPONDENT**

Neutral citation: *FirstRand Bank Limited t/a First National Bank v Makaleng* (034/16) [2016] ZASCA 169 (24 November 2016)

Coram: Shongwe, Tshiqi, Seriti and Willis JJA and Makgoka AJA

Heard: 7 November 2016

Delivered: 24 November 2016

Summary: Civil Procedure: an order by the high court postponing, *sine die*, an application for default judgment, and directing the appellant to file, at the next hearing within not less than six months of the said order, an affidavit detailing attempts to prevent foreclosure, is not appealable. Appeal struck from the roll for lack of jurisdiction.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Weiner J) sitting as court of first instance.

The appeal is struck from the roll for lack of jurisdiction with no order as to costs.

JUDGMENT

Shongwe JA (Tshiqi, Seriti JJA and Makgoka AJA concurring)

Introduction

[1] This appeal concerns the question whether the Gauteng Local Division of the High Court, Johannesburg, (Weiner J, sitting as court of first instance) (the high court) was correct in postponing the default judgment application against the respondent-debtor, Mr Makaleng, in favour of the appellant for a money judgment and ordering that the respondent's immovable property is executable. The high court made the following order:

'1. The matter is postponed *sine die*, and is not to be set down in less than six months.

2. An affidavit is to be filed on the next date of hearing, detailing all efforts made by the applicant to negotiate a settlement with the respondent, in order to prevent foreclosure'.

This appeal is with the leave of the court a quo. A question which immediately springs to mind, having regard to the order, is whether or not the court a quo's order is appealable.

Background

[2] On 7 August 2007, the appellant and the respondent entered into a facility agreement. In terms of this agreement, the appellant granted the respondent a credit facility in the sum of R432 000, with which the respondent purchased

immovable property. Pursuant to the conclusion of the loan agreement, a mortgage bond was duly registered, on 13 September 2009, in favour of the appellant, with the registrar of deeds, over the immovable property. The mortgage bond served as security for the loan, bearing interest at the rate of 11,75 per cent per annum, at the time of its registration. The monthly payment due to the appellant by the respondent was the sum of R3 337.82 over a period of 240 months. The total amount repayable was R801 076.26.

[3] The loan agreement, as loan agreements often do, contained certain 'special terms and conditions' under clause 3, as well as 'general terms of conditions' under clause 4 which terms and conditions I need not evaluate in detail as nothing turns on them. Suffice to mention that the mortgage bond served as security for the loan facility, and that the mortgaged immovable property is the respondent's primary residence.

[4] It is common cause that the respondent fell into arrears with his bond repayments. As a result, on 30 June 2015 the appellant sent a letter to the respondent, which was hand delivered on 6 July 2015, informing him of his arrears in the sum of R12 945.53, and therefore in breach of the loan agreement. The respondent did not respond to this letter. Subsequently, on 23 July 2015, the appellant purportedly sent a notice in terms of s 129(1)*(a)* of the National Credit Act 34 of 2005 (the Act), informing the respondent of his indebtedness. Section 129(1)*(a)* of the Act sets out the required procedures before a debt may be enforced and reads:

'**129 Required procedures before debt enforcement**

(1) If the consumer is in default under a credit agreement, the credit provider-

(a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute

under the agreement or develop and agree on a plan to bring the payments under the agreement up to date'.

[5] Because the respondent remained silent and was still in arrears, the appellant on 20 August 2015, caused summons to be issued in the court a quo, claiming payment of the sum of R262 331.23 plus interest at the rate of 8,25 per cent per annum, calculated daily and compounded monthly from 25 July 2015 to date of payment. In addition, the appellant sought an order declaring the immovable property executable. It is not disputed that the summons was served on the respondent's wife and the return of service reflected that the respondent was 'temporarily absent'. It is also common cause that the respondent did not defend the action:

[6] On 28 September 2015, naturally the appellant applied for a default judgment. In support of this application, the appellant filed an affidavit deposed to by the manager of its Home Loan Division in which it set out a detailed account of the facts relevant to the application. In it, the deponent set out the appellant's compliance with s 129(1)*(a)* of the Act, and alleged that the respondent's required monthly payment towards his loan was approximately R3 000. It also stated that the respondent had fallen into arrears during September 2014 and that in the light of the total outstanding amount due by the respondent as well as his payment history, the deponent did not believe that there was a possibility that the respondent's indebtedness could be discharged within a reasonable time without having to execute against the respondent's immovable property. The deponent also stated that the appellant had no knowledge of the respondent's dependents or other occupants of the immovable property, but that the appellant was aware that it was the respondent's primary residence.

[7] The matter was heard on 8 October 2015 and the aforesaid order was made on the same day. The respondent did not attend the hearing. The judgment is brief and concise. The court a quo remarked that the application was not served personally on the respondent as required in the high court's practice directive. It also noted that the amount by which the respondent was in arrears was very low and had not been outstanding for a lengthy period of time (only 3 and a half months). It further concluded:

'[T]he [appellant] seeks judgment for the monetary amount if the court is not prepared to grant execution. In line with the recommendations in *Absa Bank Limited v Lekuku* (32700/2013) [2014] ZAGPJH 244 (14 October 2014), judgements should not be granted in a piecemeal fashion, ie for the monetary amount only, postponing the execution'.

[8] Discontent with the high court's judgment the appellant sought leave to appeal. The court a quo granted leave to appeal to this court, purportedly in terms of s 17(1)*(a)*(ii) of the Superior Courts Act 10 of 2013. It reasoned, in its judgment granting leave to appeal, that there were conflicting judgments in its division and several others, pertaining to the granting of foreclosure where personal service of summons was not effected. It also indicated that there were disparate views regarding the status of practice directives, and that views also varied on the question whether piecemeal judgments ought to be granted. Consequently, it granted leave to this court. I should mention at this stage that the respondent has not opposed the proceedings throughout. As a result, this court sought the assistance of the Free State Bar, and we were assisted, *pro bono*, by Mr Hefer, for whose help we are grateful.

[9] It is clear from the appellant's notice of appeal that it has taken the view that the effect of the high court's judgment is a refusal of its application for default judgment, and it mounted its appeal on several grounds. It argued before us, that the high court did not possess a general discretion to refuse relief

claimed upon a contract, but that it indeed had a discretion not to sanction execution against the respondent's immovable property – due to it being his primary residence. The respondent argued that the high court was duly entitled to postpone the matter, and that such postponement did not preclude the appellant from obtaining a default judgment at the following hearing. As a result of the view I take on the question of appealability to which I now turn, it is not necessary to deal with these contentions.

Appealability

[10] As foreshadowed the court a quo postponed the application for default judgment. My immediate reaction, as indicated, is to ask whether the judgment and order is appealable. The appellant argued that it is appealable on two grounds. Firstly that insofar as it directs the appellant to engage the respondent in settlement negotiations, it is final. Secondly, that the Superior Courts Act 10 of 2013 has abandoned the finality of a 'judgment or order' as a prerequisite to appealability. Elaborating on this proposition, the appellant contrasted the provisions of s 20 of the Supreme Court Act 59 of 1959 which referred to a judgment and order being appealable, and sections 16 and 20 of the Superior Courts Act 10 of 2013, which only refers to decisions.

Discussion

[11] The question of appealability of a judgment or order has, under the Supreme Courts Act, been the subject of a large number of judgments over many years. In *Zweni v Minster of Law and Order* 1993 (1) SA 523 (A), Harms AJA (as he then was) summarised the general proposition pronounced in various judgments as follows (at 531H-533F):

'1. For different reasons it was felt down the ages that decisions of a 'preparatory or procedural character' ought not to be appealable *(per* Schreiner 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 *(SA Eagle Versekeringsmaatskappy Bpk v Harford* 1992 (2) SA 786 (A) at 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) at 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) at 35F-G, 42I).

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 at 427; *Administrator, Cape, and Another v Ntshwaqela and Others* 1990 (1) SA 705 (A) at 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. Section 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", ie "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 (the *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) at 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) at 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 and Another* 1992 (4) SA 202 (A) at 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) at 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) at 566C-D).'

[12] At 536 A-C of *Zweni* having reviewed further judgments, the court remarked:

'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'.

[13] Recently in *Nova Property Group Holdings Limited v Cobbett & others* [2016] ZASCA 63; 2016 (4) SA 317 (SCA), this court expressed the position as follows:

'[8] On the test articulated by this court in *Zweni v Minister of Law and Order,* the dismissal of an application to compel discovery, such as by the court a quo, is not appealable as it is (a) not final in effect and is open to alteration by the court below; (b) not definitive of the rights of the parties; and (c) does not have the effect of disposing of a substantial portion of the relief claimed. However, three years later in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10F-G, this court held that the requirements for appealability laid down in *Zweni* ". . .[d]o not purport to be exhaustive or to cast the relevant principles in stone". Almost a decade later, in *Philani-Ma-Afrika v Mailula & others* 2010 (2) SA 573 (SCA) para 20, this court considered whether an execution order (which put an eviction order into operation pending an appeal) was appealable. It held the execution order to be appealable, by adapting "the general principles on the appealability of interim orders to accord with the equitable and more context-sensitive standard of the interests of justice favoured by our Constitution". In so doing, it found the "interests of justice" to be a paramount consideration in deciding whether a judgment is appealable.'

[14] With regards to the question of the interest of the justice, this court continued:

'[9] It is well established that in deciding what is in the interests of justice, each case has to be considered in light of its own facts. The considerations that serve the interests of justice, such as that the appeal will traverse matters of significant importance which pit the rights of privacy and dignity on the one hand, against those of access to information and freedom of expression on the other hand, certainly loom large before us. However, the most compelling, in my view, is that a consideration of the merits of the appeal will necessarily involve a resolution of the seemingly conflicting decisions in *La Lucia Sands Share Block Ltd & others v Barkhan & others* 2010 (6) SA 421 (SCA) and *Bayoglu v Manngwe Mining (Pty)* 2012 JDR 1902 (GNP) on the one hand, and *Basson v On-Point Engineers (Pty) Ltd* 2012

JDR 2126 (GNP) and *M & G Centre for Investigative Journalism NPC v CSR-E Loco Supply* case number 23477/2013 (8 November 2013) on the other.'

[15] I agree with the authors DE van Loggerenberg and E Bertelsmann *Erasmus: Superior Court Practice* vol 1 2016 A2-43 (looseleaf), where they say that reference to 'decisions' in s 16(1) of the Superior Courts Act still corresponds with the test articulated in *Zweni*, although the three attributes set out therein are not exhaustive. The appellant's contention to the effect that reference to 'decision' has changed the requirements for appellabilty, is thus misplaced. Counsel for the appellant was in any event unable to refer us to any authority in this regard. If he was correct, this court would certainly be inundated with appeals.

[16] Accordingly, we would follow the approach of this court in *Absa Bank Limited v Mkhize and two similar matters* [2013] ZASCA 139; 2014 (5) SA 16 (SCA) and *Absa Bank v Van Rensburg & another* [2014] ZASCA 34; 2014 (4) SA 626 (SCA). In *Mkhize* in a majority judgment, it was held that an order for postponement in the circumstances of these cases amounted to no more than a direction, from the high court, before the main action could be entered into, as to the manner in which the matter should proceed. What had occurred in that matter was that, not being satisfied with the service effected by *Absa*, the court had directed that certain further steps be taken. It did not amount to a refusal of default judgment, nor did it directly bear upon or dispose of any of the issues in the main action, and could therefore not be said to be tantamount to a dismissal of *Absa's* action. It follows therefore that, as the order was not one having the effect of a final judgment, the court lacked jurisdiction to entertain the appeal. The appeal was accordingly struck from the roll with costs. The court stated that:

‘[63] The order does not amount to a refusal of default judgment, nor does it directly bear upon or dispose of any of the issues in the main action, it thus cannot be said that it is tantamount to a dismissal of Absa's action (contra *Durban City Council v Petersen* 1970 (1) SA 720 (N) at 723). It may be that the order of the high court causes Absa some inconvenience but as Harms AJA, with reference to *South Cape Corporation* supra, pointed out (*Zweni* at 533B – C): “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.’’

[64] Accepting that this order is appealable could result in a situation where virtually every refusal to enter default judgment, including those for want of proper service, would be appealable. That “would indeed open the door to the fractional disposal of actions and the piecemeal hearing of appeals” (*Levco Investments (Pty) Ltd v Standard Bank of SA Ltd* 1983 (4) SA 921 (A) at 928H). In seeking and obtaining leave to appeal to this court, no consideration was given by Absa or the high court as to whether the order was indeed appealable. Thus the fact that the high court granted leave carries the matter no further, since its power to do so arises only in respect of “a judgment or order” within the meaning of that expression. In truth the matter was approached as if an appeal lies against the reasons for judgment. It does not. Rather, an appeal lies against the substantive order made by a court. (*Western Johannesburg Rent Board and Another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.)’

(See also *Jacobs & another v Baumann NO* [2009] ZASCA 43; 2009 (5) SA 432 para 9).

[17] In the current appeal, it is clear, upon a perusal of the notice of appeal that the appellant’s premise is that the court a quo refused the default judgment. For instance, one of its grounds of appeal is that ‘the court cannot refuse to give effect to the implementation of contractual provisions on the basis that their provisions appear to the court unreasonable and unfair.’ This is an erroneous way of interpreting the order, which is very clear, and it must be the reason why the appellant’s heads of argument did not comprehensively deal with the issue of appealability. The high court granting leave to appeal could not have assisted matters. Although the respondent’s counsel, Mr Hefer, conceded that the matter

is appealable, he however stated that the concession was not made on the strength of the appellant's submission, but because of the ambit of the high court's granting of leave to appeal. As stated, the court a quo granted leave to appeal so that the issue of conflicting judgments could be resolved by this court. None of these conflicting judgments were at issue in the default application and were also not at issue before us, and neither were they placed before us. In fact, counsel for the appellant submitted that the appellant had no issue with the practice directive. The appellant only contended that the court a quo did not have the power, *mero motu*, to postpone the default judgment application. It argued that the court a quo was enjoined to uphold the terms of the contract between the parties and accordingly grant the appellant relief on the contract if a case for relief is made out. As mentioned, it is not necessary to pronounce upon these matters.

[18] It follows therefore that on the point of appealability the order of the court a quo is not a judgment or order having the effect of a final judgment. Accordingly, I make the following order.

'The appeal is struck from the roll for lack of jurisdiction with no order as to costs.'

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J B Z Shongwe

Judge of Appeal

Willis JA (dissenting):

[19] I have had the privilege of reading the judgment prepared by my brother Shongwe JA. I disagree with him that the judgment is not appealable. Section 16(1) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) provides

that an appeal lies 'against any decision of a Division as a court of first instance.'[1] The corresponding provision of the predecessor to the Superior Courts Act was 20(1) of the Supreme Court Act 59 of 1959 (the old Supreme Court Act), which provided that an appeal would lie against a 'judgment or order'.

[20] It is a trite principle of our law that Parliament is presumed to have been acquainted with the interpretation of earlier legislation by the court, especially when there has been a settled and well-recognised judicial interpretation before the relevant legislation was passed.[2] As the judgment of Shongwe JA makes clear, there has been no dearth of authority dealing with the meaning of 'judgment or order' within the context of s 20(1) of the old Supreme Court Act.

[21] To my mind, it is obvious that there is not only a difference in meaning between a 'decision' of a court on the one hand and its 'judgment or order' on the other but also the legislature, against the trite background of principle to which I have referred, must deliberately have chosen the word 'decision' in the new Act to make a break with the interpretation of 'judgment or order' under the old.

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[1] The provisions of s 16(1*)(a)*(i) of the Superior Courts Act are relevant, as the court a quo consisted of a single judge.

[2] See for example *Fundstrust (Pty) Ltd (in Liquidation) v Van Deventer* 1997 (1) SA 710 (A) at 732A-B; *Commissioner for Inland Revenue v Estate Hulett* 1990 (2) SA 786 (A) at 788A-C and *Krause v Commissioner for Inland Revenue* 1929 AD 286 at 297.

[22] Although in *Khumalo & others v Holomisa*,[3] the Constitutional Court was dealing with a context somewhat different from the present (the word 'decision' in its Rule 18, contrasted with 'judgment or order' in s 20(1) of the old Supreme Court Act), the unanimous judgment thereof, delivered by O'Regan J, gives a strong indication that it would not be appropriate to give a meaning to 'decision' of a high court that was equivalent to that given to 'judgment or order.'[4]

[23] Ordinary, everyday English usage gives a 'decision' by a court a much broader meaning than a 'judgment or order' and , in my opinion, self-evidently may include a decision of the kind made by Weiner J. Not only did she consider her decision to be appealable but so also did counsel for both the appellant and the respondent. This is also an entirely sensible interpretation at which to arrive in the circumstances.[5] That a decision by the high court may be appealable does not mean that, willy-nilly, every decision is deserving of an appeal or that the general rules against interlocutory, interim and procedural rulings or orders being appealable should be jettisoned. Besides, we already have a viable test for appealability: 'the interests of justice'.[6]

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[3] *Khumalo & others v Holomisa* 2002 (5) SA 401 (CC).
[4] Paras 7- 8.
[5] See for example *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13; *Natal Joint Municipal Pension Fund v Emdumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18*; Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) paras 10,12 & 19; *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) para 25.and *Firstrand Bank Ltd v Land and Agricultural Development Bank of South Africa* [2014] ZASCA 115; 2015 (1) SA 38 (SCA) para 27.
[6] See for example *Nova Property Group Holdings Ltd & others v Cobbett & another* [2016] ZASCA 63; 2016 (4) SA 317 (SCA) para 8; *Philani-Ma-Afrika & others v Mailulula & others* [2009] ZASCA 115; 2010 (2) 573 (SCA); *S v Western Areas Ltd & others* [2005] ZASCA 31; 2005 (5) SA 214 (SCA) paras 25-26. See also *Khumalo &*

[24] The National Credit Act 34 of 2005 (the NCA) has not escaped criticism but there can be no doubt that its purposes and provisions have required that the courts look at the enforcement of ordinary consumers' debt in new ways.[7] Weiner J was dealing with a conundrum that frequently arises in the high court: how best to deal with a situation that is governed by the NCA in circumstances where to give judgment would not seem to be in the interests of justice but, correspondingly, to dismiss a credit provider's claim would also fall short of justice's exacting demands? The judge decided, in effect, to postpone the matter for a reasonable period, to allow for the possibility that the parties could make some sort of arrangement or reach a compromise and to call for more information. This is a situation that cries out not only for guidance from this court but also the kind of uniformity of practice throughout the land that a judgment by this court, on appeal to it, would necessarily give. Accordingly, the interests of justice require that the merits of her decision be considered in this appeal.

[25] The judge exercised a discretion. The Constitutional Court's judgment in *National Coalition for Gay and Lesbian Equality & others v the Minister of Home Affairs & others* has made it clear that an appeal court will not interfere with a lower court's discretion unless that court was influenced by wrong principles or a misdirection of the facts or if that court reached a decision the result of which could not reasonably have been made by the court properly directing itself to all the relevant facts and principles.[8] No such finding, adverse

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others v Holomisa (above) para 8.

[7] See for example *Nkata v Firstrand Bank Ltd* [2016] ZACC 12; 2016 (4) SA 257 (CC) paras 96-98 and the cases therein referred to.

[8] *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) para 11.

to the high court, can be made here. I cannot fault the judge's exercise of her discretion. On the contrary, I consider it to have been exemplary. By way of contrast, an illustration of the appealability of orders of this kind may be found by reference to the following example: suppose that a judge had postponed the matter for so long a period of time as to visit a serious injustice upon a credit provider. Would it be correct to refuse to hear an appeal, for the reasons given by Shongwe JA? I think not.

[26] In my opinion, the correct order would have been to dismiss the appeal. As counsel for the respondent acted *pro bono*, no order as to costs would be appropriate.

N P Willis

Judge of Appeal

Appearances

For the Appellant:	H M Viljoen Instructed by: Charl Cilliers Inc. Attorneys, Johannesburg; Rossouws Attorneys, Bloemfontein.
For the Respondent:	J F Hefer Instructed by: Free State Bar of Advocates, Bloemfontein.